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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume III

including

CM 196472 to CM 199307

(1931-1932)

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WAR DEPARTMENT
In The Office Of The Judge Advocate General
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Military Justice
CM 196472.

AUG 27 1931

UNITED STATES v. Private HERMAN TALLENT (R-6325283), 3d Ammunition Train, alias Private Roy Brown, Company G, 10th Infantry.	FIFTH CORPS AREA Trial by G.C.M., convened at Fort Thomas, Kentucky, July 30, 1931. Dishonorable discharge, suspended, and confinement for ten (10) months. Disciplinary Barracks.

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

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

2. The accused was tried upon rehearing July 30, 1931, upon the following Charge and Specification:

CHARGE: Violation of the 54th Article of War.

Specification: In that Private Herman Tallent, Third Ammunition Train, alias Private Roy Brown, Company G, 10th Infantry, did, under the name of Roy Brown, at Fort Hayes, Columbus, Ohio, on or about May 22, 1931, by wilfully concealing the fact that he was then a private in said Third Ammunition Train, procure himself to be enlisted in the military service of the United States by Major Charles E. Dority, United States Army, Retired, and did thereafter at Fort Hayes, Columbus, Ohio and Fort Thomas, Kentucky, receive pay and allowances under the enlistment so procured.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. The reviewing authority approved the sentence, but remitted two months of the confinement, directed its execution, but suspended the dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement. The sentence was published in General Court-Martial Order No. 121, Headquarters Fifth Corps Area, August 13, 1931.

3. The accused was first tried on July 3, 1931, found guilty of the Charge and Specification, and sentenced to dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for one year. The reviewing authority disapproved the sentence and ordered a rehearing. At the rehearing on July 30, 1931, First Lieutenant Frederick M. Thompson, 10th Infantry, sat as a member of the court. Lieutenant Thompson had previously sat as a member of the court that first heard the case on July 3, 1931. Article of War 50½ provides that a rehearing -

> "shall take place before a court composed of officers not members of the court which first heard the case."

Thus, all members of a court which first hears a case are by statute made legally ineligible to sit as members at a rehearing of the same case. Since in this case one of the members at the rehearing had sat as a member of the court that first heard the case, it follows that the court, at the rehearing, was not legally constituted, and was without jurisdiction to try the accused and that its proceedings, including the findings and sentence, were null and void ab initio.

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

E. M. Kelly, Judge Advocate.

[illegible], Judge Advocate.

Mark E. Guering, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Military Justice
C. M. No. 196481

AUG 31 1931

UNITED STATES vs. Privates HERBERT A. ANDERSON (6706993), WILLIAM O. EHLERS (6826965), and MARTIN J. KOSICH, JR. (6707410), all of Battery E, 65th Coast Artillery.	PANAMA CANAL DEPARTMENT Trial by G. C. M., convened at France Field, Canal Zone, July 30, 1931. Dishonorable discharge and confinement for six (6) months in the case of each accused. Fort Randolph, Canal Zone.

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

1. The record of trial in the case of the soldiers named above has been examined and held by the Board of Review to be legally sufficient to support only so much of the finding of guilty of the specification under the original charge as finds that each of the accused did attempt to desert the service of the United States at the time and place and in the manner alleged, in the execution of a conspiracy to desert previously entered into with the other two accused, and to support the findings of guilty of both charges and the Specification under the Additional Charge, and to support the sentence.

2. For the reasons stated in paragraph 27, page 18, Manual for Courts-Martial, there can be no such offense as joint desertion. For like reasons, the offense of joint attempt to desert cannot exist. Consequently, a conviction of joint attempt to desert cannot legally be sustained. The particular specification now under consideration, however, includes allegations that each accused attempted to desert in the execution of a conspiracy, and the evidence is legally sufficient to support the conviction of each accused of the offense thus charged against him in the allegations so included in the specification. While it is irregular and bad pleading to charge

in one specification several persons with separate, individual offenses, it is considered that, in this case, the irregularity did not injuriously affect the substantial rights of the accused.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Military Justice
CM 196523

NOV 13 1931

UNITED STATES	)	FOURTH CORPS AREA
	)	
v.	)	Trial by G. C. M., convened at
	)	Fort Benning, Georgia, July
Captain RAYMOND MacDONALD	)	28 and 29, 1931. Dismissal.
(O-10162), Infantry.	)	

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

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

2. Accused was tried on the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that Captain Raymond MacDonald, Infantry, did, at Fort Benning, Georgia, on or about June 11, 1931, with intent to deceive the Commandant, The Infantry School, Fort Benning, Georgia, officially state in writing to the Commanding Officer, 2d Battalion, 1st Tank Regiment (Light), Fort Benning, Georgia, relative to an alleged indebtedness of said Raymond MacDonald to the Fidelity Loan & Investment Company of Columbus, a corporation, that, viz: "this account has been taken care of", which said statement was made by the said Raymond MacDonald as true when he did not know it to be true, in that said alleged indebtedness remained intact and unliquidated at the time of making said false statement.

Specification 4: In that Captain Raymond MacDonald, Infantry, being indebted to the Post Exchange, Fort Benning, Georgia, in the sum of, viz: One hundred and Twenty-Eight and seven hundredth dollars ($128.07) for his, viz: September, 1930, account transactions with said Post Exchange which indebtedness became due and payable on, to-wit: October 1, 1930, did, at Fort Benning, Georgia, from, viz: October 1, 1930, to October 25, 1930, dishonorably fail and neglect to pay said debt.

Specification 5: In that Captain Raymond MacDonald, Infantry, being indebted to the Post Exchange, Fort Benning, Georgia, in the sum of, viz: One hundred thirty and six hundredth dollars ($130.06) for his, viz: January, 1931, account transactions with said Post Exchange, which indebtedness became due and payable on February 1, 1931, did, at Fort Benning, Georgia, from, viz: February 1, 1931, to March 4, 1931, dishonorably fail and neglect to pay said debt.

Specification 6: In that Captain Raymond MacDonald, Infantry, being indebted to the Post Exchange, Fort Benning, Georgia, in the sum of viz: Ninety-six and thirty-nine hundredth dollars ($96.39) for his viz: February, 1931, account transactions with said Post Exchange, which indebtedness became due and payable on, viz: March 1, 1931, did, at Fort Benning, Georgia, from, viz: March 1, 1931, to March 21, 1931, dishonorably fail and neglect to pay said debt.

Accused pleaded not guilty to the Charge and all specifications. He was found not guilty of Specifications 1 and 2, and guilty of the remaining specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced "to be dismissed the service". The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that accused was tried and found guilty of two separate and distinct classes of offenses. Specifications 4, 5 and 6 of the Charge relate to one class, while Specification 3 relates to the other. The evidence having to do with Specification 3, in so far as material to the issue, may be briefly summarized as follows:

Accused on June 26, 1930, contracted a loan with the Fidelity Loan & Investment Company of Columbus, Georgia, in the amount of $204.00, principal and interest, payable in one year from date in twelve monthly installments of $17.00 each (R. 96-97). On November 12, 1930, accused contracted a second loan with the same concern for $204.00, principal and interest, similarly payable (R. 98). By June 8, 1931, accused had permitted his part payments on the indebtedness composed of these loans to fall in arrears to the extent of five installments, totaling $85.00 (R. 88, 90). On the same day, June 8, 1931, Mr. W. Drane, Secretary and Treasurer of the Fidelity Loan & Investment Company, wrote a letter to the Commandant, Fort Benning, Georgia, reporting the above stated delinquincy with the following complaint:

> "We have written Capt. MacDonald several letters but so far he has not replied to them and if not contrary to your rules and regulations we will appreciate it very much if this is brought to his attention" (R. 77-78; Ex. K; R. 88).

In the meantime, the Fidelity Loan & Investment Company on June 9, 1931, received a check for $51.00 from accused, dated June 8, 1931 (R. 89, 90, 91; Ex. L). This check was deposited on June 9th, and was on June 10th returned by the bank marked "Insufficient Funds" (R. 91, 117). On that date the abovementioned letter addressed to the Commandant by the Fidelity Loan & Investment Company was referred to accused by his battalion commander with instructions,

> "For remark and return of all papers through this office."

On June 11, 1931, accused, by indorsement, returned the correspondence, with the following written statement subscribed by him:

> "This account has been taken care of" (Ex. K, p. 2; R. 78, 80).

At the time of making this statement on June 11th, the status of accused's account with the Fidelity Loan & Investment Company remained as of June 8th, and as stated in the letter above referred to, i.e., "There were five payments of $17.00 each, past due", as to which no extension of time limits had been granted (R. 90). At no time in that month was any payment thereon made (R. 91); and even had the aforementioned "Insufficient Funds" check for $51.00 been paid on the date of June 9th when deposited in the bank by the Fidelity Loan & Investment

Company, still the indebtedness of the accused to that Company would have been delinquent to the extent of two installments "of $17.00 each, past due", as testified to by its Secretary and Treasurer (R. 91). When the check for $51.00 was returned by the bank on account of insufficient funds, the Fidelity Loan & Investment Company notified accused of the circumstance by letter (R. 102). No reply thereto was received, and the check was again presented for payment after July 1st, and cashed (R. 89, 91-92, 102, 104). This witness also testified that accused, at the time of trial, had paid the June note in full, but that payments on the November note were overdue for the months of March, April, May, June and July, and that he was still obligated on the latter note to the total extent of one hundred and fifty-six dollars (R. 145). He further testified in substance that accused tendered a number of postdated checks at the time he took out the first loan, payable on the last day of each month, on which respective dates accused was given credit therefor and the checks deposited (R. 92), and, as well as he could remember, that accused also tendered three thirty-four dollar checks at the time he took out the second loan, which latter were applied, upon maturity, to payments on both loans on the last day of December, January and February (R. 93-94). He was unable to state that accused declared his intention to pay off the first loan before maturity (R. 95).

Mr. Charles P. Willis, representative at Fort Benning of the Columbus Bank and Trust Company, appeared as a witness for the defense. In substance he testified that accused "has been a good customer of my bank" (R. 146). In a few instances checks of accused were returned on account of insufficient funds which "I took up until I could get in touch with him", and which accused invariably made good (R. 147); in other words, he paid them promptly (R. 148). The witness and the officer of the main bank in Columbus have an agreement that checks signed by the personnel at Fort Benning will not be dishonored because of insufficient funds without first consulting the witness (R. 151). Had accused applied to his bank for credit to cover outstanding checks to the amount of about $100.00, it would have been granted because "I have always liked him personally and his account has been pleasing" (R. 146-147). He did not believe that accused ever uttered checks against insufficient funds with criminal intent (R. 149). Witness could not state how many checks of accused were returned for want of sufficient funds because all of them were not brought to his personal attention (R. 151-152). Through some misunderstanding the two dishonored checks of accused in question (totaling $114.99) had not been brought to his personal attention (R. 152); otherwise he would have been glad to take care of them to prevent resulting embarassment (R. 153). At the time of giving testimony the witness had in his immediate possession officers' checks totaling about four hundred dollars which were not good and would not be good until the first of the next month (R. 149).

The evidence having to do with Specifications 4, 5 and 6, in so far as material to the issue, shows that accused, while a student officer at the Infantry School, Fort Benning, Georgia, contracted obligations from month to month at the Fort Benning Post Exchange. On September 19, 1930, a letter from Post Headquarters to accused, dated September 15, 1930, was transmitted to him by 1st Indorsement, wherein he was notified that his August, 1930, account was reported delinquent by the Post Exchange Officer in the amount of $158.43, and directed to adjust that account (R. 19; Ex. C). By 2nd Indorsement dated September 20, 1930, accused replied and in substance reported that he had made a payment of $100.00 on the account before the receipt of the above communication and that he had at the same time made a satisfactory arrangement with the Post Exchange Officer to have the balance of $58.43 carried forward until September 30, 1930. A prior letter of accused addressed to the Post Exchange Officer under date of September 17, 1930, was introduced in evidence to show that accused had requested an extension of credit. In that letter accused promised to pay the balance of $58.43 with his account in full on September 30, 1930 (R. 15; Ex. B). Major Sam I. McCants, Post Exchange Officer, while testifying for the prosecution, was unable to remember the transaction (R. 25), but was positive that accused was reported delinquent, and would have been so reported, even though he had made a request for extension of credit (R. 25-26). During the month of September, 1930, accused contracted a further indebtedness with the Post Exchange, which with the $58.43 carried over from the preceding month as part of his September account therewith, totaled $128.07 (R. 75, Ex. J; R. 56; R. 15, Ex. A; R. 55). The witness testified their regulations require that a post exchange account for any month must be paid not later than the tenth day of the succeeding month (R. 30). On October 11, 1930, accused addressed a letter to the Post Exchange Officer respecting his September account as follows:

> "Please credit my account with enclosed check in amount of $28.07.
>
> Due to unavoidable circumstances I am again compelled to request that the balance of my account be carried until October 31st for which I am enclosing a post dated check.
>
> I regret that I must make this request and trust that this arrangement will be satisfactory for this month" (R. 20; Ex. D).

On October 11, accused's bank balance was $60.28 but due to other outstanding checks it was reduced on that day to $27.28 (Ex. M). Two days thereafter, on October 13th, the Post Exchange Officer reported accused delinquent to the extent of $100.00 for the month of September (R. 20; Ex. E), and on October 20, 1930, the Post Exchange Officer addressed a formal letter to the Commandant of the Infantry School, wherein he complained that accused was not only delinquent

for the $100.00 "reported by this office under date of October 13, 1930", but that the check tendered by accused in part payment for $28.07 had been "returned to the Post Exchange unpaid, marked 'Insufficient Funds'" (R. 15; Ex. A). By indorsement through channels accused was accordingly directed to make a prompt settlement and also to report the action taken (Ex. A, p. 2). By 3rd Indorsement accused returned the correspondence on October 25th, inclosing therewith in payment of his September account a check for $128.07, with the assurance that a deposit had been made at the bank on the day preceding to cover the check, and concluding as follows:

> "My Post Exchange account, has, for the past five years, averaged about $100.00 per month. On several occasions it has been necessary for me to have small balances extended which were taken care of. I did not realize that my last request would be unsatisfactory; however, I shall, in the future, limit my Post Exchange account to an amount that will ensure prompt settlement" (R. 15; Ex. A, p. 2).

The evidence further shows that accused contracted an indebtedness at the Post Exchange during the month of January, 1931, totaling $130.06. On February 10, 1931, accused tendered a check for that amount in payment of the bill. At the commencement of business on that date accused's balance in the bank was $130.39 but due to other outstanding checks was reduced to $95.39 at the close of business (Ex. M). The check was later returned by the bank upon which it had been drawn marked "Insufficient Funds" (R. 21, Ex. F; R. 62-63; R. 55). The delinquency was thereafter brought to the attention of accused by indorsement of Post Headquarters, dated February 24, 1931, in which he was directed to promptly settle this account and report action taken. Accused thereafter settled the account on or before March 4, 1931, reporting that his bank account had been depleted through payment of a postdated check, the amount of which he had failed to deduct "from my bank balance" (Ex. F, pp. 2,3).

During the month of February accused again contracted an obligation at the Post Exchange totaling $96.39. On March 10, 1931, he tendered a check for that amount. At the beginning of business on March 10 accused's bank balance was $129.03 and by the close of business had been reduced to $109.03 (Ex. M). The check was on March 16th returned by the bank upon which it had been drawn marked "Insufficient Funds" The Post Exchange Officer thereupon reported the delinquency and accused was notified of such report and directed by indorsement of Post Headquarters thereon to take "prompt action and report". On March 20th accused reported:

> "1. The matter referred to in basic communication has been taken care of.
> 2. There will be no reoccurrence of matters of this kind" (R. 21, Ex. G; R. 63; 55).

While the Post Exchange lost no money through the return of the aforementioned checks marked "Insufficient Funds" (R. 49), it did suffer "annoyance, additional work, additional accounting, and the danger of establishing precedents of granting favors illegally and improperly" (R. 50). The accused, in order to "save time" in the introduction of evidence relating to his Post Exchange indebtedness for September, 1930, January, 1931, and February, 1931, and uttering of "Insufficient Funds" checks in payment thereof, made the following admission in open court, during the presentation of the case in chief for the prosecution:

> "The accused stands ready to admit the debts and admits that they were delinquent. He admits the fact that the prosecution brought out with reference to the three checks which were returned to the Post Exchange marked 'insufficient funds', in order to save time. The only thing we are pleading not guilty to in this case is the dishonorable intent. I admit all the other features" (R. 55).

The defense thereafter objected to "any testimony regarding these checks coming back for insufficient funds" as immaterial to the issue (R. 60, 58). The law member overruled the objection (R. 61), and thereupon evidence was introduced to show that each of the checks tendered the Post Exchange in payment of the accounts referred to had been received in the usual course of business and was subsequently returned by the bank with the notation "Insufficient Funds" (R. 61-63).

The accused elected to take the stand as a witness in his own behalf and as to Specification 3, declared in substance that when he made the alleged false official statement of June 11, 1931, namely, "This account has been taken care of", with reference to the sum due the Fidelity Loan & Investment Company, he honestly believed that the balance theretofore due was fifty-one dollars in delinquent payments and that the same had been taken care of by him (R. 159). At the time he took out the first loan in June, 1930, he declared his intention to pay it back "three months ahead of time" because he had been delinquent to that extent on a prior loan with the same company. He therefore tendered at the time of the loan postdated checks, six for seventeen dollars and three for thirty-four dollars each. In the following November, he found it necessary to take out another loan and as a coincidence the first payment on the November loan became due with the maturity of the first thirty-four dollar check. Apparently - "to protect my delinquency" - the Fidelity Loan & Investment Company split the thirty-four dollar check "and applied seventeen dollars to the June note and seventeen dollars to the November

note, bringing both of those up to date." He had intended that all of "those checks be applied on my June note, which would have liquidated that note" (R. 158). Three or four days before receiving the official communication, he was convinced that the first note had been taken care of because none of the postdated checks had been returned and therefore he then sent the check for fifty-one dollars to cover "a total of fifty-one dollars" he "figured" was due (R. 158-159) - "on the eighth I had mailed this check for fifty-one dollars to the Fidelity Loan & Investment Company, feeling that that was the three delinquent payments I owed that company" (R. 157). He "figured" he "had enough in the bank to cover those three payments" and mailed the check (R. 158), not intending any deceit in connection therewith (R. 166). When the Adjutant of the Tank Battalion delivered to him the officially indorsed letter of June 8, 1931, noted above,

> "I looked at it and said, 'Elliott (which is the Adjutant's first name) put an indorsement on there that this amount has been taken care of'. I meant the total of three payments on my new note, feeling that my checks had liquidated the balance. I admit now, after studying the thing, that what happened was that he split the checks and applied them to the two notes. But at that time I was honest in my belief that it had been taken care of, and that my balance was fifty-one dollars. I felt that my first loan had been taken care of. I had no desire to deceive Major Kingman or the Commandant" (R. 159).

As to Specifications 4, 5 and 6, accused did not testify respecting the "Insufficient Funds" checks tendered the Post Exchange in settlement of his account therewith, noted above. He stated, in effect, that his tardiness in the payment of his Post Exchange obligations was due to recurrent financial stress, but that "When directed to pay those they were paid. In no case did I fail to pay an account when directed to. And whether or not the Post Exchange officer remembers the specific cases in which he granted the extensions, these accounts were taken up with him at the proper time, and honorably" (R. 159-160).

Accused testified that he was a married man with two boys and two girls in his family (R. 225) and that he had been contributing to the support of his family ever since they left Fort Benning (R. 227).

On cross-examination, accused declared that at the time of writing the fifty-one dollar check on June 8th he thought he knew what his bank balance was, but at time of testifying he did not know what he considered that balance to be, and admitted having received a letter from the Fidelity Loan & Investment Company demanding payment of his account, just prior to uttering that check (R. 193, 194), which on redirect examination he affirmed was issued "with every reason to believe" that there were to his credit "sufficient funds in the bank to pay" it (R. 224). He further admitted on cross-examination that on June 8th the sum of $85.00 was due and payable on the matured amounts of the June and November notes irrespective of the extent to which either had been reduced by applying to the one or the other the several installment payments made by him in part payment thereof (R. 205). However, at the time of the indorsement in question of June 11th, he, in good faith, thought the facts to be otherwise and that "the account had been taken care of" (R. 206). He admitted thinking Mr. Drane in error but not pointing that out in his indorsement (R. 206). Further cross-examined as to why he did not do so, the accused replied:

> "I have already explained that, but I will try to again. This communication was handed to me by the Adjutant of the Tank Battalion. I said, 'Elliott, which is the Adjutant's first name, put an indorsement on there that it has been taken care of,' He took the communication and in ten minutes my signature was on it. I believed that my account, which could be shown on the books of Mr. Drane, could only refer to my November note, and I knew I had mailed him fifty-one dollars to cover this note. The facts of the case did not come before me until one week ago" (R. 207).

He "glanced over" but did not "analyze" Exhibit K, the basic letter of June 8, 1931, written by Mr. Drane, for the Fidelity Loan & Investment Company, to the Post Commander, before placing thereon the indorsement in question (R. 203).

4. As to Specification 3, the evidence is conclusive of guilt thereof as laid. On a letter of complaint of his inattention to correspondence on two loans and of his failure to pay five matured installments thereof, totaling $85.00, accused, called upon by his commanding officer for an official statement in the matter, put this

indorsement: "This account has been taken care of." To the contrary, the proof is conclusive that on the respective dates of this letter and indorsement (Ex. K), namely, June 8, 1931, and June 11, 1931, accused, as stated in such letter, was in arrears on his two notes for $204.00 each, payable in twelve seventeen dollar monthly installments each, an aggregate sum of $85.00 for five installments, matured and unpaid, no part of which was subsequently paid until after July 1, 1931. The meaning which the quoted words bear on their face, read in connection with the content of the letter of complaint, is the meaning the accused intended they should convey to his commanding officer. This conclusion is one of natural reason; and accords with a working principle of law phrased as follows by the Federal Supreme Court in Abrams v. U.S., 250 U.S. 616, 621: "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." Here, the words of accused signify at the very least, on their face, that a certain loan account, not disputed and involving an overdue obligation of $85.00, had been paid or the necessary further credit therefor obtained by or for the accused - in a word, that payment of $85.00 or credit for any unpaid balance thereof had been accomplished. Such, however, as the evidence proves, was not the case, of which fact the accused was put on notice by the very content of the letter of complaint, since, had the creditor, by grace of the bank or its Fort Benning representative, received promptly the $51.00 on the "insufficient funds" check of three days before, nevertheless $34.00 of the $85.00 rightly demanded as then due without challenge of the accused would not have been "taken care of". Good faith and regard for the truth on the part of the accused would certainly have impelled him then and there to verify any lesser sum than $85.00 conceived by him to be due for any reason and to specifically state the same - which the evidence shows he failed to do. He did not challenge the statement that $85.00 was due, but replied "This account has been taken care of." It will be noticed that accused as a witness in his own behalf makes no pretence of having paid as of June 8, 1931, on both notes, more than $204.00 in postdated checks given, he says, at time of procuring the June, 1930, loan, as to which check payments his recollection is minute. Consequently, on June 8th he must have been cognizant of the fact, without regard to any letter from the creditor setting it forth, that at that time, as proved by the evidence, <u>not less than five installments of $17.00 each were overdue</u>, irrespective of the particular note to which the two hundred and four dollar check payments had been severally credited. Indeed, on the basis of his own witness-professed assumption that all these check payments had been applied to the June note, prior to maturity of all of its installments, in accordance with his asserted oral instructions to the

creditor at the time (thereby reducing by one seventeen dollar payment the amount otherwise available for credit on the November note), not five installments on both notes aggregating $85.00, but six installments on the November note aggregating $102.00, would have represented the sum total of his arrears on June 8th; as to which date he professed on the witness stand to believe that but $51.00 was due the creditor on both notes because (in substance) the latter then claimed of him no greater sum with respect to the November, 1930, note, and because he viewed the June, 1930, note as then wholly paid by his postdated checks. Had his checks been so applied, then on his own payment showing on the witness stand six installments amounting to $102.00 would have constituted his arrears on the November note as of June 8, 1931, instead of $51.00, as shown above. Determination of the question of the moral offense or evil intent, if any, involved in the issuance of the fifty-one dollar "insufficient funds" check on June 8, 1931 (for the uttering of which "with intent to deceive" he was tried and acquitted on Specification 1 in these proceedings), is not, in our view of the issue thereon, essential to the adjudication of this case with respect to Specification 3 now under consideration. It is enough that the remainder of the competent and relevant evidence conclusively shows that the account referred to in accused's indorsement of June 11th had not then been "taken care of" to the extent of $34.00, even after credit allowance for the fifty-one dollar dishonored check retained by the creditor until paid after July 1st, and that accused had ample means of knowing the status of that account on June 11th which he refrained from using although under the duty to know it and put on notice thereof by the very contents of the letter before him at the time of making the false, intentionally deceptive and exonerative statement recited in Specification 3.

By the foregoing considerations we are led to the conclusion that the indorsement of June 11, 1931, is shot through with falsity and willful disregard of the truth and intent to deceive, and that the evidence amply suffices to prove guilt of Specification 3 and of the Charge in violation of the 95th Article of War.

By the evidence pertaining to Specifications 4, 5 and 6, it is proven that the accused failed to pay his Post Exchange accounts for periods of fifteen, twenty-two and eleven days, respectively, after the tenth day of October, 1930, and February and March, 1931, on which dates they became payable under the custom of the service and Army Regulations paragraph 45 b, AR 210-65, June 29, 1929. On October 11, 1930, when the accused tendered a check, subsequently dishonored, for $28.07, his bank balance was $60.28, but checks presented for payment

and paid that date reduced the balance to $27.28. At no time from that date until the account was subsequently paid on October 25th, was the bank account deficient more than $1.29. On February 10, 1931, when the check for $130.06 was tendered, the accused deposited $147.00 in the bank but by the close of business on that date the balance had been reduced to $95.39 because of the payment of other checks presented. At no time thereafter at the close of any business day up until March 4, the date of payment of the account, was the accused's balance sufficient to pay the check although he deposited several hundred dollars during that period (Ex. N). On March 10, 1931, accused tendered a check for $96.39. At the close of business on that day and the following day accused's bank balance was more than sufficient to pay the check but after March 11 and up to March 21, the date of payment of the account, the balance was insufficient. The evidence further establishes that the bank had on several occasions honored accused's overdrafts and that the bank's representative at Fort Benning had arranged with the bank that officers' checks would not be dishonored without reference of the matter to him, although in these three instances this procedure was not followed. The evidence also establishes that in each case the accused promptly paid the debts represented by the dishonored checks when called upon to do so. The delay in payment was, in each case, of a duration so short as not to involve serious culpability, and such derelictions for such periods do not constitute misconduct in violation of the 95th Article of War, as that Article has been construed and applied in military administration. See C.M. 123090; 121152; 195373; 196063.

The salient facts summarized above are insufficient to establish that the accused tendered checks in payment of the three monthly accounts without intending that there should be sufficient funds in his account or sufficient credit at the bank to insure payment of the checks when presented. The evidence thus fails to establish conduct unbecoming an officer and a gentleman and the findings of the court are to that extent not sustained by the record. The facts and circumstances in connection with these accounts and with the accused's failure to pay them at the time such accounts are normally payable, justify findings that the accused's failure to pay the accounts promptly was conduct of a nature to bring discredit upon the military service in violation of the 96th Article of War. We are therefore of opinion that only so much of the findings of guilty of Specifications 4, 5 and 6 and of the Charge in relation thereto is sustained by the evidence as involves findings of guilty that accused did fail and neglect to pay, for the period of fifteen, twenty-two and eleven days, respectively,

the indebtedness set out in each, in violation of the 96th Article of War.

In connection with these specifications, the Board of Review deems it noteworthy that the Manual for Courts-Martial prescribe a form for debt delinquency under A.W. 95, reading "did, at ..... from ..... 19.., to ..... 19.., dishonorably fail and neglect to pay said debt" (App. 4, form 117), and another under the same Article for making check with insufficient funds for use, inter alia, in payment of a debt specifically setting forth the wrongful making and uttering thereof (App. 4, form 114). Our examination of adjudicated cases discloses no precedent for disregarding the latter form and for the purpose thereof employing the former, as is sought to be done in the case in hand. Such pleading is improper and is not approved.

To rebut accused's statement on the witness stand on direct examination to the effect that he never made a false statement in his life to a civilian friend or to an officer in the Army, and that he believed he had a good record in the Army (R. 157), the prosecution with the express consent of the accused was allowed to introduce in evidence the report of a Special Inspector, dated September 21, 1928, containing a recommendation "that notation be made on his current efficiency report to the effect that he incurred indebtedness which he failed to pay promptly, made a false statement regarding a payment on said debt, and made a promise of future payments on said debt, which promise he failed to keep" (Ex. P, R. 170). On the record as a whole, by reason of the conclusiveness of the proof of guilt on Specification 3 by evidence clearly proper for consideration by the court, and the consent of accused to introduction of the Inspector's report, we are of opinion that such error is not invalidating in its effect.

Upon careful scrutiny of the record of trial in the instant case we perceive therein no other question requiring notice here.

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

> "Corp. and sgt. Co. M, 2 Inf. Wis. N.G. 30 June 16 to 28 Feb. 17 and from 15 July 17 to 9 Aug. 17; 1 lt. Inf. Sec. O. R. C. 27 Nov. 17; accepted 27 Nov. 17; active duty 27 Nov. 17; hon. dis. 4 Aug. 19. --- 1 lt. of Inf. 1 July 20; accepted 3 Oct. 20; Capt. 8 Aug. 29."

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 4, 5 and 6 and of the Charge in relation thereto as involves findings of guilty that accused did fail and neglect to pay, for the period of fifteen, twenty-two and eleven days, respectively, the indebtedness set out in each, in violation of the 96th Article of War, legally sufficient to support the findings of guilty of Specification 3 and of the Charge, and the sentence, and warrants confirmation thereof. Dismissal is mandatory on conviction of violation of the 95th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

SEP 14 1931

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

Military Justice
C. M. No. 196526

UNITED STATES	)	FOURTH CORPS AREA
	)	
vs.	)	Trial by G. C. M., convened at
	)	Fort Benning, Georgia, August
Private WALTER M. RAY	)	13, 1931. Dishonorable discharge
(6369750), Company A, 29th	)	and confinement for one (1) year.
Infantry.	)	Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BRENNAN and GUERIN, Judge Advocates
ORIGINAL EXAMINATION by KNIGHT, Judge Advocate.

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

2. Substantially all of the material evidence tending to establish the guilt of the accused under the Specifications of Charge I was obtained by an illegal search and seizure (R. 37-41). This evidence, having been obtained in contravention of the Fourth Amendment to the Constitution of the United States and in violation of the Act of Congress approved November 23, 1921 (42 Stat. 223; Sec. 53, Title 18, U. S. Code), was not admissible at the trial and findings of guilty based thereon are not valid (C. M. No. 161760 - Halfaker).

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

under Charge II and its Specification, and under the Additional Charge and its Specification; legally insufficient to support the findings of guilty of Charge I and its Specifications; and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., SEP 14 1931 To the Commanding General, Fourth Corps Area, Fort McPherson, Atlanta, Georgia.

1. In the case of Private Walter M. Ray (6369750), Company A, 29th Infantry (C. M. No. 196526), I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that the findings of guilty of Charge I and its Specifications be vacated; and you are advised that thereupon you will have authority to order the execution of the sentence as approved by the reviewing authority.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, which is returned herewith, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this case in this office is 196526. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place that number in brackets at the end of the published order as follows:

(J.A.G.O. No. 196526.)

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

RECEIVED SEP 16 HQ. 4TH CORPS AREA

1 Incl.
Record of trial.

REC'D J. A. O., HQ. 4th C. A.
SEP 23 1931

201-Ray, Walter M. 2nd Ind. KA/rwc

HQ. FOURTH CORPS AREA, Fort McPherson, Atlanta, Georgia, September 24, 1931.
To The Judge Advocate General, War Department, Washington, D. C.

1. A reconsideration of the Holding of the Board of Review in this case is requested.

2. I have caused an investigation to be made as to the search of Private Ray's residence, and in this connection attention is invited to the affidavits of the four persons who participated in the search. (Incls.1,2,3,4) It will be seen from said affidavits that Private Ray expressed a willingness to have his residence searched (Incl. 1) and that he raised no objection prior to, during or after said search. During the trial of this case (R-37-41) the accused did not make any objection whatever to the introduction of the evidence offered, which had been obtained during the serach in question, and there being nothing of record to show that the officers were acting without authority, it must be presumed that said officers were acting, either with the consent of the accused, or by due process of law. As previously stated, while the record does not show such authority the affidavits (Incls. 1,2,3,4) do show that the accused gave permission and did not object to the serach of his residence.

> "Where a search was made of plaintiff's residence for stolen goods without a warrant therefor, the question whether plaintiff consented to the search is one for the jury (McClurg vs Brenton, 123 Iowa 368)"

3. There being nothing of record to show whether or not accused gave his consent to the search the matter rested entirely with the jury, however, since the trial of this case, additional evidence has been secured to show affirmatively that the parties making the search had permission of the accused so to do, and the question of their right to make the search (there being no objection by the accused), was one purely for the jury (court) to pass upon.

4. aThe right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated ***" (Const. Amendt.IV) While a search - with warrant- may not properly be made for the sole purpose of getting evidence to be used against one in a criminal case, the right to such warrant and search is to be found in the interest of the public in having the property seized. (Gouled vs.U.S., 255 U.S., 298) Thus this rule would seem to justify a search of Ray's home for the interest the Government had in the recovery of its own property - the spiral begins in this case. Further, it seems that Section 2040, Mil. Law-R.S.3748, authorizing a seizure of such property by any officer of the United States, civil or military, is a declaration of Congressional intent to validate seizure of such property without search warrants. A searching officer, after a lawful entry, is not limited by the terms of the warrant in regard to the property he may seize, but he may make any seizure that is reasonable.(U.S.vs.Old Dominion Warehouse,10 Fed.(2d) 736)

bNo person shall be ** ** compelled in any criminal case to be a witness against himself ***" (Const. Amendt. V). That Congress has deemed it necessary to enact the 24th Article of War, protecting military men in the

Par. 4. continued.

enjoyment of rights similar to the constitutional guarantee against self-incrimination evinces a Congressional belief that but for the enactment of such a statute a man in the military service does not enjoy immunities similar to those guaranteed by the Constitution."***Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb **" (Const. Amendt.V). Here, again, that the Congress has deemed it necessary to enact Article of War 40, protecting military men in the enjoyment of rights similar to this Constitutional guarantee against double jeopardy, evinces a Congressional belief that but for the enactment of such a statute a man in the military service does not enjoy immunities similar to those guaranteed by the Constitutinn.

cThese statutes, (Articles of War 24 and 40) are appropriate exercises of the constitutional powers of the Congress to make rules and regulations for the government of the Army (Art. I, Sec. 8, Clause 14). These statutes offer respectable justification for the conclusion that service in the military establishment, practically speaking, divests a person of those protections guaranteed by the Fifth Amendment to the Constitution. If such be a reasonable construction as regards these guarantees of the Fifth Amendment to the Constitution, it is not unwarranted to conclude that while in the military service, one is divested of the immunity from search and seizure and does not enjoy a constitutional guarantee against searches and seizures,when made in pursuance of the appropriate administration and discipline of the Army. Because such searches and seizures are not unreasonable and are made under sanction of law and the Constitution. These views are not without legal basis, for it has been repeatedly held by the United States Supreme Court that the provisions and principles of military laws and regulations constitute for those in the military service "due process" as guaranteed by the Fifth Amendment to the Constitution. (219 U.S. 296,304;259 U.S. 326,335,336,343)

dThe Fifth Amendment to the Constitution, by its own terms, excepts the military in time of war from its guarantee of indictment by Grand Jury. However, there is no Constitutional provision excepting persons in the military service from the guarantee of the other provisions of this constitutional amendment as to former jeopardy and of self-incrimination. Nevertheless,Congress has deemed it necessary to provide by statute (Articles of War 40 and 24) for the enjoyment by the personnel in the military service of immunities similar to these constitutional guarantees as to former jeopardy and self-incrimination, when being tried by military tribunals authorized by Article I, Section 8, Clause 14, of the Constitution. There is nothing in the nature of the Constitutional guarantee as to search and seizure, differentiating it from these other two guarantees just noted.(All three were inserted in the Constitution by Amendments). Accordingly, the view is entertained that these three guarantees may be dealt with as being entirely parallel, as regards the application of them in favor of persons in the military service. Therefore, the Congress having passed no statute, similar to Articles of War 24, and 40, extending to persons in the military service the enjoyment of statutory guarantees against search and siezure similar to that guarantee of the Constitution, it is believed that such personnel, by entering the service, has passed from the realm of the civilian enjoying these guarantees into the realm of the soldier subject to rules and regulations made under the authority of Article I, Section 8, Clause 14 of the Constitution. These constitute for him due process of law.

2nd Ind. continued.

eArticle III of the Constitution provides for a judicial system for the Federal Government and, among other things, guarantees a trial by jury of all criminal cases. But it has never been contended for, nor held by the courts, that these provisions of the Constitution were applicable to the military establishment. And this notwithstanding there is no constitutional declaration to that effect. However, Article I, Section 8, Clause 14 of the Constitution, authorizes Congress to make rules and regulations for the Army. This has ever been regarded as the constitutional source for the whole military system of justice, discipline, and administration.(Winthrop, p. 49). Each of these Articles of the Constitution has ever been given a full field of operation, and without nullifying other equal provisions of the Constitution or of each other. Even so, the right of trial by jury guaranteed by Article III is not enjoyed by a man in the military service when tried by a military tribunal exercising the constitutional powers provided by Article I, Section 8, Clause 14. (Ex parte Milligan, 4 Wall 2, 119).

fIn measuring the constitutional guarantees which may be enjoyed, at the trial, by a member of the military service, it must be determined first, whether his is a trial of a criminal case before a tribunal established under the provisions of Article III of the Constitution, or, second, whether his is a trial for an offense against the peace and dignity of the Army, its rules and regulations,and or prejudicial to good order and military discipline, before a military tribunal established under the provisions of Article I of the Constitution. If the former, he enjoys all the guarantees of Article III and others of the Constitution and statutes established to be operative in and for the guidance of tribunals drawing their authority from Article III - just to the same extent as if he was not in the military service. If the latter, he enjoys none of those guarantees and only such others as have been provided by statue to be operative in and for the guidance of military tribunals drawing their authority from Article I. Among such other guarantees which he enjoys, and which are similar to those guaranteed by the constitution to be enjoyed in trial before tribunals authorized by Article III, are the guarantees against self-incrimination (Article of War 24) and against double jeopardy (Article of War 40)

gThe constitutional guarantee against unreasonable search and seizure serves only to immunize one against the consequences of the discoveries made by such prohibited acts, when such acts are improperly undertaken, and the Government seeks to make use of the discoveries there made in the consequent trial of a criminal case before a tribunal authorized by Article III. It has no application to cases being tried before military tribunals authorized by Article I. I submit this conclusion can not be discarded as unsound without assuming the burden of satisfactorily explaining why the Congress deemed it necessary to enact Articles of War 24 and 40 in order to grant immunity against self-incrimination and former jeopardy in trials before military tribunals. This I am wholly unable to do

hThe Act of November 23, 1921, referred to in the holding of the Board of Review (Sec. 53, Title 18, U.S.Code) by its own precise terms only has application to "any officer, agent, or employee of the United States engaged in the enforcement" of some law of the United States. Manifestly the military personnel conducting the search were not engaged in "the enforcement" of any law of the United States within the meaning of that statute.

2nd Ind.,Par 4h continued.

This statute is one of a number of others passed by the Congress establishing crimes and offenses and prescribing procedure in the trial of criminal cases before tribunals authorized by Article III. It may not properly be given application except in the cases of a search and seizure in pursuance of the enforcement of some law of the United States, violation of which is cognizable before a judicial tribunal established under the authority of Article III of the Constitution.

iThe members of the military service are prohibited by the posse comitatus act of June 18, 1878, 20 Stat. 152, from undertaking the execution of any of the laws of the United States. Accordingly, they may not lawfully engage in the enforcement of any of the laws referred to in the Act of Nov. 23, 1921, supra, even with a search warrant. And if the 1921 Act is to be given application to searches and seizures made in pursuance of proper military administration and discipline; then so must the prohibition of the posse comitatus act be also given application. If such is to be the case then military men can make no search and seizure in aid and in pursuance of military administration and discipline, either with or without a search warrant. Manifestly it is of no altering consequence whether the search and seizure is conducted on or off a military reservation subject to the exclusive control of the United States. If such a distinction is to be made then I submit there was less authority to search Ray's locker in the barracks at Fort Benning than his quarters in Columbus, Georgia. If such is to be the case then the Army must be provided with a corps af civilian process servers in order that the military establishment may be lawfully administered and disciplined. This is simply unthinkable.

jTo give application to the Act of November 23, 1921, to the search and seizure in this case, as held by the Board of Review, is to hold the military personnel making the search and seizure to have been engaged in the enforcement of a law of the United States in violation of the posse comitatus act. Manifestly it is not in accordance with sound rules of statutory construction that by interpretation the authorizations and prohibitions of a statute be given application to a class of persons to whom it can have no application unless and until that class of persons is guilty of a violation of the prohibition of another statute of equal dignity, which it is not contended is repealed or modified in the least degree. Such an interpretation must be founded in something more than the presumed eventualities of violations of the posse comitatus act by military personnel.

kEvidence procured by unlawful search and seizure is admissible in Georgia. (Calhoun vs. State, 144 Ga., 679 - 87 S.E. 893; Smith vs .State 17 Ga.,App. 693 - 88 S.E. 42)

5. While the sentence to confinement in this case is not affected by the holding of the Board of Review it is believed the administration of military discipline will be seriously handicapped if the specifications of Charge I, are held to be legally insufficient.(The findings as to specification 1, Charge I, were disapproved by the undersigned).

2nd Ind. continued.

6. For the reasons here indicated and the additional evidence hereto attached, it is requested that the Board of Review again consider this case.

F. R. McCoy

F. R. McCOY
Major General, U.S.A.
Commanding.

REC'D
SEP 28 1931
J. A. G. O.

5-Incls. 4 added.
1-Affidavit of Lt. Ives,
2-Affidavit of Pvt. 1st Cl. Andrepon
3-Affidavit of Sgt. Wald
4-Affidavit of H.M.Adair
5-Record of trial.

Executive
J A G

3d Ind.

War Department, J.A.G.O. OCT 5 - 1931 - To: The Commanding General, Fourth Corps Area, Fort McPherson, Atlanta, Georgia.

The reconsideration requested in 2nd Indorsement is not permissible. In this connection attention is invited to the decision in J.A.G., C.M. 152122, Thomas (Dig. Ops. JAG 1923, p. 52) to the effect that when, under Article of War 50½, the Board of Review holds a record of trial legally insufficient to support a finding or sentence and such holding is concurred in by The Judge Advocate General, such finding or sentence is thereby vacated and the case cannot be reconsidered for the purpose of reversing such holding.

OCT 7
HQ. 4th CORPS AREA

Blanton Winship,
Major General,
The Judge Advocate General.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Military Justice
CM 196619

OCT 14 1931

UNITED STATES vs. Privates EUGENE G. GOYETTE (6698238), IRVING F. BLAND (6835798), and ORA R. CURTIS (6645953), all of Company I, 23rd Infantry.	SECOND DIVISION Trial by G. C. M., convened at Fort Sam Houston, Texas, August 4, 1931. Dishonorable discharge and confinement for fifteen (15) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Privates Eugene G. Goyette, Irving F. Bland, and Ora R. Curtis, all Company "I", 23rd Infantry, acting jointly and in pursuance of a common intent, did, at Fort Sam Houston, Texas, on or about May 6, 1931, desert the service of the United States and did remain absent in desertion until they were apprehended at Dallas, Texas, on or about May 11, 1931.

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

Specification 1: In that Privates Eugene G. Goyette, Irving F. Bland and Ora R. Curtis, all Company "I", 23rd Infantry, acting jointly and in pursuance of a common intent, did, at Fort Sam Houston, Texas, on or about May 8, 1931, unlawfully enter Building Number 10-A, Infantry Post,

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being the kitchen and mess hall of Company "I", 23rd Infantry, with intent to commit a criminal offense, to wit, larceny, therein.

Specification 2: In that Privates Eugene G. Goyette, Irving F. Bland and Ora R. Curtis, all Company "I", 23rd Infantry, acting jointly and in pursuance of a common intent, did, at Fort Sam Houston, Texas, on or about May 8, 1931, with intent to do him bodily harm commit an assault upon Edward Rodriguez by pointing a dangerous weapon, to wit: a pistol, at said Rodriguez.

Specification 3: In that Privates Eugene G. Goyette, Irving F. Bland and Ora R. Curtis, all Company "I", 23rd Infantry, acting jointly and in pursuance of a common intent did, at Fort Sam Houston, Texas, on or about May 8, 1931, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Edward Rodriguez one (1) watch of the value of one dollar ($1.00) or thereabouts, one (1) pocket knife of the value of one dollar ($1.00) or thereabouts, and one dollar ($1.00) lawful money of the United States, all the property of the said Rodriguez, and from the presence of said Rodriguez one (1) Dodge automobile of the value of eleven hundred dollars ($1100.00) or thereabouts, the property of the Owl Taxi Co., all of the total value of eleven hundred and three dollars ($1103.00).

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

Specification: In that Privates Eugene G. Goyette, Irving F. Bland and Ora R. Curtis, all Company "I", 23rd Infantry, acting jointly and in pursuance of a common intent did, at Fort Sam Houston, Texas, on or about May 8, 1931, feloniously take, steal and carry away nine (9) cans of sardines of the value of 81/100 dollars ($0.81) or thereabouts, four (4) cans of sandwich spread of the value of 48/100 dollars ($0.48) or thereabouts, eight cans of No. 2½ pineapples of the value of one and 60/100 dollars ($1.60) or thereabouts, nine cans of No. 2 peas of the value of 81/100 dollars ($0.81)

or thereabouts, twenty one cans of milk of the value of one and 26/100 dollars ($1.26), or thereabouts, one (1) can of No. 3 tomatoes of the value of 13/100 dollars ($0.13) or thereabouts, two (2) cans of No. 2½ peaches of the value of 30/100 dollars ($0.30), or thereabouts, two (2) cans of No. 10 corn of the value of one and 24/100 dollars ($1.24), or thereabouts, and one can of No. 10 peaches of the value of 50/100 dollars ($0.50), or thereabouts, of the total value of seven and 13/100 dollars ($7.13) or thereabouts, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Privates Eugene G. Goyette, Irving F. Bland and Ora R. Curtis, all Company "I", 23rd Infantry, acting jointly and in pursuance of a common intent, did, at Fort Sam Houston, Texas, on or about May 8, 1931, wrongfully and unlawfully bind and gag Edward Rodriguez.

Each accused pleaded to Charge I and its Specification not guilty but guilty of absence without leave in violation of the 61st Article of War and to all other charges and specifications not guilty, and each was found guilty of all charges and specifications. Evidence of one previous conviction of Goyette by Special Court-Martial for loitering on post and one of Bland by Summary Court-Martial for breach of restriction was introduced. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifteen years. The reviewing authority approved the sentence, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence shows that on May 6, 1931, Bland absented himself without leave from his company and on May 7, 1931, Curtis absented himself without leave from his company (R. 13, 14). On May 7, 1931, Company I, 23rd Infantry, of which all the accused were members, left Fort Sam Houston on maneuvers. Goyette did not go with the company but remained in the Post and was marked "quarters" (R. 14). Goyette was last seen by the charge of quarters at 9:00 p.m., May 8, 1931. He had no permission to be absent (R. 16). At about 9:12 p.m., May 8, Edward Rodriguez, a chauffeur for the Owl Taxi Company, received a telephone call at the garage in San Antonio, Texas, to go to 1209 Mason

Street. He reported at that address at about 9:30 p. m. (R. 21), driving a four door Dodge Eight Sedan (R. 19, 34). Here four men, whom he had never seen before, entered the car, all sitting in the back seat. Two men, whom he later identified as Curtis and Bland, were of these four (R. 18), and he later identified Goyette by his voice (R. 24). He was directed by the four men in the back seat to drive to the 2nd Tank Company (R. 21). As he drove the men in the back seat "put a gun to" him which he felt but did not see (R. 21-22). They told him that they would shoot his brains out (R. 23). After driving about half a block further he was ordered to get out of the car, which he did, and they tied a handkerchief around his eyes and tied his hands (R. 22). He was put in the back of the car which was then driven to the incinerator where he was taken out of the car, tied down to an old settee and gagged (R. 23). There was some conversation in whispers (R. 24). During the ride to the incinerator a watch, a knife, and one dollar in change were taken from his pockets but he could not tell by whom (R. 25). The watch and knife were introduced as exhibits before the court. After Rodriguez had been bound to the settee, the men left him and he heard the car when they drove it away (R. 24). Rodriguez remained bound in the incinerator from about 10:00 p.m., May 8, 1931, until about 6:00 a.m., May 9, 1931, when he was released by Sergeant Uhl (R. 27,34). Sergeant Uhl testified that he released Rodriguez on the morning of May 9, 1931 (R. 37, 38). The car Rodriguez drove on the night of May 8, 1931, was the property of the Owl Taxi Company (R. 34) and was missing when he was released on the morning of May 9, 1931 (R. 35).

At about 4:30 a.m., May 11, 1931, W. R. Large, Deputy Sheriff of Dallas County, Texas, found the three accused asleep in a Dodge Eight 1930 automobile in Dallas, Texas. He arrested them and later delivered them to the Provost Marshal, Fort Sam Houston, Texas. In the car he found certain items of canned goods, a watch, chain, knife, and three .32 cal. S.W. cartridges. He delivered the automobile, watch, and chain to Mr. Vega, Manager of the Owl Taxi Company, in San Antonio, Texas, and shipped the other articles to Lieutenant Flood at Fort Sam Houston, Texas. The watch and knife were found on the person of Bland, the cartridges on the person of Goyette (Ex. 3). On the morning of May 9, 1931, it was discovered that the kitchen of Company I, 23rd Infantry, had been opened and the storeroom had been broken open and canned goods were strewn on the floor (R. 43). The charge of quarters nailed up the door and left the storeroom otherwise in the condition in which he found it until the mess sergeant returned from maneuvers (R. 47, 48). Mr. C. A. Vega, Manager of the Owl Taxi Company, testified that the automobile driven on the night of May 8, 1931, by Rodriguez and returned by Mr. Large was a Dodge Eight Sedan about eight or nine months old, worth $1685 when new, and belonged to the Owl Taxi Company (R. 49, 52). The items shipped by Mr. Large to Lieutenant Flood were received and the canned goods were marked, kept locked

in a safe, exhibited at the first hearing of this case, and then turned over, except the spinach, to the Mess Sergeant of I Company, 23rd Infantry (R. 54, 55, 61). These cans were retained by the Mess Sergeant and exhibited to the court at the rehearing (R. 61). On the return of Company I, 23rd Infantry, from maneuvers, a check of the property in the storeroom determined the shortage to be as listed in the Specification, Charge III (R. 58-59) and of the value alleged (Ex. 4). The last previous inventory of the contents had been made on May 1st and from then until the departure of the company on May 7th, when the Mess Sergeant nailed up the storeroom, no shortage had appeared (R. 58, 59).

Accused Bland testified at his own request that he had gone down town the afternoon of May 8, 1931, and at about 1:30 a.m., May 9, 1931, he started to walk back to the company with Goyette and Curtis. They had been drinking and were drunk. On the way out they came upon the car which they were accused of taking, parked, unoccupied, on the edge of the viaduct. The three accused got into the car and Bland drove it away (R. 72-74). They procured more whiskey (R. 75) and then drove around until their liquor gave out when they started back from Dallas to San Antonio. They ran out of gas at about midnight and were picked up at about 4:00 a.m. (R. 74).

Goyette and Curtis declined to testify or to make unsworn statements.

4. Consideration of the questions of law and fact presented by this record will be facilitated by grouping of certain related specifications disregarding the charges under which they are respectively laid. The first question for consideration arises from the Specification, Charge I, which alleges that the three accused, acting jointly and in pursuance of a common intent, did, at the time and place specified, desert the service.

The evidence showed that Bland was absent on May 6, 1931, and Curtis on May 7, 1931, and that Goyette was last seen at his place of duty at 9:00 p.m., May 8, 1931, but was absent from duty on May 9, 1931, and that none of them had permission to be absent. It also shows that they were apprehended together in Dallas, Texas, on May 11, 1931. Thus it is shown that each accused absented himself without leave about the date alleged and that his unauthorized absence was terminated when and as alleged. The evidence hereinafter discussed in connection with other specifications sufficiently shows the intent of each not to return. For the reasons stated in paragraph 27, page 18, Manual for Courts-Martial, there can be no such offense as joint desertion, even when the

several accused leave at the same time. The particular specification now under consideration, however, included allegations that each accused deserted and remained absent in desertion until apprehended at the time and place alleged; and the evidence is legally sufficient to support the conviction of each accused of the offense thus charged against him in the allegations so included in the specification. It is irregular and bad pleading to charge several persons in one specification with separate, individual offenses, and the trial is in fact a common trial in which each accused is entitled to one peremptory challenge. In the instant case the several accused, before the court was sworn, but after the defense had exercised a peremptory challenge against Lieutenant Jurney, were asked "Is the Defense satisfied with the court as now constituted?", to which the Defense Counsel replied "Yes, Sir." The accused thereby waived whatever right they may have had to further challenge, and the irregularity did not injuriously affect the substantial rights of the accused.

The second question is the legal sufficiency of the evidence introduced to support the conviction of Specification 1, Charge II (housebreaking), and the Specification, Charge III (larceny of canned goods).

The only evidence offered to sustain these specifications is to the effect that on May 9, 1931, the storeroom of Company I, 23rd Infantry, had been broken into; that when a check was made a few days later certain canned goods appeared to be missing; that at 4:30 a.m., May 11, 1931, the three accused were arrested in Dallas, Texas, and had in their possession certain items of canned goods, some of which corresponded with some of the items that appeared to be missing from the storeroom. Other items of food not missing from the storeroom were also found in the possession of accused.

It is a well settled rule of law that "where circumstances are relied on entirely to justify a conviction, the circumstances must not only be consistent with guilt, but inconsistent with innocence." (U.S. v. Hart, 162 Fed. 192; Romano v. U.S., 9 F. (2d) 522, 524; CM 195705, Tyson.)

In the instant case the circumstances of the finding in the possession of the three accused of certain canned goods similar to certain canned goods that appear to have disappeared from the storeroom about the time accused absented themselves, but which might readily have been purchased from almost any grocery store, together with other items of food, including canned goods which were not missing from the storeroom, are not such as to give rise to a presumption that any of the articles

found in the possession of the accused had been in the storeroom. It fails to preclude every reasonable theory except that of the guilt of the accused.

The record of trial is, therefore, lacking in substantial evidence to support the conviction of the larceny alleged in Specification 1, Charge III, or conviction of the housebreaking alleged in Specification 1, Charge II, both of which rest upon the same circumstances.

The third question is the legality of the conviction of Specification 2, Charge II (assault with intent to do bodily harm), Specification 3, Charge II (robbery), and the Specification, Charge IV (assault and battery).

In support of the alleged joint assault upon Rodriguez, by pointing a dangerous weapon, to wit, a pistol at him, Rodriguez testified that one of the four men in the back seat of his car "put a gun to" him (R. 21), which witness felt on the back of his head, and they said they would shoot his brains out (R. 33). The witness testified that he did not see the gun (R. 22) and no pistol or other fire arm was found in the possession of the accused when they were arrested. Since no witness saw a pistol it cannot be said that there is any substantial evidence that a pistol was used. Apparently Rodriguez merely concluded from the threat to shoot him that what he felt was a pistol. The evidence therefore is not sufficient to sustain conviction of the alleged assault with a pistol or any other dangerous weapon. While a simple assault with some instrument the character of which was not disclosed, was proved, conviction thereof cannot be sustained for the reason that it is not proved that the instrument was a weapon as alleged.

In the instant case an assault was committed upon Rodriguez with an object which he believed to be a pistol. Within a few minutes he was blindfolded and bound and lost dominion over his automobile. He was then driven by one of the four men to the incinerator, further bound and gagged, and robbed of his watch, knife, and one dollar in money en route. Thereafter the accused left in the automobile of which they had previously taken possession.

The rule of pleading as stated in the Manual for Courts-Martial, paragraph 27, is that "one transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person." The term "unreasonable" as here used connotes unreasonableness from the viewpoint of both the legality and the appropriateness of the punishment involved.

The third question may be thus restated: Are the three acts described in Specifications 2 and 3, Charge II, and the Specification, Charge IV, separate and distinct offenses, or but different aspects of the same offense?

It is the opinion of the Board of Review that, under the particular circumstances of this case the assault, not alleged in, but proved under, Specification 2, Charge II, and the binding and gagging of Rodriguez at the incinerator, alleged in the Specification, Charge IV, were really the "putting in fear" and the "force and violence" constituting component parts of the robbery alleged in Specification 3, Charge II. Since, therefore, the conviction of robbery includes conviction of the assault proved under Specification 2, Charge II, and the assault and battery alleged in the Specification, Charge IV, the accused should be punished only for the desertions and the robbery, inasmuch as there was "that continuity of offense which made the several acts charged against the defendant only one crime", to employ language of the Federal Supreme Court in a cognate case (Ebeling v. Morgan, 237 U.S. 625, 631; see also Manual for Courts-Martial, page 171).

5. The charge sheet shows that Goyette enlisted November 23, 1928, with no prior service and was 20 years and 8 months of age; that Bland enlisted December 19, 1929, with no prior service and was 20 years of age, and that Curtis enlisted March 25, 1930, with three years' prior service and was 22 years of age.

6. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the finding of guilty of Charge I, only so much of the finding of guilty of the Specification, Charge I, as finds each of the three accused guilty of a separate desertion, terminated by apprehension, as alleged, and the findings of guilty of Charge II and Specification 3 thereunder, and of Charge IV and its Specification, but legally insufficient to support the findings of guilty of Specifications 1 and 2, Charge II, and of Charge III, and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twelve and one half years.

E. C. McNeil, Judge Advocate.

Jno. M. Connor, Judge Advocate.

Mark E. Guerin, Judge Advocate.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Military Justice
CM 196776

OCT 13 1931

UNITED STATES	)	HAWAIIAN DIVISION
	)	
v.	)	Tried by G. C. M., convened at
	)	Schofield Barracks, T. H., August
Private SAMUEL P. MAIALOHA	)	18, 1931. Dishonorable discharge
(R-3549290), Company F,.	)	(suspended) and confinement for
27th Infantry.	)	one (1) year. Schofield
	)	Barracks, T. H.

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

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found not legally sufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Samuel P. Maialoha, Company "F", 27th Infantry, did, at Schofield Barracks, T. H., on or about July 3, 1931, desert the service of the United States and did remain absent in desertion until he was apprehended at Honolulu, T. H., on or about July 22, 1931.

He pleaded guilty to the Specification except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from", and "without leave", of the excepted words not guilty, of the substituted words guilty, to the Charge, not guilty but guilty of violation of the 61st Article of War, and was found guilty of the Charge and Specification. Evidence of one previous conviction, by

summary court-martial for absence without leave in violation of the 61st Article of War, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge, and designated the Post Stockade, Schofield Barracks, T. H., as the place of confinement. The sentence was published in General Court-Martial Order No. 66, Headquarters Hawaiian Division, Schofield Barracks, T. H., September 9, 1931.

3. The evidence shows that accused, a soldier in Company F, 27th Infantry, absented himself without leave from the station of his company, Schofield Barracks, T. H., on July 3, 1931 (R. 9). Entries in the organization morning report were read in evidence as follows:

> "July 3, 1931: Pvt. Maialoha, duty to A.W.O.L., 5:45 A.M."
> "July 16, 1931: Pvt. Maialoha, A.W.O.L., to desertion."
> "July 22, 1931: Pvt. Maialoha, Desertion to confinement at Ft. Shafter, T.H." (R. 8-9; Ex. 1)

The First Sergeant testified that he had no knowledge bearing on accused's intention to remain permanently away except "I have known him since he has been in the organization - he is below average as a soldier, didn't seem to like his lot as a soldier, always waiting for a detail" (R. 9-10). On July 22, 1931, a police officer of Honolulu T. H., apprehended accused while he was eating breakfast at his sister's house in Honolulu. At the time of apprehension accused was dressed in civilian clothes (R. 10-11). He was thereafter turned over to the military police at Fort Shafter (R. 11). The police officer testified, "I knew he was a deserter from the army as his description was posted on the bulletin board at Police Headquarters since July 16th." During the examination of the witness a member of the court asked the police officer, "Did you get any reward for turning in <u>this deserter</u>?", to which the witness replied in the negative (R. 11).

Accused chose to remain silent before the court (R. 13).

4. The record of trial therefore presents the question of law whether the evidence is legally sufficient to support the findings that accused deserted the service as alleged. It is obvious that the court erred in receiving the personal opinion of the First Sergeant to the effect that accused was not satisfied with his lot as a soldier. Instead evidence of factstending to show such dissatisfaction should have been

introduced. The evidence that accused was apprehended "as a deserter" offers no proof of intent to desert other than the mere fact of the apprehension itself. After eliminating all of the incompetent evidence of intent to desert, the record of trial is bare of any proof of desertion other than the mere showing that accused absented himself without leave at the time and place alleged, and that he was apprehended at his sister's home in Honolulu, T. H., after an absence of nineteen days, while wearing civilian clothes. In the opinion of the Board of Review the instant case falls clearly within the rule laid down in CM 196187 (Roath), wherein it was held that absence without leave for a period of eighteen days, terminated by apprehension, was not in itself sufficient to warrant a conviction of desertion. In its opinion in that case the Board declared:

> "The question arises in this case whether the absence was 'much prolonged' and not satisfactorily explained within the meaning of the Manual. The Board of Review is convinced that the absence in this case cannot properly be deemed 'much prolonged'. The record discloses no evidence which tends to show an intention to desert. There is no proof that accused was under charges, or that charges against him were contemplated, or that any other matter had arisen that would induce him to attempt to separate himself from the service. He was apprehended in a city immediately adjoining the post of his organization, and the post from which he had absented himself. The fact that at the time of apprehension accused was dressed in civilian clothes cannot properly be said to show a fixed intention to desert the service, for the reason that it is common knowledge that enlisted men in peacetime are permitted to wear civilian clothing outside Army posts. As the Board views the record, the only proof to support the findings is the unauthorized absence of accused, and absence without leave for a period of 18 days, unaccompanied by other proof of intention to remain permanently absent, is not sufficient to warrant the court in inferring from the absence alone an intent to desert."

