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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume VII

including

CM 203000 to CM 204275

(1935-1936)

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

Board of Review
CM 203000

MAY 24 1935

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Winfield Scott, California,
Captain GEORGE E. PRUIT	)	January 21 and 22, 1935. Dis-
(0-11287), Quartermaster	)	missal, total forfeitures, and
Corps.	)	confinement for two (2) years.

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

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

2. The accused was tried upon charges and specifications summarized below.

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

Specification 1: Embezzlement at Redding, California during the period July 1, 1934, to October 19, 1934, both dates inclusive, of $3583.72, property of the United States, which came into the hands of the accused as District Quartermaster, Redding District, CCC, California.

Specification 2: Embezzlement at Redding, California, during the period May 10, 1933, to September 19, 1934, both dates inclusive, of $2705.69, property of the United States entrusted to accused as Class "A" Agent Finance Officer, Headquarters Redding District, CCC.

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

Specification 1: Willful incapacitation for the performance of military duty as District Quartermaster, Redding District, CCC, at Redding, California, on or about September 19, 1934, through voluntary indulgence in intoxicating liquor as a beverage.

Specification 2: Willful, wrongful and unlawful failure and neglect at Redding, California, on and after August 3, 1934, to transmit or otherwise properly dispose of a check for $800.00, dated July 31, 1934, and signed by W. A. Dunton, Jr., which was received by accused as District Quartermaster, Redding District, CCC, as part payment of balance due the United States on ration and savings account of the 918th Company, CCC, for the month of June, 1934.

Specification 3: Willful, wrongful and unlawful failure, at Redding, California, during the period July 1, 1934, to October 19, 1934, both dates inclusive, in violation of section 90 of the Federal Penal Code of 1910 (sec. 176, title 18, U.S.C.), to render accounts for $3583.72, public money belonging to the United States, received by accused in his capacity as District Quartermaster, Redding District, CCC, California, and which he was not authorized to retain as salary, pay, or emolument.

Specification 4: Willful, wrongful and unlawful failure, at Redding, California, during the period May 10, 1933, to October 19, 1934, both dates inclusive, in violation of section 90 of the Federal Penal Code of 1910 (sec. 176, title 18, U.S.C.), to render accounts for $2705.69, public money belonging to the United States, received by accused in his capacity as Class "A" Agent Finance Officer, Headquarters Redding District, CCC, California, and which he was not entitled to retain as salary, pay, or emolument.

Specification 5: Willful, wrongful and unlawful failure and neglect, at Redding, California, on and after May 10, 1933,

to maintain a cash blotter record of all funds received and disbursed, and of all funds turned over to the accountable officer, by accused as Class "A" Agent Finance Officer, Redding District, CCC, as required by paragraph 12, AR 35-320.

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

Specification 1: Wrongful betting at cards and other games of hazard at Redding, California, on or about August 10, 1933, while disbursing officer and Class "A" Agent Finance Officer having public funds in his possession and under his control, contrary to the provisions of paragraph 6, AR 35-120, and to the prejudice of good order and military discipline.

Specification 2: Wrongful betting at cards and other games of hazard at Redding, California, on or about December 8, 1933, while disbursing officer and Class "A" Agent Finance Officer having public funds in his possession and under his control, contrary to the provisions of paragraph 6, AR 35-120, and to the prejudice of good order and military discipline.

Specification 3: Wrongful betting at cards and other games of hazard at Redding, California, on or about December 19, 1933, while disbursing officer and Class "A" Agent Finance Officer having public funds in his possession and under his control, contrary to the provisions of paragraph 6, AR 35-120, and to the prejudice of good order and military discipline.

Specification 4: Wrongful betting at cards and other games of hazard at Redding, California, on or about May 24, 1934, while disbursing officer and Class "A" Agent Finance Officer having public funds in his possession and under his control, contrary to the provisions of paragraph 6, AR 35-120, and to the prejudice of good order and military discipline.

The accused pleaded not guilty to Charge I and the specifications thereunder, and guilty to all other charges and specifications. He was found guilty of all charges and specifications, and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The only legal question presented is that of the sufficiency of the evidence to support the findings of guilty of Charge I and the specifications thereunder, and, specifically, whether or not the evidence in support of this charge and the specifications thereunder establishes the criminal intent which is an essential element of the offenses charged. A satisfactory consideration of this question requires a somewhat comprehensive presentation of the evidence. In the interest of clarity, a brief summary will first be presented followed by a more complete statement of certain evidence which requires detailed consideration.

On May 6, 1933, Captain George E. Pruit, Quartermaster Corps, the accused, was officially instructed to proceed to Redding, California, and report to the District Commander of the Civilian Conservation Corps District at that place. He arrived at Redding on May 8, 1933 (Accused, R. 82). The District Commander arrived on May 10, 1933 (Accused, R. 83), and on May 10, 1933, accused was appointed District Quartermaster, Class "A" Agent Finance Officer and Supply Officer, Redding, California (Ex. 54). On September 19, 1934, accused was admitted to Letterman General Hospital suffering from the effects of long continued use of alcohol and of a recent debauch (Major W. F. Rice, M.C., R. 62). On September 20, 1934, a board of officers examined accused's desk at Redding, California, and found therein certain papers fully described hereafter (1st Lt. L. S. Chaplin, 30th Inf.-Res., Recorder of Board, R. 40-41, 112-113). Accused remained in the hospital as a patient until October 24, 1934 (Rice, R. 63). On October 19, 1934, he was relieved of his duties as District Quartermaster, Class "A" Agent Finance Officer and Supply Officer (Ex. 55).

Allowing credit for all vouchers of record, including those known to exist although not actually cleared, audits of accused's accounts show a balance in favor of the government in his money accountability as Class "A" Agent Finance Officer of $2705.69 (1st Lt. H. F. Chrisman, F.D.,

Property Auditor, R. 28), and as District Quartermaster of $3584.22. The latter sum should be reduced by fifty cents because of an accounting error, thus making the correct net shortage $3583.72 in the latter account (Chrisman, R. 25). Accused admits that the debits charged to him are correct but states that he has no way of determining whether all credits due him have been allowed, and suggests the possibility of duplicate payments and lost vouchers (R. 94). One duplicate payment which was discovered and corrected is established (1st Lt. C. J. Harrold, Q.M.C., R. 80; stipulated testimony of 1st Lt. N. A. Donges, Inf.-Res., R. 81). Accused failed to render accounts covering government funds for which he was accountable as District Quartermaster during the period July 1, 1934, to October 19, 1934, and for government funds for which he was accountable as Class "A" Agent Finance Officer during the period May 10, 1933, to October 19, 1934 (pleas of guilty to Specifications 3 and 4, Charge II; Major H. G. Foster, F.D., Finance Officer, Fort Mason, R. 12; B. J. Wiar, Chief Clerk, Finance Office, Fort Mason, R. 18-19). Accused did not keep a blotter showing his transactions as Class "A" Agent Finance Officer as required by Army Regulations (Accused, R. 107). He opened a bank account as Class "A" Agent Finance Officer in which he deposited funds which came into his possession in that capacity (Accused, R. 108), and maintained another bank account in his own name in which he habitually deposited both his own personal funds and those which came into his possession as District Quartermaster as collections for subsistence and drew checks against this account for both personal and official expenditures (Accused, R. 97).

It is undisputed that accused's duties were arduous and that he did not at all times have competent assistants or an efficient organization. Whether his organization was efficient during the period July 1, 1934, to September 19, 1934, is disputed. It is abundantly established that during practically the entire time he was on duty at Redding, California, accused used intoxicating liquor to excess (Accused, R. 86-87,89-91; 1st Lt. T. L. Ricks, QM-Res., R. 57; 1st Lt. W. F. Dean, 30th Inf., R. 66-67; Pvt. 1st Class P. A. Lyons, Q.M.C., R. 106; depositions of Major A. L. Parsons, M.C., and 2d Lt. B. Thielen, 8th F.A., Def. Exs. C and B).

By his pleas to the Additional Charge and the specifications thereunder, accused admits that on August 10, 1933, December 8, 1933, December

19, 1933, and May 24, 1934, respectively, at all of which times accused was a disbursing officer and Class "A" Agent Finance Officer having public funds in his possession and under his control, he wrongfully bet at cards and other games of hazard.

Accused asserts emphatically that he never knowingly used any government funds for his own purposes (R. 95,109), and contends that the admitted shortages in his money accountability are due to negligence in failing to keep proper records and not to criminal intent. He attempts to explain and excuse this negligence by pointing out the effect on his physical and mental condition of his arduous duties, the nervous strain to which he was subjected, and his voluntary excessive use of alcoholic stimulants. He suggests the possibility of duplicate payments and lost vouchers, and asserts his belief that such shortages as exist occurred during May, June, and July, 1934. His counsel suggests (R. 115) that accused's condition during that time should be considered in mitigation of his offenses.

As to his lack of competent assistants and his use of intoxicants, the accused testified in substance: At no time while I was in the Redding District did I consider my personnel, commissioned, enlisted or enrollee, sufficiently experienced properly to handle the duties they were called upon to perform. The commissioned personnel at all times were willing and the Regular Army personnel, if permitted to remain, would have become excellent assistants. The enlisted personnel were loyal and hard working, but their abilities were limited. After July 1, 1934, my subsistence branch was efficient only in part. The supervision was efficient, but, due to frequent changes, some of the personnel in the office were not competent (R. 85,95). Between the second, or winter construction period, and the third, or spring construction period, the office got on a sounder working basis and things seemed to run more smoothly. There was a lull which allowed me to obtain more rest. I did not have such long hours and my condition more or less improved. About May, 1934, we had both the auditor and the annual inspection. The auditor found some discrepancies in subsistence but none in funds. The discrepancies found in other lines, in property, were due more to clerical errors and, as I believe, loss of papers by personnel handling the records. In his report the corps area inspector found the maintenance of camps satisfactory in all respects but conditions concerning property and subsistence unsatisfactory. His severe criticism of my administration in the handling of subsistence and

general supplies discouraged me to the extent that I was very much broken up. He expressed the opinion that this was due to my excessive use of alcohol which caused my failure to apply myself more to the supervision in detail of the activities of the subsistence and supply branches (R. 87,89). The amount of work that fell on me personally, and the information I was required to furnish to the surgeons, the adjutant's office, the publicity branch, and the twenty-nine camp commanders we soon had, at various times drove me frantic. By August, 1933, I became so nervous and upset that I commenced the use of alcohol because I found it had a tendency to steady my nerves and I could go on with my work. By the end of the second construction period I had become so run down and nervous over the strain that I was unable to sleep at night and would lie awake until exhausted solving some problem that had to be handled the next day, with the result that I drank more and more as it had the effect of allowing me to continue work with an increased desk. The duties of the third period, and the worry incident to the necessity for a practical revision of the work of the first period, had a tendency to start me to drinking more and more. However, I never lost a day from the use of liquor during that period. It is true I was using much alcohol but if I had not used it I would not have been able to carry on and would have been in the hospital sooner. There is no question but what I did drink to excess, but it was brought on by the duties and conditions which I have enumerated. If things had been normal or if I had had either experienced personnel or experienced clerks it would not have been so difficult (R. 86-87,89-91).

As to his finance activities, the accused testified in substance: I kept no blotter and I do not recall that I struck a balance any time during the last four or five months. I know I had struck a balance in May, 1934, because I expected to be audited by the inspector, who never called (R. 107). I think that most Class "A" Agent Officers did not know until about October, 1934, that they should keep a cash blotter. I know it now. I found it in regulations. I do not know a single Class "A" Agent Officer in the Redding District who kept a blotter, but do not mean to say that some did not. I have been a Class "A" Agent Officer for eleven out of the past twelve years. At only one station have I been required to keep a blotter and in that instance it was an innovation for the disbursing officer who desired complete data for the preparation of some report he was required to make (R. 91). Accused was asked, "Yet, with eleven years experience as a Finance Officer you did not feel you needed to keep any blotter?" and replied, "Well, I never had any trouble before" (R. 112). Accused

also testified in substance: It was not practicable to make a return to the Finance Officer immediately after payment. In some cases funds were sent 184 miles to a camp for payment of personnel and it would be a week or ten days before the pay roll would be returned. Then it would be found to be in error and would have to be sent back for correction. In some cases two weeks or more would elapse after payment of the roll before it could be transmitted to the Finance Officer. All transmission of funds to the finance was made by letter of transmittal inclosing form 45b, which is the form for transmittals from one officer to another, and form 45c, which is the receipt of the receiving officer (R. 92). The Finance Officer also required for his own transmittal to Washington a receipt on form 45a for the amount not in his possession, and would make out the form showing the balance he had me charged with and I would be required to sign that. In other words, all the time he not only held my receipt for the balance according to my accounts, but an additional receipt for the balance according to his accounts. After I would submit forms 45b and 45c along with my vouchers to the Finance Office, those forms would show my balance but it might be all the way from three weeks to two months before I would get a receipt for that. I never was able to strike a balance with the disbursing officer. My accounts might show that I had $584.00 on hand and his account would show that I had $22,000.00, because I had $21,000 and some odd dollars in vouchers that had not been audited yet and passed to my credit. When I went to the hospital they had me charged with some $14,000, when in reality I probably had about $3500 (R. 108). With one or two exceptions the turn in on collections for subsistence stores was made by one check which was my first check in favor of the Finance Officer at Fort Mason. On two or three occasions charge sales collections for the period would probably be only one or two organizations and the checks would be indorsed by the Finance Officer and sent in. For other months the collections would run all the way from twenty to fifty checks ranging in amount from $2.34 up to perhaps five or six hundred dollars. These would be grouped and deposited in one check in favor of the Finance Officer (R. 92).

The accused also testified in substance: During the time I was Agent Finance Officer at Redding, I had no assistance in handling that account. I did not really need any other assistance than I would get from my own stenographer in typing letters of transmittal or completing forms. I considered that I was entirely able to handle it myself (R. 96).

The accused further testified in substance: During the period I was at Redding I presume $100,000 was disbursed for construction. Sometimes I had on hand at least $30,000 (R. 91-92). I only kept a small amount of money in the safe because I kept the transportation requests in the safe and the transportation clerk had the combination. I never kept anything in there except what I wanted him to have access to (R. 98). I kept no separate bank account (R. 108). Collections for subsistence were habitually deposited in my account (R. 97). I had one check book from which I drew checks for my personal use and still another check book for government funds, but I do not have either one of those stub books now (R. 109). There were several ways in which moneys were withdrawn from my account. They were withdrawn for my personal uses and also for demands from the Finance Officer to satisfy my government obligations (R. 97).

For precise accuracy the following questions, and the accused's answers thereto, are quoted:

"Q. You never knew when you were checking out for your own use any of the Government funds, through error or otherwise?
A. I would not know unless I checked up the stubs in my book. I depended upon my memory.
Q. Did you check up the stubs in your book?
A. Quite often.
Q. You are sure that you were not using any Government money?
A. I know I never used any.
Q. What?
A. I never knowingly used any.
Q. Could you have used any in that way?
A. Could, yes." (R. 109)

"Q. What method did you use in checking out of your personal account so that you would know you were not using personally any of the Government funds?
A. I only just kind of kept track of what my own amount was in there. I only had a certain amount and had certain bills to pay and I kept no detailed record." (R. 108)

"Q. So, when you deposited, say, your monthly pay, or whatever amount you did deposit on your own check book, you would no doubt enter that on the stub, wouldn't you?
A. Yes.
Q. And as you drew personal checks out you would subtract that and then if you had a separate and distinct check book there should be no danger of your drawing for your own personal use any of the Government funds; is that right or wrong?
A. I kept a separate one for my own." (R. 109)

"Q. Did you receive cancelled checks from the bank each month?
A. Yes.
Q. Did you go over those to see whether you had issued duplicate checks?
A. I never found any duplicate checks.
Q. You never found any duplicate payments?
A. I did not, that I recall. I do not recall - I do not remember whether I went over them the last two or three months or not, but I know up until when I expected inspection that I went over them all.
Q. And you found none?
A. I did not find any then." (R. 110-111)

"Q. Why did you not make a separate account of the government funds in the bank?
A. In one way I had no more right to maintain a bank account than I did to deposit it in my own account. I will admit it would look better, there is no authority for class A agents to open an account anywhere. I started in the first place of sending my own returns in of the collections by personal check, due to the fact I had so much agent's money on hand which I had in a different account, that I did not desire the disbursing officer to know that I had opened up a checking account as an agent officer. An agent officer is supposed to keep his funds in his possession. I only had a field safe and that field safe was not protection.
Q. Assuming you had had a separate account of the Government funds, would there have been any probability of error in that account in any large amount?

A. Not unless, as I say, there was a duplicate payment which is not accounted for." (R. 97)

"Q. Referring to the mixing of your funds, was there any practical reason why you could not and should not have kept a separate account for your quartermaster funds before they were turned over to any agent finance, or finance office?

A. Oh, I could have opened a different account and kept that solely for--

Q. A separate and distinct account, even though one person was handling both?

A. Yes, separate and distinct, and the quartermaster must make his collections and turn them into the finance; or, he can turn them into the agent officer if there is no disbursing officer available, so in some cases I did take up funds as agent officer, because they were required for immediate payment of payrolls, and which would take some days to obtain funds from the disbursing officer, and in those cases I was charged with the funds as an agent officer and credited with them as quartermaster." (R. 99-100)

Accused also testified in substance: There is something in regulations against the procedure I followed in handling Quartermaster funds, but I never read it until these investigations came up and then I got to "digging through regulations" and I found there is such a regulation. You will not mix government with personal funds (R. 109-110).

On September 19, 1934, accused's safe was examined and was found to contain $202.58 in cash (Chaplin, R. 42-43).

On September 20, 1934, accused's desk was examined (Chaplin, R. 41,43, 112-113) and the following papers found therein:

Nine ration and savings accounts hereafter particularly described.

A corrected daily report of charge and cash sales for July 10, 1934, hereafter particularly described.

A daily report of charge and cash sales for August 10, 1934, hereafter particularly described.

A check (Ex. 1) for $800.00, dated July 31, 1934, payable to the order of Redding District Quartermaster CCC, signed "Company Fund Co 918 CCC W. A. Dunton, Jr.", and indorsed "Pay to Finance Officer Ft Mason Geo E Pruit Capt QMC", followed by a stamp reading "GEO. E. PRUIT Capt. Q.M.C. District Quartermaster", followed by the words in script "Redding CCC".

Checks as follows:

From Lt. Ben Ahl	$6.05
From Lt. Donges	36.97
From Lt. Ricks	5.85
From Company Fund 978th Co. CCC Redding District	2.85
From Capt. Claud Acre	6.60
Total	$58.32.

All of the checks described above were turned over to the Assistant Quartermaster to be sent to the Finance Officer and credited to the proper accounts (Chaplin, R. 113).

The accused testified in substance: I do not recall what vouchers and checks were in my desk but the inventory furnished me after I returned from the hospital covering the items found therein did not show any checks being found other than the one for $800.00. However, I am positive that there were several more checks therein. I was last at my desk on the night of September 18, and the inventory of the desk was taken some thirty-six hours thereafter on September 20. I am positive there were other checks in my desk besides the one for $800.00 (R. 94), although I cannot say what they were, but I received checks more or less daily. All checks I received would come from the subsistence branch unless one just happened to be mailed to me directly and then it would be sent out to the subsistence branch to be made a matter of record. I had a key to the desk and I usually locked it. Unfortunately I did not do so this time because it was found unlocked (R. 98). It was my habit to lock my desk but the day I left for the hospital they collected my keys and I was informed when I went back that the desk was not locked (R. 101). I do not recall whether the checks which I believe were in my desk when I left were indorsed. As a rule I would never indorse them unless I was ready to deposit them or transfer them. I would not indorse them in blank and leave them in the desk, except that I have no doubt on occasions when I expected immediately to dispose of them by transfer and deposit, and something would come up,

I would have to desist and go and do something else (R. 100). Any checks made out to me and indorsed with my name that were left in my desk could be cashed by anybody who could get hold of them (R. 101). I would not say that I would habitually walk away and leave a check indorsed and therefore negotiable. I have done it. I would not say whether I have done it more than once (R. 102).

Ration and savings accounts (on War Department Form No. 346) were prepared for each and every month for every company in the Redding CCC District (Capt. J. F. Cole, C.A.-Res., R. 78). These reports showed whether the company was overdrawn at the commissary. They were sent to the various camps to be signed by the company commander concerned, then returned, signed by the accused, and approved by the District Commander, after which they were supposed to go to the Finance Officer (St. Sgt. L. J. Lebanoff, Q.M.C., Principal Clerk, Subsistence Branch, R. 44). On September 20, 1934, nine such reports (Exs. 4-11, inclusive, and 53) were found in accused's desk (Chaplin, R. 41). Seven of these reports were for the month of June, 1934, and two for the month of July. Each of them had been prepared in the subsistence branch of the District Quartermaster's office, approved by the Camp Commander, taken to the accused, and signed by him (Lebanoff, R. 43-44; Enrollee Vandiver, Rations and Savings Clerk, R. 50). In these several accounts in the column marked "Due Quartermaster (ration credit overdrawn)", the following amounts appear:

Exhibit No.	CCC Camp No.	Amount
4	976	$270.26
5	977	249.46
6	978	285.63
7	993	258.98
8	1908	238.27
9	1919	277.39
10	1554	401.12
11	978	294.19
53	1554	128.94
	Total	$2404.54

Each of these ration and savings accounts bears the signature of the appropriate company commander under the following certificate:

> "We certify that the entries opposite our signatures are correct; *** and that we have paid to the Quartermaster the sums appearing in column 'Due Quartermaster'".

None of these accounts, nor any other ration and savings accounts for the same organizations for the months of June and July, 1934, was received in the Finance Office at Fort Mason (Wiar, R. 19-20).

The prosecution offered in evidence (Exs. 16-21, inclusive, and 24-26, inclusive) nine checks dated during the period July 20, 1934, to August 24, 1934, inclusive, each for the identical amount certified to be due on the several ration and savings accounts referred to above, and each signed by the same company commander who signed that certificate. All of these checks except Exhibits 18, 20, 21, 24, and 26 are payable to the order of the District Quartermaster, Redding District CCC. Exhibits 18 and 26 are payable to the order of "District Quartermaster". Exhibit 20 is payable to the order of the "Quartermaster Redding District CCC". Exhibits 21 and 24 are payable to the order of "District Quartermaster Redding Dist." Each of them bears accused's indorsement as District Quartermaster (Lebanoff, R. 36) and all of them, except Exhibit 21, which is a typed and not a photostatic copy, show stamps or perforations evidencing the fact that they have been paid. None of them was received in the Finance Office at Fort Mason (Wiar, R. 20).

The prosecution also offered (Exs. 33-37, inclusive, 45 and 52) receipts signed by accused showing that the several checks referred to above were turned over to accused by the subsistence branch of his own office during the period of July 21, 1934, to August 31, 1934, inclusive. Captain Cole testified (R. 45-46) that they were in fact so turned over and that they cover the same funds represented by the checks referred to above.

Although related ration and savings accounts were not introduced, two checks (Exs. 22,23) similar in character to those referred to above, dated July 19, 1934, and July 31, 1934, respectively, for the aggregate sum of $863.16, were received in evidence, and also receipts (Exs. 33,37) signed by the accused showing that these checks were delivered to him on July 21, 1934, and August 1, 1934, respectively. These two checks likewise bear the accused's indorsement and show perforations evidencing the fact that they have been paid.

The prosecution also introduced receipts (Exs. 29-33, inclusive, 35, 38-51, inclusive) bearing accused's signature, which show that at various times during the period July 3, 1934, to September 18, 1934, accused received from the subsistence branch of his own office checks and cash

aggregating $374.37 covering payments received for gasoline, transportation and other quartermaster supplies, and also a similar receipt signed by Sergeant Lebanoff (Ex. 28) covering a check from Captain S. W. Kephart for $7.27 in payment for gasoline, which check Sergeant Lebanoff testified, together with all of the sums covered by Exhibits 29 to 52, inclusive, was turned over to the accused (R. 35). Four of these receipts (Exs. 47, 49,50,51) were for the checks from Ahl, Donges, Ricks and Acre, which were found in accused's desk.

Captain Cole testified in substance: Exhibits 29 to 52, inclusive, are hand receipts prepared in the office of the subsistence branch covering money collected from the various companies in the Redding District for overdrawn rations, and from officers in the district for gasoline and oil, which were taken up on form 346 and turned over to the accused either by himself, Sergeant Lebanoff or enrollee Vandiver (R. 45-46). These facts are not disputed except that the receipts show that some of the money for gasoline and oil was received from enlisted personnel. Sergeant Lebanoff so testified (R. 35).

The prosecution offered (Ex. 12) a Daily Report of Charge and Cash Sales on War Department Form 346 dated July 10, 1934, prepared by Enrolle Vandiver, and signed and certified correct by the accused (Lebanoff, R. 38; Vandiver, R. 49), which was duly received by the Finance Officer, Fort Mason, California (Wiar, R. 20; Chrisman, R. 28). This report shows no cash receipts. The prosecution likewise introduced a "(corrected)" Daily Report of Charge and Cash Sales on War Department Form 346 for July 10, 1934 (Ex. 15), which was found in accused's desk on September 20, 1934 (Chaplin, R. 41). This report was not signed by the accused and was not received by the Finance Officer, Fort Mason, California (Wiar, R. 20; Chrisman, R. 29). It shows cash receipts for subsistence of $2844.57, and for transportation of $78.79, total $2923.36. This report was prepared in the subsistence branch of accused's office by Enrolle Vandiver, who testified that he did not remember "why it was corrected" (R. 49). This corrected report (Ex. 15) was identified by Captain Cole (R. 46-47) by his own initials thereon, by the amount entered, and by the notation thereon of the delinquency of Camp Deer Creek, 918th Company. Captain Cole testified that this form was prepared in the office of the subsistence branch and transmitted out as a matter of routine to the District Quartermaster's Office. He was asked: "Do you know whether the lump sum collections reported here" (identified, R. 46, as $2923.36) "include the checks about which you just testified?" (i.e., Exs.

16-26, inclusive, R. 46), to which question he replied, "The lump sums reported on this form includes the checks". Captain Cole further testified (R. 47) that these same lump sums are also "included in the hand receipts", evidently referring to the receipts (Exs. 29-52, inclusive) previously identified by him (R. 45,47). Sergeant Lebanoff testified that the subsistence branch does not have on file any receipt from the Finance Officer showing that the money collected as shown by the receipts (Exs. 28-52, inclusive), in addition to the checks (Exs. 16-26, inclusive) was received by him; and that in the regular course of business such receipts would be filed in the subsistence branch (R. 37).

The prosecution introduced (Ex. 27) a Daily Report of Charge and Cash Sales on War Department Form No. 346 for August 10, 1934, which was prepared by Karollee Vandiver (Vandiver, R. 48), which shows total cash receipts of $281.80. This report was found in accused's desk on September 20, 1934 (Chaplin, R. 41). It was not cleared in the files of the Finance Officer at Fort Mason (Chrisman, R. 29) and there was no record in the subsistence branch of accused's office showing its receipt by the Finance Officer at Fort Mason (Lebanoff, R. 38).

The accused testified in substance: As to the papers found in my desk, I can only say it was my habit to get such papers off my desk when leaving at night and to place them in a drawer until I could get to them the next day to dictate the letters of transmittal. As to the ration and savings accounts and charge and cash sales reports which were found, I can only state from the conclusions I have formed from past handling thereof that that was my intent. I do not recall why they were placed in the desk specifically. I am inclined to the belief that the ration and savings account and the $800.00 check were held in my desk for the purpose of dictating a letter of transmittal therefor, the one prepared by Captain Cole not being considered sufficiently explanatory (R. 93).

The following is quoted from the testimony of the witness Wiar, who made an audit of accused's accounts as Class "A" Agent Finance Officer:

"Q. Mr. Wiar, in your audit of Captain Pruit's accounts did you find any indication of falsification of records?
A. In one case which was exhibited to me, Form 346, one which was supposed to be sent in and was never sent in, dated July 10, 1934.

Q. Would that be a falsification or failure to render a report?
A. I do not know what the intent was when it was not sent in. I cannot answer that question. It might have been an intent to falsify and it might have been an oversight, I do not know.
Q. You are not sure?
A. No." (R. 22-23)

Lieutenant Chrisman testified:

"Q. Did your audit indicate any falsification of records by Captain Pruit?
A. No, sir; I discovered no evidence of any records having been falsified." (R. 33)

4. Section 90 of the Federal Penal Code denounces as embezzlement the failure of any officer or agent of the United States who has received public money which he is not authorized to retain as salary, pay, or emolument, to render his accounts for the same as provided by law. AR 35-180, May 10, 1929; 35-320, May 21, 1929; 35-780, April 2, 1927; and 35-6660, June 18, 1929, require officers responsible therefor to account for public funds and render reports relating thereto.

The following specific provisions of AR 35-320 are quoted:

"12. Cash blotter.--Each agent officer will maintain a cash blotter record showing in separate columns entries of all funds received from the accountable officer; entries of all funds received from other sources; entries of all funds disbursed as shown by paid vouchers; entries of all funds turned over to the accountable officer; and entries of all amounts represented by incorrect vouchers, if any, returned for which credit is not given by the accountable officer. Funds disbursed by an agent officer as shown by incorrect vouchers returned by the accountable officer will be considered as cash 'in hands of agent officer' and accounted for as such.

* * * * *

15. Accounts of Class A agent officers.--a. Agent officers of Class A will make the necessary returns to the

accountable officer within 24 hours after completion of the particular payments for which designated.

b. Failure to render.--Failure on the part of a Class A agent officer to close and render his accounts within 24 hours after completion of specified payments will be promptly reported by the accountable officer to the commanding officer of the stations where the agent officer is operating."

AR 35-120, February 10, 1933, paragraph 6, provides:

"Gambling.--If any disbursing officer shall bet at cards or any game of hazard, his commanding officer will suspend his functions, require him to turn over all public funds in his keeping, and will immediately report the case to the corps area commander and to the Chief of Finance. The corps area commander will at once cause the matter to be investigated with a view either to the trial of the officer, or such other disciplinary action as, in his judgment, the case may require."

It will be observed that this regulation does not in express terms prohibit gambling by disbursing officers. The Board of Review considers, however, that it does so by necessary implication, and in any event that the offenses described in the several specifications under the additional charge, to which the accused pleaded guilty, constitute conduct to the prejudice of good order and military discipline in violation of the 96th Article of War.

5. This office has held that:

"Any adult man who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, can not complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence." Dig. Ops. JAG, 1912-30, sec. 1563.

However, no presumption is necessary in this case. It is uncontroverted that the accused deposited government funds for which he was

accountable as Class "A" Agent Finance Officer and as District Quartermaster in banks in violation of existing law and regulations; that the latter funds were deposited in his private personal account and commingled with his own private funds; that he did not keep a blotter showing his receipts and expenditures as required by regulations; that he certified as correct and sent forward a report for July 10, 1934, showing no cash actually received; that he actually received considerable sums which he did not report and for which he did not account; and that an unsigned "corrected" report dated July 10, 1934, showing large cash receipts, including those last referred to, was found in his desk on September 20, 1934. In view of accused's experience and length of service his assertion that he did not know the requirements of Army Regulations concerning such an important subject as the handling and accounting for government funds is quite amazing. However that may be, the impropriety and probable result of commingling private and official funds should be manifest to anyone, even in the absence of an express prohibition. Why sums actually received after that date should be included in a "corrected" report dated July 10, 1934, is not explained, but this does not alter the fact that those sums were never reported nor accounted for. Accused's explanation that on September 19, 1934, he was still holding this "corrected" report dated July 10, 1934, a similar report dated August 10, 1934, and nine ration and savings accounts for various dates in July and August, 1934, until he could get time to prepare explanatory letters of transmittal is not convincing. Also for consideration is the accused's admission (R. 97) that he remitted official funds by personal check because he did not desire the disbursing officer to know that he had opened a checking account as an agent officer. The entire evidence shows more than negligence and carelessness. The somewhat hazy suggestion that, during the period covered by the charges and specifications, the accused was not sufficiently responsible to be capable of forming a criminal intent is not justified by the evidence, and the suggestion, vaguely implied, that in some unknown manner other than his own act official funds in his possession disappeared (possibly through larceny) is not persuasive and does not raise any reasonable doubt as to accused's guilt, especially since a considerable portion of the funds for which he has not accounted reached the accused in the form of checks which he is shown to have indorsed and cashed.

Accused is 55 years of age, has no allotments to dependents and no deduction of pay for government insurance. His service is as follows:

"(Non-Federal; 2 lt. Inf. Mo. N.G. 11 Aug. 10 to 1 June 11.)---Pvt. and corp. Co. F, 20 Kans. Vol. Inf. 12 May 98 to 27 Aug. 99; 1 lt. Q.M.C., N.A. 8 June 18; accepted 8 June 18; capt. Q.M.C., U.S.A. 2 June 19; accepted 4 June 19; vacated 29 Sept. 20.---1 lt. Q.M.C. 1 July 20; accepted 29 Sept. 20; capt. 1 Apr. 33."

6. Attached to the record is a recommendation for clemency signed by three members of the court which tried the accused, viz.: that all confinement and hard labor involved in the sentence be remitted. The reasons assigned are (a) the tremendous pressure under which the accused worked for a long period which weakened him physically, deadened his will power, drove him to drink and made him an easy victim to temptation; (b) the fact that during the early months of the organization of the CCC accused performed his duty in a superior manner; (c) the fact that accused's dismissal from the service will "restore to the Government" potential retired pay earned by long years of service; (d) accused's age, and (e) the fact that he has a family. The language of this recommendation indicates no doubt on the part of its signers concerning accused's guilt of the offenses of which he was convicted. The fact that the accused performed certain duties unusually well is not believed to constitute a sufficient reason for the action recommended. Reasons for clemency similar to the others assigned exist in almost every case in which an accused is convicted and sentenced to dismissal and confinement. After the most careful consideration of the entire record and all other pertinent facts, the Board does not feel that the reasons set out above or any other reasons justify the action recommended.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed at the trial. The Board of Review is of opinion that the record is legally sufficient to support the findings and sentence, and warrants confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of the 93d Article of War or of the 96th Article of War. Confinement in a penitentiary is authorized for embezzlement by the 42d Article of War and sections 98 and 401, title 6, Code of the District of Columbia, 1929. However, the accused is not an habitual criminal and this appears to be his first offense. While confinement in a penitentiary is authorized in

this case, it does not appear that the purposes of discipline demand penitentiary confinement or that the confinement of accused in association with misdemeanants and military offenders would be to their detriment. Par. 90 a, M.C.M. The Board of Review is accordingly of opinion that the interest of discipline would be adequately served if the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, were designated as the place of confinement, and so recommends.

Theodore Kall, Judge Advocate.

H. A. Trunkell, Judge Advocate.

S. McGrath, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., JUN 3 1935 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Captain George E. Pruit (O-11287), Quartermaster Corps, 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 sufficient to support the findings and sentence, and that the sentence should be confirmed. However, I am not satisfied that the entire sentence to confinement should be ordered executed.

3. Captain Pruit, now past 55 years of age, has been an efficient officer and has served through two wars. There appears to be no reasonable excuse for these defalcations. Though there is slight indication of a studied purpose to conceal his peculations, the record of trial abounds in evidence of utter disregard of his obligations as disbursing officer and as quartermaster as shown by his intermingling of his own and government funds, his carelessness and neglect and his habits of drinking and gambling.

The officer who investigated the charges was of opinion that -

> "This case would never have reached its present serious state had his (Pruit's) previous commanding officers exercised a stricter supervision over the work of the accused and had the finance officer for whom he acted as agent, not permitted him to function as a class B agent when he was, in fact, appointed as a class A officer."

Major Willis J. Tack, Infantry, DOL, testified by deposition (Def. Ex. A) that he was District Commander, Redding District, CCC, from May 10 to December 7, 1933; that considering Captain Pruit's age he "often wondered how he stood up under the load he carried". He referred to the extreme heat at Redding during the summer of 1933 when for about six weeks there was an average temperature of 107 degrees.

Second Lieutenant Thielen, 8th Field Artillery, Assistant District Adjutant and District Adjutant, Redding District, CCC, testified by

deposition (Def. Ex. B) that during the period July 1-December 31, 1933, the accused faced with an emergency situation, namely, establishment of supply functions under unsettled conditions, performed his duty in a superior manner, and that thereafter, until September 1, 1934, Captain Pruit's function became analogous to that of a post quartermaster, in which capacity he considered him merely satisfactory. Lieutenant Thielen testified that in his opinion lack of responsible and qualified commissioned assistants and "to some extent, lack of inherent ability for administrative detail" were responsible for the change in efficiency of the accused. The witness also testified that duties of Captain Pruit "especially in the early months of the CCC project, were beyond the capacity of any average officer without qualified assistants. The accused worked from early morning to late at night, including Sundays and holidays".

First Lieutenant T. L. Ricks, Quartermaster Reserve, an assistant to Captain Pruit, testified (R. 59) that during May, June and July, 1933, Captain Pruit worked from eighteen to twenty hours each day, including Sundays.

Captain Pruit testified (R. 86) that the amount of work that fell on him personally and the information he was required to furnish the surgeons, the adjutant's office, the publicity branch, and the 29 camp commanders "drove me frantic, and by August, 1933, I became so upset and nervous that I commenced the use of alcohol, because I found it had a tendency to steady my nerves and I could go on with my work".

It is quite probable that being overworked he resorted to the use of alcohol as a sustaining influence and that as the habit grew his gambling proclivities developed, resulting in his neglect of the business that had been entrusted to him.

4. Three members of the court recommended clemency to the extent of the remission of the confinement imposed. His wife, on behalf of herself and their three unmarried daughters, one of whom is still in school, has appealed to the President to exercise the same clemency.

5. Under all the circumstances of the case, I am constrained to the view that Captain Pruit will have been sufficiently punished for

his misdeeds, and the ends of justice will have been fully met, if the sentence be confirmed and the confinement be reduced to one year, and I so recommend.

6. There is inclosed herewith draft of a letter for your signature transmitting the record to the President for his action, if you concur in these views, and also an alternative draft of the last page of the letter in case you should decide that the entire sentence, which includes total forfeitures, dismissal and confinement at hard labor for two years, should be executed. There is also inclosed a form of Executive action designed to carry into effect the recommendations hereinbefore made should they meet with approval, and an alternative form of Executive action in case it should be determined to order the execution of the entire sentence.

7. I further recommend that the Atlantic Branch of the United States Disciplinary Barracks, Governors Island, New York, be designated as the place of confinement. Though warranted under the law, I deem penitentiary confinement in this case unnecessary.

8. Attention is invited to the following letters in regard to this case, the originals of which are appended hereto:

a. Letter from Florence J. Pruit (wife of accused), Fort Baker, California, to the President, dated January 28, 1935.

b. Letter from H. D. Pruitt, Oakland, California, to the Honorable Hiram W. Johnson, United States Senate, dated January 28, 1935.

c. Letter from the Honorable Albert E. Carter, House of Representatives, to The Judge Advocate General, dated February 4, 1935.

Hugh C. Smith
Hugh C. Smith,
Colonel, J.A.G.D.,
Acting The Judge Advocate General.

6 Incls.
Incl. 1-Record of trial.
Incl. 2-Draft of let. for sig.
Secy. of War (alternative last pages).
Incl. 3-Alternative forms of Executive action.
Incl. 4-Let. to Pres. 1-28-35 from Mrs. Pruit.
Incl. 5-Let. to Sen. Johnson 1-28-35 from H.D. Pruitt.
Incl. 6-Let. to JAG 2-4-35 from Mr. Carter.

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

Board of Review
CM 203034

MAR 13 1935

U N I T E D S T A T E S	)	THIRD CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters Third Corps Area,
Captain ROBERT A. JOYNER	)	Baltimore, Maryland, February
(0-112521), Infantry	)	26, 1935. Dismissal and con-
Reserve.	)	finement for one (1) year.
	)	Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HALL, KING and SMITH, L.M., 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 a single charge and three specifications as follows:

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Captain Robert A. Joyner, Infantry Reserve, while on active duty in command of Camp S. 97, Civilian Conservation Corps, and as such Commanding Officer being the custodian of the company fund of the 1329th Company, Civilian Conservation Corps, did, at Camp S. 97, Salisbury, Pennsylvania, on or about the 13th day of August, 1934, feloniously embezzle by fraudulently converting to his own use monies to the amount of Seventy-Two Dollars, the property of 1329th Company, Civilian Conservation Corps, entrusted to him as such custodian for the use of the members of said company.

Specification 2: In the same form as the preceding, alleging embezzlement of $72, property of the 1329th Company, Civilian Conservation Corps, August 18, 1934.

Specification 3: In the same form as Specification 1, alleging embezzlement of $80, property of the 1329th Company, Civilian Conservation Corps, August 23, 1934.

Accused pleaded guilty to all specifications and the charge. The nature and effect of his pleas were explained to him and he adhered to them (R. 6,7). Accused was found guilty of all specifications and the charge. No evidence of previous convictions was introduced. He was sentenced to dismissal 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 of trial for action under the 48th Article of War.

3. The evidence for the prosecution would have been insufficient, without the plea of guilty, to support the finding; but, if the plea had been otherwise, no doubt the prosecution would have introduced additional evidence. The evidence in the record is, however, enough to show the nature and degree of accused's misconduct. The evidence for the prosecution may be summarized as follows:

It was the duty of Captain Warren, supervisor of the 9th sub-district, Civilian Conservation Corps, to make frequent audits of the funds of the companies in his sub-district, including the 1329th Company at Salisbury, Pennsylvania, under the command of accused. In September, 1934, Captain Warren made an incomplete audit of the company fund of that company for August, 1934, and at least twice a month thereafter asked accused for his council book and papers; but accused was unable to give them, due to the various reasons which he gave. Finally, in January, 1935, Captain Warren directed accused to turn all books and papers relative to the fund over to the two lieutenants in the company for a complete audit. As a result of that audit, certain discrepancies were discovered and Captain Warren relieved accused of his command (R. 10-12, 14). The company council book for August, 1934, showed three disbursements as follows (Ex. A):

Voucher	Date			Ration Savings Expenditures
13	23	Kellogg Sales	Cereals	$72.00
14	23	Kellogg Sales	Cereals	72.00
15	23	General Food Sales	Cereals	80.00

Both the company fund and accused individually had accounts in the First National Bank of Salisbury. The company fund check book showed on its stubs three checks corresponding in date, amount, and name of payee to the above three entries in the company council book (Ex. B). No vouchers or canceled checks corresponding to the above items were found among the papers pertaining to the company fund or produced by accused (Warren, R. 13,14; Walter, R. 18; Remaley, R. 21). On the other hand, the ledger sheet of the company fund account in the above bank showed debits of $72 on August 16, $72 on August 18, and $80 on August 23 (Ex. C); and there were found with the deposit slips of the company fund three duplicate deposit slips showing deposits to accused's personal account in the same bank of $72 on the 15th, $72 on the 18th, and $80 on the 23d of August, 1934 (Exs. D,E,F; Remaley, R. 22; Johnston, R. 24-27). The inference is that instead of drawing checks to the business houses mentioned in the council book and on the stubs, accused drew three checks on the company fund to his own order or to cash and deposited them to his personal account.

4. The defense introduced two witnesses, Chaplain Ira Freeman, Reserve, chaplain of the district which included accused's camp, and First Lieutenant Alexander Solosko, Medical Corps Reserve, apparently surgeon of accused's camp, though that is not definitely stated, both of whom testified to accused's good character, that he does not drink, that his wife lived nearby and he was a good husband, that he was mentally upset and worried over his mother's illness and death.

As an unsworn statement by accused his counsel read into the record certain telegrams passing between accused at Salisbury, Pennsylvania, and his brother at Oakland, California (R. 37-39), which may be summarized as follows:

a. February 17, 1934. His brother to accused.
Mother taken sick, condition due to old age, in semi-coma. If taken to hospital Mother will be more comfortable. The muscles of the

heart have contracted. Only a matter of few days.

b. February 19, 1934. Accused to his brother.
Financially impossible to make trip and not permitted army mail plane. You can rely on me in connection expense. I would be there if humanly possible.

c. April 7, 1934. His brother to accused.
Mother passed away six AM. Wire funds immediately.

d. April 8, 1934. Accused to his brother.
Unable to wire money now, will send later, whatever arrangements you make satisfactory.

As a part of the same unsworn statement, the defense counsel read into the record certain correspondence with the Interstate Commerce Commission, from which it appears that accused was for several years and until about the time of his entering upon active duty with the Civilian Conservation Corps a tariff examiner in that commission, that he has now to his credit in the retirement fund $593.30, excluding interest, which may be paid to him on executing the necessary form of application therefor. Accused on February 26, 1935, the date of his trial, transmitted to the Commission the necessary application, with the request that the check for the amount due be sent to him in care of the Finance Officer, Third Corps Area. It was further stated on behalf of accused that he desired the sum thus owing to him, which greatly exceeded his shortage, to be applied so far as might be necessary to make it good.

5. The telegrams exchanged between accused and his brother have no bearing upon the question of accused's guilt; nor, in the opinion of the Board of Review, do they afford a basis for clemency. Accused's mother was taken sick in February and died April 7 (R. 38). His defalcations occurred in August. The mother's sickness and death several months before can have created no urgent need for money in August.

That accused is willing to use the money due him from the civil service retirement fund to make good his shortage is to his credit; but the question presents itself, if he had over five hundred dollars to his

credit in that fund in August, to be had for the asking, as appears to have been the fact, why did he not draw it and use it for his urgent needs, instead of embezzling his company fund? To this question, the record neither presents nor even suggests an answer.

6. The Board of Review has considered certain features of the case and certain papers either referred to or received by it, all relating to clemency. Excluding those already mentioned, these features of the case and these papers may be thus enumerated and summarized:

a. Accused's plea of guilty. That the accused admitted his guilt and threw himself upon the mercy of the court is a circumstance in his favor.

b. A recommendation to clemency attached to the record and signed by four of the ten members of the court. This paper is indefinite as to the extent of the clemency which its signers thought should be granted. It is based upon accused's prior good record and other matters already mentioned in the opinion. The Board notes that the signers are four of the five junior members of the court.

c. A written plea for clemency addressed by accused February 28, 1935, to the reviewing authority, which has been transmitted through military channels to The Judge Advocate General and by him informally referred to the Board. This is based upon -

(1) The clear military and personal record of accused.
(2) Great emotional strain caused by his mother's death, his wife's illness with an incurable disease, and financial worries caused by debts contracted prior to entering active service.
(3) The fact that accused's wife is unable to work and will be left destitute if the sentence is confirmed.
(4) Arrangements made for restitution.

d. A letter from R. R. Spriggs, Commander, Bunker Hill Post No. 31, American Legion, Washington, D. C., to The Adjutant General, March 1, 1935, referred to The Judge Advocate General and by him to the Board. The writer mentions accused's creditable record in the World War and the

high esteem in which he has been held by his comrades. A representative of the American Legion has also called in person on the Board of Review.

e. A letter from Lillian V. Joyner, accused's wife, to The Adjutant General, March 1, 1935, referred to The Judge Advocate General and by him to the Board. The writer refers to accused's war record and his pride in membership in the Officers' Reserve Corps, and states that she is not at all well and unable to work, and that she and her daughter are entirely dependent upon accused for support and will be destitute if the sentence be confirmed. Mrs. Joyner has also called in person upon the Board.

f. A petition dated March 1, 1935, addressed to The Adjutant General and signed by F. W. Howard and 102 other persons who state that they are employees of the Interstate Commerce Commission and as such have for periods of from two to seven years associated with accused. They state that through daily contact they have known accused as a man of high character and good habits, and request "the utmost mitigative consideration" of the case.

g. A letter dated March 4, 1935, from Michael B. Driscoll, 2115 C Street, N. W., Washington, D. C., to the Commanding General, Third Corps Area, stating that the writer has been associated with accused for several years at training camps and at the office where he was last employed (meaning presumably the Interstate Commerce Commission), that he has always found accused "an industrious, loyal, serious-minded gentleman", and has never known him to do a single discreditable act. Mr. Driscoll asks that no severe punishment be imposed.

h. A paper addressed "to all whom it may concern", dated March 5, 1935, and signed by Major H. McE. Pendleton, Cavalry, counsel for accused at his trial. Mrs. Joyner called on the Board and exhibited the original of this paper, which she retained, after permitting the Board to make a copy. Major Pendleton says that the following facts are pertinent:

(1) Accused's method was so dumb and childlike that there was no possible chance of failure of discovery.

(2) The absence of any reason for taking the money and any explanation as to what became of it seems to show it the act of an unbalanced or under-developed mind.

(3) The appearance, manner and understanding of the accused show a lack of any criminal action and again tend to show it to be the act of a childlike mind.

(4) Full restitution is being made for the total shortage.

i. Radiogram dated March 7, 1935, from Major H. McE. Pendleton, Cavalry, defense counsel, to The Judge Advocate General, and informally referred by him to the Board, stating that complete restitution has now been made.

j. Report from the Finance Officer, Third Corps Area, dated March 7, 1935, to the Commanding General, Third Corps Area, and transmitted by him through military channels to The Judge Advocate General, confirming the above telegram.

k. On March 8, 1935, on one of the several calls which Mrs. Joyner made upon the Board, she was accompanied by First Lieutenant K. H. Sheelor, adjutant of the 320th Infantry, accused's regiment, who stated that through several years' association with accused as a neighbor and as an officer in the same regiment he had formed the highest opinion of accused's character.

l. Letter from First Lieutenant Alexander Solosko, Medical Corps Reserve, dated March 10, 1935, direct to The Judge Advocate General, and by him informally referred to the Board. Lieutenant Solosko says:

> "As medical officer with this company I had the opportunity to daily observe Captain Joyner. While not afflicted with any mental or physical condition which would disqualify him for active duty, his general physical condition was very much below par. He is markedly underweight, asthenic and in a general rundown condition. I feel certain, having examined the man on numerous occasions, that he is in no physical condition to perform any hard labor. Should the sentence be carried out it would materially shorten his life prematurely.
>
> Since the sentence of the Court included the provision of imprisonment at hard labor I feel it my duty in view of my knowledge of his physical condition to bring the above to your attention."

m. Letter from Captain Raymond W. Short, 320th Infantry, March 10, 1935, direct to The Judge Advocate General, and by him informally referred to the Board, stating that he has known accused socially and at military camps for many years, and that accused has always been regarded by the writer and other officers of his regiment as honest, conscientious, and of excellent character.

The papers mentioned under c, d, e, f, g, h, i, j, l, and m are inclosed.

7. The Board sympathizes with Mrs. Joyner; but her situation, if the sentence be confirmed, will be no different from that of the wife of any other person convicted of crime and sentenced to confinement. If such a sentence were to be remitted in every case in which the convicted person had a dependent who would need public relief upon his imprisonment, a large fraction of such persons would be freed and justice could not be administered without discrimination.

8. The Board has attentively considered all the reasons advanced in favor of clemency, but concludes that none of them justifies modification of the sentence. Embezzlement is a serious crime, a felony. Embezzlement by a company commander, who should have the welfare of his men as his first consideration, of the fund intended for the benefit of those men, is a particularly objectionable and discreditable form of this crime. To remit the confinement or even to reduce it at this time below one year would in the opinion of the Board of Review minimize the offense in a way harmful to military discipline among those numerous officers serving with the Civilian Conservation Corps. Accused's poor physical condition, mentioned by Lieutenant Solosko in his letter, quoted in paragraph 6 l above, and also by Mrs. Joyner during one of her calls, will no doubt be taken into account by the officer under whose supervision he will serve his sentence in deciding to what sort of work accused should be detailed. The Board thinks that that letter might properly be transmitted to such officer, if and when the sentence shall be confirmed. If, while serving his sentence, accused's physical condition shall become worse, the Board has no doubt that appropriate measures will be taken, by recommendation to clemency or otherwise, to prevent any serious or permanent injury to his health.

9. Accused is 44 years of age. He served as an enlisted man during the World War until honorably discharged February 25, 1919, to accept a commission as second lieutenant of infantry in the Officers' Reserve Corps (inactive list). He has since served in that rank and as first lieutenant and captain with numerous periods of active duty. During some part of that period not definitely shown he also served in the California National Guard. He has been on active duty with the Civilian Conservation Corps since September 16, 1933.

10. The court was legally constituted. Accused, a reserve officer on active duty, is subject to military law. CM 201678, Anderson; CM 202366, Fox; CM 202479, Babbington. No errors injuriously affecting the substantial rights of accused were committed at the trial. The record of trial is legally sufficient to support the findings of guilty and the sentence and warrants confirmation thereof. Dismissal is authorized for a violation of the 93d Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

10 Incls.
Incl. 1-Let. to C.C., 3d C.A., Feb. 28, 1935, from accused.
Incl. 2-Let. to TAG, Mar. 1, 1935, from Mr. Spriggs.
Incl. 3-Let. to TAG, Mar. 1, 1935, from Mrs. Joyner.
Incl. 4-Petition to TAG, Mar. 1, 1935, from Mr. Howard and others.
Incl. 5-Let. to C.G., 3d C.A., Mar. 4, 1935, from Mr. Driscoll.
Incl. 6-Paper, addressed to all whom it may concern, Mar. 5, 1935, from Maj. Pendleton.
Incl. 7-Radiogram to JAG, Mar. 7, 1935, from Maj. Pendleton.
Incl. 8-Report to C.G., 3d C.A., Mar. 7, 1935, from Finance Officer, 3d C. A.
Incl. 9-Let. to JAG, Mar. 10, 1935, from Lt. Solosko.
Incl.10-Let. to JAG, Mar. 10, 1935, from Capt. Short.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., MAR 21 1935 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Captain Robert A. Joyner, Infantry Reserve, together with the foregoing opinion of the Board of Review.

2. There are also inclosed for your consideration and that of the President certain papers bearing upon the question of clemency, enumerated in the opinion of the Board of Review, paragraph 2 c, d, e, f, g, h, i, j, l, and m, together with certain additional papers which have been received since the opinion of the Board of Review was written, as follows:

a. Letter from Lieutenant Colonel John V. Richards, 320th Infantry Reserve, the regiment to which accused has been assigned, dated March 11, 1935, to me, saying that accused has served faithfully and efficiently with that regiment until placed on active duty with the Civilian Conservation Corps, and that so far as known he was of good habits and upright character. The writer therefore requests that the sentence be mitigated to discharge from the Officers' Reserve Corps.

b. Letter from Honorable William G. McAdoo, Senator from California, dated March 12, 1935, to the Secretary of War, pointing out the extenuating features of the case, mentioning the fact that if accused is imprisoned Mrs. Joyner will be destitute, and asking that all the foregoing be carefully weighed in the consideration of accused's plea for clemency.

c. Letter from Lillian V. Joyner, accused's wife, dated March 13, 1935, to the Secretary of War, left personally by her at this office with the request that it be forwarded with the record, stating that full restitution has been made, that accused's prior military record has been excellent, and that his health is so poor that it is doubtful if he will survive imprisonment. Mrs. Joyner asks that accused be allowed to resign his commission.

d. Letter from Mrs. Joyner, dated March 13, 1935, to the President, also left at this office by her with the request that it be forwarded

with the record. This letter is to the same effect as the preceding, and also mentions the writer's poor health.

e. Letter from James O'Connor Roberts, Commander of the Department of the District of Columbia, American Legion, dated March 19, 1935, to the Secretary of War, through this office, asking that, because of his excellent civil and military record and his dependent wife and daughter, accused be required, in lieu of the sentence adjudged, to resign his commission for the good of the service. The writer states that if not subjected to imprisonment accused may be reinstated with the Interstate Commerce Commission.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence, and that confirmation thereof by the President is authorized by law. However, on the question of the exercise of clemency by the President I am of a view other than that expressed by the Board. In my judgment the confinement adjudged may properly be remitted by the President, and I so recommend for the following reasons:

a. Accused's prior conduct, civil and military, public and private, has been exemplary. He served creditably in the World War, and since in the Reserve. His record as an employee of the Interstate Commerce Commission is without blemish.

b. Accused pleaded guilty.

c. Four members of the court recommended clemency, namely -
Lieutenant Colonel H. C. Kress Muhlenberg, Air Corps.
Major William C. Young, Ordnance Department.
Major Milo H. Brinkley, Coast Artillery Reserve.
Major James R. Manning, Ordnance Reserve.

Major Brinkley is in civil life an employee of the Interstate Commerce Commission, as was accused.

d. Accused's present physical condition is so poor that the surgeon of the camp which he commanded has expressed the opinion that his life

would be shortened if the sentence to confinement were carried out (letter of Lieutenant Solosko inclosed). Informal inquiry discloses that the Veterans' Administration in 1933 and again in 1934 has refused two successive applications of accused for life insurance because of his poor physical condition.

e. Accused has made full restitution of the amount embezzled.

4. There is inclosed a draft of a letter for your signature transmitting the record to the President, with alternative last pages, one marked A to be used if you shall approve my recommendation that the confinement be remitted, and one marked B to be used if you agree with the opinion of the Board of Review that the sentence should be confirmed without modification. There are also inclosed two drafts of Executive action, similarly marked, from which the President may choose that which he prefers.

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

18 Incls. - 8 added:
Incl.11-Record of trial.
Incl.12-Draft of let. for sig. of Secy. War (alternative last pages).
Incl.13-Alternative forms of Executive action.
Incl.14-Let. to JAG, March 11, 1935, from Lt.Col. Richards.
Incl.15-Let. to Secy. War, March 12, 1935, from Sen. McAdoo.
Incl.16-Let. to Secy. War, March 13, 1935, from Mrs. Joyner.
Incl.17-Let. to President, March 13, 1935, from Mrs. Joyner.
Incl.18-Let. to Secy. War, March 19, 1935, from Mr. Roberts.

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

Board of Review
CM 203036

MAR 25 1935

UNITED STATES	THIRD DIVISION
v.	Trial by G.C.M., convened at Fort Douglas, Utah, February 4, 1935. Dishonorable discharge and confinement for one (1) year and eleven (11) months. Disciplinary Barracks.
Private JAMES A. GEMEKE (6252548), Battery C, 1st Field Artillery.	

HOLDING by the BOARD OF REVIEW
HALL, KING and SMITH, L.M., Judge Advocates.

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

2. Accused was tried on the following charges and specifications, to all of which he pleaded not guilty:

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

Specification: In that Private James A. Gemeke, Battery C, 1st Field Artillery, did, at Fort Sill, Oklahoma, on or about September 11, 1934, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Douglas, Utah, on or about November 29, 1934.

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

Specification 1: In that Private James A. Gemeke, Battery C, 1st Field Artillery, did, at Fort Sill, Oklahoma, on or about September 12, 1934, feloniously take, steal, and drive away one 1931 model Ford Roadster, value about $195.00, the property of Private Walter D. Burgwin, Battery C, 1st Field Artillery.

Specification 2: (Finding of not guilty.)

The court found accused guilty of Charge I and the Specification thereunder, and of Charge II and Specification 1 thereunder, but not guilty of Specification 2, Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to 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 withheld the execution of the sentence pursuant to Article of War 50½.

3. The Board of Review is of opinion that there is no question as to the legal sufficiency of the record to support the findings of guilty of Charge I and the Specification thereunder, and a sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for one and one-half years, the maximum punishment permissible upon conviction of the offense of desertion alleged. The only question presented by the record is whether or not the admission of incompetent and damaging evidence for the prosecution under Charge II and Specification 1 thereunder was so serious an error as to require the disapproval of the findings of guilty of Charge II and Specification 1 thereunder, and the disapproval of so much of the sentence as rests upon these findings, namely, five months. For the reasons set forth below, the Board of Review is of opinion that this question should be determined in the negative and that the record is legally sufficient to support the sentence.

4. Accused was tried at Fort Douglas, Utah, for the larceny of a Ford car, the property of Private Burgwin, at Fort Sill, Oklahoma, as alleged in Specification 1 of Charge II, and the evidence in proof of the commission of this offense was introduced by means of depositions. So far as necessary for the purpose of this inquiry the evidence may be summarized as follows:

Private William T. Johnson, Battery A, 77th Field Artillery, Fort Sill, Oklahoma, testified that he sold the car to Private Burgwin on or about October 1, 1933, for an agreed price of $175.00, of which he had actually received $152.50 (Ex. 5).

Private Monnie A. Dixon, Battery B, 77th Field Artillery, Fort Sill, Oklahoma, testified that on or about September 10, 1934, he had custody of the Ford car intrusted to him by Private Burgwin who was then in jail at Lawton. Burgwin had told him to let no one drive the car but himself (Dixon). On this morning accused told the witness that Burgwin had told him (accused) to take the car to Lawton so that it could be used to secure bail for Burgwin. Dixon gave the keys of the car to accused who drove the car away and Dixon had never seen it since. Burgwin had let accused drive the car a few times before, and two or three days before had mentioned using the car as security for bail. The car was in fairly good condition (Ex. 6).

Private Walter D. Burgwin, Headquarters Battery, 77th Field Artillery, testified that on or about September 10, 1934, he was in jail at Lawton, Oklahoma. He then owned the Ford car which during the period of September 1 to 11, 1934, was in the custody of Private Dixon. He had instructed Private Dixon that no one should drive the car but Dixon. Burgwin had given no instructions to accused to bring the car to Lawton to be used as security for bail, and accused did not bring the car to Lawton. He had last seen his car on August 8, 1934 (Ex. 7).

There was included in the evidence presented by the defense the deposition of Private Sloan Garvey, Battery B, 77th Field Artillery, Fort Sill, in which appear the following questions and answers:

"8th interrogatory:	What was Private Burgwin's reputation as to honesty and reliability?
Answer:	It was good.
*	* * *
10th interrogatory:	What was Private Dixon's reputation as to honesty and reliability?
Answer:	It was good." (Ex. 13.)

It may be assumed that the purpose of these two questions was to obtain evidence indicating that the reputation as to honesty and reliability of each of these two witnesses for the prosecution was other than good. It was obviously an attempt to diminish their credibility, that is, an attempt to impeach them, but was quite unsuccessful, and it is clear that the reputation of either of these witnesses for "honesty and reliability", or for veracity, was in no manner impeached thereby.

The accused did not testify and in the evidence for the defense there was no contradiction of the evidence for the prosecution recited above.

After the defense had rested its case the prosecution offered in rebuttal the deposition of Captain Edward H. Roberts, 1st Field Artillery, Fort Sill, and it was received in evidence. In this deposition appear the following question and answer:

"8th interrogatory: What is your opinion of the honesty and reliability of Private Burgwin?
Answer: I consider him to be honest and reliable. I have known him over two years and base my opinion on the quality of his service." (Ex. 15.)

This testimony that Private Burgwin was considered "honest and reliable" is, in substance, that he was considered truthful and that his statements could be relied upon. Had he been properly impeached and his reputation for veracity put in issue it would have been competent for the prosecution to have introduced evidence of his general reputation for truth and veracity. It is well settled by many decisions of the courts and opinions of The Judge Advocate General that testimony as to the good reputation of a witness for truth and veracity may not be introduced to bolster his testimony when his reputation for veracity has not been impeached, even though his testimony has been contradicted. As stated in CM 202940, Riggs, the matter was elaborately discussed in CM 201997, Mellon, and what was there said by the Board need not be repeated. Beside the Mellon case, other opinions and decisions t. the same effect are CM 190259, Sheffield; CM 195687, Stansbury; CM 198565, Sosebee; CM 201710, Reynolds, CM 202250, de Ramos; CM 202940, Riggs; Louisville and Nashville Railroad Co. v. McClish, 115 Fed. 268; Ford v. United States, 3 Fed. (2d) 104; Harris v. United States, 16 Fed. (2d) 107; and Bolling v. United States, 18 Fed. (2d) 863. It thus appears that the testimony of Captain Roberts recited above was incompetent not only because it was an expression of his personal opinion of the character of the witness Burgwin instead of evidence of general reputation, but also, and principally, because under the rule just stated it was not admissible in either form. The admission of this testimony was error, even in the absence of objection by the defense, and in conformity with the precedents mentioned would require the disapproval of the findings of guilty of Charge II and Specification 1 thereunder if considered prejudicial to the substantial

rights of the accused. It is to be noted, however, that the instant case is distinguished from the others in the line of precedents in that there was no occasion to weigh the testimony of Burgwin against that of accused or other witnesses for the defense. Burgwin's testimony was not contradicted by the defense, but on the other hand was corroborated in part at least by that of Dixon. The instant case is further distinguished from the precedents in the fact that incompetent testimony that the reputation of both Burgwin and Dixon for "honesty and reliability" was good had been deliberately introduced in evidence by the defense in the deposition of Private Garvey before similar matter was introduced in rebuttal by the prosecution in the deposition of Captain Roberts.

In the case of Bolling v. United States, cited above, the court, while recognizing this well settled rule of evidence, held that under the circumstances of that case the error, if error it was, was not necessarily reversible error. And in CM 202250, de Ramos, cited above, the Board of Review, with the concurrence of The Judge Advocate General, held that the rule was applicable to that case unless the guilt of the accused was so clearly established that the error in admitting such incompetent testimony as to the reputation of the prosecuting witness could not have affected the findings of the court.

5. In view of the foregoing, the Board of Review is of opinion that the admission of the testimony of Captain Roberts was error, but that under the particular circumstances of the case this error did not injuriously affect the substantial rights of the accused, and is further of opinion that the record is legally sufficient to support the sentence.

Theodore Kell, Judge Advocate.

Archibald King, Judge Advocate.

L. M. Smith, Judge Advocate.

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

Board of Review
CM 203112

APR 15 1935

UNITED STATES	SECOND CORPS AREA
v.	Trial by G.C.M., convened at Mitchel Field, New York, March 1, 1935. Dishonorable discharge and confinement for six (6) months. Disciplinary Barracks.
Private EDWARD E. BURK (C707011), 5th Observation Squadron, Air Corps.	

HOLDING by the BOARD OF REVIEW
HALL, KING and SMITH, L.M., Judge Advocates.

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

2. Accused was tried on a single charge and specification, alleging in the usual form larceny at Mitchel Field, New York, on or about December 3, 1934, of one revolver, value about $35, property of First Lieutenant Demas T. Craw, Air Corps, in violation of the 93d Article of War. Accused pleaded not guilty to and was found guilty of the specification and charge. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year. The reviewing authority approved the sentence, reduced the confinement to six months, designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement, and withheld the sentence under Article of War 50½.

3. All the elements of the offense are clearly and satisfactorily proved except that of time. Nowhere in the record is there any definite evidence of the time that the pistol was stolen. The best evidence on this point which the record affords is the following in the testimony of Lieutenant Craw, the owner of the pistol (R. 10):

"Q Did that gun ever leave your possession; has it left your possession recently?
A Yes, sir."

The witness went on to say that he kept the pistol in a foot locker in the trunk room in the basement of his quarters. The record further shows that accused, who was a striker at Lieutenant Craw's quarters, sold the pistol to Private Jerusik, who in turn sold it to a civilian policeman, Smith. The only other mention of a date or time in the entire record is in the testimony of Policeman Smith, as follows (R. 21):

> "Q Where was the first time that you saw this gun?
> A The first time that I saw this gun was on Tuesday morning, February 5th, I believe it was."

The charge sheet is dated and the accuser swore to it on February 8, 1935. It further states that accused was confined February 7, 1935. The trial took place March 1, 1935.

4. So far as the Board of Review has been able to find, neither the Board nor The Judge Advocate General has ever passed upon the question whether the absence of proof of the time of the offense constitutes an omission fatal to the validity of the conviction. Such opinions of The Judge Advocate General as deal with the time element are abstracted in Dig. Ops. JAG, 1912, pp. 485, 486; but none seems helpful in solving the present problem. However, foot note 2 on page 485 reads as follows:

> "As to the latitude allowable in the allegation of time in military pleadings, compare 1 Op. Atty. Gen. 295, 296."

In the opinion cited, Attorney General Wirt, following several old writers of military law, held that no fatal variance exists if the evidence shows the offense to have been committed on any day during the same month as the day alleged in the specification, or on any day during the preceding or following month. However, neither that opinion nor the well-known present practice of disregarding a slight variance between the date alleged and that proved is here relevant, because in the present case no date whatever was definitely proved.

The foot note from which quotation has just been made continues:

> "In the civil practice, 'nothing is better settled than that proof of guilt is not confined to the day mentioned in

the indictment. It may extend back to any period previous to the finding of the bill and within the statutory limit for prosecuting the offense', McBryde v. State, 34 Ga., 203."

The general rule stated in the above quotation is exemplified or laid down in a great many cases. In the majority of them a variance is held immaterial because the date proved is within the limits mentioned, and the general rule is enunciated as in the McBryde case. Collins v. United States, 77 Tex. Cr. 156, 178 S.W. 345; Commonwealth v. Major, 198 Pa. 290, 47 Atl. 741, 82 Am. St. R. 803; 31 Corpus Juris 835; 14 Ruling Case Law 180. The nearest cases on the facts to the present are Givens v. State, 105 Ga. 843, 32 S.E. 341, and Meredith v. Commonwealth, 192 Ky. 377, 233 S.W. 793. In the former, the presentment was found in September, 1897, and the trial held in October, 1898. The evidence showed that the offense was committed "on the night of 9th August", without stating any year. The Supreme Court of Georgia, without writing an opinion, reversed the conviction. In the Meredith case, an indictment for selling liquor in dry territory was found on November 17, 1920. The only evidence of the date of the offense was that it occurred "in the fall of 1919". The defense objected that the verdict was not sustained by the evidence. The court held the objection well taken and said that the offense was a misdemeanor; that therefore the prosecution must show that it occurred within twelve months before the indictment; that the "fall" comprises September, October and November; and that the offense might have been committed before November 17, 1919.

5. The period of limitation for the offense charged in the present case is three years (A.W. 39, 93). Is it sufficiently shown that the offense occurred within that period? As has been stated, the owner of the pistol testified (R. 10):

"Q Did that gun ever leave your possession; has it left your possession recently?
A Yes, sir."

It may be objected that the trial judge advocate put two questions to the witness and it cannot be said to which his answer related. The Board does not regard that objection as sound. Either the answer was intended by the witness to be responsive to both questions or to that last put. In either view, it is shown that the pistol had "recently"

left Lieutenant Craw's possession. "Recently", as so used, certainly means within three years, the period of limitation, and that is all that is necessary to prove. The Board therefore concludes that the evidence, though far from as definite as might be desired, sufficiently proves that the offense occurred within the period of limitation.

6. As has been stated, the rule laid down in the civil courts also requires that the evidence show that the offense occurred prior to the finding of the indictment, presentment, or information. In a number of cases, convictions have been set aside because the evidence showed the commission of the offense after the finding of the indictment or information. Minhinnett v. State, 106 Ga. 141, 32 S.E. 19; Lewis v. State, 187 Ind. 403, 119 N.E. 720; St. Joseph v. Dienger, 165 Mo. 95, 65 S.W. 223; Moore v. State, 48 Tex. Cr. 394, 88 S.W. 228; Wolf v. State, 48 Tex. Cr. 54, 85 S.W. 1145; Graso v. State, 69 Tex. Cr. 633, 155 S.W. 209. Does the evidence in the present case satisfy that part of the rule generally laid down which requires proof of commission of the offense on a date before the finding of the indictment? The present case differs from those just cited in that in them a date of offense after the finding of the indictment was definitely proved, while here no definite date was proved. The word "recently", occurring in the testimony in this case, does not per se exclude the possibility of the offense having taken place after the date of execution of the charge sheet. The testimony of Policeman Smith, already quoted, ante, this holding, paragraph 3, is more helpful with respect to this point. As has been stated, accused sold the pistol to Private Jerusik, who in turn sold it to Smith. Smith testified (R. 21) that the first time that he saw this pistol was on Tuesday morning, February 5th. It may perhaps be argued that the witness may have seen the pistol on some occasion before he bought it from Jerusik; but this hypothesis is at variance with the context and whole current of Smith's testimony, and so improbable as to be fanciful; and the Board therefore rejects it. It is also true that the witness mentions no year, but he was testifying March 1, and the inference that he was speaking of the previous month is so strong as to be well-nigh irresistible. This inference is greatly strengthened by the fact that February 5, 1935, was a Tuesday. The pistol was stolen before Policeman Smith saw it. He saw it on February 5, 1935. If it was stolen before that date, it was stolen before the date of execution of the charge sheet, which was February 8, 1935, and the rule is

satisfied. If the witness was not speaking of February 5, 1935, he must have been speaking of February 5 in some earlier year, which would also place the larceny before the execution of the charge sheet.

7. The Board of Review therefore concludes that the record contains evidence from which the court might properly find that the offense occurred within the period of limitations and before the date of execution of the charge sheet, and that the rule laid down by the authorities in this respect is satisfied. However, the Board does not wish to be understood as approving or condoning the failure of the trial judge advocate in the present case to prove more definitely the date of the offense. On the contrary, so far as appears from the record and accompanying papers, he was highly blameworthy.

8. For the reasons indicated, the Board of Review holds the record of trial in this case legally sufficient to support the findings and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 203259

JUN 12 1935

UNITED STATES	)	HAWAIIAN DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Shafter, T. H., March 6,
First Lieutenant LEWIS M.	)	7, 8, and 11, 1935. Dismissal
GOULD (0-17903), Medical	)	and confinement for three (3)
Administrative Corps.	)	years.

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

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

2. Accused was tried March 6, 7, 8, and 11, 1935, at Fort Shafter, T. H., upon charges, specifications, and pleas, which may be abstracted as below.

CHARGE I: Violation of the 96th Article of War.
Plea, guilty.

Specification 1: Drunk and disorderly at Honolulu, T. H., January 11, 1935. Plea, not guilty.

Specification 2: Borrowing $300 from an enlisted man, Technical Sergeant Hopper, at Tripler General Hospital, Honolulu, T. H., October 11, 1934. Plea, guilty.

CHARGE II: Violation of the 69th Article of War.
Plea, guilty.

Specification: Breach of arrest at Tripler General Hospital, January 14, 1935. Plea, guilty.

CHARGE III: Violation of the 93d Article of War. Plea, not guilty.

Specification 1: Embezzlement of $1016.03, property of the Post Exchange, Tripler General Hospital, between December 24, 1934, and January 14, 1935. Plea, not guilty.

Specification 2: Embezzlement of $565, property of the Post Exchange, Tripler General Hospital, January 14, 1935. Plea, not guilty.

Specification 3: Embezzlement of $175, property of Private Duffy, at Tripler General Hospital, between July 20, 1934, and January 25, 1935. Plea, not guilty.

ADDITIONAL CHARGE: Violation of the 69th Article of War. Plea, not guilty.

Specification: Breach of arrest at Tripler General Hospital, February 14, 1935. Plea, not guilty.

Accused was found guilty of all specifications and charges. No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The convening authority approved the sentence and forwarded the record for the action of the President under the 48th Article of War.

3. The evidence with respect to Specification 1, Charge I (drunk and disorderly); the Specification, Charge II (breach of arrest on January 14); and Specifications 1 and 2, Charge III (embezzlement of post exchange funds), is so connected that it may best be stated together. The evidence for the prosecution in chief with respect to those specifications may be summarized in narrative form, with the addition of certain evidence supplied by the accused and other witnesses for the defense, as follows:

On and for some time previous to the dates mentioned in the specifications to the original charges, accused, in addition to other duties, was Post Exchange Officer and Commanding Officer of the Detachment of the Medical Department at Tripler General Hospital, Honolulu, T. H. (Jones, R. 136,159). It further appears by inference, though it is not expressly

stated, that office hours for administrative personnel at that hospital ended at 1:00 p.m. (Zuver, R. 77).

On Friday, January 11, 1935, First Lieutenant Paul K. Zuver, Medical Administrative Corps, stationed at Tripler General Hospital, was sick in quarters in Honolulu. About 1:30 p.m. that day accused, in uniform and on his way from the hospital, called at Lieutenant Zuver's quarters to bring that officer his mail (Zuver, R. 65,66,72,73). While there accused had four drinks of intoxicating liquor (accused, R. 309,319). After remaining there about an hour, accused went to the apartment of Miss Eunice Lambert, where he arrived between three and four (Miss Lambert, R. 78,79; MacLean, R. 112; accused, R. 310). Miss Lambert and accused lived in different units of a group of bungalow apartments opening on a common court (Neal, R. 49; Zuver, R. 200). Accused and Miss Lambert were engaged to be married when he should obtain a divorce from his wife, from whom he had been separated five years (Miss Lambert, R. 78,83,84; accused, R. 294,321). While at Miss Lambert's apartment accused had two more drinks (accused, R. 310). In conversation with several persons there present, accused stated that he could hypnotize a chicken, but the others denied it (Miss Kluegel, R. 96; MacLean, R. 112; accused, R. 311).

Accused went to his apartment, changed to civilian clothes, and drove to a chicken farm where he bought a live chicken, with which he returned to Miss Lambert's apartment, where he hypnotized the chicken (Miss Lambert, R. 66,67; Miss Kluegel, R. 96,97; MacLean, R. 113; accused, R. 311,312). While there he had several more drinks of Scotch whisky (Miss Kluegel, R. 98; MacLean, R. 112). By the time accused left Miss Lambert's apartment, he was somewhat under the influence of liquor (Miss Kluegel, R. 98,105,106; MacLean, R.114). He then called a second time on Lieutenant Zuver, with whom he offered to bet on his ability to hypnotize the chicken; but Lieutenant Zuver requested accused to take the chicken out of his house (Zuver, R. 67; accused, R. 312,313). Accused thereupon went to the Palm Tree Inn, where he stayed ten or fifteen minutes and had one or two drinks of Scotch whisky (accused, R. 313).

Next, accused went to the Waikiki Tavern, where he arrived between 7:30 and 8:00 (Takahara, R. 12; accused, R. 313). He took a seat upon a stool and placed the chicken, which on this and previous occasions he called "Oscar", on the counter in front of him, where it walked up and

down and flapped its wings. He announced that he was Lieutenant Gould of the Medical Corps. Miss Ethel Campbell, sitting two stools away, requested accused to take the chicken off the counter, which he refused to do, saying that it was a trained chicken, that he had it hypnotized, and that it would not hurt any one. Miss Campbell thereupon complained to the manager, who asked accused to remove the chicken from the counter. Accused then placed the chicken upon a stool beside him (Takahara, R. 11-14; Miss Campbell, R. 22-28; Geracimos, R. 28-31; accused, R. 314). Later accused apologized to Miss Campbell for the annoyance caused her by the chicken (Miss Campbell, R. 27; Miss Lambert, R. 81; accused, R. 315). Accused telephoned to Miss Lambert from the tavern to come and meet him there. Upon her arrival she asked him to leave with her, which he declined to do, notwithstanding repeated pleading by her. She then left alone (Miss Campbell, R. 27; Miss Lambert, R. 80,81; accused, R. 314,327,328). While at the tavern accused had three more drinks of whisky (Takahara, R. 12,14; accused, R. 315). In paying for his drinks accused displayed a large wad of money, crumpled up, which he drew from his pocket, and spoke of buying the tavern and letting Oscar walk on the counter all he pleased (Takahara, R. 15,16; Miss Campbell, R. 24,25; accused, R. 316). The proprietor, Geracimos (R. 31), the waiter, Takahara (R. 12,18), and Miss Campbell (R. 25) all testified that accused was not drunk; but Geracimos and Miss Campbell both stated that he was slightly under the influence of liquor (R. 26,27,35). Accused himself definitely admitted that he was drunk (R. 315). Geracimos directed that no more drinks be served to accused, but maintained on the stand that he did this in the hope that he might thereby induce accused to take his chicken away rather than because accused was drunk (R. 30,34). Accused was at the tavern a little over half an hour (Takahara, R. 13). Two young men came into the tavern, seated themselves next to accused, and engaged him in conversation, and the three left together (Takahara, R. 17,22; Geracimos, R. 32,33,35).