There is no material fact or circumstance appearing of record in the instant case that removes it from operation of the principle announced in the above cited case. The apprehension in Honolulu was not so distant from the post of duty as to lend, in the opinion of the Board, any material weight to the prosecution's case. There being no evidence from which the court might reasonably conclude that accused

intended to desert, it follows that the record is legally sufficient to support only so much of the findings of guilty as involves findings of absence without leave for the period alleged in the Specification (nineteen days), the maximum punishment for which, as fixed by paragraph 104 c of the Manual for Courts-Martial, is confinement at hard labor for fifty-seven days and forfeiture of two-thirds of his pay per month for a like period.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, on July 3, 1931, at Schofield Barracks, T. H., absent himself without leave and remain absent until he was apprehended at Honolulu, T. H., on or about July 22, 1931, in violation of the 61st Article of War; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for fifty-seven days and forfeiture of fourteen dollars and seventy cents of his pay per month for a like period.

E. C. McCoy, Judge Advocate.

Wm. W. Carmer, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

Military Justice
C.M. 196854.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

OCT 29 1931

UNITED STATES v. Private CHARLES K. SNYDER (6788260), Battery F, 55th Coast Artillery.	)))))))	HAWAIIAN SEPARATE COAST ARTILLERY BRIGADE. Trial by G.C.M. convened at Fort Shafter, Territory of Hawaii, July 29, 1931. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

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

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

2. In the instant case findings of guilty upon the following charges and specifications were approved by the reviewing authority:

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

Specification: In that Private Charles K. Snyder, Battery "F", 55th Coast Artillery, did, at Fort Ruger, T. H., on or about June 17, 1931, with intent to do him bodily harm, commit an assault upon Corporal Freeman D. Moore, by cutting him in the back with a dangerous weapon, to wit, a butcher knife.

CHARGE II: Violation of the 65th Article of War.

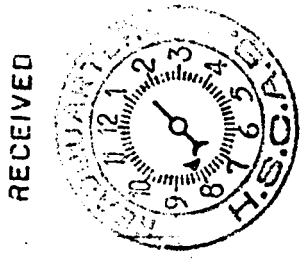
Specification: In that Private Charles K. Snyder, Battery "F", 55th Coast Artillery, did, at Fort Ruger, T. H., on or about June 17, 1931, assault Corporal John D. Rogers, a noncommissioned officer, who was then in the execution of his office, by cutting him in the forearm with a butcher knife.

The record of trial presents the substantial question of law whether the assault and battery described in the Specification, Charge II, which the evidence shows was committed while Corporal Rogers was in the execution of his office, constitutes, by reason of the fact that the violence done his person was intended for another, an assault and battery to the prejudice of good order and military discipline in violation of the 96th Article of War, instead of an offense violative of the 65th Article, designated in Charge II. It clearly appears from the evidence that the accused, after being knocked down and then kicked about the head and shoulders by Corporal Moore in the course of an altercation between the two of a personal nature, struck at Corporal Moore with a knife and in so doing happened to inflict a wrist wound upon Corporal Rogers, who had suddenly and unseen by the accused seized Corporal Moore from behind in an attempt to prevent further bodily harm to the accused. The question therefore arises: To constitute a violation of A.W. 65, must the offender know at the time of the wrongful act that the person maltreated is a warrant officer or non-commissioned officer, as the case may be? Although this element is not expressly included in the statutory description of the insubordinate conduct there denounced, the Board of Review is of the opinion that it is a necessarily implied requisite thereof, and that consequently the question just stated must be answered in the affirmative.

This Article was first enacted in the 1917 revision of the Articles of War. However, adverting to prior legislation in pari materia therewith, namely, the 64th Article of War, the purpose of which is specifically to punish assaulting or wilfully disobeying a superior officer, we find a similar knowledge on the part of the offender to be an implied constituent or limitation of the offense therein denounced. Of this latter Article, Winthrop in his commentaries on military law (Reprint, p. 570) says, citing to the same effect other authorities: "To warrant a conviction, it should appear that the accused was aware that the person assaulted by him was his superior officer." Both Articles have the common purpose to promote discipline and secure the exercise of military authority throughout the military establishment, and in respect of awareness of official status, should, in the light of their manifest purpose, be construed alike. This view of Winthrop, above cited, is adopted in the exposition of the 64th Article of War in paragraphs 134a and 134b, of the Manual for Courts-Martial; and in the discussion in paragraph 135a, relative to the 65th Article of War, the common general object of the two Articles is made apparent.

Inasmuch, therefore, as it clearly appears from the evidence in the instant case that the assault and battery of Corporal Rogers, charged in the Specification of Charge II, was not knowingly committed by the accused, in so far as the former's identity as a noncommissioned officer is concerned, it follows that such proved assault and battery constitutes an offense in violation of the 96th Article of War instead of the 65th Article of War.

3. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the finding of guilty as to Charge II, but legally sufficient to support the finding of guilty upon the specification thereunder in its entirety as a violation of the 96th Article of War, legally sufficient to support the findings of guilty of the Specification, Charge I, and said Charge, and legally sufficient to support the sentence.



_____ Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Military Justice
CM 196867

OCT 31 1931

UNITED STATES	)	EIGHTH CORPS AREA
	)	
v.	)	Trial by G. C. M., convened at
	)	Fort Crockett, Texas, September
Private CLARENCE H. SWENSON	)	11, 1931. Confinement for
(R-3068119), 39th School	)	four (4) months.
Squadron, Air Corps.	)	Fort Crockett, Texas.

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

1. The record of trial in the case of the soldier named above, having been examined in The Judge Advocate General's Office and there found not legally sufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Clarence H. Swenson, (then Staff Sergeant) 39th School Squadron, Air Corps, did at Kelly Field, Texas, on or about July 1, 1931, desert the service of the United States and did remain absent in desertion until he surrendered himself to Recruiting Authorities at Houston, Texas, on or about July 24, 1931.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for four months and to forfeit $16.10 of his pay per month for a like period. The reviewing

authority approved the sentence, directed its execution, and designated Fort Crockett, Texas, as the place of confinement. The sentence was published in General Court-Martial Order No. 410, Headquarters Eighth Corps Area, September 25, 1931.

3. The evidence shows that on July 1, 1931, accused was absent without leave from his station, Kelly Field, Texas (Ex. A). On July 24, 1931, he reported to Corporal John W. Keister, at the Army Recruiting Station at Houston, Texas (about 200 miles from Kelly Field), stating that he had been absent without leave from his organization and station since about July 1, 1931. Accused was dressed in civilian clothes at the time he reported (Ex. B). He was confined in the Guard House at Fort Crockett, Texas, on July 25, 1931 (Ex. C).

Accused offered in evidence his record of service totaling twelve years and eight months, with five excellent discharges, one as Sergeant, one as 1st Sergeant and two as Staff Sergeant; a record of clothing settlement showing that there was due him $91.95 (Ex. E); and a report of desertion containing no adverse comments and stating that no reason was known for his absence (Ex. F). Accused made an unsworn statement through counsel that he was married, lived in town and left his civilian and military clothes there (R. 7).

4. The record of trial therefore presents the question of law whether the evidence is legally sufficient to support the findings that accused deserted the service as alleged. The record contains no evidence of desertion beyond the mere showing that accused absented himself without leave at the time and place alleged, and that he surrendered himself to military control after an absence of twenty-three days at a place about two hundred miles distant from his proper station. It is the opinion of the Board of Review that the instant case falls clearly within the rule laid down in CM 196187 (Roath) wherein it was held that absence without leave for a period of eighteen days, terminated by apprehension, was not in itself sufficient to warrant a conviction of desertion. In its opinion in that case the Board declared:

> "The question arises in this case whether the absence was 'much prolonged' and not satisfactorily explained within the meaning of the Manual. The Board of Review is convinced that the absence in this case cannot properly be deemed 'much prolonged'. The record discloses no evidence which tends to show an intention to desert. There is no proof that accused was under charges, or that charges against him were contemplated, or that any other matter had arisen that would induce him to attempt to separate

himself from the service. He was apprehended in a city immediately adjoining the post of his organization, and the post from which he had absented himself. The fact that at the time of apprehension accused was dressed in civilian clothes cannot properly be said to show a fixed intention to desert the service, for the reason that it is common knowledge that enlisted men in peacetime are permitted to wear civilian clothing outside Army posts. As the Board views the record, the only proof to support the findings is the unauthorized absence of accused, and absence without leave for a period of 18 days, unaccompanied by other proof of intention to remain permanently absent, is not sufficient to warrant the court in inferring from the absence alone an intent to desert."

To the same effect are CM 189659, Hawkins, 195988, Parr, and 196776, Maialoha.

There is no material fact or circumstance appearing of record in the instant case that removes it from the operation of the principle announced in the above cited case. The place of surrender to military authority, although about two hundred miles distant from the proper station of the accused, is not so remote in point of travel time or travel means, in the light of existing transportation facilities between the cities of Houston and San Antonio which are a matter of common knowledge, as to afford a basis for reasonable inference of intent not to return to place of duty, where other substantial evidence of such intent is lacking. There being no evidence from which the court might reasonably conclude that accused intended to desert, it follows that the record is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave for the period alleged in the Specification (twenty-three days), in violation of the 61st Article of War, the maximum punishment for which, as fixed by paragraph 104 c, M.C.M., is confinement at hard labor for sixty-nine days and forfeiture of forty-six days' pay.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, on July 1, 1931, absent himself without leave from Kelly Field, Texas, and did remain absent until he surrendered at Houston, Texas, on or about July 24, 1931, in violation of the 61st Article of War; and legally sufficient to support only so much of the sentence as involves

confinement at hard labor for sixty-nine days and forfeiture of sixteen dollars and ten cents of his pay per month for a like period.

E. C. McCrey, Judge Advocate.

Wm. M. Connor, Judge Advocate.

R. Sorrenman, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington

CM 196923

DEC 21 1931

UNITED STATES	)	SEVENTH CORPS AREA
	)	
	)	Trial by G.C.M., convened at
	)	Fort Snelling, Minnesota,
Captain EUGENE N. FRAKES	)	September 11 and 12, 1931.
(07985), 3d Infantry.	)	Dismissal.

OPINION of the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, 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 96th Article of War.

Specification 1: (Disapproved by reviewing authority)

Specification 2: In that Captain Eugene N. Frakes, 3rd Infantry, having received a lawful command from Major Merl P. Schillerstrom, 3rd Infantry, his superior officer, to go to his quarters, did, at Fort Snelling, Minnesota, on or about July 2, 1931, fail to obey the same.

Specification 3: (Finding of not guilty)

CHARGE II: Violation of the 64th Article of War.

Specification: In that Captain Eugene N. Frakes, 3rd Infantry, did, at Fort Snelling, Minnesota, on or about July 2, 1931, offer violence against Major Merl P. Schillerstrom, 3rd Infantry, his superior officer, who

was then in the execution of his office, in that he, the said Captain Eugene N. Frakes, did threaten to strike the said Major Merl P. Schillerstrom with his fist.

CHARGE III: Violation of the 63rd Article of War.

Specification 1: In that Captain Eugene N. Frakes, 3rd Infantry, did, at Fort Snelling, Minnesota, on or about July 2, 1931, behave himself with disrespect toward Major Merl P. Schillerstrom, 3rd Infantry, his superior officer, by saying to him, "I wouldn't mind giving you a poke in the jaw", or words to that effect.

Specification 2: In that Captain Eugene N. Frakes, 3rd Infantry, did, at Fort Snelling, Minnesota, on or about July 2, 1931, use, orally and in the presence of Major Merl P. Schillerstrom, 3rd Infantry, and Mrs. Evelin M. Schillerstrom, the following contemptuous and disrespectful words against Colonel David L. Stone, 3rd Infantry, Commanding Officer of Fort Snelling, Minnesota, and his superior officer, to wit: "You get the Commanding Officer down here and I'll give him a sock in the jaw, also", or words to that effect.

Accused pleaded not guilty to all charges and specifications and was found guilty of all except Specification 3 of Charge I. Of this specification he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 1, Charge I, approved the sentence, and forwarded the record for action under the 48th Article of War. The action of the reviewing authority contains the following statement:

"The sentence is believed to be excessive and if it lay within the authority of the reviewing officer he would commute it to a reduction on the promotion list of five hundred files and to a reduction in rank of five hundred files."

3. Since the court found accused not guilty of Specification 3, Charge I, and the reviewing authority disapproved the finding of guilty of Specification 1, Charge I, the evidence relating to these two specifications will not be recited or discussed except in so far as it may have a bearing upon the other specifications.

The evidence, in so far as material to the issue, shows that Captain Frakes and his wife lived in a building at Fort Snelling, Minnesota, which contained two sets of quarters, one being occupied by them and the other by First Lieutenant and Mrs. Russell D. Powell. The building had a common front porch, divided by a railing and a screen partition in which there was a gap or opening sufficiently large to permit a person to pass through by merely stepping over the railing (R. 30,38-41).

About 7 o'clock on the evening of July 2, 1931, Mrs. Powell and a friend, Mrs. Birmingham, were sitting on the former's front porch (R. 18,20,43,44), when Mrs. Frakes, the wife of the accused, came out of the front door of her quarters carrying her shoes in her hand and presenting an appearance described as "very disheveled and excited" with "blood dripping from her chin" and looking "very sick" (R. 23-25,45). Mrs. Powell asked Mrs. Frakes what was the matter and invited her into her quarters but Mrs. Frakes, without replying, motioned Mrs. Powell back and departed in the direction of Major Schillerstrom's quarters (R. 24,26-28,46). Shortly afterwards the accused came out of his quarters, crossed the railing to the Powell portion of the porch and, after asking if his wife was in the Powell quarters and being told she was not, entered the quarters without permission in order to search for his wife (R. 29-31,44,50). He apparently left the quarters within a very few minutes. Later in the evening, Mrs. Powell saw accused on his own back porch and he again asked if Mrs. Frakes was in the Powell house and was told that she was not, whereupon he replied "I will have to find her or I cannot go to Des Moines in the morning" (R. 33,34).

At about 7 o'clock Mrs. Schillerstrom was serving dinner when accused's wife came to her front door (R. 59,60). Later, probably towards 11 o'clock (R. 82,103), Mrs. Schillerstrom telephoned to accused that his wife was at the Schillerstrom house, where she would be taken care of, and for him not to worry. Thereupon accused became very angry and declared that he was coming to get his wife. Mrs. Schillerstrom replied that she preferred him not to come to her quarters and that his wife was in no condition to leave the house (R. 63). Then Mrs. Schillerstrom went downstairs to close the doors. She had turned out the lights in the other downstairs rooms (R. 83) when, upon entering the kitchen, she heard accused climbing up onto the porch and immediately turned off the kitchen lights (R. 66,83). Accused called out to her: "Gypsy, is that you?" (R. 85). It was customary for her to be called "Gypsy" by her friends (R. 96). On

receiving an affirmative reply accused declared that he had come for his wife and demanded that Mrs. Schillerstrom open the door for him. When she told him he could not come in he reiterated his demand several times not only vehemently but profanely (R. 66), and accused Mrs. Schillerstrom of interfering in his family affairs. She insisted that he could not enter or take his wife home that night (R. 67,68,86). This conversation took place through the screen door, which Mrs. Schillerstrom testified she thought was latched (R. 67). After apparently a few moments of conversation with accused, Mrs. Schillerstrom called her husband who was upstairs bathing at the time. Major Schillerstrom hurried into the kitchen in his pajamas (R. 67). He testified that when he reached the kitchen he saw accused through the screen door, which was latched; that accused was on the back porch leaning against the railing, talking and "seemed to be somewhat excited--not especially so at that time"; and that Mrs. Schillerstrom seemed frightened (R. 104,105).

The testimony of Major and Mrs. Schillerstrom as to what followed differs in a number of details. Mrs. Schillerstrom's version is substantially as follows: Major Schillerstrom went to the door and told accused to return to his quarters (R. 68), the first words spoken being "I want you to go home" (R. 87). Accused replied angrily and in a very loud tone: "God damn it, I won't; you have my wife and I intend to come in and take her home". Major Schillerstrom then "asked him to go home the second time and he made some remark to the effect that he didn't want a man like Captain Frakes in his home" (R. 68). It was not until after he had told accused the second time to go home that Major Schillerstrom added, "I don't want trash like you around the house" (R. 87). Accused was "yelling by this time" and demanding admittance, and Mrs. Schillerstrom suggested it would be "much better" to let him in (R. 68). Thereupon the Major opened the door and admitted accused (R. 69,70). Upon entering the kitchen accused told Major Schillerstrom that he had no right to speak to him in the manner he had and, when the Major expressed a protest against accused's manner, the latter "raised his arm and stepped toward the Major and told him: 'If you don't like what I am doing, I will give you a good poke in the nose' or 'sock in the jaw', or words to that effect" (R. 70). Mrs. Schillerstrom also testified that she was sure the "actual language" used by accused was "I am going to give you a sock in the jaw" (R. 81). She would not admit, though she did not positively deny, that what accused said was "I have a good notion to poke you in the jaw" or "I have a notion to give you a poke in the nose" or " to poke you in the jaw" (R. 81,82). She testified that she could recall accused using

the words "poke you in the nose", but finally admitted that she could not remember what language preceded these words (R. 82). She also admitted that, in testifying at the preliminary investigation, she said nothing about accused raising his arms or hands (R. 88). As accused stepped towards Major Schillerstrom with his arm raised, Mrs. Schillerstrom stepped between them. Accused then "seemed to realize his mistake". He stood back and told the Major that he was interfering with his family affairs and he demanded that he be permitted to see his wife. When, during this conversation in the kitchen, Major Schillerstrom suggested calling the Colonel, accused said: "Call the Colonel, and I will give him a good poke in the nose" (R. 71). Mrs. Schillerstrom also testified that accused's exact language was: "Call the Colonel; I don't mind giving the Colonel a good poke in the jaw" or "giving him a good poke in the nose" (R. 95). After this conversation, Mrs. Schillerstrom went upstairs and talked to Mrs. Frakes. Upon returning to the kitchen she told accused to go up and see his wife (R. 72), that she was ready to see him. Mrs. Schillerstrom left him with his wife (R. 77), where he remained about fifteen minutes (R. 92). He was at the Schillerstrom quarters about thirty or forty minutes in all (R. 91).

Major Schillerstrom testified that when he entered the kitchen and saw accused on the back porch his first words to him were "What are you doing here? You go home". Accused, without starting to obey, answered in some such words as "You have my wife here. I came to get her" or "I want her" (R. 104). Major Schillerstrom then said to accused: "You go home; I don't want trash like you in my house". At this accused became angry and cursed several times (R. 105) very loudly. He continued to demand admittance and the Major unlatched the door and let him enter (R. 106). Major Schillerstrom admitted that he himself was very angry and excited (R. 115), that his remarks to accused were "probably" made in a loud tone of voice (R. 119), that accused did not appear excited or talk excitedly until after being referred to as "trash" (R. 116), and that he was probably justified in being angered by this remark (R. 121). He also admitted that, at the preliminary hearing, he had testified in substance that the first remark passed between himself and accused was when he told accused to go home, adding that he "did not want trash like him around the place" (R. 113), and that he gave the order to go home only once (R. 117). According to Major Schillerstrom, when accused entered the kitchen, as the two men stood near the middle of the room, accused said to

Major Schillerstrom: "You can't talk to me like that; I will give you a poke in the jaw", at the same time advancing "probably a short pace" with his fist doubled up, his right arm being in the position illustrated by the witness in court and described in the record as follows: "his right arm down to the elbow flush with the side of his body, and the forearm at about right angles, with the fingers doubled up" (R. 107). At this time Mrs. Schillerstrom was standing about four feet away and she stepped forward to a position nearly between the two men. Major Schillerstrom admitted that at the preliminary investigation he had testified that what accused said was "I have a good notion to poke you in the jaw" and that these may have been the words used (R. 112); and it also appears that at that investigation Major Schillerstrom made no mention of any menacing movement of accused's arm (R. 118). When Major Schillerstrom said, "I am going to call the Commanding Officer", accused replied, "Bring him up here and I will sock him in the nose too" (R. 108). Major Schillerstrom thought that at about this time or shortly thereafter, accused remarked "that it might be a good thing to bring the Colonel up and settle the whole affair" (R. 113). At this time Colonel Stone, 3d Infantry, was the post commander (R. 109) and Major Schillerstrom was the next senior officer on the post. He did not know positively that Colonel Stone was actually on the post when the remarks were made about him (R. 120). At one time during the conversation in the kitchen accused made the remark, "You have my wife here. She is my property and I am going to get her". Later "after he had cooled down somewhat" he asked Major Schillerstrom if he did not know that when he interfered "in a man's troubles with his wife" he was "just hunting trouble". While on the porch accused more than once used each of the expressions "God damn it" and "By God" (R. 110). Major Schillerstrom testified that accused "calmed down" within about a half minute after threatening him (R. 114), or probably not over five minutes after his arrival on the back porch (R. 110). Mrs. Schillerstrom left the accused and her husband in the kitchen and went upstairs. When she returned accused went up. On coming down he stopped in the hall, where Major Schillerstrom was standing, and said, "I guess I won't see Carrie any more". He then went home (R. 111).

The accused neither testified nor made an unsworn statement. He introduced as witnesses in his behalf his wife, Mrs. Carolyn Frakes, Private William M. Johnson, Service Company, 3d Infantry, and First Lieutenant Russell D. Powell, 18th Field Artillery.

The testimony of Mrs. Frakes has no bearing upon the specifications of which accused stands convicted nor upon the cause of her

physical condition when she left the accused's quarters and went to the Schillerstrom's quarters. The gist of the testimony of Lieutenant Powell and Private Johnson is that the accused and Mrs. Frakes and Major and Mrs. Schillerstrom were socially intimate, frequently visiting each others quarters in the normal informal manner appropriate to such intimacy, and that "cuss words" and such phrases as "God damn it" were sometimes used by the accused at social gatherings in the presence of ladies (R. 146-148,149,165-167).

4. The pertinent evidence as summarized above demonstrates that all the offenses of which the accused stands convicted were committed within a period of possibly five minutes (R. 110), and that they each constituted a part of one transaction. The only substantial questions presented by the record are whether or not the evidence establishes

a. That the alleged command from Major Schillerstrom to the accused that the accused go to his quarters was in fact a "lawful command" (Specification 2, Charge I);

b. That at the time the accused offered violence against Major Schillerstrom, the latter officer was "in the execution of his office" (Specification, Charge II).

With reference to Charge III and the two specifications thereunder of which the accused stands convicted, the Board of Review is of opinion that the evidence sustains the findings.

5. In reference to the question first propounded above, namely, whether or not Major Schillerstrom gave a lawful command to the accused at the time and place and in the form alleged, the Board of Review is of the opinion that the so-called command was not a "lawful command" from a superior to a subordinate.

A short discussion of the relationships of Army officers with each other will tend to shorten and to clarify the consideration not only of the question immediately referred to but of the second question propounded. During all duty hours and many hours normally considered "off duty", officers of the Army are in close and intimate contact. Their relations to each other during these periods are sometimes official and sometimes purely personal. Official matters may arise and be disposed of during non-duty hours and personal matters

may come up during duty hours. The numerous daily changes from the official to the personal and vice versa are due to so many different circumstances and so many different conversations that to distinguish in words the official from the personal is often impossible as a practical matter. However, this distinction is easily and unerringly recognized in fact. If this were not so, normal social relations in the Army would be impossible. It goes without saying that in purely personal matters much advice given and perhaps many directions given by a superior to a subordinate are not given under the sanction of the President's commission and have no authority of law or custom to make compliance therewith obligatory on the junior. In other words, the matters are purely personal and there is no offense involved in the direct disobedience of the advice or direction or in the failure to obey the same.

The facts established by the testimony recited above demonstrate that both the accused and Major Schillerstrom were engaged in a purely personal discussion from the moment the accused arrived at Major Schillerstrom's quarters until he departed therefrom. The facts alleged in the specifications and charges of which the accused stands convicted all occurred within a period of about five minutes (R. 110,114). The so-called command issued by Major Schillerstrom was coupled with insulting language directed toward the accused. The two officers had been in the past on intimate terms. The Board of Review cannot declare that a lawful command was given under the circumstances and in the terms involved in the instant case. To so declare would be tantamount to affirming that any officer in his intercourse with a subordinate speaks and acts by virtue of his commission no matter what the circumstances. Military law does not always exact execution by a subordinate of the expressed will of a superior officer who is himself at the time of expressing the same subjecting the former to unmilitary maltreatment denounced by that provision of Army Regulations governing military discipline which declares that "Superiors are forbidden to injure those under their authority by tyrannical or capricious conduct or by abusive language" (Paragraph 3, AR 600-10, October 16, 1929). The Board is therefore of opinion that the finding of guilty of Specification 2 of Charge I is not legally sustained by the evidence and that the findings of guilty of that specification and of Charge I should be disapproved.

The foregoing discussion is also determinative of the second question propounded. It is evident that at the time of the alleged offer of violence Major Schillerstrom was not in any sense "in the

execution of his office" within the meaning of Article of War 64. In fact the demonstrated cause of the offer of violence was Major Schillerstrom's angry and insulting remark to the accused. Whether the accused had by prior actions not disclosed by the record incurred Major Schillerstrom's contempt is purely conjectural and entirely immaterial. The language used by the latter was such as naturally to arouse resentment, particularly on the part of a person who had theretofore had friendly and almost intimate social relations with the speaker, and as the language was not used in an official capacity the natural reaction to that language could not have been directed to the speaker in his official capacity, that is, while he was "in the execution of his office". But while accused's offer of violence does not constitute an offense under Article of War 64, it does constitute an offense under Article of War 63. Winthrop, 1920 Reprint, p. 567. As such it is a component and inseparable part of the offense alleged in Specification 1 of Charge III (see C. M. 196619, Goyette et al.). The findings of guilty of Charge II and its Specification should, in the opinion of the Board of Review, be disapproved.

6. Upon the arraignment of the accused his counsel moved that the Specification of Charge II be stricken out as not alleging an offense under Article of War 64, the motion being based on the ground that "a mere threatening in words" is not an offering of violence in the sense of that Article (R. 11-13). In the opinion of the Board of Review the motion was properly denied by the court. It is true that a mere threatening in words is not a violation of the Article but no such threat is alleged. The word "threaten" includes a physical menace and when used in connection with the phrase "offer violence against" reasonably charges an actual assault as distinguished from an oral threat. The phrase "offers any violence" as used in the Article in question has long been construed to include an assault. Winthrop, 1920 Reprint, p. 570; M.C.M. 1917, p. 209; id. 1921, p. 354; id. 1928, p. 148.

7. Forwarded with the record are three recommendations to clemency, two of which are signed by one and the third is signed by three of the nine members of the court by whom accused was tried. The first recommendation is that the sentence be modified to include reprimand, restriction to specified limits for the maximum period authorized by law, and loss of the maximum number of files dictated

or indicated by similar awards in similar cases, and states as grounds "The effect upon innocent dependents" and "The officer's efficient service". The second recommendation is that "some degree of clemency" be extended and states as grounds, first, that on three occasions accused has served at the same post or station with the officer signing the recommendation without any unfavorable reports of accused's conduct or efficiency coming to the latter's attention; second, that at the conclusion of the trial the accused presented to the court some excellent testimonials of his valuable and efficient service; and third, that it is apparent that the execution of the sentence of dismissal would impose serious hardships on certain of accused's dependents. The third recommendation is that the sentence "be restricted to reduction of files and official reprimand" and states as grounds "lack of sufficient evidence" and "character and number of letters from former commanding officers". As already stated, the reviewing authority has, in effect, recommended that the sentence be commuted to reduction of five hundred files on the promotion list and in rank.

In view of the conclusion of the Board of Review that the record is legally insufficient to support the charge and specification laid under Article of War 64 and of the fact that recommendations for clemency accompany the record, consideration of the matter of an appropriate sentence is proper. It will be noted that in the opinion of the Board of Review the record of trial is legally sufficient to support only two of the specifications and one of the charges upon which the sentence is based. All of the acts of disrespect alleged were committed within the period of a very few minutes and were committed in the privacy of an officer's quarters not in the presence of military subordinates. The reviewing authority's implied recommendation for clemency would impose upon the accused an unusually severe sentence in view of the combination of circumstances diminishing culpability in the absence of proved circumstances of aggravation. While the views of the reviewing authority as to the propriety of a sentence are entitled to great weight, it must be remembered that in making his statement as to what he considered a proper sentence the reviewing authority necessarily considered the fact that the findings of guilty he approved included a finding of guilty under the 64th Article of War and that upon this finding of guilty the court was authorized to impose, and the President was authorized to confirm

and order executed, a death sentence. As the finding of guilty under Article of War 64 is not legal, the reviewing authority's indication of an appropriate sentence is not persuasive. In considering what punishment should be imposed upon the accused, the fact must be taken into consideration that the one transaction which is the basis for the two separate offenses of which the accused is technically guilty was a purely personal conversation between the accused and Major Schillerstrom, and that the disrespectful language and acts of the accused directed toward Major Schillerstrom in his presence and the disrespectful reference to the commanding officer, who was not present, were very evidently the result of a sudden gust of anger resulting from an insulting remark made to the accused. The policy of the War Department in the past has been stated by Winthrop in the following language:

> "Opinions for which, if privately indulged in, an officer or soldier would not be answerable, may constitute, if publicly declared, the offense under consideration." Winthrop, p. 566.

While the language quoted was spoken in reference to another Article of War, the principle of the Article is the same as that under consideration and the language is equally appropriate. The Manual for Courts-Martial lays down the policy in the following language:

> "* * * in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation."

The policy stated should be adhered to in determining the punishment to be awarded in this case. It is doubtful that the accused would have been brought to trial for the offenses of which he stands legally convicted had not other charges of a graver nature been preferred. Of these other charges he was acquitted or the findings of guilty thereof have been held by the Board of Review to be invalid. Careful examination of the record fails to disclose proof that the departure of Mrs. Frakes from the accused's quarters and her appearance of having suffered an injury were due to any act or omission of accused. As far as the record of trial is concerned, it is not established that Captain Frakes was responsible for his wife's departure. Under these circumstances the Board of Review is of opinion that the ends of justice according to law and the interests

of military discipline will be served by the commutation of the sentence to a reprimand.

8. The court was legally constituted. For the reasons above stated, the Board of Review is of opinion that the record of trial is legally insufficient to support the findings of guilty as to Specification 2 of Charge I, and Charge I, and as to Charge II and its Specification, but is legally sufficient to support the findings of guilty as to Charge III and its two specifications and the sentence. Dismissal is authorized for the offenses of which the accused stands legally convicted, but in view of the fact that the findings of guilty of the capital offense alleged in the Specification, Charge II, are invalid, and the accused stands convicted of offenses which, in view of the conditions under which they were committed, would not normally be made the subject of disciplinary action, the Board of Review is of opinion that the sentence should be commuted to a reprimand.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., DEC 21 1931 To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Captain Eugene N. Frakes, 3d Infantry (CM 196923), together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty as to Specification 2 of Charge I, and Charge I, and as to Charge II and its Specification, but is legally sufficient to support the findings of guilty as to Charge III and its two specifications, and that the sentence is authorized by law. This conclusion is reached as to the findings of guilty of Specification 2, Charge I, and Charge I, on the ground that it is believed Major Schillerstrom, whose order was alleged to have been disobeyed, apparently did not intend to give a military order at that time and that the accused did not understand it to be an order. At least the accused should be given the benefit of the doubt as to this. I do not concur in the recommendation of the Board of Review that the sentence be commuted to a reprimand, but recommend that the sentence be commuted to reduction of one hundred files on the promotion list and the relative rank list. The offenses of which Captain Frakes stands convicted betray a very grave lack of discipline and understanding on his part of the common and ordinary respect in which tradition and the custom of the service require a junior officer to hold those in authority over him. In my opinion his conduct merits such punishment as will be a constant reminder to him of the offenses of which, in this case, he has been convicted, and a deterrent to himself and others from future outbursts of temper and disrespect.

3. The reviewing authority in approving the sentence stated:

> "The sentence is believed to be excessive and if it lay within the authority of the reviewing officer he would commute it to a reduction on the promotion list of five hundred files and to a reduction in rank of five hundred files."

At the time of making this statement the reviewing authority had approved the findings of guilty under Charge II and its Specification. The authorized punishment upon conviction of that charge and specification includes the death penalty. With this fact in mind, the reviewing authority naturally would recommend the imposition of a severe penalty even though the sentence to dismissal were commuted. In view of the fact that the findings of guilty of Charge II and its Specification are invalid, I feel that the specific recommendation of the reviewing authority should be disregarded, although normally I would give great weight to the recommendation of the officer responsible for the discipline of the corps area.

4. There is inclosed herewith for your signature draft of a letter to the President consistent with the foregoing should the recommendation expressed herein meet with your approval. There are also inclosed for your signature draft of an alternative letter to the President consistent with the recommendation of the Board of Review in case that recommendation meets with your approval, and appropriate drafts of action by the President whichever view may be approved.

Blanton Winship,
Major General,
The Judge Advocate General.

6 Incls.
Incl.1-Record of trial.
Incl.2-Op. of Bd. of Rev.
Incl.3-Draft of letter to Pres. with recommendation of Bd.Rev.
Incl.4-Draft of letter to Pres. with recommendation of J.A.G.
Incl.5-Draft of action by Bd. of Rev.
Incl.6-Draft of action by Judge Advocate General.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

NOV 7 1931

Military Justice
C.M. No. 196960

UNITED STATES	)	FIFTH CORPS AREA
vs.	)	Trial by G. C. M., convened at Fort Thomas, Kentucky, September 22, 23, 1931. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private First Class GEORGE ANDERSON (R-6477257), Service Company, 10th Infantry.	)	

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty of Charges I, II and III, and the specifications thereunder, and the sentence.

2. The evidence pertaining to the Additional Charge and its Specification, charging larceny of Post Exchange funds, shows that the $270.00 therein referred to came lawfully into the possession of the accused in the performance of his duties as Post Exchange Steward, there was no trespass involved in the taking and the offense of larceny was therefore not proven.

3. For the reason above stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of the Additional Charge and its Specification, but legally sufficient to support the remaining findings of guilty, and the sentence.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

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

DEC 21 1931

CM 197011

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Presidio of San Francisco,
Major HARVEY C. KEARNEY	)	California, October 2, 1931.
(0-4962), U. S. Army,	)	Dismissal.
Retired.	)	

OPINION of the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, 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 on the following charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that Major Harvey C. Kearney, USA Retired, was at 1430 Larkin Street, San Francisco, California, on or about August 10, 1931, drunk and disorderly in the presence and hearing of several persons, to the disgrace of the military service.

He pleaded not guilty to the charge and all specifications and was found not guilty of Specifications 1 and 2 and guilty of Specification 3 and the Charge. Evidence of one 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. As the accused was convicted of but a single specification, namely, Specification 3, the evidence having to do with that specification alone will be herein considered. In so far as material to the issue, such evidence may be briefly summarized as follows:

During a part of the month of July, 1931, and the first ten days of the succeeding month, the accused was a guest of the Bernita Hotel, located at 1430 Larkin Street in the city of San Francisco, California, and occupied a room on the second floor of the hotel building, on the first floor of which was the room occupied by the woman manager (R. 8,17,20). Witnesses in testifying on the trial refer to this hotel as a "hotel", "family hotel", "apartment house", and "boarding house" (R. 20,22,30,32,38). On the night of August 9-10, 1931, about three o'clock, the manager of this hotel was waked by a scream, which sounded like a woman's voice coming from the third floor (R. 12,13,41). On her way upstairs to "investigate and see what the trouble was" she there encountered an unknown woman who then "was screaming and headed toward the stairs", and who appeared to be "a common woman", the kind not tolerated in that hotel, and whom she ordered out of the building and had never seen with accused and has never seen since (R. 13,14,15,43). This "strange woman", the manager testifies over insistent objection as hearsay of defense, was then and there asked by her "where she had been and what she was doing in the house at that hour in the morning" and said "she was coming from Pete Kearney's room", the witness thinks, and also that "he was trying to choke her" (R. 13,14). The manager also testifies, "I told her we had no such person in the house", and then of her own accord adds: "I beg pardon, I don't know, don't remember whether she said now who it was" (R. 13,14). Further questioned, she stated that she did not remember just what the woman said, and could not recall "whether she told me she came directly from his room or whether he did that"; affirming that at the time she was frightened and taken by surprise, and that on the witness stand her "excited and nervous" condition made it "pretty hard to remember" what occurred on the night in question (R. 15). After making this statement, this witness testified, "the woman was rather hysterical at the time, and I can't remember if she said 'a man choked me' or if 'Pete Kearney choked me' - I can't remember" (R. 17). Questioned by the court as to her professed uncertainty on this point, the witness responded: "I don't remember. That question has been asked me by twelve or fifteen different men, and I have been very ill since then, and this all happened some while ago, and I have been

going to the doctor, and I ought to be down there now - I don't remember" (R. 18,40,41,43).

The manager, after ordering this unknown woman out of the hotel, went at once to the room occupied by the accused and there found him awake and fully dressed (R. 15). She remained in his room for several minutes and talked to him, but does not recollect the conversation (R. 16). He then appeared to her not to be normal or in possession of his faculties, but although she observed him very closely she was unable to determine whether his condition was one of drunkenness or illness (R. 16). She, however, considered him to be ill, was trying to help him, and upon being asked by the hotel proprietor "to do something about it", telephoned the Presidio "and asked them if they couldn't send someone over there to take care of Major Kearney" (R. 15,16). Having been advised by the Presidio to call the Emergency Hospital, she did so, and two city policemen responded to that call (R. 15,40). Of her part in causing his removal at that time from the hotel, she says: "I was upset and nervous, and I felt the quicker he got away from there, the better it would be for me, for him, and for everybody concerned" (R. 16,41). At no time on this night did the manager see any disorderly conduct on the part of accused (R. 17). She did not see him take a drink, and saw no liquor in his possession or in his room, except some red liquid "in the usual wine jug" which she took to be wine (R. 18).

One of the two city policemen mentioned above testified on the trial. He knows accused as Pat Higgins, whom the two arrested in his room in the Bernita Hotel at about the hour of 4:30 a.m. of August 10, 1931, on request then and there made by the woman manager "to take the man out of the premises", and took to the police station "in the Ford patrol", booking him on the charge of drunkenness - "the fact that she objected to his presence there gave us authority under the ordinance". Accused "realized he was in the hands of police officers"; caused no "annoyance or disturbance" but "was orderly" in their presence; "talked rational", saying "I have done nothing out of the way" or "something to that effect"; and, says this policeman on the witness stand, "his face looked just about the same as he does now, his appearance was just about the same as it is at present". However, this witness testifies, accused was then drunk, "absolutely to my knowledge". "He staggered, and we had to assist him out of the place; his breath smelled of alcohol". (As to his ability to then walk without assistance, the manager testifies, "he walked perfectly straight". Specifically questioned, she says: "There was one

officer beside of him, but I couldn't say whether they were assisting him or not - it wasn't necessary, he could walk all right", and "I saw them taking him from the room, and I walked behind them down the hall to the stairs"; "I didn't go any further than the first floor".) The two policemen "tried to reason with the landlady that the best way was for the man to go to bed, and she said, 'no, we want him out of here'" (R. 28-30,40).

Between 3:00 and 4:30 o'clock of the morning of August 10, 1931, the accused was in the presence and hearing of at least four persons, including the two policemen who arrested him, in the Bernita Hotel, the other two being the woman manager and the proprietor thereof (R. 17,18,28,40). There is no direct evidence that accused wore the uniform of an Army officer on this particular occasion, or that he was dressed in civilian clothes. He never wore a uniform "around the hotel", but some of the hotel guests knew him to be an Army officer (R. 16). Unusual occurrences in this hotel are subjects of conversation and so become matters of common knowledge amongst the guests (R. 22).

A defense witness who had known accused since January, 1931, testified that about August 10, 1931, he seemed to be other than his usual self, and would put "his hands on the back of his head" and complain "of a depression, an injury" (R. 38). Witness was with accused in the Bernita Hotel on Sunday, August 9, 1931, from 6:00 p.m. until midnight, during which period the latter was not in the company of any other person, drank nothing of an intoxicating nature, was quite sober, and, so far as witness knows, had no intoxicating liquor in his room, where witness visited him on that night (R. 39).

Accused, apprised of his witness rights, elected to remain silent (R. 44).

4. Analysis of the accusation whereof accused was found guilty shows that it contains two very distinguishable allegations of conduct at a stated time and particular place unbecoming an officer and a gentleman, to wit, (a) drunk to the disgrace of the service, and (b) disorderly to the disgrace of the service. In the reflected light of the evidence introduced to prove each of these allegations, it is clear beyond question that the particular act of a disorderly nature attempted to be proved against the accused is so different in

character and circumstantially isolated from the mild drunkenness shown and so extremely scandalous in itself, that the case for the prosecution and the gravamen of the accusation against him under the 95th Article of War center in the averment that he was disorderly on the night in question. In fine, the primary and the crucial question presented by the record of trial is whether the evidence proper for consideration by the court suffices to prove (b) above, namely, that accused was disorderly as alleged.

As will be noted from the summary of the evidence in paragraph 3, there is no direct testimony to this effect by any eye-and-ear witness to the disorderly act which the prosecution sought to fasten upon the accused. The only testimony tending to show the same was the assertion by the hotel manager that on the night in question she had been told by the stranger whom she discovered in the hotel hall that Pete Kearney had been trying to choke her. (Here it is to be noted that the evidence as a whole, including this assertion of the hotel manager, is bare of any declaration that Harvey Kearney or Major Kearney was the assailant of this stranger or that he was known to anyone by the name of Pete Kearney.) This utterance, or something of more or less similar substance, this witness says, was in response to her question concerning the declarant's presence in the hotel at the time of the disturbance which waked the witness. The utterance of the absent declarant, vague as was its recital on the stand by this witness, was received in evidence as a testimonial assertion over objection as hearsay of the defense; and the question of law thereby raised is whether this utterance, whatever it was, was admissible in evidence as part of the res gestae. On that question of law hinges the primary and crucial question involving (b) above, now under consideration.

The particular rule of evidence here to be noticed is the common law rule on the subject of res gestae operative in the Federal courts and consequently made applicable to courts-martial by paragraphs 111 and 115 b, Manual for Courts-Martial. The latter, in pertinent part, reads as follows:

> "Circumstances, including exclamations, declarations, and statements of participants and bystanders, substantially contemporaneous with the main fact under consideration and so closely connected with the main fact as to throw light upon its character, are termed res gestae. Evidence of

anything constituting a part of the res gestae is always admissible.

* * * *

"It sometimes happens, however, that an utterance constituting a part of the res gestae was made under such circumstances of shock or surprise as to show that it was not the result of reflection or design but made spontaneously. In such a case evidence that the utterance was made may be introduced for the purpose of proving the truth of the utterance itself. This does constitute an exception to the hearsay rule. For example, an accused, A, is charged with having shot and killed B. A witness testifies that he, as well as A, B, and a fourth man, C, were present at the time of the shooting; that A and C had pistols; that he did not actually see the shot fired; that he was looking at B and not at A and C when he heard a shot, and saw B, who was looking toward A and C, fall; and that as B fell B exclaimed 'A has shot me!' The testimony as to B's exclamation is admissible as part of the res gestae; but, because of the circumstances under which the exclamation was made, the evidence may also be considered as tending to prove that it was A who shot B."

In a word, the hearsay utterance of the declarant becomes admissible as though it were original evidence when it partakes of the nature of a shadow giving outline and form to the substance of a main fact or transaction otherwise properly in evidence. The utterance cannot itself be both shadow and substance and be admissible as part of the res gestae. There must be a res otherwise testimonially shown. This is the upshot of the above quoted text of the Manual in its bearing on the case in hand and of the Federal authority binding upon the Board of Review. The obvious reason therefor is that the separately evidenced main transaction lends credit to the proffered unsworn utterance to offset the distrust with which the law looks on hearsay. That the utterance of the unknown woman, whatever it was, put in evidence by the prosecution in the case before us, if admissible at all, has its admissibility source in a main transaction which must be otherwise testimonially shown is a necessary corollary of the doctrine of U. S. v. Angell, 11 Fed. 34, 41, contained in the following excerpt from the opinion of the court:

"Declarations accompanying and explaining the res gestae may undoubtedly be proved. 1 Greenl. 119-120,

and other elementary writers; Sessions v. Little, 9 N. H. 271. But such declarations are not admissible as part of the res gestae unless they in some way elucidate or tend to characterize the act which they accompany, or may derive a degree of credit from the fact itself. Woods v. Banks, 14 N. H. 101.

"Now, for what were these declarations offered? Not to explain or elucidate the transaction between the witness and respondent, but to show that certain persons had clubbed together to employ the respondent to get them some rum, and for that purpose they were not competent. They were the declarations of the respondent himself, deriving no degree of credit from the transaction itself. Such declarations were not the best evidence the case afforded. The persons clubbing to employ Mr. Angell might themselves, for aught that appears, have been called, or one who did so club with the others.

"There is often great difficulty in determining whether the declarations offered are part of the res gestae; and, say the court, in Lund v. Inhabitants of Tyngsborough, 'it is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances, in particular cases, come within the import of the term.' 9 Cush. 42. In that case the declarations of a physician, made at the time of the examination of an injury, offered to show the nature and extent of the injury,-the examination, detached from the declarations, being unimportant and immaterial,-are inadmissible in evidence, not being a part of the res gestae, although the physician be dead at the time of the trial. Lund v. Inhabitants of Tyngsborough, 9 Cush. 36.

"The principle seems to be this, as stated by Wilde, J., in Haynes v. Butler, 24 Pick. 244: 'If the declaration has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and <u>depending entirely for its effect on the credit of the person making the declaration, it is inadmissible.</u>' 1 Stark. 47. Here the statement offered to be proved was an abstract statement, and <u>depending entirely on the credit of the persons making the statement</u>" (underscoring supplied).

The Massachusetts case cited in the penultimate paragraph of the foregoing excerpt is a leading case on the subject and contains a luminous exposition of the question here involved. The Supreme Judicial Court of that State therein declared:

> "It is a well established principle of the law, that declarations which form a part of the res gestae, and are to be considered as a part of the transaction, do not come under the head of hearsay, but are admissible as original evidence.
>
> * * * *
>
> "It is proposed, in the present case, to consider the subject somewhat more at large, and to endeavor to set forth and illustrate, with some particularity, the principles and tests by which this class of questions must be determined.
>
> "If a declaration has its force by itself, as an abstract statement, detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence. Such a declaration would be hearsay. As where the holder of a check went into a bank, and, when he came out, said he had demanded its payment; this declaration was held inadmissible to prove a demand, as being no part of the res gestae. This statement was mere narrative, wholly detached from the act of demanding payment, which was the fact to be proved. But when the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction, to explain the particular fact, distinguish this class of declarations from mere hearsay.
>
> "Such a declaration derives credit and importance, as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it.

> "The res gestae are different in different cases; and it is not, perhaps, possible to frame any definition which would embrace all the various cases, which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances, in particular cases, come within the import of the terms. In general, the res gestae mean those declarations, and those surrounding facts and circumstances, which grow out of the main transaction, and have those relations to it which have been above described.
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> * * * *
>
> "Every case has its own peculiar distinctive res gestae; and to determine, in any particular case, whether or not there is properly any main fact, and what declarations, facts, and circumstances belong to it, as forming the res gestae, is often very difficult, requiring very careful consideration and nice discrimination."

The language of the decision in that case is no less pertinent: "There was, therefore, in legal contemplation, no main act with which the declarations could be connected" (9 Cush. 36, 41-42, 44, 46).

Williams v. Great Southern Lumber Company, 277 U.S. 19, decided by the Federal Supreme Court in 1928, involved an action brought by the widow of Lem Williams to recover damages for the alleged unlawful killing of her husband. Labor troubles in the city where the company operated had occasioned public disturbances and disorders and resulted in the organization of a volunteer police which at the time of the killing of Williams constituted a posse of peace officers to assist the city authorities in maintaining law and order and in serving warrants issued for the arrest of certain persons then in Williams's office. Says the court, "There was a direct conflict in the evidence as to what occurred when the posse reached Williams's office", and "A crucial issue in the case was whether the party that killed Williams was a mob, acting in concert with the company, which had gone to his office for the purpose of killing him; or whether it was a bona fide posse of peace officers sent by the chief of police and the commissioner of public safety to aid the officer in making the arrests" - in a word, whether the killing of Williams was unlawful or necessary in the enforcement of law. On this issue plaintiff was permitted to testify, over objection of the company, "that about

ten or fifteen minutes after her husband had been killed and the last shot had been fired, she heard one Carson, a member of the volunteer police force, say that 'they had come to kill Lem Williams, and they had killed him'". Of this statement of Carson, so put in evidence, the Supreme Court held: "The statement made by him as to the purpose the party had in coming, made after the killing had taken place and when the conspiracy, if one had existed, had accomplished its purpose, was hearsay, not part of the res gestae, and not admissible against the company".

As to the admissibility of the utterance of the unknown woman in the present case, our conclusion is in essence perhaps best expressed in two decisions quoted above and reading: "There was, therefore, in legal contemplation, no main act with which the declarations could be connected", and "Here the statement offered to be proved was an abstract statement and depending entirely on the credit of the persons making the statement". The inarticulate outcry which disturbed the quiet of the hotel and waked the woman manager thereof on the night in question in no wise implicates the accused. Of itself, it is no evidence that he, or for that matter any guest in the hotel, was then disorderly. Some minutes thereafter he was found in his room, awake, fully dressed, quite orderly, but slightly intoxicated. To infer from such outcry, and the presence and appearance of accused in his room, on that occasion, that he had committed any particular disorderly act requires the exercise of the imagination rather than of ordinary reason. Therefore the case respecting (b) above, putting out of view the utterance of the unknown woman to the hotel manager, is devoid of any main transaction testified to, wherefrom that utterance can derive credit under the authorities cited above. It therefore falls under the condemnation of the hearsay rule, and as hearsay, must be excluded from the competent evidence in the case. Its exclusion leaves no substantial evidence whereon to base a finding that accused was disorderly as alleged.

Assuming for the sake of argument, without in the least conceding, that in the record of trial there is evidence of an assault upon the unknown woman - the main act or transaction - with which her extrajudicial statement to the hotel manager (whatever it was) implicating the accused can be connected, under the authorities cited, yet, in the language of the Federal Supreme Court in Railroad Co. v. O'Brien, 119 U.S. 99, applicable here, "The fact remains that the occurrence had ended when the declaration in question was made". Such

being the case, "The better rule is that when the transaction is over, no matter how short may have been the interval and the assailant is absent, declarations by the assailed, even though subsequently deceased, are not part of the res gestae" (1 Wharton's Crim. Ev. 503 n. and authorities cited). Also, in Callahan v. U.S., 240 Fed. 683, decided by the Circuit Court of Appeals, Ninth Circuit, in 1917, it appears that "the plaintiff in error and Grace Carey were the only witnesses who testified concerning what transpired between them. Their testimony was sharply contradictory, and the evidence of Laura Herrington was admitted for the purpose of corroborating the testimony of Grace Carey". The case was one of rape committed upon a girl under the age of consent, whereof accused was convicted in the Territory of Alaska, and the prosecution was required to prove only the act of sexual intercourse irrespective of the consent of the girl. She testified to such consent and the commission of such act upon her person by accused in his house, upon one of several occasions when she had gone there for that purpose; that on this particular occasion accused gave her three dollars, and that "soon after going upon the street", after being "in his house but a short time", she happened to meet her friend Laura Herrington to whom she related the occurrence. The latter, over defense objection, testified to the conversation, during which the former showed her three dollars said to have been received from accused. Moreover, the jury were instructed that if they believed beyond a reasonable doubt that Grace Carey made the statement so testified to, at her first opportunity to tell any person, and that the statement was made immediately after leaving the house of the accused, it might be considered by the jury as a circumstance tending to sustain the truth of the testimony of Grace Carey as to what had just transpired between her and him. The opinion further states, "The testimony, although it was hearsay, is claimed by the government to have been admissible as part of the res gestae". The Circuit Court of Appeals held: "In the case at bar there is entire absence of circumstances to justify the admission of testimony such as that given by Laura Herrington. The statement of which she testified was made to her, not as a complaint, not as the expression of outraged feeling, not under excitement produced by an external shock, but purely as a matter of interesting information in a casual conversation between two intimate friends".

Consequently, on the primary and crucial question whether the evidence sufficies to prove that accused was disorderly as alleged,

we unite in the opinion that there is a failure of proof of that accusatory averment.

5. This brings us to a consideration of the less important question, in the light of the evidence of record, whether the proof suffices as to (a) above, namely, that accused was, at a stated time and particular place, drunk to the disgrace of the service, in violation of the 95th Article of War. We dismiss from consideration as entirely lacking in legal merit the impossible theory that accused, by his drunkenness on the night in question, slight as it was, offended against the 95th Article of War, which denounces conduct unbecoming an officer and a gentleman. The whole course of adjudicated precedent is against it (CM 194563; 195373; 196063). It remains to consider the substantial question presented by the record of trial whether such drunkenness of accused (a retired officer) in the privacy of his hotel room at 1430 Larkin Street, San Francisco, at about three o'clock on the night of August 9-10, 1931, infringed that provision of the 96th Article of War which makes "all conduct of a nature to bring discredit upon the military service" a military offense. While drunkenness in these circumstances is not a common law offense, to be drunk at any time in any place does constitute a criminal offense under the statute law of some of the States (Commonwealth v. Conlin, 68 N.E. 207; State v. Austin, 19 Atl. 117; State v. Bromley, 25 Conn. 6). In Winthrop's Military Law (Reprint, 722 n.), the following quotation from Bishop's Criminal Law appears: "Mere private drunkenness, with no act beyond, is not indictable at the common law. * * * Still the common law has always regarded drunkenness as being in a certain sense criminal. * * * Our jurisprudence deems it <u>malum in se</u>". This authoritative writer in his exposition of drunkenness as a military offense under the General Article quotes a pronouncement of General Crook as reviewing authority in G.C.M.O. 47, Dept. of the Platte, 1876, to the effect that "Drunkenness by persons in the military service is an offence against good order and military discipline whenever and wherever it occurs" (Reprint, 722). He adds:

> "And it has been repeatedly held in the General Orders that drunkenness, not on duty, is conduct to be charged under the present Article. There can indeed rarely be an occasion when a soldier, or an officer, in camp or at a military post, may become intoxicated, and thus incapacitated for properly answering a call for duty, without rendering himself liable to be treated as an offender within the terms of Art. 62. Whether the act, when com-

mitted under other circumstances, as where the party is at a station which is not a military post, or is travelling, or is on a pass, etc., may properly be charged as a military offence, will depend upon the relation and effect, if any, which such act may have, under the circumstances, to the military service and upon military discipline" (Reprint, 723).

It should here be noted that in the Code of 1916 (39 Stat. 650-670) the General Article was enlarged in scope, in the matter of misconduct punishable by court-martial, by the addition of the clause, "all conduct of a nature to bring discredit upon the military service". We are of opinion that this clause must be given a reasonably liberal construction in keeping with its manifest purpose and verbal comprehensiveness. And because persons under the influence of liquor are oftentimes thereby rendered mentally blind to the rights of their fellows; or to be more explicit, because drunkenness involves a deprivation of normal control of the mental and physical faculties and oftentimes makes persons in that condition a source of potential trouble, mischief or harm to others; we are of opinion that all persons in that condition who are subject to the Articles of War are, in legal contemplation, punishable by court-martial therefor under the clause above quoted, if not thereby infringing some other punitive Article, whenever the drunkenness is voluntary on the part of officer or enlisted man, irrespective of the offender's active or retired status or of the time or particular place of commission of the offense.

As the evidence as a whole establishes that accused was drunk at the time and place alleged to the extent of inability to walk without staggering, and that he was seen by several persons in that condition, we conclude as to (a) above that so much of the accusatory averment that accused was drunk at the time and place alleged to the disgrace of the service, in violation of the 95th Article of War, is proved as involves drunkenness at that time and place in violation of the 96th Article of War.

As accused was erroneously convicted on incompetent and untrustworthy evidence of conduct unbecoming an officer and a gentleman in violation of the 95th Article of War, whereon a sentence of dismissal is mandatory, we are of opinion that the matter of commutation of such sentence by the President as serving the ends of justice according to law in the present case should be considered. However, in the determination of a proper punishment, his previous conviction (Ex. 1)

while on the active list, on January 9, 1931, of drunkenness in violation of the 96th Article of War as charged in four specifications, should be given consideration.

Upon careful scrutiny of the record of trial in the instant case we perceive therein no other question requiring notice here.

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

> Cadet M.A. 15 June 14 to 9 July 15; 2 lt. of Inf. 22 Mar. 17; accepted 27 Mar. 17; 1 lt. 15 May 17; capt. (temp.) 5 Aug. 17; capt. 9 Oct. 18; maj. 25 May 30. Retired June 30, 1931, as maj. under sec. 24 (b) Act of June 4, 1920 (National Defense Act).

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 3 and of the Charge as involves a finding that accused was, at the time and place alleged, drunk, in violation of the 96th Article of War, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., DEC 21 1931 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Major Harvey C. Kearney, U. S. Army, Retired, together with the foregoing opinion of the Board of Review.

2. I concur in the legal conclusions expressed by the Board of Review, and accordingly recommend that only so much of the findings of guilty of Specification 3 and of the Charge be confirmed as involves a finding that accused was, at the time and place alleged, drunk in violation of the 96th Article of War.

Whether the sentence of dismissal should be confirmed is a matter which requires serious consideration. The court, at the time it adjudged the sentence, had just convicted the accused of conduct unbecoming an officer and a gentleman in violation of the 95th Article of War, and a sentence of dismissal was mandatory. Had the court properly convicted him only of being drunk in violation of the 96th Article of War, it could still have adjudged dismissal or a lesser sentence in its discretion. The court also had properly before it for consideration a previous conviction of accused by court-martial in January, 1931, of four offenses of drunkenness in violation of the 96th Article of War. Examination of this record of trial shows that on July 25, 1930, Major Kearney went with a Captain Merrill to the home of a civilian in Caspar, Wyoming, where a social "penny ante" poker game was played. Accused was drunk and was a "decided nuisance" in the game. No liquor was served at the party (Specification 1). On August 2, 1930, he was invited to accompany two ladies by automobile to a Girl Scouts' camp about fifty miles from Caspar, Wyoming. He appeared all right when he entered the car but soon went to sleep and it was discovered that he was drunk. Not wishing to take him to the Scout camp, the ladies let him out of the car at a small town to get something to eat and picked him up on the way back. His condition then was better but he said that he had been arrested while they were gone (Specification 2). On August 10th, Major Kearney, accompanied a Mr. Walker and a lady to a cabin on Caspar Mountain occupied by Mr. Hays, an attorney, and his wife. He was drunk when he arrived there, and immediately proceeded to take liberties with the ladies and to make remarks to which they objected. On one occasion he urinated just out of sight, but within hearing, of the ladies. Finally he went to sleep and when Mr. Hays, in packing up preparatory to leaving, took a blanket covering Kearney, he noticed that his pants were unbuttoned, and his private parts exposed.

Just after leaving camp, Mr. Hays, incensed at Kearney's conduct and his repeated derogatory remarks concerning the women, stopped the car, slapped Kearney's face, and told him to get out and fight. They did engage in a fight in the course of which Kearney injured his ankle (Specification 3). The party drove on for a time and then stopped at a spring to get water. At this time accused appeared to be drunk and used profane and obscene language in the presence of Rev. E. M. Berg, his wife and another civilian (Specification 4).

I am convinced from a study of the two records of trial that the accused is an undesirable type, unfitted to be carried on the rolls of the Army. A study of his whole record discloses nothing which leads to a contrary conclusion. I believe that the court, on conviction of drunkenness in violation of the 96th Article of War in the instant case, could and should have imposed the sentence of dismissal, and I recommend that the sentence be confirmed.

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

Blanton Winship,
Major General,
The Judge Advocate General.

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

C O P Y

CONFIDENTIAL

WAR DEPARTMENT
The Adjutant General's Office
Washington

February 12, 1932.

Subject: Trial of Retired Officers by General Court-Martial.

To: The Judge Advocate General, Washington, D. C.

The following extract from a recent letter of transmittal from the Secretary of War to the President inclosing the record of trial by general court-martial in the case of an officer on the retired list is quoted for your information:

"....I....disagree entirely with the fundamental basis of this trial. To my mind, it establishes one of the most dangerous precedents that has confronted the Army in its many years of jurisprudence. It, in effect, extends the general court-martial system to retired officers to practically the same extent that it does to active officers and to the practical exclusion of the civil police powers. It has been the immutable custom of the service that officers when retired, unless some extraordinary circumstances were involved linking them to the military establishment or involving them in conduct inimical to the welfare of the nation, would be subject only to the police restrictions and jurisprudential processes as the ordinary civilian.

"In the present instance the accused, an officer on the retired list, not in uniform or in any way connected with the military establishment, was drunk in his hotel room. The woman manager of the hotel telephoned...., and then the Emergency Hospital in...., to which call two policemen responded. They suggested that Major .... be allowed to go to bed, but on the insistence of the manager of the hotel, took him to the police station and booked him as ... for drunkenness. He was not brought to trial by the civil authorities. The military authorities, however, then proceeded to apply the normal processes of the active service. This case would establish a precedent along such lines.

"I believe it to be fraught with danger in many ways, and I, therefore, recommend that the proceedings be disapproved for the reasons stated above.

By order of the Secretary of War:

(Signed) C. H. Bridges
Major General,
The Adjutant General.

CONFIDENTIAL

In the foregoing case of Major Harvey C. Kearney, U. S. Army, Retired, the entire proceedings, including the sentence, are disapproved.

The White House,

December 30, 1931.

(Signed) Herbert Hoover

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

CM 197115

JAN 14 1932

UNITED STATES v. Sergeant MARVIN H. FROELICH (6531511), Service Battery, 64th Coast Artillery (AA).	)	HAWAIIAN SEPARATE COAST ARTILLERY BRIGADE Trial by G.C.M., convened at Fort Shafter, T.H., September 11, 1931. Dishonorable discharge and confinement for two (2) years and eight (8) months. Disciplinary Barracks.