In another apartment in the same court with accused and Miss Lambert lived Kenneth P. Bushly, radioman first class, United States Navy, and his wife (Bushly, R. 36; Mrs. Bushly, R. 45). About 8:30 p.m., January 11, while in their apartment, they heard a disturbance in the adjacent apartment of Miss Lambert. They heard a crash like furniture being overturned and loud male voices. One voice said, "Don't do that. I am trying to help you". Two or three minutes later two men, dressed in civilian clothes, whose faces the witnesses were unable to recognize

because of the darkness, hurriedly left the apartment where the disturbance had occurred and the court in the direction of the beach. A few minutes later accused emerged from the apartment and took the same course. About fifteen minutes later Mrs. Bushly, intending to call upon a neighbor, turned on her porch light and left her apartment. Just outside her door she met accused who accosted her, saying, "Will you help me Helen?" Mrs. Bushly called her husband and left. Accused's clothes were disarranged. He was swaying and bloody. He had a cut over his right eye and a wound on his neck (Bushly, R. 36-38; Mrs. Bushly, R. 45,46). Accused was drunk (Bushly, R. 40; Mrs. Bushly, R. 46). Bushly tried to get accused to go with him in his (Bushly's) automobile to the Emergency Hospital or to a civilian doctor, but accused resisted, and insisted on talking about matters of no interest, such as the length of his service in the Army, that he had a brother in the Navy, etc. Bushly renewed his effort, but with the same result. He finally managed to get accused to the door of his (accused's) apartment, took accused's keys, opened the door for him and switched on the light. Accused entered, took a large roll of money from his coat pocket and threw it on the dresser. Some tens and twenties dropped to the floor. Bushly told accused to put the money into the dresser drawer and pull the shades down, which accused did. Accused said that there was a thousand dollars in the roll, but did not at this time mention that any money was missing. Accused mentioned that Miss Lambert had gone to the Kewalo Inn for dinner. Knowing that Miss Lambert was a friend of accused, Bushly and his wife drove to that inn, found Miss Lambert and told her the circumstances (Bushly, R. 38 et seq.).

While Bushly and his wife were absent on that errand, Aviation Machinist's Mate First Class Thomas M. Neal, Naval Aviation Pilot, and his wife, who also lived in the same court, returned in their automobile about 9 p.m. and saw accused, with blood on his hands, face, and clothes, in the court talking to another occupant of it. In answer to Neal's inquiry, accused said that he had met at the Waikiki Tavern two young men who represented themselves to be naval officers, that he (accused) had invited them to Miss Lambert's apartment to have a drink, that there they got into an argument and one of them hit him over the head with a clock and relieved him of a large amount of government funds. At one time he said that he had been robbed of seven or eight hundred dollars, and at other times of a thousand dollars. He seemed more worried about that

than about his injuries. He seemed in a daze and kept up a continual chatter about it. After much talk, Neal and the other neighbor finally persuaded accused to go with Neal to the Queen's Hospital, Emergency Unit. Accused offered some slight resistance to being put upon the operating table, but allowed his wounds to be dressed. He continued saying the same things on the way to the hospital and while there. His speech was incoherent. His conduct was very good. Neal testified that accused might have had something to drink, but would not swear that he was drunk. About five minutes after the arrival of Neal and accused at the hospital, Miss Lambert and other friends of accused arrived, and Neal left (Bushly, R. 39; Neal, R. 49-64).

Miss Lambert and her friend, Miss Kluegel, having been found by Bushly at the Kewalo Inn, went to the former's apartment and thence to the hospital and brought accused back. Miss Kluegel, who had had nursing experience, said that accused appeared to be "in the secondary stage of shock" rather than under the influence of liquor. At the hospital and on the way back he made the same statement about having been robbed that he had previously made to Neal, and wanted to go to look for the robbers (Miss Lambert, R. 86, 90; Miss Kluegel, R. 98-101,105,106).

Miss Lambert's apartment, as viewed by Mrs. Bushly just after accused's appeal to her for help and by others a little later, was in a state of great disorder. The rug was soaked with blood. There were blood spots on the floor and walls. The electric clock, which had run perfectly up to the time of the affair, had apparently stopped at 8:20. It was on the floor, stained with blood and a flange was bent so that it would not stand upright. Broken china, cigarette butts, and ashes were on the floor. Except for two pieces, the broken fragments of an ash tray were in the other end of the room from which the tray was usually kept (Mrs. Bushly, R. 47; Miss Lambert, R. 89-90,93,94; Miss Kluegel, R. 105).

When accused returned to his apartment, he, assisted by others present, searched for the money supposed to be missing. A wallet was found in accused's coat, which contained $185. Accused said that this was his own money and not that which he had lost. At a later period, Neal was left alone with accused in his apartment while his other friends went to summon a physician. While accused was pacing up and down, apparently agitated

about his loss, Neal noticed a bulge in accused's hip pocket and asked what it was. Accused emptied his pocket and two large rolls of money fell out upon the bed. Accused counted one of the rolls, made up wholly of ten dollar bills, while Neal watched, and there was about $330 in it. The other roll was composed mostly of fives and ones, and had in it by rough estimate $250. When accused finished counting, he said, "There it is. That's all of it", or something like that. Somewhat later, in Miss Lambert's apartment, not that of accused, when Dr. Bell, the civilian physician who had been summoned, had finished his examination and treatment of accused, and when two detectives of the Honolulu police department were present, accused reached into his hip pocket and a large roll of bills, estimated at from $400 to $1000, fell out upon the floor. Dr. Bell and others picked up the money from the floor and returned it to accused. Accused said, "Let me see if all my money is here"; and, apparently satisfied that it was, a moment or two later said, "Everything is all right".

As the two similar incidents are placed by the witnesses in different apartments, with different persons present, as the money is said to have fallen in one case on the bed and in the other on the floor, and to have been counted on one occasion and not on the other, and as other details differ, it seems probable that Neal was describing one occasion and Miss Kluegel, MacLean, Dr. Bell, and Stagbar were describing another similar incident which occurred later. Whether the same money fell out of accused's hip pocket on two different occasions, or whether it was a different roll which fell out on this latter occasion does not clearly appear.

His friends were a couple of hours trying to get accused to bed, but he insisted that he wanted to go out to find the men who had robbed him. Finally, as has been stated, they summoned Dr. Bell, a civilian physician, who arrived about midnight. Dr. Bell testified that accused had a wound on his face over the right eye, two wounds in the neck, and that a knuckle and finger were swollen and sore. The wounds were caused by a sharp instrument, which might have been the flange of the electric clock or a piece of glass. None of them was serious. The injury to the hand might have been caused by striking a blow with the fist. Accused was agitated, pacing round, and making making too much disturbance. Dr. Bell, after first saying that he would not pronounce accused drunk, nor yet perfectly sober, admitted that he had had too much to drink and in every day

terminology was drunk. He removed the dressing already on accused's wounds, redressed them, and gave accused a hypodermic injection of morphine to quiet him.

Lieutenant Zuver, who arrived about 11:00 o'clock, would not state as a fact that accused was drunk, but said that he (the witness) considered him so.

Accused told his friends the story already set out as to his meeting two men who called themselves naval officers, going with them to Miss Lambert's apartment to have a drink, and there being assaulted and robbed of a thousand dollars of official funds. He further said to Lieutenant Zuver that rather than have the above facts appear he proposed to state that going up some steps with a glass in his hand he had fallen and cut himself. He seems to have told Dr. Bell nothing as to the cause of his injuries. Just as Dr. Bell was about to leave, two detectives of the Honolulu police department arrived. Accused told them that he had hurt himself by falling downstairs with a glass in his hand and that their services were not needed. They left, and so reported to their superiors. There are no interior stairs in these apartments (Bushly, R. 39; Neal, R. 56-60; Zuver, R. 67-71,73-76; Miss Lambert, R. 86-89; Miss Kluegel, R. 102-105,107; MacLean, R. 116-123; Bell, R. 256-265; Stagbar, R. 280-283).

On the next day, Saturday, January 12, accused remained in his quarters or their vicinity. He told Misses Lambert and Kluegel the same story as before as to his having been robbed; but told Neal, "Everything's all right", with respect to his money. He did not look well and in Dr. Bell's opinion was not in condition to work (Neal, R. 60,61; Miss Lambert, R. 90; Miss Kluegel, R. 106,107; Bell, R. 261).

According to accused's own testimony (R. 328), on Sunday, January 13, he went to the post exchange and put into the safe all the money in his possession, including $185 belonging to himself. He counted all such money and found it $1016 short. On Monday, January 14, a few minutes after 8 a.m., Colonel Harold W. Jones, Medical Corps, commanding Tripler General Hospital, summoned accused to the office of the post exchange. By Colonel Jones' direction accused opened the safe, to which he alone had the combination, and in accused's presence Colonel Jones audited and counted the cash of the exchange. Immediately thereafter Colonel Jones went to the

Bishop First National Bank where the account of the post exchange was kept and, with the assistance of an officer of the bank, ascertained its balance there. Colonel Jones began by taking the cash balance at the end of the previous month, adding thereto all cash since received and deducting therefrom all cash expenditures since made. The amount thus ascertained was the cash for which accused was responsible at that moment. Colonel Jones found as follows:

Cash for which accused was responsible		$5385.56
Cash assets on hand:		
In post exchange	$1132.23	
In bank	3237.30	4369.53
Shortage		$1016.03

The cash assets which Colonel Jones found in the post exchange were in detail as follows:

Miscellaneous:		
Silver	$164.50	
In hands of steward	100.00	
Savings bond	125.00	
Separate cash items	(.08	
	(1.10	
	(1.75	$392.43
Currency:		
Twenty dollar bills	160.00	
Ten dollar bills	320.00	
Five dollar bills	85.00	
One dollar bills	4.00	569.00
Checks		170.80
Total		$1132.23

The above count was made by Colonel Jones, Captain Alexander and accused, working together, and all three agreed on the amounts counted (Jones, R. 136-144,161-165,167; Alexander, R. 182,183). Colonel Jones then told accused that he was relieved as post exchange officer, that Captain Alexander would take that duty, and directed accused to replace

the money in the safe, saying that it was still his (accused's) money and would remain in the safe under seal until a board of officers could examine it, and that he (accused) was still responsible for it. Accused then apparently put all the money back in the safe, but Colonel Jones and Captain Alexander were at one side and their view of accused's forearms was somewhat obscured by the door of the safe. Accused then closed and locked the doors of the safe, and Colonel Jones placed on them three seals on which he wrote his initials (Jones, R. 145-150,162-164; Alexander, R. 183-185,189-191,192).

Accused himself testified that he had opened the safe that morning prior to the above count, and had taken from it $565 in bills which he put into his pocket, for use in cashing checks, collection of bills, and making change prior to the sailing of the transport the next day; that, when his cash was audited, he put this money with the rest to be counted, and after the count replaced it in his pocket (R. 330). Other than to suggest that a recent deposit at the bank had not been credited, which Colonel Jones later found not to be the fact, accused made no explanation or justification of the shortage (Jones, R. 144,145,167). Colonel Jones then directed that accused be placed in arrest within Tripler General Hospital. Captain Alexander, as adjutant of the hospital, drew up a letter to this effect, which Colonel Jones signed and which Captain Alexander at once delivered to accused, who read it in Captain Alexander's presence (Jones, R. 154,166; Alexander, R. 185-187).

Notwithstanding the above order, which accused admits that he received and understood (R. 332), he at once got into his automobile and drove to the pier in Honolulu, ten miles from Tripler General Hospital, at which U. S. Coast Guard cutter Itasca was berthed, where he arrived about 9 a.m. Standing by the gangway on that vessel was Pay Clerk Archibald J. MacLean, U. S. Coast Guard, a friend of accused and uncle of his fiancee, Miss Lambert, who had been one of those assisting him on the evening of January 11. At accused's request MacLean walked to his car with him. Accused said, "Mac, I'm in an awful jam, my accounts are short about a thousand dollars, and I'm thinking of running away". Accused told MacLean that he was in arrest. His talk was incoherent and jerky. Accused did not ask MacLean for a loan but the latter advised accused to return to his post and wait a couple of hours and said that he (MacLean), as soon as he could come ashore, would see if he could help him. MacLean offered to take accused to a finance company in order to negotiate a loan. After a

few minutes conversation, accused jumped into his car, said, "Good-bye, Mac, I'll see you in a couple of hours", and drove off (MacLean, R. 114-116,122,123; accused, R. 332,333).

Accused next drove to Miss Lambert's apartment. He entered and awoke her from sleep. He seemed to her to be terribly upset, but was sober. He kissed her, said, "Good-bye, you will never see me again", and left immediately. After his departure, Miss Lambert found on her bed a roll of paper money apparently left there by him, which she turned over to Lieutenant Zuver that afternoon without counting it (Miss Lambert, R. 81-83,85,86,92). Lieutenant Zuver took the money to his own apartment where he counted it in the presence of his wife and two other persons, and found it to amount to $425 in twenty, ten, and five dollars bills. Lieutenant Zuver took it to the Military Police Station in Honolulu and turned it over to Captain Jensen, commanding officer of the Military Police Detachment. Although military and civilian police were present in Miss Lambert's apartment and the adjoining apartment of accused that afternoon, neither Miss Lambert nor Lieutenant Zuver told them of the possession of this money. Miss Lambert gave as her reason for the course which she took that Lieutenant Zuver was a friend of accused's and the only man whom she knew well enough to call upon. Lieutenant Zuver said that the money belonged to the post exchange at Tripler General Hospital, that his first duty was to Colonel Jones, his own commanding officer and commanding officer of the hospital, that he tried to get Colonel Jones and other hospital authorities by telephone, and, failing to do so, turned the money over to Captain Jensen. Captain Jensen turned over $425 the next morning (January 15) to Colonel Allin, the Department Inspector (Miss Lambert, R. 81-83,85,86,92; Miss Kluegel, R. 108-111; Zuver, R. 194-204; Allin, R. 171; Paine, R. 212,213; Connally, R. 289,290).

After leaving Miss Lambert's apartment accused went about 10:15 a.m. to a grocery near-by, from which he sent several telephone messages. One was to Colonel Jones, his commanding officer. He complained to Colonel Jones that that officer had been very hard on him, and said that he (accused) would come back if Colonel Jones would "give him a break". Colonel Jones declined to make any promises (Jones, R. 154,155,165,166; accused, R. 335). Accused testified that he also telephoned Lieutenant Colonel John G. Ingold, Medical Corps, and tried unsuccessfully to see him near his quarters in Honolulu. Colonel Ingold admits receiving a telephone

call from accused, but because of defects in the telephone could not understand accused (Ingold, R. 285,286; accused, R. 335,336,371). Accused also testified that he unsuccessfully attempted to phone Major Thomas (Thomas, R. 277; accused, R. 335).

According to accused's own testimony, while waiting near Colonel Ingold's quarters to see that officer, he was seen and pursued by military police; but he (accused) outdistanced them in his car, took the "round the island" road, and after a stop at "The Cocoanut Grove", went to the residence of Mr. O'Connor. There he wrote three notes in the nature of exculpation and defense indicating an intention to commit suicide (accused, R. 336-338; Def. Exs. 2,3,4).

Accused next drove to Kailu Tavern, on the windward side of Oahu, where he was found on the afternoon of January 14 by Major Thomas, retired, and a corporal of military police. At the moment accused was in a telephone booth and said that he was trying to telephone Major Thomas. Accused was laboring under extreme excitement, crying, was armed with a loaded service pistol, repeated statements already set out as to having been robbed, said that he had made several unsuccessful attempts to raise money, that he was going to commit suicide and would destroy any one who tried to keep him from it. Accused was arrested and returned to military control (Thomas, R. 276,279).

On the next morning, Tuesday, January 15, Lieutenant Colonel Allin, Department Inspector, in the presence of Colonel Jones, Captain Alexander, accused, Private Sutton (Colonel Allin's clerk, a certified public accountant), the steward, and the bookkeeper of the post exchange, and a representative of the bonding company, made another count of the cash in the post exchange safe. The seals placed on the safe the previous day by Colonel Jones appeared to be intact. Accused opened the safe. The cash found therein was the same as on the previous day except in two respects:

a. All the currency in the safe except four one dollar bills had disappeared, making a further shortage of $465.
b. Three cents were found in a box which had apparently been overlooked by Colonel Jones the day before.

While the count was in progress Captain Jensen appeared and turned over a roll of twenty, ten, and five dollar bills amounting to $425.

Though there is no definite testimony to that effect, this was presumably the same roll left by accused with Miss Lambert, turned over by her to Lieutenant Zuver, and by him to Captain Jensen. By Colonel Allin's direction this was credited to the post exchange and delivered to Captain Alexander, the new post exchange officer (Jones, R. 150-152,165; Allin, R. 168-172,175-177; Sutton, R. 180,181; Alexander, R. 191,192).

4. The evidence for the defense, as well as certain evidence brought out upon cross-examination of the prosecution's witnesses, shows that accused had a large number of duties, commanding officer of the detachment, Medical Department, consisting of about 150 men; medical supply officer, with property responsibility of about $225,000; post exchange officer; police officer; educational and recreational officer; library officer; class A agent officer, with pay rolls as high as $5000; transportation officer; and salvage officer.

Accused was officer of the day every third day; and, when other officers were sick, every other day or every day. Lieutenant Zuver, who was mess officer and registrar, was sick quite a bit, and at such times accused had to do his work also. Accused's duties were such that it was often necessary for him to work overtime and evenings (Zuver, R. 77; Jones, R. 157,158; Hopper, R. 228; Thomas, R. 276,279; accused, R. 294-296). Colonel Jones admitted that up to the time of the present alleged offenses accused's accounts were well kept, that there were no shortages of money or property, and that accused's job was well done (R. 158,159). Accused made money for the post exchange, was much interested in it, got rid of dead stock, and proved himself a good live post exchange officer (Jones, R. 160,161).

The principal witness for the defense with respect to the specifications now under consideration was accused himself. Excluding irrelevant matter, unnecessary detail, and matter already stated in abstracting the evidence for the prosecution in chief, accused testified in substance:

On the morning of Thursday, January 10, Lieutenant Zuver and I went to Honolulu together in the post exchange car to make deposits, and stopped in front of the bank. We could not find a place to park and therefore I sat in the car while Lieutenant Zuver went into the bank to make his deposits and I asked him to make a deposit for me of $466.40 in checks

belonging to the post exchange. He did so. (Pass book, prosecution's exhibit 9, is shown to witness, who points out entry of above deposit.) I had cash with me, but I did not give it to Lieutenant Zuver to deposit because it was post exchange money and I did not want to let any one handle it who was not connected with the post exchange. I returned to the post exchange and put the money in the safe. I have orders that when I take money of the post exchange to town I shall be armed and have an armed escort (R. 300-303).

On Friday, January 11, I took out of the safe somewhere round $1600 to take to town, part of which I intended to deposit and with part of which I intended to get change. I put the ten dollar bills in one pocket, the five dollar bills in another, and the twenty dollar bills in a third. I had $185 in a wallet of which $175 was Private Duffy's money mixed with ten dollars of my own. I left the post exchange shortly after one o'clock, and went to the medical supply warehouse. There I found a large mass of work awaiting me, upon which I started, and it was after two o'clock before I noticed the time (R. 307,308). I knew then that the bank would be closed. I went to Lieutenant Zuver's quarters to take him his mail (R. 309). There I had four drinks of gin and lemon juice (R. 310). From there I went to Miss Lambert's apartment, where I had two drinks (R. 310), went to my own apartment, changed to civilian clothes, went back to her apartment, and had one or more drinks (R. 311). A discussion arose as to whether I could hypnotize a chicken. I went to a chicken farm, bought a chicken, returned, hypnotized the chicken, and had several more drinks of Scotch whisky (R. 311,312). I went back to Lieutenant Zuver's quarters, thence to the Palm Tree Inn where I had one or two drinks of Scotch whisky, thence to the Waikiki Tavern, where I had three or four drinks. I was then drunk (R. 312-315).

Accused then related what occurred at the Waikiki Tavern substantially as already stated in the earlier part of this opinion, and continued: Two men sat down near me and started a conversation. I got the impression that they were lieutenants junior grade in the Navy (R. 316). They said that they would take me home. We all three went in my car. The smaller one drove it. I took them to Miss Lambert's apartment and we had a drink there. We talked about football. The bigger one said that he was an all-American. I doubted that. The smaller one said, "You can't say that to my friend", and hit me with an electric clock (R. 317,318). I struck

him with my right hand, and one of them hit me over the eye and knocked me out (R. 319). When I regained consciousness, the big roll of money that I had in my inside coat pocket was gone. I still had my wallet. I went toward the street trying to find these men. I asked Mrs. Bushly to help me (R. 320). I went to my own apartment and got about $310 of my own money which I had in a laundered shirt in a drawer, and put it into my pocket (R. 320-322). Besides this I had $20 or $30 in $10 bills of my own money in my pocket, and some loose change (R. 323). I had $185 of my own in the bank (bank statement produced, Def. Ex. 5, showing $183.56 to credit of accused) (R. 321,322). I asked Mrs. Bushly to call a civilian doctor. I did not want to go to a hospital because they would make a report of it, and I didn't want my commanding officer to know about it. It was my intention to draw my money from the bank Saturday morning and raise the other funds necessary to replace the shortage (R. 323). I did not do it because I was too sick (R. 324). I then intended to make it up the first thing Monday morning, after signing the morning report and other necessary papers, but Colonel Jones called me to the post exchange (R. 327).

Certain testimony of accused with reference to putting a roll of currency into his pocket Monday, January 14 (R. 330), has already been abstracted. Accused testified further that he did not tell Colonel Jones what had happened (meaning presumably that he had been robbed) because he wished to do so when they were alone, as he and Captain Alexander were not on friendly terms (R. 331,332). The witness continued: I have handled thousands and thousands of dollars before and never been short a dime (R. 333).

After seeing Mr. MacLean at the Itasca, I went to Miss Lambert's apartment, laid this money on the bed, said that if I don't come back see that this money gets back to where it belongs, kissed her good-bye, and left. I meant that, if I did raise the money, I was coming back; and, if I did not, I was going to dispose of myself (R. 333,334).

The rest of accused's direct testimony has been summarized along with the prosecution's evidence.

On cross-examination accused was asked why, since he left the medical supply office Friday, January 11, after two o'clock, he did not return

the money on his person to the safe. He answered, the bank does not close against deposits at two, though it will not make change thereafter; but when I got to the bank the door was closed. I figured that I would go home with the money and carry it back next day. I did not intend to get drunk (R. 350).

So that it would not become known around the hospital that I had been drunk and gotten into an argument, my friends probably made up the story about my falling downstairs with a glass in my hand to protect me; but the story is not true. I repeated the story to alibi myself. The true story is that the two men beat me up and took my money (R. 357-359).

On Monday, January 14, I did not hear Colonel Jones say anything to the effect that I was relieved as post exchange officer (R. 367). (The assistant trial judge advocate showed to the witness and had him identify a cash book, Pros. Ex. 14.) From these notes in this book I am able to tell the amount of cash and different denominations that I had on hand from day to day. On December 22, 1954, my cash was $1819.62 (R. 373,374). This is my own supplementary daily cash record book kept in my own handwriting. It shows on December 22, $650 in ten dollar bills. That does not necessarily mean that they were actually on hand. There might have been a bunch of small change that actually made ten dollars and to save time I carried it as an additional ten dollar bill (R. 375). You see there is no column for twenty dollar bills or fifty dollar bills, so I might have had some of them and picked them up in the ten dollar bill column (R. 376). This (Pros. Ex. 8) is a check book that I had while on duty as post exchange officer. I wrote some of the checks and the bookkeeper wrote some of them. I signed all of them. The bookkeeper was not there on December 24. I gave her that day off. There was a check drawn on that day for $650, bearing a notation "For change only". That is exactly the amount that I had in ten dollar bills on the 22d according to my cash book, but it is just a coincidence (R. 377,378). Inventory was taken December 24 by Lieutenant Zuver. I don't remember whether the stub of that check was exhibited to Lieutenant Zuver. I would say that the check now pasted in the book to the stub belongs there, but I did not post it (R. 379). It is numbered in sequence with the checks preceding and following it. I always fill in the stub before I make the check out.

"Q New then Lieutenant Gould, you just take this check book and examine this check (indicating), just examine it and

tell us from the water marks on that check stub, whether or not that check came from the place where it is now pasted back to the check book?

A I am not competent to state whether or not it did.

Q (Indicating) Doesn't each of those four checks on that page bear a distinct water mark on the paper?

A I don't know where the water mark is, I don't know.

Q Well I'll show you where it is. (standing up and walking to witness chair and indicating in check book) In each instance there is colored into the paper a distinct water mark. Here it is right here. It says the Bishop First National Bank. It's right here in light brown color, about two inches long and about an inch and one fourth across. And you will notice that the water mark runs right through the check and the stub to make the complete pattern. You will also note this check on the bottom of the page (indicating), that the water mark does not coincide with the water mark on the stub. That is the check I am referring to, that is the check drawn for cash for six hundred and thirty dollars on December 24th.

A I don't see any connection. Before even mentioning this water mark I might repeat again, for your information, that I have several loose checks in my desk and it might have been one of these loose checks." (R. 381.)

I may have spoiled that check and used one of the loose ones in my desk instead (R. 382). I was only present at this inventory until Lieutenant Zuver checked my cash. I don't remember whether I went to Honolulu that morning (R. 383).

On November 26, 1934, there is a check numbered 5928 for $200, marked "Drawn for cash only" (R. 383). That was inventory day. The water mark doesn't fit on this check. I probably spoiled that check, tore it out, and used a loose one from my desk to replace it. It looks like I spoiled that check on inventory day, as I did the later one (R. 384). It just happened that way. I never had on hand less than a thousand dollars in ten dollar bills according to the cash book, but it might have been in

bills of other denominations (R. 388-389). I was never restricted as to the amount of cash I might have on hand. I could have had the entire bank balance in cash (R. 389,390). I don't know whether the stub for the check drawn November 26 for cash was exhibited to the auditing officer. I don't know when it was written. (The witness was asked when the check was cashed and told to hold it up to the light and read the date from the perforations. He was unable to answer.) If the stub was in the check book I showed it to the auditing officer (R. 391). If there was a blank stub there and a blank check also, he would have disregarded it entirely (R. 392). As to the check on December 24, if I made that check out before the auditing officer saw my check book, he would have seen the stub and would have counted that with the balance of my assets. Since he did not do this, I must have made it out after inventory (R. 392). This check was paid December 24 (R. 393).

Redirect examination:- Lieutenant Zuver took inventory of the cash some time in the forenoon, very likely around 9:30 (R. 393). On certain occasions last summer I had more than three thousand dollars on hand (R. 393).

Examination by the court:- When on Monday, January 14, I put this $565 in currency in my pocket instead of the safe, it was more or less unconsciously done and I first began to comprehend that I had this money when driving by the Itasca. I knew that if I left it with Miss Lambert it would get back to its proper place (R. 395). I think I had a deposit slip made out on January 10 for the amount that Lieutenant Zuver deposited for me (R. 395). I didn't take any steps to find the alleged naval officers except to go out myself. I didn't want a scandal. I would raise the money and put it back in the safe (R. 397). It is not customary to make out a list of change I require except on pay days. I knew what change I required (R. 398).

5. The evidence for the prosecution in rebuttal with respect to the specifications now under consideration may be summarized as follows:

First Lieutenant Paul E. Zuver, Medical Administrative Corps, recalled. On December 24, 1934, I took the inventory of the post exchange at Tripler General Hospital and audited the cash. I began shortly after 8 a.m. Accused was not there at that time. I took stock inventory first, which

required about two hours, and then I counted the cash of Sergeant Harned, steward of the post exchange (R. 400). He had $100. About that time accused came in and prepared his cash for me and I counted it. It was then approximately 10:30. The exact amount was $819.60 (R. 401). I audited prosecution's exhibit 8, check book. Turning to the page bearing checks dated December 24, 1934, I find four checks, of which the last is No. 5990. I am familiar with the handwriting of both accused and the bookkeeper and can say definitely that the bookkeeper wrote the first three and accused the last, which was for $630 and is dated December 24, 1934, the date of my audit (R. 402). That check must have been made up after the audit. It is not listed as outstanding and had it been out there would of necessity have to be $630 more on hand. Examining the water marks, I am of opinion that that check came from somewhere else, not from the stub (R. 403). When I counted the cash I found ones, fives and tens; no fifty dollar bills. I don't remember about twenty dollar bills (R. 404).

Cross-examination:- Officers often go into the post exchange and obtain blank checks. The post exchange has them on hand (R. 404). I have several times spoiled a check and had to write it over again. I did not notice that the funds on hand in the post exchange on December 22 dropped far below preceding and subsequent days, or that they had on other days run as high as fifteen hundred dollars (R. 405).

Technical Sergeant Frank C. Harned, Medical Department. I am post exchange steward and have been such since July 17, 1934. I recall that on December 24, 1934, Lieutenant Zuver made the inventory of the post exchange (R. 406). It was close to eight o'clock. I arrived at the post exchange about a quarter of seven and opened the office. It seems to me accused got there around seven o'clock, but I couldn't swear to it (R. 407). He didn't remain there but he returned shortly before we finished the audit. Lieutenant Zuver counted my cash about ten o'clock and next counted accused's cash in the big safe. Accused was there then. It only took him about five minutes to count my cash (R. 408).

Cross-examination:- We cashed quite a few checks for officers and enlisted men (R. 409).

As to Specification 1, Charge I, the Board of Review concurs in the views of the Staff Judge Advocate, Hawaiian Department, who reviewed the record, that the evidence clearly shows, and accused admitted on the stand,

that he was drunk at the Waikiki Tavern on the night of January 11, 1935, and the evidence conclusively shows that his conduct in that place, and at the other places that night, was disorderly. Accused admits that he took with him to the Waikiki Tavern a live chicken, placed it on the counter and refused to remove it upon the request of a lady customer, who was eating dinner and who objected to the chicken flapping its wings and spreading feathers. The lady customer, Miss Campbell, testified that her several requests to accused met his protesting remark that the chicken was trained and would hurt nobody; that he told her he was a Lieutenant in the Medical Corps; and she was forced to appeal to the manager to remove the chicken from the counter, and when the manager caused accused to place the chicken on a seat, he pulled a large roll of bills from his pocket, saying he would buy the place and let the chicken walk on the counter all it pleased. Such conduct in a public place by a commissioned officer, while drunk, is per se "disorderly". All allegations in the specification are completely proved, and the court's finding of guilty was fully in accord with the evidence.

The findings of guilty of Charge II and its specification are supported by accused's pleas of guilty and the evidence summarized above.

As to Specification 1, Charge III, the shortage of funds alleged is clearly established. The only question requiring special consideration is whether all or any part of this shortage was due to the assault and alleged robbery of accused on January 11. There is no doubt he was involved in a physical encounter with some unknown persons on the night of January 11. When he returned to his apartment from the hospital, after receiving treatment for injuries received in the encounter, he repeatedly insisted he had been robbed, but when several separate rolls of money were found on his person he exclaimed, "There it is", and "Everything is all right". The evidence does not indicate that accused had at first, as he claimed, between $1600 and $1800. He had, in the estimation of a number of witnesses who observed his money, between $700 and $1000, after the alleged robbery. It is extremely improbable that the robbers would have overlooked this substantial amount which appears to have been readily accessible.

That accused did not have in his personal possession before the robbery the amount he claims is also indicated by the evidence which shows he was short $630 on the previous inventory day, December 24, 1934; that

he covered up this shortage by drawing a check for that amount which he did not enter on the stub in the check book until after the cash was counted; that at the time the auditing officer checked his cash on December 24, 1934, check No. 5990, dated December 24, 1934, for $630 was not entered in the check book nor was it reported to the auditing officer as an outstanding check. Had this check been so entered in the check book or reported as an outstanding check, or both, the auditing officer would have required him to account for $630 additional cash on hand. Lieutenant Zuver testified, and the records show, that December 22, 1934, was the last business day before inventory; that accused was accountable at the close of business on that day for $819.60 in cash on hand; that December 23 was Sunday; and that he, Lieutenant Zuver, made his inventory on Monday, December 24; that he was shown, and counted, the $819.60 by accused as all cash on hand. The canceled check shows that it was cashed on December 24, 1934. Accused's explanation as to why he drew this check is not worthy of belief when it is considered that the following day, December 25, was Christmas Day, and that the exchange was not open for business after it closed on December 22, until December 26, except for a short time on Christmas morning. An examination of the water marking on the check clearly shows that the check was not detached from the check stub of like number.

In the opinion of the Board accused did not lose any money in the alleged robbery and the evidence establishes beyond a reasonable doubt the guilt of accused of this specification.

With respect to Specification 2, Charge III, the evidence for the prosecution shows and accused expressly admits that he took $565 of post exchange money January 14, instead of replacing it in the safe, put it into his pocket, went downtown, and eventually to Miss Lambert's apartment, where he left on her bed a roll of bills which was later found to contain $425. What happened to the $140 difference does not appear. Accused testified that he told Miss Lambert that, if he did not come back, she should see that the money got back where it belonged (R. 333). Accepting accused's testimony for the moment as true, the direction which he gave was on its face most ambiguous, and the whole transaction an extraordinary way of treating semi-public funds. As Miss Lambert was accused's fiancee, it might be supposed that her testimony would be as favorable to him as the facts allowed; but she does not testify to any such statement (R. 82). The court apparently disbelieved accused's

testimony as to what he told Miss Lambert, and the Board thinks that it was justified in so doing. For a man to give trust funds with whose care he is charged to his lady friend is just as much embezzlement as spending them on himself. The Board of Review considers that the evidence supports the finding with respect to this specification.

6. Specification 3, Charge III, alleges embezzlement between July 20, 1934, and January 25, 1935, of $175, property of Private Duffy. The evidence for the prosecution with respect thereto may be summarized in narrative form as follows:

On July 20, 1934, Private Duffy, a member of the Medical Detachment commanded by accused, went to the orderly room and told Corporal Kopec, acting first sergeant, that he (Duffy) wanted to deposit some money. Kopec told Duffy to wait until accused should come in. When accused arrived, Duffy, in the presence of Kopec, gave accused $175 in bills and told him that he wanted it deposited with the quartermaster for the purpose of buying his discharge. By direction of Corporal Kopec, the company clerk typed a receipt which accused signed and gave to Duffy, as follows:

"Tripler General Hospital,
Detachment, Medical Dept.,
July 20, 1934.

Received from Private Austin P. Duffy, R-1247401, the sum of One Hundred and Seventy Five Dollars ($175.00), for safe keeping.

(Signed) L. M. GOULD
(Typed) L. M. GOULD,
2d Lieut., Med. Adm. Corps,
Comdg. Det."

Duffy testified that accused said that he would see that the money got to the quartermaster; and, when the deposit book should be made, for Duffy to return the receipt to Corporal Kopec. Duffy further said that he did not give the money to accused for safekeeping, but that he did not object to that word in the receipt because accused said that it was all right, "and when an officer says it's all right and he signs his name on it, then it is all right with me". It was the custom in the detachment

for the commanding officer to make deposits for enlisted men on the day following the next pay day. A deposit slip for this deposit was made out for accused's signature, but he returned it unsigned to Corporal Kopec about July 31, saying that he would deposit the money later. Duffy never received a deposit book and never got the money back from accused. Corporal Kopec testified that to the best of his knowledge no deposit was ever made, because he had the service record and deposit book and checked all records, and a deposit form was never in the deposit book kept on his desk. Duffy later changed his mind about buying his discharge, told accused so, and withdrew his application for discharge, but denied on the stand that he had told accused to hold the money until he should want it (Duffy, R. 229-232,234-238; Kopec, R. 239-244; Pros. Ex. 12).

On January 25, 1935, Duffy drew up and signed a written demand upon accused for the above money. On that day Major Boyle, Medical Corps, Captain Taylor, and Duffy went to accused, then a patient in the hospital, and Major Boyle read the letter aloud to accused. Accused neither said nor did anything in answer. Accused was mentally depressed, but otherwise his physical condition was all right. He had a spinal puncture that day, but it did not appear to have any effect on him (Duffy, R. 232-234; Boyle, R. 244-247; Pros. Ex. 13).

The only evidence for the defense with respect to the specification now under consideration is the testimony of accused. As a part of his testimony concerning the money in his possession on Friday, January 11, he swore that he had in his wallet $175 belonging to Duffy, that this was a part of $185 therein, and was mixed with $10 of his own money, and that he (accused) had had to use Duffy's money from time to time in making change in the post exchange (R. 307,308). However, it should be remembered that accused had, on the evening of Friday, January 11, stated that the $185 in his wallet was his own money (Neal, R. 56).

Accused further testified in substance as follows:

I signed the receipt and took Duffy's money and put it into my pocket. It was my understanding from my clerk and from Duffy himself that the money was deposited for safekeeping while Duffy was negotiating for a homestead in Pennsylvania. Duffy first said, when it was put on the deposit slip, that he had in mind to buy out, and later changed his mind.

He swung back and forth quite awhile. Duffy never asked at any time that the money be deposited. When Duffy demanded the money at the hospital, I was mentally dead and physically a wreck, in a daze. I did not pay it because all of this money and my other money were in my bank account which had been garnisheed at the instance of Colonel Jones. The money in my wallet and other cash in my possession had been put into the post exchange funds (R. 339-342). On Saturday, January 13, I put Duffy's $175 into the safe. You may count it either way, just a matter of opinion, whether Duffy's money was in the wallet or in the bank (R. 348,349).

This evidence is clear and convincing as to accused's guilt of this specification.

7. In Specification 2, Charge I, it is alleged that accused on October 11, 1934, wrongfully borrowed $300 from an enlisted man, Technical Sergeant Hopper, Medical Department, Tripler General Hospital. It will be recalled that accused pleaded guilty to this specification. The evidence for the prosecution relative to this specification is solely that of Sergeant Hopper, which may be abstracted as follows: From August, 1934, to February 15, 1935, I was assistant bookkeeper at the post exchange, Tripler General Hospital (R. 221). I lent accused $200 and at a later date $100 more. He gave me a note, as follows:

"Tripler General Hospital,
Honolulu, T.H.,
October 11, 1934.

TO WHOM IT MAY CONCERN:

I promise to pay ELBERT B. HOPPER, Tech. Sgt., M.D., Tripler General Hospital, Honolulu, T.H., the sum of THREE HUNDRED DOLLARS ($300.00) on or before December 31st, 1934. Value received this date.

(Signed) L. M. GOULD
(Typed) L. M. GOULD,
2nd Lt., Med. Adm. Corps."

(R. 222,223; Pros. Ex. 11.)

The prosecution asked the witness how much, if any, of the loan had been repaid. The defense vigorously objected that whether the loan was

repaid had no bearing on the offense charged. The prosecution contended that the question was proper, not only with respect to the present specification, but also with respect to Specification 3, Charge III, alleging embezzlement of Private Duffy's money. The law member overruled the defense's objection, and the witness answered that in November last accused paid him $50, but reborrowed it in ten minutes on witness' statement that the money was not due until December 31, and that if accused needed the money he did not have to repay it at that time. Other than the above, none of the loan has been repaid (R. 225).

If the ruling of the law member mentioned in the preceding paragraph be considered improper, the error was harmless so far as concerns Specification 2, Charge I, because accused pleaded guilty to it, and also so far as concerns Specification 3, Charge III, heretofore discussed, because of the compelling nature of the evidence in support thereof.

The only evidence introduced by the defense with reference to the specification now under consideration was the testimony of accused, as follows: This money was not due until December 1. Prior to that I had offered to repay $50 or $100, but Sergeant Hopper said that he did not need it. A few days after I was placed in confinement at the hospital, I received a check for $300 from a finance company in San Antonio which was taken away from me by the ward officer and I have never seen it since. It was my intention to use that money to pay Sergeant Hopper (R. 343).

The findings of this specification and of the charge under which it is laid are supported by accused's pleas of guilty and the evidence summarized above.

8. The Board of Review next passes to the Specification, Additional Charge, alleging that accused, having been placed in arrest February 6, 1935, broke arrest February 14. The principal evidence to show that accused was placed in arrest February 6, 1935, as alleged, is the testimony of Colonel Jones, commanding officer of accused and of Tripler General Hospital. He testified that on that day he changed accused's status from confinement to arrest in that hospital by a written communication, receipt of which accused acknowledged in writing. Neither the communication nor the receipt was produced (Jones, R. 154,156,157,166). The only other evidence that accused was in arrest on February 14 was the testimony of

Major Barnwell, Medical Corps, who was officer of the day at Tripler General Hospital on the night of February 13-14, that the status of accused at that time was "arrest in quarters", though he did not know the limits of accused's arrest (R. 254,255).

The only evidence of breach of arrest was the testimony of Corporal Benedick, Corporal of the Guard, Fort Shafter, on the night of February 13-14, 1935, that about 2:30 a.m., February 14, he had posted his relief "on the 64th side" and was coming back with the men who had been relieved when he found accused "on the road that goes up from the gulch toward the post exchange". Accused appeared to be frightened, walking very fast, and mumbling to himself. He had blood on his hands, face, and legs, and a safety razor blade with a holder in his hand. There were cuts on his wrists and the back of his legs. The corporal and one of the sentries each took him by an arm and escorted him back to the hospital. Tripler General Hospital is on the reservation of Fort Shafter (R. 248-250). Major Barnwell, Medical Corps, testified to seeing accused at Tripler General Hospital about 2 a.m., February 14, 1935. Accused was dressed in pajamas, was very cold, apparently suffering from a nervous reaction, had blood on his face, hands, and clothing, and had superficial cuts about an inch long, apparently made by a sharp instrument, one on the wrist and three or four on the left leg (R. 251-254).

Accused testified with respect to this specification that on February 13 he was laboring under great mental strain, that he felt as if he was going crazy, and finally got a razor blade, cut himself on the hands and legs, jumped up, and ran out, tried to get away from it all. The next thing that he knew he was back in the receiving office (R. 344,345).

That accused was duly placed in arrest at Tripler General Hospital on February 6, 1935, as alleged in the Specification, Additional Charge, is clearly established by the testimony of Colonel Jones, commanding the hospital. Though the arrest and its acknowledgment by accused were accomplished by written instruments which were not introduced in evidence nor their unavailability accounted for, this irregularity may be considered waived in the absence of objection by the defense. Par. 116 a, M.C.M. The contention of the defense that this specification was not proven because of the absence of evidence showing the limits of Tripler General Hospital is untenable. A general court-martial appointed by the Commanding

General, Hawaiian Department (Headquarters Fort Shafter), sitting at Fort Shafter, could, as a matter of common military knowledge, take judicial notice of the limits of Tripler General Hospital and that the point at Fort Shafter at which accused was apprehended was outside of such limits.

In the opinion of the Board the evidence establishes beyond a reasonable doubt the guilt of accused of this specification and charge.

9. Attached to the record are letters from accused to the President and to the Commanding General, Hawaiian Department, commenting on his trial and requesting clemency. In these letters he contends that he did not have a fair trial, that his defense counsel was incompetent, and that though he admits the shortages the specific intent involved in the several embezzlement specifications was not proven. Additional letters of accused to the Commanding Officer, Fort Shafter, and the U. S. Department of Justice are also attached.

The record shows that accused was represented by a civilian attorney as individual counsel assisted by the regularly appointed defense counsel of the court; the Board sees no serious faults in their conduct of the defense. That the several conversions of funds alleged in the three embezzlement specifications were with fraudulent intent may clearly be inferred from the evidence in support of these specifications heretofore summarized in this opinion.

Accused bases his plea for clemency on the grounds of his 16 years of honorable service, the fact that he has never before received any punishment, even of a minor nature, his willingness to assume responsibility for the shortages, his poor health, his lack of knowledge of any trade or occupation, and the disgrace that would be inflicted upon his motherless son, 13 years of age, if the sentence is executed. He urges that he be saved from dismissal if possible and that at least he be saved from confinement. In his indorsement on the letter to the President, the Commanding General, Hawaiian Department, states that the various statements made by accused in the letters mentioned have been given careful consideration, and that he is convinced that accused is simulating insanity and that he wrote the additional letters referred to with that end in view. The papers accompanying the record include a report of a board of medical

officers convened at Tripler General Hospital before the trial to examine into and determine the mental capacity of accused. This board found that accused was mentally responsible for his acts at the time of the commission of the offenses alleged, that he was mentally responsible at the time of the examination by the board, and that he was mentally capable of conducting his defense. There is nothing in the record of trial or accompanying papers to show that accused's health is seriously impaired.

After carefully considering these several communications of accused in the light of the facts and circumstances of the case, the Board of Review does not recommend clemency.

10. At the time of the trial accused was 37 1/12 years of age. The statement of his service as it appears in the Army Register is as follows:

"Pvt., pvt. 1 cl., corp., sgt. and staff sgt. Med. Dept. 10 July 18 to 8 Sept. 22 and from 20 Feb. 23 to 22 Oct. 29; 2 lt. Med. Adm. C. 5 Oct. 29; accepted 23 Oct. 29; 1 lt. 19 Oct. 34."

11. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed at the trial. The record of trial is legally sufficient to support the findings of guilty and the sentence and warrants confirmation thereof. A sentence of dismissal is authorized for the violations of the 69th, 93d and 96th Articles of War involved in the present case. Confinement in a penitentiary is authorized for embezzlement by the 42d Article of War and sections 98 and 401, title 6, Code of the District of Columbia, 1929. However, the accused is not an habitual criminal and this appears to be his first offense. While confinement in a penitentiary is authorized in this case, it does not appear that the purposes of discipline demand penitentiary confinement or that the confinement of accused in association with misdemeanants and military offenders would be to their detriment. Par. 90 a, M.C.M. The Board of Review is accordingly of opinion that the interest of discipline would be adequately served if the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, were designated as the place of confinement, and so recommends.

W. A. Trimble, Judge Advocate.
Archibald Hy, Judge Advocate.
S. M. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 203355

JUL 17 1935

UNITED STATES	)	WAR DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Humphreys, Washington,
Colonel ALEXANDER E. WILLIAMS	)	D. C., May 20, 21, and 22,
(0-90), Quartermaster Corps.	)	1935. Dismissal.

OPINION of the BOARD OF REVIEW
SAUNDERS, TURNBULL and SMITH, L.M., Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Colonel Alexander E. Williams, Quartermaster Corps, then Brigadier General, Assistant Quartermaster General, United States Army, in charge of the Transportation Division, Office of The Quartermaster General, Washington, D. C., did at Washington, D. C., during period November 24 to 28, 1933, both dates inclusive, solicit and obtain a loan of $2500.00 from Mr. Frank E. Speicher, a representative of the Eastern Bee Corporation of New York City, in exchange for a note in words and figures as follows: to wit

"$2500.00 Wash, D.C., Nov.24,1933
6 Mo. - - - - after date I promise to pay to
the order of Bearer
Twenty five hundred - - - - - 00/100 Dollars
at 6%
Value received

A. E. Williams"

the said Colonel Williams, then Brigadier General, as aforesaid, well knowing at the time he solicited and obtained said loan, that the said Mr. Speicher was attempting to favorably interest him, the said Colonel Williams, then Brigadier General, as aforesaid, in his official capacity as officer in charge of the Transportation Division of The Quartermaster General's Office, as to the suitability for equipment on motor vehicles to be purchased by the War Department, of cemented-in tubes, a patented type of inner tube for pneumatic tires, manufactured exclusively by the said Eastern Bec Corporation.

Specification 2: In that Colonel Alexander E. Williams, Quartermaster Corps, then Brigadier General, Assistant Quartermaster General, United States Army, in charge of the Transportation Division, Office of The Quartermaster General, Washington, D. C., did at Washington, D. C., on or about January 15, 1934, solicit and obtain a loan of $2000.00 from Mr. Frank E. Speicher, a representative of the Eastern Bec Corporation of New York City, the said Colonel Williams, then Brigadier General, as aforesaid, well knowing at the time he solicited and obtained said loan that the said Mr. Speicher was attempting to favorably interest him, the said Colonel Williams, then Brigadier General, as aforesaid, in his official capacity as officer in charge of the Transportation Division of The Quartermaster General's Office, as to the suitability for equipment on motor vehicles to be purchased by the War Department, of cemented-in tubes, a patented type of inner tube for pneumatic tires, manufactured exclusively by the said Eastern Bec Corporation.

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

Specification: In that Colonel Alexander E. Williams, Quartermaster Corps, then Brigadier General, Assistant Quartermaster General, United States Army, in charge of the Transportation Division, Office of

The Quartermaster General, Washington, D. C., having taken an oath in a hearing before Subcommittee No. 3 of the Committee on Military Affairs, House of Representatives, a competent tribunal, that he would testify truly, did, at Washington, D. C., on or about December 10, 1934, willfully, corruptly, and contrary to such oath testify as follows:

Question: "General, I want to ask you this: Did you ever obtain any money, any cash from Mr. Speicher?"
Answer: "No, sir."
Question: "None whatever?"
Answer: "No, sir."
Question: "Did you ever give him a note for a certain sum of money?"
Answer: "No, sir."

which testimony was a material matter and which he did not then believe to be true.

He pleaded not guilty to all charges and specifications, and was found not guilty of Specification 2 of the original Charge, but guilty of the original Charge and Specification 1 thereunder and of the Additional Charge and its specification. He was sentenced to be dismissed the service of the United States. Four members of the court recommend that, in view of the long and distinguished service of accused in peace and war, including gallantry in battle, and as an act of mercy, the sentence of dismissal from the service be commuted to suspension from rank, duty, and command during the remainder of accused's service on the active list, and forfeiture of all pay and allowances for four years. A fifth member recommends that on account of the long and faithful service of accused before the commission of the offenses of which he was convicted, the sentence of dismissal be commuted to suspension from rank, duty, and command, and forfeiture of all pay and allowances for a period of five years.

3. The material evidence in the case which may properly be considered in support of the findings of guilty may be summarized as follows:

Accused was Brigadier General, Assistant Quartermaster General, in charge of the Transportation Division of the office of the Quartermaster General, during the period February 6, 1931, to February 6, 1935, and the Motor Transport Branch of that office was directly under him during this period (Accused, R. 228,245-246). During the period October 1, 1933, to February 1, 1934, approximately, the Government was in the market for motor vehicles (Accused, R. 246).

On August 2, 1932, Frank E. Speicher (now vice president in charge of sales of Eastern Bec Corporation) answered a newspaper advertisement and procured a position with the Eastern Bec Corporation selling and exploiting an automobile tube manufactured by that corporation (Speicher, R. 16). This tube was a patented type of cemented-in inner tube for pneumatic tires (Miller, R. 198; Accused, R. 246). On the following day he came to Washington, D. C., with the view of interesting the Government in the tubes (Speicher, R. 17). About a month after his arrival in Washington, he met Brigadier General Albert L. Cox, Reserve, who evinced interest in the tube and told Speicher that if he could see his way clear to engaging him, General Cox, as attorney, the latter would be able to assist him in interesting the Government in the tubes, as he had many friends in the Army. About two weeks later Speicher again met General Cox and told him that he would be glad to install the tubes in government vehicles and let the Government run them at the expense of the Eastern Bec Corporation. General Cox told Speicher he would see accused at luncheon that day, and that after luncheon he would like to see Speicher. Immediately after luncheon he was advised by General Cox to go to the Munitions Building and wait in accused's office until the latter came in. He went there and was waiting for accused when he came in. (Speicher, R. 18-20; Accused, R. 229) General Cox also came to the office. As a result of the interview then had, accused telephoned Captain Dailey, in charge of the Quartermaster Corps Garage, and at accused's instance Captain Dailey arranged with Speicher for the installation of his tubes in the cars of the Secretary of War and the Assistant Secretary of War, and in another car (Speicher, R. 19-20; Accused, R. 230,249).

Accused advised Speicher how to go about getting his tubes considered by the Army, and told him to go to Fort Bragg where tests of tubes were being made by the field artillery (Accused, R. 230). Later General Cox and Speicher went to Fort Bragg to see Colonel McIntyre. An arrange-

ment was made with the Field Artillery Board there to take a number of the tubes and run a test with them. This test was made by a battery that was proceeding to Camp Allen. The tubes did not reach Fort Bragg until after the battery had departed, but the battery was delayed in Washington and the tubes were installed there under Speicher's supervision. (Speicher, R. 21)

Speicher wanted to see the tubes that had been installed in some cars issued to the CCC (Accused, R. 230) and in August, 1933, accused wrote and delivered to Speicher six letters, which read as follows (Speicher, R. 22-25; Exs. 1-6):

"Aug 15 1933

MEMORANDUM to Mr. Clark
Transp Clerk
Fort Hayes

Please help Mr. Speicher out in securing the information he desires.

A. E. Williams." (Ex. 1)

"Aug 8 1933

Memorandum for Col. Hall -
Fort Benning, Ga.

Mr. Speicher representing the Bec tubes will call at Fort Benning -

Will you afford him an opportunity to see the trucks equipped with these tubes and confer with the officers operating them.

They are all Chev. trucks recently furnished the 29th Inf and the C.C.C. Camps.

Sincerely
Alexander E. Williams." (Ex. 2)

"Aug 8 1933

(Addressed to Col. Wm. H. Noble, Quartermaster,
4th Corps Area, Fort McPherson, Ga.)

My dear Noble -

The Chev. trucks furnished for C.C.C. Camps in 4th C.A. are equipped with cemented in tubes puncture proof,

a new departure.

Mr. Speicher, representative of the tube Co. will be in Atlanta and I have suggested he see you and find out where the trucks are operating. He may be of assistance to the operating personnel in suggesting how to handle the tubes.

Will you put him in right path to get the information.

Sincerely,

Williams." (Ex. 3)

"Aug 8 1935

(Addressed to Brig Gen Manus McClosky,
Fort Bragg, North Carolina.)

My dear Mack -

The bearer, Mr. Speicher, representing Bec tubes, will drop in at Bragg to demonstrate how you may save money and increase efficiency of prime movers by use of cemented in tubes.

Lend an ear to the economy part?? and let him consult the users of the Chev trucks equipped with Bec tubes.

Sincerely,

'Biff'". (Ex. 4)

"Aug 15 1935

(Addressed to Col. Sam Bottoms, Quartermaster,
7th Corps Area, Omaha, Neb.)

My dear Bottoms

The bearer Mr. Speicher represents the Bec tube which is in tires on your CCC Chev. trucks.

Will you let him know where these trucks are in the Corps Area and allow him to inspect the trucks he can give the drivers useful information about using them.

Sincerely,

'Biff'". (Ex. 5)

"Aug 15 1935

(Addressed to Brig Gen A. G. Lott,
Fort Riley, Kansas.)

My dear Abe -

The bearer Mr. Speicher represents the Bec inner tube, with which the experimental trucks are equipped.

Twenty of these trucks were assigned 2d Cav at Fort Riley.

Will you afford Mr. Speicher opportunity to consult the officers & men who operate the trucks.

Regards & best wishes to you & Mrs. Lott.

Sincerely,

'Biff'". (Ex. 6)

However, Speicher did not use any of the letters (Speicher, R. 26). After General Cox gave him permission to call and see accused, Speicher used to go to accused's office quite frequently and see him and call him on the telephone to advise accused how he was getting along with the tubes in the CCC camps and to learn about new bids for the purchasing of trucks by the Government. Speicher was working with Mr. Haig, in charge of fleet sales of the Chevrolet automobile, endeavoring to get Bec tubes specified and furnished for Chevrolet cars sold to the Government. Mr. Haig gave him an opportunity to equip with Bec tubes about 225 out of 819 trucks for the Militia Bureau. (Speicher, R. 26,27) Speicher and Haig at one time had accused as their guest for luncheon at the Powhatan Hotel, and at another time accused was Haig's guest for luncheon at the Mayflower with an engineer named Webster from the Chevrolet Company. At that time there was a discussion about specifications for trucks being written in the Assistant Secretary of War's office. Speicher and accused became very good friends, Speicher sometimes addressing accused as "Biff", and occasionally accused addressing Speicher as "Frank". Speicher had also talked with accused over the telephone and called himself "Captain Smith". (Speicher, R. 28-30)

Accused on other occasions also evinced his interest in the Bec tubes. Colonel B. F. Miller, Field Artillery (with the Quartermaster Corps), accused's subordinate in direct charge of the Motor Transportation Branch in the office of the Quartermaster General, testified in regard to one incident as follows:

"Q. Did General Williams ever give you any instructions with regard to tubes of the Eastern Bec Corporation?

A. No; I don't think General Williams knew anything about the first specification and when it was attempted to have the Bec tube specified, because that was handled directly with the National Guard, the Quartermaster General's technical committee and finally in conference

in the office of the deputy chief of staff. At one time Speicher made a complaint to General Williams that we had issued orders or instructions that these cemented-in inner tubes would not be placed in stock in the quartermaster depot. General Williams asked me about this and I explained to him that these tubes were experimental and did not need replacement. I further explained that we should not buy and stock with them because they had to have a can of cement to cement them in and a can of high-test gasoline to remove the tube from the casing. General Williams agreed with me. Those instructions went to the quartermaster of the 8th Corps Area, who had requested that these tubes be stocked.

Q. Did Mr. Speicher occasionally come to your office?

A. He was in the office four or five times during the time between 1933 and the time he disappeared." (R. 198)

Accused testified about this and another incident as follows:

"Q. Do you remember that Mr. Speicher complained to you that the Quartermaster General had issued instructions to the Quartermaster of the 8th Corps Area not to stock the Quartermaster Depots there with Bec tubes?

A. Yes.

Q. And you took that matter up with Colonel Miller, I believe?

A. Yes.

Q. Why did you do that?

A. Mr. Speicher said to me that the Quartermaster of the 8th Corps Area had asked to have the Bec tube stocked to replace those that might go bad and that Holabird had turned it down and would not buy the tubes for the 8th Corps Area.

Q. Did Mr. Speicher initiate this?

A. Yes; he came to the office. I called Colonel Miller about it and he said 'No, we have not stocked with those tubes, because we would have to furnish them cement to place them and special gasoline to wash them'. He did not think it was a good idea, and I said 'All right, do not do it'.

Q. Do you recall a conversation you had with General DeWitt, then Quartermaster General, in regard to giving the Bec tubes a more thorough tryout before they were cut out of War Department specifications?

A. We discussed that matter and I said I thought they ought to have a thorough trial so that when we made a decision it would be accurate and definite. They had not been given as thorough a trial as I thought they should have." (R. 249-250)

Around the 20th or 21st of November, 1933, accused telephoned Speicher that he was coming to the Carlton Hotel to see the latter (Speicher, R. 31). Speicher and Roy C. Remick had a room there at the time (Speicher, R. 31; Remick, R. 185). When accused arrived at the hotel he had his son with him. The son was introduced to Speicher and Remick and the son went upstairs with Remick to discuss the matter of Remick's assistance in securing a position for the son with the Tennessee Valley Authority. (Speicher, R. 31; Remick, R. 185; Accused, R. 250) Accused and Speicher stood up at the north end of the hotel lobby where the following conversation (to quote Speicher) occurred between them:

"A. General Williams said, 'Frank, I want to ask you a little favor'. I said, 'What is it?' He said, 'I am pushed tight and I want to borrow a little money'. I said, 'How much do you want?' At the same time I reached in my pocket. He said, 'I would like to have $2,500'.

Q. He or you said that?

A. He said that. He said he would like to have $2,500. I told him, 'That is a lot of money, but I will try to get it for you'. The General said he had a farm in Little River, North Carolina, and there were certain obligations in connection with it that had to be taken care of and he would like to have the money by the 24th of the month, by the end of the week. I told him I would do my best; that I would try to get it and let him know." (R. 33)

Accused then owed $1500 on a past due note to Doctor D. H. McLeod for money used on the farm (Accused, R. 251).

The next day Speicher called up Mr. Garrett, the vice president and treasurer of the Eastern Bec Corporation in New York City, and as a result on Saturday, November 25, received a Western Union money order for $2500 from William L. Sweet, Jr., president of the Eastern Bec Corporation (Ex. 7). It was impossible for him to cash the money order on Saturday afternoon. However, he telephoned accused, advised him of the receipt of the money order and told him he would meet him at the Hotel Washington on Monday, where accused was to have luncheon. He saw accused at the Hotel Washington as arranged, exhibited to him the Western Union money order, and accused arranged to meet him around 5:30 p.m. at the Carlton Hotel. Accused came to the hotel as arranged and met Speicher in his room, No. 446. Speicher, who had previously cashed the money order, turned over twenty-five $100 bills to accused, who distributed the bills among several of his pockets. Accused said, "I want you to know that I only want this money as a loan". He then took out a pen, went to the dresser and wrote out a note for $2500, which he handed to Speicher. This note, which was received in evidence (Ex. 8), reads as follows:

"$2500.00 Wash. D. C. Nov. 24, 1933.
6 mo. - - - - - - - - - - after date I promise to pay to
the order of Bearer
Twenty five hundred - - - - - - - - - - - - 00/100 Dollars
at 6%.
Value received A. E. Williams.
No._____Due_____." (Speicher, R. 33-37)

Speicher mailed the note to Mr. Garrett and later received it back from him in a special delivery letter, the note then having a series of holes punched in the signature (Speicher, R. 37-38). When Speicher telephoned Mr. Garrett about the $2500 loan, he told Garrett that accused requested the loan because he had a mortgage on a farm in either North or South Carolina on which he raised artichokes and he wanted the loan to pay off the mortgage (Garrett, R. 137). Mr. Garrett took the matter up with Mr. Sweet, though whether the former told the latter the money was for accused is not clear, and Mr. Sweet telegraphed $2500 to Speicher (Garrett, R. 138; Sweet, R. 214). The next week Garrett came into Mr. Sweet's office with the note for $2500. The incident of punching holes in accused's signature on the note is described by Mr. Sweet as follows:

"Mr. Garrett brought the note to my office and told me that it was the $2,500 I had sent to Frank, that the money had been loaned and that was the note representing the money. I do not recall that he had any message or information from Speicher other than the note. I demurred and said I disapproved of it. I said that I did not care to be loaning money in such amounts to anybody. It was all I could do to finance the company and Speicher. I refused to take the note; I did not want it. The note was no good to me. I have an objection to notes. Mr. Garrett sat alongside of me after I had told him what I thought and then punched the holes in the note." (R. 214-215; also see Garrett, R. 138-139)

Twenty-five hundred dollars was charged to the account of Speicher (Garrett, R. 139). Accused did not offer to repay the $2500 to Speicher at any of the times he saw him after Speicher gave accused the money (Speicher, R. 41). The note remained in Speicher's possession until he delivered it to an agent of the Department of Justice in New York City (Speicher, R. 38). It may fairly be inferred from the evidence in the case that the note has not been paid.

On November 27, 1933, he (accused) had obligations amounting to several thousand dollars including a note for $900 due the Munsey Trust Company, loans on two government and two other insurance policies, loans of approximately $800 from members of his family, a balance on an automobile, $302.29 for fertilizer, freight and interest on indebtedness, and accounts with a number of stores in Washington and elsewhere. The balances on that date in his two bank accounts were $0.71 in the Branch Banking and Trust Company, Fayetteville, North Carolina, and $51 in the Munsey Trust Company, Washington, D. C., where he maintained a joint account with his wife. (Accused, R. 256-271)

On November 29, 1933, accused made a deposit of $100 in cash in the Munsey Trust Company to the joint account of A. E. or J. M. Williams; another deposit of $500 in cash was made to the same account by Mrs. Williams on the same day. On December 7, 1933, another deposit of $100 was made to the same account, and still another of $100, this by Mrs. Williams, on December 15, 1933. On November 29, 1933, accused purchased for cash a draft for $900 from the Riggs National Bank of Washington,

D. C., to the order of the Branch Banking and Trust Company, Fayetteville, North Carolina (Ex. 13). This draft was purchased on a bank other than the one in which accused kept his account, though he had occasion on the same day to go to his own bank and make one of the deposits above mentioned. On December 1, 1933, he paid $190 to the Agricultural Adjustment Administration. He purchased for cash at the post office in the Navy Building money orders as follows: December 5, 1933, John Wanamaker, Philadelphia, $200; December 13, 1933, Collector of Internal Revenue, Baltimore, Maryland, $22.99. On December 16, 1933, he made a cash payment of $100 to the Palais Royal, Washington, D. C. On December 18, 1933, he made a deposit of $100 by money order in the Branch Banking and Trust Company, Fayetteville, North Carolina. None of accused's pay was used in making these deposits and payments which aggregate $2312.99. (Accused, R. 311-321; Janie M. Williams, R. 399-400)

On May 26, 1934, accused was in New York to make an address before a meeting of Reserve officers and to transact some Army transport business (Accused, R. 238; Bash, R. 411). Speicher, who did not desire to see accused but who understood that accused desired to see him, called accused over the telephone at the McAlpin Hotel and told him he was sending a "boy" with a note in the handwriting of accused (for identification purposes only) and that accused could talk with the boy and make any arrangements he desired through him. This "boy", Mr. Schnuer, a lawyer, was to make arrangements for accused and Speicher to get together. (Speicher, R. 51-52) Harold Schnuer, the young lawyer, testified as follows as to the arrangement for his meeting accused at the Hotel McAlpin and of his visit to him:

"Q. State how you came to go there?
A. An arrangement had been made in New York City through a certain party and -
Q. What party?
A. Nathan Silverman, of Broadway, New York City. We had been in conference with Joseph Silverman in Washington on Friday previous to May 26 and he informed us that General Williams would be in New York City the following day. He said that I or Mr. Speicher should communicate with Nathan Silverman in lower Broadway and he would advise us just when General Williams would be in New York City and where. That was to be done at 11:00 o'clock Saturday morning and at 11:00 o'clock I telephoned

Nathan Silverman and he told me to call him again. I called again and he then advised me that General Williams would be at the McAlpin Hotel at 1:00 o'clock that day. On that day at or about 1:00 o'clock I proceeded to the McAlpin Hotel and went upstairs and nobody was there.

Q. Do you recall where you went in the McAlpin Hotel?

A. Room 1095-6, I think; or it may have been room 1295-6. Then I went downstairs and met Mr. Speicher a short distance away with William Hill, another attorney. I told Mr. Speicher that General Williams was not there in the room. He told me the General was there, because he said he had telephoned him. I went back and General Williams was there and I asked him whether Mr. Speicher had telephoned to him and he said he had.

Q. You have testified that we had gotten in touch with Joseph Silverman prior to this visit. Whom do you mean?

A. Mr. Speicher and myself.

Q. By telephone or otherwise?

A. Always by telephone.

Q. Telephone from New York City to Washington?

A. Washington to New York or New York to Washington or to Asbury Park, his home, the home of both Silvermans.

Q. What was the reason for telephoning to Washington to Joseph Silverman?

A. There were several reasons. Mr. Speicher had been in communication with Joseph Silverman continuously -

PROSECUTION.

It occurs to me that I should state and I presume we can establish it that Mr. Speicher has waived the privilege of attorney and client throughout and he consents to his counsel appearing and testifying to these proceedings.

DEFENSE.

We have no objection to his testimony.

PROSECUTION.

I do that for his protection also.

Q. What was the reason for telephoning to Washington to Joseph Silverman?

A. Mr. Speicher had been in communication with Joseph Silverman most every day for a period of months, and on previous occasions he had asked about General Williams. This is

something that was told to me. He always felt a great deal about General Williams. Joe Silverman had been telling Mr. Speicher and he told me that General Williams was quite worried about matters. In the course of the conversation it was arranged after a visit by Joseph Silverman to the Hotel Ansonia in New York City during the passover holidays that upon Mr. Silverman's return to Washington he would arrange to have General Williams at a certain telephone number and have Mr. Speicher talk to the General and calm him down. Shortly thereafter, I think it was in April, 1934, an arrangement was made at 11 o'clock one evening and Mr. Speicher then spoke to Mr. Silverman and I presume to General Williams. This was a telephonic conversation and I only know what Mr. Speicher said.

Q. Were you present at the New York and of the conversation?

A. Yes.

Q. Do you know what telephone number Mr. Speicher called?

A. Yes; it was Wisconsin 2526, Chevy Chase, Maryland.

Q. Going back to the McAlpin Hotel visit, after you reached the door of General Williams' apartment for the second time, what happened? Did you knock at the door and walk in?

A. I knocked and walked in? General Williams did not know me. He opened the door and I gave him a piece of paper which Mr. Speicher had given to me to give to the General. I do not remember exactly what the piece of paper was, but, as I remember, it was in the handwriting of the General. I gave it to the General and told him that Mr. Speicher had told me to do so. Very little conversation took place between us. I asked the General to come downstairs or anywhere else outside the hotel and meet Mr. Speicher, but General Williams refused to do that. He said he would see Mr. Speicher only in his room.

Q. He said he would see Mr. Speicher only in the room?

A. Yes.

Q. Did he give any reason why he would not see him elsewhere?

A. No; I do not think so.

Q. Did you state to him why you desired to bring Mr. Speicher and General Williams together?
A. I cannot definitely say. I went as a messenger to bring General Williams to Mr. Speicher." (R. 162-165)

The next morning at about 6:30 Speicher telephoned accused at the Army Base in Brooklyn, told him that "Captain Smith" was talking and arranged to meet him at the 32d Street entrance of the Pennsylvania Hotel at 7:15 or 7:30 a.m. By arrangement Schnuer met accused when he drove up to the hotel, got in his car, and came with him to the 33d Street entrance of the Pennsylvania railroad station where they were joined by Speicher. Accused and Speicher drove over to 8th Avenue and 23d Street where Schnuer alighted. They drove about town for awhile and finally returned to 22d Street and 8th Avenue near Bickford's Restaurant where Schnuer was awaiting Speicher's return. (Speicher, R. 50-55; Schnuer, R. 167-170) Speicher testified as follows as to his conversation with accused during the time they were driving about alone:

"A. I told the General there were many unkind things being said about me in Washington, but that I wanted him to know that until I looked at him and told him that I would hand that note over, he could go to sleep on it, that I never would. I said for him to go back and tell Joe Silverman that if he had so much pull he should get that subpoena off of me and that I had been listening to him just about long enough. I told General Williams that when he asked me to meet Silverman and I did not want to meet him. I had known him long enough. I told the General that I would rather cut my right arm off than to hurt him. I knew that he had about 34 years' service in the Army.
Q. What did General Williams say?
A. He agreed with me.
Q. What did he say?
A. He said that if that note showed up, if it got in wrong hands, his 34 years' service in the Army would be finished. I said that I did not have the note but that I would try to get it and turn it over to him. General Williams said, 'Very well, Frank, I will be in Philadelphia the following Thursday and I would like to see you there if I can'. My wife carried that note and you might as well have asked

her for her right arm or leg as to ask her to give that note back.

Q. Was that the sum and substance of the conversation?

A. Around that, yes. I shook hands with General Williams and bade him goodby." (R. 56)

The next week accused was in Philadelphia at the Quartermaster Corps School (Accused, R. 343).

It was stipulated between the prosecution and the defense that on December 10, 1934, accused testified before Subcommittee No. 3 of the Committee on Military Affairs, House of Representatives, 73d Congress, 2d Session; that his testimony was germane and material to the inquiry; that said subcommittee was functioning under House Resolution 275 of March 2, 1934; that an oath was duly administered to accused by the Chairman then presiding over said subcommittee, Honorable John J. McSwain, pursuant to power invested in him by Section 191, Title II, United States Code; that the subcommittee was a competent tribunal; that accused testified before the subcommittee as follows:

Question: "General, I want to ask you this: Did you ever obtain any money, any cash from Mr. Speicher?"
Answer: "No, sir."
Question: "None whatever?"
Answer: "No, sir."
Question: "Did you ever give him a note for a certain sum of money?"
Answer: "No, sir."

House Resolution 275 reads as follows:

"Resolved, That the Committee on Military Affairs, or any subcommittee appointed by the chairman, be, and is hereby, authorized and directed to inquire into and investigate the allegations and charges that have been or may be made relative to profiteering and irregularities involving the expenditure of public funds for national defense, the use and disposition of surplus property, and other matters in which the problem of national defense in whole or in part is involved; be it further

Resolved, That the said committee, or such subcommittee thereof, shall make a thorough and exhaustive investigation of all allegations and charges that have been or may be made in connection with any and all matters pertaining to legislation or proposed legislation coming within the jurisdiction of said committee, and shall make a full and complete report to the House of Representatives, together with such recommendations as it deems advisable; and be it further

Resolved, That for the purpose of this resolution, the said committee, or any such subcommittee thereof, is authorized to hold such hearings, to sit and act during the sessions and the recesses of the present Congress, at such time and places, either in the District of Columbia or elsewhere, and to require by subpena or otherwise the attendance of witnesses, to administer oaths, to compel the production of books, papers, and documents by Government or private agencies, and to take and record such testimony as the committee or subcommittee may deem advisable or necessary to the proper conduct of the investigation directed by this resolution." (R. 223-226; Ex. 12)

4. Accused testified as a witness in his own behalf. He admitted that he met Speicher through General Albert L. Cox and advised Speicher how to go about getting his tubes considered by the Army. He told Speicher "to go to Fort Bragg where tests of tubes were being made by the field artillery and if they saw fit to test them, that would be his best plan to have them tested to see whether or not they were suitable for the Army". He also told him to see Captain Dailey, who was in charge of the Motor Garage in Washington, and later Captain Dailey telephoned accused that Speicher was there and suggested that tubes be put in the cars used most, those of the Secretary and the Assistant Secretary. Accused did not order Captain Dailey to install the tubes but told him "that he could put them in any cars he thought could give the best test". Accused also testified Speicher "came in later and wanted to see the tubes that had been installed in some cars issued to the C.C.C., and I thought it would be a good plan to have him see them, because he might assist the drivers or the officers in charge of C.C.C. cars in handling these tubes. Therefore I wrote notes to several officers in the field at places designated by Speicher. He stated that he would like to visit certain places." He admitted giving to Speicher the six notes heretofore set out (Exs. 1-6), and explained that some of them were signed "Biff" because they were addressed to

personal friends who had known him by that name since he had played football at West Point. Speicher came to his office frequently in regard to the tubes. He came in on one or two occasions with Mr. Haig of General Motors and on other occasions with Mr. Remick, previously mentioned in this opinion. The report submitted of the test made by the field artillery was favorable. (R. 230-233)

Accused testified that on several occasions Speicher proposed to him that he should buy some General Motors stock (R. 234). In further reference to this proposal and with reference to the giving of the $2500 note, accused testified on direct examination as follows:

"Q. Did he state to you why you should buy that stock?
A. He stated or claimed to be very close to the authorities and he knew that General Motors was down but was going up shortly.
Q. Did you know anything about stock speculation at that time from your own experience?
A. No; I had not speculated in stocks.
Q. What story did he tell you about the possibility of this stock?
A. He claimed to know or have a tip that this stock was going up soon and if purchased at that time there would be an opportunity to make money.
Q. How many times did he talk to you about that matter?
A. I would say four or five times altogether in dropping into the office.
Q. During the course of those conversations did it develop how you would participate in those stock arrangements, if at all?
A. Yes; he urged me to buy. I told him I had no money to spend for stock. Then he proposed that I should sign a note. He said his broker would take the note for security for stock purchased.
Q. Did you talk about that note more than once?
A. Yes; he proposed it on several occasions.
Q. Did there come a time when you executed such a note?
A. Yes. I did so at a standup desk in the corner of my office. I did write such a note in considering this proposition.
Q. Can you place the approximate time of that transaction?

A. It was in November, but I do not remember definitely the date.
Q. Can you describe the circumstances under which you executed that note?
A. I had an old blank note form in the desk and I wrote out the note making it payable to bearer. Speicher was to take that note to his broker and his broker would accept it, Speicher said.
Q. Was there anything said as to the name of the broker?
A. It was a broker at the Washington Hotel.
Q. Can you explain why the note was made payable to bearer?
A. No; except that he did not want it made payable to any particular person.
Q. What happened after you executed it?
A. I signed that on November 24. We discussed it on one visit, and as I recall, I went back to my desk to answer a telephone call while we were talking about the note. He said that he would have to endorse it or get a representative of General Motors to endorse it.
Q. Where was the note at that time?
A. I left it on the standup desk, and he picked it up.
Q. Where was that standup desk with reference to the desk where the telephone was?
A. It was about 10 or 12 feet from my desk.
Q. And you say that Speicher had the note in his possession after you had finished the conversation on the telephone?
A. He had picked it up and was looking at it.
Q. What, if anything, did he say then?
A. He said, 'I might have to endorse it or get a General Motors representative to endorse it'.
Q. What did you tell him?
A. I told him I would not have anything to do with it if anybody had to endorse the note.
Q. Then what happened?
A. I said, 'Then we will tear it up', meaning the note. He apparently tore it up and dropped it in the waste paper basket.
Q. He tore up in front of you the paper which you thought was the note you had executed and threw it in the waste paper basket?
A. Yes; that is right.

Q. When was the next time you heard that the piece of paper Speicher threw away was not the note you had executed?
A. When the Committee on Military Affairs of the House brought out the note which I had signed.
Q. Is this (indicating) the note presented to you by the Committee on Military Affairs of the House?
A. (After examining) Yes; it is.
Q. Is it the note you executed on the occasion to which you have previously testified?
A. It looks like the note I executed.
Q. You recognize it as the note you executed at the time Speicher, according to your own story, tore up the piece of paper and threw it in the waste paper basket, do you?
A. Yes.
Q. General, I ask whether you have at any time prior to January 1, 1934, requested or solicited a loan from Frank E. Speicher in the amount of $2,500?
A. No, sir.
Q. If Speicher has stated that you did so solicit a loan of $2,500, he is mistaken; is that right?
A. He is mistaken. It is not so.
Q. You have heard Speicher testify here under oath that on an occasion when you were about to proceed to the meeting of the North Carolina Society of Washington, to meeting to be held in Washington the evening of November 20, 1933, you had a conversation with Speicher in the lobby of the Carlton Hotel, in which conversation you requested that he loan you $2,500. State whether or not that is true or false. Is that a true or a false statement?
A. That is a false statement, wholly. It is made up.
Q. Will you state to me and to the court whether you had any conversation with Mr. Speicher in the lobby of the hotel Carlton on that occasion?
A. Yes, I did. I was there waiting for my son. Speicher came over to me and spoke while my son was away.
Q. What did he talk about?
A. It was a general conversation. He was commenting on the fact that I was wearing evening clothes, evening dress.
Q. How long was your son away? How long was he away before he joined you and Mr. Speicher?
A. A few minutes; not long enough to sit down." (R. 234-237)

On cross-examination he also testified:

"Q. General, would you mind again explaining the circumstances surrounding the drawing of a note for $2,500.
A. No. As I explained to the court before, Speicher proposed that I buy some General Motors stock and when I told him I had no money to invest in stock he said that the broker would take my note.
Q. When did you write the note?
A. On the occasions of one of his visits to the office. I do not remember the date. It is probably the date on the note.
Q. It is probably November 24, 1933?
A. It is probably November 24, 1933.
Q. What kind of stock was he going to purchase?
A. He said General Motors stock.
Q. What kind of stock, preferred or common?
DEFENSE.
He has said he does not know.
PROSECUTION.
Q. What was General Motors stock selling for at that time?
A. I do not recall the figure of that time.
Q. Was it paying any dividend?
A. I did not investigate.
Q. When did Mr. Speicher first speak to you about this stock?
A. He spoke to me about it on several of his visits before that.
Q. How many days, for instance, before November 24?
A. I do not know. He was in the day before -
Q. A week, two weeks or a month?
A. I think it was several days.
Q. Did you ever speak to any of your friends about the stock market details?
A. I do not recall that I discussed it with anybody.
Q. When was the last time you had a stock market deal?
A. I have not had any.
Q. You knew very little about stocks?
A. I had not been dealing in stocks.
Q. So that you were relying wholly upon what Mr. Speicher told you about General Motors stock?
A. Yes.

Q. You did not know what it was selling for?
A. No.
Q. You did not know the name of the broker through whom the deal was to be negotiated?
A. No; but it was his broker in the Washington Hotel, he said.
Q. Did you own any other stock?
A. No. I had some stock in a newspaper on the west coast that came to me in 1915, but since then I have not purchased any stock.
Q. How were you going to buy this stock, according to your conversation with Speicher, on margin or outright?
A. My understanding was that I was to give the broker a note, he would buy the stock, hold the note as collateral, then sell the stock and give me the money.
Q. How many shares of stock was he going to get?
A. I do not recall the exact number of shares or the price.
Q. $2,500 was to cover the deal?
A. Yes.
Q. Upon what did you base the belief that the stock was going up?
A. On Speicher's statement that he had a tip to the effect that the stock was going up.
Q. Did you have any friends or acquaintances in the business world who were acquainted with stocks?
A. I may have had, but I did not discuss the matter with them.
Q. You did not discuss the matter with any of them?
A. No.
Q. What did you plan to do in the event the stock went down?
A. That was not figured.
Q. That is a probability that anybody has to consider when he goes into the stock market, is it not?
A. My understanding was that if the broker accepted my note, he would take the stock as collateral for the note.
Q. Were you to buy outright or on margin?
A. That I do not know.
Q. Suppose the broker bought on margin, the stock began to go down, and the broker called on you for additional margin, what would you have done?
A. That part I do not know.
Q. Do you know what it means to buy on margin?