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

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

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

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

Specification: In that Sergeant Marvin H. Froelich, Service Battery, 64th Coast Artillery, did, at Fort Shafter, T.H., on or about May 3, 1931, unlawfully enter the storeroom of the Regimental Supply Office, 64th Coast Artillery, with intent to commit a criminal offense, to wit, fraudulent conversion, therein.

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

Specification: In that Sergeant Marvin H. Froelich, Service Battery, 64th Coast Artillery, did, at Fort Shafter, T.H., on or about May 3, 1931, wrongfully and fraudulently convert to his own use, lawful money of the United States, of the value of three hundred dollars ($300.00), the property of Leo C. Petchick.

He pleaded not guilty to both charges and specifications, and was found guilty of the Specification, Charge I, and said Charge, and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the sentence but remitted four months of the confinement imposed, designated the United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record for action under A.W. 50½.

3. It is noted that the rehearing record does not contain a transcript of the testimony of Staff Sergeant William C. Littlewood, Service Battery, and Corporal Thomas C. Page, Battery G, 64th Coast Artillery, witnesses for the prosecution. However, it does show that the testimony given at the original hearing by these two witnesses, who were, it seems, at distant places on the date of the rehearing, was read in toto before the court by the trial judge advocate in the presence of accused and his counsel as a part of the evidence for the prosecution on rehearing under the provisions of paragraph 117 b, M.C.M., that defense counsel expressly abstained from objection to such introduction of the same, and that proof of the original record was made by stipulation between prosecution and defense (R. 13, 18-20). Also, the records of original hearing and rehearing are bound together as required by paragraph 85 b, M.C.M. Under the circumstances shown, we regard the testimony of these two witnesses as contained in the former record as available on appellate review for purposes of proof in the case to the same extent as on the rehearing itself. There was a substantial compliance with A.W. 33 and the Manual for Courts-Martial for adjudication purposes; and, on the showing above stated, we are not concerned with the omission to make the record of testimony of these witnesses a physical part of the rehearing record. We find in that record, by reason of that omission, no legal obstacle to adjudication of the case under A.W. 50½ or invalidating insufficiency or error within the contemplation of that Article. See and compare CM 192451 (Hajek).

4. As the accused was convicted on one specification and acquitted on the other, both of which involved, as the evidence shows, the same fraudulent conversion, the record of trial may be said to present the question whether the inconsistency in these findings has the legal effect of invalidating the conviction on the Specification of Charge I and said Charge. We unite in the opinion that such is not the case. While the precise question before us would seem to be an open one in

military justice administration, in the field of Federal criminal procedure the better rule on principle and authority is that inconsistent verdicts of guilty and not guilty in the same criminal proceeding do not vitiate the former (Dealy v. U.S., 152 U.S. 542; Huffman v. U.S., 259 Fed. 335; Athanasius v. U.S., 227 U.S. 326; Roark v. U.S., 17 F. (2d), 570; Hopkins Federal Criminal Law, p. 22, and other authorities there cited). It follows, therefore, that in the instant case the findings of not guilty of Charge II and its Specification in no wise affect the findings of guilty of Charge I and its Specification.

5. With respect to the latter, the evidence of record establishes that accused received more than $300.00 belonging to one Petchick, on May 1, 1931, for safe-keeping during the latter's pleasure, the money to become the property of accused in event of Petchick's death from a certain surgical operation, and while in the possession of accused to constitute a fund wherefrom accused could borrow to any extent desired. Accused on Saturday, May 2nd, placed at least $300.00 of this money in a field safe in the storeroom of the Regimental Supply Office, 64th Coast Artillery, at Fort Shafter, T.H., to which safe he did not have access, as the only keys thereto were kept in the possession of Sergeant Littlewood, in charge of the Regimental Supply Office, who permitted the safe to be used for the purpose and who held the money in the locked safe for and as agent of accused. Sometime thereafter and not later than about midnight of Sunday, May 3rd, accused, without the knowledge or consent of anyone, broke into the room in which the safe containing the money was kept, broke the lock on the safe, and removed therefrom the aforementioned money, thereby accomplishing his intent in entering such room, and thereafter stated in substance that such entry and breaking had been effected in his absence from the building (in another room of which he had sleeping quarters) and without his knowledge, and that the money in question had disappeared.

These facts are established by the evidence of record (including the extrajudicial statement of accused (Ex. A) that, in effect, he was solely responsible for "robbing the safe in the regimental supply room" of a "sum of money amounting to $300.00" intrusted to him for safe-keeping by a civilian named Petchick), and they are sufficient for adjudication purposes to support Charge I and its Specification. They suffice in our view of the law as enunciated by the Federal Supreme Court to make a case of "fraudulent conversion" within the averment of such Specification, which is to say, of embezzlement within the contemplation of A.W. 93 (Moore v. U.S., 160 U.S. 268; Grin v. Shine, 187 U.S. 181, 195-196; CM 195772, Wipprecht). Here, the accused, as

to the money placed in his hands for safe-keeping, had nothing more nor less than possession thereof through his agent, Littlewood, notwithstanding on the one hand his right to borrow therefrom at pleasure, and on the other his placing the money in a locked safe to which only Littlewood had the keys. And clearly such right to borrow did not confer upon him the right to make a concealed and deceptive conversion thereof to his own use. The act of conversion here committed, shot through with intent to defraud, constitutes embezzlement denounced in the 93d Article of War. Therefore we conclude that the fraudulent conversion or embezzlement element of the specification under consideration (which must appear in the form of an intent, at least, to constitute the housebreaking charged) is proved in the instant case.

The facts above recited also suffice, in our opinion, to make a case of housebreaking, as charged in the Specification under consideration in violation of A.W. 93. The offense there denounced by mere denomination is that created and defined by Act of Congress of March 3, 1901, (31 Stat. 1323) in respect of the District of Columbia (District of Columbia Code, 1929, sec. 55, p. 43), which may be committed by entering any room with the requisite criminal intent and as to which "it is not essential that there be a breaking" (M.C.M., 1928, p. 169; M.C.M., 1921, pp. 420-421). It is immaterial therefore whether there was entry by breaking into the room wherein the safe was kept when accused removed therefrom the aforementioned money or whether the door lock was subsequently broken to divert suspicion from himself as the author of the criminal act charged. It is enough to support a conviction in this case that he entered aforesaid room with intent and purpose to fraudulently lay hands on the money intrusted to him then in the safe. That intent made the entry unlawful within the intendment of "housebreaking" in Article of War 93. See on the subject of unlawful entry as controlled by intent, People v. Barry, 29 Pac. 1026, and People v. Brittain, 75 Pac. 314.

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

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

Military Justice
C.M. 197230.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

DEC 19 1931

UNITED STATES v. Private CLAUDE T. RUFF (6333385), Regimental Headquarters and Band, 20th Infantry.	EIGHTH CORPS AREA Trial by G.C.M. convened at Fort Crockett, Texas, September 21, 1931. Dishonorable discharge and confinement for seven (7) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates
ORIGINAL EXAMINATION by KINMAN, Judge Advocate

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

2. The evidence introduced by the prosecution in proof of the larceny and the embezzlements charged in the specifications under Charges II and III, consisted entirely of depositions and pawnbrokers' reports, introduced without objection by the defense. None of the articles was before the court.

The substantial question of law presented by the record concerns the proof of value of the articles embezzled or stolen, as that value is made the measure of the confinement imposable by paragraph 104 c, Manual for Courts-Martial 1928 (Table of Punishments). The meager proof as to value contained in the record is stated below:

Specification 1, Charge II. Disapproved by reviewing authority.

Specification 2. This shotgun and the one referred to in Specification 3 were purchased by the company in August, 1927, at a cost of $58.45 each (Ex. C, D). A pawnbroker loaned $8.00 on it on April 27, 1931, stated that he would not have loaned any more, and that it was worth $12 or $15 (Ex. J, K).

Specification 3. Cost $58.45 in August 1927 (Ex. D). Pawned May 2, 1931, for $9.75 (Ex. L, M). No evidence as to present value, but cannot be considered of greater value than the one referred to in Specification 2, which was purchased at the same time and was said to be worth $12 or $15.

Specification 4. Violin, the property of Private Yoder. A pawnbroker loaned $5.00 on this violin on May 2, 1931, and said he would not have loaned any more (Ex. O). Private Brahen, Band, 20th Infantry, identified a violin in the possession of Lieutenant Willis, which had been recovered from a pawnshop, as the property of Private Yoder and said the violin and case were "worth about $50.00" (Ex. G).

Specification 5. Saxophone, property of Technical Sergeant E.O. Bandel. The owner testified the value was "about $100" (Ex. S). It was pawned on May 1, 1931, for $15.00. The pawnbroker said no more would have been loaned on it (Ex. Q, R).

Specification 6. A civilian suit. The court reduced the value from $20 to $10 to conform to testimony of owner (Ex. S).

Specification, Charge III. A violin, property of United States. The court reduced the value from $24 to $21.31, shown to be the government list price, on June 20, 1931, of a violin with bow and case (Ex. T). It was pawned on April 24, 1931, for $7.25, and the pawnbroker testified he would have loaned no more on it (Ex. L, N).

The statements of value contained in the depositions of Captain Stubbs and Bandleader Zepf (Ex. C and E) are not considered of probative value since it is evident they were merely stating list or claimed prices and not testifying as to present value.

3. Considering the foregoing evidence, the Board of Review is of opinion that the two shotguns (Specifications 2 and 3, Charge II), and the government violin (Specification, Charge III) are not proven to be of a value greater than $20 each, and the confinement adjudged as to each of these three specifications cannot exceed six months for each.

The testimony of Sergeant Bandel that the value of his saxophone (Specification 5, Charge II) was about $100, and of Private Brahen that Yoder's violin and case (Specification 4, Charge II) were worth about $50, must be accepted on appellate review as sufficient proof of the values stated, but in view of the nature of this evidence, and considering that but $15.00 was loaned on the saxophone and but $5.00 on the violin, and that the pawn brokers testified that they would have loaned no more, the court or the reviewing authority should have reduced the value of the saxophone to not more than $50.00 and the violin to not more than $20.00.

4. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specifications 2 and 3, Charge II, and of the Specification, Charge III, as involves findings that accused did, at the time and place alleged, feloniously embezzle the two shotguns and the government violin,

each of some value not greater than $20.00, legally sufficient to support all the other approved findings of guilty, and the sentence.

E. C. McCleary Judge Advocate,

Wm. M. Connor Judge Advocate.

R. S. Newman Judge Advocate.

Military Justice
C.M. 197230. 1st Ind.
DEC 19 1931

War Department, J.A.G.O., - To the Commanding General,
Eighth Corps Area, Fort Sam Houston, Texas.

1. I concur in the foregoing holding of the Board of Review and, for the reasons therein stated, recommend that only so much of the findings of guilty of Specifications 2 and 3, Charge II, and of the Specification, Charge III, be approved as involves findings that accused feloniously embezzled the two shotguns and the government violin, each of some value not greater than $20.00. You are advised that, thereupon, you will have authority to order the execution of the sentence.

2. Because of the meager and unsatisfactory evidence of value, I also recommend that only so much of the findings of guilty of Specifications 4 and 5, Charge II, as involves findings that accused, at the times and place alleged, feloniously embezzled one violin, property of Private Yoder, of a value not in excess of $20.00, and one saxophone, property of Sergeant Bandel, of a value not in excess of $50.00, be approved and that the sentence be reduced so as not to exceed dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for four and one-half years, the maximum confinement authorized for the offenses with the values as stated above.

3. When copies of the published order in this case are forwarded to this office together with the record of trial, which is returned herewith, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this case in this office is 197230. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place that number in brackets at the end of the published order as follows:

(J.A.G.O. No. 197230).

Rec'd A.G.8th C.A. DEC 22 1931

Blanton Winship,
Major General,
The Judge Advocate General.

Rec'd J.A.8th C.A. DEC 22 1931

1 Incl.
record of trial.

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WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington

Military Justice
CM 197243

NOV 27 1931

UNITED STATES	)	FIRST CAVALRY DIVISION
v.	)	Trial by G.C.M., convened at Fort D. A. Russell, Texas, October 27, 1931. Dishonorable discharge and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.
Private NEIL H. THOMPSON (6812548), Machine Gun Troop, 1st Cavalry.	)	

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

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

2. The larcenies of the blanket and bridle, less bits, property of the United States, and of the bits, property of First Sergeant Ferguson, were properly laid from a technical viewpoint under the 94th Article of War and the 93d Article of War, respectively. The evidence sustains the finding of guilty as to each specification and charge. However, under the rule stated in the Manual for Courts-Martial, paragraph 149 g, page 171; the larceny of the several articles described in the specifications was one transaction and constituted a single larceny although the articles were in part property of the United States, and in part property of Sergeant Ferguson. The total value of the stolen property was less than $20.00, for which larceny the maximum limit of confinement is six months, and a greater period of confinement is not authorized by allegations of separate ownership. For the wrongful disposition of government property of the value of $11.82 the maximum confinement authorized is six months. Therefore, the maximum sentence which could have been imposed upon accused for the offenses of which he was convicted was dishonorable discharge, total forfeitures and confinement for one year.

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

sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year.

E C Mickey Judge Advocate.

Jas. M. Connor, Judge Advocate.

[illegible] Judge Advocate.

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

CM 197396

UNITED STATES	)	SECOND DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sam Houston, Texas,
Private DANIEL E. CHRISTOPHER,	)	November 13, 1931. Dishonor-
Jr. (6811843), Battery B,	)	able discharge and confine-
12th Field Artillery.	)	ment for nine (9) months.
	)	Fort Sam Houston, Texas.

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

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

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

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

Specification: In that Private Daniel E. Christopher, Jr., Battery B, 12th Field Artillery, did, at Fort Sam Houston, Texas, on or about October 16, 1931, feloniously take, steal and carry away one (1) blanket, W.O.D., of the value of about $2.50, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Private Daniel E. Christopher, Jr., Battery B, 12th Field Artillery, did, at Fort Sam Houston, Texas, on or about October 16, 1931, wrongfully introduce into quarters intoxicating liquor, to wit: four (4) pints of whiskey, and twelve (12) pints of beer.

Specification 2: In that Private Daniel E. Christopher, Jr., Battery B, 12th Field Artillery, was, at Fort Sam Houston, Texas, on or about October 16, 1931, drunk in quarters, to wit: Battery B, 12th Field Artillery, Fort Sam Houston, Texas.

He pleaded not guilty to, and was found guilty of, the charges and specifications 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 nine months. The reviewing authority approved the sentence, designated Fort Sam Houston, Texas, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The principal question presented by the record of trial is whether or not the evidence sustains the finding of guilty of Charge I and its Specification. There are two essential elements in the crime of larceny; first, the taking must be actually or constructively by trespass, and second, there must be an intent permanently to deprive the owner of his property in the thing taken. The Board of Review is of opinion that the evidence in this case fails to sustain the finding that the taking of the blanket by the accused was a trespass. The material evidence bearing upon this point establishes that prior to November 9, 1929, four olive drab blankets, the property of the United States, furnished and intended for the military service thereof, were issued to the accused (R. 9,10). The evidence further discloses that prior to the middle of October, 1931, the equipment of the accused was turned in to the supply room of his organization because of the fact that he was absent from his organization, sick in hospital (R. 10,13,14), and that sometime thereafter the property of the accused so turned in was checked and it was discovered that there was only one blanket present; in other words, that there was a shortage of three blankets. In connection with this shortage the evidence introduced on behalf of the prosecution discloses that on or about September 16th, the accused took an olive drab blanket of the usual government issue type to the home of a Mrs. Myrtle Collins, 814 North New Braunfels Avenue, San Antonio, Texas, and attempted to exchange it for some beer; that Mrs. Collins declined to accept the blanket in exchange for the beer although she did give the accused a dozen bottles of that beverage; and that the accused thereupon left the blanket at Mrs. Collins' house, saying that he would return for it later (R. 22-26).

4. It is clear from the evidence that the original taking of the blankets by the accused, in other words, his custody or possession, was lawful. There is no evidence that at the time of obtaining possession of the property, many months prior to the offense charged in this case, the accused had the intent to convert it to his own use. Thus there is no such fraud in obtaining the property as to make the original taking a constructive trespass. The only theory upon which the finding of guilty of larceny in this case may be sustained is that of a constructive taking, founded on the fact that the accused received the blanket to use, care for, or employ for a specific purpose in the service of the government, the government retaining possession of the blanket and the accused having merely a naked custody thereof.

Many articles of equipment issued to a soldier are issued for such temporary use and for use so directly in the service of the government that it requires no discussion to establish, under the doctrine of the earlier cases, that the soldier has only custody of the same and that the conversion of such articles constitutes a trespass against possession and therefore larceny at the common law. In such case the control of the soldier over such articles is so slight as to amount to custody merely and not to possession. Among such articles are small arms, that is, rifles and pistols. The customs of the service and the regulations require that small arms when not in actual use be kept in authorized arms racks or chests equipped with hinges and locks for the safe-keeping of such arms. In ordinary peace-time garrison operation and training such arms are issued to a soldier for a very limited time and a very limited purpose. Thus, they may be issued for a tour of guard duty, or for instruction in their use, or for purposes of inspection. The soldiers to whom they are issued are under the constant supervision of a commissioned or noncommissioned officer. In these cases the arms are returned to the proper racks or chests as soon as the purpose of the issue has been accomplished. The soldier's control of the arms is normally so slight as to negative the idea of possession and to constitute at the most that naked form of custody which at the common law may coexist with a larcenous constructive taking by the thief. For these reasons, the conversion of small arms issued for limited times and purposes has been held to constitute larceny thereof. CM 168350 (Patterson); CM 168689 (Roovers). On the other hand, clothing and many articles of equipment, such as raincoats, toilet sets, chevrons, blankets, sheets, etc., are issued to a soldier for indefinite periods, often

for an entire enlistment, and are used primarily for the comfort and well-being of the soldier to whom issued. He exercises considerable discretion in their care and use. It would be stretching the doctrine of "naked custody" too far to hold that the soldier's control of clothing and such articles of equipment as are listed above does not constitute possession as distinguished from bare custody of the property."

For the foregoing reasons, the Board of Review holds that since no trespass against possession is shown by the evidence in the present record, the conviction of larceny cannot be sustained.

5. By the conclusion that the evidence fails to sustain the finding of guilty of larceny in this case, we are brought to a consideration of the substantial question of law presented by the evidence of record, whether the proved misappropriation of the property is an offense included in the accusatory averment of larceny in the Specification of Charge I. A careful examination of decided cases discloses that the question is still an open one in military justice administration, notwithstanding a legal sufficiency holding, without opinion, in CM 147022 (Murphy) and dictum in CM 193003 (Simpkins).

At the outset, we dismiss from consideration, as not contributory to a solution of the question before us, the course of decision in the few States having a specific statutory provision to the effect that upon an indictment charging larceny a conviction may be had for embezzlement (State v. Rosefelt (Mo.), 184 S.W. 904; State v. Thompson (Mo.), 46 S.W. 191; State v. Cornwall, 88 Mo. App. 190; State v. Baldwin (Ia.), 30 N.W. 476; Huntsman v. State, 12 Tex. App. 619). No such rule obtains either by statute or judicial decision in the field of Federal criminal law and procedure. There, the conviction for an offense included in the accusation is limited to <u>one necessarily included therein or to an attempt to commit the offense charged</u>, under R.S. 1035, as the statute has been construed by the Federal Supreme Court in Sparf v. U.S., 156 U.S. 51, 63. On the question of the averment requisites in the offense of misappropriation of property now under consideration, an instructive case is that of Evans v. U.S., 153 U.S. 584, 587, involving the sufficiency of an indictment for wilful misapplication of national bank funds, under R.S. 5209, wherein the Supreme Court said:

> "The crime must be charged with precision and certainty, and every ingredient of which it is composed

must be accurately and clearly alleged. United States v. Cook, 17 Wall. 168, 174; United States v. Cruikshank, 92 U.S. 542, 558. 'The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' United States v. Carll, 105 U.S. 611.

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

Applying the principle thus enunciated to the words, "feloniously take, steal and carry away", in the present case, we find little room for argument concerning the notion that these words carry in their content anything dissociated from a wrongful taking of the property in question. Analysis of either their technical or ordinary meaning shows that they do not. Their underlying concept is that of a taking of property from the possession of another - the distinctive feature of larceny as opposed to criminal appropriation of property placed in the hands of the offender. See R.S. 5356; Federal Penal Code, sec. 287; U.S. Code, Title 18, sec. 466; R.S. 5490; Federal Penal Code, sec. 89; U.S. Code, Title 18, sec. 175; 4 Bl. Com., 229-232. Blackstone, supra, declares common law larceny to be "the felonious taking, and carrying away, of the personal goods of another" ("cepit et asportavit in the old law-latin"), and adds: "It must be a taking. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny". This is the sum and substance of the fundamental difference between larceny and embezzlement as laid down by the Federal Supreme Court in the two modern cases of Moore v. U.S., 160 U.S. 268, 269-270, and Grin v. Shine, 187 U.S. 181, 195, 196. In the latter, the court declared:

"These cases are strictly in line with that of Moore v. United States, 160 U.S. 268, in which we held

that 'embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.'"

In the 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.

6. In the administration of criminal justice by the Federal tribunals in recent years we find the old theory of constructive taking in larceny giving way to the more workable doctrine of the modern landmark cases of Moore v. U.S. and Grin v. Shine, supra, which fix the elements of embezzlement and which, in effect, obliterate any distinction between bare custody and possession on the part of the offender as a requisite of embezzlement. Illustrative cases are Schell v. U.S., 261 Fed. 593, 595; Cooper v. U.S., 30 F. (2d), 567, 568; Weinhandler v. U.S., 20 F. (2d), 359, 361. On the authority of all these cases, and to simplify the whole process of adjudication of cases of fraudulent appropriation of property whether in the custody or the possession of the offender, it may be affirmed as a fact of law that whenever the property of another passes into the custody or the possession of him to whom it is entrusted or lawfully delivered and who fraudulently appropriates the same, not manifesting the intent to do so when the property is received by him, such fraudulent appropriation is punishable as embezzlement within the contemplation of that offense as denounced in Article of War 93. See hereon CM 148528 (Jacobs); 155621 (Drezner); 170613 (Williams); 193195 (Cavanaugh); 195772 (Wipprecht); 196960 (Anderson); and the consonant exposition of "Embezzlement" in paragraph 149 h, Manual for Courts-Martial.

7. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the approved findings of guilty of the Specification of Charge I and said Charge, legally sufficient to support the findings as to Charge II and its two

specifications and legally sufficient to support only so much of the sentence as includes confinement at hard labor for three months and fifteen days and forfeiture of pay of $14.00 per month for three months.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

DEC 24 1931

CM 197398

UNITED STATES	)	UNITED STATES MILITARY ACADEMY
	)	
v.	)	Trial by G.C.M., convened
	)	at West Point, New York,
Cadet NORMAN L. MINI,	)	November 5, 1931.
Second Class, United	)	Dismissal.
States Corps of Cadets.	)	

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

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

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

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

Specification: In that Cadet Norman L. Mini, Second Class, United States Corps of Cadets, was on or about the 24th day of October, 1931, on a public street, New Haven, Connecticut, drunk while in uniform.

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

Specification: In that Cadet Norman L. Mini, Second Class, United States Corps of Cadets, did, at New Haven, Connecticut, on or about the 24th day of October, 1931, drink intoxicating liquor in violation of paragraph 132, Regulations for the United States Military Academy.

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

3. The essential facts in this case are clearly established by uncontradicted evidence. Indeed, most of the facts are not in dispute. The witnesses for the prosecution were First Lieutenants Daniel DeBardeleben, Cavalry, William E. Crist, Infantry, Philip E. Gallagher, Infantry, and George E. Bruner, Infantry, all tactical officers at the United States Military Academy, Major Don G. Hilldrup, Medical Corps, and Private William T. Conway, Medical Department. From the testimony of these witnesses the facts appear to be substantially as hereinafter stated.

On October 24, 1931, the Corps of Cadets went from West Point, New York, to New Haven, Connecticut, to attend a football game between the teams representing, respectively, the United States Military Academy and Yale University, in the Yale Bowl (R. 6,8,12,16,22,28). The Corps dined at about noon in the Yale dining hall and immediately thereafter was formed in the street in front of the hall to march to the Bowl, a distance estimated at about a mile (R. 7,9,13,16). The accused had been granted permission to dine with friends at the Taft Hotel and consequently did not have dinner with the Corps (R. 9,10; Pros. Ex. A). He was somewhat late in returning and found the Corps already practically formed. He was running and succeeded in getting into his place in ranks with L Company just before the march started (R. 7,13,15,16). L Company was next to the last in the column (R. 8).

As he was running to join his company he passed Lieutenant DeBardeleben (R. 7), in charge of L Company, Lieutenant Crist, in charge of another company (R. 13), and Lieutenant Gallagher, whose duty it was, as adjutant, to get the entire Corps under way (R. 16). As accused passed Lieutenant DeBardeleben he came from a run into a walk and saluted, then resumed his running. Lieutenant DeBardeleben testified that accused at this time presented "a somewhat disheveled appearance", with his cap on the back of his head (R. 7), his cape not turned back, and his coat collar partly turned up, and that when he came to a walk to salute he staggered (R. 11). After he had passed Lieutenant DeBardeleben, the latter called to him but he did not stop (R. 7). As accused was "trotting" past Lieutenant Crist

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NAVY DEPARTMENT

he executed what was described as "anything but a military salute". His cap was on the back of his head; he had a "peculiar stare"; and Lieutenant Crist, thinking he was drunk, called to him twice, but he paid no attention. Lieutenant Crist did not follow him because Lieutenant DeBardeleben said that he knew him and to "let him go" (R. 13). As accused approached Lieutenant Gallagher he reduced his pace somewhat, but not to an actual walk, and he "made no effort to straighten up his head". His appearance was such that Lieutenant Gallagher suspected him of being under the influence of liquor (R. 16). After the Corps had begun to move Lieutenants Gallagher and DeBardeleben stood together at the side of the street observing the various companies (R. 7,16,17). As L Company passed, they observed accused closely because of the manner in which he had previously come to their notice. According to Lieutenant DeBardeleben, accused was staggering as he marched, though not "decidedly bumping" into the cadets on either side of him (R. 7,11). Lieutenant Gallagher testified that accused was not marching properly at attention, but was staggering, swaying from side to side, leaning forward out of his rank and not holding his head erect (R. 19). Lieutenant Crist also observed accused while marching and testified that he "bobbed up and down", but was not "side stepping" (R. 15). This witness expressed the opinion that civilians would not have noticed the condition of accused while marching because he was in the inner part of the column (R. 14). His attention was especially drawn to accused by reason of the latter being late for the formation; and thereafter he watched him closely (R. 15).

Accused's appearance and manner of marching as his company passed Lieutenants DeBardeleben and Gallagher convinced these two officers that he was under the influence of liquor. Consequently, Lieutenant DeBardeleben stepped out to the side of the squad and told him twice to "fall out". Accused not complying with the direction, Lieutenant DeBardeleben instructed the cadet marching at accused's left to take him out of ranks (R. 7,17). Lieutenant DeBardeleben then took charge of him and conducted him to the rear of the column where some tactical officers were following in a reconnaissance car, also described as a machine gun bus (R. 7,17,26). He was instructed to enter the car and did so (R. 8,17,26) without assistance but apparently with considerable difficulty (R. 13,26). He rode in the reconnaissance car to the Yale Bowl (R. 8,17) and was described as having a "silly grin" during the ride (R. 27). On arrival at the Bowl, Major Hilldrup, Medical Corps, was called and, after examination, left accused in the car outside the Bowl (R. 17,22) in charge of

Private Conway, a medical attendant, who remained with him during the first quarter of the game (R. 29). Major Hilldrup testified that accused was sitting quietly in the car but was "slouched down" in his seat. Otherwise his conduct was "as it should be" (R. 23,24). Upon examination he found accused was drunk and presented the usual symptoms, such as dilated pupils, thick speech, lack of muscular coordination, slow mental reaction and a distinct odor of alcohol on his breath (R. 23). Accused was not behaving in an unusual manner, was not loquacious, sullen or quarrelsome, did not act foolish, and no confusion of memory, loss of appreciation of time, body tremor or faulty orientation was apparent, though some impaired articulation and thickness of speech were noted (R. 24,25). Major Hilldrup expressed the opinion that accused's condition could not have been due to overexertion, such as running five or six city blocks on a warm day while wearing a uniform and heavy overcoat, even after having taken a drink of liquor. Such exertion, under the conditions described, would probably cause a man to perspire freely and to be "pretty much winded", and if the exercise followed soon after a heavy meal he might also become nauseated, but it would not cause him to stagger (R. 23).

Private Conway testified that during the time he was with accused the latter was sick, vomited two or three times, and sometimes went to sleep, that there was an odor of alcohol about him and he had been drinking, but witness could not say that he was drunk. At times when he heard cheering inside the Bowl, accused also cheered (R. 29).

One witness testified that when he saw accused on the train returning to West Point accused was asleep (R. 17). With the exception of Private Conway, all witnesses for the prosecution agreed that accused was drunk. None testified that he was disorderly and several testified that he was neither grossly drunk nor conspicuously disorderly.

The court, at the request of the prosecution, took judicial notice of paragraph 132, Regulations for the United States Military Academy (R. 30), which reads as follows:

> "132. Intoxicating liquors.- Cadets who shall drink or be found under the influence of intoxicating liquor, or bring or cause the same to be brought

within the cadet limits, or have the same in their rooms, tents, or otherwise in their possession, shall be dismissed the service or otherwise less severely punished."

4. The defense introduced in evidence (R. 48) a circular letter from the Second Corps Area Surgeon, dated April 7, 1930, which purports to enumerate many reliable symptoms of alcoholic drunkenness, the presence of a majority of which would warrant a positive diagnosis, and warns against being misled by certain symptoms regarded as unreliable.

The defense called as a witness Major John S. Wood, Field Artillery, who was in command of the Corps of Cadets at New Haven on October 24, 1931 (R. 30), and who was in the reconnaissance car when accused was brought to it and sat immediately in front of the latter during the ride to the Yale Bowl. He testified that accused made no disturbance and entered the car quietly, without any particular difficulty that he could recall (R. 31), but that he was drunk (R. 32). His conduct was not dignified; he was unsteady in his walk; and, in the car, witness detected an odor of alcohol from accused's direction (R. 31).

The other witnesses for the defense were Cadet P. T. Hanley, whose place in ranks on the occasion in question was immediately at the left of accused (R. 32), Cadet James L. Dalton, whose place was in the rank next behind accused and one file to the left (R. 36), Cadet William C. Reeves, who marched at accused's right (R. 39), Cadet H. L. Stiegler, whose place was directly behind accused (R. 40), and Cadet R. J. Meyer.

Cadet Hanley testified that when, after dinner on October 24, 1931, accused reached his company, which was standing at ease at the time (R. 36), witness was talking with another cadet and did not notice accused's appearance. He detected no odor of liquor about accused and it did not occur to him that the latter might be drunk until after the command "squads right" had been executed (R. 33). He was then led to think that accused might have been drinking because he had been late for the formation and was out of step, although a number of others were also out of step and the step was constantly changing (R. 35). Accused was breathing hard and appeared to have been running. Witness did not see him stagger (R. 34).

Witness was surprised when Lieutenant DeBardeleben directed accused to "fall out" (R. 33). After Lieutenant DeBardeleben had given the direction, he told witness to take accused out of ranks, whereupon witness stepped back, put his right arm on accused's left and stepped with him two or three paces out of ranks, after which he resumed his place (R. 33,34). Witness then had no further doubt that accused had been drinking (R. 35). He testified further that normally accused is very indifferent to military discipline and often wears his cap on the back of his head; and that he would not say that accused's actions were such as to bring discredit on the Corps or on the uniform (R. 33).

From the testimony of the other cadets who were witnesses for the defense, it appears that accused was much out of breath and appeared to be fatigued from running when he joined his company on the occasion in question (R. 37,40,41,44); that none of these witnesses detected any odor of liquor about him (R. 38,39,42,45); that he did not stagger while marching (R. 38,39,43,45); that there was nothing peculiar about his speech (R. 38,39,41,45) and they did not suspect that he had been drinking before he was taken out of ranks (R. 37,40,42,45); that a number of other cadets were late to the formation due to the fact that it was different from the year before (R. 37) and was changed at the last moment (R. 41); that accused was out of step as were a number of others due to the fact the step was constantly changing (R. 43); and that normally accused is indifferent about his military appearance, customarily wears his cap on the back or side of his head and, in general, is careless about wearing his uniform in accordance with regulations (R. 45).

Several witnesses for the defense testified that accused was not grossly drunk or conspicuously disorderly and that his conduct was not such as to bring discredit upon the Corps or the uniform (R. 33,42,45).

Accused did not testify but made an unsworn statement through his counsel to the effect that he miscalculated the time necessary to reach the place of assembly on time and, as a consequence, had to run three or four city blocks with his overcoat on; that the formation was in a different location from that of the two preceding years, which necessitated his running about to find his company; and that he was very tired when he joined and thought that this accounted for his appearance (R. 50).

5. Drunkenness is defined in paragraph 145, page 160, Manual for Courts-Martial, as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties". No extended discussion of the evidence summarized above is necessary to demonstrate that it leaves no reasonable doubt that the exercise by accused of both his mental and his physical faculties was so sensibly impaired, on the occasion in question, as to attract the attention of a number of persons. For example, several officers noticed that he staggered; he was not wearing his cap as required by regulations; he failed to salute in a proper military manner at least two of the officers whom he passed; he did not stop running when called by two different officers; he failed to hear, or, if he heard, he did not heed the twice given direction of Lieutenant DeBardeleben to leave the ranks, although the direction was heard by other cadets who were farther away than he was; he had difficulty in getting into the reconnaissance car; and he went to sleep while sitting in the car outside the Yale Bowl where a football game was in progress. Nor, in view of the odor on his breath, his vomiting, his general appearance, and the testimony of the medical officer who examined him, can there be any doubt that his condition was due, in part at least, to his admitted drinking of intoxicating liquor. It was proved and not disputed that he was in uniform and on the public streets of New Haven, Connecticut, at the time. Thus the evidence fully sustains the finding of guilty of the Specification of Charge I. The findings of guilty of Charge II and its Specification are sustained by both the evidence and the pleas of guilty.

The only serious legal question presented by this case is whether or not the conduct alleged in the Specification of Charge I, as established by the evidence, constituted a violation of the 95th Article of War as found by the court. That Article, which is applicable as well to cadets as to commissioned officers, denounces "conduct unbecoming an officer and a gentleman". The Manual for Courts-Martial (Section 151, page 186), in discussing the 95th Article of War, quotes Colonel Winthrop as follows:

> "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." (Underscoring supplied)

In Colonel Winthrop's discussion of the conduct contemplated by this Article of War, 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." (Reprint, page 711) (Underscoring supplied)

* * * *

"Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." (Reprint, page 711) (Underscoring supplied)

* * * *

"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, page 712) (Underscoring supplied)

Colonel Winthrop also quotes General McClellan in General Order 111, Army of the Potomac, 1862, as follows:

"These words, ('conduct unbecoming', etc.), imply something more than indecorum, and military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self-respect." (Reprint, page 712)

From the authorities quoted above, it appears that to constitute a violation of the 95th Article of War the conduct must be such as to show moral turpitude on the part of the officer or cadet concerned, of a nature to stamp him as morally unfit to hold a commission and one with whom his brother officers or cadets cannot associate without loss of self-respect. Acts prosecuted and punished as violations of this Article are, as a rule, of a clearly dishonorable character, such as acts of fraud or dishonesty, knowingly making a false official statement, opening and reading another's letters without authority, giving worthless checks, and the like. The Manual for Courts-Martial (par. 151), however, mentions among instances of violation of this Article "being grossly drunk and conspicuously disorderly in a public place"; and Colonel Winthrop cites "drunkenness of a gross character committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused", as an example of conduct unbecoming an officer and a gentleman (Reprint, page 717).

In this case all that is charged in the specification under the 95th Article of War is that the accused was drunk in uniform in a public street. It would seem, therefore, from the above, that to bring his alleged conduct within the Article, it would have to appear that he was grossly drunk and conspicuously disorderly or that his drunkenness was of a gross character and was in the presence of military inferiors or was characterized by some peculiarly shameful or disgraceful conduct. No witness testified to any disorderly conduct on the part of accused. Several testified that he was not disorderly and all who were asked direct questions as to whether he was conspicuously disorderly denied that he was. Also a number of witnesses testified that he was not grossly drunk and that his acts were not such as to bring discredit upon the Corps of Cadets or the uniform. The only military inferior shown to have seen him was the medical attendant detailed to take care of him in the car outside of the Yale Bowl and he refused to testify that accused was drunk. It appears from the evidence, together with accused's unsworn statement, that he was able to run several blocks in what was probably a strange city to him and to find the place of assembly and his own company notwithstanding the change in the location thereof. It also appears that he fell into his proper place in ranks and marched off with his organization. It is probable that his drunkenness was so slight that it would not have been noticed were it not for the fact that

his slight tardiness drew attention to himself. No shameful conduct was shown nor was there any evidence that he made a disgraceful exhibition of himself. In the opinion of the Board of Review the evidence fails totally to show that accused was grossly drunk or conspicuously disorderly, or that his conduct was such as to stamp him as morally unfit to be in the Army or to associate with officers or cadets. It follows that the Board of Review is of the opinion that the record fails to show that accused's conduct on the occasion in question constituted a violation of the 95th Article of War.

For a cadet to become drunk, especially at a time when he knows that he is about to march with his Corps in the presence of throngs of civilians who will be observing the Cadet Corps and forming their impressions of the Military Academy largely from the appearance and conduct of the cadets, unquestionably is a grave offense and constitutes conduct of a nature to bring discredit upon the military service and prejudicial to good order and military discipline and, consequently, a violation of the 96th Article of War, and the court should have so found.

6. The Cadet Register shows that accused was admitted to the Military Academy from California (National Guard) on July 1, 1929; that he was 22 years of age on February 7, 1931; and that his class standing for the last scholastic year was No. 140 in a class of 367.

7. The court was legally constituted. Except as hereinabove noted, the record of trial discloses no errors or irregularities injuriously affecting the substantial rights of accused. For the reasons hereinabove indicated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as finds the accused guilty of that Specification in violation of the 96th Article of War, and legally sufficient to support the findings of guilty of Charge II and its Specification, and the sentence, and warrants confirmation thereof. A sentence of dismissal is mandatory for violation of the 95th Article of War, but not for violation of the 96th Article of War. Such a sentence is authorized, however, for violation of the latter Article.

E. C. McHaney, Judge Advocate.

Wm M Connor, Judge Advocate.

Rosenman, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., DEC 24 1931 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Cadet Norman L. Mini, Second Class, United States Corps of Cadets, together with the foregoing opinion of the Board of Review.

2. I concur in the conclusions expressed by the Board of Review and accordingly recommend that only so much of the findings of guilty of Charge I and its Specification as finds the accused guilty of that specification in violation of the 96th Article of War be confirmed. The drunkenness shown in this case was not extreme, but in view of the public occasion on which it was committed, I believe that this accused has no place in the Corps of Cadets and therefore recommend that the sentence be confirmed.

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

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

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

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

Completely [illegible]
Op. #12.

JAN 8 1932

Military Justice
CM 197408

UNITED STATES	)	EIGHTH CORPS AREA
v.	)	Trial by G.C.M., convened at The Field Artillery School, Fort Sill, Oklahoma, November 19, 1931. Dishonorable discharge (suspended) and confinement for six (6) months. Fort Sill, Oklahoma.
Private First Class W. M. McCRIMON (6369444), Headquarters Battery, 1st Field Artillery.	)	

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class W. M. McCrimon, Hq. Btry., 1st F.A., did, at Fort Sill, Oklahoma, on or about October 3d, 1931, feloniously take, steal, and carry away groceries of the value of about $2.50, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six

months. The reviewing authority approved the sentence, directed its execution, but suspended the execution of the dishonorable discharge and designated Fort Sill, Oklahoma, as the place of confinement. The sentence was published in General Court-Martial Order No. 512, Headquarters Eighth Corps Area, November 30, 1931.

3. Briefly summarized, the evidence for the prosecution shows that early on the morning of October 3, 1931, certain articles of foodstuff, namely, 2 cans of tomatoes, 3 cans of corn, 1 can of peas, 2 cans of red beans, 1 box of oatmeal, 1 package of raisins, 2 boxes of cocoanut, 1 package of All-Bran, 2 pounds of butter, and 4 pounds of roast pork, were missing from the storeroom of Headquarters Battery, 1st Field Artillery, at Fort Sill, Oklahoma (R. 8,18-21). The articles were of the value of approximately $2.50 (R. 28). Accused was a member of and on duty as a cook in that organization (R. 6-7). After hearing of the shortage in the storeroom on October 3d, the battery commander, with the first sergeant and the mess sergeant of the battery, the military police officer, and a city policeman (R. 9,21,35), went, without a search warrant, to the house, 815 Avenue B, Lawton, Oklahoma, where, in the absence of the accused (R. 34), they searched and seized certain articles of foodstuff, some of which were similar in brands to the articles missing from the storeroom (R. 10,18-34,39). The battery commander testified:

> "We were looking for cans of goods of the brands that we have in our storeroom and all such brands we took." * * * "In the case of canned peas for instance, there might have been listed two cans and we found three; however, we took all that we knew to be issue brands" (R. 39).

The articles found and seized were practically all ordinary articles of brands in commercial use and obtainable in the open market in that vicinity (R. 40-42). Accused had a bunk in barracks and sometimes slept there (R. 12). He was married (R. 9), and his residence was at 815 B Avenue, Lawton, Oklahoma, according to a report made by him to the first sergeant about two weeks before the alleged larceny (R. 10).

Accused left the section on October 2d about 6:00 p.m. while it was still light, stating he was going to town (R. 44).

The defense introduced evidence tending to establish that the key to the storeroom was accessible to other men on duty in the kitchen.

4. The only competent evidence tending to connect the accused with the alleged larceny is: (a) accused was a cook in the organization from which certain articles of foodstuff were missing; and as a cook he had access, when on shift, to a key to the storeroom where the groceries and other foodstuff were kept; (b) accused left the section of his battery for town on the afternoon of the date of the alleged larceny; (c) articles of foodstuff, some of which were similar to those missing, were found in the kitchen or in an apartment of a house at the street number given by accused as his residence number.

5. There is no competent evidence in the record to show that the kitchen or apartment from which the seized articles of foodstuff were taken was a kitchen or apartment used or controlled by accused or that the accused otherwise had possession of the articles found there.

The only evidence tending to connect the accused with the possession of the property (seized in a building wherein, it seems, several persons lived) is set forth below:

Captain Gossett, commanding Headquarters Battery, 1st Field Artillery, testified:

"A. We went to a house on Avenue 'B', 815 I believe, in Lawton, and the civilian policeman inquired of the landlady if Private McCrimon lived there.
Q. Did you hear him make that inquiry?
A. No, I did not. He went in alone; the rest of us stayed in the car. Then he came back out to the car and stated the landlady said Private McCrimon lived there.
Q. Did you talk to the landlady afterwards?
A. Yes, sir.
Q. Will you state what your conversation was?
A. I am not sure that I remember exactly the conversation. She asked us why we were there and we explained that to her. She seemed surprised about him being in trouble, etc.
Q. Did you find out definitely that the accused, one of the cooks in Headquarters Battery, lived in that house?
A. Yes, she told us he did.
Q. Will you state what you did when you went into the house?
A. We went into the kitchen and made a search for supplies that had been taken from our Mess storeroom."
(R. 35,36) (Underscoring supplied)

First Sergeant Mengel of Headquarters Battery, 1st Field Artillery, testified:

"A. The Battery Commander, Mess Sergeant and myself, and we got Lieut. Holsinger and went to town and got one of the civilian law, Policeman Newman, and proceeded to that address at 815 'B'. When we got there Policeman Newman got out of the car and went in and saw the landlady and we stayed out in the car.

Q. How do you know the accused lived there?

A. The policeman made sure by inquiring from the landlady whether he lived there and I also had his address and telephone number written down.

Q. When did you get his residence and telephone number?

A. About two weeks before this trouble came up.

Q. Did you receive that officially or otherwise?

A. I received it from Private McCrimon for my own information.

Q. Did you go in the apartment?

A. I accompanied the Battery Commander and the rest of the party." (R. 9-10) (Underscoring supplied)

Neither the landlady at 815 Avenue B, Lawton, Oklahoma, nor the policeman of the searching party, testified in this case. What the landlady told the policeman when he went up alone to the house, what the policeman told the other members of the searching party she said as to accused having an apartment there and living there (R. 10,35,36), and what she told the searchers about accused's apartment (R. 34), all in the absence of the accused (R. 34), were clearly hearsay and incompetent legally to connect the accused with the kitchen or apartment from which the seized articles were taken or legally to connect the accused with the articles there seized and offered in evidence.

Accused, in his unsworn statement through counsel, stated he left his organization between 5:00 and 6:00 o'clock and then went to Lawton on the Lawton-Fort Sill bus; that he did not take away any articles from the kitchen and never has; and that the articles found had been bought from a civilian concern by his wife. This statement of accused is not evidence but may be considered (Par. 76, M.C.M., 1928).

6. The competent evidence for the prosecution, in the opinion of the Board of Review, is too slightly inculpatory in effect to approximate proof of the alleged larceny by the accused. Proof of mere

opportunity to commit a crime is not sufficient to establish guilt (CM 154726, Hall; Buntain v. State, 15 Tex. App. 490). The probative quality, value, and test of sufficiency of circumstantial evidence in criminal proceedings were succinctly set forth in Buntain v. State, supra, where, as in this case, the question on appellate review was not one of weighing conflicting evidence or passing upon the credibility of witnesses or determining whether facts relied on to prove the ultimate fact in issue were themselves proved, but merely the question of law whether certain circumstantial facts established by the evidence of record justified the conclusion of guilt as a logical inference from such circumstantial facts. On that question the court said:

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

See also the leading case of 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. The conviction of larceny in the instant case must be set aside because the inferences from the facts shown are not sufficiently conclusive to exclude all other reasonable inferences except the one of accused's guilt (People v. Razezicz, supra; CM 195705, Tyson). There is nothing in the evidence of record in the case in hand which in principle differentiates the same from the ground of decision of the Tyson case, supra, which had to do with the probative value of circumstantial evidence, and wherein the Board of Review gave thorough consideration to the doctrine of persuasiveness of such evidence as enforced in criminal tribunals, State and Federal. By that case the present case, as we view the evidence, is governed. See also CM 196619, Goyette et al., and Romano v. United States, 9 F. (2d), 522, 524.

7. In view of the foregoing, it is not necessary to pass upon the question of the legality of the search and seizure in this case.

8. The charge sheet shows that accused had no prior service, enlisted December 6, 1928, for three years, and was 22 years of age at the time of the commission of the alleged offense.

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

E. C. McPherson, Judge Advocate.

Wm. M. Connor, Judge Advocate.

R. S. Sherman, Judge Advocate.

To The Judge Advocate General.

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

DEC 14 1931

Military Justice
CM 197461

U N I T E D S T A T E S	)	UNITED STATES ARMY TROOPS IN CHINA
	)	
v.	)	Trial by G. C. M., convened at
	)	American Barracks, Tientsin, China,
Private First Class EDWARD	)	October 23 and 30, 1931. Reduction,
R. HULL (6703732), Company	)	confinement for three (3) months and
K, 15th Infantry.	)	forfeiture of $14 per month for like
	)	period. Soldier's station.

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

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

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

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

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

Specification: In that Private First Class Edward R. Hull, Company K, 15th Infantry, was, at Tientsin, China, on or about October 10, 1931, drunk and disorderly in uniform in a public place, to wit: the streets of Tientsin, China.

He pleaded not guilty to the charges and specifications, and was found not guilty of Charge I and its Specification, guilty of the Specification of Charge II, except the words "and disorderly", of the excepted words

not guilty, and guilty of Charge II. 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 three months and to forfeit $14 of his pay per month for a like period. The reviewing authority approved the sentence, directed its execution, and designated the station at which the soldier is serving as the place of confinement. The sentence was published in General Court-Martial Order No. 16, Headquarters U. S. Army Troops in China, Tientsin, China, November 9, 1931.

3. The record of trial shows that the order appointing the court (Paragraph 2, Special Orders No. 235, Headquarters U. S. Army Troops in China, Tientsin, China, October 13, 1931) did not designate a law member, and a radiogram from the Commanding Officer, U. S. Troops in China, confirms the fact that no law member for this court was detailed by the convening authority. Article of War 8 provides, among other things, that -

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

The foregoing provisions of the 8th Article of War have been repeatedly held to be mandatory (CM 192877, Butler; 159140, DuTemple; 159143, Davis; 159144, Anderson; 159147, Neenan; 159228, Willey; 163239, Cunningham; 163259, Adkins; 166057, Dunn; 187098, Henshaw; 187201, Bokoski).

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

5. For the reasons above stated, the Board of Review is of the

opinion that the record of trial is legally insufficient to support the findings and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

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

JAN 21 1932

CM 197514

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Brady, Michigan, November 7, 1931. Dishonorable discharge (suspended), and confinement for six (6) months. Fort Brady, Michigan.
Private STEVE F. HANDING (6759942), Company M, 2d Infantry.	)	

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

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

Although error was committed in the reception of evidence relating to the veracity character of the chief witness for the prosecution (R. 23-24, 51), nevertheless, in our view of the evidence as a whole, the fortifying evidence clearly proper for consideration by the court is too persuasive of guilt to reasonably admit of a conclusion that such erroneously admitted evidence injuriously affected the substantial rights of the accused and so invalidated the findings and sentence, within the contemplation of the pertinent provisions of Article of War 50½.

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

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

Feb. 17, 1932.

CM 197598

UNITED STATES v. Captain CHARLES J. SULLIVAN (O-8025), 31st Infantry.	PHILIPPINE DIVISION Trial by G. C. M., convened at Fort William McKinley, Rizal, P. I., November 6, 1931. Dismissal.

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

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

2. Accused was tried on the following charge and specifications:

CHARGE: Violation of the 69th Article of War.

Specification 1: In that Captain Charles J. Sullivan, 31st Infantry, having been duly placed in arrest at Manila, P. I., on or about September 3, 1931, did, at Manila, P. I., on or about October 4, 1931, break his said arrest before he was set at liberty by proper authority.

Specification 2: In that Captain Charles J. Sullivan, 31st Infantry, having been duly placed in arrest at Manila, P. I., on or about September 3, 1931, did, at Manila, P. I., on or about October 11, 1931, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to, and was found guilty of, the Charge and its two specifications. No evidence of previous convictions was introduced. He was sentenced "to be dismissed the service". Neither the findings nor the sentence were announced in open court. One member of the court which tried the accused recommended to the convening authority that the sentence be commuted to loss of five hundred files on the promotion list, basing his recommendation upon his belief that the evidence does not indicate flagrant violations of the 69th Article of War and, therefore, the maximum penalty should not be imposed. The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

3. The record of trial discloses that the charge and specifications upon which the accused was brought to trial were referred for trial November 5, 1931, a copy of the charge sheet served upon the counsel for the accused on the same date, and trial commenced and concluded on November 6, 1931. There is nothing affirmative in the record to indicate that the accused consented to trial within a period of five days subsequent to the service of charges upon him. However, as the accused made no objection, the trial was not in contravention to the pertinent provision of Article of War 70 that

> "In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

In this connection the review of the staff judge advocate states that the early trial was at the accused's request.

4. The evidence establishes that on September 3, 1931, the accused was placed in arrest by order of his commanding officer, Colonel L. D. Gasser, Infantry, the commanding officer of the post of Manila. Notification of the arrest was given to the accused orally by the post adjutant and also in writing (R. 6; Ex. 1). On the same date accused submitted a written request that he be permitted to go to Fort William McKinley on that afternoon and at such times thereafter as might be necessary in preparation for and during his trial on charges which theretofore had been preferred

against him for alleged offenses not connected with those involved in this case. This request was approved on the same date (R. 6; Ex. 2). On September 4th, the commanding officer of the post of Manila, acting in accordance with the authority conferred upon him by Article of War 69, extended the limits of the accused's arrest (he having theretofore been restricted to his quarters) to include the city of Manila south of Pasig River, Fort William McKinley, and the routes from Manila to Fort McKinley (R. 7; Ex. 3). Under date of September 9, 1931, the accused submitted to his post commander a request in writing as follows:

> "Request that the limits of arrest be amended to permit me to visit the law office of Gibbs and McDonough and of Mr. Ben S. Onich and Mr. McFee in the city of Manila, north of the Pasig River",

which request was duly approved the same date (R. 8; Ex. 4).

After the introduction of the evidence summarized above the prosecution and the defense stipulated

> "that the accused was at Tom's Oriental Grill, north of the Pasig river, at sometime between the hours of 12:01 am and day break on October 4, 1931 and between the same hours on October 11, 1931, and that by common knowledge, Tom's Oriental Grill is not a law office",

whereupon the prosecution rested.

5. No affirmative evidence was introduced by the prosecution to establish the lawfulness of the arrest, the prosecution apparently relying upon the presumption of regularity recognized by the Manual for Courts-Martial, namely, that "an arrest is presumed to be legal". However, the defense in the cross-examination of the only witness called on behalf of the prosecution developed the fact that at the time the accused was ordered into arrest, charges (the nature of which was not disclosed) had been preferred against the accused and forwarded by the commanding officer of the post of Manila to the officer exercising general court-martial jurisdiction (R. 9).

6. At the close of the case for the prosecution the defense made a motion under paragraph 71 d, Manual for Courts-Martial, 1928, that the accused be acquitted on both specifications and the charge. The basis of the motion was that certain approved decisions of The Judge Advocate General hold that the Article of War denouncing as an offense a breach of arrest is not violated unless the officer is in "close arrest" at the time of the breach. The decisions referred to applied to an Article of War materially different from that now in effect under which the accused was brought to trial. The Article of War referred to in the decisions provided that officers charged with crime shall be arrested and confined in their barracks, quarters, or tents. It provided a compulsory sentence of dismissal for a breach of the "confinement". The present Article of War does not require that a person put in arrest shall necessarily be restricted to his barracks, quarters, or tent. It does provide that a person placed in arrest shall be so restricted "unless such limits shall be enlarged by proper authority", and makes the sentence for violation of the Article such "as a court-martial may direct". The court properly denied the motion for an acquittal.

7. The defense introduced as witnesses the commanding officer of the post of Manila, Colonel L. D. Gasser, Infantry, who is the officer who put the accused in arrest, and the executive officer of that post, Lieutenant Colonel G. A. Lynch, Infantry, who is the accuser in this case. Their testimony established that in June, 1931, an investigation was being conducted into certain alleged irregularities in handling funds in the post of Manila, the conduct of the accused in connection therewith apparently being an issue; that subsequently and as a result of the investigation, charges were preferred against the accused and forwarded by the post commander to the Commanding General, Philippine Division, who exercised general court-martial jurisdiction over the post of Manila, the charges apparently having been forwarded sometime in August, 1931, and prior to the date of the arrest of the accused. The evidence on behalf of the defense circumstantially establishes that the accused was put in arrest because of the fact that charges had been preferred against him and forwarded by the post commander to the officer exercising general court-martial jurisdiction over the post (R. 12,13), and that the accused was put in "close arrest" on October 16, 1931, after reports had been made to the post commander that the accused had been guilty of a breach of the limits of his arrest (R. 14,15). The foregoing testimony was given by the post commander. The testimony

of the post executive was to the effect that "Major (Russell P.) Hartle of the 31st Infantry" first informed the witness that accused had been guilty of a breach of arrest and that other witnesses substantiated the report (R. 17). The witness specifically denied that "Major Scales" came to the witness and stated that the accused had been in Tom's Dixie Kitchen (R. 17). (Major Howard N. Scales, Infantry, is shown by the October Army List and Directory as being a member of the 31st Infantry and it is assumed that this is the officer to whom reference is made.) After the foregoing testimony was introduced the accused was sworn as a witness in his own behalf. He testified that the original charges referred to in the testimony of the post commander were first forwarded to the officer exercising general court-martial jurisdiction August 7, 1931, were returned to the post commander August 19, 1931, and again forwarded to the convening authority August 20, 1931, and that he was not placed in arrest until September 3, 1931. In reference to the extension of the limits of his arrest, he testified as follows:

> "My defense counsel told me to get the limits of my arrest extended to include the business district of Manila, north of the Pasig. I went to the Cuartel and told a stenographer in the Regimental Supply Office about what I wanted him to write. I think I said to him, 'Write a letter, request for amended limits of arrest and I asked him to write the letter asking that the limits be extended north of the Pasig'. I gave the reason to visit the law offices of these firms. He wrote this letter. I am not sure I read it. I signed it and I took it to the Adjutant and he took it to the Commanding Officer and came out and said that it had been approved. The next day I found the letter with the approval of the Commanding Officer on it, in my box. I simply folded it up and took it to my home. From the time this letter was approved on September 9th, I believed that I had a right to go north of the Pasig river; that, in fact, the limits of my arrest were the city of Manila and Fort McKinley and I acted according to that belief. I repeatedly went north of the Pasig river and, in fact, met a great many officers from the regiment at different times prior to October 2nd. I repeatedly met my Commanding Officer at social functions. I met him at the quarters of Major Ardrey. I talked to him and had a drink with him. Nothing was said about my being out of limits. I con-

sidered my arrest a technicality which was a necessity based upon a paragraph in the Manual for Courts-Martial.

At the time I was alleged to have made this breach of arrest I was in the midst of a trial under very serious charges and I do not believe it is reasonable to infer that I would have deliberately broken arrest in the midst of that predicament.

Q. Was or was not your purpose in requesting an extension of your limits north of the Pasig river to permit you to interview firms with whom you had done business, certain banks and individuals who were to be witnesses?

Prosecution: May it please the court, the prosecution objects to the question. The letter which asked this extension is in evidence and shows the reasons for making the request.

Defense: Withdraw the question.

Q. During the period of some weeks which elapsed with your arrest with the large limits indicated, did any of your superiors say or intimate to you officially that you were exceeding the limits of your arrest?

A. Just prior to the time of the 31st Infantry despedida the Adjutant called me and said the Commanding Officer didn't think it would be proper for me to attend the despedida in as much as it was an official function. I replied that I had no intention of attending the despedida.

Q. Was that the only intimation you received regarding your freedom of action?

A. That is the only one I can remember now. My wife and I were repeatedly invited to functions at other quarters. Nothing was said until the date of the despidida.

Q. Was anything said as to the hour you could go certain places or not?

A. No sir. There was no hour indicated in the letter I wrote.

Q. Did you at the time have specific authority to go north of the Pasig river?

A. I did. I had a letter which had been approved by the Commanding Officer, in which I asked that permission.

No further questions by the defense.

CROSS EXAMINATION
Questions by the prosecution.

Q. Do you not consider it of sufficient importance when you are under arrest to determine your exact limits?
A. In my mind the limits were clear and exact. I believed that they included the entire city of Manila after that last letter was written and approved.
Q. Did not that letter state specifically that your limits were extended north of the Pasig river for the purpose of visiting law offices and name the offices?
A. I have forgotten the exact wording of the letter.
Q. Could you not have read that letter carefully enough to determine your exact limits?
A. I could have read it easily enough.
Q. Do you ordinarily sign letters written by other people for you without first reading them?
A. I probably quite often do. I didn't mean to say a while ago, if I did, that I did not absolutely read this letter. I meant I might have not read it.
Q. Can you give any reason for not reading this letter which meant so much to you?
A. The contents of the letter were very clear in my mind and I figured that if it was approved, that it would automatically permit me to go north of the Pasig river at any time.
Q. How did you draw a conclusion that you could go anywhere north of the Pasig at any time after reading that letter?
A. The main purpose of my writing the letter was to visit law offices, but that was only a reason for writing it."

8. The bearing of the testimony introduced by the defense upon the issues in the case is apparent only if the closing argument on behalf of the accused is considered. In substance the accused argued for an acquittal on the following grounds:

a. That the arrest was not a legal arrest and there could be no breach of an illegal arrest.

b. That the approval of accused's request for an extension of limits had the effect of permitting the accused to go north of the Pasig river at any time and, substantially, to any place.

c. That the prosecution of the accused on the charges now under consideration amounted to a persecution, the originator of the charges being also the originator of other charges upon which the accused had been tried, the trial having resulted in an acquittal two days before the trial of the instant case. In this connection the counsel for the accused made the following statement:

> "Finally, in closing, I would submit that it is within the knowledge of this court that the accused has recently been tried on charges emanating from the same source as the present ones and submit that those hostile to the accused have in those charges taken twenty six shots at him and missed every one. That now they take two more shots at him. I would also like to remind the court that these two charges now being heard before you were preferred against the accused at the time he was engaged in the midst of a trial which jeopardized his liberty and his commission, and that such action was decidedly prejudicial to the accused and further indicates to a thinking man bias and a decidedly hostile animus on the part of the accuser. Otherwise, the charges which are now before this court might well have been held in abeyance pending the outcome of the trial, instead of being not exactly published, but information given out and I believe that many people were cognizant that these charges existed."

9 a. The argument that the commanding officer was without legal authority, on September 3, 1931, to place the accused in arrest because some days before he had forwarded charges against accused to the division commander recommending trial by general court-martial, thereby transferring to this higher authority his power to place officers of his command in arrest, does not, in our opinion, require discussion. It overlooks the whole principle of implied power of command residing in a post commander, both inherently and by devolution. The contention that no breach of arrest could be committed because the accused was not in "close arrest" was raised by the accused on his motion for an acquittal at the close of the prosecution's case and the question was decided against the accused. As has been stated in paragraph 6 above, this ruling of the court was correct and the point requires no further discussion.

b. In reference to accused's contention that the approval of his request for permission to visit certain law offices north of the Pasig river was tantamount to an almost unlimited extension of the limits of his arrest, the Board of Review is of opinion that this contention is devoid of merit. The prosecution conclusively proved that the accused's only request for permission to go north of the Pasig river was the letter (Ex. 4) signed by him requesting that the limits of his arrest be amended "to permit me to visit the law office of Gibbs and McDonough and of Mr. Ben S. Onich and Mr. McFee in the city of Manila, north of the Pasig river". He attempts to explain his conception of his freedom by stating that he is not sure that he read the letter when he signed it and that after receiving approval he took it for granted that the limits of his arrest were the city of Manila and Fort McKinley. The Board of Review recognizes that if the accused, as he claims, was at that time preparing for or undergoing trial on serious charges he might have been so preoccupied as to fail to note many matters which normally could not escape his attention. However, the brevity of his request for an extension of limits and the very detailed statement of the places north of the Pasig river he desired to visit, preclude any idea that the written request was in its essence the work of any clerk. The letter states facts which could only have been within his own knowledge, and he is charged with notice of the contents of that letter.

c. In reference to the claim of the accused that his prosecution was in fact a persecution, it is sufficient to state that no evidence in the record and no statement made by or on behalf of the accused charges the officer who appointed the court and referred the case for trial with being either the accuser or the prosecutor. The motives which may have actuated other persons in bringing to light the accused's breach of the limits of his arrest can have no effect upon the legality of the trial.