A. I have an idea, but I never bought any that way.
Q. Will you please state your understanding of purchasing stock on margin?
A. One gives a broker a certain amount of money and he buys stock and then sells it before it gets too low.
Q. How much does one have to put up for each share of stock purchased?
A. I do not know.
Q. Suppose stock is selling for $100 a share, and one wanted to purchase 1 share on margin, what would the average broker require one to put up for that share?
A. Not having purchased any stock that way, I do not know.
Q. Why did you make this note payable to bearer?
A. Mr. Speicher advised me that was the best way to make it.
Q. Who advised you as to the time of the note, the due date? It was a six months' note?
A. Yes. I do not recall what came up at the time.
Q. Who suggested that the interest be six per cent?
A. That was just a normal rate.
Q. You just wrote that in, and it was not Mr. Speicher's suggestion?
A. I do not recall that he suggested it.
Q. How did you know that the interest rate of six per cent would be satisfactory to the broker who was to negotiate this deal?
A. I did not know it would be satisfactory till he had accepted it.
Q. Did you believe a broker would take a note payable six months after date?
A. I did not know. Anyway, this negotiation had not come to a conclusion, and if the broker would not take it the deal was off.
Q. Why did this deal fall through?
A. Because Mr. Speicher said he might have to endorse the note or have it endorsed by one of the representatives of General Motors, and I would not have anything to do with that.
Q. Why not?
A. I said the broker would have to take my note and take the stock as security. I was not going to ask somebody to go security on the note by endorsing it.

Q. You did not want to have anybody else as security on that note?
A. No.
Q. Suppose, for instance, this stock had gone down and the broker called on you for additional money?
DEFENSE.
That has been gone over.
LAW MEMBER.
The question may be asked.
PROSECUTION.
Q. If the stock had gone down and you had been called upon for more money, could you have produced it?
A. No.
Q. As a matter of fact did you not have a considerable number of debts at that time?
A. Yes; I had some debts." (R. 252-256)

On examination by the court he further testified:

"Q. During the same period were you acquainted with the general manager here of the General Motors Corporation?
A. Who?
Q. The general manager or the representative of the General Motors Corporation.
A. Mr. Mimick represented General Motors here then.
Q. I do not know his name. I am referring to the representative of the General Motors Corporation here in Washington. Maybe I mean Mr. Haig. Were you acquainted with him?
A. Yes; but Mr. Mimick was then the representative of General Motors here.
Q. Did Mr. Mimick or Mr. Haig advise you to buy this security?
A. No.
Q. Then you went into the matter of buying stock upon the advice of a stranger and you knew nothing about the stock?
A. I had not purchased stock recently. This deal was never consummated. I did consider it, and I did not consult anybody else.
Q. You were only considering it when you gave this note?
A. I did not give that note. I made it out in consideration of the proposition, and Speicher stated that he might have to endorse it or get somebody else to endorse it.

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NAVY DEPARTMENT

Q. You gave him a note before you came to a conclusion in regard to the matter?

A. He was not given the note. It was there. It had been written out in considering his proposition that he take it to his broker, but nothing had been done with it. The note was not given to Speicher. He picked it up to look at it when I made the telephone call or answered the telephone. When he made the remark that I have stated, that the note would have to be endorsed by himself or a representative of General Motors, I told him that closed the deal. It closed the deal so far as I was concerned.

Q. You must have given him the note. You said you thought he had torn it up.

A. He picked the note up from the table and was looking at it when I made that remark.

Q. You have drawn many notes, I take it?

A. I have.

Q. And you understand thoroughly that the drawing, the execution and giving of a note makes it operative and an obligation upon the signer, and that the only way that a note, once signed and delivered, becomes inoperative is to destroy it.

DEFENSE.

I think that is an unfair statement or inference. A note is not operative until it is delivered by its maker.

THE COURT.

I asked him if he knew that.

DEFENSE.

The fair inference from the question was that the note, having been signed, was his obligation.

THE COURT.

I wanted to know whether he understood that part of it. I am not trying to confuse anybody.

THE COURT.

Q. Did you understand that the note, once signed and delivered became operative and was your obligation?

A. After it was delivered, yes.

Q. After it was delivered?

A. Yes.

Q. When a note falls into possession of a man you also understand that whether he gets it honestly or dishonestly, it is hard to prove, except by the statements of the maker and the possessor of the note as to how the possessor got it?

A. Yes.
Q. Then why did you accept Speicher's word, in a most indefinite word, that he destroyed the note for $2,500, especially when you were so hard up?
A. Why he destroyed it?
Q. Why did you accept the piece of paper you saw him tear up as the note you had executed? You have testified that you saw him tear up a piece of paper and you thought it was the note you had executed.
A. That is right.
Q. The question is why you let him tear up the note instead of tearing it up yourself?
A. He tore it up, apparently, on the spur of the moment when I stated I would not have anything to do with any endorsement on it. What his object in doing that was I do not know.
Q. Did you take any steps to ascertain whether the paper he tore up was or was not the note you had executed?
A. I did not.
Q. When did you first learn that the paper he tore up was not the note you had executed?
A. When the Committee on Military Affairs confronted me with the note.
Q. About what time was that?
A. That was, as I recall, in December, 1934.

* * * *

Q. Just what positions were you and Speicher in when he performed this sleight of hand operation, this substitution of papers? He had a paper and you saw him tear it up?
A. Yes.
Q. You thought it was the note that he had torn up?
A. I thought it was the note, yes.
Q. Were you facing him at the time?
A. As I recall the situation, I had been to the telephone at my main desk. We were talking at a standup desk in a corner of the room. Speicher was there and he had some papers in his hand. He picked up the note, looked at it when I made that remark. He was very quick to tear it up when I said I would have nothing to do with it if the note had to be endorsed. He was standing at this standup desk with those papers in his hand. He tore up the paper and threw it in the wastepaper basket.

Q. Had you made out the note on the corner desk and left it there?
A. I was talking to him at that standup desk when I was called to the telephone at my other desk. I left the note on that desk.
Q. You did not turn it over the Speicher?
A. I never turned it over to him. I made it out and left it on the standup desk when I went to answer the telephone.
Q. You went to answer the telephone and left the note on the standup desk?
A. Yes; and he picked it up and was handling it with other papers.
Q. You went to the telephone. Did you telephone before you talked to him about endorsing the note?
A. As I took the telephone up the matter came up. I was ready to return to the standup desk.
Q. Did you have that conversation between the telephone and the standup desk?
A. Yes.
Q. At which time he tore up the note before you got back to the standup desk?
A. Yes.
Q. Did you go clear back to the desk, back to the standup desk?
A. I went back and said that ended the deal.
Q. Did he throw the paper he tore up in the wastepaper basket?
A. Yes.
Q. You never looked in the wastepaper basket?
A. No; I did not follow it to see whether it was there. I assumed it was.
Q. Speicher said something to you that made it reasonably sure in your mind that General Motors was going up; is that true?
A. He said he felt sure that General Motors was going up.
Q. He convinced you too that it was going up?
A. I was considering taking the chance of its going up, basing action upon his word. There would have been further discussion with his broker when we went to him to make the deal.

Q. You meant to go with him to the broker?
A. Yes. I did not mean to give him the note. I meant to take the note to his broker.
Q. Then why did you draw it at that time and sign it, if you were going to go with Speicher to his broker with the note?
A. We were considering the proposition and I drew it up at his suggestion that we do it that way.
Q. Why was it necessary to draw the note payable to bearer under those conditions rather than make it payable to the broker after you went there?
A. That was the suggestion Speicher made, to make it payable to the bearer.
Q. You have testified that you have never bought stock before this incident.
A. That is right.
Q. And you were ready to risk this $2,500 on the word of this tube agent?
A. That was probably because I had not bought stock before.
Q. You were substantially in debt and behind at that time and you were going to take another risk to the extent of $2,500, because you would have done so if that note had been received by anybody without endorsement. Your intention was to risk that $2,500 until it was said that the note would have to be endorsed. The unendorsed note would have been your obligation and risk to the amount of $2,500?
A. If the broker was willing to take it as security without endorsement.
Q. The background being that Speicher expressed to you, based upon a tip from some third party, that General Motors was going up?
A. Yes.
Q. Did the fact that Mr. Speicher was working with General Motors give you the idea that somebody in General Motors had given him the tip?
A. I presumed that Speicher knew somebody in General Motors, because I knew that he went around with the General Motors representative, and he claimed he knew other high General Motors officials." (R. 372-378)

Accused testified as to his financial condition on November 27, 1933, as heretofore set forth in this opinion (R. 256-271). He further testified that on November 15, 1933, he borrowed $1500 from his wife; that his wife had received an inheritance of approximately $12,000 between 1922 and 1926, which she had deposited in the Munsey Trust Company as received, but had later drawn out portions thereof from time to time and placed in a reserve which she had since maintained in cash in her possession. The $1500 loan had come from this reserve fund. (R. 270-271) None of it was deposited in the joint account in the Munsey Trust Company; it was disbursed by deposits in the Branch Banking and Trust Company and for other purposes in connection with his North Carolina farm (R. 355-359).

He admitted making the deposits and payments aggregating $2312.99, heretofore mentioned (R. 311-321), but he indicated that these amounts (except $22.99 for income tax) came from the $1500 loan from Mrs. Williams or from other money withdrawn from her cash reserve (R. 356-363). In explanation of the $900 draft, he testified that he had cash and wanted to make a deposit in the Branch Banking and Trust Company of Fayetteville, North Carolina, and purchased the draft at the Riggs National Bank for that purpose; that he handled a fund that was deposited in the Riggs National Bank and went into the bank to see about this fund and while there bought the draft (R. 313-314). The payment of $190 to the Agricultural Adjustment Administration was in settlement of seed loans made to his farm tenants (R. 314-317). As to his purchase of money orders on December 5 for $200 to the order of John Wanamaker, Philadelphia, and on December 13 for $22.99 to the order of the Collector of Internal Revenue, Baltimore, Maryland, he testified:

"Q. Why did you purchase these money orders when you had a bank account at the Munsey Trust Company in Washington and a bank account in the Branch Banking and Trust Company in Fayetteville, North Carolina?

A. The explanation of that money order is the same as the others you are going to present. Mrs. Williams wanted to make payments to these out-of-town concerns. She was not able to come downtown and she gave me the money, having made out the bills, and asked me to get the money order and mail it.

Q. Is it easier for you to go to the post office and make out one of these application blanks, go to the window

and stand in line, perhaps, and get the money order, put it in an envelope and mail it, than it is to sit down at your desk, write a check on the Munsey Trust Company and mail it?

A. It was much easier for me to handle the money in that instance at the post office, because I could go down there during office hours and get the order, the post office being in the same building as I am in. Otherwise I would have to make a deposit in the Munsey Trust Company, go over there during office hours, at inconvenience. It is more convenient to walk down to the post office in the Navy Building." (R. 318)

As to his trip to New York on May 26, 1934, accused testified that General Bash had an invitation to talk to reserve officers in New York on that date but that he had another engagement and could not go, so he asked accused to make the talk. Arrangement was also made for accused to transact some official business at the Army Base at the same time. Accused's account as to his meeting with Mr. Schnuer corresponds substantially with the latter's testimony except that he denied communicating or attempting to communicate with Speicher or Schnuer through the Silvermans, and also that he had ever, in company with Joe Silverman, talked with Speicher over the long distance telephone. He also testified to receiving at the Army Base in Brooklyn a telephone call from Speicher, though he did not remember whether Speicher used the name of Captain Smith; at other times in Washington he had frequently used that name and also the name vice president. He further testified in regard to this incident as follows:

"Q. Will you state the substance of any conversation you had with Captain Smith, the vice president, or Mr. Speicher on the morning of May 27, 1934?

A. I do not remember what was said. He said he wanted to see me.

Q. Did he indicate for what purpose he wanted to see you?

A. He did not.

Q. Did he ask you what you were doing?

A. I do not remember the conversation.

Q. Did you tell him what you were going to do?

A. Yes; I told him I was going to Washington.

Q. What did he say them?
A. He said he wanted to see me as I went out.
Q. Did he say he wanted to go along with you to Washington?
A. I don't remember anything like that.
Q. As a result of that conversation did you (go) to the place that was designated by him?
A. Yes; I did.
Q. What happened?
A. He said he would be at the Pennsylvania Hotel if I would drive by there. I drove by there and when I went to the door Schnuer came out and said that Speicher was at the railroad station. He got in the car and we rode over there. Speicher came out and said good morning and got in the car and I drove off. After we had gone a short distance he told Schnuer to get out.
Q. Did you request Schnuer to get out of the car?
A. I did not.
Q. What did Mr. Speicher talk to you about on that occasion when you picked him up in New York?
A. It was difficult to determine what he wanted to see me about. His principal conversation was telling me not to believe the stories I heard about him in Washington. I was careful to say very little.
Q. Did you tell him anything about what the Department of Justice agent had told you?
A. As we drove down 8th Avenue I told him the Department of Justice agent had told me they had nothing against him. I further told him that he could stay in the car and I would take him to Washington.
Q. So far as you knew at that time, was there any reason why you should not have picked up Speicher at the place you did, except the general statement made to you by the Department of Justice agent?
A. No.
Q. As a result of the statement made to you by the Department of Justice agent had you any reason to believe Speicher was a fugitive from justice?
A. No. He was not a fugitive from justice. All the Department of Justice wanted to do was to serve a subpoena

on Speicher to appear before the House Committee on Military Affairs.

Q. Was that the advice given to you by the Department of Justice agent?

A. Yes; he advised me to that effect.

Q. Was there anything further said during that ride by you and Speicher?

A. When he said he would not go to Washington with me, we started back. I turned off 8th Avenue and drove awhile and then went back to 8th Avenue.

Q. When he stated he would not go back to Washington with you, did you ask him to go back?

A. I told him I would take him to Washington if he would stay in the car.

Q. Is there anything further in connection with that automobile ride that would be helpful to enlighten this court?

A. The only thing I really thought he wanted to see me about, possibly, was when he slipped out of the car he said to me 'You tell Joe Silverman to get in touch with me'.

Q. Had he any reason to suggest that you should communicate with Joe Silverman?

A. No.

Q. Did you communicate with Joe Silverman?

A. I did not.

Q. Did you at any time on that occasion when you talked with Mr. Speicher discuss the subject of this note?

A. I did not.

Q. Did Speicher discuss the note?

A. He did not.

Q. Did he say anything from which you could reasonably infer that he felt you were under obligation to him?

A. No." (R. 242-244)

Accused admitted that in February or March of 1934, he had heard rumors that Speicher had been going around Washington telling that accused owed him money (R. 341-343).

Janie M. Williams, the wife of accused, was a witness for the defense. She testified that she had a cash reserve, and as to her

reasons for maintaining such reserve she further testified on direct examination as follows:

"Q. * * * I ask you whether there has ever been any occasion when, from circumstances that I am going to ask about, it has been necessary to conserve cash assets so as to have them immediately available. Has that ever been brought to your attention?

A. Yes.

Q. Will you state to the court the circumstances and the facts that thus impressed themselves upon your mind.

A. Calling no names?

Q. You need not mention any names.

A. I think I would rather not mention names because I think the parties I have in mind are known to all members of the court. Once several years ago at an Army post there was the death of an officer whose wife was an intimate friend of mine. When her husband died she sent for me and said, 'Mrs. Williams, you are my confidante and therefore I have sent for you'. Of course, my sympathies were with her, because her husband had been our good friend and the friend of everybody else there. I think it was a Sunday when he died and all preparations were made for a funeral. On Monday afternoon friends of the deceased and his wife, who were also my friends, came to my house and asked when the funeral would be, and I had to tell them I did not know. Monday night again several officers came to our house and asked if funeral arrangements had been made. I had to tell them I had not heard a word about it. Tuesday morning the same thing occurred. On the afternoon of that day several officers came and asked whether I knew if any arrangements had been made for pallbearers honorary or otherwise, and I had to say I did not know. Tuesday night about 9:00 o'clock the Post Adjutant came to our quarters and said 'Mrs. Williams, this matter is getting quite serious; can you not find out about this matter for us?' I hesitated about doing anything because the wife of the deceased, my dear friend, had not said anything to me about arrangements. I did not know why she had not said something. Tuesday

night at bedtime I asked her 'Have you any definite plans for the funeral; those on the post are very anxious to know and several officers have been here to inquire about funeral arrangements'. She finally said to me, 'I have not one cent of money in the world to do anything; and I cannot tell everybody that; I have telegraphed my brother twice, but have not heard anything from him. He is not coming and he is not sending money, even though I wired for it'. In the meantime she had asked me if I would go to the undertakers and ask about a casket. She asked me 'Won't you go and see what can be done?' I went to the undertakers and talked about a metal casket that the lady wanted. I knew very little about metal caskets, but I talked to the undertaker and tried to explain to him in a veiled way the exact circumstances of the widow. I thought it would be perfectly all right in the end and that money might come. The undertaker said, 'If it were the wife to be buried, I would unhesitatingly furnish the casket, but since it is the officer himself that is a different tale'.

Q. I think the circumstances you have related thus far indicate to the court the nature of the thought you must have had as the result of that experience.

A. The next day we found that the telegrams addressed to her brother were not delivered. He was in the field fishing or hunting and had not received the telegrams. Her husband's body waited four or five days for burial. Then and there I decided that if I had any money I would keep it near me so I could handle any pressing emergency that might arise. (R. 386-388)

She testified that the possibility of a bank failure or of the death of her son or daughter involving an emergency and a need of money also influenced her in maintaining a cash reserve (R. 390-391). She testified that she began to accumulate this cash reserve in 1922 and had continued to accumulate it until 1938. She had received two legacies from uncles, one amounting to about $3200 or $3800, and the other to more than $11,000. These amounts had first been deposited in the joint bank account of accused and herself, but later parts thereof had been withdrawn to add to

the cash reserve. She kept the money "in a steel trunk very similar to the old box lockers of the Army, but it was bought for safety and had double locks". Sometimes she would pay family obligations from the fund when the bank account was depleted and later, when the bank account had been replenished, would withdraw money therefrom to place in her reserve. She stated that she had kept a record of the reserve fund and testified in detail as to additions to and withdrawals from the fund until it was exhausted; that at the beginning of 1933 the reserve amounted to $3484; that from this fund on November 15, 1933, she loaned accused $1500 on two notes for $900 and $600 respectively (Ex. 21). After this she began paying numerous sums on account of big bills while she had the cash, the reserve becoming exhausted by the end of 1934. (R. 390-404) She testified she carried charge accounts in various department stores, some in her own name and some in the name of accused, and that among these stores were Kann Company, Garfinckel's and Woodward & Lothrop of Washington, D. C., Frederick Loeser Company of Brooklyn, John Wanamaker of Philadelphia, John Wanamaker of New York (R. 388-389), W. B. Moses & Sons, Washington, D. C., Mayer & Company, Washington, D. C., Palais Royal, Jelleff's, and Hecht (all of Washington, D. C.)(R. 405-407).

In regard to $930 which she borrowed in 1931 from W. W. Fuller, Mrs. Williams testified as follows:

"Q. May I endeavor to refresh your recollection by reading from a statement by General Williams before the inspector? This question was asked: 'Referring to the two deposits she made on Exhibit Z-6, on May 11, 1931, for $930, you testified this morning that this was a loan from W. W. Fuller to Mrs. Williams, and, as I recall your testimony, that your pay check for the month of April had gone to the bank but there had been some confusion in having it credited to your account and that Mrs. Williams had called up the bank, after she had written several checks, and found that your pay had not been deposited and that it was then that she borrowed this $930 from Mr. Fuller. Is that correct?' The answer was: 'Yes'. Is that correct?

A. Yes.

Q. What were the circumstances of that loan?
A. General Williams' pay account was supposed to be deposited with the Munsey Trust Company. I gave, as was usual, several checks at the time, one of which was for schooling my daughter. The check came back, and other checks came back and I could not understand. I called the Munsey Trust Company for an explanation; and they informed me that the General's pay account had not been deposited. I called the Army finance officer and he told me that the General's pay account went through as usual. I was ill at the time and unable to attend to my business, so I called this friend and he attended to the matter. The matter was taken up with Mr. Pope of the Munsey Trust Company and later he called to say that the General's pay account came in all right but it was credited to the wrong Williams. It was at that time that I got the Fuller loan.
Q. You had the reserve at the time?
A. I had the reserve, but I was ill and could not attend to any business.
Q. You were in Washington and the General was not here?
A. No; I was in Brooklyn and the General was here. I think that General Williams was then on inspection; but he was living here. He came here in February and I came in June.

PROSECUTION.

No further questions at this time.

REDIRECT EXAMINATION.

Questions by defense:

Q. Referring to this $700 transaction, will you state to the court where you were at the time you borrowed this money?
A. From Mr. Fuller - I was ill in bed in Brooklyn.
Q. Brooklyn where?
A. New York.
Q. And your account was in the Munsey Trust Company of Washington, D. C.?
A. I called on Mr. Fuller.
Q. What did you request him to do?
A. Explain the circumstances. I explained the circumstances to him, and he said, 'I will take care of this for you'.
Q. Did you then have your cash reserve in New York?

A. Yes; but I could not conveniently get at it at the time.
Q. Why not?
A. It was in a locked closet in a locked chest.
Q. Where were you?
A. In my bedroom.
Q. Were you under a physicians orders at the time?
A. I don't know that I was under a physicians orders, but I do know that I was quite ill.
Q. Did Mr. Fuller send the money to the bank in Washington?
A. He attended to the matter.
Q. If it should appear from the report of the same investigator that the deposit in the Munsey Trust Company was in the form of a money order, Western Union money order, would that refresh your memory?
A. I don't know. He told me that he would attend to the matter for me, and that's all I know about it." (R. 408-410)

As to the purchase of money orders by accused at her request, she testified:

"Q. * * * Can you tell me whether there ever came a time when you requested General Williams to purchase money orders for you?
A. Yes; for the purpose of paying bills during December. At that time I was not well and I could not go to the bank or the post office. I had cash on hand and, as was my custom, I put the money, the necessary money, in each envelope with the bill and put a slip on the outside and asked General Williams to go to the post office in the Munitions Building, get the money orders and send them to the proper persons.
* * * *
Q. Mrs. Williams, can you state to this court why your requested General Williams to purchase money orders for these various amounts to apply on your accounts at a time when you had a bank account in which you could have deposited this money and drawn checks thereon?
A. We built up the bank account for a purpose and I did not want to break into it. I had the cash on hand and it (was) more convenient for General Williams to send the post office money orders at that time.

Q. Can you state to us anything that may have led you to retain this cash reserve, to which you have testified, and which you kept in your possession at home, at a time when your various bills were accumulating and in some instances demands were being made upon you for payment?

A. There were two reasons. First, in holding off the statements for 30, 60 or 90 days it would be a point of good business to establish credit by finding out whether the shops or commercial houses would extend accounts. In one instance I wrote to a store in this city asking that my account be marked forward. My idea was that if it was not marked forward I would pay out of the cash reserve or the bank account. The credit was extended without question and I appreciated that greatly.

Q. Did General Williams from time to time discuss with you the subject of making payments in connection with these various accounts you were running?

A. He never discussed it with me, because he did not know where I had accounts. He did not make them and he did not pay them. I made them and paid the bills and the accounts were mine. In two instances the accounts were always addressed to Mrs. A. E. Williams. I have had an account with John Wanamaker of Philadelphia for 25 or 30 years, although that account may have started in the name of General Williams when he was a Lieutenant and we were living in Cuba. I have had an account with them always since. The other account is with Woodward & Lothrop here in Washington, and their bills are always sent to Mrs. A. E. Williams." (R. 400-402)

Character evidence introduced by the defense may be summarized as follows: Major General Louis H. Bash, now the Quartermaster General of the Army, under whom accused served for some time, testified that accused's reputation for integrity, honor and truthfulness among officers of the Army is "undoubtedly the highest", and that witness has known accused ever since he was a cadet and concurs unreservedly in the esteem in which accused is held by such officers (R. 411-412). Major General Robert Courtney Davis, Ret., formerly Adjutant General, American Expeditionary Forces in France, and later The Adjutant General of the Army, testified by deposition that he had heard of accused's service from time to time in the junior grades, knew of his service in France and in

the Quartermaster General's Office; that he had always considered accused a most efficient officer of the highest value to the military service; that he had the reputation of being one of the most efficient officers of the Quartermaster Corps and for many years has been known as one of the most outstanding officers of that Corps. He also testified that from his cadet days accused has always enjoyed the highest reputation for truth, integrity, honesty and veracity, and that witness would believe accused under oath (Ex. 25). Brigadier General John Lesesne DeWitt, formerly the Quartermaster General of the Army, testified by deposition that he had known accused for 36 years and had been closely connected with him in the military service since 1930. When witness was appointed the Quartermaster General of the Army, accused was on duty as Quartermaster Supply Officer, New York General Depot, and was later appointed brigadier general and Assistant to the Quartermaster General and was on duty in witness' office; that he was the immediate commanding officer of accused from about February, 1931, to February 5, 1934; that he had always considered accused to be an officer of fine character with high ideals of truth, integrity and honesty, and conscientious performance of his duty, and had he not believed accused to be an officer of this type he would not have recommended him for appointment as brigadier general and Assistant to the Quartermaster General in 1931; that he knows accused's reputation for truth, integrity, honesty and veracity in the military service, and that such reputation is excellent has never been questioned. (Ex. 26) It was stipulated between counsel for the prosecution and the defense that General John J. Pershing, General of the Armies of the United States, would, if called upon to testify in the proceedings, testify as follows: "I have known General Williams for many years and have always considered him an excellent officer of unquestioned integrity" (Ex. 27).

Colonel B. F. Miller, Field Artillery, who served directly under accused from June 1, 1932, to February 6, 1935, in charge of the Motor Transportation Branch of the office of the Quartermaster General (R. 197, 203), testified that he first knew accused during the World War; that he knows accused's reputation among officers of the Army for integrity, honor and truthfulness, and knows of nothing against accused's integrity; that he personally has the utmost respect, consideration, confidence, and affection for accused, and that he would believe accused under oath (R. 203).

The defense offered in evidence, with the consent of the prosecution, excerpts from various official records pertaining to accused. These were read into the record of trial by the defense as follows:

"For the period July 1, 1934, to February 5, 1935, General Bash rated General Williams' knowledge of General Williams' profession as superior. This question was asked: 'Of all general officers of his grade personally known to you what number would you give him on this list and how many comprise your list?' The answer was: 'No. 1 among the 3 Brigadier Generals of the Quartermaster Corps'.

For the period March 26, 1934, to June 30, 1934, General Bash rated General Williams' knowledge of General Williams' profession as superior. This question was asked: 'Of all general officers of his grade personally known to you what number would you give him on this list and how many comprise your list?' The answer was: 'No. 1 among the 3 Brigadier Generals of the Quartermaster Corps'.

For the period July 1, 1930, to July 23, 1931, when General Williams was officer in charge, Port of Embarkation, Pilgrimage War Mothers and Widows, General DeWitt, the then Quartermaster General, rated General Williams' manner of performance of duty as superior. He added: 'An officer of the finest type, of high character, forceful and able, has po(i)se, good judgment and common sense, with a wealth of experience in the performance of the varied duties of the Quartermaster Corps in peace and war'.

Next is an efficiency report covering the period October 7, 1925, to June 14, 1926, made by Major General Hagood, commanding the Fourth Corps Area. General Hagood rated General Williams' performance of duty as Chief of Staff of the 82nd Division as above average. He said that General Williams is 'A forceful, energetic, highly efficient officer'.

Next is an efficiency report by Brigadier General Albert J. Bowley, Fourth Corps Area, period August 1, 1925, to October 6, 1925. General Williams was then Chief of Staff of the 82nd Division and he was rated above the average in the manner of performance of duty. General Bowley said of General Williams: 'Excellent material for Quartermaster General'.

Next is an efficiency report covering the period June 7, 1924, to August 22, 1924. At that time General Williams was Assistant Commandant of the summer training camps at Fort Bragg, North Carolina. General Bowley rated him as above average in the manner of performance of his duty. That was concurred in by Colonel Darrah, Chief of Staff of the Corps Area Commander. General Bowley said: 'A highly efficient, loyal and resourceful officer'.

Next is an efficiency report covering the period September 1, 1922, to June 30, 1923, made by Major General E. F. McGlachlin, Jr., Commandant of The Army War College. General Williams was then a student at The Army War College. General McGlachlin said: 'Very much above average. General service value based on F and H - very much above average. Practical, conversative, zealous, thorough, enthusiastic, has a fine honest, simple, genuine character, is sound, reliable, helpful, accurate, convincing, a little slow, set in opinions, dignified, impressive'.

Next is an efficiency report covering the period July 1, 1921, to June 30, 1922, made by Major General H. L. Rogers, The Quartermaster General. General Williams was then Assistant to the Quartermaster General and in matters of supply and transportation he was rated superior. There is this statement: 'I rate Colonel Williams as one of the ablest officers in the Quartermaster Corps, and in fact one of the ablest in the Army. He is a man of wide experience and broad vision'.

I think any additional testimony along this line would simply be cumulative and we have nothing further to offer with reference to his efficiency record.

We now offer in evidence, with the consent of the prosecution, various commendations taken at random from the official files of the War Department.

PROSECUTION.

No objection.

LAW MEMBER.

Is the whole of that (indicating) offered or only the extracts?

DEFENSE.

We would save time to let what I have read go in.

PROSECUTION.

That is satisfactory to the prosecution.

DEFENSE.

There was an inspection made of the New York General Depot September 1, 1928, and June 11, 1929, by Colonel Louis J. Van Schaick, I. G. D. The following is an excerpt: 'Colonel Alexander E. Williams, Q. M. C., Colonel A. E. Williams, Q. M. C., General Superintendent Army Transport Service, New York deserves official commendation for his knowledge and grasp of the details of the Army Transport Service, and his business-like conduct of the Government's interests embraced within that service.'

Next is an individual record of decorations and citations. Under date of August 29, 1924, General Williams was 'awarded silver star citation by the War Department August 8, 1924, for gallantry in action against Spanish forces at Santiago, Cuba, July 1, 1898.' At the time of that service General Williams was a second lieutenant in the Second Infantry.

Reading from the same file I find that 'The board of decorations recommends and the distinguished service medal is awarded to Colonel Alexander E. Williams, Quartermaster Corps, United States Army. For exceptionally meritorious and distinguished services. As Chief Quartermaster, Army of Occupation, he displayed untiring zeal and administrative ability of the highest order in the organization and operation of the supply system of the 3rd Army. By his sound judgment, initiative and resourcefulness he solved many perplexing problems of supply and finance in a most satisfactory manner, thereby effecting a great saving for the United States.'

In the same file under date of March 31, 1921, concerning General Williams, I find that he was: 'Awarded decoration of the Order of University Palms, grade of Officier de l'Instruction Publique - Gold Palms, by the French Government.'

Any further evidence along this line would be cumulative, therefore we will not introduce it." (R. 426-429)

5. The defense was permitted the utmost latitude in attacking the credibility of Frank E. Speicher, the main prosecution witness. As the findings of guilty rest largely on Speicher's testimony the evidence relating to his credibility is set out in detail, including the parts thereof which were technically inadmissible. On cross-examination Speicher stated that he was employed by the Bec Corporation on August

2, 1932, and proceeded to Washington on August 3, 1932 (R. 59). On cross-examination of Victor Garrett, secretary and treasurer of the Bec Corporation, it was brought out that Speicher had informed Mr. Garrett that he went to Chicago immediately after August 2, 1932, for the purpose of interesting Montgomery Ward or Sears, Roebuck in the Bec tubes, and that Speicher had been paid expense money for the trip to Chicago (R. 142-144). However, on cross-examination, W. J. Sweet, Jr., president of the Bec Corporation, testified that the corporation did not pay the expenses of Speicher to Chicago, but only paid his expenses to Baltimore where Speicher interviewed someone with respect to the Chicago business (R. 217-218).

On cross-examination Speicher stated that while employed by the Bec Corporation he had received approximately $30,000, of which amount he paid around $15,000 or $18,000 to Roy Remick who was assisting him in his attempts to interest the War Department in the tube, and also implied that he paid Mr. Remick's expenses in connection with the marketing of the Bec tubes (R. 69-70). On cross-examination Mr. Remick testified that the maximum amount he received from Speicher was approximately $2200, and that Speicher did not pay his, Remick's, expenses in Washington (R. 189-194).

On cross-examination Speicher was asked the following question:

"Q. Did you ever show Mr. Howard a sum of money aggregating thirty or thirty-five thousand dollars which you removed from your shoes?
A. I did not.
Q. You deny that?
A. I do. I have heard that so much that I am sick of it." (R. 86)

At the conclusion of the opening argument of the prosecution the defense was permitted to introduce the deposition of Richard B. Howard. In this deposition the following questions and answers appear in the direct examination of Mr. Howard:

"Q. Will you state if upon any occasion Mr. Speicher has exhibited to you a large amount of money?
A. Yes.
Q. If so, kindly state fully the circumstances, including the approximate time, place and what you observed in this connection?

A. In the late fall, November or December, of 1933, at the Union Station at Washington, D. C., Frank Speicher exhibited to me a large roll of bills from his pocket and told me he had a large amount in his shoes. I put my fingers on the inside of his shoes and felt what appeared to be paper money. To the best of my recollection, he stated that this amount was $10,000." (R. 447)

At the same time the defense was permitted to put into evidence a deposition from Herman Henry Reinecke, who, in reply to similar questions propounded to him on direct examination, stated:

"On or about January 27, 1934, Mr. Speicher and I were in a hotel in Cleveland, Ohio. I asked him to cash a check for $200 for me. He cashed my check and in doing so displayed about $20,000, as near as I could estimate. The money was in bills, many of which were of one-thousand dollar denomination. He carried the money in his wallet, in various pockets and also in his shoes. On previous contact with Mr. Speicher he had complained of being short of funds. I have here the canceled check cashed for me by Mr. Speicher on January 27, 1934. (Check exhibited) I have not seen Mr. Speicher since that time." (R. 446)

Speicher also admitted that at various times in his career he had used the names Laughrey, Frank Speitzer, and Frank McQuaide (R. 66-67). He admitted representing the Anthony Body Company and the Commercial Shearing and Stamping Company in Washington at the same time as he was representing the Bec Corporation (R. 85-86). He admitted that he was arrested for forgery committed in Detroit in 1907, the document forged being a $75 check purporting to have been drawn by George Blakesley (R. 95). He also admitted that in April, 1909, he was indicted in the State of Michigan for uttering and publishing a forged and counterfeit instrument, which indictment resulted in his conviction and sentence on June 23, 1909, to from one to fourteen years in the Detroit House of Correction (R. 95-96). A certified copy of the record of the Recorder's Court of the City of Detroit in the case was received in evidence and read to the court (R. 418-420; Ex. 22). This record states that at the time of his conviction Speicher was 21 years of age; that he pleaded guilty to the crime of uttering and publishing a forged and counterfeit instrument;

and that he be committed to the Detroit House of Correction and confined therein for a term of not less than one year, with the recommendation that he be released at the end of that term if his conduct has been good. He also admitted that he was arrested in Detroit in February, 1912, charged "with false pretenses" (R. 96), and that he was arrested in Newark, New Jersey, about 1913 for passing bad checks (R. 97). He further admitted that in 1913, while at Wilkes-Barre, Pennsylvania, he secured the indorsement of Mr. Pettebone on certain checks purporting to have been drawn by Lawrence A. Early; that the name, Lawrence A. Early (drawer), and the name, Web Laughrey (payee and indorser), were placed thereon by him; and, furthermore, that the name, Lawrence A. Early, was fictitious. He admitted that he was later indicted in Wilkes-Barre "as a fugitive from justice". He testified in regard to these checks that they were subsequently paid and the indictment withdrawn. (R. 98-100) He was asked if he had been arrested by the detective bureau of Newark, New Jersey, on March 17, 1914, on a charge of grand larceny preferred by Peter Coffey of Brooklyn, New York, to which he replied, "I may have been" (R. 100). He was also asked if he had been indicted in December, 1917, by the Hudson County New Jersey Grand Jury for false pretenses growing out of an agreement with James Cannon, a municipal official, to sell him a Stearns automobile, value of the automobile, $2000, to which question he replied, "I was in the automobile business at that time, and what you are reading you can take any way you desire. I had a going business at that time, but I failed. That happens to be one of the transactions you are laying stress on" (R. 100). He was asked if he had been indicted for false pretenses in cheating Alfred Cradick out of $1200, to which question he answered, "It was not a matter of cheating. It was a matter of owning a business and the cars all falling down. I was not the only one who had the same trouble around the United States at that time" (R. 101).

Speicher further testified that he had been drafted during the war with Germany and assigned to Camp Humphreys, Virginia, as a sergeant, and that while stationed there he had filed application for a commission in the Army (R. 101). He denied having testified under oath to Captain Trevor of the Military Intelligence Department in the City of New York in 1919, that he had talked with Colonel Coddington in regard to a commission (R. 102). Speicher admitted returning to Camp Humphreys after one of his trips to Washington in the uniform of a captain without having received a captain's commission and without having been sworn in as an officer (R. 103). He also admitted that sometime after his return

to Camp Humphreys in the uniform of a captain he was turned over to a detective from the State of New Jersey, and that on his way to New Jersey he purchased or caused to be purchased the insignia of a major, which he put on and wore (R. 103,107). Speicher denied ever having made the following statement:

> "I told him I had been in the service since July and was over after a commission. He said he knew Colonel Stair very well, he was a particular friend of his, and he said sit down and I will see what I can do to help you along with it. I waited. He came out to me. He said 'There are certain things that have to be done around here in order to get your commission'. He said that somebody has to be taken care of. I said 'What do you mean by that'. I said 'I have no money, but perhaps I could get some'. He said 'Two hundred dollars would see this party'. I said 'Who is the party'. He said 'That don't interest you'. I said 'No, he don't interest me'. At that time I didn't have the money. He asked me when I could get the money. He said 'Can I depend upon you getting it?' I said 'If I get it I will give it to you, but I don't know what you want to use it for'. He said 'Come in here'. Colonel Stair sat there, and they were talking together. Colonel Stair went out. He (Colonel Coddington) took my application and all the papers pertaining to it." (R. 104,106)

The defense also asked him the following question:

> "Q. Did you ever make this statement? 'How long did you appear in the Captain's uniform at Camp Humphreys, how many days?' The answer was: 'I appeared in the Captain's uniform from the 2nd or 3rd of October until about the 20th. Then I met Coddington, after ten or fifteen, or twenty days - afterwards - and met him at the Motor Transport Corps in Washington, and he asked me how I was making out, I said "Alright", I said I have not received any certified copy of my commission, because I kept asking Major Finney had it arrived. He said "I will take care of that". I said "I was supposed to be assigned for duty". He said "I think

> we will send you down to Camp Johnson, we have a Motor Transport Corps down there". Now he put a proposition up to me which was this - instead of making it $200, if I would make it $500, that he would see that I got a Major's commission'. Did you make that statement?"

to which he answered:

> "I may have made the statement, but I never made it with Colonel Coddington's name injected because I do not know him." (R. 106-107)

Speicher admitted that on his return to New Jersey he was released on $5000 or $10,000 bail and that while he was out on bail he wore the uniform of a major (R. 107-108).

Speicher admitted having written the following letters without authority from the Secretary of War or any other authorized person:

"Address reply to Chief, Motor Transport Corps, Washington, D. C.

WAR DEPARTMENT

Office of the Chief, Motor Transport Corps, Washington,
March 1, 1919.

In answer refer to File No. 210.

From: Lt. Col. W. F. Speicher.
To: Amitale Corporation.
Subject: Contract for Tires.

1. This letter will be authority for the following amounts and sizes of tires from the Motor Transport Corps:

2. We will release immediately seventy-five thousand (75,000) 37x5 Goodyear, all weather tred cord tires now held at Toledo, Ohio, and consign them to you immediately.

3. The price of these tires will be $30.00 apiece. Therefore, you will be required to meet a sign draft bill of lading on a New York bank for the sum of $2,250,000.00 which you will be notified on arrival of tires in New York. We guarantee these tires to be first.

Lt. Col. F. E. Speicher,
Disbursing Officer."

"Address reply to Chief, Motor Transport Corps, Washington, D. C.

WAR DEPARTMENT
Office of the Chief, Motor Transport Corps
Washington, March 4, 1919.
In answer refer to File No. 210.

From: Lt. Col. F. E. Speicher.
To: Amitolo Corporation.
Subject: Contract for Dodge Touring Cars.

1. This letter will be your authority for the purchase from the Motor Transport Corps for 429 Dodge 1918 touring cars.

2. We will assign to you as soon as we have a complete inventory this amount of Dodge cars mentioned herein. We will notify you within ten days at what place we will deliver same to you.

3. It will be necessary for your company to bear the expense of either convoying these cars from Camp Bolabird, Baltimore, Maryland, or a New York port.

Lt. Col. E. F. Speicher,
Disbursing Officer."

"Address reply to Chief Motor Transport Corps, Washington, D. C.

WAR DEPARTMENT
Office of the Chief, Motor Transport Corps
Washington, March 15, 1919.
In answer refer to File No. 210.

From: Lt. Col. F. E. Speicher.
To: Amitalo Corporation.
Subject: Contracts for the following merchandise:

1. This letter will be your authority for the prices of tires and Dodge cars issued you on March 1 and March 4, 1919. Price on 110,000 tires of various sizes will be twenty ($20) dollars apiece. The price on 75,000 tires 37x5, Goodyears, all weather tread, will be Thirty ($30) dollars apiece. The price on the 429 Dodge touring cars will be Four Hundred ($400) dollars apiece.

2. It is understood between the Government and the Amitalo Corporation of New York that the terms set down in this contract are binding on both parties. That if on the failure of the Amitalo Corporation to pay within 48 hours after being notified that either tires or cars have reached their destination called for by the Amitalo Corporation, that the Disbursing Officer has the authority to cancel all contracts with the Amitalo Corporation at once.

3. We further agree to send these tires by trucks to you. The first shipment will be between March 15 and 20th, 1919.

Lt. Col. F. E. Speicher." (R. 109-113)

Speicher admitted having received $5100 from the people in New York with whom he had been negotiating in regard to the sale of the Dodge cars and tires, with which he purchased a Stutz automobile for the purpose of giving it to Colonel Finney, an Army officer involved in the Dodge car and tire deal (R. 113-114).

Speicher admitted that he was arrested on April 12, 1919, by officers of the Military Intelligence Department and returned to Governors Island; that he escaped from Governors Island on or about May 9, 1919; that he was again apprehended near Ellenville, New York, and returned to Governors Island (R. 114-116); that he was tried before a general court-martial at Governors Island, New York, on August 16, 1919, and convicted of desertion and escape from confinement (R. 116). General Court-Martial Order No. 403, Headquarters Eastern Department, Governors Island, New York, dated August 16, 1919, was admitted in evidence and read to the court (R. 423-425; Ex. 23).

Speicher was asked if he had been arrested in Jersey City on April 21, 1923, and turned over to the Federal authorities, to which he replied, "Perhaps so" (R. 117).

On redirect examination of Speicher the prosecution brought out that he had been honorably discharged from the Army on June 11, 1920 (Ex. 24); that the dishonorable discharge adjudged against him by General Court-Martial Order No. 403, Headquarters Eastern Department, had never been executed, as he had been honorably restored to duty on January 17, 1920, and served five months thereafter as an enlisted man

in the Guard Company of the Disciplinary Barracks at Governors Island (R. 119-120). Speicher also testified that he had only been convicted twice during his lifetime, once in Detroit in 1909, and once for desertion and escape while in the Army; that he was only 18 or 19 years of age when convicted in Michigan, and that the reason for his conviction had been his plea of guilty, which plea he had made on the advice of "some smart lawyer" (R. 121-122).

Lieutenant Colonel Bruce R. Campbell, United States Army, Retired, testified that he had known Speicher in 1919 or 1920, and had had several conversations with him about the Army, during which Speicher had said "that if he ever had an opportunity to hang it on anybody in the Army, he would most assuredly do it, as they had always tried to hang it on him". This witness also testified that while Speicher was a witness against him during an investigation being conducted by a subcommittee of the House, Speicher would inform him of what was taking place. (R. 380-381) On cross-examination the prosecution brought out that the witness and Speicher had been on very intimate terms in 1921, and that while witness was a commissioned officer on the active list he was using Speicher to obtain confidential information in regard to the investigation being conducted by the War Department (R. 381-383).

In order to rehabilitate Speicher, whose testimony had been impeached, the prosecution called Colonel John E. Hunt, United States Army, Retired, who had been Commandant of the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, during the period Speicher had been incarcerated therein. This witness testified that Speicher had been recommended for restoration to duty because he had made no attempt to escape, though he was under indictment in New Jersey, and had given no trouble or difficulty to the authorities at the Disciplinary Barracks. This witness also testified: "So far as I was concerned he seemed to be perfectly trustworthy". (R. 208)

6. When the prosecution started to offer evidence of various deposits made to the credit of accused's bank accounts and various payments made to creditors shortly after November 27, 1933 (the date that evidence previously offered by the prosecution shows $2500 to have been paid over by Speicher to accused), the defense objected, basing its objection on the case of Williams v. United States, 168 U.S. 382 (R. 273-274). In that case it appears that one Richard S. Williams, Chinese Inspector at Port

of San Francisco, was indicted and tried in the District Court of the United States for the Northern District of California for having feloniously extorted and received from one Wong Sam, on September 18, 1895, the sum of $100 for permitting one Wong Sin Choy, also a Chinese, to enter the United States, and for extorting and receiving $85 from one Chan Ying, another Chinese, in consideration of his being permitted to come into the United States. The date of the receipt of the $85 from Chan Ying is not shown in the opinion. Over the objection of accused, the prosecution read in evidence an affidavit of accused, made June 1, 1896, and filed by him in a divorce suit brought against him by his wife. In this affidavit accused admitted being worth about $5000 on the date he was first employed by the Government, September 25, 1893, and the inheriting of other property since that date. The prosecution also introduced a bank deposit book showing deposits to the credit of accused in the San Francisco Savings Union of $1300 during October, 1893, and November and December, 1895, and a deposit book showing deposits to the credit of Mrs. Williams in the Hibernia Savings and Loan Society of $3450 in September, October and December, 1895. The United States Supreme Court held that, no connection having been shown between the possession by the defendant of the sums specified in the affidavit and bank books and the alleged extortion by him of two named sums from certain persons, the evidence pertaining to the affidavit and bank books was improperly admitted, and reversed the judgment of the lower court.

The defense contended that this decision had direct application to the instant case and that, as a decision of the United States Supreme Court is binding on the United States District Courts, it is also binding on courts-martial under the rule stated in paragraph 111, Manual for Courts-Martial, that "So far as not otherwise prescribed in this manual or by act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States will be applied by courts-martial".

Prior to the time the prosecution offered this evidence, it had introduced evidence showing $2500 in cash paid by Speicher to accused on November 27, 1933, and that at that time accused was practically without funds and greatly in debt. After hearing lengthy argument by the defense and prosecution (R. 274-310), the law member made the following ruling:

"The ruling is that the test of evidence is its relevancy. The prosecution may proceed to introduce relevant testimony and evidence. It will be allowed to proceed provisionally, and if the relevancy of the evidence is shown it will be accepted. If the relevancy does not appear, the court will take proper action.

The doctrine of the Williams case is, of course, accepted, but the doctrine enunciated in that case applies to the facts of that case which they were considering." (R. 310-311)

Thereafter the prosecution elicited from accused the testimony hereinbefore mentioned showing that between November 27, 1933, the date upon which Speicher delivered $2500 to accused, and December 18, 1933, there was deposited in his two bank accounts and otherwise disbursed by him $2312.99, the greater part thereof being in cash, exclusive of his pay.

In the opinion of the Board this evidence was proper for consideration by the court as connected with and relevant to the offense alleged in Specification 1 of the original Charge, and the ruling of the court thereon was not in error. The distinction between the Williams case and the instant case is that in the first there was no necessary connection, either as to time or amounts, between the bank deposits and the offenses charged, while in the instant case there is such a connection. The correctness of the ruling of the law member is supported by Commonwealth v. Mulrey, 49 N.E. (Mass.) 91, 94; People v. Connolly, 237 N.Y.S. 303, 320; Silverman v. United States (C.C.A.), 59 Fed. (2d) 636, 638; the review of the Attorney General of the general court-martial record of Captain Oberlin M. Carter, Engineer Corps, U.S.A., published in 22 Ops. Atty. Gen. 589, 601; and sec. 154, Wigmore on Evidence, 2d ed., and cases there cited.

At a hearing before the Board of Review on June 21, 1935, the individual counsel for accused, J. Leonard Townsend, Esq., Attorney at Law, Washington, D. C., reiterated the arguments he had made at the trial as to the evidence above discussed, and again contended that the court erred in admitting such evidence. He also assigned as error the ruling of the law member refusing admission in evidence of a recapitulation of bank deposits of accused, prepared by the office of Colonel Reed, an inspector general, over his signature, for the period November 4, 1925, to December 15, 1934 (R. 364-365). This recapitulation related largely to periods too remote in point of time and was hearsay, and so inadmissible. In the opinion of the Board the law member did not err in his ruling on this question.

7. In weighing the evidence and determining whether it establishes the guilt of accused beyond a reasonable doubt it is necessary to consider carefully the credibility as witnesses of Frank E. Speicher, accused, and Janie M. Williams, accused's wife. It is clear that Speicher has had a checkered career, been guilty of various deceits, and convicted once by a civil court and once by a general court-martial. However, it does not follow that his testimony in this case is untrue. His story is corroborated in various material respects by Colonel B. F. Miller, (FA) Quartermaster Corps, by Mr. Sweet and Mr. Garrett, president and vice president-treasurer, respectively, of the Eastern Bec Corporation, Roy C. Remick, Speicher's business associate in Washington, Harold Schnuer, New York City lawyer, and by accused himself. Further corroboration is furnished by the Western Union money order for $2500, dated November 25, 1933 (Ex. 7), and by the note in question (Ex. 8), which accused admits is in his own handwriting.

In the final analysis the question for decision is whether the note for $2500 made by accused on November 24 was executed under the circumstances testified to by Speicher or under the circumstances testified to by accused. Accused's story does not ring true. The Board cannot conceive that an officer of accused's education, intelligence and experience would execute a note of this considerable amount payable to bearer, under the circumstances described by him, and evince so little interest as to its ultimate disposition. Neither can the Board conceive that an officer of accused's business training and experience in the Quartermaster Corps would so nonchalantly and carelessly handle a business transaction of importance to himself, nor that he is as ignorant of ordinary business principles and precautions as his testimony indicates. His testimony as to the making of the note is unbelievable, was not accepted by the court, and cannot be accepted by the Board as the true explanation thereof. In the opinion of the Board extended comment on the testimony of Mrs. Williams is unnecessary. Suffice it to say that in its material aspects the Board considers her story unusual, improbable and unworthy of weight as accounting for the sums aggregating more than $2500 which accused had in his possession shortly after November 27, 1933. With accused's explanation of the note and Mrs. Williams' story eliminated from consideration, the testimony of Speicher, corroborated as it is in many respects, is accepted by the Board as true, and with the other competent evidence in the case supports the findings of guilty of the original Charge and Specification 1 thereunder.

The findings as to the Additional Charge and its specification are supported by the evidence as to Specification 1 of the original Charge heretofore discussed and by several stipulations entered into between the prosecution and the defense. The only question that requires mention is whether the testimony given by accused before Subcommittee No. 3 of the Committee on Military Affairs, House of Representatives, as alleged in the specification, was a material matter. The prosecution and defense stipulated that this testimony was germane and material to the inquiry. The finding of the court on the specification shows that it adopted this theory. This stipulation is a conclusion of law and as such is not binding on this Board. However, after examining House Resolution 275 (hereinbefore quoted), under which the subcommittee was acting, the Board is of opinion that the testimony set forth in the specification was a material matter.

8. At the time of the trial accused was 60 2/12 years of age. His service is shown by the Army Register as follows:

"Cadet M.A. 20 June 94; 2 lt. of Inf. 26 Apr. 98; 1 lt. 2 Mar. 99; capt. 31 Dec. 02; Q.M. 15 Dec. 07 to 14 Dec. 11; Q.M.C. 28 Apr. 15; maj. 26 Jan. 17; lt. col. (temp.) 5 Aug. 17; col. (temp.) 9 May 18 to 30 June 20; reld. Q.M.C. 30 June 20; col. 1 July 20; trfd. to Q.M.C. 30 July 20; brig. gen.a. Q.M. Gen. 24 Nov. 20; accepted 27 Nov. 20 (recess apmt. expired 4 Mar. 21); F.A. 5 Sept. 23 to 11 Feb. 24; brig. gen. A. to Q.M. Gen. 24 Jan. 31; accepted 6 Feb. 31."

9. Long and honorable service in the Army is its own reward and imposes an obligation in direct ratio to length of time and degree of excellence. In the opinion of the Board the long service of accused deprives rather than entitles him to special consideration in the nature of clemency. There is not a word in the record of trial indicating lack of deliberation or extreme stress of circumstance on his part. On the contrary it appears that in the fullness of mature judgment and after weighing the consequences to his advantage and to his disadvantage, accused deliberately and premeditatively elected to pursue the course which he knew might bring discredit to the military service and disgrace to himself and family. The offense alleged in the specification of the Additional Charge is analogous to that of making a false official statement, for which the customary punishment is dismissal. The Board does not recommend any clemency.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and warrants approval thereof. Dismissal is authorized for violation of the 96th Article of War.

Edwin O. Saunders, Judge Advocate.
W. A. Trumbull, Judge Advocate.
L. M. Smith, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., AUG 3 1935 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Colonel Alexander E. Williams (O-90), Quartermaster Corps.

2. I concur in the conclusion of the Board of Review that no errors injuriously affecting the substantial rights of the accused were committed during the trial, that the record of trial is legally sufficient to support the findings of guilty and the sentence and warrants approval thereof.

In view, however, of the fact that the court in this case was appointed by the President, I have deemed it particularly appropriate to make some additional observations pertaining to the evidence as shown by the record of trial and to give expression to my views on certain legal principles which I conceive to be applicable thereto, as well as to remark concerning the sentence imposed by the court and the matter of the exercise of clemency.

3. Accused's testimony as to the tearing up of the note and that he did not know that it was in existence until displayed to him in December of 1934 by the House Military Affairs Committee was discredited by the testimony of Harold Schnuer, an unimpeached witness. In regard to the existence of this note Schnuer testified:

"Q. After May 27, 1934, did you ever have any further conversation with General Williams?
A. I did.
Q. Personally, face to face, or otherwise?
A. Only by telephone.
Q. How often until today, say?
A. I do not know exactly. Just guessing I would say 2 or 3 times. I can recall only one definite conversation.
Q. What conversation was that?
A. The latter part of August, August 26, I believe, from the Hotel New Yorker in New York City.
Q. What was the object of calling General Williams at that time?

A. Mr. Silverman had been in communication with Mr. Speicher directly and at that time arrangements were trying to be made so that Mr. Speicher could return to Washington and testify. These negotiations had been going on over a period of months, but nothing had been done. My purpose in calling General Williams was to advise him that there would not be any further delay, that Mr. Speicher was going to Washington regardless of consequences to anybody. I asked General Williams only 5 or 6 questions which I had written down. He answered these questions. I informed him that no more delay in this matter would be allowed.

Q. What did he have to do with Mr. Speicher giving himself up?

A. It was one of Mr. Speicher's contentions that the reason he did not come here was because of General Williams and that piece of paper. Secondly, Mr. Speicher had been in touch with General Williams all this time and had been telling him 'Don't worry; don't believe what anybody says unless I say it to you.' That was with respect to this piece of paper. I had mentioned that to General Williams. At the time of this conversation in August, matters had been delayed and it looked like that matter might go on for years. Mr. Speicher thought it best to call General Williams and that he had better do something about straightening this affair.

Q. What did General Williams then say to you?

A. I asked him a few questions that I can remember. I asked him how matters were down there and he said 'Matters are not hot.' Then we talked something about Joe Silverman. He told me that patience was a virtue. He limited his words over the telephone but that was the substance of his conversation. I recall another conversation but I cannot give the locality. It was a friendly conversation and I told the General not to believe anything unless Mr. Speicher said it to him.

Q. Was anything said about this piece of paper, as you term it, in these conversations?

A. Yes; indirectly. It was not termed a promissory note. It was termed a 'piece of paper.'

Q. What was said by you or General Williams in the conversations?

A. The most I ever said to him was, in substance, 'Don't worry about the piece of paper; it is in good hands. Don't believe anything you hear until you hear Mr. Speicher say it himself.'
Q. What did the General say in answer to that, if anything?
A. I do not recall.
Q. Did he make any inquiries as to what you meant by 'piece of paper?'
A. He did not.
Q. Are you sure that you mentioned 'piece of paper?'
A. Yes, sir " (R. 171-172).

From accused's own admission it appears that prior to December 10, 1934 (the date he testified before the House Military Affairs Committee he had not given Speicher a note and had not received any money from him), he had been told that Speicher had informed people that he, accused, was indebted to him, yet accused did not claim either to Speicher or Schnuer that the possession of the note had been obtained by fraud, in fact denied mentioning the note to either of them. Mr. Schnuer's testimony indicates that accused was disturbed about the note and was trying to get possession of it prior to the time accused testified before the Committee. All of this evidence tends to corroborate Speicher's testimony in regard to accused's delivery of the note to him.

It appears from the evidence that the principal witness, Frank E. Speicher, more than 25 years ago had been convicted in a civil court of the crime of uttering and publishing a forged instrument, and that in 1919 he was found guilty by general court-martial of desertion and escape from confinement and sentenced to dishonorable discharge and eighteen months confinement, being thereafter restored to duty and given an honorable discharge from the Army. There was other testimony introduced by the defense, much of which was highly incompetent, tending to affect his credibility as a witness. On the other hand, some of the witnesses expressed confidence in his veracity. The question of the credibility of any witness and the weight to be given to his testimony is one primarily for the court. As it has the witness before it, it is in the best position to judge of the credibility of the witness and the weight to which his testimony is entitled from all the facts and circumstances in evidence including the important factors of his demeanor on the stand and the reasonableness or unreasonableness of his statements, and his interest or lack of interest in the result of the trial.

The same rule was properly for application in connection with the testimony of the accused and his wife, who testified to many unusual circumstances.

Considering their testimony as to such circumstances, though I did not have the opportunity of observing their conduct on the witness stand, I am unable to find any fault with the court for accepting, as it must have done, the statement of Speicher concerning the circumstances attending the payment of the money and the delivery of the note, and in disregarding the testimony of the accused and his wife with respect to the cash reserve, particularly in view of the fact that Speicher's testimony in many important features was corroborated by that of other witnesses.

The Manual for Courts-Martial, 1928, provides (par. 149, p.175):

> "The testimony of a single witness is insufficient to convict for perjury without corroboration by other testimony or by circumstances which may be shown in evidence tending to prove the falsity. Documentary evidence is especially valuable in this connection; * * *."

It has generally been recognized by the War Department that the crimes including perjury especially mentioned in the 93d Article of War have reference to common-law offenses. Assuming that the rule should be applied also in the trial of an accused for the crime of statutory perjury charged as a violation of A.W. 96 (Specification of Additional Charge), it is my judgment that the rule is fully satisfied in this case by corroborating evidence, both oral and documentary, and I am satisfied that the evidence taken as a whole establishes the guilt of the accused beyond a reasonable doubt of both specifications and charges of which the accused was found guilty.

4. At the trial and subsequently before the Board of Review counsel for the accused objected to the questions asked of the accused by the prosecution on cross-examination regarding the financial transactions of accused immediately following and for about three weeks after the date the accused was alleged to have received the $2500 from Speicher, the objection being based on the decision in the case of Williams vs. United States (168 U.S. 382).

I have carefully examined that opinion in connection with the facts disclosed by the evidence in this case and it is my opinion that the facts

in the instant case distinguish it from the case which the Supreme Court had under consideration, and that there is nothing in the opinion in that case which indicates that error was committed in the trial now under consideration in admitting in evidence the financial transactions referred to above. In fact I think that opinion properly construed recognizes the existence of a rule of evidence which clearly made the transactions admissible in evidence in this trial. The Board of Review has discussed the opinion of the Supreme Court at length and after citing authorities in support of its view, concludes, rightly I think, that the Supreme Court's opinion does not support the contention of counsel.

5. Under the specification of the additional charge, the accused was found guilty of the crime of perjury inhibited by section 5392, Revised Statutes (U.S.C. 18:231), the punishment for which is a fine of not more than two thousand dollars and imprisonment for not more than five years. By the table of punishments prescribed by the President for enlisted men convicted of perjury under the 93d Article of War, the maximum punishment is fixed at dishonorable discharge, total forfeitures, and confinement at hard labor for not exceeding five years (par. 104 c, p. 99, M.C.M., 1928). Having regard to the finding of guilty of the offense of perjury alone and disregarding the fact that accused was found guilty of another offense, it would seem, in view of the punishment fixed by Congress for the crime of perjury and the maximum punishment fixed by the President for enlisted men convicted of this crime, that the court, in adjudging the punishment in this case of dismissal only, has already exercised clemency, though the dismissal of an officer with the attending disgrace and consequent loss of pay both active and retired is a punishment severe in itself.

It is noted with reference to this specification (Specification of Additional Charge) that the Board of Review has said for the purpose of justifying its recommendation that the sentence should be executed, that the offense therein alleged "is analogous to that of making a false official statement, for which the customary punishment is dismissal". The making of a false official statement by an officer of the Army is recognized as a serious military offense. However, Congress has not by statute specifically recognized that offense as a crime as it has the giving of false testimony before a committee of Congress. It is true as said by the Board of Review that upon conviction by court-martial of the offense of making a false official statement an officer is customarily sentenced to dismissal. In my view the crime of perjury of which accused was found guilty is much more serious than the making of a false official statement and certainly does not merit any less punishment.

6. It is understood that counsel for the accused in presenting the case to the Board of Review contended that the entire membership of the court recommended clemency, whereas but five of the ten officers composing the court actually signed such a recommendation.

Four members of the court joined in recommending commutation of the sentence of dismissal, to

> "suspension from rank, duty and command during the remainder of his service on the active list, and forfeiture of all pay and allowances for four (4) years."

One member recommended commutation to

> "suspension from rank, duty and command and forfeiture of all pay and allowances for a period of five (5) years", stating he is "one of those who joined in the unanimous vote for clemency."

The Manual for Courts-Martial contemplates that members of a court-martial who may desire to recommend clemency will make such recommendation in writing over their own signatures and that the same will not be embodied in the record of trial, but will be forwarded with it (M.C.M., 1928, par. 81; id. 1921, pars. 332, 357(b) 57 (d)).

Even if all members of the court originally favored clemency, they had a perfect right to change their minds and decline to sign such a recommendation for reasons deemed sufficient by them. In this case, therefore, there is for consideration of the President the recommendation of the five members of the court only.

7. In view of the offenses of which the accused has been found guilty I do not recommend that any clemency be extended.

8. Inclosed herewith is a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to approve the sentence and carry it into execution should it meet with approval.

9. Also inclosed is my separate memorandum relating to requests for clemency made on behalf of accused. This memorandum also includes a statement of accused's service in the Army.

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of letter for sig. of Secy. of War.
Incl.3-Form of Executive action.
Incl.4-Memorandum as to clemency and service of accused.

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

JUN 22 1935

Board of Review
CM 203356

UNITED STATES)	SEVENTH CORPS AREA
)	
v.)	Trial by G. C. M., convened at
)	Fort Lincoln, North Dakota,
Captain OAKLEY L. PARKHILL)	May 20, 1935. Dismissal.
(O-223174), Infantry)	
Reserve.)	

OPINION of the BOARD OF REVIEW
SAUNDERS, TURNBULL and SMITH, L.M., Judge Advocates.

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

2. Accused was tried upon two specifications, each alleging embezzlement in violation of the 93d Article of War. Accused pleaded not guilty to both specifications and the charge. He was found guilty of both specifications and the charge and was sentenced to dismissal. The reviewing authority disapproved the finding as to Specification 2, but approved the sentence, and forwarded the record of trial for action under the 48th Article of War. The offense of which he stands convicted is as follows:

> Specification 1: In that Captain Oakley L. Parkhill, Infantry-Reserve, did, at Fargo, North Dakota, from on or about July 14, 1934, to on or about March 24, 1935, feloniously embezzle by fraudulently converting to his own use seven hundred dollars thirty-six cents ($700.36), property of the Company Fund, Company 1783, VCCC, which came into his possession by virtue of his office as custodian of the aforesaid Company Fund.

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

Accused was placed on active duty with his consent for a period of six months, beginning July 4, 1934, by paragraph 2, Special Orders No. 68, Headquarters 88th Division, Minneapolis, Minnesota, dated July 2, 1934; paragraph 7, Special Orders No. 283, Headquarters 7th Corps Area, dated December 1, 1934, continued him on active duty with the CCC until March 15, 1935; and paragraph 6, Special Orders No. 41, Headquarters 7th Corps Area, dated February 20, 1935, further extended his period of active duty to September 14, 1935. Paragraph 1, Special Orders No. 44, Headquarters North Dakota District, CCC, dated July 13, 1934, assigned him to command the 1783d Company, Veterans' CCC, with station at Valley City, North Dakota (R. 10). As such he was custodian of the Company Fund of that organization (R. 25).

On March 21, 1935, Captain Thomas G. Poland, 4th Infantry, was ordered by the commanding officer of the district to audit and inspect the funds of the Veterans' Company 1783 CCC. Arriving at the camp at about 1:00 p.m., March 22, 1935, he found that accused was not there. However, he started inspecting the camp and began his inspection of post exchange funds later in the afternoon. The day following he sent for bank statements and was working on the audit of the company fund when accused arrived at about 11:00 a.m. Finding that Colonel Farrell had audited the fund for September, 1934, he started at that point, but later he discovered an earlier irregularity and decided to begin his audit about the middle of July, 1934, the date upon which accused took command of the company. He found a check for $50 on the bank statement which did not show on the check book stub and a deposit of $50 on the statement which did not show on the stub, and for October and November he found two similar entries, checks for $30 and $5 which showed on the bank statement but not on the stub. He concluded that the fund was about $90 short for the month of November. Resuming the audit on the following morning, March 24th, he found the fund so confused that with the consent of accused he asked Captain William R. Hazelrigg to assist him in checking the funds. They found his figures of the day before approximately correct (R. 4).

Upon resuming the audit after lunch accused made a statement to Captain Poland regarding the fund. Accused was first warned by Captain Poland "that it was not necessary for him to say anything about the audit", but that "anything he said could be used against him".

Accused then stated that he understood the warning and "that on account of sickness and heavy indebtedness and pressure through channels about bills, he had used certain of camp funds and that he was willing to make up the amount of shortage; that he cashed certain checks for cash and then would deposit his monthly pay check or around that amount later in the month to make it up; that he desired to do all he could to correct this in every way because he wanted to clear the matter up" (R. 3-6).

The audit was concluded to cover the month of March, 1935, and the figures showed that approximately $580 to $599 should be in cash on hand. The accused was requested to produce this amount and he informed Captain Poland that "he did not have it, but that he could make it up". Accused was then ordered to Fort Lincoln, North Dakota, for investigation and all papers and records pertaining to the fund in question were also transmitted to that station (R. 5). In view of the fact that the figure representing the total shortage in this fund ($580 to $599) as determined by Captain Poland was only "a general figure", the fund was reaudited by order of the district commander. Accordingly all papers and records were turned over by Captain Poland to Second Lieutenant Arnold A. Hanson, Field Artillery Reserve, and Second Lieutenant Richard R. Saul, Quartermaster Reserve, for the purpose of the additional audit (R. 8). These two officers were experienced accountants and bookkeepers and upon completion of their examination of this unit account for the period July, 1934, to March, 1935, a total shortage in the company fund of $700.36 was found to exist (R. 13,16).

Upon completion of the second audit referred to above, all figures were again checked by Second Lieutenant Einar A. Erickson, Field Artillery Reserve, also an experienced accountant and bookkeeper, who found that the shortage of $700.36 in the company fund account was correct (R. 19). This witness found several errors in the audit of Lieutenants Saul and Hanson but stated that the final amount of the shortage in the company fund ($700.36) as shown by their figures was correct (R. 20).

The records relating to the company fund on which the audits were based were received in evidence without objection by the defense, the latter stipulating in most instances that such records are the records of Company 1783, VCCC (R. 7-21; Exs. B-Z).

Accused testified in his own behalf to the effect that he is 45 years of age, having been born at Thorp, Wisconsin, where he received a common school education. He completed one year and five months college preparatory work at LaCrosse, Wisconsin, and thereafter worked in different occupations performing common labor on farms and in logging camps (R. 25), and was married in 1916 (R. 38). In 1917 accused enlisted in the 2d Wisconsin Infantry, National Guard, and entered an officers' training camp, but was honorably discharged because of insufficient education. He later entered active service with the Wisconsin National Guard, became a sergeant, and left for France in January, 1918, on the U.S.S.Tuscania, which was torpedoed off the Irish coast (R. 26). Accused, with other survivors, proceeded to France and rejoined the 32d Division which then entered the Aisne-Marne sector, and in September, 1918, he was commissioned a second lieutenant of Infantry, entered the front lines, and was wounded at Bois de Fays (R. 27). Accused refused to be evacuated and rejoined his unit. He served overseas a total of sixteen months and four days, during which time he was decorated for bravery in action, receiving the Distinguished Service Cross (R. 28; Exs. 1-2) and the French Croix de Guerre (R. 30; Ex.3). Upon returning to the United States accused was discharged (R. 30), and upon returning to civil life met with various financial reverses (R. 31-33). At the time of entering upon active duty as a reserve officer in July, 1934, accused's total indebtedness was $2472.17 (R. 33). He has received continued demands for money from his creditors since such time and "withdrew certain sums" from the company fund "only when hard pressed by creditors to pay them enough to keep them from causing my trouble" (R. 34). He would then deposit varying amounts from his pay check to the credit of the fund. Although the record does not show specifically the total amount withdrawn during the period in question by accused from the company fund, his testimony indicates that he deposited while custodian from his personal funds to the credit of this account various sums which total $1101.50 (R. 34,35).

Since being relieved in March, 1935, he has made restitution of $241.15 of the shortage, the amount paid being derived from the sale of his personal effects (R. 39-40).

4. The testimony and exhibits received by the court establish beyond a reasonable doubt the embezzlement by accused as set out in Specification 1 of the Charge. Accused admits in his own testimony that as custodian of the fund in question he withdrew from time to time varying sums of money which he applied to his own use.

5. Accused is 44 11/12 years of age, and his records show he was commissioned a second lieutenant, Infantry Reserve, on September 25, 1925, was promoted to first lieutenant July 30, 1929, and to captain on December 27, 1933. He has performed active duty service as follows:

July 2 to July 15, 1928;
August 14 to August 30, 1929;
July 5 to July 18, 1931;
August 8 to August 21, 1933;
July 4, 1934, to date.

The details of his World War service are stated with substantial accuracy in his testimony.

6. The court was legally constituted. Accused as a reserve officer is subject to military law. CM 202479, Babbington; CM 202366, Fox; CM 201678, Anderson. No errors injuriously affecting the substantial rights of the accused were committed at the trial. The record of trial is legally sufficient to support the findings of guilty and the sentence and warrants confirmation thereof.

Ferris S. Saunders, Judge Advocate.
N. A. Trumbull, Judge Advocate.
F. M. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 203393

JUL 25 1935

UNITED STATES	)	NINTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort MacArthur, California, May 2 and 3, 1935. Dismissal, total forfeitures, and confinement for three (3) years.
Second Lieutenant DON F. LITTLE (0-288374), Cavalry Reserve.	)	

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

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

2. Accused was tried before a general court-martial convened at Fort MacArthur, California, pursuant to competent orders of the Commanding General, Ninth Corps Area, on May 2 and 3, 1935, on charges alleging desertion in violation of the 58th Article of War (Charge I), embezzlement, in three specifications, in violation of the 93d Article of War (Charge II), and for failure to obey a lawful order of his superior officer, in violation of the 96th Article of War (Charge III). After submitting a plea to the jurisdiction of the court, which was properly overruled, accused pleaded not guilty to all specifications and charges. He was found guilty of Specifications 1 and 3 of Charge II, of Charge II, and of the Specification of Charge III and of Charge III. He was found not guilty of desertion in violation of the 58th Article of War, as alleged in the Specification of Charge I and of Charge I, but guilty of absence without leave for the period December 3, 1934, to December 17, 1934, in violation of the 61st Article of War, and not guilty of Specification 2 of Charge II. No evidence of previous convictions was introduced. He was sentenced "to be dismissed the service of the United States, 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 three (3) years". Four members of the court recommended to

the reviewing authority, as an act of clemency, the remission of so much of the sentence as involves confinement at hard labor. The reviewing authority approved the sentence as adjudged by the court, and forwarded the record of trial for action under the 48th Article of War.

3. Three reserve officers were appointed as members of the court, Captains Lyston S. Black, Infantry Reserve, Andrew J. McBride, Infantry Reserve, and Floyd A. Rutherford, Field Artillery Reserve; one of whom, Captain Rutherford, was sworn and participated in the trial. No proof that these officers were on active duty at the time of the trial appears in the record of trial. However, the staff judge advocate in his review states that records on file at the Ninth Corps Area Headquarters show each of these officers was on such duty at the time the court was appointed and trial held. In regard to the competency of reserve officers on active duty to sit as members of courts-martial, The Judge Advocate General has held:

> "There is no objection to granting authority to detail as members of a general court-martial reserve officers on active duty under section 37 a, National Defense Act, as students at service schools." Par. 206, Dig. Ops. JAG 1912-30.

The Board therefore is of the opinion that the court was properly constituted.

4. In view of the fact that at the trial accused pleaded to the jurisdiction of the court, it is believed advisable to set forth briefly the service of accused and certain fundamental facts connected therewith, some of which do not appear in the record of trial but which are included in the review of the staff judge advocate. Accused, a second lieutenant, Cavalry Reserve, was placed on active duty with the CCC with his consent for a period of six months on September 18, 1933, by paragraph 16, Special Orders 214, Headquarters Fifth Corps Area, Fort Hayes, Columbus, Ohio, September 15, 1933. This tour was extended with his consent for six months, to terminate September 17, 1934, by paragraph 2, Special Orders 50, Headquarters Fifth Corps Area, Fort Hayes, Columbus, Ohio, March 1, 1934 (Pros. Ex. 1). It was further extended six months with his consent, to terminate March 17, 1935, by paragraph 7, Special Orders 192, Headquarters Fifth Corps Area, Fort Hayes, Columbus, Ohio, August 15, 1934 (Pros. Ex. 2). On March 13, 1935, accused's active duty tour was extended

an additional six months without his consent, to terminate not later than September 17, 1935, by paragraph 3, Special Orders 60, Headquarters Fifth Corps Area, Fort Hayes, Ohio (Pros. Ex. 3), which active duty was expressly refused in writing by accused on April 16, 1935 (Def. Ex. C).

Prior to October 1, 1934, Company 557, CCC, was stationed at Badger Meadow Camp, F-158, near Bovill, Idaho, First Lieutenant John H. Hansen, Infantry Reserve, being its commanding officer and accused the store or exchange officer. On October 1, 1934, the 557th Company was moved to Sunset Valley Camp, Santa Ynez, California, Lieutenant Hansen and accused accompanying it as commanding officer and exchange officer, respectively. (R. 25) On November 5, 1934, accused was relieved as exchange officer of the company by Second Lieutenant Herman L. Walruff, Coast Artillery Reserve (R. 26). On December 3, 1934, accused was relieved from further duty with Company 557, CCC, and assigned to Company 570, CCC, at Topanga, California, and on the same date submitted a written resignation to his immediate commanding officer and then disappeared (R. 31,32,33,36; Pros. Exs. 5 and 10). He was returned to military control at Santa Barbara, California, on December 17, 1934, and placed in arrest on the same date (R. 38,86; charge sheet). The events which transpired subsequent to December 2, 1934, have been tabulated in their chronological order in the review of the staff judge advocate and are as follows:

"December 3, 1934 - Resignation in writing delivered by accused to Lt. Hansen at Santa Barbara, and forwarded to District Commander at Fort MacArthur.
December 8, 1934 - Resignation forwarded by District Commander.
December 17, 1934 - Arrest at Santa Barbara, California, and transfer to Fort MacArthur, California.
December 17, 1934 - Charges preferred alleging desertion, disobedience to orders, and making and uttering two bad checks.
December 28, 1934 - Report of investigation, Fort MacArthur, California.
December 31, 1934 - Charges forwarded to Hq. 9th Corps Area.
December 31, 1934 to Jan. 22, 1935 - Correspondence with father of accused relative to adjustment of bad check charges.
January 22, 1935 - Additional charges (two specifications under 93rd A.W. alleging embezzlement, one in Idaho)).

January 28, 1935 - Report of investigation of additional charges and forwarding of same.
January 29, 1935 - Radiogram to C.O. Ft. MacArthur, to transfer accused to Letterman General Hospital for observation and report as to sanity and pertinent papers referred to board.
January 29, 1935 - Resignation of accused with information as to both sets of charges and contemplated board proceedings forwarded to War Department.
February 6, 1935 - Refusal of W.D. to act on resignation pending determination as to sanity and disciplinary action (papers returned through Hq. 5th C.A.).
March 1, 1935 - Report of Letterman General Hospital board finding accused sane (received Hq. Ninth Corps Area March 4, 1935).
March 5, 1935 - Charges returned to Fort MacArthur for changes and more complete investigation.
March 16, 1935 - Revised charges alleging desertion, three specifications of embezzlement and failure to obey an order, prepared, verified and served upon accused (signed receipt rec'd).
March 25, 1935 - Revised charges and report of investigation received by this headquarters.
April 3, 1935 - Charges further revised as to language and referred for trial.
April 6, 1935 - Charges again served on accused.
May 2, 3, 1935 - Trial at Fort MacArthur, California."

5. Prior to arraignment accused entered a special plea to the jurisdiction of the court (R. 6), claiming that at the date of trial he was not a person subject to military law. The grounds upon which his plea was based are clearly stated in the review of the staff judge advocate and are as follows:

"a. He was not in an active duty status as the last extension of his active duty, ordered with his consent, expired March 17, 1935 (Exh. 2), and paragraph 3, Special Orders No. 60, Headquarters Fifth Corps Area, March 13, 1935 (Exh. 3), extending his period of active duty six months beginning March 18, 1935, was without his consent and was expressly refused by him by letter of April 16, 1935 (Exh. 'A').

b. The Statute (Act of March 31, 1933; 48 Stat. 22), authorizing the creation of the Civilian Conservation Corps and the use of existing departments and agencies in connection therewith became ineffective March 31, 1935, by virtue of its own provisions and thereafter until April 9, 1935, when a new Relief of Employment Act was approved there was no legal Civilian Conservation Corps and the active duty of all reserve officers called for duty with such Corps necessarily terminated March 31, 1935.

c. Service with the Civilian Conservation Corps is not military duty. It is a civilian organization and reserve officers therewith are not paid from military appropriations."

It will serve no useful purpose to discuss in detail each of the above objections to the jurisdiction of the court, as no new question is presented which has not been considered heretofore by the Board of Review. The Board has held, with the approval of The Judge Advocate General, that reserve officers on active duty with the Civilian Conservation Corps are under military jurisdiction and subject to the Articles of War. CM 201678, Anderson; CM 202366, Fox; CM 202479, Babbington; CM 202601, Sperti; CM 203034, Joyner; and CM 202770, Cooley. In regard to the attachment and continuation of jurisdiction over reserve officers on active duty with the CCC, the Board of Review has followed, with the approval of The Judge Advocate General, the rule set forth on page 90, Winthrop's Military Law and Precedents, 2d ed., which is as follows:

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

service of charges,--the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused."

CM 202601, Sperti; and CM 202770, Cooley.

In the instant case accused's last voluntary active duty tour with the CCC expired on March 17, 1935. He was first placed in arrest on December 17, 1934, and charges substantially the same as those upon which he was brought to trial were served upon him on March 16, 1935, both of these events taking place prior to the termination of his last voluntary active duty tour. From the foregoing the Board of Review is of the opinion that jurisdiction over accused attached before the expiration of his last voluntary active duty tour and continues for all purposes of trial, judgment and execution.