10. Subsequent to the date the Board of Review commenced its examination of the record in this case, a brief on behalf of the accused, signed by his defense counsel, was received from the division commander who acted on the record in this case. This brief again challenges the legality of the arrest. No discussion other than that contained in paragraphs 6 and 9 a above is deemed necessary as the contention is completely covered in those paragraphs. The brief also argues that the open manner in which accused visited on two successive Saturday nights the restaurant named in the specifications herein substantiates his claim that he thought he had a clear right

to visit the place. Had the accused shown that he visited the restaurant for a meal during hours when he was consulting with his counsel north of the Pasig river there would have been room for contending that there was no breach of arrest because the permission to go north of the Pasig river to consult with his attorneys carried with it permission to take necessary meals. But in the instant case the proof establishes that the accused was in the restaurant on two separate occasions sometime between the hours of midnight and daybreak, and no claim is made that on those evenings he had been engaged in late consultations with his legal advisers. It may be that the accused, overstrung by the nervous tension incident to the preparation and trial of serious offenses charged against him, was tempted to infringe arrest by the desire for relaxation and yielded to that temptation. But it is impossible to escape the conclusion that his acts were knowingly done, although scienter is not essential to a violation of Article of War 69. (M.C.M., p. 153).

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

> "(Federal: Pvt. U.S. Marine Corps 20 Jan. 09 to 22 Jan. 13.) - 2 lt. Inf. Sec. O.R.C. 15 Aug. 17; accepted 15 Aug. 17; active duty 15 Aug. 17; 1 lt. N.A. 31 Dec. 17; accepted 4 Feb. 18; hon. dis. 20 May 19. - 1 lt. of Inf. 1 July 20; accepted 25 Sept. 20; capt. 1 July 20."

12. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and the specifications thereunder and the sentence, and warrants confirmation thereof. We express no opinion on the matter of the appropriateness of the approved sentence, inasmuch as it involves no clearly erroneous exercise of judicial discretion on the part of either court or reviewing authority, and the matter of the minimum punishment necessary to uphold the ends of justice in this case is not before us as a subordinate reviewing agency under the second paragraph of Article of War 50½.

E. C. McCloy, Judge Advocate.

Wm. M. Connor, Judge Advocate.

[illegible], Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., FEB 17 1932 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Captain Charles J. Sullivan (0-8025), 31st Infantry (CM 197598), together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review and, for the reasons therein stated, recommend that the sentence be confirmed; but I also recommend that it be commuted to reduction of one hundred files on the promotion list and relative rank list. The accused was properly placed in arrest within certain prescribed limits, and in violation of the limits so prescribed went, on two different occasions, to a place not included within the limits of his arrest. The sentence to be dismissed is, in my opinion, unduly severe. The records of this office since January 1, 1921, show only two trials of officers in which breach of arrest in violation of the 69th Article of War was the sole offense alleged, and upon conviction sentences of reprimand and restriction to the limits of their respective stations for six months were approved by the reviewing authority. Although dismissal is a permissible sentence for violation of the 69th Article of War, this very severe penalty should be reserved for those cases wherein it is shown that accused is so insubordinate or so lacking in those qualities of discipline essential to an officer that he should no longer be retained in the service. The instant case fails to show such aggravating circumstances as indicate dismissal to be required either by justice, precedent, or the best interests of the service.

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

Blanton Winship,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Opin. of Bd. of Rev.
Incl.3-Draft of letter for signature of Sec. of War.
Incl.4-Draft of executive action.

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

DEC 31 1931

Military Justice
CM 197609

U N I T E D S T A T E S	)	UNITED STATES ARMY TROOPS IN CHINA
v.	)	Trial by G. C. M., convened at American Barracks, Tientsin, China, October 27, 1931. Dishonorable discharge (suspended) and confinement for six (6) months. Disciplinary Barracks.
Private CHARLES L. MASSACAR (6067292), Company H, 15th Infantry.	)	

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Charles L. Massacar, Company "H", 15th Infantry, did, at American Barracks, Tientsin, China, on or about October 16, 1931, feloniously take, steal and carry away one pound of butter, of the value of about $.31, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the charge and specification. Evidence of one previous conviction was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for

six months. The reviewing authority approved the sentence, directed its execution, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 17, Headquarters U. S. Army Troops in China, Tientsin, China, November 14, 1931.

3. The record of trial shows that the order appointing the court (Paragraph 2, Special Orders No. 235, Headquarters U. S. Army Troops in China, Tientsin, China, October 13, 1931) did not designate a law member, and a radiogram from the Commanding Officer, U. S. Army Troops in China, confirms the fact that no law member for this court was detailed by the convening authority. Article of War 8 provides, among other things, that -

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

The foregoing provisions of the 8th Article of War have been repeatedly held to be mandatory (CM 197461, Hull; 192877, Butler; 159140, DuTemple; 159143, Davis; 159144, Anderson; 159147, Neenan; 159228, Willey; 163239, Cunningham; 163259, Adkins; 166057, Dunn; 187098, Henshaw; 187201, Bokoski).

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

5. For the reasons above stated, the Board of Review is of the

opinion that the record of trial is legally insufficient to support the findings and sentence.

_____, Judge Advocate.

Jno. M. Connor, Judge Advocate.

Rossman, Judge Advocate.

To The Judge Advocate General.

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

DEC 31 1931

Military Justice
CM 197610

U N I T E D S T A T E S	)	UNITED STATES ARMY TROOPS IN CHINA
v.	)	Trial by G. C. M., convened at American Barracks, Tientsin, China, October 27, 1931. Dishonorable discharge (suspended) and confinement for nine (9) months. Disciplinary Barracks.
Private JOSEPH MULKERN (R-953164), Company K, 15th Infantry.	)	

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

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

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

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

Specification 1: In that Private Joseph Mulkern, Co K, 15th Infantry, was, at Tientsin, China, on or about October 11, 1931, drunk in uniform in a public place, to wit: the streets of Tientsin, China, under such circumstances as to bring discredit on the military service.

Specification 2: In that Private Joseph Mulkern, Co K, 15th Infantry, did, at American Barracks, Tientsin, China, on or about October 11, 1931, violate STO No. 615-275, Hq USATC, by being outside of the American Barracks Compound after 5.00 PM while on Non-Pass Status.

Specification 3: In that Private Joseph Mulkern, Company K, 15th Infantry, was, at American Barracks, Tientsin, China, on or about October 13, 1931, at retreat formation, drunk and disorderly to the prejudice of good order and military discipline.

CHARGE II: Violation of the 63rd Article of War.

Specification: In that Private Joseph Mulkern, Co K, 15th Infantry, did, at about 8.00 P.M., on or about October 13, 1931, behave himself with disrespect toward Madison C. Schepps, Second Lieutenant, 15th Infantry, his superior officer, by saying to him "What did you put me in here for, you miserable little punk" and "Lieutenant, if you come in here I will kick hell out of you" or words to that effect.

He pleaded not guilty to the charges and specifications, and was found guilty of all charges and specifications, except in Specification 3, Charge I, the words "and disorderly", of the excepted words, not guilty. Evidence of four 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 nine months. The reviewing authority approved the sentence, directed its execution, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 18, Headquarters U. S. Army Troops in China, Tientsin, China, November 14, 1931.

3. The record of trial shows that the order appointing the court (Paragraph 2, Special Orders No. 235, Headquarters U. S. Army Troops in China, Tientsin, China, October 13, 1931) did not designate a law member, and a radiogram from the Commanding Officer, U. S. Army Troops in China, confirms the fact that no law member for this court was detailed by the convening authority. Article of War 8 provides, among other things, that -

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

The foregoing provisions of the 8th Article of War have been repeatedly held to be mandatory (CM 197461, Hull; 192877, Butler; 159140, DuTemple; 159143, Davis; 159144, Anderson; 159147, Neenan; 159228, Willey; 163239, Cunningham; 163259, Adkins; 166057, Dunn; 187098, Henshaw; 187201, Bokoski).

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

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

_____, Judge Advocate.

Wm. M. Conner, Judge Advocate.

[illegible], Judge Advocate.

To The Judge Advocate General.

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

CM 197643

FEB 19 1932

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G.C.M., convened at Jefferson Barracks, Missouri, December 7, 1931. Dishonorable discharge and confinement for one (1) year. Jefferson Barracks, Missouri.
Private HOWARD H. SMITH (6757841), Company A, 6th Infantry.	)	

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

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

2. The accused was tried upon rehearing December 7, 1931, upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Howard H. Smith, Company A, 6th Infantry, did, at Jefferson Barracks, Missouri, on or about the 21st day of November, 1928, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Jefferson Barracks, Missouri, on or about the 4th day of August, 1931.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated Jefferson Barracks, Missouri, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The only substantial question presented by the record is whether or not the trial of the accused was barred by Article of War 39, it being evident that the rehearing was commenced more than three years after the date of the offense charged and proved.

4. The accused was first arraigned and tried September 17, 1931, upon the same Charge and Specification upon which he was arraigned and tried at the rehearing. The first trial resulted in findings of guilty of the Charge and Specification and a sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years. The reviewing authority, concurring in the opinion of the staff judge advocate that certain errors had been committed at the first trial, disapproved the sentence and ordered a rehearing. Between the date of this action of the reviewing authority and the date of the rehearing, the accused was, by competent authority, isolated in the military hospital, Jefferson Barracks, Missouri, because medical tests had indicated that he was a carrier of meningitis germs and obviously a menace to the health of persons who might come in contact with him. Upon the arraignment at the rehearing accused pleaded in bar of trial on the ground that the specification alleged the accused deserted on the 21st day of November, 1928, which date was more than three years prior to the date of arraignment on rehearing. The court overruled this plea upon the ground that the isolation of the accused in the hospital was "a manifest impediment" which prevented the bar of the statute from running. We unite in the view that no manifest impediment to the arraignment of an accused can exist during a period in which the accused is under the actual physical jurisdiction and control of the Army. The term "manifest impediment" must be construed in connection with the clause immediately preceding it in the 39th Article of War. The pertinent part of that statute provides:

> "That the period of any absence of the accused from the jurisdiction of the United States, and also 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 aforesaid periods of limitation:".

A person is "amenable" to military justice if it is possible for the military authorities to bring him before a court-martial. In the absence of this power he is not amenable to military justice.

Thus, if a person subject to military law is in lawful confinement in a state prison serving a sentence for violation of a state law, the military authorities are without power to bring him to trial; the imprisonment being a manifest impediment to trial by a military court because the United States Government cannot imperatively demand that the State surrender the prisoner for trial. Such a person during the period of his confinement is not "amenable to military justice". But a military person who is actually in the physical custody of the military authorities is certainly within the possibility of being brought before a court-martial. The fact that it may be unwise or inconvenient to arraign him before such a court does not affect the fact that he is available for such an arraignment. On this point we adopt the statement of the United States District Court for the Southern District of New York that manifest impediments

> "are such impediments only as operate to prevent the military court from exercising its jurisdiction over him; as, for instance, his being continuously a prisoner in the hands of the enemy, or of his being imprisoned under sentence of a civil court for crime, and the like. This seems to me to be the sensible and proper construction of the Article. It is the construction which has been frequently given to it by the executive department." (In re Davison, 4 Fed. Rep. 507.)

In view of the foregoing, we hold that the reason given by the court for overruling the plea was incorrect. However, if the plea was properly overruled, faulty reasoning does not make the action of the court an error injuriously affecting the substantial rights of the accused.

5. In determining whether or not the trial in this case was barred by the statute of limitations little aid can be gained from consideration of the decisions of civil courts on similar matters because of the marked difference, not only in the terms of the respective statutes of limitations, but in the procedure of military as distinguished from civil criminal tribunals. It is a principle so well established as to obviate the necessity of argument or of citation that the Articles of War, constituting as they do one complete code, must be so construed as to give all the Articles the

effect intended by Congress when it enacted them. The 39th Article of War, limiting the time in which prosecutions may be undertaken, must be construed in connection with the provisions of Article of War 50½ which, among other things, provides that in proper cases the reviewing or confirming authority may order a rehearing of a case. It is apparent that in the instant case the accused was originally arraigned and tried within the period limited by statute. If the rehearing is a part of the whole process of adjudication of the case, then it follows that the arraignment of the accused on September 17, 1931, prevents the statute from running and the sentence is le . In connection with the foregoing, it is to be noted that the rehearing was upon the identic Charge and Specification upon which the accused was arraigned on the date last stated. We think there is no escape from the conclusion, and we hold, that the rehearing provided for in Article of War 50½ is but a continuation of the original trial and an integral part of the whole process of adjudication of the case despite the fact that it is required to be had before a court the members of which were not members of the court which first heard the case, - a provision obviously for the benefit of the accused and for his benefit only. The provisions of Article of War 50½ clearly establish that the original trial, despite the disapproval of the sentence imposed therein, is for more than one purpose a living, effective part of the entire case. Thus, an acquittal on one or more charges and specifications pr ounced at the first trial is binding upon the Government, and the charges and specifications resulting in such acquittal may not be reconsidered at the rehearing. The sentence imposed at the first trial is binding upon the Government and may not be exceeded at the rehearing. The action of the reviewing authority on the first trial is not a termination of the proceedings. In the last analysis the rehearing provided by the Military Code of 1920 is analogous to the practice theretofore authorized by law and sustained by the civil courts under which practice a reviewing or confirming authority could and often did return the record of the proceedings to the court for reconsideration of its findings or sentence, or both, and even for reconsideration of an acquittal. We reaffirm the rule that, until the reviewing or confirming authority has finally acted upon a record, the trial is not complete.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and Specification and the sentence.

[illegible], Judge Advocate.

Wm. M. Connor, Judge Advocate.

[illegible], Judge Advocate.

1st Ind.

FEB 19 1932

War Department, J.A.G.O., - To the Commanding General, Sixth Corps Area, Chicago, Illinois.

1. In the case of Private Howard H. Smith (6757841), Company A, 6th Infantry (CM 197643), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence. I hereby approve the holding, at the same time withholding my concurrence in certain of the incidental conclusions of law expressed therein. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

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. The file number of the record of this case in this office is 197643. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place that number in brackets at the end of the published order, as follows:

(J.A.G.O. No. 197643)

Blanton Winship,
Major General,
The Judge Advocate General.

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

FEB 13 1932

CM 197704

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	March Field, California,
Privates ROBERT L. PURCELL	)	December 1 and 17, 1931. Dis-
(6540353) and ROBERT D.	)	honorable discharge and confine-
STRATFORD (6811225), both	)	ment for six (6) months in the
of 73d Pursuit Squadron,	)	case of each accused. March
Air Corps.	)	Field, Riverside, California.

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Robert L. Purcell, 73d Pursuit Squadron, Air Corps, and Private Robert D. Stratford, 73d Pursuit Squadron, Air Corps, acting jointly, and in pursuance of a common intent, did at March Field, California, on or about October 28, 1931, feloniously take, steal, and carry away one suit of civilian clothes, value about Forty Five dollars ($45.00), one belt waist, value about one dollar ($1.00), and two handkerchiefs, value about Twenty Five cents ($0.25), total value of about Forty-Six Dollars and twenty-five cents ($46.25), the property of Private John L. Williamson, 73d Pursuit Squadron, Air Corps.

Each stands convicted of the substance thereof; and the only substantial question presented by the record of trial is the sufficiency of the evidence to support the conviction as to the accused Stratford. This

resolves itself, on appellate review, into the question of law whether there is substantial evidence of guilt on his part, within the rule of decision on appellate review as fixed in the Hulme case (CM 192609).

3. The only fact in evidence affording a basis for conviction of accused Stratford is that he suffered the stolen property in question, shortly after its disappearance from the barracks wall locker of its owner, to remain for some hours, until found therein, in an automobile jointly owned by himself and his coaccused, after being told by the latter that he had found the property under the mattress of his barracks bed and that he intended to keep the same unless claimed by the owner. Stratford did urge his coaccused, when put on notice that the property was in the automobile, to "turn it in and notify the First Sergeant that he had found it". Failure to do more when advised of the wrongful possession of the property by his coaccused and such a semblance of possession of the stolen property by Stratford, fail to evidence any participation by him in the wrongful taking of the property by his coaccused either actual or constructive, as the case may be with respect to the latter on the evidence of record.

In Wilson v. U.S., 162 U.S. 613, 619, wherein a conviction of murder was affirmed by the Federal Supreme Court, that court declared: "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence". In Donegan v. U.S., 287 Fed. 641, 647, decided by the Circuit Court of Appeals, 2d Circuit, December 11, 1922, that court cited this case and other inferior Federal authority in support of the following rule of evidence, there laid down by it, with respect to possession of stolen property: "The possession of stolen property, standing alone, does not establish guilt, but the possession of property recently stolen raises a presumption of guilt which, in the absence of explanation, may authorize a jury to infer a criminal connection with its acquisition". So that, it is not mere possession of recently stolen goods, but the unexplained possession thereof which constitutes evidence wherefrom a larcenous taking thereof may be inferred. However, assuming that the court in the proper exercise of its judicial function could refuse to credit the testimony of Stratford as a witness in his own behalf in regard to

absence of any concert of action in the acquisition or retention of the property in question by Purcell and the secreting of the same in their automobile, nevertheless, the rule of evidence respecting proved possession of recently stolen goods, above noticed, would not be applicable, as by the fact of joint ownership of the automobile wherein the property was found, only a mere semblance of possession of such property, as respects Stratford, is shown. The prerequisite of applicability of the rule itself - proved possession of the stolen property - is wanting in the evidence. A persuasive authority on this point is CM 163072 (Boyd-Volz), wherein the Board of Review held, with the concurrence of The Judge Advocate General, as follows:

> "The evidence is legally insufficient to support the findings of guilty of accused Frank Boyd of the charge and specification thereunder. While there is evidence to show the joint ownership of the automobile, there is no evidence to show that the accused Boyd ever had possession of the articles alleged to have been stolen or that he had any knowledge of the possession of same by the accused Volz. The mere fact that the two accused were the joint owners of the automobile in which the stolen articles were found is not sufficient to establish guilt on the part of Boyd."

4. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Charge and its Specification and approved sentence as to the accused, Private Robert D. Stratford, and legally sufficient to support said findings and approved sentence as to the accused, Private Robert L. Purcell.

E. C. McCleary, Judge Advocate.

Wm. M. Conner, Judge Advocate.

[illegible], Judge Advocate.

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

CM 197795

Feb. 13, 1932.

UNITED STATES	)	PANAMA CANAL DEPARTMENT
v.	)	Trial by G.C.M., convened at Fort Davis, Canal Zone, December 22, 1931. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private CLAUDE M. HATHAWAY (6836190), Battery C, 2d Field Artillery.	)	

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

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

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

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

Specification: In that Private Claude M. Hathaway, Battery C, 2d Field Artillery, did, on or about November 14, 1931, at Cristobal, Canal Zone, feloniously take, steal and carry away one (1) four (4) cylinder Dodge sedan automobile, value of about $300.00, and one automobile tire and rim, value of about $10.00, the property of Brigadier General C. D. Roberts, U. S. Army.

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

Specification: In that Private Claude M. Hathaway, Battery C, 2d Field Artillery, did, at Cristobal, Canal Zone, on or about November 14, 1931, wrongfully take, without the consent of the owner, and convert to his own use, a Dodge four (4) cylinder sedan automobile, the property of Brigadier General C. D. Roberts, U. S. Army.

He pleaded not guilty to, and was found guilty of, the charges and specifications 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 years. The reviewing authority modified the finding as to value of the automobile described in the Specification of Charge I, fixing the same at $150.00, approved the sentence but remitted two years of the confinement imposed, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

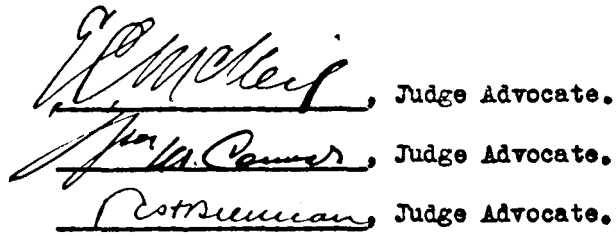
3. The single question presented by the record of trial is one respecting the sufficiency of the evidence pertaining to that part of the Specification of Charge I which charges larceny of the automobile therein described, whereof accused stands convicted. The facts in evidence not elsewhere recited which have to do with the other accusatory averment in said Specification, namely, larceny of one automobile tire and rim, are in our opinion without substantial probative value as respects the alleged larcenous taking of the automobile, as such tire and rim were disposed of in order to procure gasoline for operation of the car while in the wrongful possession of the accused.

4. Upon careful examination of the record of trial, we find that the aforementioned conviction for larceny of the automobile in question rests upon the following facts in evidence: (a) disappearance on the night of Saturday, November 14, 1931, of the car from the place where it was parked, unlocked, in front of the commissary building in Cristobal, Canal Zone; (b) finding of the car at a place in front of the salvage warehouse in Fort Davis, station of accused, on the afternoon of Monday, November 16th, the evidence not showing actual manual possession thereof by accused or anyone at the time; (c) unauthorized possession, and operation of the car by accused on three pleasure drives to places in the vicinity of Cristobal and Fort Davis, such as Colon, France Field, and Coco Solo, during the period from Saturday night, November 14, to Sunday night, November 15, 1931, attended by his pretense to companions and filling station agent of rightful possession of the car.

In our opinion these circumstantial facts do not afford a reasonable basis for an inference of intent permanently to deprive the owner of his property in the automobile in question - a necessary element of the offense of larceny. The circumstances of time, place,

and restricted area of use of the car, in our view of the evidence, conjunctively negative any such intent, and make applicable to the case the rule of decision and reasoning in two recent cases, CM 193315 (Rosborough) and CM 194359 (Sadler) - the latter arising in the Panama Canal Division - wherein the Board of Review held wrongful possession of an automobile for a short period and operation thereof in a restricted area by the accused to be sufficient to support only so much of the conviction of larceny thereof as involved a finding of guilty of wrongfully taking and carrying away the same, at the time and place alleged, without the consent of the owner, in violation of the 96th Article of War.

5. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support only so much of the modified finding of guilty upon the Specification of Charge I as involves a finding of guilty of larceny of the automobile tire and rim, as alleged, legally sufficient to support the findings upon said Charge, Charge II and its Specification, and legally sufficient to support the sentence.


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

CM 197812

JAN 27 1932

UNITED STATES	)	SEVENTH CORPS AREA
	)	
v.	)	Trial by G.C.M. convened at Fort Crook, Nebraska, January 15, 1932. Dishonorable discharge and confinement for one and one-half (1½) years. Disciplinary Barracks.
	)	
Private ELMWOOD MASTERS (R-1358656), Troop G, 15th Cavalry.	)	

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

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

2. The evidence shows that the accused absented himself without authority from his organization on March 4, 1920, and remained absent until he surrendered at Fort Omaha, Nebraska, on December 25, 1931. The Executive Order of November 29, 1927, provides that the Manual for Courts-Martial, 1921, shall govern as to the punishment to be imposed upon conviction in any case for offenses committed prior to April 1, 1928. The Executive Order of December 10, 1920, page 227 of the 1921 Manual, limits the punishment for desertion terminated by surrender after an absence of more than sixty days to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

3. For the reason stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

E. McNeil, Judge Advocate.
Jno. W. Connor, Judge Advocate.
R. Brennan, Judge Advocate.

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

CM 198108

JUN 27 1932

UNITED STATES	)	SIXTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sheridan, Illinois,
Private FRANK CASEY	)	February 15, 1932. Dishonor-
(6817265), Service Battery,	)	able discharge, suspended,
76th Field Artillery.	)	and confinement for six (6)
	)	months. Fort Sheridan.

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

1. The record of trial of the soldier named above, having been examined in the office of The Judge Advocate General and there found not legally sufficient to support the findings and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

2. This case involves trial by a court other than the one directed by the reviewing authority to try the case. Both courts were properly appointed and had the same trial judge advocate, Captain Candler A. Wilkinson, 14th Cavalry. On January 4, 1932, the Commanding General, Sixth Corps Area, after the charges had been formally investigated, referred them "for trial to Captain Wilkinson, Trial Judge Advocate, general court-martial appointed by paragraph 8, Special Orders No. 219, Headquarters Sixth Corps Area, September 12, 1931", hereafter referred to as Court A. Thereafter, the Commanding General appointed a new general court-martial pursuant to paragraph 1, Special Orders No. 20, dated January 25, 1932, hereafter referred to as Court B. On February 4, 1932, Court B convened and proceeded with the trial of accused who, after arraignment, pleaded not guilty to desertion but guilty to absence without leave for the period alleged. The court found him guilty of absence without leave for the period alleged and sentenced him to confinement at hard labor for five months and forfeiture of $14 per month for a like period.

Without taking formal action on the record of trial, it was returned to Captain Wilkinson by 1st indorsement, "Hq. Sixth Corps Area, Chicago, Illinois, February 11, 1932", signed by an Assistant Adjutant General "By command of Major General Parker". This indorsement stated:

> "2. The last mentioned court not having been authorized to try the case, its action a nullity, and there was no trial within the meaning of the 40th Article of War; and the order of reference on the charges is still in effect.
>
> "3. The charges and accompanying papers are accordingly returned herewith for appropriate action."

On February 15, 1932, Court A convened and proceeded with a second trial of accused on the same Charge and Specification, which read as follows:

> CHARGE: Violation of the 58th Article of War.
>
> Specification: In that Private Frank Casey, Service Battery, 76th Field Artillery, did, at Fort Francis E. Warren, Wyoming, on or about the 20th day of October, 1931, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Milwaukee, Wisconsin, on or about the 12th day of December, 1931.

On this occasion accused pleaded not guilty to desertion but by appropriate exceptions and substitutions guilty to absence without leave for the period alleged, and was found guilty of desertion as charged. Evidence of one previous conviction by special court-martial for absence without leave was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence but reduced the period of confinement to six months, directed its execution but suspended the dishonorable discharge, and designated Fort Sheridan, Illinois, as the place of confinement. The sentence was published in General Court-Martial Order No. 84, Headquarters Sixth Corps Area, February 25, 1932.

3. The two records of trial, with their accompanying papers, therefore present a number of questions of law, which may be summed up in the following queries:

(a) Was the first trial a nullity?
(b) If not, has it been disapproved?
(c) Is the second conviction, and the sentence based thereon, legal?

4. An extended search of the precedents in this office reveals no decision based upon the precise circumstances presented. On the jurisdictional question involved, in the first instance, the precedents of this office clearly hold that where the appointing and reviewing authority are one and the same he may elect to approve the trial and conviction of an accused even though it be shown that the original charges had been referred to a court other than the one which actually tried the case. Clearly such an action can be held good only upon the principle that the court which actually tried the case had jurisdiction in the first instance and that therefore the sentence was not illegal and void ab initio, for otherwise a subsequent ratification could not be had at law.

Before considering the precedents of this office it will be well to review the source of court-martial jurisdiction with the preliminary operative conditions prescribed by statutory law. Under the Constitution of the United States, Congress alone has the authority to confer court-martial jurisdiction, hence all powers and limitations thereon must be sought in the Articles of War, or other Federal statute. The controlling consideration in the instant case, therefore, hinges on the precise question as to whether Congress intended that in each individual case approved for trial there should be a formal reference of trial to a particular court by the appointing authority as a precedent condition to jurisdiction when it is shown that two or more courts had been appointed by him competent to try the case. There is no language in any of the Articles of War remotely warranting such a conclusion.

The indispensable conditions necessary to show court-martial jurisdiction are aptly set out in paragraph 34, Manual for Courts-Martial, 1921, page 27, as follows:

"(a) That it was convened by an officer empowered to appoint it.

"(b) That the persons who sat upon the court were legally competent to do so.

"(c) That the court thus constituted was invested by the acts of Congress with power to try the person and the offense charged.

"(d) That its sentence was in accordance with law." (Underscoring supplied.)

This language is copied almost verbatim from the decision of Judge Sanborn in Deming v. McClaughry, 113 Fed. 650.

Article of War 8 recites the authorities who may appoint courts-martial, "The President of the United States, the commanding officer of a territorial division * * *, etc." And such power is held not to be an attribute of person or rank, but solely an attribute of the commander's office, a function that cannot be delegated to another officer (par. 5 a, M.C.M., 1928).

Once a general court-martial is appointed, according to law, it

'shall have power to try any person subject to military law for any crime or offense made punishable by these articles * * *." (A.W. 12) (Underscoring supplied).

And the duly appointed trial judge advocate "shall prosecute" not in the name of the appointing authority but "in the name of the United States" (A.W. 17).

It remains to be seen what mandatory provisions of law have been enacted by Congress in the Articles of War prescribing the preliminary action contemplated on charges before trial. The only prerequisites material to the issue are set out in Article of War 70 and may be stated as follows:

(a) Charges and specifications must be signed by a person subject to military law.

(b) No charge will be referred for trial until after a thorough and impartial investigation.

(c) "Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice." (Underscoring supplied.)

It is therefore clear that Congress enjoins upon the appointing authority no necessity of a formal reference of the charges to a particular court as a precedent condition to jurisdiction. The language in the Manual for Courts-Martial, as well, negatives any such presumption where it reads as follows:

"The usual form of indorsement referring charges for trial is shown on the form (App. 3). The signed indorsement referring charges will be on the original charge sheet and may include any proper instructions." (Underscoring supplied.)

The foregoing is not a new doctrine in military justice. Reference is made to the Digest of Opinions, Winthrop, 1895, paragraph 26, page 234, where a broader and more far reaching rule is laid down, as follows:

"The mere fact, however, that a court has proceeded to the trial of charges, referred to it without due authority by a commander inferior to the one who convened the court, cannot affect the legality of the finding or sentence in the case. XXII, 502; XXVI, 167."

The rule stated above by Colonel Winthrop is based upon two opinions by Judge Advocate General Holt in 1866 and 1867. In one of them he stated:

"I have to advise you that it is quite unnecessary in order to give a court-martial jurisdiction of charges, that the same shall expressly appear to have been approved and referred for trial, by the commander who convened the court.

> The court may proceed to try upon any set of charges if only they appear authenticated by the signature of its judge advocate or by that of some responsible officer * * *. It is of course most regular and desirable, as well as courteous to the commander, that all charges should be forwarded through him for his approval; but such approval is not essential to confer jurisdiction upon the court when once legally appointed."

As a matter of law, a written reference for trial is not necessary, - such reference may be oral, in which case the record of trial and accompanying papers would be bare of any evidence to indicate whether or not the court which tried the accused was the court before which the appointing authority had instructed the trial judge advocate to bring the accused for trial. The order of reference for trial has never been considered a jurisdictional matter. This is shown by the fact that prior to 1919, the original charges with the order of reference for trial were not required to be forwarded with the record of trial to the Judge Advocate General, who, therefore, was unable to determine whether the case was tried by the particular court to which referred.//

5. The controlling precedent in this office is CM 138625, Woodward, a case involving like circumstances, and differing only in that the reviewing authority in the Woodward case approved the sentence, while in the instant case the reviewing authority took no formal action on the record. In the Woodward case, Judge Advocate General Crowder signed the following indorsement:

> "1. I have not signed the foregoing indorsement, prepared by the Board of Review of the Military Justice Division and concurred in by the Chief of that Division, because in my opinion the court that tried the case cannot be said to have been without jurisdiction so to do, for
>
> (a) The charges were duly preferred, investigated, and submitted for appropriate action to the officer exercising general court-martial

jurisdiction over the command to which Woodward belonged;

(b) That officer approved the charges for trial and ordered trial by general court-martial;

(c) Trial was had before a general court-martial duly appointed by the officer who had approved the charges for trial and had ordered their trial by general court-martial;

(d) That court was competent to try the accused for the offense with which he stood charged; and

(e) The officer who ordered the charges tried and had appointed the court before which they were tried approved the sentence, thus evidencing his approval of the trial of the charges by the particular court.

"2. With the foregoing conditions present, I find no element or condition missing that was necessary to give the court jurisdiction over the person of Woodward and the offense with which he stood charged.]

"3. The case is clearly distinguishable from the case of Williams (C.M. 122619 & C.M. 124998), for in that case (C.M. 122619) the officer exercising general court-martial jurisdiction over the command to which the accused belonged and in which he was being held at the time of trial had neither approved the charges for trial nor ordered them tried by a general court-martial.

"4. Until comparatively recently the original charges were not forwarded with the record of trial. Therefore, until recently, this office was not in a position, when examining a record of trial, to determine whether or not the case had been tried by the particular court to which it had been formally referred.

"5. For the reasons indicated I am of the opinion that the court in Woodward's case had jurisdiction of the person of the accused and of the offense in question, and that the record is legally sufficient to support the sentence."

This opinion was concurred in by Secretary of War Baker, who wrote in his own hand "I am of opinion that the court had jurisdiction and so hold", and it has been followed by this office in innumerable cases since that time.

6. The form and phraseology of the present Articles of War, which are a reenactment with amendments and modifications of the Articles of War adopted by Congress in the year 1916, confirm the view that the jurisdiction of courts-martial is not affected by errors or irregularities of procedure. Prior to 1916 the Articles of War were basically a foreign code amended from time to time by piece-meal legislation during periods of war and under the stress of war conditions. The Articles of War as a whole had apparently not been seriously considered by Congress since their restatement in the Revised Statutes of 1874. For several years prior to 1916 the matter was given careful consideration in the War Department and in the Congress, and as a result the Code of 1916 was finally adopted. That code was divided into five sections, some of which had appropriate subheads. The code was so designed as to bring together in any particular section all the provisions of the articles relating to the same subject matter. Thus in the Code of 1916 and in the Code of 1920 the Articles of War are divided into the following sections:

I. Preliminary Provisions.
II. Courts-Martial.
III. Punitive Articles.
IV. Courts of Inquiry.
V. Miscellaneous Provisions.

Section II relating to "Courts-Martial" is divided into seven subheads, of which the third is entitled "Jurisdiction". This subhead, which contains Articles of War 12 to 16, both inclusive, states in detail the jurisdiction of general courts-martial, of special courts-martial, and of summary courts-martial, and contains certain other pertinent provisions. There is nothing in the subhead entitled "Jurisdiction" nor in the Articles of War contained therein which indicates that the jurisdiction of a court-martial duly appointed is dependent upon any particular form or method of bringing before the court for trial a person subject to military law. In this

connection it is interesting to note that Section II also contains the subhead entitled "Procedure", in which the material procedural requirements in connection with the administration of military justice are prescribed. The subhead covering "Procedure" contains Article of War 37 which provides in pertinent part as follows:

> "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case * * * for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused * * *."

The scientific arrangement of the Articles of War commencing with the Code of 1916, coupled with the express Congressional declaration that errors of procedure shall not cause the invalidation of the proceedings of a court nor a disapproval of its findings or sentence except for the reasons stated, forces the conclusion that the jurisdiction of the court cannot be affected by irregularities occurring prior to trial.

7. The essential requisites of jurisdiction, based upon the foregoing authorities, are all present in this case, and, accordingly, the Board of Review is of the opinion that the first court which tried Casey had jurisdiction to try him for the offense of desertion charged against him. The trial by this court was not a nullity, but the reviewing authority had power to approve its sentence, thus giving it life, or to disapprove it.

8. The Manual for Courts-Martial, 1928, at page 77, provides pertinently as follows:

> "The reviewing authority will state at the end of the record of trial in each case his decision and orders * * * he will sign in his own hand the action taken by him on the proceedings * * *."

The Opinions of The Judge Advocate General indicate that the reviewing authority must act in person and that such power cannot be delegated (1912 Dig. Ops. JAG 554; 1919 id. 273).

The Commanding General, Sixth Corps Area, did not "sign in his own hand the action taken by him on the proceedings" of the first trial. This was irregular, but by 1st indorsement to this office, dated May 21, 1932, he has in effect stated that the action taken has his approval and was in accord with his desire although he is "unable to add from his recollection anything to the presumption arising from the recital of the indorsement in question that it was written by his command". In view of the lapse of time and his numerous intervening duties, it is not surprising that the Commanding General has at this time no personal recollection of this case, but the record shows that, on February 25, 1932, on which date he personally signed his action on the second trial, he had before him both the record of the first trial and a review by his staff judge advocate which stated: "Some delay in this case was occasioned by the fact that the case was heard on February 4, 1932, by a general court-martial to which it was not referred".

The Board of Review is of the opinion that the action taken by the Commanding General, Sixth Corps Area, by the indorsement of February 11, 1932, together with his signed action on February 25, 1932, approving the second sentence, must be considered as a disapproval of the proceedings including the sentence of the first trial, and that the second trial must therefore be considered a rehearing (15 Atty. Gen. 290; Runkle v. United States, 122 U.S. 543; United States v. Page, 137 U.S. 673; United States v. Fletcher, 148 U.S. 84).

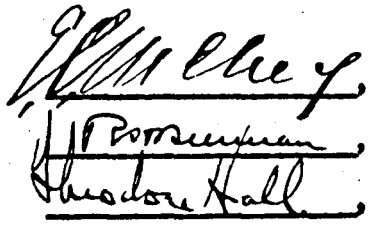
9. Article of War 50½ provides as to rehearings:

> "When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not

> guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding; * * * "

The first court found accused not guilty of desertion but guilty of the included offense of absence without leave, and sentenced him to confinement at hard labor for five months and forfeiture of fourteen dollars per month for a like period.

10. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did about October 20, 1931, absent himself without leave from Fort Francis E. Warren, Wyoming, and did remain absent without leave until he surrendered at Milwaukee, Wisconsin, on or about December 12, 1931, in violation of the 61st Article of War; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for five months and forfeiture of fourteen dollars of his pay per month for a like period.


, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

To The Judge Advocate General.

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

CM 198145

MAR 9 - 1932

U N I T E D S T A T E S	)	FIRST DIVISION
v.	)	Trial by G.C.M. convened at Fort Hamilton, New York, February 11, 1932. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private 1st Class WILLIAM L. BROWN (6774280), Company M, 26th Infantry.	)	

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

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

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

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

Specification 1: In that Private 1st Class William L. Brown, Company M, 26th Infantry, did, at Fort Hamilton, N. Y., on or about December 24, 1931, feloniously take, steal, and carry away money to value of about Twenty dollars ($20.00), the property of Private Michael Malast, 6785928, Headquarters Company, 18th Infantry.

Specification 2: In that Private 1st Class William L. Brown, Company M, 26th Infantry, did, at Fort Hamilton, N. Y., on or about December 24, 1931, feloniously take, steal, and carry away a pair of russet shoes to the value of about Ten dollars ($10.00), the property of Corporal Michael Brady, 6082104, Service Company, 26th Infantry.

MAR 25 1932

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

Specification: In that Private 1st Class William L. Brown, Company M, 26th Infantry, did, without proper leave absent himself from his station at Fort Hamilton, N. Y., from about December 24, 1931, to December 29, 1931.

He pleaded not guilty to, and was found guilty of, all charges and specifications. Evidence of one 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 Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence in support of the findings of guilty of Charge I and Specification 2 thereof and Charge II and its Specification is direct and positive, and the findings of the court thereon, in the absence of legal error, are binding on the Board of Review. No error as to such charges and specifications is found.

The evidence introduced to establish the guilt of the accused as to Specification 1 of Charge I, that is, that he stole $20, the property of Private Michael Malast, Headquarters Company, 18th Infantry, is purely circumstantial. The record, therefore, presents the question whether or not the circumstances shown are "not only * * * consistent with guilt, but inconsistent with innocence". United States v. Hart, 162 Fed. 192, 196-197; CM 195705, Tyson. This question is a question of law and imposes upon the Board of Review the duty to examine the evidence "not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict". Abrams v. United States, 250 U.S. 616, 619; CM 195705, Tyson.

The evidence bearing on the specification is that two days prior to the alleged theft, and also on the day the theft was discovered, accused was without funds (R. 10: Ex. 1); that at that time accused knew that Private Malast had money in his purse (R. 10,13,14); that Private Malast put the purse and money in his trunk locker late on the night of December 22, 1931, at a time when accused was present in the room; that at that time accused's presence in the room was normal,

his bunk being in that squadroom; that accused was awake at the time, he having returned to the squadroom with Private Malast; that at the time Private Malast placed the purse and money in the trunk locker, the squadroom was unlighted and the night was very dark, there being a heavy rain and some fog (R. 12); that prior to the events causing this trial accused had on his key ring a key which fitted the lock of Private Malast's trunk locker (R. 17); that on December 24, 1931, Private Malast discovered that a $20 bill had disappeared from his purse which was in his locker (R. 14,27); that accused absented himself without leave the same date (R. 45); and that the following day accused's key ring was found under the pillow on his bunk and one of the keys fitted and unlocked Private Malast's trunk locker (R. 32,34,36). There is no evidence that accused was seen near the trunk locker at any time before the disappearance of the money, no evidence that he had money in his possession, and no evidence that he was the only person cognizant of the fact that Malast had money in the trunk locker. The evidence establishes (R. 52,55) that several other enlisted men left the organization about December 24th. The defense requested time to examine the locker keys in possession of the men in accused's organization in order to determine whether or not any of them would open Private Malast's trunk locker, whereupon the following discussion took place:

> "The Defense Counsel: The defense wants time to get all of the keys that are in this organization and see how many other keys that have not been already identified as the particular key, that will actually open this foot locker. I want to see how many other keys can be used to open this foot locker.
>
> "The President: You have a perfect right to do that of course, but every member of the court knows that there are probably two dozen keys in the regiment that will do that. If you want to do that, the court will not object to it, but we all know that there is any number of keys that will do that.
>
> "A Member: Probably every organization has keys of that same number.
>
> "The Defense Counsel: In view of that statement, by the court, the defense will not produce those keys in order to prove that statement which could be easily done.
>
> "The President: I do not think it is necessary to delay the case for that." (R. 72.)

The foregoing is tantamount to a finding of fact that several members of the accused's organization had in their possession keys which would unlock Private Malast's trunk locker.

4. The evidence of record establishes nothing more than that accused had an opportunity to commit the crime charged against him. Proof of mere opportunity to commit a crime is not sufficient to establish guilt (CM 195705, Tyson, and cases cited). Nor does the fact that accused absented himself without leave at substantially the same time the money was stolen serve, in the absence of testimony connecting the accused with the offense, to establish his guilt for the reason stated by the Board of Review in the Tyson case, supra, "Desertion without apparent cause is of such frequent occurrence in the military service, the disappearance of a soldier who had opportunity to commit a crime would hardly justify more than a suspicion against him in respect thereof".

5. For the reasons hereinabove stated, the Board of Review holds the record of trial not legally sufficient to support the finding of guilty of Specification 1 of Charge I, but legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder and of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months and twenty-five days.

[signature], Judge Advocate.

[signature], Judge Advocate.

_____, Judge Advocate.

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

MAY 18 1932

CM 198202

UNITED STATES	)	PHILIPPINE DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Santiago, Manila, P.I.,
First Lieutenant FRANCIS B.	)	January 4 and 5, 1932.
VALENTINE (0-12129), Air	)	Dismissal.
Corps.	)	

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

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

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

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

Specification 1: In that First Lieutenant Francis B. Valentine, Air Corps, did, at San Fernando, La Union, Philippine Islands, on or about April 23, 1931, wilfully and wrongfully take a picture, by photograph, of the persons of his wife and of the wives of Captain Fred C. Nelson, Air Corps, and First Lieutenant Uzal G. Ent, Air Corps, which said women were then and there in a state of substantial nudity and in postures offensive to public morals and decency.

Specification 2: (Finding of not guilty)

Specification 3: In that First Lieutenant Francis B. Valentine, Air Corps, having wrongfully photographed his own wife and the wives of Captain Fred C. Nelson, Air Corps, and First Lieutenant Uzal G. Ent, Air Corps, in a state of substantial nudity, did, at Nichols Field, P.I., on or about June 15, 1931, knowingly prejudice and injuriously affect the good name, honor and virtue of the aforesaid wives of Captain Fred C. Nelson and First Lieutenant Uzal G. Ent, by turning over to First Lieutenant Richard W. Gibson, Air Corps, a person not authorized to receive the same, the photographic film bearing the imprint of the aforesaid photograph of said wives of Captain Fred C. Nelson, and First Lieutenant Uzal G. Ent, he, the said Lieutenant Francis B. Valentine, then well knowing that the said Lieutenant Gibson was Assistant Photographic Officer at Nichols Field, and that development of said photographic film and making of prints thereof would take place in the official photographic laboratory at Nichols Field, a place wherein numerous and divers soldiers were officially on duty and customarily present.

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

Specification 1: In that First Lieutenant Francis B. Valentine, Air Corps, did, at Nichols Field, P.I., on or about June 15, 1931, wrongfully and maliciously compromise and impeach the reputation, honor and virtue of Mrs. Fred C. Nelson, the wife of an officer of the Regular Army, by publishing a certain photographic film bearing thereon, in part, the imprint of the picture of the said Mrs. Fred C. Nelson and showing a posterior view of her naked lower limbs and buttocks. This contrary to the law of the Philippine Islands, made and provided in Act Number 277.

Specification 2: In that First Lieutenant Francis B. Valentine, Air Corps, did, at Nichols Field, P.I., on or about June 15, 1931, wrongfully and maliciously compromise and impeach the reputation, honor and virtue of Mrs. Uzal G. Ent, the wife of an officer of the Regular Army, by publishing a certain photographic film bearing thereon, in part, the imprint of the picture of said Mrs. Uzal G. Ent, and showing a posterior view of her naked lower limbs and buttocks. This contrary to law of the Philippine Islands, made and provided in Act Number 277.

He pleaded not guilty to all the charges and specifications, and was found guilty of Specification 1, Charge I, except the word "at", substituting therefor the word "near", and the word "substantial", substituting therefor the word "partial", of the excepted words, not guilty, of the substituted words, guilty; not guilty of Specification 2, Charge I; guilty of Specification 3, Charge I, except the word "substantial", substituting therefor the word "partial", and of the words "and virtue", interpolating the word "and" between the word "name" and the word "honor", and of the words "and that development of said photographic film and making of prints thereof would take place in the official laboratory at Nichols Field, a place wherein numerous and divers soldiers were officially on duty and customarily present", of the excepted words, not guilty, of the substituted and interpolated words, guilty; and guilty of Charge I; of Specification 1, Charge II, guilty, except the words "and virtue", interpolating the word "and" between the word "reputation" and the word "honor", of the excepted words, not guilty, of the interpolated word, guilty; guilty of Specification 2, Charge II, with the same modifications noted in Specification 1, Charge II; and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced "to be dismissed the service". The reviewing authority approved the sentence and forwarded the record for action under the provisions of Article of War 48.

3. The conduct of the accused denounced in the several specifications relates to his act in taking a kodak picture of his own wife and the wives of two other officers at a beach picnic, and his act some weeks later in turning the film over to a brother officer for

development by him. The serious question to be decided is whether his conduct, established by the evidence, constitutes a violation of the 95th Article of War. That Article denounces "conduct unbecoming an officer and a gentleman" and in order that the evidence may be properly considered and weighed, the following definitions of "conduct unbecoming" are given. The Manual for Courts-Martial (section 151, page 186), in discussing the 95th Article of War, quotes Colonel Winthrop as follows:

> "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." (Underscoring supplied.)

In Colonel Winthrop's discussion of the conduct contemplated by this Article of War, 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." (Reprint, page 711) (Underscoring supplied).

> "Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." (Reprint, page 711) (Underscoring supplied).

> "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 pershaps the most reliable test of his amenability to trial and punishment under this Article." (Reprint, page 712) (Underscoring supplied).

Colonel Winthrop also quotes General McClellan in 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, page 712.)

From the authorities quoted above, it appears that to constitute a violation of the 95th Article of War the conduct must be such as to show moral turpitude on the part of the officer concerned, of a nature to stamp him as morally unfit to hold a commission and one with whom his brother officers cannot associate without loss of self-respect.

Evidence for the Prosecution.

4. The evidence summarized below should be considered in the light of the definitions contained in the paragraph above. It shows that on April 23, 1931, a party of three Air Corps officers, Captain Fred C. Nelson, First Lieutenant Uzal G. Ent, and the accused, and their wives proceeded from Baguio, Philippine Islands, to the seashore, on a beach picnic and swimming party, two or three miles south of San Fernando, at a place called Long Beach, on the China Sea (R. 8, 30). They drove to the beach in two automobiles, Captain and Mrs. Nelson taking Lieutenant and Mrs. Ent in their Ford sedan, while accused and his wife drove in their own Ford coupe (R. 8). They arrived at the beach at about 10:30 a.m. (R. 34), and there being no bathhouse, the two parked cars were used as a screen to afford privacy while the ladies and officers were disrobing or dressing on opposite sides (R. 8,30,42,44). No other persons were present and therefore they had "absolute privacy on the beach" (R. 20,27). Three or four

hours were spent swimming and lying on the sand. In the meantime a lunch was served, when a number of pictures were taken (R. 21,23, 34). After lunch, a short period was again devoted to swimming and thereafter preparations were made to return to Baguio. Captain Nelson testified that while the ladies were dressing on their side of the car, accused, to tease them, made an "ostentatious" pretense of going around the car with a camera to take a picture. At that time Captain Nelson was dressing a torn finger, and when accused pretended to go around the car the ladies, who could see him coming, would "shrill and scream and take cover". Since there was no note of alarm in their cries, he did not think the occasion required action on his part (R. 9). At the time of trial Lieutenant Ent was unable to recall any of the foregoing circumstances. He did not hear any "undue shrilling or laughter" on the side of the car where the ladies were dressing, did not see accused take any picture, and heard no objections made to any picture being taken (R. 31,35). Mrs. Ent testified that accused made several attempts to, and on one occasion apparently did, snap a picture of the ladies while they were dressing (R. 42). Mrs. Nelson testified that while they were on one side of the car, drying themselves, accused "attempted to take our picture, first just to frighten us. We took shelter. I dropped in the sand at one time and another time he came around the car we would snatch our towels around us and on this time * * * he ran around and snapped the picture" (R. 45).

Just before leaving the beach, or while en route to Baguio, Captain Nelson had a conversation with accused and, "in the presence of Lieutenant Ent and possibly the women", advised him that if he had any pictures of the women "he must exercise every precaution that they did not come into the hands of anyone who was not a subject of the picture". Accused agreed to take every precaution to safeguard the pictures (R. 10, 109). Lieutenant Ent testified that he recalled no such conversation (R. 31, 39). On the way home Mrs. Nelson mentioned the fact that accused might have taken a picture that "would not be quite right" (R. 47), and subsequently she asked him on two or three occasions about the films (R. 45). On one particular occasion she saw him at a moving picture show where she asked him if he had the roll of film, and at that time accused "just shook his head and said, 'Haven't done anything with them', or words to that effect" (R. 46).

Captain Nelson did not recall any subsequent conversation with accused about the pictures, and gave the beach party no further thought

until November 6 or 7, 1931. At that time, while on duty at Headquarters Nichols Field, he was detailed to make an investigation of a report that the Photo Finishing Shop, a Post Exchange concession, and also the Photo Laboratory, 6th Photo Section, were concerned in the taking and circulation of obscene pictures. He thereupon searched the barracks of the 6th Photo Section with the assistance of Captain Reed, commander of the detachment, and Lieutenant Stowell, the officer of the day. While searching the barracks Captain Reed discovered what appeared to be an enlargement of a picture of three women taken on a beach and clothed in bath towels only (R. 11-12). It was found in the wall locker of Private Constantine, an enlisted man of the Photo Section (R. 15). Captain Nelson was present at the time, witnessed the discovery and identified the subjects of the picture (R. 12). Knowing that accused had given the film to Lieutenant Gibson (R. 15), he proceeded to obtain possession of it from Gibson who had it in his house, and then proceeded to investigate how a print came into the hands of an enlisted man. On the same day he took the negative to accused, who explained that it had been turned over to Gibson with instructions that it be developed in secrecy (R. 15-16).

On the following day, accused, at the suggestion of Captain Nelson, destroyed the negative in the presence of Captain Nelson and Lieutenant Ent (R. 17).

On cross-examination, Captain Nelson, with the permission of the court, recited to some extent the various steps of his investigation. After being detailed to make it, rumors for the first time came to his attention that a picture of officers' wives, partly dressed, was going around in the hands of enlisted men. Before the print was found, he learned from Lieutenant Ent that accused had turned the film over to Gibson. Lieutenant Gibson in turn assured Captain Nelson that he had developed the film in person; that no prints had been made, and that the film had been in his personal possession ever since (R. 24-25). Lieutenant Ent testified that Lieutenant Gibson told him on the golf course that he had some films to develop for Lieutenant Valentine, but he could not say when this conversation took place (R. 39).

The print which had been discovered in the wall locker of Private Constantine was thereupon identified as an enlarged reproduction of the negative that had been destroyed (R. 17), and was received in evidence as Government Exhibit No. 1 (R. 28). The persons portrayed were identified as Mrs. Ent, on the left, Mrs. Nelson, in the center, and Mrs. Valentine, the wife of accused, on the right (R. 17,18,35). Both Mrs. Ent and Mrs. Nelson identified the picture as one that accused must have taken at the beach, and both testified that they gave accused no authority to take it, and no authority to turn the negative over to Lieutenant Gibson for development (R. 42-43; 45-48). Mrs. Ent could not remember seeing the ladies in such a position on the beach (R. 43), but Mrs. Nelson did, and said, "I knew what I was doing" (R. 48).

The evidence relating to the publication of the film (Specification 3, Charge I, and Specifications 1 and 2, Charge II) may be summarized as follows:

In the early part of June, 1931, accused turned over the roll of films containing the original negative to First Lieutenant Richard W. Gibson, Air Corps, who was Assistant Photographic Officer, Nichols Field, Rizal, P.I. (R. 75). In substance Lieutenant Gibson testified that accused turned it over with a request that he personally develop the film. Accused stated to the witness that he did not want the roll taken to the Photo Shop, and referred to it, possibly, as "bare-ass", though witness had no independent recollection of the exact words used (R. 65,69). The court found accused not guilty of using those words (Specification 2, Charge I). Gibson gathered from the conversation that the films were of an intimate nature and should not be published. For that reason he developed the film himself (R. 69,70), and tested it, but made no prints because the negatives were poor and very thin (R. 72). On close inspection he was able to recognize only Mrs. Ent and Mrs. Valentine on the original negative (R. 72), which was about two and one-half by three and one-half inches in size (R. 67).

The record is silent as to where the roll of film was actually developed, but it appears that it was placed in a photo section room to dry (R. 71). While there a number of enlisted men on duty with the Photo Section observed the roll of negatives on the drying rack (R. 52).

Private John R. Hubbard took the roll, containing several blanks and several indistinguishable exposures, into the enlarging room. The negative was very dim and only the "outlines of what would naturally appear to be women partially unclothed" could be seen (R. 130,131). He placed the negative in the enlarging machine and by using "the most contrasty paper we had" and by adding bromide to the developer, he and Private Constantine succeeded in making the enlarged print identified as Government Exhibit No. 1 (R. 128). Two of the enlarged prints were made, one for Hubbard, and the other for Constantine (R. 50-51). After the enlargements were completed, Hubbard concealed the negative under some boxes of paper in the enlarging room, and a short time thereafter it was turned over to Sergeant Hienye who in turn gave it to Lieutenant Gibson (R. 132-133). Constantine saw two or three other small contact prints of the original negative in the Photo Section, but does not know what became of them (R. 57). He identified Exhibit 1 as the enlarged print discovered in his foot or wall locker where he had placed it in June, and where it remained "forgotten", except for one occasion when he permitted Private Feign to make a copy of it (R. 56). It does not appear that any of the enlisted men identified the subjects of the picture (R. 58-59).

On or about November 13, 1931, accused was called before Major Herman E. Erlenkotter, Field Artillery, Inspector General's Department, and, after being advised as to his constitutional rights, made a statement, the gist of which may be summarized as follows (R. 78,79,84; Ex. 2):

Accused remembered turning a roll of films over to Lieutenant Gibson about June 1, 1931, with instructions that the film contained exposures made on a beach party, and he did not want anyone else to see them until he, accused, had first an opportunity to see what the negatives showed. Of the exposures on the original film, his wife took most of them, landscape scenes around Baguio, but as to one exposure he was not certain, but thought very likely that he took it himself at the beach near San Fernando (Ex. 2, pp. 1-2). From April 23d to June 1st he made no attempt to have the films developed because he wanted them developed "by somebody I thought would guard their confidential character" (Ex. 2, p. 3). He had no knowledge that any prints of the negative had been made until Captain Nelson advised him that one had been discovered in the investigation of the Photo Shop. Shortly after-

ward he got the film from Lieutenant Gibson, and on November 8th it was destroyed in the presence of Captain Nelson and Lieutenant Ent (Ex. 2, p. 4). At the time the pictures were taken, "I didn't know, nor do I believe that anyone else on the beach party knew exactly what the pictures contained". He felt certain that the film contained nothing of an obscene or degenerate nature, but did feel that the film might contain pictures which should not be generally circulated and therefore he took the precaution to have Lieutenant Gibson develop it privately (Ex. 2, p. 5). He was of the opinion that all three officers made a number of playful threats to take pictures and all were in the immediate vicinity (Ex. 2, p. 3). "The picture was taken in the midst of considerable action. Under the circumstances it may have shown nothing improper as well as what was shown. The bodies of the ladies were covered by towels, except as the snatching of the towels of one another may have exposed them" (Ex. 2, p. 5). In spite of the appearance of the picture he did not think it was posed. The ladies made general objections to the introduction of cameras at the time but no one was angry. "During the kidding I don't think any of the ladies knew at what point of the kidding the picture was taken" (Ex. 2, p. 7).

Evidence for the Defense.

Three officers appeared as character witnesses for the defense.

Major Henry W. Harms, Air Corps, testified that he had known accused practically two years. While he was in command of Nichols Field accused was stationed with him from June, 1930, to May, 1931. Since that time accused "has been my assistant Air Officer and I was also associated with him as Division Air Officer". He rated accused above average professionally and referred to his standing as an officer and gentleman as being very good (R. 88-89).

Captain Edward C. Black, Air Corps, testified in substance that he had known accused intimately during the past three years and ever since 1922, having been associated with him at other posts. His standing as an officer and a gentleman has been very good (R. 88).

Captain Edgar P. Sorenson, Air Corps, had known accused well since 1929, and rather closely during the past ten months. He con-

sidered his standing as an officer and a gentleman in the command as being very good (R. 87-88).

Mrs. Geneva C. Valentine, wife of accused, appeared as a witness for the defense, and identified a camera (Defense Ex. 1) as belonging to her husband and herself. She testified that it was then in the same condition as of April, 1931 (R. 89-90).

First Lieutenant Ployer T. Hill, Air Corps, a graduate of the Air Corps Technical School, Department of Photography, 1923, identified Defense Exhibit 1 as an Eastman Camera, taking pictures on a roll of film the individual exposures thereof measuring approximately two and one-fourth by three and one-fourth inches (R. 90-91). He described the view finder as approximately three-eighths by five-eighths of an inch in size, and of a poor type. The view finder of the camera in question was in extremely bad condition due to a defect in the lens or deterioration of the mirror. An operator attempting to take a picture of three or more people would not be able to "see their expressions or what they were doing" in the view finder. He would have to be content with seeing that the objects are in the picture, and, to take a picture of three adult persons standing in front of the camera it would be necessary to focus the instrument at a minimum of twenty feet from the subject of the picture (R. 91-92). It was demonstrated before the court that at twenty feet three adult persons could barely be brought within the limits of the camera (R. 97-98).

Accused chose to be sworn as a witness in his own behalf. In substance he testified that he was commissioned as an officer in the Army November 1, 1918, and that his record so far "has been absolutely clean"; that he never received an efficiency report for remark, and that his social conduct has never been questioned. After reciting his various assignments to stations, including a four year detail in the Department of Modern Languages at the Military Academy, he stated he sailed for the Philippine Islands in June, 1930, and had been stationed at Nichols Field ever since (R. 101). His various duties at that field from time to time included Assistant Air Officer, Group Supply Officer, Division Air Officer, Officer in Charge of Army Correspondence Courses, and temporary commander of three different organizations for short periods during the absence of the regular

organization commanders. He also testified that he never attended a photographic school of the Air Corps and had very little experience with cameras. At the time of his marriage he gave the camera, which "had lain idle for a long period of years", to his wife with the idea that he would take no more pictures. During the past seventeen or eighteen years he had never attempted to develop a film because his youthful efforts proved highly amateurish (R. 102).

Accused did not deny the probability that he actually took the picture (R. 115,124), but he testified that when he handed the roll of films to Lieutenant Gibson he had "no idea of the subjects" and did not in fact remember at the time that he had taken a picture himself. He had obtained the roll from his wife, who, he was certain, "extracted it from this camera". Other pictures had been taken on the beach. The party was highly active and there was some teasing of the women by all of the men (R. 104). He did not remember the scene depicted by Exhibit 1, and had he known that his wife's wearing apparel had been snatched up as shown in the exhibit, he "would not have taken her picture under those circumstances" or "any officer's wife". (R. 103). He had no intention to take such a picture (R. 105), and had no intention of causing harm or damage to any of the women on the party (R. 106). It did not occur to him "that the degree of exposure shown by the picture ever actually existed. Nor do I believe that any member of the party knew what that picture shows or they would have objected to its development" (R. 108). At the time the picture was taken

> "I had no definite plan about its disposal. Such caution as other members of the party enjoined upon me, I agreed with. My impression is that it was sometime later, a matter of three weeks or a month that I found out that Lieutenant Gibson was a photographic officer and at the suggestion of some member of the party, I turned the film over to Lieutenant Gibson" (R. 102),

who was a "very close friend" of all the members of the party (R. 118). He asked him to develop the pictures in person because they had been taken on a beach party (R. 107). For that reason he thought they

should be considered confidential in character and because they might have contained pictures that should not be circulated generally (R. 108). He considered the pictures to be mutual property of all the members on the party (R. 110) and entrusted them to Gibson for development so that he could inspect the negatives before any prints were made (R. 108). Afterward Mrs. Nelson intimated several times that she was anxious to see the film and he "told her that Lieutenant Gibson had it. She knew that he had it. She suggested that I hurry him up on it". About a month after giving Gibson the film, accused asked if he had developed it, and Gibson said, "No", but that he would in a few days with some of his own (R. 111). Accused was certain that every member on the party knew that Gibson had the film for two months previous to November 6, 1931, because

> "It was no secret. I had no idea of secrecy. In reply to all inquiries over a long period, I will say from the first of July until the first of November, my answer was that I had given the film to Gibson and that he had not yet returned it to me. * * * I had the film some five weeks before I turned it over to Gibson. I believe that had other members of the party not inquired about this film that it would probably still be undeveloped." (R. 113, 114.)

4. The foregoing paragraph sets forth a complete summary of the evidence presented to the court without regard to its competency. This has been deliberately done because even considering all this evidence, the Board has reached the conclusion that the offenses charged have not been proven. The accused was charged only with wrongfully taking the picture, and with publishing it by turning the photographic film over to Lieutenant Gibson. The trial judge advocate stated to the court (R. 61) that the government relied solely upon the publication to Lieutenant Gibson and not on any later publication to others. The Board of Review does not understand the theory which induced the prosecution to introduce evidence in regard to the making of photographs from the film and the distribution of two or three of such photographs to other soldiers by the enlisted men who improperly made the prints. Nor does it understand why the defense did not object to the introduction of such testimony except upon the theory that in view of all the circumstances the defense was perfectly willing that

the entire matter be laid before the court. Upon this theory it might be considered that the accused, by necessary implication, consented to the introduction of this irrelevant evidence. In any event had the accused objected to its introduction, or had he not consented either expressly or inferentially to its introduction, the Board of Review would have been compelled to hold that the substantial rights of the accused were prejudiced by the reception of such evidence. In considering the legal sufficiency of the evidence to support the findings and sentence in this case, all such testimony must be disregarded as having no bearing upon the offenses charged.

5. Upon the evidence adduced, the court found accused guilty under the 95th Article of War (Charge I) of conduct unbecoming an officer and a gentleman by wilfully and wrongfully taking the picture of the three women "in a state of partial nudity and in postures offensive to public morals and decency" (Specification 1), and by knowingly injuring the good name and honor of Mrs. Nelson and Mrs. Ent by turning the film over to Lieutenant Gibson (Specification 2).

The court by its findings obviously must have reached the conclusion that the picture was "offensive to public morals and decency". But as to this, anyone may form his own conclusion, for an enlargement of the picture is attached to the record. Everyone will agree, we think, that the picture is mild compared to what would be expected from the language of the specifications, which suggests some form of degeneracy. 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. In this connection the following from Ives' Military Law (1886) is illuminative:

> "The question as to what constitutes 'conduct unbecoming an officer and a gentleman', is one upon which much difference of opinion has existed.
>
> "In a case tried in 1862 the commanding general of the Army of the Potomac said,—'Conduct unbecoming an officer and a gentleman is a phrase to which a technical meaning has been attached, and in that technical sense it is used in the articles of war. In one sense, every impropriety, every indecorum, is unbecoming an officer, and equally so to a gentleman. But this is not the signification that the words have when employed in framing charges'.
>
> * * *
>
> "In still another case that came up in that army it was held that 'this article should only be used when the offense is such as to disgrace an offender—to make him an unfit associate for officers and gentlemen, and to render his expulsion from the society of such, necessary to the preservation of the respect due them as a class. That such is the nature of the unbecoming conduct contemplated by the 83d (present 95th) Article of War is plainly deducible from the fact that dismissal is the prescribed and certain punishment. To draw the line less rigidly would subject every officer in the army to dismissal by a court whose notions of propriety were more stringent than, or even different from his own, and lead to the anomaly presented by the foregoing case, in which a number of officers request to have returned to them as a companion, one whom they have just pronounced guilty of conduct for which the Article of War brands him as unfit to be among them.'" (Undercoring supplied.)

In the case of Surgeon Stone, the Secretary of War said:

> "An officer of the highest merit may, from indiscretion or thoughtlessness, or from momentary excitement, do an act which all right minded persons would consider as highly unbecoming a gentleman, and yet, if it involved nothing dishonorable or morally wrong, he would not thereby forfeit his character as a gentleman."

So in the case of Lieutenant Valentine, if it be found that he intended to snap a picture of the wives while the bath towels reasonably served the purpose of modesty at a private bathing party, his act, although indiscreet, inappropriate, and opposed to good taste and propriety, was not morally unbefitting and unworthy, and did not offend so seriously against law, justice, morality or decorum as to expose him to disgrace socially or as a man. In other words, the questions presented are whether the accused can justly be charged with responsibility for the unforeseen, deliberate act of one lady in snatching away the towel covering another at the very moment the kodak was snapped, and whether one indiscreet act constitutes conduct unbecoming an officer and a gentleman within the technical meaning of that phrase as used in the 95th Article of War. To answer these questions the evidence must be carefully considered.

6. What then does the evidence show as to accused's conduct? Three Air Corps officers stationed at Camp Nichols, P.I., on leave at Baguio, together with their wives, all well known to each other, went for a picnic and swimming party to a beach where they were absolutely alone. Two parked automobiles were used to separate the sexes while disrobing and dressing. Several hours were spent swimming, lunching and lying on the sand. While drying and sunning themselves at the conclusion of the outing, accused, in a spirit of fun, invaded the ladies' side of the car, and at some time took the picture of which an enlargement is in evidence. There was nothing stealthy about his actions. The men as well as the ladies knew what he was about and no one objected. Although Mrs. Nelson and Mrs. Ent stated on the witness stand that they did not consent to the taking of the picture, it speaks for itself. It is obviously posed, or at least taken with full knowledge of the ladies. Two of them, with heads turned toward the

kodak, are smiling, while the third, Mrs. Nelson, carefully turns her own face away while at the same time raising Mrs. Valentine's bath towel. No one is objecting to the picture. All three knew a picture was in all probability being taken. Mrs. Nelson's act made the picture objectionable. Had the three ladies been standing in the same position as Mrs. Ent and as fully covered, certainly no reasonable person could object, for Mrs. Ent has more covering than is provided by the modern bathing suits worn at our most decorous beaches, and more than is commonly used in pictures and advertisements in our most reputable newspapers and magazines. All knew that a picture might have been obtained which they would not want generally circulated, and this was discussed and accused cautioned to be careful of the film. This was all any of the party considered necessary and by this conversation the others surely consented to the development of the film, using due care in so doing. It is not intimated that anyone expected accused himself to develop the film. For five or six weeks accused took no action toward developing the film although during that time Mrs. Nelson asked him several times about it. Then, learning that Lieutenant Gibson was a qualified photographer, he gave him the film, explaining that the pictures were taken at a beach party, and asked him to develop it personally as accused wished to see it before any prints were made. This Gibson agreed to do, but after developing it, he left it, for a day or more, hanging in the drying room of the Photo Section where two soldiers saw it and made the enlarged print attached to the record and one similar one. Lieutenant Gibson was an officer of the Air Corps stationed at Nichols Field and well known to the six persons on the picnic. Accused testified that the suggestion that the film be given to Gibson came from some member of the party.

The kodak was a small one taking pictures measuring two and one-fourth by three and one-fourth inches, with a view finder three-eighths by five-eighths inches in size, which was in bad condition due to a defect in the lens or deterioration of the mirror. Lieutenant Hill, a graduate of the Department of Photography, Air Corps Technical School, called as an expert, testified that an operator attempting to take a picture of three or more people would not be able to "see their expressions or what they were doing" in the view finder. He would have to be content with seeing that the objects are in the picture, and, to take a picture of three adult persons

standing in front of the camera it would be necessary to focus the instrument at a minimum of twenty feet from the subject of the picture.

From the foregoing, the Board of Review concludes that the evidence fails to show that accused did "wilfully and wrongfully take a picture" of the three women "in a state of partial nudity and in postures offensive to public morals and decency". Obviously it would not have been wrong to take a picture of the women had all three been standing in the position of Mrs. Ent and as fully covered as she. The wrong is predicated upon the uncovered state of Mrs. Valentine caused by the act of Mrs. Nelson. The accused testified that he did not recall any such scene as shown in the picture, said that he would not have taken the picture had he known that his wife's towel had been snatched up as shown in the picture, and declared he had no intention of taking such a picture or of causing harm or damage to any of the women, and the correctness of these statements is indicated by all of the facts and circumstances of the case. No member of the party saw the scene depicted by the picture, except Mrs. Nelson, who stated, "I knew what I was doing". Anyone familiar with the operation of taking pictures with a small camera without a tripod knows that the person taking the picture must concentrate his attention on the view finder, and while he could center the picture there, he would have difficulty in clearly distinguishing movements made by the subjects. The evidence is not legally sufficient to support the finding of guilty of Specification 1, Charge I.

Under Specification 3, Charge I, the court found that accused, having wrongfully taken the picture, did "knowingly prejudice and injuriously affect the good name and honor" of Mrs. Nelson and Mrs. Ent by turning the film over to Lieutenant Gibson, a person not authorized to receive it. As stated above, the evidence does not prove that the picture was wrongfully taken. Neither does it show that any injury was actually done to the good name and honor of the women <u>in so far as Lieutenant Gibson is concerned</u>, and the picture is not of such a character that the act of turning it over to a man who knew the women well, as did Lieutenant Gibson, would <u>per se</u> affect injuriously their good names and honor. Moreover, it appears that

the whole party discussed the picture, and merely enjoined care in its development. No one suggested that accused himself develop it, and in fact he was unable to do so. Accused selected to develop the film a brother officer well known to all the others and upon whom he had a right to rely, and fully explained the personal nature of the film to him. From the evidence of record, it is fair to say that accused's act in turning the film over to Gibson and at the time exacting a promise that he would develop it himself was an exercise of such care as was contemplated by the parties, and therefore that his act was in effect consented to by the others. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty under Specifications 1 and 3, Charge I, and Charge I.

7. The two specifications of Charge II, laid under the 96th Article of War, cover the same publication of the film described in Specification 3, Charge I, but charge the act as libel in violation of Act No. 277 of the law of the Philippine Islands - Specification 1 as to Mrs. Nelson and Specification 2 as to Mrs. Ent. The court found that accused did "wrongfully and maliciously compromise and impeach the reputation and honor" of each of these ladies by publishing the film "showing a posterior view of her naked lower limbs and buttocks". Each specification contemplates only the publication by giving the film to Lieutenant Gibson, and the trial judge advocate so stated to the court.

Act No. 277, enacted October 24, 1901, and contained in Volume 1 of Public Laws enacted by the Philippine Commission, reads in part:

> "Section 1. A libel is a malicious defamation, expressed either in writing, printing, or by signs or pictures, * * * tending to blacken the memory of one who is dead or to impeach the honesty, virtue, or reputation, or publish the alleged or natural defects of one who is alive, and thereby expose him to public hatred, contempt, or ridicule.
>
> "Sec. 2. Every person who <u>wilfully and with a malicious intent to injure another</u> publishes or procures to be published any libel shall be punished by a fine of

not exceeding two thousand dollars or imprisonment for not exceeding one year, or both.

"Sec. 3. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

"Sec. 4. In all criminal prosecutions for libel the truth may be given in evidence to the court, and if it appears to the court that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted; otherwise he shall be convicted; but to establish this defense, not only must the truth of the matter so charged be proven, but also that it was published with good motives and for justifiable ends." (Underscoring supplied.)

It is to be noted that the law requires that the publication be made "wilfully and with a malicious intent to injure another", and also provides that "An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown".

Malice is an essential ingredient of the offense of libel. No one contends or even suggests that in this case there was malice in fact. Under all the circumstances shown, it would be ridiculous to say that Lieutenant Valentine, in giving the film to Lieutenant Gibson for development, was actuated by any intent to injure Mrs. Nelson or Mrs. Ent. Not only was the accused, and his wife as well, a close friend of the two ladies and their husbands, but Mrs. Valentine was in the picture and stood as much chance of injury as the other two. Manifestly the accused did not intend to injure his own wife. Malice in fact may therefore be dismissed from further consideration.

Was the publication injurious so that malice may be presumed under Section 3 of the law in the absence of a justifiable motive for making it? The record of trial contains no evidence that the publication of the film to Lieutenant Gibson compromised or impeached the reputation or honor of the two ladies. Captain and Mrs. Nelson and Lieutenant and Mrs. Ent were provoked after the enlargement was found and the circumstances of its making became known, but their resentment was caused by the circulation of the picture among the enlisted men, which the charges have excluded from this case.

Lieutenant Gibson was not asked, nor did he in any way indicate that his opinion of the ladies was lowered by seeing the film. Nor is it reasonably probable that his opinion of ladies whom he had known well for some time would be affected in any way by a picture such as we have here, taken at a private beach party and under the circumstances clearly shown by the picture itself. Surely it cannot be presumed that the ladies were per se injured, when no effort was made to show actual injury and when all the attending circumstances indicate that there was no actual injury. But if some slight injury be presumed, although not shown by the evidence, has not the accused met the burden of the statute and shown that the publication was made with justifiable motives? We think that he has. The picture was not taken stealthily, but with the knowledge of all members of the party, except possibly Lieutenant Ent; the possibility of having pictures which should not be circulated generally was discussed by the party, and accused was enjoined to use care in handling the pictures to which he fully agreed; it was not suggested that he develop them himself, and he did use care in selecting a brother officer, well known to all the party, who agreed to develop the film personally so that accused could look it over before any prints were made. We think that the development of the film was contemplated by the parties, that the accused used reasonable care in arranging for its development by Lieutenant Gibson, and that at least some members of the party knew that the film had been turned over to Lieutenant Gibson. Under the circumstances shown, we are convinced that the accused's motives in giving the film to Lieutenant Gibson were justifiable, and therefore that there would have been no libel even had injury been shown. It follows that the evidence is not legally sufficient to support the findings of guilty of Charge II and the two specifications thereunder.

8. To briefly sum up the whole case, we find no evidence which satisfies us beyond reasonable doubt that the accused had an intent either to take an indecent picture, or to injure anyone by having the film in question developed. Neither is there evidence that anyone was injured by any act of the accused. His act was indiscreet and in bad taste, and for that he has already suffered tremendous punishment in his trial and the publicity and gossip incident thereto. Were it established that

the accused, with a debased intent, took an obscene picture, and thereafter carried it about to satisfy his lewd desires, and with like motive showed it to others so that they might together feast upon it, or that his conduct indicated morals comparable to this, we would have no difficulty in saying that such conduct dishonored him as a gentleman and exhibited him as morally unworthy to remain a member of the honorable profession of arms. But in this case, the accused took the picture in a spirit of fun which was so harmless that none of the ladies objected to it. A like spirit in Mrs. Nelson made the picture what it is. Thereafter accused was so little interested in the result that he did not give the film over for development for five weeks, and after making one inquiry, a month later, he completely forgot it until the enlarged print was discovered about five months later. It is altogether unreasonable to think that an officer of previously unblemished character would deliberately take an obscene picture of his own wife, then give it to a friend for development and then forget about it from June to November. We find nothing in the conduct of accused to warrant a conviction of conduct unbecoming an officer and a gentleman as denounced in the 95th Article of War. Nor do we find in the evidence in this case any proper proof that accused is guilty of any lesser included offense.

9. The Official Army Register shows the accused's service as follows: "Cadet M.A. 10 July 16; 2 lt. of Cav. 1 Nov. 18; 1 lt. 2 Nov. 19; A.S. 24 Aug. 20; trfd. to A.S. 29 Nov. 21".

10. 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.

E. C. McCrory, Judge Advocate.

R. Rosenman, Judge Advocate.

John P. Dinsmore, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., MAY 18 1932 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of First Lieutenant Francis B. Valentine, Air Corps (CM 198202), together with the foregoing opinion of the Board of Review.

2. Without regard to the technical questions raised by the Board of Review, including those involving the admissibility of certain evidence, I, for reasons hereinafter indicated, concur in the conclusion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence. I therefore recommend that the sentence be disapproved.

3. The evidence as to the kind of camera used and the condition of its finder (R. 90-93), coupled with the evidence as to the character of the accused, raises much more than a substantial doubt that the accused knew or suspected that he was taking the picture in question. In this connection I may add that the evidence of record as to the accused's character is strongly confirmed by numerous letters received in this office since the trial.

4. Furthermore, in the recommendation to clemency attached to the record, the following appears as one of the reasons for the recommendation:

> "The evidence indicated that the accused realized that some of the pictures might turn out to be of an intimate nature so accordingly took certain steps to safeguard them from becoming public."

This statement as to what the evidence indicated is clearly inconsistent with the finding that the picture was taken wilfully as alleged in Specification 1, Charge I. Yet, this statement is signed by five members of the court and a finding of guilty could not have been reached as to the specification referred to unless at least two of the five signers voted to convict the accused on that specification.

5. First Lieutenant Richard W. Gibson, Air Corps, who developed the picture in question, was tried on January 27-28, 1932,

by a court headed by Brigadier General Herbert J. Brees, and composed of eleven officers of rank substantially the same as the Valentine court. The charges against Lieutenant Gibson were similar to those against Lieutenant Valentine, viz: two specifications under the 95th Article of War alleging that he wrongfully developed and printed the photographic negative and that he permitted enlisted men to obtain possession of it, and under the 96th Article of War, three specifications alleging violation of Act No. 277 of the Philippine laws and one specification alleging a false statement to Captain Nelson. All of the important witnesses in the Valentine trial testified also at the Gibson trial. Lieutenant Gibson was acquitted.

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

Blanton Winship,
Major General,
The Judge Advocate General.

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

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

JUL 12 1932

CM 198256

UNITED STATES	)	SEVENTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	The Cavalry School, Fort
Captain PAUL F. HUBER	)	Riley, Kansas, February 2,3,
(0-8802), Quartermaster	)	4,5,8,9,10,11 and 13, 1932.
Corps.	)	Dismissal.

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

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

2. Accused was tried upon charges and specifications as follows:

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

Specifications 1 to 21, inclusive, alleging embezzlement by accused of the sum of about $25.00 in each of 20 instances and of the sum of about $64.75 in one instance, which said sums were the property of the detachment of which accused was commanding officer. (Not Guilty)

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

Specification 1: In that Paul F. Huber, Captain, Quartermaster Corps, being at the time commanding officer of the Detachment, Quartermaster Corps, Fort Riley, Kansas, and as such, custodian of the moneys and funds of the said Detachment, did, at Fort Riley,

Kansas, on or about May 25, 1929, with intent to deceive, wrongfully and unlawfully make and utter a certificate in words and figures as follows, to wit:

"I CERTIFY that the foregoing account for the month of May, 1929, is correct, and that of the amount for which I am responsible Four hundred seventy and 71/100 ($470.71) is deposited with the Central Nat'l. Bank, Junction City, Kans., to the credit of the Fund, Det., Q.M. Corps, and is in possession Central Nat'l. Bank for safekeeping. One fifty dollar liberty bond.

P.F. Huber,
Capt., Q.M. Corps,
May 25, 1929. Commanding Det.",

he, the said Paul F. Huber, Captain, Quartermaster Corps, well knowing that the said certificate was false in that he well knew that he had in his possession the sum of about twenty-five and no/100 dollars ($25.00) belonging to the said Detachment Fund, which sum was not included in the said certificate as cash in hand or in bank or otherwise accounted for.

Specifications 2 to 21, inclusive - Each of these specifications is substantially the same as Specification 1, except as to the alleged date of the offense, the month covered by the certificate, the sum or sums deposited in bank, the sum not included in the certificate or otherwise accounted for, and the date of the certificate. The sums shown as deposited in bank are not material to the consideration of the case and are therefore not herein indicated. The other variations in the specifications are indicated as follows:

Date of Offense	Month covered	Sum not accounted for	Date of Certificate
Spec. 2: June 30, 1929	June, 1929	$25.00	June 30, 1929.
" 3: July 31, 1929	July, 1929	25.00	July 31, 1929.
" 4: Aug. 31, 1929	Aug., 1929	25.00	Aug. 31, 1929.
" 5: Dec. 31, 1929	Dec., 1929	25.00	Dec. 31, 1929.
" 6: Jan. 31, 1930	Jan., 1930	25.00	Jan. 31, 1930.
" 7: Feb. 28, 1930	Feb., 1930	25.00	Feb. 28, 1930.
" 8: Aug. 31, 1930	Aug., 1930	25.00	Aug. 31, 1930.
" 9: Sept. 30, 1930	Sept., 1930	25.00	Sept. 30, 1930.
" 10: Oct. 31, 1930	Oct., 1930	25.00	Oct. 31, 1930.
" 11: Nov. 30, 1930	Nov., 1930	25.00	Nov. 30, 1930.
" 12: Dec. 31, 1930	Dec., 1930	25.00	Dec. 31, 1930.
" 13: Jan. 31, 1931	Jan., 1931	25.00	- - -
" 14: Feb. 28, 1931	Feb., 1931	25.00	Feb. 28, 1931.
" 15: Mar. 31, 1931	Mar., 1931	25.00	Mar. 31, 1931.
" 16: Apr. 30, 1931	Apr., 1931	25.00	Apr. 30, 1931.
" 17: May 31, 1931	May, 1931	25.00	May 31, 1931.
" 18: June 30, 1931	June, 1931	25.00	June 30, 1931.
" 19: July 31, 1931	July, 1931	25.00	July 31, 1931.
" 20: Aug. 31, 1931	Aug., 1931	64.75	Aug. 31, 1931.
" 21: Sept. 30, 1931	Sept., 1931	25.00	Sept. 30, 1931.

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

Specification 1: In that Paul F. Huber, Captain, Quartermaster Corps, did, at Fort Riley, Kansas, on or about December 1, 1928, with intent to defraud, falsely alter a certain ration return of the Detachment, Quartermaster Corps, Fort Riley, Kansas, Q.M.C. Form No. 72, drawn for the month ending November 30, 1928, in the following words and figures, to wit:

WAR DEPARTMENT
Q.M.C. Form No. 72 (old No. 223) Quartermaster's No.__
Revised May 11, 1926
Ration Return of Det Q.M. Corps
At. Fort Riley, Kansas, from November 1, 1928 to November 30, 1928
Net number of rations due, (including rations for men messing
1715 separately) all additions and deductions for
percentage computed
Corrections for percentages (Pars. 11 AR 30-2210, and 44 a and b
AR 345-400):

Additions No. 103 Deductions No. None

	Garrison	Filipino	Travel	Field
Rations Required	No. 1715	No.	No.	No.

I certify that this Ration Return is correct.

Signed: CLARK L. RUFFNER.
Clark L. Ruffner,
2d Lt., 2d Cavalry,
Asst. Pl. Adjutant.

Approved: By order of the Commandant:
Signed: JOHN C. MACDONALD
John C. Macdonald,
Captain, 9th Cavalry,
Acting Adjutant.

by changing the number of garrison rations due and required, as shown on the said Q.M.C. Form, from the correct figure of 1715 to the figure 1865, which said Q.M.C. Form was a writing of a public nature which might operate to the prejudice of the United States. (Not Guilty)

Specifications 2 to 21, inclusive - Each of these specifications is substantially the same as Specification 1, except as to the month covered by the particular ration return, the particular alterations in the number of rations shown as being due and required, and the names signed to the returns. These names are not material to the consideration of this case and are therefore not indicated herein. The months covered by the returns and the particular alterations in the numbers of rations, as alleged in the various specifications, are indicated as follows:

	Month covered	Alterations in Rations
Spec. 2:	Jan., 1929	From 2086 to 2486
" 3:	Mar., 1929	" 1972 to 2371
" 4:	Apr., 1929	" 2257 to 2457
" 5:	Sept., 1929	" 2016 to 2216
" 6:	Oct., 1929	" 2153 to 2353
" 7:	Nov., 1929	" 1978 to 2278
" 8:	Dec., 1929	" 2287 to 2687
" 9:	Feb., 1930	" 2009 to 2309
" 10:	June, 1930	" 2400 to 2700
" 11:	July, 1930	" 2472 to 2772
" 12:	Sept., 1930	" 2461 to 2661
" 13:	Oct., 1930	" 2428 to 2828

	Month covered	Alterations in Rations
Spec. 14:	Dec., 1930	From 2132 to 2732
" 15:	Jan., 1931	" 2095 to 2395
" 16:	Feb., 1931	" 1869 to 2069
" 17:	Mar., 1931	" 2202 to 2502
" 18:	Apr., 1931	" 2183 to 2483
" 19:	May, 1931	" 2302 to 2502
" 20:	July, 1931	" 2687 to 2887
" 21:	Oct., 1931	" 2533 to 2933.

Specification 22 alleging failure to obey the lawful order of a superior officer to turn over certain records to the Post Personnel Adjutant. (Not Guilty)

Specification 23: In that Paul F. Huber, Captain, Quartermaster Corps, did, at Fort Riley, Kansas, on or about November 6, 1931, wilfully and unlawfully destroy certain Statement of Accounts, Q.M.C. Form No. 341, covering the period of from about June, 1930, to August, 1931, and certain records of indebtedness due from various boarders to the Ration Savings Funds of the Detachment, Quartermaster Corps, Fort Riley, Kansas, which said statements and records he, the said Paul F. Huber, Captain, Quartermaster Corps, then knew to be pertinent to an official investigation then in progress and that said statements and records should be preserved, this to the prejudice of good order and military discipline.

Specification 24 alleging the wilful and unlawful destruction of eleven duplicate copies of Q.M.C. Form No. 341 pertinent to an official investigation then in progress. (Not Guilty)

Specification 25: In that Paul F. Huber, Captain, Quartermaster Corps, being at the time commanding officer of the Detachment, Quartermaster Corps, Fort Riley, Kansas, on or about the dates and in amounts hereafter appearing, to wit:

Date	Amount
May 1, 1929	$25.00
June 1, 1929	25.00
July 1, 1929	25.00
Aug. 1, 1929	25.00
Dec. 1, 1929	25.00
Jan. 1, 1930	25.00
Feb. 1, 1930	25.00
Aug. 1, 1930	25.00
Sept. 1, 1930	25.00
Oct. 1, 1930	25.00
Nov. 1, 1930	25.00
Dec. 1, 1930	25.00
Jan. 1, 1931	25.00
Feb. 1, 1931	25.00
Mar. 1, 1931	25.00
Apr. 1, 1931	25.00
May 1, 1931	25.00
June 1, 1931	25.00
July 1, 1931	25.00
Aug. 1, 1931	64.75
Sept. 1, 1931	25.00

which recited amounts came into his possession by virtue of his office from boarders of the mess of said Detachment, did fail to account for all such moneys in violation of paragraph 1 Army Regulations 210-50.

Accused pleaded not guilty to all charges and specifications, declining to plead the statute of limitations to any specification to which such statute appeared to be applicable. He was found not guilty of Charge I and all specifications thereunder, guilty of Charge II and all specifications thereunder, guilty of Charge III and all specifications thereunder except Specifications 1, 22 and 24, and not guilty of Specifications 1, 22 and 24, Charge III. No evidence of previous convictions was introduced. He was sentenced "To be dismissed the service of the United States." The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

3. The evidence relative to those specifications of which accused was acquitted will not be discussed, except in so far as it may have a bearing upon the specifications of which he was found guilty. Many facts in this case are undisputed. They were not only established by uncontradicted evidence for the prosecution, but were in large measure, expressly admitted by the accused in his testimony. A detailed recital of the evidence showing these undisputed facts is deemed unnecessary. Following is a substantial summary of these undisputed facts:

Accused reported for duty at Fort Riley, Kansas, June 5, 1927, and from June 10, 1927 to November 25, 1931, he was Commanding Officer of the Detachment, Quartermaster Corps, at that post and, in that capacity, custodian of the detachment fund. The fund accounts were kept by him in the council book. A mess was run for the Detachment by the School for Bakers and Cooks. The men of the Detachment generally ate at this mess as did some soldiers who were not members of the organization but were attached thereto for rations. Some also were rationed separately; that is, they did not take their meals at the mess but were paid each month the value of their rations. Also, a number of boarders, both soldiers and civilians, took meals at the mess and were charged fifteen cents a meal in the case of soldiers and thirty cents a meal in the case of civilians. The mess sergeant, Staff Sergeant Hibbert O. Johnson, kept track of these boarders and the number of meals taken at the mess by each, and, at the end of each month, turned over to the Acting First Sergeant, Harry F. Davidson, a list showing the amount due from each boarder. The total amount thus shown was entered by the mess sergeant on the "Statement of Accounts" (Q.M.C. Form No. 341) for the month, under the heading "Received from boarders." One copy of this form was sent to the School for Bakers and Cooks, where copies were typed, signed by the Assistant Commandant of the School, Captain Irwin W. Guth, and returned to the mess. The first sergeant made the collections from the individual boarders and turned over to the accused the amounts collected, except certain small sums paid by him on some occasions, with accused's knowledge, as compensation to a cook or dining room orderly. For these sums he accounted to accused by turning in receipts. These collections from boarders belonged to the detachment fund and should have been, and many months were, taken up by accused in the council book as receipts under ration savings. For the twenty-one months mentioned respectively in the specifications of Charge II and in Specification 25, of Charge III, no collections from boarders were shown in the council book, although the amounts received from boarders those months were in no instance less than the amounts respectively mentioned in those specifications. Nevertheless the fund account for each month was certified by accused to be correct in the form alleged in each of the twenty-one specifications of Charge II. Paragraph 1, A.R. 210-50, mentioned in Specification 25, Charge III, provides in material part as follows:

> "Commanders of * * * detachments * * * will * * * account for all moneys accruing thereto * * *, such moneys to be accounted for in one fund pertaining to such * * * detachment * * *."

The method of handling ration allowances to the Detachment was substantially as hereinafter set forth.

The daily morning report, prepared by the first sergeant, showed the number of men rationed with the Detachment and the number rationed separately, thereby indicating the number of rations to which the Detachment was entitled for the day. At the end of each month the first sergeant added up the figures in the ration column of the morning report to ascertain the total number of rations due for the month. Thereafter the morning report went to the personnel office at Post Headquarters, where the ration return was made up from the information contained in the morning report. The ration return was prepared in duplicate, the original being sent to the message center for delivery to the commissary and the carbon copy, together with the morning report, being retained at Post Headquarters. On receipt at the commissary of the ration returns (Form 72) for the various organizations, they were consolidated on Form 373 by Mr. Gabriel Troesany, a civilian clerk in the commissary. Form 373, when completed, showed for each organization the number of rations due for the month, the cost of the ration, the money value of the number of rations due, the value of stores purchased by the organization from the Quartermaster Corps, and either the amount due the organization or the amount due from the organization for overdrawn ration credit. Form 373 was sent to the Finance Officer who, upon the basis of this form, made payment to such organizations as were entitled thereto. A duplicate copy of the form was retained at the commissary together with the original ration returns.

In some instances it had happened that the post personnel figures from the morning report did not agree with the figures of the first sergeant of the Detachment, due undoubtedly to errors in addition. This had resulted in the Detachment being credited with a different number of rations from that to which it appeared to be entitled according to the first sergeant's figures. Consequently accused had instructed the first sergeant to cause the ration column figures to be added on an adding machine and to attach the adding machine slip to the morning report before sending it to Post Headquarters. As a rule the first sergeant followed these instructions; but the morning report for October, 1931, was sent to the post personnel office with the first sergeant's penciled figures but without the usual adding machine slip. Consequently, on November 3, 1931, the first sergeant, fearing that his figures might be incorrect, went to the post personnel office and procured the morning report for October. He then caused the ration column figures to be added on an adding machine and discovered a slight discrepancy between the adding machine figures and his own. Fearing that, if the post personnel office had taken his figures, the number of rations appearing on the ration return might not be correct, he went to the commissary

and compared the adding machine figures with those appearing on the original ration return. This comparison disclosed the fact that the return showed 2933 rations due the Detachment for the month of October, while the adding machine figures showed only 2533 rations. He called the discrepancy to the attention of Mr. Trocsany and then, borrowing the original ration return, took it to the post personnel office and showed Staff Sergeant Walter Estes, the clerk who had prepared the Detachment ration return, the discrepancy between the adding machine figures and the number of rations shown on the return. Sergeant Estes, thinking it was due to an error on his part immediately made what seemed to be the necessary correction on the original return. Then getting the retained carbon copy from the files he discovered that that copy showed only 2533 rations and he remembered that there had been no erasure in making up that particular ration return. Thus it clearly appeared that the number of rations on the original return had been raised 400.

The discovery that the ration return for October had been altered gave rise to an investigation conducted by Major Charles A. Wickliffe, J.A.G.D., assisted by Lieutenant Richard H. Trippe, F.D., to determine, if possible, who had made the alteration and what, if any, other ration returns pertaining to the various organizations at the post had been altered. The evidence unearthed at this investigation and introduced at the trial established the fact, which is not in dispute, that the ration returns described respectively in Specifications 2 to 21, both inclusive, Charge III, all pertaining to the Detachment commanded by accused, had been altered by someone in the manner alleged in these specifications and the credit for the increased number of rations had in fact been received by the Detachment. Search for an individual motive for these alterations led to the discovery and proof at the trial that collections from boarders for the months mentioned in Specification 25, Charge III, had not been accounted for.

On or about November 4, 1931, accused was informed by the Post Adjutant of the alteration in the October ration return pertaining to his Detachment and on or about November 5, 1931 he knew that an investigation was being made to ascertain who had made the alteration, for on that day he was questioned by Major Wickliffe with reference to the routing of ration returns.

On or about November 6, 1931 accused obtained from the Mess Sergeant Forms No. 341 covering a period of about three years back, with the exception of the Form for July, 1931, together with leaves from an old ledger in which the accounts with boarders had been kept. All these papers accused placed in a trash can ordinarily used for burning trash. Form 341 for July, 1931, had previously been turned over to Major Wickliffe by the mess sergeant.

4. Thus it appears from the undisputed and generally admitted facts that accused did fail to account for collections from boarders as alleged in Specification 25, Charge III, in violation of Par. 1, A.R. 210-50; that nevertheless he certified as correct the accounts for the months in which he thus failed to account for collections from boarders in the forms alleged in the Specifications of Charge II; and that he placed substantially all the forms and records mentioned in Specification 23, Charge III, in a receptacle where, in the ordinary course of events, they would be burned. It was accused's contention that he had no dishonest motive in not accounting for collections received by him and which belonged to the detachment fund, it being his claim that he used these moneys collected from boarders to reimburse himself for large advances previously made by him for Christmas parties, picnics, and certain kitchen utensils for the Detachment, and to pay certain small sums to mess cooks and orderlies. His explanation of his having signed the certificates set forth respectively in the Specifications of Charge II, notwithstanding the fact that the accounts thus certified were not complete in that they failed to show the collections from boarders which he had received was, in substance, that he did not consider that the certificates were false for the reason that he construed them as merely certifying the correctness of the items entered, of the statement as to where the amounts with which he charged himself were located and of the additions and subtractions. He testified that, in making the certificates, he had no intention to deceive. He denied altering the ration returns mentioned in Specifications 1 to 21, both inclusive, of Charge III, and denied having any knowledge that an investigation of his mess was in progress when he deposited the records and forms mentioned in Specification 23, Charge II, in the trash can.

5. The defense introduced the testimony of a number of witnesses, including accused, showing that the Detachment, Quartermaster Corps, gave picnics in June 1928 and June 1929 and Christmas parties in December of each of these years. The witnesses differed considerably in their estimates of the expenses of these entertainments, but it seems reasonably certain from the evidence that the four could not have cost less than $1100 or $1200. The council book shows only a small portion of this cost as having been paid out of the detachment fund. Accused testified that, in order not to deplete too greatly the detachment fund, he advanced from his personal funds substantial sums to meet the expenses of these parties and picnics, intending gradually to reimburse himself out of the moneys collected from boarders. The council book contains no entries indicating any advances or loans by accused or that the detachment fund was in any wise indebted to him, and there is no evidence that he ever told anybody that he had made these advances and was using collections from boarders to reimburse himself. He testified that he had kept a complete file of vouchers for the Detachment bills paid out of his personal

funds, but that in September 1931 these vouchers disappeared from a drawer in his desk.

Accused's testimony as to just what sums he advanced to pay expenses of the 1928 and 1929 picnics and Christmas parties is somewhat confusing. He testified that he paid bills as follows:

for the 1928 picnic,	$260;
for the 1928 Christmas party,	$490;
for the 1929 picnic,	$246.39; and
for the 1929 Christmas party,	$125.00

This would give a total of $1121.39 advanced by him. He further testified that he reimbursed himself out of the collections from boarders without entering such collections in the council book, as follows:

in May, June, July and August 1929	$100;
in December 1929 and January and February 1930	$ 90; and
from August 1930 to September 1931, both inclusive, about	$620.

This would give a total reimbursement to himself of only about $810. Yet he testified that after reimbursing himself in these amounts there remained due him a balance of only about $11 which he decided not to collect.

6. In discussing the sufficiency of the evidence to support those specifications of which accused was found guilty, Specification 25 of Charge III, alleging twenty-one violations of paragraph 1, A.R. 210-50, by failing to account for moneys collected from boarders, will be considered first.

However unsatisfactory accused's testimony may seem concerning advances of money claimed to have been made by him, it appears that the court was not wholly convinced that this claim was unfounded; for upon no other reasonable hypothesis can one explain accused's acquittal of all the acts of embezzlement alleged in the specifications of Charge I. In view of this acquittal it will be assumed in this discussion that those moneys collected from boarders for which accused admittedly failed to account, as alleged in Specification 25 of Charge III, were used only to reimburse himself for detachment fund expenses paid by him out of his personal funds and to pay a few small sums to cooks and dining room orderlies. This, however, is no defense to, or excuse for, the admitted failure to account for the sums specified as required by the

regulation. Moreover, it is not difficult to perceive a motive for concealing his method of reimbursing himself by not showing in the council book the receipts used for purposes of reimbursement and the disposition thereof. It is apparent from his testimony that the condition of the detachment fund was not such as to warrant giving these expensive entertainments and a full showing in the council book of the cost thereof might well have evoked severe criticism from his superiors. Besides it appears from his testimony and from other evidence that, at some, if not both, of the picnics, prizes were awarded and at both Christmas parties presents were given and that these prizes and presents cost substantial sums of money, some, if not all, of which were advanced by accused. The use of ration savings for such purposes is prohibited by paragraph 12 c, AR 210-50, and there is no difference in principle between using ration savings directly for unauthorized purposes and using funds belonging to a ration savings account to reimburse a person for moneys advanced for such purposes. It would be quite natural for accused not to wish the council book to contain evidence of this prohibited use of moneys belonging to the ration savings account.

In the opinion of the Board of Review, the evidence is amply sufficient to sustain the finding of guilty of Specification 25, Charge III.

7. Specification 25, Charge III, alleged twenty-one separate violations of the same regulation and was therefore multifarious and subject to objection on that ground. No such objection was made and the fact that accused was tried for these offenses upon one specification instead of twenty-one cannot have injuriously affected any of his substantial rights. It is therefore considered that, under the provisions of the 37th Article of War, the irregularity in pleading may be disregarded.

8. As indicated in paragraph 4 hereof, accused's only defense to the twenty-one specifications of Charge II, alleging that, with intent to deceive, he made false official certificates, was, that he had no intention of deceiving and that, under his construction of the certificates, they were not false, although each contained the positive statement that the detachment fund account to which it related was correct while the fact was that the account failed to show the receipt or disbursement by accused of certain moneys belonging to the fund that had come into his hands as custodian and did not show the full amount for which he was responsible. Such a construction of the certificates in question is, in the opinion of the Board of Review, wholly untenable. It is almost inconceivable that an officer of accused's long service in

the Army and experience as custodian of such funds could believe that an account by the custodian of a fund which failed to show the receipt by him of moneys belonging to the fund and failed to show the full amount for which he was responsible, could, in reason or honesty, be called correct. As the Board views the admitted facts they leave no reasonable doubt that accused knew when he signed each of the certificates that it was not wholly true, and that he intended thereby to deceive those whose duty it would be to inspect the accounts. The same motives that may have actuated him in failing to enter receipts from boarders in the council book, as pointed out in paragraph 6 hereof, would apply equally in making the certificates.

The Board of Review is of opinion that the findings of guilty of Charge II and all its specifications are fully sustained by the evidence.

9. As hereinbefore indicated it was clearly proved, and is not disputed, that each of the ration returns mentioned in Specifications 2 to 21, Charge III, was altered by somebody in the manner alleged and that the detachment fund received, in ration allowances, at the expense of the Government, the benefit of the increase in the number of rations, to which increase the Detachment was not entitled. Thus the alterations resulted in a fraud upon the Government. The undisputed facts, including the long continued system of obtaining unauthorized allowances for the Detachment, preclude the possibility of the alterations having been made through mistake or inadvertence and give rise to the inevitable inference of fraudulent intent on the part of the person who made the alterations. The only question with reference to these specifications is, therefore, whether or not the evidence warrants the conclusion reached by the court that it was accused who made the alterations. On this question the evidence is wholly circumstantial.

That a motive for making the alterations may be attributed to accused seems reasonably clear. It was admitted that, during a period beginning about May 1, 1929, and ending about September 1, 1931, he diverted from the detachment fund moneys belonging thereto amounting to over $800 by failing to account for certain collections from boarders and, as claimed by him, using such collections to reimburse himself. This necessarily resulted in a drain upon the detachment fund, for which compensation could be effected by obtaining more ration allowances than those to which the Detachment was legally entitled. The evidence indicates that the collections from boarders for which accused failed to account and which he claimed to have used to reimburse himself amounted to only a little over $800, while the value of the increases in number

of rations appearing on the altered ration returns amounted to over $2400, as shown by the ration savings accounts (Forms 373 and 373a) introduced in evidence as Exhibits I - 1 to 20.

The evidence shows that, after the Detachment ration returns were made up in the post personnel office, they normally passed through the hands of several persons and that others may have had access to them. Thus it appears that persons other than accused may have had an opportunity to make the alterations in question. Some of these persons may have had a motive to raise the returns but this is not established by the evidence.

The evidence is conflicting as to whether accused had any opportunity to alter the returns. He denies receiving returns except in three or four instances; but there is other evidence in the record to the effect that, at his direction, all ration returns were either delivered to him personally or left upon his desk before being taken to the commissary. Since, as shown above, it is established that the offenses in question were committed by somebody and that a plausible motive might be attributed to accused, it becomes of utmost importance to consider and weigh the conflicting evidence as to his opportunity; for, if he did in fact have the opportunity, his denial thereof, which could only be in an effort at concealment, would go far towards justifying his conviction, while, if he had no opportunity, his conviction of these offenses could not be sustained.

George Hicks, a civilian employee, testified that he had been a messenger in the Quartermaster Corps for about four years and that it was part of his duty to collect all papers from Private Martin's desk in the post message center, take them to the Chief Clerk's office in the Office of the Quartermaster and then distribute them (R.75,76). According to his testimony, accused, about two years before the trial, gave him orders to deliver all ration returns to accused before taking them to the commissary. Up to that time he had taken them directly to the commissary, but after receiving these orders he invariably either delivered the ration returns to accused or placed them upon the latter's desk (R.76). Later, the same day or the following morning, witness would get the returns from a basket on Sergeant Ain's desk and take them to the commissary (R.78,79). Sergeant Ain got all papers from accused's office and witness got them from Sergeant Ain's office and distributed them (R.78). Witness further testified that, in an investigation, he was questioned about ration returns by Major Wickliffe and that, just before he reported to Major Wickliffe, accused asked him what he had done with ration returns and, when he replied that he had given them to accused for a long time, the latter said: "Don't say that or they will hang me" (R.76). Later accused asked

him what he told Major Wickliffe. He answered that he had said he took the ration returns to the office and then to the commissary; whereupon accused said: "You stick to that story." When first questioned by Major Wickliffe witness said that he took the ration returns from headquarters to the commissary, but, when called a second time and asked whether he took the returns directly to the commissary or to accused, he answered that he took them to accused (R.77). Witness also testified that on one occasion Mr. Trocsany asked him if he had the ration returns and, upon his answering that he had gotten them from accused's office, Mr. Trocsany said: "Why, in a few days he will swear that he never seen them" (R.78).

Accused denied ever having instructed Hicks always to bring the ration returns to him, but testified that on three or four special occasions he had told Hicks that he wanted to see the ration returns when they came from the post personnel office. This, he said, was for the purpose of making sure that his list of men attached to his organization for rations and rationed separately was correct (R.205). With reference to his conversation with Hicks just before Hicks was questioned by Major Wickliffe, accused testified that he was in Mr. Stratton's office on or about November 5, 1931 when Mr. Stratton told Hicks to report to Major Wickliffe and he asked Hicks what he had done with the ration returns when he got them from the post personnel office (R.205). Hicks replied that he had put them on accused's desk. Thereupon accused made the remark "That looks nice!" A little while later he met Hicks and the latter stopped him and said: "I told them that I took the ration returns straight to the commissary." Accused made no reply at the time, but, later in the day, again seeing Hicks in Mr. Stratton's office, accused said to him: "You had better stick to a story." (R.206).

Warrant Officer William Stratton, chief clerk in the Quartermaster Office, testified that he overheard the conversation between accused and Hicks just before Hicks reported to Major Wickliffe for questioning; that accused asked Hicks what he had done with the ration returns; that Hicks replied: "I put them on your desk"; that accused asked him why he did that; that Hicks answered: "Because you told me to"; that accused then said: "Well, I never see them"; that Hicks replied: "Well, I always put them there"; and that thereupon accused said: "If you say that you will get me in a hell of a lot of trouble" (R.81,82). Mr. Stratton further testified that he had no recollection of ever having seen ration returns in accused's hands or on his desk (R.85); that he never heard accused tell Hicks to bring the ration returns to him; and that, so far as witness knew, it was accused's invariable practice to issue all instructions to clerks through witness as chief clerk (R.84). Witness never knew of Hicks taking any papers to accused or to accused's desk, unless they had first come to the chief clerk's desk, except papers addressed to accused personally (R.85). Witness could not recall ration returns ever coming to his desk and was positive that they did not come to him regularly (R.232).

Technical Sergeant Harry Ain, Quartermaster Corps, a witness for the defense, who was also called as a witness for the court, testified that, since reporting for duty at Fort Riley on November 21, 1928, he had been principal clerk in the property branch of the Quartermaster Corps and that it was a part of his duty to empty accused's outgoing basket (R.181), taking the papers found therein to his own desk where he distributed them, placing each paper in the proper box for delivery to its destination (R.252). He went to accused's desk at least twice a day and he never found a ration return in accused's outgoing basket (R.253). Neither had he ever seen a ration return in accused's possession (R.181), nor could he recall ever having seen one on his desk (R.181,182,253). He never heard accused give any instructions with reference to ration returns. So far as he knew, ration returns never passed over witness' desk on their way from headquarters to the commissary (R.182,253), and he did not know how they were routed (R.182). It would have been possible, however, for ration returns to come to his desk without his knowing it if somebody were to put them in one of the outgoing baskets on his desk without his seeing it, in which case it would be taken up by the messenger for delivery (R.253). A number of times he found accused's outgoing basket had been emptied by someone other than himself, but, when this happened, the papers would appear in his incoming basket or on his desk. Two or three times a year he had been called on the telephone by Mr. Trocsany and asked if he knew where the ration returns were. His answer was always in the negative because he had never seen them (R.254).

Mr. Gabriel Trocsany, a civilian clerk in the commissary, called as a witness for the defense, testified that, when a ration return was late coming in, he usually called up the personnel office and had the sergeant major of the particular organization send it to the commissary. Sometimes he went to the Quartermaster Office to get late returns and he found them in the outgoing basket of the chief clerk and "a couple of times" in Sergeant Ain's outgoing basket. Witness did not think he had ever found ration returns on accused's desk (R.184,185). He found returns of miscellaneous units, such as the Engineers, in the basket of either the chief clerk or Sergeant Ain. He found detachment returns in the chief clerk's basket, but he could not say that he had ever found returns of the Detachment, Quartermaster Corps, in Sergeant Ain's basket. Ration returns of a number of organizations, including the Detachment, Quartermaster Corps, went regularly to the Quartermaster's Office before going to the commissary (R.186,187). Witness could not recall that, when told by the messenger, Hicks, that accused had had the ration returns, he had made any such remark as: "What does he want them for? Tomorrow he will swear that he never saw them" (R.184), although he might have made a "casual remark" such as: "What does he want them for?" (R.188).

From the foregoing summary of the conflicting evidence bearing upon the question of accused's opportunity to alter ration returns, it is apparent that the only direct evidence that ration returns regularly came into accused's hands before going to the commissary is to be found in the testimony of the messenger, Hicks, Neither the chief clerk in the Quartermaster office nor Sergeant Ain ever knew of returns being delivered to accused or to his desk, and neither could remember ever having seen ration returns on his own desk. Mr. Trocsany's testimony is rather inconsistent with the testimony of the chief clerk, Mr. Stratton, and that of Sergeant Ain. According to him, ration returns, not only of the Detachment but of other organizations, went regularly to the Quartermaster office before going to the commissary, and on a number of occasions, he had taken ration returns from the chief clerk's and Sergeant Ain's outgoing baskets. Still, even Mr. Trocsany could not remember ever having seen a ration return on accused's desk. The messenger, Hicks, is more or less discredited. He admitted on the stand that, at the investigation by Major Wickliffe, he had told two different stories as to what he did with ration returns after getting them from the message center. Also he is contradicted by Mr. Trocsany with regard to the latter's alleged remark to the effect that accused would swear he had never seen ration returns; and both accused and Mr. Stratton tell quite different versions from his of the conversation between accused and him just before he was questioned by Major Wickliffe.

Moreover, it was claimed by accused that it was he who caused the acting first sergeant, Davidson, to make the comparison between the adding machine figures taken from the morning report for October, 1931, with the ration return for that month at the commissary. If this be true, it is a circumstance indicating that accused had no knowledge of the alterations in the returns; for it was this comparison that brought about the discovery of the alterations. Accused testified that early on the morning of November 2, 1931, he checked Sergeant Davidson's addition of the figures in the ration column of the October morning report and, finding a discrepancy between his own figures and those of Sergeant Davidson, he directed Davidson to put an adding machine slip on the ration column and check this slip against the ration return (R.204). Sergeant Davidson testified that he had no recollection of having had any conversation with accused about November 2, 1931, concerning the October morning report (R.63,64). Mr. Trocsany testified that about November 5 or 6, 1931, Major Wickliffe, in the presence of himself, Lieutenant Trippe and accused, asked Sergeant Davidson to explain why he checked the October morning report and adding machine figures against the ration return for that month, and that

Sergeant Davidson answered that accused had instructed him to go to the commissary and see if the figures agreed (R.183-185). Sergeant Davidson testified that accused did not tell him to check the morning report against the ration returns, denied making the statement attributed to him by Trocsany and denied that Trocsany was present when Major Wickliffe was questioning him (R.244). Major Wickliffe testified that he did not understand Davidson to say that accused had told him to check against the ration return; that he got the impression from Davidson's statements that he had made this comparison on his own initiative (R.245,246). Major Wickliffe further testified, however, that Trocsany, accused and Lieutenant Trippe were present during practically the whole of his conversation with Davidson (R.246).

The evidence tending to show that accused made the alterations in question being purely circumstantial, the sharp conflict in the testimony as to accused's opportunity and as to his having directed Sergeant Davidson to make the comparison that brought about the discovery of the alterations raises, in the opinion of the Board of Review, more than a reasonable doubt as to accused having made the alterations in question.

The Board is therefore of the view that the evidence is not legally sufficient to support the findings of guilty of Specifications 2 to 21 of Charge III.

10. Of the specifications of which accused was found guilty there remains for consideration only Specification 23, Charge III. In this specification it is charged that accused, on or about November 6, 1931, destroyed certain statements of account and records which he "then knew to be pertinent to an official investigation then in-progress and that said statements and records should be preserved." The statements and records in question were not required by law or regulation to be preserved. The mere destruction of them by accused would not, therefore, constitute the offense alleged, unless he knew at the time that an official investigation, to which they were pertinent, was in progress and that, for this reason, it was his duty not to destroy them. The statements and records would have been evidence of the amount of monies collected from boarders and not accounted for by accused. If, therefore, he knew that an investigation was in progress of a nature likely to involve his detachment fund, including collections from boarders or the mess in general, it would clearly have been his duty not to destroy these statements and records.

In explanation of his admitted placing of the statements and records in the trash can used for the purpose of burning trash, accused testified substantially as follows: Prior to November 1, 1931, the system of keeping

track of meals taken at the mess by boarders had proved unsatisfactory, in that, under it, there occurred frequent discrepancies between the amounts claimed by the mess sergeant to be due from boarders and the amounts actually collected and turned in by the first sergeant. Consequently, in September, 1931, accused told the mess sergeant that he wanted him to start a new system of keeping boarders' accounts. The mess sergeant was about to go away on furlough and for this reason the inauguration of the new system was deferred until November 1, 1931, when it was put into effect (R.207). About November 6, 1931, after satisfying himself that the new book, in which boarders' accounts were entered under the new system, was being properly kept (R.207,208), he asked the mess sergeant for the old records and was given "a bunch of forms 341" and some leaves torn from the old ledger in which the records of boarders had previously been kept under the old system. All these forms accused then deposited in the trash can behind the barracks (R.208). In all this testimony accused was substantially corroborated by the mess sergeant, Staff Sergeant Johnson, except that Johnson did not know of the papers being put in the trash can (R.110,192). In answer to a question concerning "Eleven Q.M.C. Forms 341 for the period June, 1930, to August, 1931", accused testified that he did not destroy them and had no knowledge concerning them (R.208); but, in view of other parts of his testimony, it seems apparent that he was referring to the eleven duplicate copies of Q.M.C. Form No. 341 mentioned in Specification 24, Charge III, of which he was acquitted, and not to the Form 341, mentioned in Specification 23, Charge III, a "bunch" of which he clearly admitted having put in the trash can. Accused further testified that it was his recollection that the trash can had no fire in it but was filled with papers when he put the old records in it and that, at that time, he neither knew nor suspected that his mess was under investigation, or he would not have thrown away the records (R.208).

Private William L. Talkington, who worked in the detachment mess kitchen, testified that about November 7, 1931, he saw accused come out of the mess sergeant's room into the kitchen, with some papers in his hand that looked as if they might be old forms, and then leave the kitchen; that witness followed accused out immediately and saw him putting papers in the fire in the trash can used for burning trash; that accused stood there burning papers for about three or four minutes; and that, when he left, he no longer had any papers in his hand (R.126,127).

It is believed to be immaterial whether accused actually burned the statements and records himself or merely placed them in the trash can, since placing them in a receptacle where they were practically certain to be burned with the trash, would, in the opinion of the Board of Review, amount to destroying them.

As to accused's knowledge concerning the investigation then in progress, it is not in dispute that the alteration in the ration return for October, 1931, was discovered on November 3, 1931 (R.60, 61,68,72,73,96). Accused was informed of the discovery on November 3 or 4, and about November 5 he knew that Major Wickliffe was conducting an investigation to ascertain who had made the alteration (R.205). Also, probably the same day, accused stood for a few minutes at the desk where Major Wickliffe was questioning the Mess Sergeant, Johnson (R.102,103, 108,111,112), and at that time a council book was lying on the desk and probably also a ration return (R.111,112). All these occurrences were before accused disposed of the statements and records in question. Under the circumstances, he must have known that the investigation would probably extend to his mess and the matter of collections from boarders, and that the statements and records in question would become pertinent evidence, and therefore should not be destroyed. The Board of Review is therefore of the opinion that the evidence is legally sufficient to support the finding of guilty of Specification 23, Charge III.

11. Much hearsay and otherwise inadmissible evidence was introduced by both the prosecution and the defense, generally without objection. Most of the inadmissible evidence for the prosecution related to the specifications alleging alterations of ration returns. In view of the conclusion reached by the Board of Review with reference to the findings of guilty of these specifications, it is unnecessary to consider whether or not the objectionable evidence may have influenced the court in reaching these findings. In so far as concerns the other findings of guilty, examination of the entire record fails to indicate that any of the evidence erroneously admitted injuriously affected accused's substantial rights.

12. The Board of Review has had the advantage of careful examination and consideration of an extensive and helpful brief and argument, together with affidavits and copies of records indicating the existence of newly discovered evidence, presented to the Board by civilian counsel for accused, who did not participate in the trial, namely, Hal E. Harlan, Esquire, of Manhattan, Kansas, and George E. Strong, Esquire, of Washington, D. C. The indicated newly discovered evidence would relate only to Specifications 8 to 21, Charge III, alleging alterations of the ration returns. In view of the Board's conclusions with reference to the findings of guilty of these specifications, it would serve no purpose to discuss such indicated evidence here, nor to discuss the brief and argument in relation to these specifications.

With reference to Charge II and its specifications alleging the making of 21 false official certificates, counsel for the accused argue in effect that paragraph 18 a (5), AR 210-50, requires that the monthly certificate

in the council book cover only the distribution of the balance on hand and the mathematical correctness of the entries in the account, and that the regulation does not require a complete statement of the condition of the detachment fund each month. To sustain this admittedly technical argument, counsel cite sub-paragraph (6) of the paragraph cited above as requiring an "all inclusive" certificate only when the fund is turned over by the custodian to his successor. Extensive discussion of this argument is not necessary. Paragraphs 18 a (1) and 18 b of the regulation cited require that "the council book will contain an account of the fund"; that "entries in the council book will be made on the day the transaction takes place, or as soon thereafter as practicable"; that each entry in the council book be "supported by an itemized voucher, properly receipted", and that the vouchers be "preserved for three full years after the payments of the accounts covered by the vouchers." The regulation not only contemplates but requires that each transaction affecting the fund, whether a receipt of money or a disbursement thereof, be entered immediately in the council book and supported by a voucher showing the transaction in detail. This has been the practice since time immemorial. The council book is worthless unless each and every transaction is entered therein and no officer can be permitted to argue successfully that his certificate that a monthly account is correct means anything except that every cent received and every cent disbursed has been recorded in the account. Counsel argue further that in making the false certificate the accused had no intent to deceive and that while the accused's methods were irregular, his acquittal of the charges of embezzlement negatives the theory that he used the funds improperly. We believe this point is fully covered by the discussion in paragraphs 6 and 8 above.

The remainder of the brief argues in effect that the evidence fails to sustain the charges of wilfully destroying the records of the detachment mess and failing to account for money received from boarders. These points are fully covered by our discussion in paragraphs 6 and 10 above and need no further comment.

13. The Army Register contains the following with reference to accused's service:

> "Capt. Q.M.C.N.A. 19 Sept. 17; accepted 22 Sept. 17; vacated 24 Sept. 20—Pvt., corp., sgt. and qm sgt. Tr. M, 14 Cav. and Q.M.C. 21 Feb. 03 to 21 Sept. 17; capt. Q.M.C. 1 July 20; accepted 24 Sept. 20; (Discharged as captain and appointed first lieutenant, Nov. 18, 22; acts June 30, 22 and Sept. 14, 22); 1 lt. (Nov. 18, 22); capt. 20 June 23."

14. The court was legally constituted. No errors injuriously affecting the substantial rights of accused are disclosed by the record, with the possible exception of errors in the admission of certain evidence bearing upon those specifications of which conviction is not, in the opinion of the Board of Review, warranted by the evidence. If any substantial injury resulted to accused from these latter errors, disapproval of the findings of guilty of these specifications, in accordance with this opinion, would cure such injury. 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 of Specifications 2 to 21, both inclusive, of Charge III, but is legally sufficient to support all the other findings of guilty and the sentence and warrants confirmation thereof. A sentence of dismissal is mandatory upon conviction of violation of the 95th Article of War and is authorized upon conviction of violation of the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., JUL 12 1932 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Captain Paul F. Huber (0-8802), Quartermaster Corps (CM 198256), together with the foregoing opinion of the Board of Review, and a brief and argument by counsel for the accused.

2. I concur in the conclusions expressed by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specifications 2 to 21, both inclusive, of Charge III, but is legally sufficient to support all the other findings of guilty and the sentence and warrants confirmation thereof. Accordingly, I recommend that the findings of guilty of Specifications 2 to 21, both inclusive, of Charge III, be disapproved, and that the sentence be confirmed.

3. The record contains testimony of accused's immediate superior at Fort Riley, Kansas, Lieutenant Colonel Max A. Elser, QMC, to the effect that accused was a very industrious officer who did the work practically of three men, was most careful in his observance of regulations, and could always be relied upon to perform efficiently any duties assigned to him. The testimony of some of accused's subordinates was of similar import. Accompanying the record, also, is an application for clemency addressed by accused's counsel to the reviewing authority, to which application are attached copies of numerous commendations by officers under whom accused has served, including several general officers, commenting most favorably upon accused's industry and efficiency in the performance of his duties. It is regrettable that so efficient an officer should be lost to the service. At the same time no matter how satisfactory his past record may have been, maintenance of the high ideals of honor which should govern the conduct of all officers in the Army demands that no officer be retained in the service who is so lacking in appreciation of the ethics of his profession as to permit of his repeatedly making false official certificates with reference to financial matters and to his personal advantage in violation of the 95th Article of War for which a sentence of dismissal is mandatory under the law.

4. Inclosed herewith is a draft of a letter for your signature transmitting the record to the President for his action, together with a form of executive action designed to carry into effect the recommendations hereinabove made should they meet with approval.

Blanton Winship,
Major General,
The Judge Advocate General.

5 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Opin. of Bd. of Rev.
Incl. 3 - Brief and argument.
Incl. 4 - Let. for sig. of Secy. of War.
Incl. 5 - Form of executive action.

10 Received A. G. O JUL 15 1932

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

CM 198262

APR 29 1932

UNITED STATES	)	SEVENTH CORPS AREA
	)	
v.	)	Trial by G.C.M. convened at
	)	The Cavalry School, Fort Riley,
Private AEKIELS MILLER	)	Kansas, March 4, 1932. Dis-
(6794888), Headquarters	)	honorable discharge and confine-
and Service Troop, 9th	)	ment for six (6) months. Dis-
Cavalry.	)	ciplinary Barracks.