In view of the above, no opinion is necessary with respect to the legal effect of paragraph 3, Special Orders 60, Headquarters Fifth Corps Area, Fort Hayes, Columbus, Ohio, March 13, 1935, which extended the active duty tour of accused six months from March 18, 1935, without his consent.

6. The specifications, other than the one of which accused was acquitted, are set out separately below with the pleas of accused, the findings of the court, a summary of the evidence in support of each of them and the views of the Board of Review. The summary of the evidence made by the staff judge advocate and to some extent his views as to its legal sufficiency have been adopted by the Board and are included in the matter set forth in the following paragraphs.

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

Specification: In that 2nd Lieutenant Don F. Little, Cav-Res., while on active duty, did, at Sunset Valley Camp, F-369, Santa Ynez, California, on or about December 3, 1934, desert the service of the United States and did remain absent in desertion until he was apprehended at Santa Barbara, California, on or about December 17, 1934.

Plea: Not Guilty.

Finding: Of the Specification, Charge I: Guilty, except the words "desert" and "in desertion"; substituting therefor respectively the words "absent himself without leave from" and "without leave"; of the excepted words, not guilty; of the substituted words, guilty. Not guilty of violation of the 58th Article of War, but guilty of violation of the 61st Article of War.

On November 28, 1934, accused received an order transferring him from Sunset Valley Camp near Santa Ynez, California, to another company at Topanga, Canyon Camp near Topanga (Ex. 5), effective December 3, 1934, which order he failed to obey (R. 68,69). On December 3, 1934, he submitted a written resignation to his local commanding officer (R. 32,33; Ex. 10) and then disappeared (R. 36). He was apprehended at Santa Barbara, California, December 17, 1934 (R. 86). Morning reports of both companies show him absent without leave from December 3 to 17, 1934 (Exs. 11 and 13).

Accused offered no explanation or defense to the offense of desertion set forth in this specification, except that of insanity which is discussed <u>infra</u>.

The Board of Review is of opinion that the evidence under this charge and specification is legally sufficient to support the finding of the court.

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

Specification 1: In that 2nd Lieutenant Don F. Little, Cav-Res., while on active duty, being at the time Camp Exchange Officer, Company 557, CCC, Badger Meadow Camp, F-158, and as such custodian of the moneys of the camp exchange of said company, did, at Bovill, Idaho, on or about September 29, 1934, feloniously embezzle by fraudulently converting to his own use moneys in the sum of three hundred and twenty-nine dollars and fifty-six cents ($329.56), property of the said camp exchange, which moneys came into his possession by virtue of his said office.

Plea: Not Guilty.

Finding: Guilty.

Lieutenant Hansen testified (R. 24-61) that prior to October 1, 1934, Company 537, CCC, was stationed at Badger Meadow Camp, near Bovill, Idaho, and that he was commanding officer of the company and accused was the store, or exchange officer; and that on October 1 the company, including accused and himself, entrained for Sunset Valley Camp, Santa Ynez, California (R. 25). Lieutenant Hansen further testified that as company commander he audited the camp exchange accounts when the books were closed each month, including September 30; that Exhibit 9 (large book with numerous attached papers) contains these accounts and is the original account book used by accused (R. 27); that the entry therein showing a cash credit for a payment to Mason, Ehrman & Company, September 29, 1934, lacked a supporting voucher, but that a check for such payment had been written and pinned to the company's statement ready for mailing (R. 28); that the account of this company was not brought to his attention until about November 10, 1934, when two telegrams were received from the company making inquiry about the check above mentioned; that the next time witness heard of the account was about January 10, 1935, when a bill therefor was received; that $3.91 was the cash balance on hand at the end of September, 1934, as shown in the account book, assuming the payment of the Mason Ehrman account (R. 29), but that without such credit $333.47 in cash would have been needed to balance the account; that the exchange carried its account in the First National Bank of Moscow, Idaho (R. 30) and, after transfer to California, in the Bank of America, Santa Barbara (R. 31); that in making his monthly audits of the exchange the witness counted the cash and audited the books and they balanced each month (R. 46,47); that incident to obtaining a clearance from the Inspector at the end of September four or five checks were made and all were mailed except one (R. 48); that he could not remember the amount of collections at the end of September but believed they were paid and deposited (R. 50); that upon transfer of the exchange to Lieutenant Walruff in November, 1934, there was much difficulty in balancing the books and, as shown by the journal (Ex. 9), three attempts and two inventories were made and a shortage of $30 was found in the stock, which shortage accused made good by his check (R. 52,53); that there was a store steward at all times accused was exchange officer and he did considerable buying (R. 55,56); that the witness does not know who made the credit entry of $329.56 in the cash account but accused was responsible for keeping the book (R. 57); that a credit of $119.77 in the account book under "Bills Payable", dated September 29, in favor of Mason, Ehrman & Company, was to correct an error in a previous month and had nothing to do with the $329.56 which

was for September purchases (R. 58-60); that the exchange deposits were usually made by "the Doctor" on pay day, he receiving them from accused (R. 61); that many of the camp records were lost during the transfer to California, one of such records being the bank statement for September (R. 62,63); that in paying the men at the end of the month the amount due the exchange was first deducted and such amount, as shown by the store books, was turned over by accused to "the Doctor" for deposit in the bank before the men were paid (R. 63,65); the witness does not know what record was made of collection sheets (R. 64); and that collections at pay day ran around $300 (R. 67).

Captain Hugh M. Bell, Quartermaster Reserve, District Inspector, Fort MacArthur District, CCC, testified (R. 73-83): He audited the exchange records for September, 1934 (R. 74), and found a cash balance of $3.91, being the cash balance entered in Exhibit 9, to which should be added the $329.56 if the Mason, Ehrman & Company payment was not made (R. 76).

First Lieutenant Herman L. Walruff, Infantry Reserve, testified (R. 88-96) that about November 1, 1934, he joined Company 557 and was assigned to duty as camp exchange officer relieving accused, and started taking over the property and funds November 5, completing the transfer November 25, Lieutenant Hansen making the audit (R. 89); that about $500 on deposit in the Bank of America was turned over (R. 90); that in the transfer no unpaid bill of Mason, Ehrman & Company was listed and the witness received a statement from Mason, Ehrman & Company early in December, 1934, of an account of $329.56 (R. 93,98), which account has not been paid by witness (R. 94); that the delay in the transfer from accused was due to the taking of an inventory and closing the books (R. 96).

By deposition (Ex. 6) Howard W. Staples testified that he is cashier of the First National Bank of Moscow, Idaho; that this bank carried an account in the name of "Camp Exchange Fund, Company 557, CCC, By Don F. Little, Bovill, Idaho", and honored checks drawn thereon by Don F. Little; that a statement attached (excluding pencil notations) shows the true state of such account from May 9, 1934, to November 13, 1934; that there is no record of the $329.56 check being presented; that neither on September 28, nor at any subsequent date, was there a sufficient balance on deposit to meet a check for $329.56; that the present balance is $3.99; that the last deposit was $235.00 made September 28, 1934; and that about November 5, 1934, a check for $91.35, and about December 1, 1934, a check for $43.27, drawn on such fund were paid. (The bank statement shows a

last deposit of $235 on September 28, 1934, a then balance of $327.56, payment of eight checks aggregating $324.17 within the next eleven days, including the two checks of $91.35 and $43.27, respectively, and a balance of $3.39 on December 1, 1934.)

By deposition (Ex. 7) Clyo Delbert Emahiser, testified that he is manager of the Moscow, Idaho, branch of Mason, Ehrman & Company, wholesale grocers, and sold goods to the Camp Exchange of Company 557, Lieutenant Little and others making the purchases; that on September 28, 1934, there was due his company from the exchange the amount of $329.56, with which the exchange was properly billed, but no payment was made on or about that date and the amount was still due on April 1, 1935; and that no check for $329.56 in payment of this account was ever received by the company.

By deposition (Ex. 8) Captain Charles S. Pettee, Infantry, testified that from April 1, 1934, to October 1, 1934, he was District Inspector, Fort George Wright District, CCC, and from September 28 to October 1, 1934, made final inspections and audits of funds of Company 557 near Bovill, Idaho, and four other companies, including funds of the exchange of Company 557; that he examined the exchange accounts of Company 557 about September 29 in the absence of Lieutenant Little, and later at Bovill saw him and received a satisfactory explanation of several items and was shown how outstanding bills were to be paid; that the accounts were correct except as to a credit for $11.25 in the coupon account; that by arrangement made with the company commander, since bills could not be paid until the pay day collections were made, he permitted all the five companies leaving September 30 to report as paid bills for which checks were then mailed; that the witness saw a check for $329.56 drawn on the exchange account with the First National Bank of Moscow, Idaho, in favor of Mason, Ehrman & Company, and noted a credit entry in the account book for such payment; that accused stated the company owed such amount and showed the check to the witness, ready for mailing; that the witness cannot recall how accused satisfied him there was money to meet such check but he (witness) was satisfied that funds in or on the way to the bank were sufficient; that he identified an attached balance sheet for September, certified by accused and indorsed by the witness; and that accused stated there was an account in the First National Bank of Moscow.

Exhibit 9 (Exchange account book) was offered (R. 27) as "the original cash book" and attached thereto by clips, and therewith as loose papers

in an inclosure marked "Incl. 1 to Exhibit 9", are numerous vouchers and other papers pertaining to the exchange accounts. While no witness so stated, such book and papers therewith appear to be the entire records of the exchange and the original book records of cash, bills, coupons, merchandise, stock, etc. The records show a cash credit on September 29, 1934, on a Mason, Ehrman & Company account of $329.56 and a debit charge under Bills Payable on that date in the same amount. The book shows numerous transactions with this company for several months. At the end of each month balances were struck and carried over, balance sheets signed Don F. Little being attached.

Accused offered no explanation or defense to the offense alleged in this specification except that of insanity which is discussed infra.

The evidence in support of the offense alleged in this specification is found chiefly in the account book of the post exchange, in the testimony of witnesses in regard to an alleged payment of $329.56 on September 29, 1934, to Mason, Ehrman & Company of Moscow, Idaho, recorded therein, and in the testimony of witnesses in regard to audits made of the account book. An account book was positively identified by Lieutenant Hansen as "the Post Exchange cash book" and introduced in evidence as Prosecution Exhibit 9, although neither he nor any other witness testified that it was the original book of entry. However, it was introduced in evidence by the trial judge advocate as "the original cash book of the Post Exchange" with the consent of defense counsel (R. 27). The book itself is appended to the record of trial and has the appearance of being the original and only book kept by the exchange. Under these circumstances, the Board of Review is of opinion that it may reasonably presume the book to be the original account book of the exchange.

There is no testimony in the record of trial as to the identity of the person who actually recorded the entries in the book. However, Lieutenant Hansen, the commanding officer of the camp at which the exchange was located, testified that accused was the post exchange officer and responsible for all moneys of the post exchange and for the accounting in connection therewith (R. 26,30,57). It appears that accused was assisted in the operation of the post exchange by a store steward (R. 55,56), but there is no evidence that the store steward had any duties in connection with the account book. In regard to the entry on September 29, 1934, of a payment of $329.56 to Mason, Ehrman & Company, Lieutenant Hansen was unable to identify the person who made that particular entry. However,

Captain C. S. Pettee, Infantry, testified that on or about September 29, 1934, he audited the accounts of the post exchange and noted an entry in the account book showing a payment of $329.56 to the Mason, Ehrman & Company on September 29, 1934, and that accused informed him that the exchange owed this firm a debt of that amount and showed to him a check in the amount of $329.56 payable to said firm drawn on the First National Bank of Moscow, Idaho, ready for mailing (Pros. Ex. 8). Furthermore, Lieutenant Hansen testified that when he was engaged in auditing the accounts of the post exchange on or about September 30, 1934, he saw a statement from Mason, Ehrman & Company for $329.56, to which was pinned a check for that amount (R. 28). From these facts the Board of Review is of opinion that the responsibility for all of the entries in the account book covering the period accused was exchange officer and in particular the entry of $329.56 on September 29, 1934, with respect to an alleged payment to Mason, Ehrman & Company, may be fairly imputed to accused.

The fact that the check for $329.56 was not received by Mason, Ehrman & Company was proven by the testimony of the manager of that company's branch at Moscow, Idaho (Pros. Ex. 7); and that it was not presented for payment at the bank on which it was drawn, by the testimony of the cashier of the First National Bank of Moscow, Idaho (Pros. Ex. 6).

It now remains to be shown that the $329.56 entry on September 29, 1934, in the account book of the post exchange actually covered a shortage in money in the funds of the post exchange on that date. Lieutenant Hansen testified that he audited the books of the exchange each month, including the accounts for the month of September, 1934 (R. 26-27); that the accounts balanced at the end of each month with slight immaterial differences (R. 47-48); that the accounts for the month of September, 1934, balanced with a cash balance of $3.91, which accused represented to him as cash; that if the credit entry to Mason, Ehrman & Company had not appeared in the account books the cash balance at the end of September, 1934, should have been $3.91 plus $329.56, or $333.47 (R. 29,30). Captain Hugh M. Bell, Quartermaster Reserve, after qualifying as an expert, corroborated the testimony of Lieutenant Hansen in regard to the shortage in the accounts of accused during the month of September, 1934, of at least $329.56 (R. 73-83).

The book and vouchers upon which these audits were based were before the court and accused had the opportunity of examining them and of cross-examining each of the witnesses as to how they reached the conclusion of

the shortage. It is also apparent from the account book and vouchers that a result was capable of being ascertained by calculation. The testimony of these witnesses came within the exception to the best evidence rule set forth in paragraph 116, Manual for Courts-Martial, and was competent.

It thus appears clearly established that a shortage of $329.56 was discovered in the accounts of accused as a result of the audits for September, 1934. That this shortage was a shortage in money and not a shortage in stock of the exchange appears equally clear. Lieutenant Hansen testified to that effect (R. 45,46) and an examination of the account book itself shows that the fraudulent entry of $329.56, which may be fairly imputed to accused, was made in order to cover up a shortage in cash. Although no witness testified that accused did not restore the amount of the shortage subsequent to the audit for September, 1934, and prior to the date, November 24, 1934, when he transferred the accountability for the funds of the exchange to Lieutenant Walruff, his successor, the account book itself, which covers this period and is in evidence as Prosecution Exhibit 9, shows that he did not do so. At any rate, the existence of the shortage of $329.56 was clearly established on September 30, 1934, and it may be presumed to have continued in the absence of any indications to the contrary. Par. 112, p. 110, M.C.M.

The Board of Review has held with the approval of The Judge Advocate General that an officer may be convicted of embezzlement upon the uncorroborated evidence of the books kept by him in the course of his duties. CM 130989, sec. 1563 (4), Dig. Ops. JAG 1912-30; CM 202601, Sperti. It has also been similarly held that one who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, cannot complain if the natural presumption that he spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence. CM 123488, sec. 1563 (2), Dig. Ops. JAG 1912-30; CM 202601, Sperti.

For the reasons stated the Board of Review is of opinion that the evidence under this specification is legally sufficient to support the finding of guilty.

9. Specification 2: (Finding of not guilty)

10. Specification 3: In that 2nd Lieutenant Don F. Little, Cav-Res., while on active duty, with Company 557, CCC, at Santa Ynez, California, did on or about November 30, 1934, feloniously embezzle by fraudulently converting to his own use moneys in the sum of forty-eight dollars and fifty cents ($48.50), the property of the company fund of said company entrusted to him as the officer duly designated to collect moneys due the mess fund of the said company.

Plea: Not Guilty.

Finding: Guilty.

First Lieutenant John H. Hansen, Coast Artillery Reserve, testified (R. 24-60) that on November 30, 1934, in the absence of accused, he found a check for $50.35 on the table in camp, made out to the company fund and representing collections from officers and foresters (R. 38,51); (the check was offered as Exhibit 12, does not show payment, and is drawn on the Bank of America, Santa Barbara, California, and signed "Don F. Little"); that the witness was custodian of the company fund; that accused was mess officer in October and November, 1934, and authorized to make collections from boarders; that the check represented amounts collected by accused from such boarders in the sum of $48.50 plus $1.85 due the witness personally; that the check was not honored by the bank upon presentation (R. 39) and, so far as the witness knows, accused never made payment to the company fund (R. 40).

E. W. Field testified (R. 87,88) that he messed with Company 557 at Sunset Valley Camp, Santa Ynez, California, a part of October, 1934, and paid accused $9.05 therefor about November 12, 1934, by check made payable to him at his request. The check covered the amount due for the mess, extra coffee money and pay to the mess attendant, as stated by accused at the time. (It is noted that Mr. Field testified that he paid accused $9.05, but Lieutenant Hansen testified from a memorandum (see Pros. Ex. 12) that $6.05 was collected from Mr. Field. If the latter testimony is correct, the sums paid accused for mess bills amount to

$48.50, and were attempted to be covered by his check of $50.35, which also included the $1.85 due Lieutenant Hansen.)

By deposition Joseph Adam Wagner (Ex. 14) testified he messed with Company 557 the entire month of October, 1934, and about November 5, 1934, at Santa Ynez, paid accused $8.00 for board; that about November 30, 1934, accused gave witness a slip of paper with a check attached for delivery to Lieutenant Hansen and the papers were so delivered. (No identification of check or paper.)

By deposition (Exs. 15-19) J. H. Willhite, Glenn Baker, Eberhardt Henry Schilz, W. R. Parsons and Edward Wheldon, testified that at various times in November, 1934, they paid to accused for October, 1934, board in the company mess the sums of $10, $8.75, $10.75, $3, and $1.50, respectively.

By deposition (Ex. 21) Angelo Gustavo Gallotti testified that he is assistant manager of the Bank of America, Estado-Cota Branch, Santa Barbara, California; that accused had an account there about November 25, 1934; that a check for $50.35 on such account was presented about December 6, 1934, and not paid because of insufficient funds; that the account balance on November 25, 1934, was $5.87, and on December 6, 1934, was $4.49, when the check was presented; and that at no time between said dates were there sufficient funds in the account to cover this check.

Accused offered no explanation or defense to the offense alleged in this specification, except that of insanity which is discussed infra.

The evidence in support of this specification shows that accused while on duty as mess officer of Company 557, CCC, collected $48.50 due the company fund from persons boarding at the company mess, that it was his duty to turn this money over to his company commander, that instead of turning the money over to his company commander he transmitted to him his (accused's) personal check for the amount involved, which check was dishonored by the bank upon which drawn because of insufficient funds, and that at the time of the trial the company had not been reimbursed for the sums collected from the boarders by accused.

The Board of Review is of the opinion that the evidence under this specification is legally sufficient to support the finding of guilty.

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

Specification: In that 2nd Lieutenant Don F. Little, Cav-Res., while on active duty, having received a lawful order from his superior officer Lieutenant Colonel H. R. Oldfield, District Commander, CCC, who was then in the execution of his office, to proceed to Topanga Canyon Camp, P-295, Topanga, California, did, at Santa Barbara, California, on or about December 3, 1934, fail to obey the same.

Plea: Not Guilty.

Finding: Guilty.

The evidence in support of the offense alleged in this specification and charge is substantially the same as that in support of the specification of Charge I, which was set forth in paragraph 7, supra.

Accused offered no explanation or defense to the offense alleged in this specification except that of insanity which is discussed infra.

The evidence shows clearly that accused received the order transferring him to the 570th Company, CCC, at Topanga, California, and that he did not report at that camp.

The Board of Review is of opinion that the evidence under this specification is legally sufficient to support the finding of guilty.

12. Accused did not testify or make an unsworn statement, offered no evidence relative to the several charges, and evidence presented by the defense was confined to the mental condition of accused (R. 120-131). Dr. Samuel M. Marcus testified that he is a Los Angeles physician and is expert psychiatrist for Los Angeles civil courts; that he examined accused about two hours one afternoon (R. 126) and diagnosed his case as one of "psychoneurosis of the major type" with a "split" personality wherein there occur amnesia and other states that weaken the will power (R. 122); that such an individual is irresponsible (R. 124); that unless there was some definite attack of amnesia there would be no apparent ground for refusing the service of such an officer on a duty

status (R. 125); that accused gave him his personal and family history (R. 126); that people so afflicted may appear quite normal and then go to pieces and are prone to imagine and act as though they have diseases that they do not have (R. 129); and that accused is now insane or was insane for periods of several days in the past six months or year (R. 132).

Second Lieutenant J. T. Glenn, Field Artillery Reserve, testified (R. 117-120) that he knew and observed accused at Fort MacArthur about four months, found him quiet and retiring, keeping to himself; that on April 30, 1935, the witness was officer of the day and about 10:30 p.m. heard a hysterical laugh and upon investigation found it was accused who was in bed in his quarters laughing and crying. He had fallen downstairs. He could not walk without assistance while being taken to the hospital, and did not talk coherently. The odor of liquor upon his breath was so strong that witness thought him "severely drunk".

In rebuttal on the issue of insanity the trial judge advocate offered the following:

Dr. Paul F. Kid, Contract Surgeon, CCC (R. 144-145), testified that he attended accused the night of April 30, 1935, and diagnosed his case as one of acute alcoholism, of which he showed all signs.

First Lieutenant William W. Roe, Jr., Medical Corps, testified that he attended accused on the evening of April 30, 1935, and diagnosed his ailment as acute alcoholism (R. 139), and that he had observed accused while a patient in the hospital at Fort MacArthur for mental disease from December 17, 1934, to January 9, 1935, and found him sane (R. 140). He also testified that he had the usual course in psychiatry in medical school, and that during his internship he spent six weeks in the psychopathic ward at the Los Angeles General Hospital, but that he had had no extended experience in psychiatric cases nor devoted any time to the study of psychoanalysis other than in his routine as an ordinary practitioner (R. 140-141).

By deposition (Ex. 23) Major William F. Rice, Medical Corps, Letterman General Hospital, testified that accused was under his observation as a patient from January 30, 1935, to March 7, 1935; that the witness was a member and president of a board appointed to examine and report on mental cases, and accused appeared before such board;

that attached to the deposition is the original report of such board dated March 1, 1935, in the case of accused, duly signed by all members and finding accused sane during the period September 29, 1934, to December 3, 1934, and at the date of the report.

In response to cross-interrogation witness testified that he was specializing in psychiatry. The data upon which his opinion regarding accused's mental condition was based was as follows: Daily observation and questioning, "proper" laboratory examinations, and social history. The facts observed were as follows: Accused's conversations were relevant. He showed no delusional content. His memory was intact. There was no slowing of thought processes and his knowledge of current events was good. He showed no emotional deterioration. No hallucinations were elicited. In general he showed the normal mental reaction one would expect in an individual in his situation.

The court made no formal finding on the issue of insanity, disposing of same by a ruling of the law member "that the accused was and is mentally competent" (R. 146). The following then occurred:

"THE COURT - Any objection by any member of the Court?
(No objection noted).

THE COURT - The ruling of the Law Member will stand."

The Board of Review is of opinion that the issue of insanity was properly disposed of by the court (A.W. 31).

13. Accompanying the record of trial is a letter signed by four of the seven members of the court, who sat at the trial, in which clemency to the extent of remitting the sentence to confinement is recommended. The reasons given for recommending clemency are as follows:

"a. The fact that the accused has already been deprived of his freedom for five (5) months, he having been restricted to the limits of the Post at Fort MacArthur, California, since December 17th, 1934.

b. The fact that the offenses of which he has been found guilty involve only money to the amount of Three Hundred Seventy-Eight and 06/100 ($378.06) Dollars, whereas

he has already lost through forfeitures the sum of approximately One Thousand and no/100 ($1,000.00) Dollars.

c. The extreme youth of the accused, twenty-five (25) years.

d. The fact that the accused is the father of a child two (2) years old, he being the sole support of said child.

e. The run down physical and mental condition of the accused.

f. Clemency on the part of a Court-Martial is merely an approximation of the principle of probation which is met with in nearly all Courts throughout the land."

There is also inclosed with the record of trial a copy of a letter purporting to be from Mrs. Ora M. Little, mother of the accused, in which she states that she has custody of the small son of accused and that both of them need his support. The existence of the infant son, its dependency, and that of the mother of accused, have not been verified by any reliable agency. Of the various reasons for recommending clemency there is only one of sufficient importance to warrant consideration - the dependency of the infant son and mother of accused. When it is considered that the existence and dependency of these persons have not been verified by any reliable informant, any action at the present time would be unwarranted.

14. Accused is 25½ years of age. After completing two and one-half years as a student at the Ohio State University he was commissioned on July 17, 1931, a second lieutenant, Cavalry Reserve. On September 18, 1933, he was ordered to active duty with the Civilian Conservation Corps and has remained on such duty to date.

15. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The conclusions of the Board of Review as to the legal sufficiency of the record to support the findings have already been set forth in the discussion of the evidence under the several specifications of which accused was found guilty. The Board is also of opinion that the record is legally sufficient to support the findings of guilty of Charges I, II, and III, and the sentence and warrants confirmation thereof. A sentence to dismissal is authorized upon conviction of violation of the 61st, 93d or 96th Articles of War. The extent of the sentence to confinement was discretionary with the court and in adjudging three years the court

did not exceed the maximum limit of punishment prescribed for enlisted men in paragraph 104, Manual for Courts-Martial. Confinement in a penitentiary is authorized for embezzlement by the 42d Article of War and sections 98 and 401, title 6, Code of the District of Columbia, 1929. While confinement in a penitentiary is authorized in this case, it does not appear that accused is an habitual criminal or that his confinement along with military offenders and misdemeanants would react to the detriment of the latter. Par. 90 a, M.C.M. The Board of Review is accordingly of opinion that the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, could properly be designated as the place of confinement, and so recommends.

Theodore Hall, Judge Advocate.

N. A. Trumbull, Judge Advocate.

C. M. Smith, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., AUG 3 1935 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Don F. Little (0-288374), Cavalry Reserve.

2. I concur in the opinion of the Board of Review that no errors were committed during the trial which injuriously affect the substantial rights of the accused, that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. However, I believe that the ends of justice and discipline would be met by reducing the period of confinement to one (1) year. In this connection, attention is invited to the fact that four of the seven members of the court, including the president and the law member, recommended that the sentence be reduced to dismissal and forfeiture of all pay and allowances due or to become due.

3. Inclosed herewith is a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence and carry it into execution should it meet with approval.

4. I further recommend that the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, be designated as the place of confinement.

5. Attention is invited to the appended letter from Cora M. Little, Columbus, Ohio, mother of accused, to The Adjutant General, dated July 28, 1935. This letter was received in this office after the opinion of the Board of Review was signed. It appears from this letter that Lieutenant Little's son is not now in the custody of Lieutenant Little's mother.

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

4 Incls.
Incl. 1-Record of trial.
Incl. 2-Draft of let. for sig. of Secy. of War.
Incl. 3-Form of Executive action.
Incl. 4-Letter to AG 7-28-35 from Mrs. Little.

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

Board of Review
CM 203394

AUG 7 1935

UNITED STATES	)	UNITED STATES MILITARY ACADEMY
v.	)	Trial by G.C.M., convened at West Point, New York, May 23, 1935. Dismissal.
Cadet BYFORD H. STOUT, Fourth Class, United States Corps of Cadets.	)	

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

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

2. Accused was tried upon three specifications, each alleging false official statements in violation of the 95th Article of War. He pleaded not guilty to the charge and the specifications thereunder, and was found not guilty of Specifications 1 and 2, and guilty of Specification 3 and the Charge. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The offense of which he stands convicted is as follows:

CHARGE: Violation of the 95th Article of War.

Specification 3: In that Cadet Byford H. Stout, Fourth Class, United States Corps of Cadets, in making a written explanation of a report of delinquency under the provisions of paragraph 23.05, Orders United States Corps of Cadets, 1932, did, at West Point, New York, on or about April 16, 1935, with intent to deceive the Commandant of Cadets, United States Military Academy, knowingly and willfully make and submit to said Commandant of Cadets a false official written statement in

explanation of an alleged offense committed on April 15, 1935, by stating that: "The report is believed to be incorrect. I raised my hand to adjust my sweater before assembly. The bugle had not blown", which statement was known by the said Cadet Stout to be untrue in that he had raised his hand to adjust his sweater after assembly and after the bugle had blown.

3. Major Omar N. Bradley, Infantry, West Point, New York, a witness for the prosecution, testified in substance as follows: On the afternoon of April 15, 1934, with First Lieutenant Eugene W. Ridings, Infantry, he was in the Battalion Commanders' office on the second floor of Cadet Headquarters at West Point. He was watching formations of cadet companies in the area of South Barracks, and particularly that of the fourth class of Company F, which was then forming for rifle marksmanship. Between thirty seconds and one minute before assembly a cadet fell in on the right of the rear rank of Company F. This cadet raised his hand and adjusted the collar of his sweater "soon after assembly went", "somewhere between fifteen and forty-five seconds afterwards, maybe a minute afterwards". Lieutenant Ridings was about to raise the window and instruct the section marcher to report this cadet but did not do so because witness stated that he had the necessary blanks on his desk and would make the report himself. Witness then wrote out a report, the substance of which was for raising hand in ranks at the 3:15 p.m. drill formation. To avoid any error in identification witness waited until the section passed immediately under the window, at which time the cadet in question was identified from photographs available in the office as the accused. Witness had not observed accused constantly during the period of from thirty seconds to a minute that he had been in ranks before assembly was sounded, but had been watching the formation of about twenty-five cadets, and did not see him raise his hand before assembly was sounded. The signal for the sounding of assembly is the ringing of the bell in barracks and assembly occurs either on the bell or the bugle. (R. 14,15) A report for delinquency may be explained by the cadet involved after having been posted on the bulletin board, but only certain reports are required to be explained, and he did not know whether or not this particular report made against accused required an explanation (R. 16,17; Ex. A). Three demerits are awarded for raising a hand in ranks and if the report of delinquency is satisfactorily explained the report is removed and no demerits awarded (R. 18). Explanations of reports are required to be addressed to the Commandant of Cadets (R. 16). At the

time accused reported for assembly on this occasion there were upper classmen in the vicinity, and while accused was the last fourth classman in ranks at the time he was not officially late if he had arrived in ranks before assembly (R. 18). The section marcher of a fourth class section is normally the fourth classman who stands "highest alphabetically" in the section, and the section marcher is responsible for ascertaining whether all members of the section are present. In this particular instance, witness was unable to state whether the section marcher of accused's section had called the roll or had "checked them off as they fell into ranks, in order to save time". (R. 18,19) Witness identified the written explanation alleged in the specification as being the one which "was brought to me personally by the Assistant to the Commandant" and, without objection by the defense, it was admitted in evidence as having been written by accused (R. 15,17; Ex. B).

First Lieutenant Eugene W. Ridings, Infantry, West Point, New York, a witness for the prosecution, testified that he is in command of the company of which accused is a member, and that shortly before 3:15 p.m., April 15, 1935, he was in the Battalion Commanders' office with Major Bradley observing from the window the drill formations, and particularly the fourth class drill formation. Major Bradley stood beside him at the window and also watched the formations. "After assembly had gone", Major Bradley asked witness if he saw "what Mr. Stout was doing". Witness looked at accused and saw him arranging the collar of his sweater. Witness would estimate this to be "a minute after the bugle had blown". Accused had joined the ranks shortly before assembly, "not over a minute before assembly went", but he did not observe accused particularly until Major Bradley called attention to him. (R. 19-20) Describing the action of accused in reaching up to adjust his sweater, witness stated, "The collar was twisted -- not exactly turned up, but not rolled back properly. He had his hand up towards his back arranging the collar". The position of Major Bradley and witness in relation to that of accused at this time was "slightly in rear of the prolongation of their line", and the cadets in that formation could not have seen them without turning around. (R. 21) Accused probably could have raised his hand before assembly without witness noticing it, because "he was not in ranks until shortly before assembly went". There were upper classmen standing around in the area before assembly. (R. 24,28) The report of the delinquency in question would not necessarily require an explanation by accused unless a star had been placed upon it before his name, and witness was not certain whether or not he had "starred" this report. A cadet receives information

that he has been reported when he sees the report on the bulletin board, which is normally for delinquencies of the day before, and in this case the report should have been published on April 16, the day after the commission of the offense. (R. 21,22)

Accused was sworn at his own request and testified that on the occasion in question he reported to his place in ranks about a minute before assembly, but had his gloves on and turned around and went back to his room and put them away (R. 48). He then came back, having doubled time up and down the steps, and took his place in ranks about thirty seconds before assembly time. There were several second classmen, including Mr. Tiffany, watching him at the time he took his place in ranks. After having taken his place in ranks he raised his hand "to adjust my sweater, sir. I buttoned the top button, sir". He did not want to be reported for having the sweater unbuttoned. He learned on the day afterward that he had been reported for raising his hand and thought that one of the second classmen had made the report. He believed the report to be a mistake, and he did not remember raising his hand after assembly nor at the time he made the explanation of report did he recollect raising his hand after assembly. (R. 50) At the time he sat down and wrote out this explanation he had in mind a definite idea of the time he raised his hand and he did not recall raising his hand "after assembly had gone", and "could not bring that picture forth into my mind" (R. 52). Accused admitted that he made the written explanation which had been introduced in evidence as Exhibit B and which was as follows:

"Subject: Explanation of Report: April 16, 1935.
'Raising Hand in Ranks at Drill Formation
at 3:15 P.M., 15th inst.' Report of April 15.

To: The Commandant of Cadets.

1. The report is believed to be incorrect.
2. I raised my hand to adjust my sweater before assembly. The bugle had not blown." (R. 52,53; Ex. B)

Accused testified that he raised his hand about a second before the first note of the bugle, and that he found out by looking at the delinquency report on the bulletin board at about 3:00 p.m. the next day that he had been reported for raising his hand at the 3:15 p.m. drill formation (R. 53). Accused testified that in March, 1935, he had accumulated about 100 demerits,

and had been informed that in another month he would be "over the limit". He was aware that he "was being supervised and watched rather closely". (R. 52,54)

4. In order to sustain the conviction of accused it is necessary that the competent evidence in the record establish beyond a reasonable doubt that accused knowingly submitted, with the intent to deceive, a false official statement to the Commandant of Cadets. In the consideration of this question it is first necessary to analyze carefully the language employed by accused in this statement. The staff judge advocate in his review has adopted the view that paragraph 1 of this explanation was a statement of belief based upon a positive statement of fact contained in paragraph 2, above, concluding thereby that accused meant and intended to mean

> "The bugle that sounded assembly had not yet blown at the time or at any time when I raised my hand in ranks on the occasion in question."

Upon the premise that the report of accused "purports to reflect a flawless recollection of exactly what the writer did in respect of raising his hand in ranks in aforesaid formation", the staff judge advocate proceeded to examine the evidence and to sustain the conviction. The Board of Review is unwilling to subscribe to this conclusion, as such a conclusion imputes to accused ability to employ the English language in nicety of expression far beyond what his education warrants. As a matter of fact, a careful analysis of the two paragraphs of accused's explanation fairly permits a conclusion contrary to the one adopted by the staff judge advocate. If accused only raised his hand once, and there is no allegation or testimony which indicates that he raised his hand more than once, and he only believes that he did not raise it after the bugle for assembly had sounded, how can it be said that he positively stated that he raised his hand before the bugle sounded assembly? Furthermore, the testimony of accused indicates that his entire explanation was based upon his belief. In regard to this matter he testified:

> "Q. At the time you sat down and wrote out this explanation, you had in your mind then a definite idea of the time you raised your hand, is that right?
> A. Yes, sir.

Q. But you did not recall raising your hand after assembly had gone?
A. No, sir.
Q. Did you raise your hand after assembly had sounded?
A. I do not recall raising my hand after assembly, sir. I could not bring that picture forth into my mind, sir." (R. 52)

The language employed by accused in the alleged false statement and his testimony in explanation thereof warrants a construction that the entire statement of accused was one of belief, and in fairness to him and in view of the lack of any evidence to the contrary, the Board of Review is not warranted in interpreting it otherwise. The fact that the explanation of accused was expressed as a belief does not, however, exonerate him for the responsibility for having made a false statement if at the time of its making he had a conscientious and abiding belief contrary to the one expressed. The innocence or guilt of accused therefore turns not upon the fact of whether or not he raised his hand after assembly but upon his belief as to when he raised his hand.

Major Bradley testified accused raised his hand "between fifteen and forty-five seconds" after assembly, yet he did not recollect how assembly was sounded for he testified in response to a question in regard to this matter, "Assembly either on the bell or bugle". Furthermore, after testifying that he had not taken his eyes off the whole formation for one minute before assembly, he was unable to state whether or not the section marchers called the roll or "checked them off as they fell into ranks, in order to save time", this latter mode of ascertaining the presence of cadets necessarily taking place while Major Bradley had his eyes on the formation. Witness also testified that he wrote out the report covering the delinquency of accused, yet he could not recollect whether or not this particular report required an explanation from accused. Lieutenant Ridings who was with Major Bradley at the time the incident occurred testified in regard to the time accused raised his hand that he "would estimate it to be a minute after the bugle had blown". Lieutenant Ridings further testified that he could not remember "whether I starred the report which would require him to explain it", although Major Bradley had testified that he, Major Bradley, had submitted the report of accused's delinquency. Accused testified that he raised his hand about a second before the first note of the bugle. The testimony of these witnesses indicates that it was a matter of seconds between assembly and the time accused raised his hand.

The evidence in regard to the relative positions of accused and the officer witnesses shows only that the section of which accused was a member was being formed in the area of south barracks and that the officers were on the second floor of cadet headquarters, and that the position of the latter was "slightly in rear of the prolongation of their line". Major Bradley apparently did not recollect how assembly was sounded, but from the testimony of Lieutenant Ridings and accused assembly in this instance appears to have been sounded by bugle, although no one testified as to the whereabouts of the bugler. Under these circumstances it is not impossible that the bugler was located closer to the officers than to accused and that its sound reached them before it reached accused.

From the testimony of Major Bradley and Lieutenant Ridings it also appears that there was a cadet in charge of the section of which accused was a member, and that accused fell in on the right of the rear rank of Company F, this latter testimony indicating that there must have been a cadet on accused's left. Furthermore, both of these officers and accused testified that prior to assembly there were upper classmen in the vicinity of the section of which accused was a member. Accused mentioned by name one second classman, Mr. Tiffany. None of these cadets were called as witnesses for either side. If called the testimony of these witnesses, even if negative, would have been of considerable value in determining when accused actually raised his hand.

The weight of the above testimony is to the effect that in fact accused raised his hand in ranks after assembly, but it is not so overwhelming as to exclude all possibility that the incident may have occurred before or while the bugle was sounding.

It is not clear from the evidence in the record as to whether accused voluntarily submitted the explanation or whether it was "starred", thereby requiring an explanation from him. At the trial Major Bradley and Lieutenant Ridings were unable to make any definite statement in regard to this matter and accused did not testify concerning it. In order to resolve this incident one way or another the Board of Review, in the interest of justice, has examined the report of the investigating officer. This report shows that on April 25, 1935, Lieutenant Ridings testified before the investigating officer as follows: "Mr. Stout was required to explain this report" because "he has been reported so many times - so much that I thought in justice to Mr. Stout that I should like to look over his explanation for all delinquencies". Since the investigation was held

almost a month before the trial it is only fair to assume that Lieutenant Ridings' testimony before the investigating officer reflected a clearer recollection of what had transpired than his subsequent testimony at the trial; and that in fact the explanation was not voluntarily submitted by accused but, on the contrary, was required of him.