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Aekiels Miller, Hqrs & Ser Troop, 9th Cavalry, having taken an oath in a hearing before a board of officers, a competent tribunal, that he would testify truly, did, at Fort Riley, Kansas, on or about January 29, 1932, wilfully, corruptly and contrary to such oath, testify in substance that he was not on the slope in front of the Ninth Cavalry barracks about midnight on the night of January 21-22, 1932, which testimony was a material matter and which he did not then believe to be true.

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

Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence establishes that the accused appeared and testified under oath before a board of officers convened at Fort Riley, Kansas, under the provisions of paragraph 1 c (4) (b), AR 345-415, for the purpose of investigating and reporting upon the circumstances connected with an injury sustained by the accused and of finding as to whether or not the injury was incurred in line of duty, and that his testimony given under oath was knowingly false in the particular alleged in the specification. In view of the conclusions hereinafter expressed, a detailed statement of the evidence is not necessary.

4. No question of common law perjury is involved in this case. The specification, although laid under Article of War 93, charges the kind of perjury sometimes known as "statutory perjury", which is defined in section 125 of the Federal Penal Code of 1910. The specification therefore should have been laid under the 96th Article of War. Section 125 of the Federal Penal Code of 1910 provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years." (Underscoring supplied)

An essential element of the offense denounced is that the person charged must have taken an oath in a case "in which a law of the United States authorizes an oath to be administered". The Board of Review knows of no law of the United States which provides for the board of officers referred to above, generally known as a "line of duty" board, or which authorizes an oath to be administered to witnesses examined by such a board. In fact, Army Regulations do not require that all the testimony received by such board shall be on the oath of the witness. The board in its discretion may receive testimony in the form of certificates

or in the form of affidavits. Line of duty boards and other similar boards created for purposes of military administration are in general appointed pursuant to Army Regulations or to custom of the service, but some of them are authorized or required by Act of Congress. The president and the recorder of all military boards are authorized by Article of War 114 to administer oaths. To some administrative boards, such as those convened pursuant to the provisions of Article of War 105, Congress has expressly given the power "to summon witnesses and examine them upon oath or affirmation". Similar power is expressly given courts of inquiry by Articles of War 100 and 101, to a summary court-martial conducting the inquest required by Article of War 113, and to retiring boards provided for by section 1248, Revised Statutes. A witness before such boards or courts of inquiry who wilfully and contrary to his oath testifies to any material matter which he does not believe to be true is guilty of perjury under the statute quoted above, but a witness so testifying before an administrative board not by law given such powers as those stated above does not testify in a case in which a law of the United States authorizes an oath to be administered. The offense, therefore, is not perjury. However, the giving of false testimony before an administrative board not authorized by a law of the United States to examine witnesses under oath is, depending upon the circumstances, prejudicial to good order and military discipline or conduct of a nature to bring discredit upon the military service, in violation of the 96th Article of War. It is customary to examine under oath military personnel testifying before boards of officers. This procedure is, moreover, recognized and sometimes demanded by Army Regulations. The wisdom of the procedure is apparent.

In the instant case the evidence is not legally sufficient to support a conviction of perjury but is legally sufficient to support so much of the findings of guilty as finds the accused guilty of the lesser included offense of false swearing, in violation of the 96th Article of War.

In reaching the conclusions stated above the Board of Review has considered the opinions of the United States Supreme Court in the case of United States v. Smull, 236 U.S. 405, and similar cases arising under the laws relating to public lands and laws relating to claims against the United States. The questions in each of these cases are distinguished from the question here presented in that the statutes pertinent to those either expressly or impliedly authorize

the issue of regulations requiring evidence to be given under oath and thus gave notice to the public at large that in any case where an oath is required by such regulations, the giving of false testimony in a material matter would be punishable as perjury. Thus, in the Smull case, the court said:

> "Section 125 of the Criminal Code must be read in the light of section 2246 of the Revised Statutes which is explicit:
> 'The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land-Office, in connection with the entry or purchase of any tract of the public lands.'" (Underscoring supplied.)

In all other cases examined by the Board of Review a similar situation exists. No authoritative case has been found which supports the proposition that, where the statute to which a departmental regulation relates does not expressly or by necessary implication authorize the administration of oaths, a person making a false statement under oath as to a material matter may be punished as for perjury.

5. The court was legally constituted. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings that the accused did, at the time and place alleged, make under oath a statement in substance that he was not on the slope in front of the 9th Cavalry barracks about midnight on the night of January 21-22, 1932, which statement he did not then believe to be true, in violation of the 96th Article of War, and legally sufficient to support the sentence.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

REMARKS BY BOARD OF REVIEW: While the statement of accused attached to Ex. B does not recite that it was made under oath, he appeared before the board on the following day and all members testify that at that time he was sworn by the recorder.

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

CM 198340

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M. convened at Fort Crook, Nebraska, March 11, 1932. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Corporal GLEN W. CONYERS (6414781), Headquarters Company, 17th Infantry.	)	

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

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

2. The accused was tried for forgery (2 specifications) in violation of the 93d Article of War (Charge I), the offenses alleged to have been committed at Omaha, Nebraska, on or about July 27 and August 7, 1931, and for obtaining the sum of $30 by false pretenses at Fort Crook, Nebraska, on September 10, 1931, in violation of the 96th Article of War (Charge II). He pleaded guilty, under the specifications of Charge I, by exceptions and substitutions, to unlawfully obtaining property instead of forgery, and not guilty to Charge II and its Specification. He was found guilty of all the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for eleven years, two-thirds of the members present at the time the vote was taken concurring. The reviewing authority approved the sentence, reduced the period of confinement to two years, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. By Specifications 1 and 2, Charge I, there are described offenses which are alleged and are shown by the evidence to have been

committed on or about July 27 and August 7, 1931. The Specification of Charge II describes an offense which is alleged and is shown by the evidence to have been committed on or about September 10, 1931. The record of trial shows that the accused was discharged from the service in December, 1931 (R. 47). After the court reached its findings, evidence as to pay, age and service was received which shows that he was discharged on December 13, 1931, and reenlisted on December 14, 1931 (R. 54). Informal communication by The Judge Advocate General's Office with the Office of The Adjutant General confirms the fact that the accused was discharged on December 13, 1931, from the enlistment under which he was serving at the time of the commission of the several offenses charged. The charges were preferred on January 26th and the case was tried on March 11, 1932, during a later enlistment and subsequent to such separation from the service.

The Manual for Courts-Martial, paragraph 10, states:

> "The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service."

The Board of Review and The Judge Advocate General have held that a court-martial is without jurisdiction to try a person subject to military law for sodomy committed in a prior enlistment terminated by an honorable discharge prior to the preferment of charges and trial. CM 171874, Finnimore; CM 192335, Clark. The Judge Advocate General has expressed opinions to the same effect in cases wherein soldiers were dishonorably discharged, but not held in confinement, prior to trial for desertions committed in enlistments terminated by the discharges (Ops. JAG 250.419, April 6, 1926, October 23, 1926). In the opinion of the Board of Review the court which tried the accused in this case was without jurisdiction to try him for the offenses described in the specifications of Charges I and II. It is therefore unnecessary to discuss or decide the legality of the sentence in this case.

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

[signature], Judge Advocate.

[signature], Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

CM 198354

APR 15 1932

UNITED STATES	SEVENTH CORPS AREA
v.	Trial by G.C.M. convened at Fort Snelling, Minnesota, March 3, 11 and 14, 1932. Confinement for two (2) years. Penitentiary.
General Prisoner ENRICO SANTINI.	

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

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence. Confinement in a penitentiary is authorized by the 42d Article of War for the offense of larceny of which the accused was found guilty under Charge II and the Specification thereunder, such being recognized as an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by sections 82 and 87, Title 18, United States Code.

E. M. McNeil, Judge Advocate.

P. Brennan, Judge Advocate.

_____, Judge Advocate.

War Department, J.A.G.O.,

Approved.

Blanton Winship,
Major General,
The Judge Advocate General.

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

JUN 9 1932

CM 198408

UNITED STATES	)	EIGHTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at Fitzsimons General Hospital, March 25, 1932. Dishonorable discharge (suspended) and confinement for six (6) months. Fitzsimons General Hospital, Denver, Colorado.
Private WADE E. GENTRY (6750517), Quartermaster Corps.	)	

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Wade E. Gentry, Quartermaster Corps, did, at Aurora, Colorado, on or about February 12, 1932, feloniously take, steal and carry away one (1) vase, value about one dollar ($1.00); two (2) napkin rings, value about one dollar and twenty-five cents ($1.25) each; one (1) small rug, value about fifty cents ($0.50); two (2) glass slippers, value about fifty cents ($0.50) each; one (1) cake dish, value about one dollar ($1.00); one (1) dinner bell, value about one dollar ($1.00); one (1) ash tray, value about one dollar ($1.00) and

one (1) incense burner, value about two dollars ($2.00); total value of about eight dollars and twenty-five cents ($8.25), the property of Mrs. Mary R. Leeke.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge, and designated Fitzsimons General Hospital, Denver, Colorado, as the place of confinement. The sentence was published in General Court-Martial Order No. 124, Headquarters Eighth Corps Area, April 5, 1932.

3. The evidence shows that in February, 1932, Mrs. Mary R. Leeke rented a house in Aurora, Colorado, to the accused, leaving therein some of her furnishings, consisting of a rug on the bedroom floor, and other articles, including those set out in the specification, valued at about $8.50. No agreement was made as to what articles could or could not be used by accused. According to the testimony of the owner, "It was all there" and the use of no article was prohibited (R. 5,6). While accused was occupying the premises the owner had knowledge that he had moved certain articles from the basement, where they were left by her, to other parts of the house and that they were being used by him, but she made no objection. Accused left the premises on or about February 12, 1932, and soon thereafter the loss of certain articles was discovered by the owner, whereupon a search was made and all the articles set out in the specification were found in the accused's wall locker in the post, and identified by the owner as her property and missing from the house rented to accused (R. 5-7,11,14).

4. The evidence clearly discloses that some, at least, of the articles, such as the rug, were "hired" by the accused at the time he rented the house; and that other articles, including some of those named in the specification, were used by the accused with the knowledge and without objection by, and with the implied consent of, the owner. There is no evidence in the record that any of the articles were used without the knowledge and consent of the owner. The evidence indicates that the articles in question came lawfully into the hands of the accused. There is no evidence to establish either an actual or a constructive

trespass on the part of the accused in obtaining the property. It accordingly follows, there being no trespass proved, that the evidence is legally insufficient to support the findings of guilty of larceny (par. 149 g, M.C.M., 1928; CM 193135, Cavanaugh; CM 190709, Ogden; CM 183793, Snyder).

The removing of the property under the circumstances shown by the evidence in this case constituted embezzlement, which is not a lesser included offense of larceny, the offense charged (CM 197396, Christopher).

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

E. C. McNeil, Judge Advocate.

Jno. M. Connor, Judge Advocate.

R. H. Bennett, Judge Advocate.

To The Judge Advocate General.

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

CM 198485

MAY 6 - 1932

UNITED STATES	)	THIRD CORPS AREA
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, March 2 and 10, 1932. Dishonorable discharge and confinement for two and one-half (2½) years. Disciplinary Barracks.
Private JOSEPH H. WOOD (6812358), Battery F, 6th Field Artillery.	)	

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

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

2. The evidence introduced by the prosecution shows that a 45 caliber automatic pistol was issued to the accused at about 11:00 o'clock a.m., on July 11, 1931, for use on guard duty, that he mounted guard at about 11:30 a.m., and that at about 3:00 o'clock p.m., on the same day, he left the guardhouse without permission, taking the pistol with him, did not return, and remained absent in desertion until he was apprehended about January 3, 1932, and returned to military control the next day.

The only question of law presented by the record is whether the offense proven constitutes embezzlement or larceny. While the testimony adduced at the investigation appears to be such as to have warranted a charge of larceny on the theory that accused had custody rather than possession of the pistol (CM 168350, Patterson; CM 168689, Roovers), the testimony presented at the trial of the case clearly sustains the charge and conviction of embezzlement as that offense is defined by the United States Supreme Court in the cases of Moore v. United States, 160 U.S. 268, 269-270, and Grin v. Shine, 187 U.S. 181, 195-196. In

the latter case the court said:

> "These cases are strictly in line with that of Moore vs. United States, 160 U.S. 268, in which we held that 'embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.'"

3. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington

CM 198649

JUN 7 1932

UNITED STATES	)	HAWAIIAN DIVISION
v.	)	Trial by G.C.M., convened at Schofield Barracks, T. H., April 11, 1932. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private HERBERT WAGGONER (6655623), Battery B, 13th Field Artillery.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Herbert Waggoner, Battery B, 13th Field Artillery, Schofield Barracks, T. H., did, at Honolulu, T. H., on or about March 20, 1932, violate section 4187, Revised Laws of Hawaii, 1925, by maliciously converting to his own use one automobile, without the knowledge or consent of the person entitled to the possession thereof: to wit, S. Yamagata, Yamashiro Hotel, Honolulu, T. H.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence shows that on March 19, 1932, Mr. S. Yamagata owned a 1927 model blue Chevrolet roadster automobile, with territorial license tag 59-189, which automobile was valued at $220.00 (R. 8); that Mr. Yamagata parked this automobile on the streets of Honolulu, T. H., at about 8:30 o'clock p.m., on March 19, 1932; and that, upon his return at about 9:30 o'clock p.m., on the same date, the automobile was gone, whereupon he telephoned the police station. He did not loan his automobile to the accused, nor did he give him permission to use it (R. 9). The owner received his car from the police the next day (R. 9, 10). The evidence also shows that officers Benton and Antone of the Honolulu Police Department, at about 9:30 o'clock p.m., March 19, 1932, received a call via radio to be on the lookout for a Chevrolet roadster bearing license No. 59-189 (R. 11); that at about 1:00 o'clock a.m., March 20, 1932, these two policemen saw "a Chevrolet Roadster answering the description of the car reported stolen"; that they overtook the car, and arrested the accused who was driving it; and that the automobile which they recovered was a Chevrolet roadster with a 1931 license plate bearing the number 73-696 (R. 11, 21).

4. There is no evidence in the record to show that the automobile which was taken from Yamagata's constructive possession was the automobile accused was driving and in which he was arrested. Neither does the record contain any evidence to show that the automobile accused was driving and in which he was arrested was the same automobile that was returned to Yamagata the next day. There is nothing in the record inconsistent with the theory that the accused had borrowed or rented the automobile he was driving and in which he was arrested.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In the office of The Judge Advocate General
Washington

JUN 2 1932

CM 198657

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Presidio of San Francisco,
Privates STERLING A. GREEN	)	California, April 28, 1932.
(6543054), ANTHONY KLEBING	)	Dishonorable discharge and
(6697213) and ARNOLD W.	)	confinement for three (3)
BEATTY (6540048), all of	)	years in the case of each ac-
Company G, 30th Infantry.	)	cused. Disciplinary Barracks.

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

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

2. The three accused were arraigned and tried on a charge and specification laid under the 96th Article of War alleging the wrongful conversion of an automobile, the offense being alleged to have been committed by the three accused acting jointly and in pursuance of a common intent. In addition each of the accused was arraigned and tried upon separate charges alleging as to each accused that he deserted the service on or about March 8, 1932, and remained absent in desertion until apprehended at Santa Barbara, California, March 9, 1932. Each of the accused specifically agreed that trial on the separate charges and specifications alleging separate acts of desertion should be had coincidentally with the trial for the joint offense. As to each of the accused the findings of guilty of desertion are sustained by the evidence.

The charge and specification pertaining to the alleged wrongful conversion of the automobile are as follows:

CHARGE: Violation of the 96th Article of War.

REC'D

JUN 22 1932

Specification: In that Private Arnold W. Beatty, Company G, 30th Infantry, Private Anthony Klebing, Company G, 30th Infantry, and Private Sterling A. Green, Company G, 30th Infantry, acting jointly and in pursuance of a common intent, did, at Presidio of San Francisco, California, on or about March 8, 1932, without the consent of the owners thereof, and in the absence of said owners, and with intent to deprive the owners thereof of the possession of said vehicle, unlawfully take and drive away one Durant Roadster automobile, of the value of about $450.00, the property of Leon Melicio and Gonzales Cendido.

Each of the accused pleaded to the specification "Guilty, except the words 'and with intent to deprive the owners thereof of the possession of said vehicle'", and to the charge "Guilty", and each was found of the specification "Guilty, except the words 'Leon Malicio and Gonzales Cendido', substituting therefor the words, 'Leon Gonzales, Malacio Gonzales and Candido Gonzales', of the excepted words not guilty, of the substituted words guilty", and of the charge "Guilty". Accused Klebing and Beatty were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for four years, and accused Green was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentences but remitted one year of the confinement imposed against accused Klebing and Beatty and two years of the confinement imposed against accused Green, designated the Pacific Branch, United States Disciplinary Barracks, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The only substantial question presented by the record is whether or not the court, by its findings in respect to the charge of wrongful conversion of the automobile, in legal effect acquitted the three accused of the offense charged. It is the opinion of the Board of Review that the effect of the finding of the court as to that offense is to acquit the three accused of the offense charged against them and to find them guilty of a totally unrelated offense and that so much of the sentence as is based on such finding is invalid (CM 110910, Brooks).

4. The specification alleged wrongful conversion of a Durant roadster belonging to Leon Melicio and Gonzales Cendido. The evidence adduced at the trial established, and the court found, that the accused wrongfully converted a Durant roadster belonging to Leon Gonzales, Malacio Gonzales and Candido Gonzales. There is no evidence in the record that the two men named in the specification do not exist. There is no similarity in the names of the two alleged owners as stated in the specification and the names of the three owners as proved at the trial and found by the court. It is too well settled to require discussion that the wrongful conversion of the property of one man is a separate and distinct offense from the wrongful conversion of the property of another man. Neither offense is included in the other. Where a court by exceptions and substitutions finds an accused not guilty of the offense charged but guilty of another offense, the legal effect of the action of the court is an acquittal unless all the elements of the offense found were necessarily included in the offense charged. We think the rule applicable to the instant case is adequately stated in the opinion of Mr. Justice Story in the case of United States v. Howard, 26 Fed. Cases 388, as follows:

> "In regard to cases of misnomer, it will be found, that, in all the cases where the variance has been held fatal, it was a misnomer of a party whose existence was essential to the offence charged in the indictment; as, for example, in cases of theft, where the property is charged as that of A. B., and it turns out, in proof, to be of A. C.; or in cases of robbery, where the person robbed is alleged to be A. B., and it turns out on proof to be C. B. See 2 Russ. Crimes, 707, 714, 715."

See also United States v. Denicke, 35 Fed. Rep. 407.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Charge and Specification alleging wrongful conversion of an automobile in violation of the 96th Article of War, and legally sufficient to support the conviction of each accused of desertion and so much of

the sentence as provides in the case of each of the accused for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years and six months.

E. P. McCrea, Judge Advocate.

Rossmann, Judge Advocate.

Mark E. Guerin, Judge Advocate.

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

JUN 20 1932

CM 198672

UNITED STATES v. Privates JAMES B. SUGGS (6371990), WILLIAM O. ALVIS (6235101), and JAMES A. FURCHE (6244979), all of Headquarters and Service Troop, 8th Engineers.	)))))))))	FIRST CAVALRY DIVISION Trial by G.C.M., convened at Fort McIntosh, Texas, April 25, 1932. Suggs acquitted. As to Alvis and Furche: Dishonorable discharge and confinement for six (6) months. Fort McIntosh, Texas.

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

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

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

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

Specification: In that Privates James B. Suggs, William O. Alvis and James A. Furche, all of Headquarters and Service Troop, 8th Engineers, did, at Fort McIntosh, Texas, on or about the 26th day of March, 1932, acting jointly and in pursuance of a common intent, feloniously take, steal and carry away one Boot, laced, right, size 8EE, value about $4.07, one Boot, laced, right, size 8½EE, value about $4.07, all of a total value of about $8.14, property of the United States furnished and intended for the military service thereof.

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

Specification: In that Privates James B. Suggs, William O. Alvis and James A. Furche, all of Headquarters and Service Troop, 8th Engineers, did, at Fort

McIntosh, Texas, on or about March 26, 1932, acting jointly and in pursuance of a common intent, attempt to unlawfully sell one Boot, laced, right, size 8EE, value about $4.07, one Boot, laced, right, size 8½EE, value about $4.07, one Shirt, woolen, OD, value about $2.42, one Shirt, cotton, OD, value about $1.38, one pair Shoes, garrison, value about $4.24, all of a total value of about $16.18, property of the United States issued for use in the military service thereof.

Each accused pleaded not guilty; accused Suggs was acquitted; accused Alvis and Furche were each found guilty of all charges and specifications. No evidence of previous convictions was introduced. Alvis and Furche were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for six months. The reviewing authority approved the sentences, designated Fort McIntosh, Texas, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The competent evidence, in brief, is substantially as follows: On Saturday evening, March 26, 1932, the three accused were in a saloon in Nuevo Laredo, Mexico, drinking freely of mescal and beer. They decided that they would stay all night, but as they had no more money they got together and planned to come back to the American side and get some articles to sell (R. 34,48). A Private Terry, who is not implicated in this case, was in the saloon and told accused Furche to get his O.D. woolen shirt from his locker (R. 30-31). The three accused took a taxi and came back across the river (R. 34,48; Ex. I) to Fort McIntosh, where the taxi waited for them behind the barracks.

Accused Suggs went to the cook shack in the rear of the barracks, where he slept, got a pair of civilian shoes out of his wall locker, returned first to the taxi and got in the front seat. He was in the shack about five minutes, did not go into the barracks, and was in the taxi about two minutes before accused Alvis returned, followed shortly by accused Furche. Alvis had a pair of shoes in

his hand and Furche had a bundle. Both got in the back seat (R. 34,35). Accused Alvis and Furche entered the barracks about the same time (R. 51). Alvis, on entering the barracks, talked to Private Beeson, then went to his wall locker and took out a pair of shoes that had been given him by Corporal Alfano, came back to Beeson's bunk again, then went out to the taxi by the back steps on the outside of the barracks. When he entered the taxi the driver and accused Suggs were sitting on the front seat (R. 48). Private Beeson testified that accused Alvis came to his bunk in barracks between 10:00 and 10:30 o'clock p.m. on the night of March 26th, while he, Beeson, was in bed, sat down on the side of the bunk (R. 53), then went to his own bunk, came back and sat down on Beeson's bunk again (R. 54). He was carrying a pair of shoes in his hand (R. 22). After that Alvis went directly out the side door, but did not go to the front end of the barracks nor beyond the door from which he left (R. 54). Private Gage's bunk is not by the rear door of the barracks, but "down at the west", three or four bunks beyond the door (R. 51). Accused Furche went into the barracks with Alvis but came out behind him (R. 51). He was "pretty well drunk" when he came across the river to the barracks (R. 57) but he admitted that he found Terry's key and got his shirt out of his locker (Ex. F).

After all the accused had entered the taxi, it drove off. At the bridge in Nuevo Laredo it was stopped by a Mexican customs officer who inspected the car and told accused to get out (R. 35). The officer took the pair of shoes that Suggs had in the front seat. Another officer opened the back door and pulled out a shirt, a pair of boots and a pair of shoes. The shirt was over the boots (R. 36). Suggs had never seen the boots until they were taken off the floor of the car on the right hand side where accused Furche was sitting (R. 40). Alvis did not know who had the boots. He first saw them at the bridge. He sat on the left on the back seat (R. 49). Furche was with him. The boots were taken from the back seat (R. 50). Furche admitted that he had Terry's shirt with him in the car. His bunk is at the other end of the barracks from Alvis' bunk (Ex. F).

It was stipulated that if Francisco Cardenas, Chief of Customs, Nuevo Laredo, Mexico, were present he would testify that he knew the accused by sight only, and that he remembered taking from them

on March 26, 1932, a pair of boots, a pair of shoes, and some shirts. The articles were taken because the accused would not pay duty on them. The accused were then crossing the bridge in an automobile between 8:00 and 10:00 o'clock p.m. Senor Horcasitas gave permission to some officer to take the articles back to Fort McIntosh (R. 21).

First Lieutenant James H. Stratton, of Fort McIntosh, identified two boots, each for the right foot, as having been obtained by him from the Mexican customs authorities in Nuevo Laredo on Monday morning in connection with the accused, and the two boots were received in evidence and marked respectively Exhibits C and D (R. 11,18).

The taxi driver also testified that when the three accused reached the Mexican side of the bridge in the taxi the customs officer took from them two pairs of shoes and two boots. One pair of shoes and the boots were wrapped in cloth (Ex. I).

Private Gage, stationed at Fort McIntosh, found missing from behind his bed on Sunday morning (March 27th) two boots, each the right boot of a pair, one size 8½EE and the other size 8EE. He had last seen the boots between 7:30 and 8:00 o'clock on the Saturday evening before. Neither pair had ever been worn. He was handed two boots (presumably those received earlier in evidence and marked Exhibits C and D), and testified that they were similar to those issued to him by the Quartermaster in that the one was size 8½EE and the other size 8EE. Otherwise he could not identify them as his boots (R. 23-25). When accused Alvis learned the next day that a pair of boots had been lost by Private Gage (R. 49) he went to Gage and told him that he thought the boots could be found at the Immigration office (R. 24). Alvis "figured" that these were Gage's boots and did not want Gage to think that he had taken them (R. 50).

Accused Suggs and Alvis both testified (R. 33,47); accused Furche remained silent.

4. The evidence fails to support the findings of guilty under Charge II and its Specification, since, while the intent to sell was in the minds of the accused, there is no proof of an overt act

by them to carry out such intent (p. 190, M.C.M.). The acts proven, in the opinion of the Board, amounted to nothing more than mere preparation to commit the offense charged (CM 194441, Mauro).

The evidence also fails to support the findings of guilty under Charge I and its Specification as to accused Alvis. There is no proof that the boots were taken by Alvis, nor is there proof of a conspiracy or agreement to steal property from the barracks and therefore Alvis cannot be held accountable for Furche's act.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty under Charge II and its Specification as to each of the accused, legally insufficient to support the findings of guilty under Charge I and its Specification and the sentence as to accused Alvis only; but legally sufficient to support the sentence as to accused Furche.

E. C. McCleary, Judge Advocate.

H. P. Rosenfeld, Judge Advocate.

Theodore Hall, Judge Advocate.

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

CM 198724 AUG 12 1932

UNITED STATES	)	EIGHTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at Fitzsimons General Hospital, Denver, Colorado, March 8-10, 1932. Dismissal and confinement for six (6) years.
	)	
First Lieutenant FRANCIS J. CLARK (0-15533), Infantry.	)	

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

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

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

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

Specification: In that First Lieutenant Francis J. Clark, (#0-15533), Infantry, 2d Division, attached to 1st Infantry, United States Army, did, at Fitzsimons General Hospital, Denver, Colorado, on or about November 2, 1931, with intent to commit a felony, viz: rape, commit an assault upon Second Lieutenant Lillian M. Munn, Army Nurse Corps, by wilfully and feloniously seizing the Second Lieutenant Lillian M. Munn, Army Nurse Corps, throwing her on a bed, pulling her clothes up, and holding her under his body.

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

Specification: In that First Lieutenant Francis J. Clark, (#0-15533), Infantry, 2d Division, attached to 1st Infantry, United States Army, was, at Fitzsimons General Hospital, Denver, Colorado, on or about November 2, 1931, drunk and disorderly.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced "to be dismissed from the service, and forfeit all pay and allowances to be and to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of six years". The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence introduced by both the prosecution and the defense, summarized as briefly as possible for the purposes of this review, is substantially as follows:

Accused was admitted as a patient to Fitzsimons General Hospital, Denver, Colorado, November 28, 1930, and was still a patient there on November 2, 1931, the date of the alleged offenses (R. 440). His condition and conduct on November 2, 1931, and during the several days prior thereto, are shown principally by the evidence for the defense. He commenced to drink on Wednesday, October 28, 1931, after breaking down at the train upon the departure of his sister and her little girl, and at that time drank "quite a bit". On the following day, about 11:00 o'clock in the morning, he went to the home of his fiancee, Rubye Fraser, and had a drink, and kept drinking there until she brought him to the hospital about 3:00 o'clock. On Saturday he went again to her house. He had been drinking when he got there, and then ordered "half a gallon" to be sent to the house and drank all that day. His temperature was then 102. His fiancee brought him back to the hospital that night (R. 289-292). On the afternoon of Monday, November 2, 1931, he went to the Einillig home, adjacent to the post, where he met Mrs. Cecilia Dudley, whom he had known about a year, and told her that he was going to town and had stopped to get a drink. His face was then flushed and excited (R. 233).

He had had a gallon of alcohol left at the house a few days before from which he filled a quart medicine bottle about half or two-thirds full, filling it up with water. He had at least three drinks before Mrs. Dudley left (R. 234). About 4:00 or 4:30 o'clock of that afternoon accused went to the Aurora Garage, at Aurora, a small town in the vicinity of the hospital, to hire an automobile. The proprietor told him he was too drunk to drive the car and Eddie Ralph, an employee, offered to drive him. Ralph says that "He acted funny, did not seem to be altogether sane, he walked straight one moment, and would stagger for a moment, * * *". Accused had liquor with him in a medicine bottle of "about a pint and a half". Later Ralph sampled it, taking three drinks, and thought it was alcohol and ether. It made him so sick that he went to bed that night at 9:30, although he had intended to work. Accused told him that he had "an appointment with Rubye", but did not seem to know her address. Ralph drove him around for half or three-quarters of an hour in a Model A Ford coach and then came back to the garage. Accused had no drinks while driving but had two in the garage before starting. On returning, accused went to the Nash Sales Company next door (R. 239-243), where he talked to one of the partners about the purchase of an automobile and then about renting one, offering $50 for a car and a driver. Mr. McAfee, to whom he talked, thought him drunk because he was "irrational" and his breath smelled of whiskey. Accused was there not over five or ten minutes (R. 258-261). Ralph then drove him around looking for a house where accused said he had some liquor. They went into a house where there was an elderly woman, who said she knew nothing about the liquor. Accused ransacked the house two or three times and then threatened to break open a trunk and get the liquor. The lady finally gave him a coca-cola bottle of "the same stuff" that they had been drinking and he left after half an hour. Then accused missed his hat and they went back to the house to get it. Accused had a drink coming down the highway. They drove back to the garage and he drank some of his first bottle of liquor that Ralph had hidden in the paint shop when accused went over to the Nash Sales Company. The bottle was then about half full. Accused became affectionate and embraced Ralph, who dragged accused from the front seat and put him in the back. They drove off again. Accused said he was sick. Ralph stopped opposite a vacant lot thinking that would be a good place to let him vomit if he wanted to. Accused fell when he got out,

got up and asked for his hat; he insisted that he had to have his hat - "could not get sick without it". Ralph gave him his hat. Accused then made "three or four running jumps into the weeds". Ralph sat in the car and smoked a cigarette. After about five minutes he looked around and accused was gone. He looked for him for about half an hour, turning the car around so that the headlights were directed into the weeds, but could not find him anywhere. Ralph then came back to the garage and found accused sitting there. He asked accused how he got there. Accused asked for his hat. Ralph told him he had put it on his head. Accused said, "I paid $12 for that hat, I must have it". Accused went to the telephone to get a number and was talking to his party, a woman by the name of Rubye, who was evidently asking where he was. He replied that he was in Aurora, "just Aurora that is all I know". Accused then seemed to be very much intoxicated and could hardly hang up the receiver. Ralph took it out of his hands and told the party just where he was. Accused said something about a barber shop and about a policeman arresting him, but Ralph could not very well understand what he was talking about. He wrote a check to Ralph to cover his fee, taking about five mintues to do it, and the next day when Ralph presented the check at the First National Bank for payment it was passed all around the bank before they could identify accused's signature (the check is in evidence as Exhibit 3). While driving accused called Ralph a "brigadier general". Accused was "talking foolishly" and seemed to be very much intoxicated. Ralph stated that the "party" that accused called up came out for him later but that he did not see her and that accused left about 9:00 o'clock. He thought accused had had about eight or nine big drinks that afternoon while with him. Accused drank over half of his sixteen-ounce bottle and had one drink out of the coca-cola bottle (R. 244-250).

Mr. T. F. Gilligan, President of the First National Bank of Aurora, Colorado, had known accused, a depositor at his bank, about six months. On the afternoon of November 2, 1931, he came out of his bank and happened to see a car containing accused and Eddie Ralph. He walked over to the car. Accused was sitting on the right hand of the driver. Witness opened the car door just as accused started to get out. The "odor was terrific" and witness said, "Who has been drinking here?" Accused was "very, very drunk". He got out of the car and started up the street, saying that he was

going to the drug store. Witness told him there was one across the street, and then told Ralph not to let accused drive the car but to try and get him back to the hospital and put him in charge of the nurse on the ward. The smell in the car was "like ether, or else moonshine topped off with ether" (R. 263-265).

John J. Robertson, Jr., was working in his father's garage at 7001 East Colfax Avenue on the afternoon of November 2, 1931, when he saw accused coming in one of their driveways "sometime between 7 and 8 in the evening". Accused had on a civilian suit, and overcoat, and was bareheaded. Witness saw him stop and talk to one of the customers but was busy and did not notice him again until he collided with him as accused came into the station. Witness thought it was "another hold up" and started to reach for his gun, when he smelled what he "considered was liquor and decided that the man was drunk". He put accused into a rocking chair and the latter said, "You may not know it but you are going to take me for a ride", to which witness replied, "You may not know it, but you are as crazy as you look". Accused's face was more or less distorted, "his eyes bulging and his words foolish". He had the appearance of a man so drunk that he did not know what he was doing. Witness left him in the chair and went outside to take care of his trade. He next noticed accused trying to enter one of the waiting cars in which a lady and two children were seated. Accused said he wanted to use the car to go and see his girl. He stepped away from the car when witness told him to, but again approached the car, had gotten the door partly open and was about to step into it, when witness took hold of his arm and told him he would have to get away from the car since he was frightening the woman and the two children. Witness further told him that if he did not behave and go along about his business he (witness) would call the police. Accused told him to go ahead and call the police, which witness did by telephone, stating there was a drunken man on his place and asking that an officer be sent to take care of him. Accused left the station, crossed the street and went into a barber shop. He walked rather steadily for a man who had so conducted himself. Officers Doty and Hollendrake came into the station and then went to the barber shop (R. 266-271).

Joseph A. Hollendrake, a police officer of Denver, received a call to come to the filling station at Colfax and Olive Street

about 7:15 on the night of November 2, 1931. Upon arriving there with officer Doty, they were directed by Mr. Robertson to the barber shop across the street where they found accused in a chair for a hair cut. Witness sat there for a few moments while the barber tried to cut accused's hair, but accused saw the two policemen and kept moving his head. The barber "would try to work a while, and then would quit a while". Witness and officer Doty took accused in the police car and drove across the street to the filling station. Accused was inquiring about his hat, and "seemed to think he had a hat around there some place". He thought his hat ought to be in the barber shop, and after he got into the car he seemed to think it was there. He asked for his hat possibly six times. Robertson came up to the car and said "that is the fellow". Accused started to get out and threatened Robertson (R. 275-278). Robertson told him he "would knock hell out of him with this wheel wrench". Accused responded, "Who, me? Why?" Robertson told him that he had insisted on entering a car in which there were a lady and two children. Accused said, "I did? What kind of a car was it?" Robertson said, "You are so drunk you would not know, but if it is of any interest to you it was a Hudson", to which accused replied, "Are you sure it was not a Ford?" Accused then started crying (R. 272), broke down, and told a pitiful story about being in the hospital for a number of months, and said that they did not know what he had gone through there in the past five months (R. 272, 278). Robertson told the officers he did not care what they did with accused so long as he did not come back to his place, and that he did not care to file a complaint against him. Thereupon accused "bristled up" and said, "I am going to see my girl". Officer Doty told him he was in no condition to see his girl and that he could take his choice of either going to jail or going to Fitzsimons and going to bed. Accused replied, "In that case I will go to Fitzsimons". He seemed momentarily to have recovered from his "stupor" and offered some sort of an apology to Mr. Robertson. The officers left with him (R. 272-273, 278). They drove him out to the Denver County line and released him about two or three blocks from the business portion of Aurora about 7:40 P.M. They watched him until he had gone probably a block and a half. "He was in a drunken condition." He would stagger and then "walk as straight as a string for a ways" (R. 278-279).

Paul B. Doty, a police officer, testified in corroboration of officer Hollendrake (R. 283-288). As to the condition of accused

his testimony is substantially as follows: Accused "looked like a hysterical man, his eyes were not right, he seemed to be a little nervous at that time and flighty". In witness' opinion, accused "was partly intoxicated", but he did not act like the ordinary intoxicated man (R. 284). He walked "with a little weave in his walk, but he would not hardly stagger"; at times he talked incoherently; his eyes "were kind of stary, they did not look normal". Witness thought accused "was doped". His breath smelled "like ether or some kind of dope". He had intervals of being rational, and then irrational, from three to five minutes apart (R. 285-288).

Mrs. Rubye Fraser testified that accused called her about 7:30 P.M., November 2, 1931, by telephone and asked her to come after him. She understood he was in Aurora but could not understand where, so she asked him to call someone to the telephone and the man who came said accused was at the Aurora Garage (R. 292-299). She saw him walking up and down in front of the garage. He was dressed in civilian clothes but did not have his hat on. He was "quite intoxicated". He wanted her to drive him to "Daniels and Fishers" to pick up an extra pair of trousers and did not seem to realize it was then about 7:30 and that the store had closed at 5:30. She suggested that he had better let her take him out to the hospital and he agreed, if she would take him to the Einillig house to get one more drink. She did not want to argue with him and drove over to the house where Mrs. Dudley met them at the door (R. 294).

Mrs. Dudley states that accused and Mrs. Fraser arrived about 8:30 that night. Accused was "very much intoxicated" and "wanted some more to drink". She brought out his jug of pure alcohol and he filled the bottle that he had had there in the afternoon, putting "some little water in it because the alcohol was real strong". He mixed one drink each for Mrs. Dudley and Mrs. Fraser. Accused drank all the time he was there and he remained until 10:30 or a quarter to eleven. "He had a drink in his hand all of the time." Mrs. Fraser says that he filled the bottle three times and drank an "awful lot". "He would act silly." He talked about his "funny hair cut". "After a while he slumped down in his chair", and would not talk at all. He spilled liquor "all over everything and made

a general mess of things". Mrs. Fraser finally tried to take the drink away from him and he threatened to drink a bottle of ketchup that was on the table and did drink from it, spilling it all over the place. Mrs. Fraser tried to get him started home at 9:30 and he "kept wanting one more drink". By that time "he had a very wild look, * * * and his eyes did not look like those of an ordinary drunken man". "You could understand his words, his ideas were not always so good." Mrs. Fraser took him away in her car shortly after 10:30. He fell down the steps as he was leaving. He was "dead drunk" when he left. He staggered and stumbled and could not walk straight, and she had to hold his arm and assist him into the car. After the car was proceeding toward the hospital, he asked Mrs. Fraser to "wait a minute", since he wanted to get his hat. She told him she had looked for his hat at Mrs. Dudley's but had been told that it was not there. Then he "slumped down in the seat" and went to sleep, and slept all the rest of the way up to the hospital. She made him sit up as they went through the gate because she was afraid of the sentry. He did not want to go up to his room. She argued with him. He started out of the car and stumbled, so she assisted him up the steps to his room on the second floor where she left him. As they entered the hospital through the back door she noticed an orderly there who got up when he saw them. Mrs. Fraser had never seen accused look as he did when she took him to the hospital that night. She thought him very drunk and had never seen him in that state before (R. 235-237, 294-298).

Private Harry N. Stuart, a witness for the prosecution, testified that he was an orderly at Ward E-2, Fitzsimons General Hospital, on the night of November 2, 1931 (R. 101-102). He was sitting at the kitchen table when he saw accused and Mrs. Fraser come in together. He thought accused had his overcoat on and that they walked in separately (R. 120). Later, while witness was asleep on the davenport in the solarium, he was awakened about 10:00 o'clock to find accused bending over him with his arms around behind his (witness') neck. Accused dragged him off the davenport into the middle of the solarium, saying that he had some women and liquor outside, and wanted witness to come out and join him. Witness put his shoes on intending to make accused go upstairs, but accused had disappeared. He saw accused again that night a little after 11:00 o'clock when he asked witness what kind of a nurse they had on the

ward. He told accused "she was a blonde and was all right". Accused then started toward her office although witness tried to stop him (R. 102-103).

Miss Lillian M. Munn, Second Lieutenant, Army Nurse Corps, stationed at Fitzsimons General Hospital, the complaining witness for the prosecution, testified that on the night of November 2, 1931, she was night nurse on Ward E-2 at that hospital, having gone on duty at 7:00 P.M., relieving Miss Ebert, from whom she then received the report of the day and the keys. Thereupon, she took the temperatures of the patients on the first floor and poured the medicines. About 8:30 she gave a "hypo" and then made dressings for two patients, Mr. Crook and Mr. Smithson. About 10:30 P.M. she had her "midnight supper" at the nurses' mess and returned to her ward about a quarter to eleven. She then sterilized some instruments and wrote out the evening report at the desk in the nurse's office. While there she heard someone walking outside of the dressing room and went to the window and looked out. She saw a man. A few minutes later accused entered her office, the door of which had been closed, and said, "Do you want me?" She replied, "Yes. Go upstairs to bed". He had no business being up at that time of the night. He said, "You are a blonde, aren't you?" to which she replied, "Yes, go on upstairs to bed". He then said, "I admired you for a long time but you did not know it". Thereupon, as she was standing by the door to the dressing room, he "grabbed" her with his arms around her and started to kiss her. She tried to push him off and slapped him. Before she knew it he had thrown her on the bed in the dressing room. From his position on top of her he pulled up her dress, took her hands, put them over her head and held them down under the bar at the head of the bed. His trousers were open and his penis was out. She was at first so frightened that she could not scream, and then she thought of her patients that were seriously ill in the ward and did not want to make a disturbance. She thought that if she told him what he was trying to do he would let her alone, but he did not, and after that his face was close to her's and she could not have screamed. When she was talking to him he put his tongue into her mouth and she bit it (R. 46-52). Accused told her to love him. She finally "whirled" herself away from under him and started to run, but he grabbed her, threw his coat over her, tried to throw her back on the bed but missed it, and she went down on the floor.

He "was right on top" of her again and had her clothes up. His breeches were opened and his penis was out. She "finally wormed out from under him" and ran towards the nurse's office, opened the door, ran down the corridor and opened another door. The night corps man, Private Stuart, was out there and she cried, "Save me". She turned around after she got there and accused was right behind her. She then went into the kitchen, sat down in a chair by the table and cried. She did not know how long she sat there until she "pulled herself together" (R. 53-54). Private Stuart in the meantime had taken accused upstairs with him. Her uniform was "all mussed" and the buttons pulled loose. There was a blood spot on the left shoulder. One shoe was off. She changed her uniform, laid the old uniform on a chair by the bed in the dressing room, and combed her hair which was down. Then she asked the corps man to take her over to F-4, which was the nearest ward to her, since she was afraid and "did not want to stay on the ward". He took her as far as the outside door of F-4 and she went into the nurse's office. It was then around 11:30. She could not tell the time definitely since her watch was broken during the struggle with accused (R. 55-56). About midnight she phoned the "medical emergency officer of the day" (R. 57, 82, 83). She told Private Stuart to come back to F-4 if anyone wanted her, and about 1:00 o'clock she was summoned back to give a "hypo" to Mr. Smithson who was seriously ill. Miss Vanderwood, a nurse from F-4, went back with her. When they went into the nurse's office Private Stuart was making up the bed in the dressing room, the only bed there at that time. She gave the hypodermic to Mr. Smithson, and returned to F-4 (R. 56-57, 85). Again that night she was called and told that accused wanted her at E-2, but instead of going, she called the officer of the day, Captain Lowry. He came later and she met him outside the ward. Over objection of the defense, she was permitted to testify that she told Captain Lowry that "this patient (accused) was noisy and disturbing patients most of the night in the ward". She did not tell Captain Lowry "about any of the episodes that had gone on before". Captain Lowry told her that he understood that she had had a fight with a patient on the ward and that he wanted to see this patient. He did see accused. She did not tell Captain Lowry of this affair because she wanted to wait and tell the chief nurse in the morning; she was "very nervous and upset" and Captain Lowry was "not nice" to

her (R. 56-58). He went up to accused and also talked to Mr. Smith. Then he assured her that she would be safe and told her that if accused gave any more trouble to call the guards and they would take him to E-1. She went back to Ward F-4 with Miss Vanderwood and remained there until about 6:30 in the morning. Then she went to Ward E-2, poured out a few medicines, fixed a "hypo" for one of the patients, filled in the report on the night order book and signed her name. In the report she "just said that Lieutenant Clark was noisy and disturbed us most of the night". She did not want to write up the affair because the book lay on the desk and anybody could read it. She left the ward before 7:00 o'clock, went to her room, then to the office of Miss Sheehan, the chief nurse, and reported the matter to her. So far as witness knew the accused was not drunk. There was nothing unusual about him except that when he first came into the office he stood there and stared at her, and there was a peculiar look in his eyes. She had met accused on the tennis courts at the hospital sometime in the previous July through one of the nurses, but had had no conversation with him at that time. She next saw him the first time she was on night duty on October 30, 1931 (R. 59-61).

Under a long and searching cross-examination by the defense, additional details in the testimony of Miss Munn were developed as follows:

She and accused had nothing to do with each other from July until October 30, 1931, the day she first came on duty in E-2. He came into her office that night about 10:00 o'clock and said, "I am reporting in", which was a customary and regular thing for patients to do. She gave him a telephone message to call somebody and he left (R. 61-62). She had no other dealings with him in any personal capacity until about 10:45 or 11:00 o'clock on Monday night, November 2d. She was then in the dressing room when she heard some one walking outside, looked out of the window and saw a man, with an overcoat on but no hat, walking on the concrete sidewalk that runs along the north side of the building (See "Chart" attached to record). She did not identify him at that time, and did nothing to call his attention to the fact that she was in that room and he paid no attention to her room in so far as she then knew (R. 63-64). When accused came into the nurse's office she

was in the door leading from the dressing room. He came in and shut the door behind him, then stood and stared at her for some little time. This was a very unusual occurrence. His eyes were not normal. In response to his question, "Do you want me?" she said "Yes" although she had not sent for him, and did not want him, "only to know who was out there" (R. 65-67). She looked out the window to see who was there because her patients were supposed to be in at 10 o'clock (R. 98). (The witness broke down and cried at about this point and the court then recessed at 12:00 o'clock until 1:00 P.M.) Witness admitted that in her direct testimony she had stated that accused was not drunk, but that in her testimony before Major Sherwood, one of the investigating officers, she had stated that in her opinion accused was "under the influence of either alcohol or some drug". Her personal opinion was that accused was either under the influence of drink, or under the influence of drugs. Accused did not lock the door or attempt to lock it. She was so frightened at the time he threw her on the bed that she could not say whether her hands were free. She said nothing in her statement to Major Sherwood about being frightened (R. 68-69). (Witness was permitted to read her statement to Major Sherwood made under oath on November 3, 1931, and signed by her on the following day.) When on the bed she did not touch accused with her hands, nor did she scratch him on the face or body, nor scream or cry out. Patients were on the porch at the time, adjacent to the room. Mr. Crook was in the room next to the dressing room; Mr. Smith was in either the third or fourth room and Mr. Smithson in either the second or third. Mr. Crook was at that time sleeping out on the porch. (Witness indicated by an X on the map about where his bed was (See "Chart").) Mr. Smith's bed was out on the porch so that there were two patients on the porch at the time (R. 70-72). While accused was on the bed with her he told her that he loved her. She said, "Don't you know what you are doing to me? For goodness sake, stop". She could recall no other conversation. She was not so frightened but that she "did talk to him". There were no loud or excited voices at any time between her and accused in that room. She did not raise her voice and he did not raise his the entire time while there. When on the bed he put his tongue in her mouth while she was talking to him. She did not smell any alcohol or did not know whether she smelled any or not. She bit him no place but on the tongue. She weighed 111 pounds that night. Accused weighed around 170 or 175

pounds and was a strong, powerful man, but she got out from under him on the bed (R. 73-74). After she got off the bed and before accused threw her on the floor he tried to throw his overcoat over her. She knew the coat was over her head but did not know how he did it. He threw her on the floor and was on top of her while she was there with his weight on her. She got up from under him and ran to the door between the corridor and the nurse's room, pulled the door in and ran up the corridor to the door in the solarium. At no time did she scream, or bite accused, or do anything in any manner while on the floor except to try to get away. He did not grab her while she was getting up from the floor and pull her down again. One of her Oxford shoes came off in this encounter (R. 75-77). She went through the door of the solarium into the kitchen. Stuart was in the solarium when she first saw him. Accused was right behind her as she ran up the corridor, close enough to touch her. She ran as hard as she could. He had his hands on her shoulders when she got to the door and was touching her when she got to the solarium. She told Stuart to stop accused but did not tell him either then or later anything else about what accused had done or attempted to do. Stuart had no altercation with accused to her knowledge, but took him upstairs very quietly (R. 78-80). Witness had been in the service for five years on the 19th of November (R. 80). She knew that the officer of the day was the first person to notify in case of trouble, or an attack of this kind, but she did not notify him. Her first conversation with the officer of the day was at 2:00 o'clock in the morning. She did not recall telling Miss Vanderwood that Clark was very drunk (R. 81). She did talk to Major Sawyer, the medical emergency officer, over the telephone shortly after midnight, but she denied that she told him that there was no necessity of his coming over because the patient was no worse than he had been, or that she said to him, "One of my patients is delirious, inclined to be nervous, and I want an extra corps man to take care of him". There was no other nurse in E-2 besides herself and she had nobody else phone later to Major Sawyer. He did not ask her if she wanted him to come over and she did not say "No" (R. 82-83). When she came back to E-2 from F-4 her soiled uniform was still on the chair by the bed in the dressing room where she had left it. She also found a pair of trousers and a tie of accused in that room which were not taken off while she was there. She did not know what became of the tie, nor did she ever see her uniform again after she left it in that room. After she saw accused taken upstairs by

Stuart she did not see him again that night, and to her knowledge he created no disturbance of any kind that she heard of, but about 1:30 in the morning Stuart came over and told her that accused was downstairs and wanted his throat painted (R. 83-85). She had had no complaint about accused since 12:30 but she phoned the officer of the day about 1:30 that accused was disturbing everybody, although she had no report of any kind that he was. When the officer of the day came after she phoned him, she again told him that accused was disturbing everybody. She did not tell the officer of the day anything about the assault. She denied that she told the officer of the day that she did not want accused confined as she did not care to testify against him (R. 86-89). (The night order book of the nurse of Ward E-2 was produced and marked for identification as Defense Exhibit 1 (R. 90).) Witness stated that orders had been given her to enter in the book things of interest that happened on the ward, any unusual happenings. She admitted her writing in red ink under date of November 2-3, 1931. She wrote the entry about accused: "Lieutenant Clark very noisy and disturbing pts downstairs", about 6:30 the next morning, just before she went off duty. This was the only written report she made in connection with accused (R. 91-92). Witness denied that she had "figured right along" that she could "handle" accused, but admitted that she had said to Major Sawyer, "I felt that I could handle him", and that this was one of the reasons why she did not scream (R. 93-94).

Witness admitted that she left the post about 3:00 P.M. on the afternoon of November 2, 1931, with Lieutenant Colonel Joseph E. Carberry and Lieutenant William C. Hunt, went to the shop of Miss Marian Lennox, 823 East Colfax Avenue, and then to the Cosmopolitan Hotel in Denver, where she remained in Colonel Carberry's room alone with him until after 6:00 P.M. She had while there two one-ounce drinks of whiskey and Colonel Carberry was drinking. She returned to the post shortly before she went on duty and was not under the influence of liquor (R. 94-97).

Upon redirect examination, Miss Munn said that when accused was holding her hands at the head of the bed with one of his hands his other hand was on parts of her body "where it did not belong", that is, between her legs (R. 101).

Private Stuart, who was night orderly at Ward E-2 on the night of November 2, 1931, testified that he had tried to stop accused who had started toward the office of Miss Munn, but that accused went to the office and stayed there about five or ten minutes. Witness wondered why he stayed there so long and went to the solarium door; he heard the nurse "talking loud and seemingly angry". She was not yelling but her voice was raised "above the normal tone" (R. 103). He went back again, and in a few minutes went back a third time, but did not know what to do as he "did not want to be in on anything that was not (his) my business". He did not think there was anything wrong. He was paying particular attention to the matter because accused "was in an intoxicated condition". He returned to the kitchen and "pretty soon" he heard a loud crash. As he started across the kitchen towards the door that leads out into the solarium, Miss Munn came running in "hollering", "Save me, save me". She "almost plunged headlong". Her hair was down, she was crying, and her dress was all crumpled up and torn. There was blood on her shoulder. She was hysterical, "shaking all over". Accused came in behind her, a half foot away, but did not touch her at the time. After she ran into the kitchen Miss Munn went over behind the table in the center of the room (R. 104-105). Witness grabbed accused by the arms and stopped him. He talked to accused, persuaded him to go upstairs, followed him half way up to the first floor, and then went back to the nurse. She had her head in her arms down on the kitchen table and was crying, where she remained ten or fifteen minutes and then went back to her office to change her dress (R. 106-107). While she was in the office, accused came downstairs and started toward her office, saying he wanted to go in and apologize. Witness talked to him in the corridor trying to persuade him to go back upstairs, and he finally turned and went out (R. 107). As soon as the nurse had changed her dress, witness went with her over to F-4. Upon the contention of the prosecution that it was a part of the res gestae, and over the objection of the defense, the witness was permitted to testify that the nurse told him that she was afraid accused would be outside and wanted witness "to go along as protection" (R. 108). Witness returned to E-2, entered the ward office and as he turned on the light, accused jumped up from "a little cot" in the dressing room where he had been with his head under a sheet. He was dressed in his underwear and said, "Where is the nurse?" (R. 109). At 11:30 Mr. Smithson, one of the patients, rang for a hypodermic

and witness went to F-4 and got Miss Munn and Miss Vanderwood. Miss Munn gave the hypodermic. Accused was nowhere in sight at this time. Witness put clean sheets on the bed in the dressing room because they were wrinkled and had blood on them. Then he gathered up accused's clothes which were strewn about the dressing room where the bed was. Accused came down in his pajamas and said that he wanted the nurse, that he was sick (R. 110). Witness offered to get the medical emergency officer but accused said he "wanted the nurse". Witness took accused's temperature and found it to be 98 or 99. Accused wanted to know the nurse's name and looked over the clinical records trying to find it (R. 111). Then he made a telephone call. Witness heard him say that "it was a matter of life and death for this party to come right out there, * * *". Accused then told the party to "go to hell" and hung up and went upstairs. He also used the phone in the office to make calls, trying to call "Miss Miller" (R. 112). Accused offered witness $20 to bring the nurse back to the ward, but witness told him he did not need that sort of money. Accused then said, "You have been knocking her off, haven't you, various times?" which witness denied. Accused said, "That is what I want to do, it won't take fifteen minutes, and I will check right out". Witness told him that he was an officer and "probably would be busted for this", and accused replied that he realized that, but that did not make any difference. This was about 2 o'clock. In the opinion of the witness accused was intoxicated, although he walked properly, "talked well enough", and was not staggering. Witness picked up accused's clothes and put them in the shower room off the solarium. Witness was present when Captain Lowry, the officer of the day, came in. After Captain Lowry left accused came downstairs again and said that he had an uncle in Portland, Oregon, who was a friend of President Hoover, and could get him out of trouble, and that it would be better for witness, the nurse and all of them, if they "let this thing slide" (R. 113-116).

Upon cross-examination by the defense, Private Stuart testified, among other matters, substantially as follows: He had been in the Army four years and was then in the Signal Corps. He had no interest in the outcome of the case and he did not care whether accused was convicted or not. He denied that on the evening of November 3d, "by Captain Stewart's quarters in E-2", he had said to Captain Stewart in the presence of Royal Solt, an orderly, that he

had a bet up that "Lieutenant Clark would either get the book thrown at him, or was going to hang". He admitted that he had then said that he thought Lieutenant Clark would be convicted. He admitted that his statement to Major Sherwood was a great deal the same as that he made in court, and further admitted that he had told Frank A. Montgomery, a former private at the hospital, that the statement he had made to Major Sherwood was full of lies, that he had left out some statements and made up others. He also admitted that he had told Montgomery that he would change his testimony for $20,000 (R. 116-120). He did not recall that he had told Sergeant Casey that night (November 2d) that accused came in drunk, but admitted that he had told Finley B. Smith, a patient, and others that accused came in drunk that night, and that he told Major Sherwood that accused was drunk. He testified, however, that accused had been drinking but was not drunk. When told by accused that the latter had women and liquor outside he got on his shoes and went out but saw neither women nor "booze" (R. 122-125). He advised accused not to go to the office, not because he was drinking, but because he had not checked in on bed check. He did not try to stop him from going to the office, nor did he tell the nurse that accused was drunk, nor advise the medical officer of the day of the fact. Accused must have been in with the nurse fifteen or twenty minutes, and he heard the nurse talking loudly and angrily twice when he listened at the solarium door about thirty feet from the nurse's office. He never went down to the nurse's door, or called for help (R. 126-130). When he stopped accused as he was pursuing Miss Munn, he talked to him "for some little time" (R. 133). Accused was facing the light in the kitchen, but witness could not recall what his appearance was (R. 135). He did not remember any conversation when he took Miss Munn over to F-4, or that she told him that accused had attacked her (R. 137). At the time he took accused's temperature he reported accused to the nurse and to the officer of the day. Accused put out his tongue and witness noticed that it was cut (R. 147). He told the officer of the day that accused was creating a disturbance by keeping the patients awake in the ward, and that they had been complaining about the noise. Accused made noise off and on all the evening (R. 148). Mr. Smith complained once that night that he could not sleep because of the noise (R. 153). Witness phoned the officer of the day that night "because all of the patients were complaining about the noise", but when Captain Lowry came over witness said nothing to him about the trouble with the nurse (R. 148-149).

On further examination, witness stated that Miss Munn was his superior officer and that it was her business to make any report to Captain Lowry (R. 150). When he cleaned up the dressing room, he found a woman's hair comb, all broken up, near the bed (R. 155).

Major Harold P. Sawyer, Medical Corps, testified for the defense as follows: He was the medical emergency officer of the day at Fitzsimons General Hospital on the night of November 2, 1931. His duty was to take care of any emergency arising during the twenty-four hours of his tour that could not be taken care of by the usual ward officers. He was extremely busy with a patient who was expected to die almost any time. Some time after, and close to midnight on that night he had a telephone call from some one who said, "This is the nurse on E-2 speaking", and reported that one of her patients was "inclined to be delirious and that they wanted an extra corps man to take care of him". He found out later that Miss Munn was the nurse on duty at E-2. It was his recollection that Miss Munn also said that it was not necessary for him to come over as "the patient was no worse than he had been". He knew of no phone call to him from any other nurse in reference to any disturbance in E-2 that night (R. 223-226).

Sergeant Walter L. Casey, a witness for the defense, testified that on the night of November 2, 1931, he was the noncommissioned officer in charge of the night detail at Fitzsimons General Hospital. Around 12:30 that evening, the medical emergency officer, Major Sawyer, sent him over to Ward E-2 with a special attendant. Witness saw Private Stuart there that night, who told him that a man had come in drunk but was asleep, and that he did not need a "special". There was no noise in E-2 at the time witness was there. He called up the medical emergency officer who said to take the special back. As he was leaving, Stuart said, "I want to show you something", and held up a white dress, which looked like a nurse's white uniform with spots on it which he "took to be blood". This was about 1:00 o'clock (R. 227-229).

Captain Ben H. Lowry, Quartermaster Corps, a witness for the prosecution, testified that on the night of November 2, 1931, he was officer of the day at Fitzsimons General Hospital. About 2:00 o'clock that night he was called to the telephone in the guard house

where he was sleeping. A lady on the other end of the line said that Lieutenant Clark had been creating a disturbance; was either drunk or "had been rolling on the floor". She said that she had called the medical emergency officer and that nothing had been done about it, and she was very anxious that witness should come over. He called up the medical emergency officer who said that "the lady was silly" and that there was no reason for anybody going over there. He then called E-2 and the orderly said that there was a disturbance over there, that some one had been over from the medical emergency officer's office but that "he" had not been quieted down and that some one with sufficient rank or authority should come over (R. 164-165). He called back the ward from which the woman had called first and some other woman answered, stating that the nurse who had originally called him was outside waiting for him, and that it was absolutely necessary for him to come since something had taken place and the nurse was highly excited and could not go back to her ward and do her work. This was between 2:00 and 2:30 o'clock. Two ladies, one wearing a sweater, whom he later learned to be Miss Munn, met him between E-2 and F-4 (R. 166). Miss Munn made no report that accused had assaulted her, and no such report was made by anybody else. He had no intimation of an assault and the only complaint was of a disturbance. Miss Munn said the patient had got down and rolled on the floor and that "she was afraid to go in there". She had gone back once and still found him downstairs (R. 168-169). The orderly told witness that accused had made a noise by slamming doors and going up and down the stairs, but had not told him that accused had chased Miss Munn out of the nurse's room, that she had said, "Save me, save me", and that he had stopped accused. Witness talked with Smith who said that there had been a lot of walking around and slamming of doors, but that he did not want to make complaint against anyone (R. 170-175). The bed on the porch where accused should have been sleeping had a dummy in it, made of the bed clothes and pillow (R. 173-174). Witness went into accused's room, pulled on the light, and found him lying on a cot with the cover pulled up to his shoulders. He was undressed to his waist. He told accused that he had been reported for creating a disturbance. Accused said that he had had a temperature for a couple of days and attempted to show his tongue to witness. He told accused that he "would have to cut out that disturbance". Witness talked to

Captain Stewart a few doors from accused's room. Accused came out of his room, was told by witness to keep quiet and go back, which he did. Witness went downstairs and told the nurse that he would confine the man if necessary, but that he did not think it necessary at that time unless she could not work with safety. He talked to her "approximately five minutes" and she said that "she did not care to have that done, it would be necessary for her to be a witness in such a case". Accused was not drunk, but "he was unusual, and abnormal, his face was red and his body red". He talked coherently and did not appear to be drunk. Witness was within three feet of him (R. 164-167).

Captain Charles H. Stewart, C.A.C., a witness for the prosecution, testified that on November 2, 1931, he was a patient in Fitzsimons General Hospital, and occupied a room in E-2 "about twenty feet, three doors away" from that occupied by accused. He saw accused come in about 10:10 that night accompanied by a lady. Nothing then directed his attention to accused's condition (R. 175-176). He made no disturbance of any kind (R. 179). About 2:30 in the morning, witness was awakened by the officer of the day accompanied by an orderly. The former went into accused's room and witness could hear a conversation. The officer of the day came out and told witness that accused had been making some trouble and that if he did not quiet down they would "have to throw him in the jug". He asked witness to see if he could quiet him down. Witness went into accused's room and asked him what was going on and the latter replied that there was "nothing that he knew of particularly, the O.D. had just awakened him" (R. 176). Accused was then sitting on a cot in his room and witness advised him to get out in his regular bed on the porch and go to sleep. He was very much excited and said the O.D. had been keeping him from getting treatment. A few minutes later accused came to witness' room and wanted to borrow a shirt, saying that he was going to get dressed and leave the hospital, that he was not going to stay around with a man like "that O.D.", Captain Lowry, who was keeping him from getting treatment. He was going to call up some one in California and was going to call Colonel Bruns on the post. Witness finally persuaded him that he could do all of these things the next day. Accused showed witness his tongue. It seemed to be swollen and had a cut on it on the right hand side about one inch from the end, which accused wanted treated (R. 177). He borrowed

a nickel from a patient, went out to make a telephone call, and then came back and went to bed. Witness was awake most of the rest of the night and he thought accused remained in bed. Accused seemed sober. He did not stagger and his speech was clear but his ideas were not coherent. There was no odor of whiskey or alcohol. He seemed more like a sick man. Judging from what he wished to do he was not himself. He waved his arms around and talked very rapidly and "very different from his phlegmatic nature". His face was flushed. His eyes "were rather starey and glassy and red rimmed". Witness had never seen him in a condition like that before (R. 176-180).

With the consent of the prosecution, the defense took the witness for its own and brought out the following: Witness saw the orderly, H. M. Stuart, in his ward on the evening of November 3d while witness was talking to Roy Solt, and had a conversation with the orderly. The orderly said that he had a bet up with one of the men in the detachment that accused "would get hung for this" (R. 182). Witness thought that accused was in bed on Sunday, November 1st, and did not go to breakfast at all, nor to dinner either. Accused said that his temperature was 105 and that he felt very badly. At that time his face was not flushed and he was very slow in his movements, and he was not excited. He was always a very quiet man, and kept to himself a great deal. Witness thought him moody and depressed, but his moods were not connected with "hangovers". Accused left the hospital on the afternoon of the 2d at approximately a quarter to three. Witness merely "saw his back as he sauntered out the door slowly", but he was then perfectly normal (R. 181-185).

Royal G. Solt, a witness for the defense, testified that he was day orderly on Ward E-2 on November 2, 1931. He was present when Captain Stewart and orderly Stuart had a conversation in the downstairs solarium. The orderly said to Captain Stewart that he had a bet up that Clark would get "the book thrown at him" (R. 229-230).

Miss Lena Vanderwood, a witness for the prosecution, testified that she was a Second Lieutenant, Reserve Nurses Corps, and on the night of November 2, 1931, was on duty in Ward F-4. She went to supper with Miss Munn at 10:15 and walked back with her, the wards

being practically adjacent. Miss Munn later came to witness' office about twenty-five minutes to twelve (R. 157). She was then crying, cried for about ten minutes before she said anything at all, and then said she had had a terrible time with one of her patients (R. 158).

Defense objected to the witness testifying to the conversation with Miss Munn. Prosecution claimed that the actions of the principal witness, Miss Munn, which threw light upon the attack and the whole situation, were a part of the res gestae, and that they were admissible as such. Defense objected vigorously that the statements of Miss Munn to the witness were not a "spontaneous speaking" and were not competent as a part of the res gestae. The objection of the defense was overruled by the law member and witness was permitted to state what Miss Munn had told her (R. 158-159).

The witness then testified that Miss Munn said she had heard some one walking outside of the building and had gone into the dressing room and looked out the window. Shortly afterward accused came into the office without knocking, and said to her, "You are a blonde, aren't you?" and she replied, "Yes, won't you go to bed?" With that accused had grabbed her and thrown her down on the bed, but she had struggled with him for some time and managed to get away from him. He had thrown his coat over her as she was rushing out of the door and thrown her down on the floor, but she had got away from him again and run towards the solarium where she met the orderly. Miss Munn had also said that she "hoped to God she was all right" (R. 159-160).

Defense, for the purpose of the record only, moved to strike out all of the testimony as to the conversation between Miss Munn and Miss Vanderwood, occurring something like a half hour afterwards, but the law member permitted it to remain.

Under cross-examination, witness stated that Miss Munn did not tell her that accused was very drunk. Witness remembered that she was questioned in the office of Major Sherwood in November by an investigator, but denied that she had told him that Miss Munn had told her that accused was very drunk. Neither did she tell Mr. Phelps, of the defense, that Miss Munn had said accused was drunk (R. 162-163). Witness went over to the nurse's office in E-2 about

12:30 in the morning and saw a man's clothes in the dressing room and a nurse's uniform in the nurse's office. She did not see accused that night. Miss Munn called the officer of the day over the telephone in her presence. He called back and witness told him that a patient had been "disturbing over there", and that Miss Munn had received several bruises and had been thrown down on the floor by this patient (R. 163-164).

Walter Byron, a witness for the defense, testified that he was a licensed detective in the State of Colorado. He had been employed by counsel for the defense in connection with the pending trial and had had a conversation with Miss Lena Vanderwood in Major Sherwood's office on December 4, 1931, in the course of which she stated that Miss Munn told her on the night of the assault that accused was very drunk. This was a verbal statement by Miss Vanderwood and no one else was present (R. 200-206).

First Lieutenant Mary E. Sheehan, Chief Nurse, Army Nurse Corps, a witness for the prosecution, testified that on the morning of November 3, 1931, she was called to her office about 7:00 o'clock to see Miss Munn. Witness was alarmed when she saw her (R. 185-186). Upon the witness commencing to tell of her conversation with Miss Munn, the defense objected that such a conversation was not a part of the res gestae, but was a self-serving declaration, hearsay and incompetent. The prosecution contended that it was a part of the res gestae, and a "part and parcel of the affair". The objection was overruled by the law member and the examination proceeded. Witness did not ask Miss Munn to describe in detail because from the way Miss Munn looked witness decided that she should report to the hospital authorities. When witness came into the office, Miss Munn was slumped down in a chair, could not sit up, and had her head down. Witness thought she was desperately ill and had come to report it. She was excited and could hardly talk. She told witness she had been attacked by one of the men on the ward. Miss Munn was bruised, black and blue up her legs and forearms (R. 185-189). Witness sent Miss Munn to her room, finished making her morning rounds, and then made a report to the executive officer of the hospital. It was customary for nurses to bring their affairs to the chief nurse.

Major John G. Ingold, Medical Corps, a witness for the prosecution, testified that he examined Miss Lillian Munn at 11:30 A.M.,

on November 3, 1931, made notes of his examination, and had them with him. Using these notes to refresh his memory, he stated that her temperature was 98.7, pulse 96, respiration 20. Normal temperature would be 98.6, pulse 70 to 74, respiration 16.20. He then gave a technical description of the number and location of certain discolored contusions upon her person, some the size of a dollar, others the size of a dime, upon her upper left forearm, right elbow, tip of right shoulder, front of left thigh, and front of left leg, and stated that he found the right shoulder and the muscles of the neck painful upon movement, and the front muscles, right thigh, painful upon pressure and movement (R. 189-190). Witness could not say whether the injuries were recent or old. A high pulse could be caused by indulgence in alcohol (R. 191-192).

Senter C. Crook, a witness for the defense, testified that he was a patient at Fitzsimons General Hospital, on Monday, November 2, 1931, and occupied room No. 9, immediately next to the nurse's office. He was sleeping in his bed upon the porch with his head toward the nurse's room. He heard foot steps and voices around 12:00 or 1:00 o'clock in the morning, but could not say from where they came. He did not see accused that night. There was a crack between the wall of his room and the nurse's room, and when lying in his bed on the porch outside he had frequently heard conversations in the nurse's room and also noises in the dressing room (R. 304-310). He thought he was not a particularly light sleeper, just an "average" sleeper. He had had no opiate or codeine that night. Miss Munn put a dressing on an incision in his side that night about 8:00 o'clock. She was within two feet of him for ten or fifteen minutes. He smelled no liquor on her and she seemed to him to be perfectly normal.

Finley B. Smith, a witness for the defense, testified that he had been a patient at Fitzsimons General Hospital since March 5, 1931, and was there on November 2, 1931. He occupied the end room of E-2 and his bed was on the porch. On the latter night he went to bed at 9:30 and to sleep shortly after that. An hour and a half or two hours after he went to sleep he was awakened by the slamming of doors and a general confusion or noise. He heard no sound of running nor any conversation. It seemed to him that some one was striking a door with the foot or trying to pull it open before they pulled the latch. He heard people coming into the office and going out. Some two hours after he first awakened, he heard a conversation

in the office and got up and went in (R. 311-313). He found accused sitting by the nurse's desk in the outer office and the orderly by the door. Accused was dressed in his pajamas. Witness asked him what was the idea of the noise in the office and he replied that he was sick, was running a high temperature, and was down there to get something for it. Accused's face was then flushed, his hair disordered, and his eyes "pretty irrational, * * * strained like". He spoke rationally, his eyes were "glaring, that is, bright and strained and drawn looking". His appearance reminded witness of a friend at home who had gone insane and he was "little bit leery" of accused. Witness complained of "all this racket going on" and accused said he was going to bed and went into the other room (R. 314-315). Accused did not appear to him to be drunk, but he was not normal. He noticed no odor of alcohol. Between 7:00 and 7:30 P.M., the nurse came to his room to take temperature and pulse. She did not appear to be drunk. He thought he would have noticed it if she had been (R. 316-317).

Miss Marian Lennox, a witness for the defense, testified that she saw Miss Munn, Major Carberry, and Lieutenant Hunt in her dressmaking shop on East Colfax Street, in Denver, on the afternoon of Monday, November 2, 1931. They invited her to go down to the Cosmopolitan Hotel and have a few drinks. She could not go and the others left (R. 207-208). Lieutenant Hunt returned in about fifteen minutes and stayed in her shop the rest of the afternoon. Around 6:30 P.M. Major Carberry called from the Cosmopolitan Hotel and she and Lieutenant Hunt went down and picked up Major Carberry and Miss Munn, whom they drove to Fitzsimons. Miss Munn said that she felt ill and she became very ill (R. 209). In the "estimation" of witness, she was drunk. Major Carberry had liquor in the car. He and Miss Munn said they had been drinking that afternoon. At the post witness and Major Carberry got out of the car and assisted Miss Munn to her quarters. Major Carberry said that he felt that Miss Munn was not able to go on duty but the latter said that she would have to (R. 210-211). Witness said that she heard Miss Munn tell Major Carberry that "she was very ill and had taken entirely too many drinks to have to go on duty at 7 P.M.". Miss Munn staggered "a little bit" when she got out of the car, but Major Carberry assisted her and took hold of her arm (R. 214). Her speech was thick, but she did not talk very much on the way out and said nothing foolish. It was five minutes to seven when they let

Miss Munn out (R. 215-216).

Second Lieutenant William C. Hunt, a retired emergency officer, testified as a witness for the defense that he and Colonel Carberry were in the Post Exchange at Fitzsimons General Hospital about 2:00 P.M. on Monday, November 2, 1931, when Miss Munn came in and Colonel Carberry asked her if she would like to go to Denver with them. She said "Yes", so they waited for her to get dressed and then went to Denver, stopping for about fifteen minutes at Miss Marian Lennox's shop (R. 217-218). Witness left Colonel Carberry and Miss Munn at the Cosmopolitan Hotel. The Colonel said that they were going up to have a drink and invited witness to join them but he declined. About 6:30 that afternoon Colonel Carberry phoned witness and the latter, with Miss Lennox, went to the Cosmopolitan Hotel and picked up Colonel Carberry and Miss Munn. Miss Munn "looked drunk" (R. 219). She was pale and sick looking. Colonel Carberry gave witness a drink in the car of what seemed to him "just like moonshine". Colonel Carberry said the whiskey was very bad and asked Miss Munn if she were able to go on duty. She said, "Yes, I will have to go on duty". When they got to the hospital Colonel Carberry helped her up the steps to her quarters (R. 220). Upon cross-examination, witness said that Miss Munn had to be helped into the car and out of it to the door. She was quite plainly and very much under the influence of liquor (R. 221).

4. To rebut the testimony of the last two witnesses as to the condition of Miss Munn, the prosecution called six nurses of the Army Nurse Corps at Fitzsimons General Hospital who were on duty on November 2, 1931. Two of them had been close to Miss Munn and talked with her on that day at 7:00 P.M., one inspected her at 7:30 P.M., and the other three saw her about 10:30 P.M. All testified that she was not drunk; that they smelled no liquor on her breath and observed nothing unusual about her condition (R. 419-421; 421-423; 424-425; 433-434; 435-436; 437-439).

Two patients, Captain W. McB. Garrison, F.A., and Frank E. Smithson, also testified that they saw Miss Munn that evening. Captain Garrison, with his wife, talked with her for ten or fifteen minutes between 7:00 and 8:00 o'clock; he noticed her particularly and she was "absolutely sober" (R. 426-429). Mr. Smithson saw her

for about forty-five minutes around 9:00 o'clock when she did an empyema dressing for him. She was not drunk. Upon cross-examination (R. 429-431) Mr. Smithson said that Mr. Crook was in the room adjacent to the nurse's office and he was two doors beyond. He was in his room that night. He heard quite a lot of noise in the nurse's room about 10:30 and 11:00 o'clock, a bed moving and some talking "not exceptionally loud", and he thought that Mr. Crook was sick and that they were moving him back into his room. He heard no one scream or make any outcry of any kind, nor did he hear any footsteps of people running or slamming of doors (R. 431-432).

Colonel E. H. Bruns, Medical Corps, a witness for the prosecution in rebuttal, testified that he was in charge of the medical service at Fitzsimons General Hospital. It was the custom at the hospital to permit an officer patient to take his own temperatures if he was able to do so. The record of temperatures of the accused, evidently taken by himself, from October 28, 1931, to November 4, 1931, ranged from 92 to 99.6 (the normal temperature is 98.6). There was no record of a temperature of 105. A man with that temperature would be critically ill and delirious. On November 7, 1931, the "disposition board" recommended "that this officer (accused) be returned to protective duty in the southwestern part of the United States". Witness, together with Major Shepard, also examined accused on March 7, 1932, and found him fit for duty. As a result of this examination, his condition was reported:

> "tuberculosis, pulmonary, arrested, the lobes both lungs, lesions scattered, no fibrous tissue. In other words, he has tuberculosis scattered sparsely, both lungs, his lesions are fibrous and negative, he had no cavities, and he has no tuberculi in his sputum, and from an examination his general condition is excellent." (R. 439-445).

5. Mrs. Sarah R. Clark, a witness for the defense, testified that she was the divorced wife of accused. She first met him in 1924 when he was a cadet at the Military Academy, married him in June, 1926, and lived with him as his wife until they separated in October, 1930. In April, 1931, she obtained a divorce from him on the legal ground of "mental cruelty", but they separated because of the "spells" of accused which made life unbearable, and which

apparently could not be controlled and could not be remedied. Both she and accused agreed that it was much better to separate. When she first met accused and until sometime after their marriage he was of a "very cheerful disposition, rather a merry person and joking, * * *" (R. 388, 401). She had scarcely ever seen him take a drink before they were married. From October, 1926, through the spring of 1927, there began to be periods when he would be "a little more quiet or sulky". In the spring of 1927 there was a period of depression, of "almost sullenness", which was followed by a severe drinking spell. During these periods of depression his eyes had "a very restless look, hunted look, a look of fear, and at some time it was almost like a hunted animal * * *". He told witness that he felt his mind was unbalanced, he was losing his grip on himself (R. 390). He had the idea that the "officers were picking on him" and that he was given the hard jobs. These ideas were unfounded. He would come home from work exhausted. Witness felt that he was struggling hard not to drink. "* * * there was always an awful battle going on inside." When he did drink it shortened the spells of depression (R. 391-392). He always drank alone. After recovery he was filled with remorse and spoke of doing away with himself. The spells continued from 1927 to 1930 on the average of every two months and became more intense. He was much more sullen, morose and depressed (R. 393). On three different occasions he jumped up and cried "Look out, some one is coming". Once he ran into the bathroom and closed the door. Witness found him sitting on the bathtub with his head in his hands "completely exhausted". When not in these spells he seemed to be perfectly normal and the same person she had known before (R. 394-395). He would have no recollection of certain incidents that occurred during his spells, and was absent-minded and troubled with insomnia. Afterwards when "suffering with the agony of remorse" he would weep frequently. He often "slept with his eyes open" and had nightmares (R. 396-397). He very rarely used alcohol except during spells of depression. Witness had often seen him drink in an evening as much as three quarts of gin or two quarts of okolehao, a strong Hawaiian liquor. After such drinking his mind did not work right but he was always able to walk or drive a car. His "train of thought would not be clear at all", nor consecutive. Witness knew he was drunk but others would not know he was drinking (R. 399-400). After coming out of one of these drunks he would not know where he had been or

what he had done, and while in them he did not know what he was doing. He did not go to the hospital for observation because it would go against his record, nor had they ever consulted a civilian psychiatrist. At the time witness left accused in October, 1930, he had not taken a drink since the previous February, although he had been having frightful periods of depression during the year (R. 401-415). She came as a witness at her own expense because she felt "that there was nothing he had ever done he was responsible for" and because she knew what it meant "when he gets in the grip of them" (R. 402).

Lucas Proudfit, a witness for the defense, testified that he had been a patient at Fitzsimons General Hospital since 1921 and had first met accused when the latter arrived, and had occupied a room in E-4 next to witness for two months. Accused was then "terribly nervous" and "seemed depressed". He was not very friendly. His condition was "more melancholy than anything else", like a shell-shocked patient (R. 319-322).

Captain Paul R. Knight, 16th Infantry, a witness for the defense, testified by deposition that he had known accused since 1929. He had observed accused's mental condition while the latter was serving under his command in Company A, 19th Infantry, at Schofield Barracks, Hawaii. During that time accused on many occasions "gave evidence of laboring under an abnormal condition of mental depression or melancholy". He showed definite signs of tremendous mental strain. The periods of depression would be from a few days to more than a week in duration. Accused told him that some person or persons unknown were endeavoring to inflict personal injury upon him. His actions while under these periods of abnormality displayed hysteria, hallucinations, moroseness, and complete breakdown resulting in uncontrollable weeping. In the opinion of witness accused was in an unbalanced mental condition during these periods of mental depression, and was distinctly abnormal. Witness had no personal knowledge that accused used alcohol to bring relief during these periods of depression. In the opinion of witness accused was not mentally responsible during these periods of depression . Witness had no technical medical training, but his opinion in determining sanity or insanity had been "backed up" by the decisions of expert opinion on three different occasions previously. He thought the unusual mental condition of accused had

been caused by worry over his family affairs. Witness took no action to bring the accused's periods of mental depression to the attention of the proper medical authorities because he felt that they would be eliminated when the cause of them had been removed (Ex. 1).

Blanche Clark Hafer, a witness for the defense, testified by deposition that accused was her brother. She saw him in New York City in March, 1929, and again for about two hours at Verona, New Jersey, in April, 1929. She had last seen him before in the summer of 1926. When she saw him in 1929 his condition was greatly changed. He had lost much weight and seemed depressed. In 1926 he had been in robust health and "most cheerful". In 1929, at her home in Verona, he had a spell of depression and melancholy, becoming somewhat hysterical. "He repeatedly referred to his wife and child in terms of great affection." He then broke down, appearing extremely nervous and overwrought. Witness visited accused at Fitzsimons General Hospital in August and October, 1931. His condition then seemed to be improved. He became much attached to witness' child, a little girl whom he likened to his own daughter "Polly", and when he came to the train to see them off he "became very upset" and tears came to his eyes when he said goodbye (Ex. 2).

Accused took the stand at his own request and testified at great length. He was born at Dayton, Ohio, on July 12, 1900, his father of old colonial stock, his mother of pure Irish ancestry. He was educated in the grade and high schools of Oregon. In June, 1915, he enlisted in the Oregon National Guard and was discharged a year later. A week after his discharge he reenlisted and served several months on the border before he was mustered out. He went to school again and then ran away to sea and served several months in the merchant marine. In 1917, he enlisted in the Army, went overseas with the 23d Engineers and returned in June, 1919. He was in the Argonne Offensive. He was discharged as sergeant bugler. Then he enlisted in the National Guard again, won an appointment to West Point by competitive examination, and entered the Point July 1, 1920. He ranked second in his class and was a "distinguished cadet" in his first year, was cadet captain and won the intercollegiate championship in fencing in his senior year, graduated thirty-eighth in his class and was commissioned a second lieutenant on June 12, 1924. He married in 1926 and had one child, a daughter,

who is four years old. His wife divorced him about March, 1931 (R. 324-329). As a child he walked in his sleep, the last time when he was ten or eleven years of age. He had always been nervous, and began getting "blue spells" about 1924 after he graduated. He often had lapses of memory of things that happened during periods of depression. The first one was in the fall of 1925, when one night he found himself "down in front of the Colonel's house" with a gun in his hand with "the intention of shooting his dog". He did not know how he got there, where he got the gun, or what he had been doing before (R. 329-331). His "spells of depression" started before his marriage while he was courting his wife. After his marriage "they came in cycles" at regular periods accompanied by insomnia. He would go through the night with his eyes open "in sort of a stupor", and had "frightful nightmares". He would see images and shadows would take various shapes. In Hawaii he would see Chinamen moving around with knives and things (R. 332-333). If he had money he would go off and get away. He generally drank during these periods of depression. It made them more terrible but it shortened them. At the end of one, he was physically exhausted and "his nervous system would be all apart". He drank such terrific amounts of liquor that he was scared at the amount. He knew that he would get into trouble sooner or later on account of liquor. He determined not to drink. Often he did not drink but sometimes he would, and he never knew why. He thought of suicide. Often when not in the spells he thought that he was going insane (R. 333-335). At the Presidio, he became so worried that he went to the post surgeon who told him that it was largely a matter of imagination and would pass away, and advised him not to go to a hospital for observation and treatment of a mental disorder since that would follow him through his career. He never liked alcohol but the association with drinking people led him to drink, and most of his friends drank. He drank when he was in a desperate frame of mind, and alcohol offered the road out (R. 336-340). He broke down with tuberculosis in 1930, arrived at Fitzsimons General Hospital November 28, 1930, and was a bed patient for about three months. He was then depressed and nervous. At Christmas he pulled himself together and "was like a new man" for several months. In May he visited the sick bed of a girl who had the "flu". He was "scared to death of the flu", was upset, and "the whole works tumbled down". After that he lost confidence in himself, began to worry over his symptoms, and to fret about his child, whom he had not seen since 1930 in Hawaii. A visit from his sister and her daughter, two years of age, in the latter part of October, 1931, upset him "terribly". He saw them off

on the 28th of October and then began to drink (R. 340-345). He remembered little of what then happened (a number of incidents that he said he remembered and described are not otherwise in evidence). He remembered drinking "moonshine" at Mrs. Fraser's house on Saturday. On Sunday and Monday (November 1st and 2d) he was in bed and "terribly sick". He had a high temperature and was weak and dizzy. He could not keep his food down. He did not remember sending alcohol to Mrs. Dudley's. He remembered leaving the ward on Monday (November 2d) to go to town. He stopped at Mrs. Dudley's house because he was "shaking like a leaf and gasping for breath" and had to have a drink (R. 345-350). He remembered a conversation with a policeman, that he had hired a car and was in it. He did not remember writing a check and giving it to Eddie Ralph, although the check (Ex. 4) was handed to him. He remembered that he had lost his hat somewhere, that he had been in a barber shop, and that he had wanted to go to see Mrs. Fraser on whom he "had grown to depend". He remembered drinking in the car, and the "episode of drinking the ketchup". He remembered the "impression of drinking" at the Einillig house and that Mrs. Dudley and Mrs. Fraser were there (R. 351-353). He did not remember anything about getting back to the hospital, but he did remember talking to the nurse in the office, although he did not identify her as Miss Munn. There was nothing familiar about Miss Munn when he saw her at the investigation. He remembered that they were joking and laughing in the dressing room and that he was kissing her, "it continued for some time, it was kissing rather than a kiss." He was on his elbows at the time and his head was above her some place. He remembered that

> "she began nibbling on my tongue and that it did not hurt; that finally she did hurt me, and there was an impression of realizing that things were over, the thing or whatever had gone on was over. When it hurt, when she did hurt enough, or when she bit hard it seems I realized things were over, just at an end, the impression of a conclusion." (R. 354-355).

What he thought "in his head" at the time was that "she did not want to go any further". He remembered the orderly and that his attitude had been "unfriendly and threatening", and he had an impression that he had been at the little window between the kitchen and the surgeon's office. Accused told what further things he remembered during the rest

of that night, talking with the orderly who became more friendly, seeing a patient who wanted him to go to bed, seeing the officer of the day, who talked with him and scared him and then was more friendly, and a telephone call probably to Mrs. Fraser. The next day he was "awfully befuddled". His only recollection is that he went to the nurse's office to get relief for his mouth, tongue and throat which felt like a piece of leather (R. 356-359). He was sure that he had no intention to assault or rape the nurse.

To questions by the court, witness stated that he was sure there was no sexual intercouse in the impression of a "conclusion" that he had described in the episode with the nurse. He was with an engineer regiment during the Meuse-Argonne but does not connect his spells with any war experience. He never had any spells at West Point, but got very nervous at the end of the season (R. 385-387).

On cross-examination, accused testified that he had never reported his trouble to a medical officer except the one time, and after that he was convinced that it was a matter of his imagination. So far as he knew he had never been reported unfavorably on account of drinking on the annual reports (R. 364). Often, but not always, after these "spells", and whether he drank or not, he had no recollection of things he had done which his wife would tell him about (R. 365,369). He did not always keep out of trouble, but he had never been punished under Article of War 104. He took his temperature on Sunday morning (November 1) and thought it was 105, but he did not put down 105 because he did not want to be put back to bed. He had nothing to drink on Sunday morning (R.375-377). No one forced him to drink (R. 381). His impression of the orderly Stuart was that his attitude was threatening and unfriendly. He does not remember any statements made by him to the orderly in the dressing room, but he remembers that he (accused) was curious and "they were probably based on curiosity" (R. 380, 382). He made a statement at the investigation, and stated that he remembered very little. In this statement he also said "I have a vague recollection of going to the first floor and talking to the nurse, I was noisy, disorderly and boisterous" (R. 382-384).

6. At the opening of the trial, the prosecution announced that the accused, by direction of the Corps Area Commander, had been examined by a "sanity board" at Fitzsimons General Hospital, and introduced the report of the board as Exhibit 1 (R. 10-13). The question of the sanity of the accused had not been raised by the defense nor in any manner made an issue in the case.

Major James A. Orbison, Medical Corps, testified that he was in charge of the neurotic psychiatric service at Fitzsimons General Hospital, and was a member of the board of officers which examined accused, who was under their observation for five months (R. 10, 31). Witness read the findings of the board, which were as follows:

"FINDINGS

After careful examination of the patient, clinical history, laboratory findings and all other available evidence, the Board finds:

a. That the diagnosis in the case of this patient is:

1. Observation for mental disease; none found.

b. (1) That he did not suffer from any psychosis at the time of the acts charged, but that he was mentally abnormal due to over indulgence in alcohol induced by a depressed mental state, which had existed for several days just previously.

(2) That he does not now lack the ordinary understanding of right and wrong and the ordinary capacity to control himself from wrong actions.

c. The Board takes cognizance of the fact that Lieutenant Clark has been subject to rather frequent attacks of depression of variable degree over a period of several years, constituting a fundamental depressive temperament, and that during these attacks he has resorted to alcohol, at times to excess, in an effort to alleviate the depression. This depressive temperament is considered to constitute a feature of abnormality, in that, while it would not necessarily render him less susceptible to ordinary human motives or appreciation of right and wrong, it could, and has at times, tended to prevent the normal control of his actions.

d. That he does not at this time suffer from any psychosis, but that the depressive temperament is a con-

stitutional feature and indicates a morbid process in the psychic personality.

e. That he is capable of conducting his defense intelligently."

"ADDITIONAL FINDINGS

After careful consideration of all available evidence the Board comes to the following additional findings:

a. That the accused is in proper mental condition at this time to undergo trial.

b. That the accused was at the time of commission of the alleged offense so far free from mental defect, mental disease, or mental derangement as to be able, concerning the particular act charged, both (1) to distinguish right from wrong, and (2) to adhere to the right."

Witness, in the course of his cross-examination, stated in effect that accused's depressive temperament is a constitutional feature of his makeup and that at the time of the alleged offenses accused did not have normal control of his actions. He further stated that accused's history indicates "mental disorder", which "could be called a mental derangement, mental abnormality or deviation from the normal". Witness further stated that accused's condition as disclosed by his history was closely related to manic depressive psychosis (insanity), which disease can be periodic although it is not always so. He admitted knowledge of the case of a prominent lawyer thus afflicted who attends to his business over a period of time and then goes to a hospital during the recurrences of periods of insanity (R. 15-18, 25). He testified that sadness, moodiness and sluggishness of thought and action are often manifestations of the depressive stage of manic depressive insanity, and that the accused's history disclosed these symptoms. He also stated that in the excitable manic depressive insanity sexual activity is greatly increased in some cases; that in the psychotic stage this activity sometimes leads to improper love infatuation and that both the excitable and depressive stages of manic depressive insanity are sometimes found in one individual. He stated that manic depressives have morbid impulses towards alcohol and drugs, and expressed the opinion that the toxic agent of alcohol "would pro-

duce exaggerated types of reaction" in a person of depressive temperament, and that an individual with the abnormal depressed personality, such as the accused had been found by the board to have, "would act in a much more exaggerated fashion than a normal individual" (R. 26, 28, 30, 31-40). On redirect examination the witness adhered to the opinion of the medical board that accused was mentally responsible at the time of the alleged offenses and stated that he has no psychosis (insanity), but that "he does present a depressive temperament which is considered to be one of the fundamental stages of the manic depressive psychosis" (R. 35,37).

Major Orbison, who at the request of the defense attended the sessions of the court and heard the testimony of all the witnesses, was recalled at the conclusion of the trial and stated that he had no reason to change his opinion as expressed in the findings of the board. He diagnosed accused's case as "a depressive temperament and one of the fundamental states of manic depressive psychosis, but is not psychosis * * * it is only one of the stages of manic depressive psychosis". In accused's case "the periods of depression have reached rather a severe degree". It is common with this mental condition that the patient "takes to" alcohol to relieve the depression (R. 447-449).

Throughout his testimony the witness, while impartial, indicated that the testimony of laymen as to the actions, moods, and temperament of the accused did not have much probative value because they were not technically qualified to distinguish all the elements of psychosis (R. 27, 42-44, 449).

7. With reference to Charge I and its Specification, the record of trial presents two questions which will be considered separately.

(1) Did the improper admission of evidence for the prosecution over objection by the defense injuriously affect the substantial rights of the accused within the meaning of the 37th Article of War?

The testimony of Miss Vanderwood in which she recites the story of the assault as told to her by Miss Munn forty minutes after it had occurred was offered by the prosecution as a part of the res gestae and was admitted by the court over the strenuous

objection of the defense that it was hearsay and incompetent. According to the testimony of Miss Munn the alleged assault occurred shortly after 10:45 P.M. After she had then fled to the kitchen, and the accused had been taken in charge by the orderly Stuart, she sat down in a chair by the table and cried. She did not know how long she sat there until she "pulled herself together". In the meantime, Stuart had taken the accused upstairs. Stuart says Miss Munn remained in the kitchen ten or fifteen minutes and then went back to the office to change her dress. He also says that after stopping accused, he talked to him "for some little time". Miss Munn says she then changed to an extra uniform, combed her hair which was down, and asked Stuart to take her over to F-4. She thought it was then around 11:30. Miss Vanderwood says Miss Munn came to her ward about twenty-five minutes to twelve and cried for about ten minutes before she said anything at all. The story of Miss Munn then followed, as hereinbefore recited, which the prosecution contended was admissible from the lips of Miss Vanderwood as a part of the res gestae (R. 159-160).

Over the objection of the defense that the conversation was out of the presence of the accused, and upon the contention of the prosecution that it was a part of the res gestae, Stuart was permitted to testify that when Miss Munn asked him to go over to F-4 with her she said that "she was afraid Clark would be outside and she wanted me to go along as protection" (R. 108).

Over the objection of the defense that the conversation between Miss Munn and Miss Sheehan about 7:00 o'clock on the morning of November 3, 1931, was not a part of the res gestae, but a self-serving declaration, hearsay and incompetent, the court, upon the contention of the prosecution that it was "a part of the res gestae and a part and parcel of the affair", permitted Miss Sheehan to testify substantially as follows: She did not ask Miss Munn to describe in detail. From the way Miss Munn looked she decided that she should report her condition to the hospital authorities. Miss Munn came in to tell witness that she had had a very unusual experience on the ward. She was excited and could hardly talk. She told witness that she had been attacked by one of the men on the ward (R. 187).

The rule in regard to res gestae is stated in the Manual for Courts-Martial as follows:

"Circumstances, including exclamations, declarations, and statements of participants and bystanders, substantially contemporaneous with the main fact under consideration and so closely connected with the main fact as to throw light upon its character, are termed res gestae. Evidence of anything constituting a part of the res gestae is always admissible.

* * * * * *

"It sometimes happens, however, that an utterance constituting a part of the res gestae was made under such circumstances of shock or surprise as to show that it was not the result of reflection or design but made spontaneously. In such a case evidence that the utterance was made may be introduced for the purpose of proving the truth of the utterance itself. This does constitute an exception to the hearsay rule." M.C.M., p. 118.

The "main fact" in the instant case is, of course, the assault with intent to commit rape. The authoritative rulings of the Federal Courts, applied by the Board of Review in consonance with the provisions of Article of War 38, require that in order to be part of the res gestae statements must be spontaneous, substantially involuntary, remarks or exclamations caused by and growing out of the main fact to which they relate and so nearly contemporaneous with the main fact as to exclude the possibility that they are the result of reflection or design (CM 197011, Kearney, and cases cited).

In the light of the above, it is the opinion of the Board of Review that none of the statements admitted can be regarded as properly admissible upon the ground that it was a part of the res gestae. They were not substantially contemporaneous with the principal act, nor connected with it so as to form a part of the transaction. They were not the instinctive words of Miss Munn, neither were they involuntary or spontaneous in any sense. Where not possibly self-serving declarations or conclusions expressed by Miss Munn, otherwise incompetent under the hearsay rule, they were mere narratives of a past occurrence.

The testimony of Miss Sheehan, however, as to what Miss Munn told her about the affair, is considered properly admissible, not

as res gestae but as a statement of the complaint made by one upon whom an assault with intent to rape is alleged to have been committed. Miss Sheehan's testimony recited no particulars other than those permissible and necessary to connect the complaint definitely with the alleged affair, and she did not name the assailant. Whatever weight of proof was lost by the delay in making such a complaint and whether such delay is satisfactorily explained by Miss Munn and by the circumstances, does not affect its admissibility as a "complaint".

The wrongful admission of the testimony of Miss Vanderwood was particularly damaging to the rights of the accused in this case where there was little or no evidence in corroboration of the story of the assault as told by the complaining witness, since such testimony might have been regarded by the court as a convincing corroboration of her story. It is almost the universal rule of the civil courts that the admission of such testimony is ground for reversal. The effect of the admission of this incompetent evidence upon the minds of the members of the court cannot be measured, but in view of the nature of the offense charged, it is the opinion of the Board of Review that its admission over express objection by the defense injuriously affected the substantial rights of the accused within the meaning of the 37th Article of War.

Assuming, however, for the complete consideration of this case, that the error of law discussed does not affect the validity of the findings, the second question presented must be stated and considered.

(2) Does the evidence, irrespective of errors of law, establish that the accused was at the time legally capable of forming the criminal intent charged in the specification?

The burden of proving beyond a reasonable doubt the existence of the intent to rape is upon the prosecution, and in proving that intent the prosecution must establish beyond a reasonable doubt that the accused was in such mental condition that he could form the intent. The evidence of Major Orbison, the psychiatrist who testified in connection with the sanity of the accused, considered in connection with the overwhelming and substantially unchallenged testimony that the accused was in a state

of beastly drunkenness to the point where at certain times shortly preceding the assault his mind failed to function consciously, and considered also in connection with the testimony of Mrs. Clark, the former wife of the accused, and Captain Paul R. Knight, 16th Infantry, under whom the accused had served in Hawaii, creates more than a reasonable doubt that the accused was capable of forming the required intent.

It is not necessary to state the testimony in regard to the accused's drunkenness nor the testimony of Mrs. Clark and Captain Knight, but the facts established by their testimony, taken in connection with the testimony of Major Orbison, definitely establish the truth of the opinion expressed by Major Orbison that the accused, even when not under the influence of alcohol, is in one of the fundamental stages of the particular type of insanity known as manic depressive psychosis. Major Orbison's testimony establishes that manic depressive psychosis is insanity and that its manifestations are periodic rather than constant. It is definitely established by his testimony that the accused has a depressive temperament which is one of the basic stages of the manic depressive psychosis. It is impossible for the Board of Review to determine from the evidence how far the accused has advanced in degree in these stages. Major Orbison does not lay down any standard by which it can be determined as a matter of fact when a person passes from a fundamental stage of psychosis into the actual psychosis. He testifies, however, unqualifiedly, that the toxic effect of alcohol would produce exaggerated types of reaction in a person of accused's temperamental condition. The testimony of Mrs. Clark, Captain Knight and Major Orbison does indicate the possibility that accused is in fact insane. It is not believed, however, that it establishes that fact, and the Board of Review concurs in so much of the finding of the court as involves a finding that the accused was not insane at the time of the alleged assault. The Board cannot, however, reach the conclusion that the accused was at the time of the alleged offense in such mental condition as to be able to form a criminal intent. The extent of the accused's drunkenness in itself is sufficient to cast a doubt upon his ability to form such intent, and this drunkenness, coupled with the accused's undoubted mental abnormality, raises in the minds of the Board of Review a serious doubt that the accused was conscious of his actions at the time. We cannot say that the evidence taken as a whole establishes beyond a reasonable doubt that the accused was in such

mental condition that he was legally capable of forming the criminal intent which is the essential element of the offense charged.

The conclusions stated are strengthened by the testimony of Miss Munn. The accused is a man of unusually varied military experience for one of his years, is well educated and is above average in intelligence. And yet, according to Miss Munn's testimony, he attempted to commit one of the most atrocious of crimes in an unlocked and lighted office of a hospital ward, accessible to orderlies and patients and within a few feet of some of the patients. Assuming these facts to be established, they in themselves are sufficient to raise a material doubt as to the mental condition of the accused at the time. In addition, it is significant enough to merit note that even those witnesses who saw the accused at the approximate time of the alleged assault and who were under the impression that he was not drunk testified that he was abnormal either in thought, action, or appearance.

It follows from the above that on the law and on the merits, the record of trial is legally insufficient to support the finding of guilty of assault with intent to commit rape. There remains to be considered, however, in respect to Charge I and its Specification, the question whether the evidence establishes the lesser included offense of assault and battery. In the opinion of the Board of Review and, for reasons more fully stated in the discussion of Charge II and its Specification below, the competent evidence does establish the lesser included offense. However, the assault and battery proven are major elements of the disorderly conduct charged against the accused in the Specification of Charge II and for that reason should not be found under Charge I and its Specification. It being evident from the thorough presentation of facts and opinion in regard to the accused's mental condition that, should a rehearing be ordered, the prosecution would be unable to establish beyond a reasonable doubt that the accused at the time of the alleged offense was in such mental condition as to be able to form a criminal intent, the Board of Review is of opinion that the finding of guilty of Charge I and its Specification should be disapproved.

8. This brings us to a consideration of the sufficiency of the evidence to support the finding of guilty under Charge II and its

Specification, alleging that accused was drunk and disorderly at Fitzsimons General Hospital on or about November 2, 1931, in violation of the 95th Article of War.

That the accused was drunk as alleged is conclusively established both by the evidence for the defense, introduced as defense to the more serious charge of assault with intent to commit rape, and by the evidence for the prosecution. As to this fact there is no question. The disorderly conduct of the accused is shown in the preceding review of the evidence and may be summarized in part as follows:

At about 10:00 P.M. on the night of November 2, 1931, he dragged Private Stuart, the night orderly, from the davenport where the latter was sleeping into the middle of the solarium, told him that he had some women and liquor outside and asked Stuart to come out and join him. Stuart went outside but found neither women nor liquor, and accused had disappeared. About 11:00 o'clock on the same night, after inquiring what kind of a nurse was on the ward, he went to the ward office in spite of the orderly's protest. He remained there at least ten minutes during which time, according to his own testimony, he kissed the nurse for a long period and apparently held her down on the floor or on a bed, table or other piece of furniture. That such are the facts and that his conduct in this respect was against her will and indecently disorderly is confirmed by the result; namely, the act of Miss Munn in running from the ward office through the hall and solarium to the kitchen, in a disheveled condition of dress and hair with one shoe off and with blood on her dress and hysterically crying "Save me", the accused being in close pursuit. At that time Miss Munn was crying, her dress was crumpled and torn and she was extremely agitated. Accused came into the kitchen "a half foot away from her" and Stuart had to grab him by the arms to stop him and to talk to him for some time before he could persuade him to go upstairs. Perhaps twenty minutes later Stuart found accused clad only in his underwear lying on a cot in the nurse's office with his head under a sheet. He asked Stuart for the nurse. Still later the same night accused sat on the davenport in the solarium and offered Stuart $20 if he would bring the nurse back on the ward. He said to Stuart "You have been knocking her off, haven't you, various times?" Stuart denied this. Accused then said, "That is what I want to do, it won't take fifteen minutes,

and I will check right out". Stuart reminded him that he was an officer and "probably would be busted for this", and accused replied that he realized that but that it did not make any difference "he would check right out anyway, it would only take fifteen minutes."

The several instances recited above rest upon the testimony of the accused and Private Stuart and the circumstantial evidence connected therewith. Private Stuart's testimony as to Miss Munn's condition and actions following her flight from the ward office is corroborated by her testimony, which as to those facts only may be properly considered, and other parts of his testimony are inferentially corroborated by the testimony of the accused himself. Miss Munn's flight from the office, the condition of her clothes, her appearance and her appeals for help are circumstances which support only one reasonable hypothesis, that is, that accused did commit the disorderly acts amounting to an assault and battery briefly stated in the third subparagraph of this paragraph.

The doubt expressed in paragraph 7 in regard to the accused's mental condition at the time of the assault does not affect the finding of guilty of Charge II and its Specification. The drunkenness of the accused was voluntary, and the accused became drunk with full knowledge that when he did indulge in alcoholic liquor to excess his mind often ceased to function consciously and while in that condition he committed acts which brought trouble upon him. He is legally and morally responsible for the probable consequences of his act in becoming drunk and for the disorders which resulted therefrom. While he may have been induced to drink in an effort to relieve his depression, there is no element of inability to resist the desire for drink. The testimony of the accused establishes that he could control himself in that respect, and that for about nine months just before entering the hospital he refrained from drink despite the fact he was having terrible periods of depression. Under circumstances where medical attention is not available it is understandable that a man suffering such extremes of depression as accused suffers might turn to alcohol as a relief. But the accused was in a general hospital with medical attention and with drugs available at all times, and no excuse can be found for his drunkenness nor for the disorders resulting therefrom. Accused is clearly guilty of being drunk and disorderly.

The 95th Article of War provides that any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.. The accused has been so convicted by the court and the sentence under such conviction has been approved by the reviewing authority. It is therefore appropriate to consider whether his conduct, as outlined above, together with the fact that he was drunk, can properly be held to be "conduct unbecoming an officer and a gentleman".

The Manual for Courts-Martial (paragraph 151, page 186) in discussing the 95th Article of War, quotes Colonel Winthrop as follows:

> "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."

The Manual further states:

> "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 <u>indecency</u> or <u>indecorum</u>, 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 <u>morally unfit</u> 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." (Underscoring supplied.)

In Colonel Winthrop's illuminating discussion of "Military Law and Precedents" there is found the following:

> "'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."
>
> "'Gentleman'. So, this term is believed to be used, not simply to designate a person of education, refinement and good breeding and manners, but to indicate such a gentleman as an officer of the army is expected to be, viz. 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".
>
> * * * * *
>
> "Though it (i.e., the conduct denounced) 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, pages 711-713).

Colonel Winthrop mentions among the principal offenses which in practice have been charged and prosecuted under this article, the following:

> "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by

some peculiarly shameful conduct or disgraceful exhibition of himself by the accused."

The evidence in this case shows without contradiction or question, as previously outlined, that accused was grossly drunk; that he invited a private soldier to join him with women and liquor, both non-existent and imaginary, except in the mind and purpose of the accused; that he embraced,kissed and assaulted an army nurse while she was on duty in her hospital office; that he pursued her with hair down and dress disordered about the hospital late at night to her hysterical terror; that he lay down in a bed in the nurse's dressing room, clad only in his underwear, and asked a private soldier for the nurse; that he asked the same soldier if he had not been having intercourse with the nurse and offered him $20 if he would get her for him, stating that he wanted to have sexual intercourse with her.

The Board of Review has no hesitation in reaching the opinion that such disorderly conduct is "morally unbefitting and unworthy" an officer and a gentleman, that it offends so seriously against morality and decorum as to expose the accused to disgrace socially and as a man, has brought dishonor and disrepute upon the profession which he represents, and that it shows the accused is unfit to hold a commission in the Army.

9. There remains for consideration the question whether or not the failure to allege aggravated circumstances in the Specification of Charge II was such an error of pleading as injuriously to affect the substantial rights of the accused and require a disapproval of the findings of guilty of violation of the 95th Article of War, and a substitution therefor of a finding of guilty under the 96th Article of War. In the opinion of the Board of Review no such injury appears on the face of the record. At the investigation of the charges accused was thoroughly informed of the nature of the disorderly acts charged against him and of the conditions and circumstances surrounding them. He further knew at that time and at the time of the trial that he was charged with conduct unbecoming an officer and a gentleman. There was no opportunity for him to be misled in the preparation of his defense nor to be ignorant of the gravity of the charge. The aggravating circumstances although not pleaded were established by the testimony given at the investigation and by the testimony given at the trial. Under such circumstances the provisions of Article of War 37 apply in full force and no modification of the finding of guilty of Charge II is required or authorized.

10. Civilian counsel for the accused have submitted to the Board of Review a brief discussing the evidence and the law in this case and two briefs have been filed on behalf of the accused by Honorable J. P. Kavanaugh of Portland, Oregon, who also appeared in person and discussed the law and the evidence before the Board of Review. Discussion of two of those briefs is unnecessary in view of the conclusions reached by the Board as to the legal insufficiency of the record to support Charge I and its Specification. The third brief deals mainly with accused's mental responsibility for his drunkenness and the accompanying disorders, argues in effect that accused is actually suffering from mental disease, and pleads that under all the circumstances a sentence of dismissal would be too severe and that in view of accused's long and faithful service, his pitiful physical condition and his periodic and distessing mental disorders, he should be retired. The accused's responsibility for his drunkenness and disorderly conduct has been discussed elsewhere. With reference to possible clemency the Board of Review is of opinion that clemency is never warranted when an officer or cadet is properly convicted, as this accused is convicted, of conduct unbecoming an officer and a gentleman.

However, it is argued on behalf of the accused that the record of trial, duly authenticated as provided by law, is incorrect in many particulars. At the request of the Board of Review, the civilian counsel for the accused submitted a carbon copy of the record of trial in which the alleged errors were indicated. The Board of Review carefully examined the record and compared it with the original record. Many, if not most, of the alleged errors were typographic errors and most of them related to evidence affecting Charge I and its Specification. Assuming for the sake of this discussion that the record of trial was in error in the particulars claimed by the defense, such a fact would have no bearing upon the legal sufficiency of the record to support the finding of guilty as to Charge II and its Specification. No serious claim is made that the accused was not drunk and disorderly as alleged and much of the evidence supporting the conviction was produced by the defense.

11. The record of trial departs from the conventional form of such records in a number of particulars; such as failure to copy into the record the affidavit of the officer preferring the charges and the indorsement referring the charges for trial, and the failure to have the record recite in the form prescribed in Appendix 6, Manual

for Courts-Martial, that the findings and sentence were by secret written ballot, two-thirds of the members present at the time the votes were taken concurring. None of these variations affects the validity of the record.

12. At the time of the trial the accused was 31 years of age. His service is shown by the Official Army Register as follows:

> "Pvt. Co. F, 3 Inf. Ore. N.G. 29 June 16 to 25 Sept. 16; pvt. and sgt. bglr. Tk Co. 2 and Hq. Co., 23 Engrs. 18 Sept. 17 to 25 June 19. - Cadet M.A. 1 July 20; 2 lt. of Inf. 12 June 24; 1 lt. 21 Jan. 29."

13. The court was legally constituted. Except as hereinbefore noted, the record of trial discloses no errors or irregularities injuriously affecting the substantial rights of the accused. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, but is legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support so much of the sentence as provides for dismissal from the service. Dismissal is mandatory upon conviction of violation of the 95th Article of War, but neither confinement nor forfeiture is authorized.

E. C. McNeil, Judge Advocate.

J. C. Bergman, Judge Advocate.

Theodore Hall, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., AUG 12 1932 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of First Lieutenant Francis J. Clark (O-15533), Infantry (CM 198724), together with the foregoing opinion of the Board of Review, and three briefs submitted by counsel for the accused.

2. I concur in the conclusions expressed by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification, but is legally sufficient to support the findings of guilty of Charge II and its Specification, and only so much of the sentence as provides for dismissal from the service, and warrants confirmation thereof. Accordingly, I recommend that the findings of guilty of Charge I and its Specification be disapproved, and that so much of the sentence as provides for dismissal be confirmed.

Under the opinion of the Board of Review, it would be entirely proper, in the legal sense, to recommend approval of so much of the findings of guilty of Charge I and its Specification as involve findings of guilty of the lesser included offense of assault and battery since that offense is established by the evidence. But as the finding of guilty of the grave charge of assault with intent to commit rape must be disapproved, and as the remaining assault is one of the elements of the disorderly conduct charged in Charge II and its Specification, I am of opinion that under the circumstances of this case the accused should not be found guilty of that assault under Charge I so long as it is included as a material element under Charge II. As a matter of fact, it is doubtful that the assault and battery remaining under Charge I would have been separately charged had not it been believed that the element of felonious intent was present at the time the charges were referred for trial. In all probability the accused would have been tried only for conduct unbecoming an officer and a gentleman, with the assault and battery one element of the proof of that charge.

3. Inclosed herewith is a draft of a letter for your sig-

nature transmitting the record to the President for his action, together with a form of executive action designed to carry into effect the recommendations hereinabove made should they meet with approval.

Blanton Winship,
Major General,
The Judge Advocate General.

7 Incls.
Incl.1-Record of trial.
Incl.2-Opin. of Bd. of Rev.
Incl.3-Brief of Phelps & Van Cise.
Incl.4-Brief of J. P. Kavanaugh.
Incl.5-Memorandum of J. P. Kavanaugh.
Incl.6-Let. for sig. of Secy. of War.
Incl.7-Form of executive action.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington

CM 198750

JUN 8 1932

UNITED STATES	)	THIRD CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Washington, Maryland, May 24, 1932. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private GEORGE J. KNOUFF (6812400), Company K, 12th Infantry.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private George J. Knouff, Company K, 12th Infantry, did, at Fort Washington, Maryland, on or about March 28, 1932, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort George G. Meade, Maryland, on or about April 17, 1932.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction by special court-martial for desertion in violation of the 58th Article of War was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence shows that accused went absent without leave from Company K, 12th Infantry, at Fort Washington, Maryland, on March 28, 1932, and remained absent without authority until he surrendered to the military police at Fort George G. Meade, Maryland (about 40 miles from Fort Washington), on April 17, 1932, at which time he was dressed in service uniform. He made no statement at the time of surrender (R. 5; Exs. A, B).

4. The record of trial therefore presents the question of law whether the evidence is legally sufficient to support the findings that accused deserted. Desertion is absence without leave from the service with the concurrent intent not to return thereto. In order to sustain a conviction of desertion there must be substantial evidence tending to show the necessary intent not to return to the service. It is well settled that prolonged absence, unexplained, may justify a court in inferring an intent to remain permanently absent. It is also well settled that an alleged deserter's return to military control at a point a great distance away from his proper station and after a material absence is sufficient to justify the court in inferring the necessary intent. In the instant case the absence is of short duration and the distance from the post of the accused is in itself short. The proof of intent to desert cannot be supplied by those facts alone. "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 tending to show that prior to absenting himself without leave the accused had stated that he was going to desert or some other evidence from which a court might reasonably infer that the accused intended not to return to the military service. The facts established by the evidence in this case are entirely consistent with innocence of the accused in so far as the offense charged is concerned. The Board of Review therefore holds that there is no material evidence in the record to sustain the findings of guilty of desertion. CM 196776, Maialoha; CM 196187, Roath; CM 195988, Parr; CM 189658, Hawkins.

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 as involves findings that accused did, on March 28, 1932, absent himself without leave from Fort Washington, Maryland, and did remain absent until he surrendered at Fort George G. Meade, Maryland, on or about April 17, 1932, in

violation of the 61st Article of War, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for sixty days and forfeiture of fourteen dollars of his pay per month for a like period.

[signature], Judge Advocate.

[signature], Judge Advocate.

Theodore Hall, Judge Advocate.

WAR DEPARTMENT
In the office of The Judge Advocate General
Washington

JUL 8 1932

CM 198865

UNITED STATES	)	FOURTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort McPherson, Georgia, June 9, 1932. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private First Class ROBERT B. SOSEBEE (6346628), Company G, 22d Infantry.	)	

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

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

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

CHARGE I: Violation of the 59th Article of War.

Specification: In that Pvt. 1 cl. Robert B. Sosebee, Company G, 22d Infantry, did, at Fort McPherson, Georgia, on or about May 2, 1932, by saying to him "you better sell out" or words to that effect, advise Private John Woodall, Company G, 22d Infantry, to desert the service of the United States.

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

Specification: In that Pvt. 1 cl. Robert B. Sosebee, Company G, 22d Infantry, did, without proper leave absent himself from his organization at Fort McPherson, Georgia, from about May 2, 1932, until about May 7, 1932.

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

Specification: In that Pvt. 1 cl. Robert B. Sosebee, Company G, 22d Infantry, having received a lawful order from 2d Lieut. W. E. Hall, F.A., (DOL) ADC, to report to him at his (Lt. Hall's) office at 9:30 A.M., May 2, 1932, the said Lieut. Hall being in the execution of his office, did at Fort McPherson, Georgia, on or about May 2, 1932, fail to obey the same.

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

Specification: In that Pvt. 1 cl. Robert B. Sosebee, Company G, 22d Infantry, did, at Fort McPherson, Georgia, on or about April 20, 1932, feloniously take, steal, and carry away one (1) civilian suit of clothing, value about $30.00, the property of Corporal Judson B. Crow, Company G, 22d Infantry.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to Article of War 50½.

3. The record shows that only one witness, Private John Woodall, gave testimony in support of Charge I and its Specification and Charge IV and its Specification. This witness, Woodall, was cross-examined and interrogated by the court at great length (R. 16-24). Immediately after witness Woodall had completed his testimony and before any attempt to impeach him had been made, the prosecution called another witness, Private Silas V. Strickland, to whom it propounded the following questions (p. 25-26):

Q. How long have you known Private Woodall?
A. Approximately two years.

Q. What is your opinion of Private Woodall as for truthfulness? What is his general reputation in the company for truthfulness?
A. His general reputation in the company is good, as good as the average soldier.

Then the court proceeded to propound the following questions:

Q. Would you believe Private Woodall under oath?
A. I certainly would.

Q. Would or would not?
A. I would.

Q. What I want to know is what you mean by "truthful as the average soldier"? That is a pretty broad statement and it doesn't mean anything.
A. I have known him for a year and he has never given any reason yet for to believe otherwise, as far as being truthful.

Q. As far as you have known?
A. He is honest.

Q. He is honest?
A. Yes sir.

Q. What is his reputation for telling the truth in the company? If you ask him a question can you expect the answer to be a truthful answer?
A. Yes sir.

This attempt to fortify or buttress the unimpeached testimony of the witness Woodall was error, and under the circumstances shown in this case was prejudicial to the substantial rights of the accused. CM 190259, Sheffield; 195687, Stansbury; 196371, Steenberg; Ford v. United States, 3 F. (2d) 104; Harris v. United States, 16 F. (2d) 117. The fact that the court propounded questions as to the truthfulness of witness Woodall indicates that at least some of its members were doubtful regarding his testimony.

4. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of Charges I and IV and the specifications thereunder, legally sufficient to support the findings of guilty of Charges II and III and the specifications thereunder, 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 fifteen days.

E. C. McCrey, Judge Advocate.

J. Rosenman, Judge Advocate.

Theodore Hall, Judge Advocate.

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

CM 198975,

JUL 19 1932

UNITED STATES	)	FOURTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, June 30, 1932. Dismissal.
First Lieutenant CHARLES D. SUGRUE (O-16404), 24th Infantry.	)	

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

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

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

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

Specification: In that 1st Lieut. Charles D. Sugrue, 24th Infantry, did, at Fort Benning, Georgia, on or about June 6, 1932, fail to repair at the fixed time to the properly appointed place for the performance of his duties as a Company Officer of Company G, 24th Infantry.

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

Specification: In that 1st Lieut. Charles D. Sugrue, 24th Infantry, was at Fort Benning, Georgia, on or about June 10, 1932, drunk in quarters.

He pleaded not guilty to, and was found guilty of, all the charges and specifications. Evidence of one previous conviction for appearing in uniform in a public place, - the Main Theatre, Fort Benning,

Georgia, on October 25, 1931, under the influence of intoxicating liquor, in violation of the 96th Article of War, was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

Specification, Charge I.

Accused was a company officer of Company G, 24th Infantry, Fort Benning, Georgia. The officers of this company were under orders to report at the orderly room of the company at 8 a.m. each morning for the performance of their duties, the place and hour having been fixed by the Commanding Officer of the 24th Infantry. Accused did not report at the orderly room at 8 a.m. on June 6, 1932, nor did he report at that place at any time during that morning (R. 10-12, 27-28). He had no authority to be absent and he did not notify his company commander that he would be absent on that morning (R. 11-12). Accused usually reported for duty at 8 a.m. each morning, and when he had not so reported he had invariably called up and notified the first sergeant where he was and what duty he was performing. The company commander had considered this a satisfactory explanation of accused's absence (R. 15). He did not so notify the first sergeant that he would be absent on June 6th (R. 28). There was no formation of the company that morning. The company commander saw accused at 11:30 a.m. at regimental headquarters (R. 13,14).

Specification, Charge II.

At about 2 p.m. on June 10, 1932, accused and Second Lieutenant Edward D. McLaughlin, 24th Infantry, went from the 24th Infantry bachelor building to the 24th Infantry officers' mess in the latter's car to do some work in connection with the accounts of the officers' mess. McLaughlin testified that accused was then very much under the influence of intoxicating liquor, as indicated by the fact that he seemed to be sleepy and did not talk much. After working on the accounts for a time accused went out, got into witness' car, and went to sleep. At about 3:45 p.m. Lieutenant McLaughlin took accused to

the latter's quarters, and at about 4:30 p.m. answered a telephone call asking for accused but found him asleep and was unable to awaken him (R. 28-31).

At about 4:30 or 4:45 p.m. on June 10, 1932, Captain Marcel A. Gillis, the Adjutant of the 24th Infantry, who testified that he had reason to believe that accused should have been on "some other duty" and that he wanted to "find out what the trouble was" (R. 25), requested Captain James P. Gammon, 24th Infantry, to go with him to accused's quarters (R. 23), where they were met by Major Alfred Mordecai, Medical Corps, who had been asked by Captain Gillis to examine accused and see if he was sick (R. 22). This was an official visit (R. 25).

Major Mordecai testified that upon knocking several times very loudly on the door of accused's quarters there was no response. They then opened the door and went in. There was a strong odor of alcohol in the room. Accused was lying on an Army cot near the window with his face towards the window. He did not respond when called. His pulse was "considerably stimulated". Although it was rather cool by the window, he was perspiring profusely. After having been called to and turned over on his back, accused opened his eyes. The pupils were dilated and did not react to light. There was a strong odor of alcohol upon his person and breath. He was in a state of profound and unnatural sleep. He was hard to arouse and then seemed dazed. When asked if he had taken drugs or narcotics, he denied that he had, and said that he was not sick and had not taken anything. He was able to stand quite steadily. His speech was somewhat thick and his "mentality retarded". His responses to questions were very slow and to some questions he did not answer at all. He was unable to explain why he had not met Captain Gammon at the Polo Club that afternoon when he had replied to the latter's telephone call that he would be right over. In the opinion of Captain Mordecai, accused was then suffering from acute alcoholism (R. 17-19).

Captain Gammon and Captain Gillis, who also saw accused in his quarters at this time, each testified that he was drunk and not fit for duty (R. 24,25).

Accused did not testify or make any statement and no evidence was introduced in his behalf (R. 32).

4. The evidence of record clearly shows that the accused was absent from duty on June 6th, and that he was drunk in his quarters on June 10, 1932, as alleged in the specifications. He made no explanation of his conduct on either occasion. These are serious offenses and manifest a careless and reckless disregard of duty which cannot be tolerated in a commissioned officer. While the accused was not drunk in public and the offense was not aggravated by disorderly conduct, yet he was so drunk between 2:00 and 5:00 p.m. that he could not perform duty and was actually absent from some duty he should have performed. The two offenses here charged were committed just four days apart, and in addition to these the court considered a prior conviction for being drunk in a public place in October, 1931, for which he was reprimanded. This prior offense no doubt influenced the court to impose the sentence of dismissal. While severe, the sentence involves no clearly erroneous exercise of judicial discretion on the part of either the court or reviewing authority.

5. At the time of trial accused was 28½ years of age. His service is shown by the official Army Register as follows:

"Cadet M.A. 1 July 22; 2 lt. of Inf. 12 June 26; 1 lt. 1 Nov. 31."

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. A sentence of dismissal is authorized for violation of the 61st and 96th Articles of War.

E. C. McKey, Judge Advocate.

R. S. Neeman, Judge Advocate.

Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

AUG 26 1932

CM 198988

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Snelling, Minnesota, June 16, 1932. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private RICHARD L. FEGLEY (6793691), Medical Department.	)	

HOLDING by the BOARD OF REVIEW
BRENNAN, HALL and GUERIN, Judge Advocates.

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

2. Charge I and the two specifications thereunder upon which the accused was tried (a nolle prosequi having been entered as to Specification 3) alleged burglary and larceny in violation of the 93d Article of War. The evidence upon which the court found the accused guilty of that Charge and its specifications is purely circumstantial. There being no direct evidence that the accused committed the offenses, the circumstances must be inconsistent with a reasonable hypothesis of innocence in order to sustain the findings of guilty. In the opinion of the Board of Review, the circumstances proven are not inconsistent with innocence. The evidence establishes that the accused was seen to enter the apartment house in which the burglary and larceny are alleged to have taken place and to leave the apartment house within ten minutes or less of the time he entered it. The evidence also establishes that a few minutes before going to the apartment house the accused had telephoned Miss Clara Novack, who had an apartment in the building and whose apartment and property were the subject of the burglary and larceny, that he was coming to

see her. The burglary and larceny were not discovered until approximately an hour after the accused was seen to leave the apartment house. There was found in the accused's possession subsequent to the alleged offenses a clock of ordinary commercial make and of very little value, the alleged value being $1, which was similar to one of the articles stolen from Miss Novack's apartment. Miss Novack was unable to identify the clock as the one stolen from her, there being no marks whatever upon her clock or upon the clock exhibited in court by which it could be distinguished from any other clock of similar make. None of the other articles stolen at the time the burglary was committed was found in the accused's possession. When the burglary was discovered, approximately an hour after the accused was seen to leave the building in which the apartment was situated, it was found that the apartment was in a state of great disorder, the chairs being turned upside down, ash trays thrown around the room, strings of beads torn to pieces and scattered around, and there were other evidences of deliberate wreckage. The evidence adduced by the prosecution established that two or three hours before the accused was seen to enter and leave the apartment building, an unidentified person telephoned to the witness Westrope, who was calling on Miss Novack, "I have got some news for you. A bunch is going to come down there and clean up on you". This telephone message is not connected by the evidence in any way with the accused.

The pertinent facts established by the evidence and summarized above are, in view of the material lapse of time between the accused's presence in the apartment house building and the discovery of the burglary and larceny, consistent with the theory that accused called to see Miss Novack, found that she was not at home, and departed from the building, and that the persons referred to in the telephone warning to Mr. Westrope subsequently broke into Miss Novack's apartment and stole the property referred to in Specification 2 of Charge I.

3. The total value of the articles named in the Specification of Charge II, which the accused stands legally convicted of stealing, is less than $20. The maximum confinement authorized for the larceny of property of a value of less than $20 is six months.

4. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of Charge I and its two specifications but legally sufficient

to support the findings of guilty of Charge II and its Specification and 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 six months.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

JUL 27 1932

CM 199034

UNITED STATES)	FIRST CAVALRY DIVISION
)	
v.)	Trial by G. C. M., convened at
)	Fort D. A. Russell, Texas, June
Private FRANK J. WORMUTH)	30, 1932. Dishonorable dis-
(6245495), Machine Gun)	charge and confinement for one
Troop, 1st Cavalry.)	and one-half (1½) years.
)	Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BRENNAN, HALL and GUERIN, Judge Advocates.

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

2. The accused was found guilty of four separate acts of larceny alleged to have been committed on four different days, between May 19, 1932, and May 31, 1932, both dates inclusive. All the property stolen was owned by one individual.

3. The dates of the alleged thefts as stated in the specifications were the dates upon which the owner discovered that the property was missing. The prosecution did not attempt to establish that subsequent to the first theft (Specification 2) the property described in Specifications 1, 3 and 4 was in the possession of the owner; nor that subsequent to the second theft the property described in Specifications 3 and 4 was in his possession. All the evidence as to the several acts of larceny and as to accused's guilt thereof is circumstantial. The circumstances established by the evidence are consistent with the hypothesis that all the property described in the specifications was taken by accused at one time; that is, that in taking the property referred to there was but one trespass and asportation and therefore but one larceny. The record of trial, therefore, is legally sufficient to

support a finding of guilty of only one act of larceny. The sentence is excessive inasmuch as the total amount involved is less than $20.00.

4. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

R S Bergman, Judge Advocate.

Theodore Hall, Judge Advocate.

Mark E Gunsin, Judge Advocate.

WAR DEPARTMENT
In the office of The Judge Advocate General
Washington

CM 199062

AUG 20 1932

UNITED STATES v. Privates WILFRED DOIRON (6650385), Battery A, 10th Field Artillery, HENRY W. ETZOLD (6707983), Headquarters, Headquarters Battery and Combat Train, 2d Battalion, 10th Field Artillery, and JAMES E. STAFFORD (6543456), Battery E, 10th Field Artillery.	)	THIRD DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, May 13 and 14, 1932. Doiron: Dishonorable discharge and confinement for five (5) years. Etzold: Dishonorable discharge and confinement for four (4) years. Stafford: Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BRENNAN, HALL and GUERIN, Judge Advocates,
ORIGINAL EXAMINATION by NEELY, Judge Advocate.

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

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

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

Specification 1: In that Private Wilfred Doiron, Battery A, 10th Field Artillery, Private Henry W. Etzold, Headquarters, Headquarters Battery and Combat Train, 2d Battalion, 10th Field Artillery, and Private James E. Stafford, Battery E, 10th Field Artillery, acting jointly and in pursuance of a common intent did at Fort Lewis, Washington, on or about April 10, 1932, in the nighttime feloniously and burglariously break

and enter the quarters of Lieutenant W. H. Bertsch, 9th Field Artillery, Fort Lewis, Washington, with intent to commit a felony, viz., larceny therein.

Specification 2: In that Private Wilfred Doiron, Battery A, 10th Field Artillery, Private Henry W. Etzold, Headquarters, Headquarters Battery and Combat Train, 2d Battalion, 10th Field Artillery, and Private James E. Stafford, Battery E, 10th Field Artillery, acting jointly and in pursuance of a common intent did at Fort Lewis, Washington, on or about April 10, 1932, feloniously take, steal and carry away, thirteen (13) pairs of socks, one (1) wallet, one (1) camera and one (1) box of novelty matches, of a total value of about thirty-two dollars and sixty cents ($32.60), the property of 1st Lieutenant W. H. Bertsch, 9th Field Artillery.

Specification 3: In that Private Wilfred Doiron, Battery A, 10th Field Artillery, Private Henry W. Etzold, Headquarters, Headquarters Battery and Combat Train, 2d Battalion, 10th Field Artillery, and Private James E. Stafford, Battery E, 10th Field Artillery, acting jointly and in pursuance of a common intent did at Fort Lewis, Washington, on or about March 23, 1932, unlawfully enter the locked garage of Sergeant David L. Schoch, Band, 10th Field Artillery, with intent to commit a criminal offense, to wit: to wrongfully remove from therein the said Sergeant Schoch's automobile without the owner's consent.

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

Specification: In that Private Wilfred Doiron, Battery A, 10th Field Artillery, Private Henry W. Etzold, Headquarters, Headquarters Battery and Combat Train, 2d Battalion, 10th Field Artillery, and Private James E. Stafford, Battery E,

10th Field Artillery, acting jointly and in pursuance of a common intent did at Fort Lewis, Washington, on or about March 23, 1932, wrongfully and unlawfully take and carry away an automobile, the property of Sergeant David L. Schoch, Band, 10th Field Artillery, without the said Sergeant Schoch's consent.

They pleaded not guilty to all charges and specifications. The court found, of Specification 1, Charge I: Privates Doiron and Etzold acting jointly, guilty; Private Stafford, not guilty; of Specification 2, Charge I: Privates Doiron and Etzold acting jointly, guilty; Private Stafford, not guilty; of Specification 3, Charge I: All guilty; of Charge I: All guilty; of the Specification, and Charge II: All guilty. One previous conviction as to each accused was introduced. Accused Doiron was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifteen years. Accused Etzold was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. Accused Stafford was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved only so much of the finding of guilty of Specification 1, Charge I, as finds that Privates Doiron and Etzold, acting jointly and in pursuance of a common intent, did at Fort Lewis, Washington, on or about April 10, 1932, in the nighttime, feloniously and burglariously break and enter the quarters of Lieutenant W. H. Bertsch, 9th Field Artillery, Fort Lewis, Washington, with intent to commit a felony, viz., larceny therein, and only so much of the finding of guilty of Specification 2, Charge I, as finds that Privates Doiron and Etzold, acting jointly and in pursuance of a common intent, did, at Fort Lewis, Washington, on or about April 10, 1932, feloniously take, steal and carry away, eight (8) pairs of socks, one (1) wallet, one (1) camera, and one (1) box of novelty matches, of a total value of less than twenty dollars ($20.00), the property of First Lieutenant W. H. Bertsch, 9th Field Artillery; and approved only so much of the sentence as to Private Doiron as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for five years, only so much of the sentence as to Private Etzold as provides for dishonorable discharge,

total forfeitures, and confinement at hard labor for four years, and only so much of the sentence as to Private Stafford as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for two years, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record under Article of War 50½.

3. In the opinion of the Board of Review the record is legally sufficient to support the findings of guilty of Charge I as to the accused Doiron and Etzold, the findings of guilty under Specifications 1 and 2 of Charge I, as approved by the reviewing authority, and the findings of guilty of Charge II and its Specification, and to support the sentences as approved. This leaves for consideration only the sufficiency of the evidence to support the finding of guilty of Charge I as to the accused Stafford and the findings of guilty of Specification 3, Charge I, as to all the accused.

4. The evidence under Specification 3, Charge I, shows that at about 9:15 p.m. on March 23, 1932, the three accused went to the garage of Sergeant Schoch, at Fort Lewis, Washington, broke the door open and removed his automobile therefrom for the purpose of driving to town (presumably Tacoma, Washington). Accused Stafford and Etzold remained on the outside as lookouts while accused Doiron opened the door and went inside. All three assisted in pushing the car out of the garage and all three rode to town (Ex. H; R. 85,150).

The evidence clearly shows that the intent was simply to drive the automobile for a short time and then return it where the owner could recover it (R. 85,86,150; Ex. H). There is no larcenous intent indicated by the evidence.

Sergeant Schoch, the owner of the car, did not give anyone permission to use his automobile (R. 46). The automobile was found the next day on the reservation at Fort Lewis, Washington (R. 44).

5. By Charge I and Specification 3 thereunder, the accused are charged with unlawfully entering the locked garage of Sergeant David L. Schoch with intent to commit a criminal offense, to wit: to wrongfully remove from therein Sergeant Schoch's automobile without

the owner's consent, in violation of the 93d Article of War. This specification charges housebreaking, which is defined by the Manual for Courts-Martial (Par. 149 e, p. 169) as "unlawfully entering another's building with intent to commit a criminal offense therein". Thus, the intent to commit some criminal offense is a necessary element of the offense here alleged. "The term criminal offense includes any act or omission violative of the Articles of War, which is cognizable by courts-martial, except acts or omissions constituting purely military offenses." (M.C.M., p. 169.)

The wrongful removal by a soldier at a military post of an automobile belonging to another soldier from a garage in which it is kept, without the consent of the owner, (commonly called "joy riding") is clearly a disorder prejudicial to good order and military discipline and therefore a violation of the 96th Article of War and a military offense cognizable by courts-martial. But, if it constitutes purely a military offense and not also a criminal offense of a civil nature, it is not a criminal offense within the definition of housebreaking quoted above. Whether such unauthorized removal of an automobile would constitute an offense of a civil nature depends upon whether or not, at the time and place in question, so-called "joy riding" was punishable under the civil law. Since the intended removal of the automobile was alleged and proved to be from a garage at Fort Lewis, Washington, which is a Federal military reservation, such removal would constitute an offense of a civil nature, or, in other words, a criminal offense within the definition of housebreaking only if there was in force at the time some Federal statute of general application or a statute enacted pursuant to authority of the United States making it a criminal offense. Section 289, United States Criminal Code, 18 U.S.C. 468, makes all acts or omissions, committed at a place under the exclusive jurisdiction of the United States, criminal offenses, if such acts or omissions were so denounced by the laws of the state, territory or district in which the place is situated, at the time of the enactment of the criminal code, and are not made punishable by any law of Congress. The Federal Criminal Code, supra, was approved on March 4, 1909, at which time there was no law in the State of Washington making the removal of an automobile without the owner's consent a criminal offense. There is no Federal statute of general application making such act a criminal offense. The reservation comprising Fort Lewis, Washington, is under the exclusive jurisdiction of the United States (Chapter 3, Sec. 20, p. 14,

Laws of Washington, 1917). It therefore follows that the evidence is legally insufficient to support a finding of guilty of housebreaking in violation of the 93d Article of War, but, in the opinion of the Board, it is sufficient to support a finding of guilty of the specification except the words "to commit a criminal offense, to wit:", in violation of the 96th Article of War.

It is true that the Criminal Code of the District of Columbia makes so-called "housebreaking" punishable; but that code is not a Federal statute of general application and is applicable only within the District of Columbia. (M.C.M., par. 152, p. 188.)

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specification 3, Charge I, as finds that the accused, acting jointly and in pursuance of a common intent, did, at the place and date alleged, unlawfully enter the locked garage of Sergeant David L. Schoch, Band, 10th Field Artillery, with intent wrongfully to remove from therein the said Sergeant Schoch's automobile without the owner's consent, in violation of the 96th Article of War, legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I, and Charge I, as to accused Doiron and Etzold, legally sufficient to support the findings of guilty of Charge II and the Specification thereunder, not legally sufficient to support the finding of guilty of Charge I as to accused Stafford, but legally sufficient to support the sentences.

Norman, Judge Advocate.

_____, Judge Advocate.

Mark E. Guering, Judge Advocate.

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

AUG 6 - 1932

CM 199063

U N I T E D S T A T E S	)	PANAMA CANAL DEPARTMENT
	)	
v.	)	Trial by G. C. M., convened at
	)	Albrook Field, Canal Zone,
Private GEORGE W. MARTIN	)	July 11, 1932. Dishonorable
(6358694), 44th Obser-	)	discharge and confinement for
vation Squadron, Air	)	six (6) months. Disciplinary
Corps.	)	Barracks.

HOLDING by the BOARD OF REVIEW
BRENNAN, HALL and GUERIN, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private George W. Martin, 44th Observation Squadron, A.C., was, on or about June 9, 1932, drunk in a public place, to wit: in front of the Happyland Cabaret, Panama City, Rep. of P.

Specification 2: In that Private George W. Martin, 44th Observation Squadron, A.C., did, on or about June 9, 1932, enter the Republic of Panama without proper written authority, This in violation of paragraph 12, Section I, Panama Canal Department Regulations, 1932.

Specification 3: In that Private George W. Martin, 44th Observation Squadron, A.C., was, on or about June 10, 1932, drunk in quarters.

Accused pleaded to the Specifications and the Charge, "Not Guilty" and was found of Specifications 1 and 3, "Guilty", of Specification 2, "Guilty except the word 'enter', substituting therefore the words 'remain in', of the excepted word Not Guilty, of the substituted words Guilty", and of the Charge "Guilty". Evidence of four previous convictions was introduced, three by summary court-martial and one by special court-martial, establishing conviction of various acts of disorderly conduct, violation of regulations, and similar offenses. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 3, and the Charge.

The only substantial question presented by the record is whether the court, by its finding as to Specification 2, did not in fact find the accused guilty of an offense not charged against him.

4. Paragraph 12, Section 1, Panama Canal Department Regulations, 1932, provides in part:

> "12. Entering Panama--a. No enlisted man of this command will enter or remain in the Republic of Panama without written authority. No enlisted man will remain in the Republic of Panama after 11:30 P.M. except non-commissioned officers of the first three grades, and those residing therein who, by proper written authority, habitually sleep out of quarters; to the latter the privilege of remaining in the Republic of Panama, after 11:30 P.M. applies only to their homes. * * *"

Two distinct orders are contained in the language quoted. One order prohibits enlisted men from entering the Republic of Panama without

written authority. A violation of this order is complete at the instant an enlisted man crosses the boundary without being authorized to do so. Once having crossed the boundary the duration of stay in the Republic is immaterial and cannot add to the offense charged. On the other hand, even though after such crossing the man immediately returns to the Panama Canal Department his act in crossing is a violation of the order and is punishable as such. The Board of Review concurs in the opinion of the Department Judge Advocate that the offense found by the court is not included in the offense charged. The only conceivable offense included in that of entering the Republic without authority is an attempt so to enter.

When a court by exceptions and substitutions finds an accused not guilty of the offense alleged but guilty of some other offense not necessarily included therein, it in fact finds the accused guilty of an offense for which he was not brought to trial. It is, of course, fundamental that such action is illegal and such a finding can afford no basis for a sentence.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding as to Specification 2 as finds the accused not guilty of the offense alleged in that specification, and only so much of the sentence as involves confinement at hard labor for three months and nine days and forfeiture of fourteen dollars and seventy cents pay per month for a like period.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

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

AUG 4 - 1932

CM 199072

UNITED STATES)	FOURTH CORPS AREA
)	
v.)	Trial by G. C. M., convened at Fort Benning, Georgia, July 5, 1932. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Private CLIFFORD L. HEWITT) (6363890), Quartermaster) Corps.)	

HOLDING by the BOARD OF REVIEW
BRENNAN, HALL and GUERIN, Judge Advocates
ORIGINAL EXAMINATION by NEELY, Judge Advocate.

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

2. The accused was tried for forgery (4 specifications) in violation of the 93d Article of War (Charge I), the offenses alleged to have been committed at Fort Benning, Georgia, on or about November 1, 1930, January 7, 1931, and January 8, 1931, and for embezzlement (4 specifications) in violation of the 94th Article of War (Charge II). He pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority on July 26, 1932, approved the findings as to Charge I and the specifications thereunder, disapproved the findings as to Charge II and its specifications, approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years, and forwarded the record under the provisions of Article of War 50½.

2. Specifications 1, 2, 3 and 4 of Charge I describe offenses which are alleged and are shown by the evidence to have been committed on or about November 1, 1930, January 7, 1931 (Specifications 2 and 3), and January 8, 1931, respectively. The record of trial also establishes

that the accused was discharged from the service on January 28, 1932. Informal communication by The Judge Advocate General's Office with the Office of The Adjutant General confirms the fact that the accused was discharged, on January 28, 1932, from the enlistment in which he was serving at the time of the commission of the several offenses charged. The charges were preferred on June 11, 1932, during a later enlistment and subsequent to such separation from the service.

The Manual for Courts-Martial, 1928, par. 10, states:

> "The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service."

It is well settled that a court-martial is without jurisdiction to try an enlisted man for an offense, other than one denounced by the 94th Article of War, committed in a prior enlistment (CM 198340, Conyers; Ops. J.A.G. 250.419, April 6, 1926 and October 23, 1926). In the opinion of the Board of Review the court which tried the accused in this case was without jurisdiction to try him for the offenses described in the specifications of Charge I.

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

R Rosenman, Judge Advocate.

Theodore Hall, Judge Advocate.

Mark E. Guinn, Judge Advocate.

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

CM 199117 AUG 11 1932

UNITED STATES	)	FOURTH CORPS AREA
	)	
v.	)	Trial by G. C. M., convened at Fort Benning, Georgia, July 21, 1932. Dishonorable discharge and confinement for eighteen (18) months. Disciplinary Barracks.
Private QUENTIN E. AFRICA (R-2573429), Quartermaster Corps.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Quentin E. Africa, Pvt., Specl., Sol., Det., Q.M.C., and Ralph O. Christopher, Pvt., Det., Q.M.C., did, at Fort Benning, Georgia, on or about Oct. 1, 1931, feloniously, unlawfully, fraudulently and corruptly, conspire to defraud the United States and in pursuance of such conspiracy, during the period of time from, viz: on or about October 1, 1931, to on or about January 30, 1932, the United States was feloniously, unlawfully, and fraudulently deprived and defrauded of viz: various

> and sundry, large and valuable quantities of cigarettes, property of the United States, furnished and intended for the military service thereof.

(A nolle prosequi was entered in the case of Private Christopher.) The accused pleaded 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 two years. The reviewing authority approved the sentence, reduced the period of confinement to one year and six months, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and ordered the sentence executed. The sentence was published in General Court-Martial Order No. 172, Headquarters Fourth Corps Area, July 28, 1932.

3. The specification alleges that accused entered into a conspiracy with another soldier on or about October 1, 1931, to defraud and deprive the government of large and valuable quantities of cigarettes, property of the United States, and furnished and intended for the military service thereof, and the evidence shows a series of overt acts committed by the accused in pursuance of said conspiracy from October 1, 1931, to January 30, 1932. The charge sheet shows that accused was discharged from the service on February 4, 1932, at the expiration of his term of enlistment and reenlisted the next day. After the court reached its findings, evidence as to pay, age and service was received which also disclosed that he was discharged on February 4, 1932 (R. 27). Informal communication by The Judge Advocate General's Office with the Office of The Adjutant General confirms the fact that the accused was discharged on February 4, 1932, from the enlistment in which he was serving at the time of the commission of the offense charged. The charge was preferred on June 27, 1932, and the case was tried on July 21, 1932.

The Manual for Courts-Martial, 1928, par. 10, states:

> "The general rule is that court-martial jurisdiction over officers, cadets, soldiers,

> and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service."

It is well settled that a court-martial is without jurisdiction to try an enlisted man for an offense, other than one denounced by the 94th Article of War, committed in a prior enlistment at the expiration of which he was discharged (CM 199072, Hewitt; CM 198340, Conyers). As the court did not have jurisdiction the plea of guilty was ineffective to confer jurisdiction.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT
In the office of The Judge Advocate General
Washington

CM 199155

AUG 20 1932

UNITED STATES	)	THIRD DIVISION
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, July 1, 1932. Dishonorable discharge and confinement for nine (9) months. Fort Lewis, Washington.
Private EDGAR M. COLGROVE (6541624), Company F, 7th Infantry.	)	

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the Charge and Specifications 1 and 2 thereunder and the sentence.

2. Specification 3 of the Charge alleged the crime of robbery. The court found the accused guilty of this specification. The reviewing authority approved only so much of the finding as involved a finding of guilty of larceny. There is no evidence in the record, direct or circumstantial, that the accused intended permanently to deprive the United States of its property in the pistol, a necessary element of the offense of larceny (CM 193315, Rosborough; 194359, Sadler). The evidence does show a wrongful taking and carrying away of the pistol by the accused without the consent of the owner, an offense included in larceny but in violation of the 96th instead of the 93d Article of War.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Specification 3 as involves a finding of guilty of wrongfully taking and carrying away the pistol mentioned in the specification, at the time and place alleged, without the consent of

the owner, in violation of the 96th Article of War, legally sufficient to support the findings of guilty of the Charge and Specifications 1 and 2 thereunder, and the sentence.

[signature], Judge Advocate.

[signature], Judge Advocate.

_____, Judge Advocate.

Military Justice
C.M. 199224.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

SEP 6 1932

UNITED STATES vs. General Prisoner CHARLES S. HOPPERT.	FIRST CORPS AREA Trial by G.C.M. convened at Fort Devens, Massachusetts, August 11, 1932. Dishonorable discharge and confinement for two and one-half (2½) years. Disciplinary Barracks.

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

1. The record of trial in the case of the general prisoner named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty of Charge II and its Specification alleging escape from confinement in violation of the 69th Article of War, and so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

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

In the Specification of Charge I, the accused is charged as "General Prisoner Charles S. Hoppert" and his plea of not guilty to that specification is an admission that he is the person described in the specification. Winthrop, 2d edition, p. 276. However, the record of trial is bare of any proof, either direct or circumstantial, that the dishonorable discharge previously adjudged against the accused had not been executed prior to the alleged desertion. The extract copy of the morning report establishing accused's escape from confinement, which escape is the basis for the charge of desertion, discloses that the entry made against the accused in the morning report charges escape but does not charge desertion.

There are two classes of general prisoners - those in whose cases the execution of the dishonorable discharge is suspended and those in whose cases the dishonorable discharge has been executed. The former class are still in the military service and may commit the offense of desertion (Op. JAG 1919, p. 238; Dig. Ops. JAG 1919, p. 107), but the latter class are no longer in the military service and cannot commit that offense. Dig. Ops. JAG 1912, p. 400, and opinions cited above.

In view of the foregoing it is apparent that where a general prisoner is charged with desertion, it is incumbent upon the prosecution to establish that the dishonorable discharge has not in fact been executed. If the fact of suspension of the dishonorable discharge is established by competent evidence, the presumption that that status continues is sufficient, prima facie, to establish that the discharge has not been executed. In the majority of trials of general prisoners for desertion the essential facts in relation to the suspension of the dishonorable discharge are established by the introduction in evidence of the general court-martial order promulgating the proceedings of the former trial and suspending execution of the dishonorable discharge, this order serving the double purpose of establishing the legality of the confinement from which the general prisoner escaped and the fact that the execution of the dishonorable discharge was suspended. In some cases this sound and desirable procedure is not followed.

During the past several years the Board of Review and The Judge Advocate General have sustained convictions of desertion by general prisoners where the fact that the dishonorable discharge has not been executed is not established by direct evidence. Thus where the general court-martial order publishing the proceedings in the trial which resulted in an accused becoming a general prisoner was issued by the same headquarters which subsequently brought the same accused to trial for a desertion concurrent with an escape from confinement, judicial notice has been taken of the action of the reviewing authority as published in such general court-martial order. Par. 125, M.C.M., 1928. In cases where the specification alleging desertion by the general prisoner describes him as being under suspended sentence of dishonorable discharge, the plea to the specification has been considered by the Board as establishing the status of the prisoner under the rule, cited above from Winthrop, that a plea of guilty or not guilty admits that the accused is the person described in the specification. Records of trial have also been held legally sufficient where the only evidence tending to establish that the accused is a general prisoner under a suspended sentence of dishonorable discharge is an entry in the morning report showing the change of the accused's status from confinement to desertion or from confinement to escape and desertion, it being presumed that the officer making the entry required by regulations has performed his duty in determining the status of the accused before making an administrative charge of desertion against him. In the case now being considered there is no evidence of any kind tending to establish that the accused is under a suspended sentence of dishonorable discharge and the prosecution has therefore failed to establish that accused deserted.

In cases of this kind, we believe that such questions should, and would, be avoided if staff judge advocates would invariably send instructions to the trial judge advocate directing him to prove the status of the accused as a general prisoner under suspended dishonorable discharge.

3. We concur in the opinion of the corps area judge advocate that no presumption can be indulged in that the accused was not in fact dishonorably discharged prior to his alleged desertion. We have given careful con-

sideration to his suggestion that in view of the fact that on habeas corpus proceedings jurisdictional facts may be established outside the record of trial, the record in this case might properly be held legally sufficient. We are unable to reach that conclusion for the reason, among others, that no question of jurisdiction is involved in this case, it being well established that general prisoners are subject to military law, and the only question at issue is whether or not the prosecution has established all the elements necessary to warrant the finding of guilty of desertion. As already stated, we are of opinion that the prosecution has failed to do so. In this connection we might state that Article of War 50½ imposes upon the Board of Review the duty of determining whether or not a record of trial is legally sufficient to support the sentence, irrespective of the question whether upon habeas corpus, which merely goes to the question of jurisdiction, a sufficient showing of jurisdiction can be made to prevent release of the prisoner by the civil courts.

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

[signature] Judge Advocate.

[signature] Judge Advocate.

[signature] Judge Advocate.

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

SEP 1 1932

CM 199232

UNITED STATES	)	THIRD CORPS AREA
	)	
v.	)	Trial by G.C.M. convened at Fort Myer, Virginia, August 12, 1932. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
	)	
Private EDWARD DAVIS (6695160), Machine Gun Troop, 3d Cavalry.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BRENNAN and GUERIN, Judge Advocates,
ORIGINAL EXAMINATION by NEELY, Judge Advocate.

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

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Private Edward Davis, Machine Gun Troop, 3d Cavalry, did, at Fort Myer, Virginia, on or about the 24th day of July, 1932, unlawfully enter the Ordnance Storehouse, with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Private Edward Davis, Machine Gun Troop, 3d Cavalry, did, at Fort Myer, Virginia, on or about the 24th day of July, 1932, feloniously take, steal, and carry away one pistol, U. S. Army, automatic, caliber 45, number 276944, value about twenty-six dollars, the property of Captain Krauth W. Thom, Q.M.C.

He pleaded not guilty to the Charge and specifications, and was found guilty of the Charge and of Specification 1 thereunder, guilty of Specification 2 except the words "Captain Krauth W. Thom, Q.M.C.", substituting therefor the words "the United States, furnished and intended for the military service thereof", of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge as to Specification 2 but guilty of violation of the 94th Article of War. Evidence of two previous convictions by summary court-martial for absence without leave was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for two years. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence of accused's guilt of Specification 1 and the Charge is clear and convincing.

The only question in this case requiring consideration here is the legal effect of the findings of the court as to Specification 2 whereby accused was found not guilty of that part of the specification alleging that the stolen pistol was the property of Captain Krauth W. Thom, Q.M.C., and not guilty of violation of the 93d Article of War, and guilty, by exceptions and substitutions, of larceny of the same pistol, property of the United States, furnished and intended for the military service thereof, in violation of the 94th Article of War.

The findings of the court contain a finding of guilty of vital elements not included in the offense charged, and thus exceed the power of courts-martial by exceptions and substitutions to convict of a lesser included offense. Par. 78 c, M.C.M.; CM 186919, Sweat; 191809, Price. The findings also result in a variance between the allegations and findings as to ownership of the stolen property, a variance which has been held in similar cases to be fatal to conviction. CM 157982, Acosta; 164042, Rodden; 191809, Price. Moreover, the accused was charged with an offense which, under the laws of the United States, is a misdemeanor but was found guilty of an offense which is a felony (Secs. 46, 287, 335, Federal Penal Code of 1910)

and is punishable by confinement in a penitentiary. Such finding is clearly contrary to law.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 2, in violation of the 94th Article of War, but legally sufficient to support the findings of guilty of Specification 1 and the Charge, and legally sufficient to support the sentence.

E. C. McNeil, Judge Advocate.

R. H. Brennan, Judge Advocate.

Mark E. Gunning, Judge Advocate.

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

CM 199270

OCT 3 1932

U N I T E D S T A T E S	)	FOURTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Screven, Georgia, July 27, 1932. Dishonorable discharge, suspended, and confinement for two (2) years. Disciplinary Barracks.
Private JOHN W. ANDREWS (6363812), Coast Artillery Corps, unassigned.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John W. Andrews, CAC unassigned, Hawaii, attached 3d Recruit Company, ORD, Fort Slocum, New York, did, at Fort McClellan, Alabama, on or about February 16, 1932, desert the service of the United States and did remain absent in desertion until he was apprehended at Eustis, Florida, on or about June 27, 1932.

3. The prosecution introduced in evidence an extract copy of the morning report of the 3d Recruit Company, Overseas Recruit Depot, Fort Slocum, New York, which contained the following entries:

"2-26-32.
Andrews, J.W. 6363812, CAC Haw, Asgd to Co AWOL enr to jn fr Ft McClellan, Ala., 2-16-32.
AJM HCP

2-29-32.
Andrews, J.W. 6363812, CAC Haw, Fr AWOL to desertion.
AJM HCP."

The morning report entries were admissible to establish, prima facie, the facts stated therein in so far as it was the duty of the commanding officer of the 3d Recruit Company to know the facts and to make a record of them. Par. 117 a, M.C.M., 1928. The law presumes that public officers do as the law and their duty require them, and the presumption prevails until the contrary is shown. Op. JAG, Aug. 4, 1890, P. 42, 246. The entries therefore were admissible to establish the fact that the accused was assigned to the 3d Recruit Company and was absent without leave therefrom. It is the unqualified duty of a company commander to know what officers and men are assigned to his organization and to know their status, that is, whether present or absent and, if absent, whether with or without leave. The company commander's entries in the morning report as to such matters are therefore based on personal knowledge and are primary evidence of the existence of those facts. The principle is stated in the holding of the Board of Review in CM 189682, Myers, as follows:

> "Morning report entries do not and are not intended to recite all preliminary or intermediate facts forming the basis of the authority for making them, and their administrative regularity must be and is presumed. For example, it is presumed, in the usual case, that the soldier was duly transferred to and assigned for duty with the organization from which the report reciting his absence without leave comes. It is only when the accuracy or regularity of the recital is impeached that the presumption falls."

The mere fact that there may be other sources of primary evidence as to the fact of accused's assignment to the 3d Recruit Company, for example, the order so assigning him, does not alter the fact that the entry in the morning report is primary evidence. There may be and generally are many sources of primary evidence of facts sought to be established in criminal prosecutions or civil suits. The admissibility of the morning report entry as to assignment is established. CM 149078, Burke; 169913, Kane.

What is stated above must not be construed to indicate that the accuracy of an entry in a morning report may not be impeached. Certain public writings, such as judicial records, import verity and give rise to what is substantially a conclusive presumption of their correctness. Administrative acts of Army officers do not fall within that class. Their entries in records required by regulations to be kept are merely prima facie evidence of the facts stated therein and are such evidence only if the facts stated therein are such facts as they are required as an official duty both to know and to record. The entries are therefore subject to impeachment or contradiction. In the instant case, however, not only is there no contradiction of the entries but circumstantial evidence introduced at the trial corroborates their accuracy.

It was established at the trial that when the accused was turned over to the military authorities he stated "that his service record was probably in Fort Slocum, New York, as he was supposed to go there". Army Regulations 345-125, February 1, 1932, provide that when an enlisted man is transferred, except to or from foreign service, his service record, if the man be travelling alone, will be forwarded by mail to the commanding officer of the post, camp, or station to which the enlisted man is to be forwarded. The accused's statement, coupled with this regulation, of which judicial notice is taken, is circumstantial evidence of the accused's transfer from some station to Fort Slocum, New York.

4. There remains to be considered only one question and that is whether the failure to establish by competent proof the allegation in the specification that accused deserted at Fort McClellan, Alabama, invalidates the findings and sentence. The Board of Review is of opinion and holds that, in the normal case, the failure to establish the place of the alleged desertion is not material and such failure cannot afford grounds for holding a sentence invalid, although it is conceivable that in some unusual cases a material variance between the allegation and proof of place of desertion might prejudice the substantial rights of the accused. The place of desertion is not of the essence of the offense. As a matter of fact, it is usually impossible to determine or to prove the actual place where desertion became an accomplished fact. Absence without leave, no matter what the duration thereof, does not in itself constitute desertion. The intent not to return to the military service is an essential element of the offense. Such being the fact,

a desertion cannot occur until the intent permanently to absent one's self from the military service concurs with a status of absence without leave. Thus, a soldier may, without leave, absent himself from his organization on a certain date with every intention of returning thereto at the expiration of a few days. Subsequent to so absenting himself and perhaps hundreds of miles away from his station, he may form the intent not to return. It is at the place he forms the intent that the desertion actually occurs, but it is obviously impossible to establish the fact. The alleged place of desertion appears to be no necessary part of the offense of desertion and there appears to be no legal principle upon which the place of desertion may be held to be an element of the offense. In military matters the place of the commission of an alleged offense does not have the same importance that it does in civil courts where the jurisdiction of the court is dependent thereon. It is probably for this reason that the failure to prove where alleged offenses were committed has been held not to affect the validity of records of trial by general court-martial. See CM 119864, Kutzura; 121982, Gatslick.

The principle applicable to a case where the place of desertion is alleged in the specification but is not proved at the trial is properly stated, although in reference to pleading rather than proof, by Colonel Winthrop as follows:

> "In military charges there is still greater margin allowable, since the place or region of jurisdiction is much more extensive than that of the county, district, State, &c., to which the jurisdiction of the criminal courts is limited. Thus if a specification to a military charge is so framed as to advise the accused of the particular act of offence intended to be alleged, and enable him to plead a former conviction or acquittal if subsequently brought to trial on account of the same act, it will be strictly sufficient in law if it set forth a time within the limitation of Art. 103, and a place within the United States, * * *." Winthrop, 2d edition, p. 138.

In this case the record of trial would furnish proof in bar of trial on a subsequent trial for the offense of which the accused stands here convicted.

5. The instant case is clearly distinguishable from the cases cited in the memorandum received from the Military Justice Section. Thus, in CM 155032, Bradshaw, cited in that memorandum, the morning report entry purporting to show absence without leave was recorded in the morning report of the accused's organization at Camp Meade, Maryland, and stated "Pvt Bradshaw fr surrender at Rect Office St Louis Mo to AWOL". The facts stated in that entry were clearly outside the official personal cognizance of the accused's organization commander at Camp Meade, Maryland, and were therefore hearsay and inadmissible under the provisions of paragraph 117, M.C.M., 1928. In CM 161011, Miller, and 161013, Michael, the morning report entries introduced for the purpose of establishing apprehension were made in the morning report of the accuseds' organization at Fort Humphreys, Virginia, and purported to show the apprehension of each of the accused by civil authorities at Winchester, Virginia. These entries are in the same class as those in the Bradshaw case and are clearly inadmissible to establish the facts.

6. At the time the charges in this case were referred for trial it was apparent that there was not present any direct proof that the accused was, prior to his desertion, stationed at Fort McClellan, Alabama, or that he had been ordered from Fort McClellan to Fort Slocum, New York, or that he had departed from Fort McClellan in pursuance of the order. Under those circumstances the staff judge advocate should have sent to the trial judge advocate specific instructions as to what documentary or other evidence should be secured in respect to these matters before proceeding with the trial. Failure to issue such instructions has resulted in a record which, though legally sufficient, is unsatisfactory in many respects and does not reflect credit upon the administration of military justice. The matter of sending special instructions to trial judge advocates in reference to the proof required in difficult or unusual cases has been considered by The Judge Advocate General to be of sufficient importance to require a discussion in the annual reports of staff judge advocates, thus keeping constantly in their minds the necessity for aiding officers of the line in their work as trial judge advocates. In the opinion of the Board of Review the minimum proof which should be introduced in cases such as this where desertion occurs en route from one station to another should consist of a copy of the order transferring the soldier to his new station, an extract copy of the

morning report of his old station showing the transfer and departure of the soldier, and an extract copy of the morning report of his new station showing his assignment and absence without leave. In recommending reference of such cases for trial, staff judge advocates should take the necessary measures to insure that the evidence outlined above will be introduced.

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

[illegible], Judge Advocate.

[illegible], Judge Advocate.

[illegible], Judge Advocate.

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

SEP 19 1932

CM 199285

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, August 18, 1932. Dishonorable discharge and confinement for one (1) year. Fort Sheridan, Illinois.
Private JOHN W. BRANUM (6803467), Battery B, 61st Coast Artillery.	)	

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private John W. Branum, Battery B, 61st Coast Artillery (AA), did, at or near Chicago, Illinois, on or about July 16, 1932, feloniously take, steal and carry away one gold watch, value about $50.00; one gold chain, value about $5.00; one gold football (ornament), value about $10.00; one gold locket, value about $6.00; and one cigarette case, value about $5.00; the property of Gale Blocki.

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 years. The reviewing authority "for insufficiency of evidence" disapproved "so much of the finding of guilty of the

specification of the charge as finds the accused guilty of the word, 'gold', as contained in the expression, 'one gold watch', and as contained in the expression, 'one gold locket'; and so much of said finding as finds the value of the watch to have been more than $10.00, and the value of the locket and cigarette case to have been more than $1.00 each"; approved the sentence, reduced the period of confinement to one year, designated Fort Sheridan, Illinois, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The prosecution failed to prove, or even attempt to prove, the value of the articles. The defense counsel elicited testimony as to the value of the gold chain and the gold football ornament, both of which were before the court, and the findings of the court of values of $5.00 and $10.00, respectively, for those two articles were justified. The values of the watch, locket, and cigarette case were material in order to determine the maximum punishment authorized by paragraph 104 c of the Manual for Courts-Martial for the offense. These latter articles were not before the court and the record contains no evidence of their condition or value. The court and reviewing authority were not, therefore, justified in finding them to be of any specific value, but since they were in use could have inferred that they were of some value. CM 106880, Crowley; 183954, Jackson; 188766, Ramsay; 189745, Millerick; 195212, Robinson.

The specification alleged the theft, among other articles, of one gold locket, value about $6.00, whereas the evidence establishes the loss and theft of one silver locket, value not established. The variance between the allegation and the proof renders the finding of guilty as to that article invalid.

4. There remains to be considered the question whether or not the action of the reviewing authority in disapproving for "insufficiency of evidence" so much of the findings of guilty as included the word "gold" in the expression "one gold watch" so changes the gist of the offense as to amount to an acquittal of the theft of that article. In the opinion of the Board of Review the action of the reviewing authority was authorized on precedent and on principle and, as it left the substance of the specification unaffected, did not serve to acquit the accused of the theft of the watch. Winthrop, 2d edition,

pp. 380, 381; Dig. Ops. JAG 1912, p. 537, XII A 5, XII A 5a, XII A 5b; CM 153955, Lane. In this case, as in many other cases, there is a substantial difference between findings with exceptions but without substitutions and findings with exceptions and substitutions, of which latter class of cases CM 188432, Soderquist, and the cases cited therein are examples. In those cases the exceptions and substitutions altered the gist of the offenses charged.

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 the larceny, at the time and place alleged, of one watch, of some value, one gold chain, value about $5.00, one gold football (ornament), value about $10.00, and one cigarette case, of some value, the property of Gale Blocki, and only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

[signature], Judge Advocate.

[signature], Judge Advocate.

_____, Judge Advocate.

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

OCT 1 5 1932

CM 199293

UNITED STATES	)	FIFTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Hayes, Ohio, March 8,15,17,22, April 26,27, and May 3,4,5, 1932. As to Hall: Dishonorable discharge and confinement for four (4) years and six (6) months. As to McPadden: Confinement for six (6) months and forfeiture of $14 pay per month for like period. As to Hall: Disciplinary Barracks. As to McPadden: Fort Hayes, Ohio.
Staff Sergeant BENJAMIN L. HALL (R-2256606), and Staff Sergeant VINCENT S. McPADDEN (R-400472), both of Headquarters Company, 10th Infantry.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BRENNAN and GUERIN, Judge Advocates
ORIGINAL EXAMINATION by NEELY, Judge Advocate.

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

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

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

Specification: In that Staff Sergeant Benjamin L. Hall, Headquarters Company, 10th Infantry, and Staff Sergeant Vincent S. McPadden, Headquarters Company, 10th Infantry, with General Prisoner Phillip J. Mandler, then Sergeant, Company I, 10th Infantry, acting jointly and in pursuance of a common intent, did, at Fort Hayes, Columbus, Ohio, on or about November 1, 1930, conspire to defraud the United States by obtaining payment of false and fraudulent claims against the United States on monthly, supplementary and partial pay rolls of the Recruit Detachment, Fort Hayes, Columbus, Ohio, to

fictitious persons not entitled to receive said payments, by fraudulently causing entries to be made on said pay rolls of claims for pay due, or to become due, to enlisted men of the United States Army; and causing procurement of the use of forged signatures of said enlisted men to said claims on said monthly, supplementary and partial pay rolls; and causing said claims to be presented for payment to the Finance Officer, United States Army, at Fort Hayes, Columbus, Ohio, an officer authorized to pay such claims; and causing said fictitious persons to present themselves to said Finance Officer and fraudulently represent themselves to be, and be identified respectively as, the identical enlisted men in whose names said claims should be made and presented; and by causing said fictitious persons to fraudulently make claim for, and receive from said Finance Officer, United States Army, payment of the separate amounts of said claims; and, in pursuance thereof, the said Phillip J. Mandler did, at Fort Hayes, Columbus, Ohio, fraudulently cause to be entered on certain monthly, supplementary and partial pay rolls of the Recruit Detachment, Fort Hayes, Columbus, Ohio, claims for pay due to the following named enlisted men in the amounts specified as to each, to wit:

on the Monthly Pay Roll, dated December 1, 1930,

for pay due to Private Robert S. Arman, Infantry, Unassigned, Hawaii, in the amount of twenty-six dollars sixty cents ($26.60); and

for pay due to Private Melvin E. Walker, Signal Corps, Unassigned, Panama, in the amount of thirty-eight dollars fifty cents ($38.50); and

on the Monthly Pay Roll, dated December 31, 1930,

for pay due to Private William M. Flynn, Coast Artillery Corps, Unassigned, Panama, in the amount of twenty-one dollars ($21.00); and

for pay due to Private Henry E. Meixner, Coast Artillery Corps, Unassigned, Panama, in the amount of twenty-two dollars ($22.00); and

for pay due to Private Peter Kubacki, Coast Artillery Corps, Unassigned, Panama, in the amount of twenty-one dollars ($21.00); and

on the Monthly Pay Roll, dated January 31, 1931,
for pay due to Private Robert E. Allen, Infantry, Unassigned, Hawaii, in the amount of fifty-nine dollars fifty cents ($59.50); and
for pay due to Private Ivan Wilson, Infantry, Unassigned, Hawaii, in the amount of fifty-six dollars seventy cents ($56.70); and
on the Monthly Pay Roll, dated February 28, 1931,
for pay due to Sergeant Andrew F. Crist, Headquarters Troop, 12th Cavalry, Fort Brown, Texas, in the amount of fifty-six dollars seventy cents ($56.70); and
for pay due to Private 1st Class John R. Finch, D.E.M.L., R.S., Denver, Colorado, in the amount of thirty-six dollars ($36.00); and
on the Supplementary Pay Roll, dated January 3, 1931,
for pay due to Private Ernest C. Koehrsen, Infantry, Unassigned, Hawaii, in the amount of fifty-six dollars seventy cents ($56.70); and
on the Supplementary Pay Roll, dated January 20, 1931,
for pay due to Private Stanley T. Clabaugh, Engineers, Unassigned, Hawaii, in the amount of forty-six dollars ninety cents ($46.90); and
on the Supplementary Pay Roll, dated February 3, 1931,
for pay due to Private Sherman Crum, Engineers, Unassigned, Hawaii, in the amount of thirty-nine dollars twenty cents ($39.20); and
for pay due to Private Norman M. Elseser, Infantry, Unassigned, Panama, in the amount of fifty-one dollars ten cents ($51.10); and
for pay due to Private Carl B. James, Air Corps, Unassigned, Hawaii, in the amount of forty-six dollars twenty cents ($46.20); and
on the Supplementary Pay Roll, dated February 5, 1931,
for pay due to Private Stanley T. Clabaugh, Engineers, Unassigned, Hawaii, in the amount of twenty-one dollars ($21.00); and
for pay due to Private Victor A. McMullen, Infantry, Unassigned, Hawaii, in the amount of thirty-eight dollars fifty cents ($38.50); and
on the Supplementary Pay Roll, dated March 2, 1931,
for pay due Private Sherman Crum, Engineers, Unassigned, Hawaii, in the amount of twenty-one

dollars ($21.00); and
for pay due to Private Victor A. McMullen, Infantry, Unassigned, Hawaii, in the amount of twenty-one dollars ($21.00); and
on the Supplementary Pay Roll, dated March 4, 1931,
for pay due to Private Daniel McShane, 10th Field Artillery, Fort Lewis, Washington, in the amount of fifty-two dollars fifty cents ($52.50); and
on the Partial Pay Roll, dated February 11, 1931,
for partial pay due to Private Stanley T. Clabaugh, Engineers, Unassigned, Hawaii, in the amount of seven dollars ($7.00); and, in further pursuance thereof, said Phillip J. Mandler did, at Fort Hayes, Columbus, Ohio, procure the use of the forged signatures of each of the above named enlisted men on said monthly, supplementary and partial pay rolls, upon which the claims for pay due in their respective names, in the amounts specified as to each, appeared; and, in further pursuance thereof, said Phillip J. Mandler did, at Fort Hayes, Columbus, Ohio, cause each of said claims, so fraudulently appearing on said monthly, supplementary and partial pay rolls, to be presented for payment to Captain Paul S. Beard, Finance Officer, Fort Hayes, Columbus, Ohio, an officer of the United States Army authorized to pay such claims; and, in further pursuance thereof, said Phillip J. Mandler did, at Fort Hayes, Columbus, Ohio, cause certain fictitious persons, whose names are unknown, to fraudulently separately represent themselves to said Captain Paul S. Beard to be, and be separately identified by said Phillip J. Mandler to said Captain Paul S. Beard as, the identical enlisted men above named, and in whose names said fraudulent claims, for pay due, were made on said monthly, supplementary and partial pay rolls, and to make claim for, and receive payment, separately made to each of said fictitious persons by said Captain Paul S. Beard, of each of said fraudulent claims; which were fraudulent, and then known by said Phillip J. Mandler to be fraudulent, in that said claims were not, in truth, presented for payment, or made in behalf of the respective enlisted

men in whose names said claims appeared on said rolls; and in that the signatures of each of the respective enlisted men to said claims were forged, and in that each of said fictitious persons making claim for, and receiving, payment of said claims were not the identical enlisted men in whose names said claims were made and presented for payment; and said fictitious persons were not entitled to receive payment thereof.

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

Specification: In that Staff Sergeant Benjamin L. Hall, Headquarters Company, 10th Infantry, and Staff Sergeant Vincent S. McPadden, Headquarters Company, 10th Infantry, with General Prisoner Phillip J. Mandler, then Sergeant, Company I, 10th Infantry, acting jointly and in pursuance of a common intent, did, at Fort Hayes, Columbus, Ohio, on or about January 15, 1931, conspire to feloniously embezzle, by fraudulently converting to their own use, money and bank checks, having the value of money, the property of enlisted men of the United States Army, entrusted, or to become entrusted, by them to the said Phillip J. Mandler, as deposits to be applied on the purchase of discharges from the United States Army of said enlisted men; and, in pursuance thereof, said Phillip J. Mandler did, at Fort Hayes, Columbus, Ohio,

on or about February 24, 1931, feloniously embezzle, by fraudulently converting to the use of said Benjamin L. Hall, and said Vincent S. McPadden, and said Phillip J. Mandler, a certain certified check of the value of one hundred sixty-five dollars ($165.00), the property of Private 1st Class John R. Finch, D.E.M.L., R.S., Denver, Colorado, entrusted to said Phillip J. Mandler by the said Private 1st Class John R. Finch for the purpose of purchasing the discharge of the said Private 1st Class John R. Finch; and,

in further pursuance thereof, said Phillip J. Mandler did, at Fort Hayes, Columbus, Ohio,

on or about January 15, 1931, feloniously embezzle, by fraudulently converting to the use of said Benjamin L. Hall, and said Vincent S. McPadden, and said Phillip J. Mandler, cash in the amount of fifty dollars ($50.00), the property of Private Stanley T. Clabaugh, Engineers, Unassigned, Hawaii, entrusted to said Phillip J. Mandler by the said Private Stanley T. Clabaugh for the purpose of purchasing the discharge of the said Private Stanley T. Clabaugh; and,

in further pursuance thereof, said Phillip J. Mandler did, at Fort Hayes, Columbus, Ohio,

on or about February 9, 1931, feloniously embezzle by fraudulently converting to the use of said Benjamin L. Hall, and said Vincent S. McPadden, and said Phillip J. Mandler, cash in the amount of seventy dollars ($70.00), the property of Sergeant Andrew F. Crist, Headquarters Troop, 12th Cavalry, Fort Brown, Texas, entrusted to said Phillip J. Mandler by the said Sergeant Andrew F. Crist for the purpose of purchasing the discharge of the said Sergeant Andrew F. Crist.

Each pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced as to either of the accused. Staff Sergeant Hall was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. Staff Sergeant McPadden was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. Attached to the record are letters from eight of the ten members of the court recommending clemency for accused McPadden. Four of the members recommended that the execution of the sentence of McPadden be suspended and that, if his conduct shall be exemplary during the remainder of his present enlistment, the whole of the sentence be remitted. One member recommended that the sentence be wholly remitted. One member recommended, in effect, that the sentence be mitigated to a reduction to the grade of private and confinement for three months. One member recommended that the period of confinement be reduced to six months and suspension of the dishonorable discharge until the

termination of his present enlistment when, if soldier's conduct has been exemplary, it be remitted. One member recommended that the confinement in excess of one year be remitted. The reviewing authority disapproved the findings of guilty of Charge II and its Specification as to McPadden, because of his honorable discharge on April 1, 1931, due to expiration of term of enlistment, subsequent to the wrongdoing charged in said specification; approved the sentence as to McPadden, but in view of the stainless record of service and the clemency recommendations of eight of the ten members of the court in his behalf, remitted that part of the sentence in excess of confinement at hard labor for six months and forfeiture of $14 of his pay per month for a like period, and designated Fort Hayes, Ohio, as the place of confinement; approved the sentence as to Hall, remitted six months of the confinement, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The only question requiring discussion here is the legal sufficiency of the record to support the findings of guilty of Charge I and its Specification and the sentence as to accused McPadden.

4. The evidence shows that accused Hall was Post Sergeant Major, that accused McPadden was Personnel Sergeant Major of Fort Hayes, Ohio, and that Sergeant Phillip J. Mandler was Acting First Sergeant of the Recruit Detachment, Fort Hayes, Ohio, prior to and during the dates mentioned in the Specification of Charge I; that the various frauds, forgeries and false claims set out and alleged in the specification were actually perpetrated and consummated on or about the dates and places alleged; and that Phillip J. Mandler was the person who actually committed all the overt acts mentioned in said specification. The direct evidence shows that accused Hall knew about the frauds and fraudulent pay rolls mentioned in this specification (R. 259-260); that Mandler would collect the money from the fraudulent pay rolls and other irregularities and turn it, or a portion of it, over to Hall. There is no direct evidence that McPadden knew about any of the frauds, forgeries, false claims or any other irregularities involved in the Specification of Charge I at the time they were consummated, or that he received any of the proceeds therefrom except about four or five dollars for favors he

had performed, he not being told the source of this money (R. 404-406), nor is there any direct evidence that he did anything in furtherance of the conspiracy. Mandler, who was the main prosecuting witness and about whose testimony the whole case hinges, testified that he not only had no agreement or understanding with McPadden regarding the fraudulent pay rolls mentioned in the specification, but that he had never talked the matter over with McPadden and had never given him any of the proceeds of these frauds, that he figured McPadden knew what was going on as he was closely associated with Hall and granted practically all favors that he, Mandler, asked (R. 271), and that he was of the impression that McPadden was "in on it" as he was always willing to grant any favors (R. 260). Hall testified that he never had any agreement or understanding with McPadden regarding the fraudulent transactions and that he never gave him any of the proceeds thereof (R. 600,601). The evidence shows that the various pay rolls upon which the frauds were perpetrated were made up and typed in the office of the Personnel Adjutant, over which McPadden had general supervision under the Personnel Adjutant; that they were prepared by the pay roll clerk, Sergeant Murnane, in almost all cases, and that McPadden did not always check them; that in case of an error the pay roll clerk was held responsible for the error and not McPadden. There is no evidence that McPadden prepared any of the pay rolls in question or had anything to do with them other than a general supervision of the office. There is no evidence that McPadden knew anything of the various acts done in furtherance of the pay roll conspiracy, such as the retaining of recruits and casuals at Fort Hayes longer than the period prescribed in orders, or the selling of passes to enlisted men in violation of regulations.

5. The term "conspiracy" is defined by Corpus Juris, volume 12, page 540, as follows:

> "It is a combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means."

This definition has been worded somewhat differently by various other authorities, but for the purposes of this case it is considered sufficient. It is evident from the definition that there are several distinct elements of the crime of conspiracy: first, there must be

at least two persons to conspire, second, there must be an agreement, combination or confederation, and third, there must be an unlawful purpose or act to be accomplished, or a lawful purpose to be accomplished by unlawful means. The first and third elements are present in this case, but is the second necessary element found in the evidence of record as to McPadden? As noted above there is in the record no direct evidence of any agreement, combination or confederation between McPadden and Hall or Mandler, and the only circumstantial evidence to be found is the fact that he was Personnel Sergeant Major with general supervision over the office in which the fraudulent pay rolls were prepared, and the further fact that on occasions he was paid from two to four dollars at different times for favors such as expediting discharges by purchase (R. 405). These circumstances are insufficient, in the absence of any showing that he knowingly participated in the ill gotten gains or did any act in furtherance of the design, to support a finding of guilty. "There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose." United States v. Goldberg, 25 Fed. Cas. 1342 (Case No. 15,223). "Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough. Mere suspicion that he was a party to the conspiracy is not enough." Marrash et al. v. United States, 168 Fed. 225.

The most that can be said from the evidence in this case is that McPadden, from his key position, had an opportunity to find out what was going on, but the same may be said about the Personnel Adjutant who was the actual and responsible head of the office. This is far from the proof required to support a conviction. "It needs something more than proof of mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy." United States v. Lancaster, 44 Fed. 896.

There is nothing in the evidence of record inconsistent with McPadden's innocence of any knowledge of any agreement or combination, nothing inconsistent with his innocence of any act in furtherance of such an agreement or combination, and nothing inconsistent with his innocence of participation in the proceeds of these frauds.

> "It is also true, in cases of conspiracy, as in other criminal cases, that the prisoner is presumed to be innocent until the contrary is shown by proof; and where the proof is, in whole or in part, circumstantial in its character, the circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence."
> United States v. Lancaster, 44 Fed. 896.

The fact is not overlooked that Mandler testified that he gave to McPadden $55 of the $165 realized from the check embezzled from Private First Class John R. Finch, as alleged in the Specification of Charge II (R. 274, 341). This incident, without explanation, might be regarded as tending to indicate the probability that the accused McPadden had some knowledge of the source of this money and of the existence of the conspiracy alleged in the Specification of Charge II; but it would not indicate any knowledge on McPadden's part of the pay roll conspiracy alleged in the Specification of Charge I. Moreover, Mandler testified that he had frequently borrowed money from McPadden and may have owed him as much as $70 at a time, and that he was in the habit of making partial payments of his indebtedness to McPadden (R. 335, 382). He further testified that, except for the small sums he occasionally gave to McPadden because of favors done by the latter, he gave to McPadden no more money than he owed him (R. 407). Thus it would appear that McPadden may well have considered that the $55 given him by Mandler was merely a repayment of sums borrowed by Mandler and that he had no knowledge of the conspiracy and the frauds alleged in either specification.

6. As to accused Hall, the testimony of the witness Mandler definitely identifies him as a party to the agreement or conspiracy, and identifies him as a recipient of a large portion of the proceeds of the frauds mentioned in the Specification of Charge I, and the Specification of Charge II. As the credibility of this witness is a matter for the determination of the court and the reviewing authority and as his testimony, if believed, provides direct and positive proof of Hall's guilt of both charges and specifications, the record of trial contains substantial evidence to support the findings of guilty as to Hall.

7. For the reasons indicated, the Board of Review holds the record of trial legally insufficient to support the findings and sentence as to accused McPadden, legally sufficient to support the findings of guilty as to accused Hall, except in so far as they indicate a participation in the alleged offenses by the accused McPadden, and legally sufficient to support the sentence as to accused Hall.

E. C. McNeil, Judge Advocate.

[illegible], Judge Advocate.

[illegible], Judge Advocate.

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

CM 199307

SEP 29 1932

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Wayne, Michigan, August 26, 1932. Dishonorable discharge, suspended, and confinement for one (1) year and nine (9) months. Disciplinary Barracks.
Private FRANK CAVA (6525801), Headquarters and Headquarters Squadron, Air Corps Primary Flying School.	)	

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

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

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

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

Specification: In that Private (then Private First Class) Frank Cava, Headquarters & Headquarters Squadron, Air Corps Primary Flying School, did, at Randolph Field, Texas, on or about February 6, 1932, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Wayne, Michigan, on or about July 7, 1932.

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

Specification: In that Private (then Private First Class) Frank Cava, Headquarters & Headquarters Squadron, Air

> Corps Primary Flying School, having been duly placed in arrest at Randolph Field, Texas, on or about February 5, 1932, did, at Randolph Field, Texas, on or about February 6, 1932, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and nine months. The reviewing authority approved the sentence, directed its execution, suspended the execution of the dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement. The sentence was published in General Court-Martial Orders No. 229, Headquarters Sixth Corps Area, September 6, 1932.

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

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

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

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

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

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

of April 23, 1904, which Act was later incorporated in the United States Code (annotated), section 991, p. 175, Title 10, Army, which, in material part, is as follows:

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

To construe the 4th Article of War as permitting retired officers not on active duty to be members of courts-martial might easily lead to incongruous results, for, under the provisions of the Act of April 23, 1904, quoted above, a retired officer, in time of peace, may not be ordered to active duty without his own consent. Consequently, if detailed as a member of a court-martial without having been assigned to active duty, he could not be compelled to serve without his consent. Moreover, in Kahn et al. v. Anderson, supra, and in McRae v. Henkes, supra, it appears to have been taken for granted and not questioned that to be eligible to serve on a court-martial a retired officer must be on active duty.

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

6. This case should be distinguished from the Dawson case (CM 193913) which has been followed in CM 193896, Smith, and CM 193897, Vandervort. In the Dawson case it was held that an order transferring a member of a court-martial beyond the jurisdiction of the convening authority does not of itself relieve the transferred officer from his membership on the court. In that case the member might at any time,

either with or without his consent, be ordered back to sit on the court. In the instant case, as seen above, Colonel Morton may not, without his consent, be ordered to sit on the court to which he was detailed.

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

[illegible], Judge Advocate.

[illegible], Judge Advocate.

[illegible], Judge Advocate.

To The Judge Advocate General.

1st Ind.

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

1. The record of trial by general court-martial in the case of Private Frank Cava (6525801), Headquarters and Headquarters Squadron, Air Corps Primary Flying School, is forwarded herewith, as is also the opinion of the Board of Review based upon its examination of the record. The case is one requiring the action of the President under Article of War 50½.

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

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

Blanton Winship,
Major General,
The Judge Advocate General.

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

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TITLE

DATE	BORROWER'S NAME	EXT.