It is now necessary to consider the controlling factor of this case, - what was the belief of accused at the time he wrote and submitted his explanation of the delinquency in question. The prosecution limited its proof to the fact that accused actually raised his hand after assembly had sounded, apparently relying wholly on the fact that the act per se was such an act as to preclude the possibility of an honest mistake on the part of accused in recollecting the incident. The act of raising one's hand generally is such an inconsequential thing that under normal circumstances one could not be reasonably expected to recall the act itself or the attendant circumstances twenty-four hours later. However, at the Military Academy such an act committed while in ranks, particularly by a fourth classman, assumes significance out of all proportion to its importance elsewhere. He not only subjects himself to probable disciplinary action by the authorities but also exposes himself to immediate and severe "crawling" by such of the upper classmen as may have observed the act. Although there is no evidence in the record as to the customs of the Academy, it must be assumed that the court took judicial notice of them as all members of the court were officers on duty at that institution and of necessity familiar with its customs. At the time in question accused had been a cadet at the Academy since July 2, 1934, and by experience he must have been aware of the punishment awarded by the authorities of the Academy for such an offense as raising his hand in ranks, and also must have known that his act would probably not pass unnoticed by the first classmen who were in the vicinity. The evidence in the record shows that accused arrived at his place in ranks a few seconds before assembly, felt or remembered that the collar of his sweater was not properly adjusted, and raised his hand to adjust the collar, assembly being sounded at some time during this short interval which could not have been greatly in excess of one minute. The evidence also shows that accused was aware of the fact that he was being closely watched and supervised, that there were upper classmen in the vicinity, and also that he was in danger of being discharged from the Academy because of excessive demerits. Under these circumstances, is it reasonable to assume that he would have deliberately raised his hand to adjust his collar if he had been conscious

and aware that assembly had sounded? It may be true that assembly had sounded, but is it not possible that in the hurry of "falling in", late for a fourth classman, and in his anxiety to avoid possible demerits for the disarranged collar, he was not conscious of the exact instant the bugle sounded? If the incident had been brought to his attention immediately by the action of someone in authority or by an upper classman there could not be much doubt but that he would have collected himself and realized that he had raised his hand after the bugle had blown, had he done so. However, such was not the case. The uncontroverted evidence in the record shows that the incident was not brought to accused's attention until twenty-four hours later when the report of delinquency was posted on the bulletin board. He was then required to submit an explanation for the delinquency. Is it not possible, even probable, that when he tried to reconstruct the incident, which apparently had passed unnoticed until that time, that the explanation given by him at the trial that he "could not bring that picture (meaning raising his hand after assembly) forth in my mind", honestly reflected the workings of his mind and warranted him in making a statement based upon belief? A belief has been defined in the federal courts of the United States as follows:

> "A 'belief' is a conviction of the truth of a given proposition or an alleged fact resting upon grounds insufficient to constitute positive knowledge." Boone v. Merchant Farmers Bank, (D.C.N.C.) 285 Fed. 183,191.

The Board of Review has given most careful consideration to all the facts and circumstances revealed by the record of trial, has also considered carefully the customs of the Military Academy which were in all probability judicially noticed by the court, and in one instance has resorted to the report of the investigating officer in order to clear up an uncertain matter, and is impelled to the conclusion that the evidence fails to prove beyond a reasonable doubt that accused at the time he submitted the explanation in question knew or had reason to believe that the report he submitted was false. Nor does the Board of Review find in the evidence any proper proof that the accused is guilty of any lesser included offense.

5. The files of the War Department show that accused entered the United States Military Academy on July 2, 1934, from the State of Washington, and at the time of entrance he was 19 years and 11 months of age.

6. The court was legally constituted. 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 and the sentence.

Theodore Hall, Judge Advocate.

N. A. Trumbull, Judge Advocate.

S. W. Smith, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., AUG 14 1935 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Cadet Byford H. Stout, Fourth Class, United States Corps of Cadets.

2. I concur in the opinion of the Board of Review that the innocence or guilt of accused depends upon his belief as to the time he raised his hand rather than upon the time the incident actually occurred, but for reasons hereinafter indicated I am unable to concur in the Board's view that the evidence is legally insufficient to support the findings of guilty.

3. In regard to the proof necessary to convict, it is stated in the Manual for Courts-Martial, 1928, in paragraph 78, page 62 -

> "In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof. By 'reasonable doubt' is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the defendant to escape conviction; nor a doubt prompted by sympathy for him or those connected with him. The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty. A court-martial which acquits because, upon the evidence, the accused may possibly be innocent falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts on a mere probability that the accused is guilty."

From the foregoing rule it appears that it is not necessary for a conviction that the proof exclude every hypothesis or possibility of innocence.

4. The Board of Review, in its discussion of the evidence in regard to the time accused raised his hand, expressed the view that while the weight of the evidence indicated accused raised his hand after assembly, there remained a possibility that he may have raised it before or while assembly was being blown on the bugle. The Board's view was apparently based upon the possibility that the sound of the bugle may have reached Major Bradley and Lieutenant Ridings, the two officers who testified accused raised his hand after assembly, before it reached accused and because of certain discrepancies between the testimony of these two witnesses as to the exact instant accused raised his hand. I am not in accord with these views of the Board. I do not regard the discrepancies between the testimony of Major Bradley and Lieutenant Ridings as to the exact instant accused raised his hand as deserving much discussion. Regarding their testimony in a light most favorable to accused, it appears definitely established that from their position they observed accused raise his hand at least 15 seconds after assembly. The velocity of sound is approximately one mile in five seconds. Major Bradley and Lieutenant Ridings estimated accused raised his hand not more than one minute and not less than 15 seconds after assembly. Hence it appears that the two witnesses must have been located at least 3 miles nearer to the source of the sound than the accused in order for the sound to have reached the witnesses 15 seconds before it reached accused. There is no evidence to indicate that these two witnesses were at any great distance from accused. In fact, the evidence indicates to the contrary as it shows that accused was in a section formed in the area of South Barracks and that the two witnesses were on the second floor of Cadet Headquarters "slightly in rear of the prolongation of their line". From this evidence it appears to one familiar with the ground that the officers could not have been more than 100 yards from accused. It was physically impossible for the sound of assembly to have reached the witnesses any appreciable length of time before it reached accused.

In my judgment the testimony of Major Bradley and Lieutenant Ridings proved beyond a reasonable doubt that in fact accused raised his hand after assembly.

5. The Board also contended that under the circumstances existing at the time accused raised his hand, he may have been unconscious of the fact that assembly had been sounded, and that when he tried to reconstruct the incident 24 hours later his explanation that he believed he had raised his hand before assembly possibly, even probably, honestly reflected his

belief. I do not concur in this view. His recollection at the time of the trial of certain events of a non-delinquent character occurring shortly before assembly was apparently clear as to the time they occurred. For instance, he testified that he first arrived in ranks "about a minute before", returned to his room to put his gloves away, "doubled time up and down the steps", and arrived in ranks the second time "about thirty seconds" before assembly.

It does not seem reasonable, on any basis disclosed by the evidence in this case, that his memory only twenty-four hours after the transactions under consideration as to the act of raising his hand, which as stated above occurred an appreciable time after assembly, and which was a delinquency, could have been any the least vivid with respect to the time of occurrence. In this connection it is noted that the accused had over eight months service at the time of the offense charged.

The Board also argues that it would not be reasonable to assume that accused would deliberately raise his hand after assembly, knowing as he did the probable punishment and his dangerous position academically because of excessive demerits. I also do not concur in this view. Accused testified that he raised his hand "To adjust my sweater, sir", because "I did not want to be reported for sweater unbuttoned." It therefore appears from accused's own testimony that a motive existed for him to raise his hand, which is consistent with his desire to avoid receiving additional demerits.

In my judgment the evidence in the case establishes beyond a reasonable doubt that accused knew at the time he submitted his explanation to the Commandant that it was false and untrue.

6. For the reasons herein above set forth I recommend that the sentence be confirmed.

7. Inclosed herewith are a draft of a letter for your signature transmitting the record to the President for his action for use in case you approve my views and recommendations, and a form of action by him as confirming authority designed to carry my recommendations into effect. Also inclosed is an alternate letter to the President to be substituted in case you approve the views of the Board of Review, together with an alternate form of action designed to carry those views into effect.

8. Attention is invited to the following communications in regard to this case, which are appended hereto:

a. Copy of telegram from Homer Stout, father of accused, to the President, dated May 28, 1935.

b. Letter from Honorable Homer T. Bone, United States Senator from Washington, to the Secretary of War, dated June 5, 1935.

From correspondence on file in this office it appears the receipt of the above communications has been acknowledged. However, it is recommended that each of the above individuals be informed of the action taken by the President.

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

7 Incls.
Incl.1-Record of trial.
Incl.2-Draft of letter for sig. of Secy. of War approving views of Bd . of Rev.
Incl.3-Draft of letter for sig. of Secy. of War approving views of JAG.
Incl.4-Form of Executive action confirming sentence.
Incl.5-Form of Executive action disapproving findings and sentence.
Incl.6-Copy telegram from Homer Stout to President, 5-28-35.
Incl.7-Letter from Senator Bone to Secy. of War, 6-5-35.

Sentence disapproved by President.

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

Board of Review
CM 203411

AUG 2 1935

UNITED STATES	SEVENTH CORPS AREA
v.	Trial by G.C.M., convened at Fort Meade, South Dakota, May 23, 24, 27, 28 and 29, 1935. Dismissal.
Captain ROYAL H. DRUMMOND (0-132238), Infantry Reserve.	

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

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

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

CHARGE I: Violation of the 93d Article of War. (Finding of guilty by exceptions and substitutions disapproved by reviewing authority).

Specification 1: (Finding of guilty by exceptions and substitutions disapproved by reviewing authority).

Specification 2: (Finding of guilty by exceptions and substitutions disapproved by reviewing authority).

Specification 3: (Finding of guilty by exceptions and substitutions disapproved by reviewing authority).

Specification 4: (Finding of guilty by exceptions and substitutions disapproved by reviewing authority).

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

Specification 1: In that Captain Royal H. Drummond, Inf. Res., did at Camp F-17, CCC (Calcite), Tilford, South

Dakota, on or about February 3, 1935, with intent to deceive Captain Claude T. Frimann, Inf. Res., Ass't. District Inspector, S. D. Dist., CCC, willfully and without authority publish as true and genuine the signature "Ward A. Jones" on the Camp Exchange Statement of Company V-1784, CCC, for the month of January, 1935, which said signature was, as he, the said Captain Royal H. Drummond then well knew falsely made and forged.

Specification 2: In that Captain Royal H. Drummond, Inf. Res., did, at Camp F-17, CCC (Calcite), Tilford, South Dakota, on or about March 2, 1935, with intent to deceive Captain Claude T. Frimann, Inf. Res., Ass't. District Inspector, S. D. Dist., CCC, willfully and without authority publish as true and genuine the signature "Ward A. Jones" on the Camp Exchange Statement of Company V-1784, CCC, for the month of February, 1935, which said signature was, as he, the said Captain Royal H. Drummond then well knew falsely made and forged.

Specification 3: In that Captain Royal H. Drummond, Inf. Res., did, at Camp F-17, CCC (Calcite), Tilford, South Dakota, on or about March 2, 1935, with intent to deceive the Commanding Officer, S. D. Dist., CCC, officially report to the said Commanding Officer that there were no bills payable from Camp Exchange funds, which report was known by the said Captain Royal H. Drummond to be untrue.

CHARGE III: Violation of the 96th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

3. As to the specifications and charge of which accused stands convicted, the evidence shows:

Accused was assigned to and reported for active duty April 1, 1934. On April 4 he was assigned to command Company 1784-V, project F-17, Calcite, Tilford, South Dakota, and reported on the following day. He remained continuously on this duty, with the exception of four days in June, 1934, during which time he was on leave of absence, until relieved of command of the company on April 2, 1935. (R. 6-7)

General Orders No. 1, Headquarters South Dakota District, January 24, 1935, provides, inter alia:

"e. Exchange Funds.

(1) The Exchange Personnel will consist of an Exchange Officer and an Exchange Steward * * *

(3) Operation.

a. Exchanges will be operated on a cash basis, i.e., stock purchased will be paid for at time of purchase. * * *

d. Audits and Inventory.

(1) An officer of the company, other than the Exchange Officer, will inventory the stock, audit the cash book and stock record account, and certify to their correctness in the cash book and stock record account book. Discrepancies will be reported, by the Auditor to the District Commander, through the company commander. * * *

e. Instructions for Auditors.

(1) Check Steward's daily reports against all receipts in cash book. They must agree.

(2) Check all disbursements in cash book against vouchers. These must agree and there must be a voucher for each disbursement.

(3) Check bank balance in cash book against bank statement.

(4) Check cash balance in cash book against actual cash on hand. Count cash.

(5) Add last inventory at selling price to stock purchased during the month at selling price. Subtract 'sales' during month. The difference should equal the new inventory at selling price. Any major discrepancy will be reported.

(8) Camp Exchanges will be closed for inventory and audit between the 25th and last day of each month. A written report will be submitted to this Headquarters showing the status of Camp Exchange, on close of business each month, as follows:

a. Cash on hand.
b. Cash in bank.
c. Outstanding bills payable.
d. Bills receivable (collections due, gross amount only).
e. Accurate value of stock on hand." (R. 35; Ex. K)

On or about April 6, 1935 (R. 38), Captain Claude T. Frimann, Infantry Reserve, Assistant District Inspector, South Dakota District, Civilian Conservation Corps (R. 15), audited the Camp Exchange of Company 1784. During the course of this audit he "accepted" as "true and genuine" two reports of audit and inventory of the company exchange dated February 3 and March 2, 1935. The first covered the month of January, 1935, and the second the month of February, 1935, and both bore the signature, "Ward A. Jones Capt. Inf. Res." These reports of inventory and audit show stock on hand at the beginning and ending of the months to which they pertain, total purchases, losses and sales. They also contain statements to the effect that the auditing officer has checked certain reports, balances, disbursements and cash. Just above the signature, "Ward A. Jones", on each of the instruments appears the following certificate: "I hereby certify that the above audit is correct". A later check of these audits by a board of which Captain Frimann was a member revealed some small errors in the figures contained thereon. At the time of the audit of April 6, 1935, accused did not state to Captain Frimann that the signatures on the reports of inventory and audit were those of Captain Jones. Later, before a board of which Captain Frimann was a member, accused at first denied that he had written the signatures of Captain Jones on the reports but later admitted this to be true. (R. 38-42; Exs. L,M) Captain Ward A. Jones, Infantry Reserve, was on active duty with Company 1784, at Calcite, from on or about May 21, 1934, to on or about January 24, 1935, but at no time subsequent thereto. During this period accused performed the duties of Camp Exchange Officer. At no time during 1935 did Captain Jones audit the exchange, and the signatures on the reports of inventory and audit (Exs. L and M) are not his. (R. 35,36) After twice being warned of his rights, and without "promise of leniency" or

"hope of reward", accused "of his own accord" (R. 23) stated to the officer investigating the charges in this case that he had conducted the audits of February 3 and March 2, and signed Captain Jones' name to the two reports of inventory and audit (Exs. L and M). In explanation of these actions accused further stated that he had done this because "he was expecting an auditor to come thru and he wanted to have it ready and Captain Jones wasn't in camp and he knew that another officer should sign it so he signed it instead" (R. 45-46). (Specifications 1 and 2, Charge II)

Accused, testifying as a witness in his own behalf, stated with reference to these specifications that he, as post exchange officer, prepared the reports of inventory and audit of the camp exchange of Company 1784 for the months of January and February, 1935. They were correct to the best of his knowledge and belief and such errors as were found in them he attributed to errors in calculations. (R. 91-92) As to his reason for signing Captain Jones' name to the reports,

> "The only way I can account for that was the fact that the day before Captain Frimann came up to audit I received word late that night that an officer would be up to audit the books the next morning and I had worked all night getting things in shape. About 4:00 o'clock the next morning when I thought everything was in shape, I was running them over and I noticed these two audits were not signed. I felt I had to have everything ready early the next morning and so I signed them. Certainly I did not give it any consideration for if I had, I would not have signed his name for a month, the month of February, when I well knew he was not there."

He made no attempt to "imitate" Captain Jones' signature. At the time the reports of inventory and audit were prepared accused stated that due to the press of other duties practically all of the company work and records were "at least a full month behind". (R. 93) Accused considered his actions in signing Captain Jones' name to the reports as a "technical completion of that audit" and not as a serious matter or an offense (R. 94).

Without objection on the part of the defense there was introduced in evidence by the prosecution in support of Specification 3, Charge II,

the following document:

"HEADQUARTERS VETERANS 1784 CO.
Civilian Conservation Corps
Camp F. 17 Calcite
Tilford, S. Dak.

March 2nd, 1935

Subject: Report of camp exchange funds. (February) 1935
Headquarters So. Dak Dist. CCC. Fort Meade, S. Dak.

Cash on hand----------	$ 57.45
Cash in bank----------	$ 12.79
Bills payable----------	$ None
Collections due----------	$ 198.00
Stock on hand----------	$ 128.55

Royal H. Drummond
Capt. Inf., Res." (R. 46; Ex. N)

The Executive Officer of the Civilian Conservation Corps at Fort Meade, South Dakota (R. 44), identified this document as "a report required by our Headquarters as to the status of the funds of the Post Exchange * * *" (R. 52). After being warned of his rights in the manner hereinabove set forth accused stated to the investigating officer that he made and submitted as correct the report (Ex. N) to District Headquarters with the knowledge that it was not correct (R. 53). At the same time accused stated that he did this because orders required exchanges to be operated on a cash basis and there being no funds available to pay outstanding bills he had assumed them as personal obligations and for that reason did not report them (R. 54-55). On March 2, 1935, the post exchange of Company 1784 was indebted to American Fruit Company of Rapid City, South Dakota, in the sum of $780.31 (R. 47-48; Ex. P), and to the Black Hills Wholesale Grocery Company of the same city in the sum of $298.38 (Ex. O). Accused by letter to the first mentioned company suggested that he sign a note personally for the account (R. 49-50), and stated to a representative of the second company that he would "clear up" their account as soon as possible and if necessary he would personally assume this obligation (Ex. O).

Accused testified that at the time of the two audits on March 2 there were outstanding bills against his exchange which he hadassumed

to be his "personal responsibility" (R. 97), and that during the period he was in command of Company 1784 he paid out of personal funds company indebtedness to the total amount of $889 (R. 70), although he had no income other than his salary (R. 98-99). He called the American Fruit Company and the Black Hills Grocery Company and explained that he did not see how the exchange could "pay them out very quickly" and that he assumed any outstanding indebtedness the exchange could not take care of (R. 101), but he did not specify which invoices he would pay (R. 103). He told both companies that if they wished to do so they could transfer the account to his name but "they apparently did not. They preferred to carry on in the same way". "They said they saw no reason for doing so". Company 1784 is now paying these accounts (R. 104). He offered to execute personal notes payable to the American Fruit Company but they did not accept the offer (R. 105).

4. Under Specifications 1 and 2 of Charge II, there appears to be a defect in proof in that it is not shown affirmatively that Captain Ward A. Jones did not authorize the accused to sign the name of "Ward A. Jones" to the two camp exchange statements of February 3 and March 2, 1935 (Exs. L and M), respectively. Dig. Ops. JAG 1912-30, sec. 1567. However, any hypothesis of innocence which might operate to the advantage of the accused because of this is destroyed by the testimony of Captain Jones that at no time in 1935 did he audit the exchange. That he would authorize another to sign his name in certification of audits that he did not make is so improbable that denial is unnecessary.

While Captain Frimann did not testify that accused presented these two reports of audit to him as "true and genuine" the evidence shows that they were included in the papers inspected by him at his audit, were required by general orders to be prepared and available, and that they were accepted by him as "true and genuine". Accused admits that he signed these audits after having prepared them expressly for the audit of Captain Frimann, and that he considered the signing of Captain Jones' name to them merely a "technical completion of that audit". That each of these audits was published as true and genuine by accused, as alleged, appears to be clearly established by this evidence.

5. The evidence supporting Charge II and its three specifications is, in the opinion of the Board of Review, clear and convincing and fully

warrants the findings of guilty. By his proved admissions and sworn testimony accused admits his guilt of the offenses therein charged. As to Specifications 1 and 2, he admits that he, as charged, executed the two false and forged documents and by implication, if not by the actual words, he further admits that this was done with intent to deceive, as alleged. His statements to the effect that he did not consider the execution of these false and forged instruments as an offense of any import is utterly unworthy of a man of accused's age, intelligence and experience. Granting all that he testifies in this regard to be true, it would constitute no real defense to the offenses charged in these specifications and charge. The Board of Review is of opinion that accused stands properly convicted of Specifications 1 and 2, Charge II.

As to Specification 3, accused admitted to the investigating officer that he executed and submitted to the Headquarters of his CCC District an official report as to the status of a fund or activity for which he was responsible. It is alleged and proven that this report was false in that it reported no bills payable whereas there were actually due and payable bills to the total amount of $1078.69. Accused's attempted explanation of this report is puerile. In one breath he testifies that he did not consider the proven bills to be outstanding against the fund or activity on which he was reporting because he had arranged to have the indebtedness transferred to his personal account, yet in the next breath he states that the creditors did not do so because "they preferred to carry on in the same way". The Board of Review is of opinion that accused also stands properly convicted of Specification 3, Charge II, and of Charge II.

6. Attached to the record of trial as Exhibit W is a request for clemency signed by the defense counsel, based on (a) accused's ignorance of Army paper work, (b) the fact that accused's family consists of a wife and four minor children, and (c) his expenditures of personal funds for payment of company bills. In the opinion of the Board none of these constitutes adequate grounds warranting the extension of clemency.

7. Accused is 40 years of age. He is a graduate of North Dakota Agricultural College. He attended the First Officers' Training Camp at Fort Snelling, Minnesota, from May to August, 1917. At the completion

of this camp he was commissioned a captain and thereafter was on active duty in this country until July 9, 1919. He has had subsequent active duty as follows:

July 16 to August 8, 1922;
April 19 to May 3, 1925;
October 25 to November 8, 1925;
October 1 to 14, 1933;
April 1, 1934, to date.

8. The court was legally constituted. Accused, a reserve officer on active duty, is subject to military law. CM 201678, Anderson; CM 202366, Fox; CM 202479, Babbington. No errors injuriously affecting the substantial rights of accused were committed at the trial. The record of trial is legally sufficient to support the findings 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.

Theodore Hall, Judge Advocate.
W. A. Turnbull, Judge Advocate.
S. W. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 203431

AUG 6 1935

UNITED STATES	NINTH CORPS AREA
v.	Trial by G.C.M., convened at Presidio of San Francisco, California, May 28 and 29, 1935. Dismissal.
First Lieutenant HENRY L. HUGHES (0-16566), (CAC) Quartermaster Corps.	

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

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

2. Accused was tried upon ten specifications in violation of the 95th and 96th Articles of War, a nolle prosequi having been entered by the prosecution as to Specification 5 of Charge I. The seven remaining specifications of Charge I allege variously the making of false official statements, failing to meet an official promise to a superior officer, and dishonorably failing to pay just debts, all in violation of the 95th Article of War. Specifications 1 to 3, inclusive, Charge II, allege as many wrongful failures and neglects to reply to official communications, in violation of the 96th Article of War. Accused pleaded not guilty to both charges and all specifications thereunder. He was found guilty of Specifications 1, 7 and 8, Charge I, and of Charge I, and not guilty of Specifications 2, 3, 4, and 6, of Charge I, and of Charge II and the specifications thereunder. He was sentenced to dismissal. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The offenses of which he now stands convicted are as follows:

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

Specification 1: In that First Lieutenant Henry L. Hughes, Coast Artillery Corps (QMC), did, at Boise, Idaho, on or about November 3, 1933, with intent to deceive his superior officers, the Commanding General, Ninth Corps Area, and the District Commander, Boise District, CCC, Boise, Idaho, knowingly, officially and falsely state in writing by his 5th Indorsement to said District Commander concerning a letter from Electrolux, Inc., Norfolk, Virginia, dated September 15, 1933, as follows:- "1. The letter in question is attached. The account to the writer of basic letter thereon, has been paid in full", which said statement was false and untrue and was then and there known by the said First Lieutenant Henry L. Hughes to be false and untrue, in that such account in fact had not then been paid and settled in full.

Specification 7: In that First Lieutenant Henry L. Hughes, Coast Artillery Corps (QMC), being indebted on July 10, 1933, to John A. Brean, doing business as Citizens Loan Association, Chicago, Illinois, in the sum of $135.83, plus interest, the balance due and unpaid upon a loan of $200.00 made to said First Lieutenant Henry L. Hughes, September 6, 1932, did, at Boise, Idaho, and elsewhere as the said First Lieutenant Henry L. Hughes changed his station and residence, from July 10, 1933, to the present date, dishonorably fail and neglect to pay said debt. (The charges were sworn to February 26, 1935)

Specification 8: In that First Lieutenant Henry L. Hughes, Coast Artillery Corps (QMC), being indebted to Electrolux, Inc., a corporation, in the sum of $55.50, the balance due and payable August 30, 1933, upon a written contract of purchase signed by said First Lieutenant Henry L. Hughes, April 29, 1933, did, at Boise, Idaho, Philadelphia, Pennsylvania, and elsewhere as the said First Lieutenant Henry L. Hughes changed his station and residence, from August 30, 1933, to April 5, 1934, dishonorably fail and neglect to pay said debt.

3. The evidence concerning the above specifications is summarized as follows:

Specification 1. Employees of Electrolux, Inc., Norfolk, Virginia, testified (Cummings, Ex. 5; Harbin, Ex. 6) that on April 29, 1933, accused purchased of such corporation a vacuum cleaner at a price of $77.50, paying $10 in cash at the time and signing a sale agreement to pay the balance of $67.50 in monthly installments of $6 on the 4th of each succeeding month until fully paid, beginning with June 4, 1933; and that such contract provided that upon failure to make any of the monthly payments "the entire balance will then become due and payable". After the down payment of $10 on April 29, 1933, the only other payment was one of $12 made on August 30, 1933, and no other payment was made prior to April 5, 1934. Letters requesting payment were sent by the corporation to accused direct on June 16, 1933, August 2, 1933, and August 5, 1933, the latter by registered mail. No reply was received from accused other than an undated letter from accused's wife, mailed March 22, 1934. Letters from Electrolux, Inc., to The Adjutant General, dated August 9, 1933, and to Lieutenant Colonel E. S. Adams, A.G.D., Ninth Corps Area, Presidio of San Francisco, dated September 15, 1933, relative to its account (copies of letters with Ex. 6) were transmitted to the Commanding General, Ninth Corps Area, and upon the latter being brought to the attention of accused he reported (5th Indorsement, November 3, 1933, Ex. 4): "The letter in question is attached. The account to writer of basic letter thereon, has been paid in full", having theretofore stated in the same correspondence (1st Indorsement, October 27, 1933, Ex. 4) that he "has replied directly to writer of basic communication and satisfactory adjustment will be made", and in another indorsement to the Commanding Officer, Boise District, CCC, dated November 2, 1933 (Ex. 3), that "Reply has been made direct to the writer of basic communication. Satisfactory adjustment will be made. No further correspondence on this matter should be necessary". Prior thereto and on August 23, 1933, accused by indorsement to the letter from Electrolux, Inc., to The Adjutant General, stated to the Commanding Officer, Boise District, CCC, that this account "has been paid up to date" (Ex. 2).

As to the foregoing accused testified that he entered into a contract with Electrolux, Inc., in April, 1933 (R. 32), and was familiar with the terms of the contract (R. 47); that after the down payment of $10 he personally made but one payment, a money order for $12 in August, 1933, having received a registered letter from the Electrolux, Inc., that the account was in arrears (R. 60,62,37). He did make an official statement that the Electrolux account had been paid in full (R. 36-38) (Ex. 4 shows

that this statement was made on November 3, 1933). He "had every reason to believe that it was paid up to date", and that was what he meant when he said the account was "paid in full", it having been agreed that his wife would continue the payments (R. 36-38). He did not see his wife from about May 26, 1933, until she arrived at Boise, Idaho, during the month of August (R. 53,36).

Mrs. Hughes, wife of accused, testified that the vacuum cleaner was purchased on April 29, 1933, upon her insistence. She told accused she would take care of the payments with her stock dividends. It was agreed with accused that she would assume all the responsibility for meeting their financial obligations with funds from their joint checking account. He had every reason to believe she was meeting the monthly payments as she had agreed to do. The several transfers of accused increased the family expenses. She was separated from accused from May 26 to August 9, 1933. Her private income from stocks ceased in the summer of 1933. The payments made by her to Electrolux (after the first down payment) were $12 sometime between June 1 and October 27, 1933, $12 April 3, 1934, and $6 per month thereafter until fully paid January 1, 1935. (Ex. A)

Specification 7. The evidence for the prosecution under this specification is substantially as follows: On September 6, 1932, accused borrowed $200 from John A. Breen, doing business as Citizens Loan Association, Chicago, Illinois, and gave his promissory note in which he promised to make monthly payments of $20 with interest at the rate of 3½% per month, on the 10th of each month, commencing October 10, 1932, until the full amount of the note and interest was paid; and that upon default of any installment of the principal or interest the entire amount would become due at the option of the holder. Payments were irregular and insufficient. Between February 6, 1933, and April 7, 1934, no payments were made, and between February 6, 1933, and February 13, 1935, no payment was made adequate to cover all accrued interest or to apply on the principal after application to past due interest charges. On February 6, 1933, the unpaid balance of principal was $135.83. This remained unchanged until February 13, 1935, when intervening payments had discharged accrued interest and a payment made on the latter date had reduced the principal to $130.59. During the period from July 10, 1933, to February 24, 1934, no communications concerning the indebtedness were received by the holder of the note from accused or from any person purporting to represent him. From March 30, 1934, to February 14, 1935, some seventeen communications

were addressed by the holder of the note to Mrs. Hughes, who had requested that they be directed to her because accused had been ill and in March, 1934, was in a hospital. In approximately the same period twelve letters were received from Mrs. Hughes, either transmitting small and inadequate payments which were applied on accrued interest, or regretting her inability to make any payments at all. (Exs. 17,18,19) In 1933 the holder of the note wrote several letters to the Commanding Officer, Fort Worden, accused's home station, relative to accused's indebtedness, one of which was transmitted to accused at Boise, Idaho, in December, 1933, for an explanation. Accused replied that monthly payments would be made until the debt was paid. (Exs. 20,21) Such monthly payments were not commenced thereafter until April 7, 1934, and then in insufficient amounts to pay the monthly installments and interest (Ex. 18). Several communications relative to this indebtedness were mailed from Fort Worden to accused at this address in Boise in December, 1933, and January, 1934, to which no reply was made although he was there during such months. Two of these communications were sent by registered mail, receipts therefor being signed by persons acquainted with accused. (Exs. 21,24,25)

Accused testified (R. 40, et seq.) that he borrowed $200 from the Citizens Loan Company of Chicago on a contract upon which he had paid $328.79, and that at the date of trial the debt had been paid in full (Ex. E). Since about January 9, 1934, payments had been made regularly (R. 41), a total of $92 having been paid during 1934 by Mrs. Hughes (R. 42). The first of the monthly payments he promised to make was made as soon as he reached Philadelphia and recovered from his illness (R. 62). He returned from Walter Reed Hospital for duty in Philadelphia about the middle of April, 1934 (R. 35). His expenses were large due to several transfers, family illness, and increased living costs because of CCC work. He wrote the Citizens Loan Association on January 21, 1934, from Boise explaining his delinquency in making payments and promising that Mrs. Hughes would make payments in the future until the account was closed. (R. 35; Ex. B) He never received any of the communications from Headquarters Fort Worden in December, 1933, and January, 1934, except one received about January 21. He was on a leave status and absent from Boise on hunting trips off and on for two or three weeks (R. 43). He finally left for Philadelphia with his family February 4, 1934 (R. 35).

Mrs. Hughes testified that accused was ill and under medical care while in Philadelphia, and upon orders from his doctor (his brother in Philadelphia) mail for him was withheld by witness, and when accused returned from Walter Reed April 13, 1934, such mail could not be found. It included

registered letters from the War Department which were never opened. (Ex.A)

Staff Sergeant Backer (Ex. B) testified that he typed for accused the letter mentioned by the latter to have been mailed the Citizens Loan Association on January 21, 1934, identified a copy of it. He did not see accused sign it and did not remember that it was mailed. (Ex. B)

Dr. B. A. Hughes testified that he professionally attended accused, his brother, at Philadelphia, during the period February 18 to March 20, 1934, until accused was sent to Walter Reed General Hospital. Accused was then not physically capable of taking care of his personal affairs. He suggested that accused's wife be given full authority to handle all his finances. Accused had bronchitis and rhinitis, his condition having been aggravated by his CCC duties in Idaho. (Ex. C)

Specification 8. The evidence above summarized under Specification 1 in part applies also to this specification.

4. Conclusions. The evidence shows without contradiction that accused in his 5th Indorsement to the District Commander, dated November 3, 1933, with reference to a letter from Electrolux, Inc., Norfolk, Virginia, dated September 15, 1933, stated that the "account to the writer" of this letter had been paid in full, whereas in fact this was not true since there then remained due and unpaid to Electrolux, Inc., the sum of $55.50. The explanation offered by the defense in this connection, to the effect that the statement was intended to mean that the account was paid in full as to the amount then due, is not considered by the Board of Review to be based on a reasonable interpretation of the language used by accused under the circumstances. This is a clear and unequivocal statement that the account referred to had been wholly paid and that no part of it remained due and unpaid, which, as shown by the record, was not true. As to this offense the Board of Review is of opinion that the evidence shows beyond any reasonable doubt that accused submitted the statement knowing it to be false at the time and with the intent to deceive.

The failure to pay the debts alleged in the remaining two specifications is clearly established by the evidence. The period of time elapsing during which no payment was made on either of these obligations is believed, under the circumstances, to be of such duration as to characterize such failure and neglect as dishonorable. Notwithstanding repeated efforts by the creditors involved and official communications in respect thereto, accused continued to disregard these obligations for periods of about nineteen and

seven months, respectively. The Board of Review is of opinion that the failure of accused to attend properly to these matters for such an extended period of time, and under such circumstances, constitutes conduct unbecoming an officer and a gentleman as contemplated under the 95th Article of War.

5. At the time of trial accused was 31 5/12 years of age. The statement of his service as contained in the Official Army Register is as follows:

" Pvt., corp., and sgt. C.A.C. 1 Dec. 22 to 10 Nov. 25; pvt. 30 Inf. 9 Feb. 26 to 9 Sept. 26; 2 lt. A.C. 13 June 26; accepted 10 Sept. 26; trfd. to C.A.C. 9 May 27; 1 lt. 17 Apr. 32; Q.M.C. 1 Mar. 34."

6. The Board of Review is in receipt of a letter from accused dated July 3, 1935, in which he raises various points in connection with his case which he requests be considered by the Board. After careful consideration of the points noted, the Board of Review is of opinion they are not well taken in that they are clearly insufficient in law and are statements of conclusions not supported by the evidence. There is nothing in the record to indicate that the substantial rights of accused were prejudiced. Accused requests that final action on this case, if unfavorable, be delayed until he can be permitted to return to his permanent station to obtain additional evidence not available at the time of trial. The nature and substance of such additional evidence is not stated, nor is any explanation offered as to why it was not previously available and presented. There appears to be no sufficient reason for delaying action upon the record.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed at the trial. The record of trial is legally sufficient to support the findings 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.

Theodore Hall, Judge Advocate.

W. A. Turnbull, Judge Advocate.

L. M. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 203457

AUG - 1935

UNITED STATES	)	FIRST DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Hamilton, New York, June 13, 1935. Dismissal.
	)	
Second Lieutenant HENRY A. SEBASTIAN (0-19561), 16th Infantry.	)	

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

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

2. Accused was tried before a general court-martial convened at Fort Hamilton, New York, on June 13, 1935, pursuant to competent orders of the Commanding General, First Division, on the following charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Henry A. Sebastian, 16th Infantry, while a Cadet First Class, United States Corps of Cadets, did, at the United States Military Academy, West Point, New York, on or about September 20, 1933, with intent to deceive the authorities of said academy, falsely certify in writing that he was not married, which certificate was known by the said Henry A. Sebastian to be false in that he well knew that on June 16, 1931, he was married to Harriet Hagman and that this marriage had not been dissolved.

Specification 2: In that Second Lieutenant Henry A. Sebastian, 16th Infantry, while a Cadet First Class, United States Corps of Cadets, did, at the United States Military Academy, West Point, New York, on or about May 8, 1934, with intent to deceive the authorities of said academy, falsely certify in writing that he was not married, which certificate was known by the said Henry A. Sebastian to be false in that he well knew that on June 16, 1931, he was married to Harriet Hagman and that this marriage had not been dissolved.

After submitting special pleas to the jurisdiction, and in bar of trial under the statute of limitations, which pleas were properly overruled by the court, accused pleaded not guilty to both specifications and to the charge. He was found guilty as charged and sentenced to be dismissed the service. No previous convictions were considered. Clemency in various forms was recommended separately by seven of the eight members of the court. The reviewing authority approved the sentence as adjudged by the court and forwarded the record of trial for action under the 48th Article of War.

3. Before arraignment the defense made a plea to the jurisdiction of the court on the ground that accused being a commissioned officer could not be tried by general court-martial for offenses committed while a cadet (R. 8). This plea was apparently based upon the general rule set forth in paragraph 10, page 8, Manual for Courts-Martial, which provides as follows:

"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."

This precise question was considered by The Judge Advocate General in 1907 and the following opinion rendered:

"On the question as to whether a commissioned officer could be tried for misconduct as a cadet, held, that there

is ground for the view that a prosecution may be instituted against an officer for an offense committed while a cadet, although no precedent exists in the military service for such prosecution. Cadets are not discharged upon graduation, but may be promoted second lieutenants; there would, therefore, appear to be no hiatus in the military status of a man between the time he serves as a cadet at the Military Academy and the time when he serves under a commission. C. 22475, Mar. 2, 1907." Par. VIII I 2, Dig. Ops. JAG 1912, p. 515.

Other opinions of The Judge Advocate General which are helpful are (sec. 1435, Dig. Ops. JAG 1912-30, p. 713):

"The accused, an officer, entered a plea to the jurisdiction of the court. It appeared that the offense was committed while the accused was a contract surgeon serving with the Army in South San Antonio, Texas. He was 'serving with the Armies of the United States in the field'. The military court had jurisdiction of the accused for that reason, not because he had a contract with the United States. His service as contract surgeon was continuous up to the time he received his commission. His change of status from contract surgeon to officer in no way interfered with the jurisdiction of the military tribunal. A contract surgeon is amenable to military law when serving with the Army in the field or in a foreign land. (Dig. Op. J.A.G. 1912, p. 97.) C. M. 104677 (1917); C. M. 119582 (1918).

An enlisted man who accepts a commission does not lose his military status; it is merely a change from one kind of military status to another, and jurisdiction for an offense committed while an enlisted man does not terminate upon the acceptance of a commission. Held, That in this case accused is answerable for his acts as an enlisted man. C.M. 121586 (1918).

An officer in the United States Guards was charged with certain offenses under military law; before trial, he was appointed an officer in the Infantry, United States Army. Held, That he is still subject to be tried for the old offenses. (Winthrop, Mil. Law and Precedents, reprint, page 93; par. 5, G.O. No. 73, W.D. 1918; Dig. Op. J.A.G. 1912, p. 515.) 250.4, Oct. 25, 1918.

Upon the trial of an officer the defense entered a plea in bar upon the grounds that accused had been promoted from second to first lieutenant since the commission of his offenses, and that this promotion operated as a constructive pardon. A large number of promotions were being made at the time and the change in accused's grade was 'a routine matter in the office of The Adjutant General', which office was not informed of the pending charges and trial. Held, That because of the circumstances under which the promotion was made the plea was properly overruled. C.M. 145848 (1921).

Accused, an officer, was charged with offenses (not under A.W. 94), committed prior to the time at which he had been discharged as an emergency officer for the purpose of accepting a commission in the Regular Army. He entered a plea in bar on the ground that his discharge released him from amenability to trial for offenses committed prior thereto. Under the circumstances under which this discharge was executed, it can not be said that accused's military status terminated, and it follows that the rule that a person once discharged can not be tried by courts-martial for offenses committed prior to his discharge, except for violations of A. W. 94, does not apply. The plea was properly denied. C.M. 145719 (1921); C.M. 149318 (1921); 250.451, Nov. 2, 1920; C.M. 149937 (1921)."

This question was also considered in a habeas corpus proceeding before the United States District Court, Southern District New York, in Ex parte Joly, 290 Fed. Rep. 858. So much of this case as is relevant is as follows:

"Briefly stated, the essential facts are as follows: Relator was an emergency lieutenant colonel prior to September 23, 1920. He was charged with having committed various offenses between February, 1920, and July, 1920. On September 23, 1920, he was honorably discharged. In his petition, relator alleges that 'on September 24, 1920', he was 'duly commissioned as major in the regular establishment of the United States army'. In his traverse, however, he fixes the date of his commission as major as February 5, 1921.

The answer alleges that the discharge as lieutenant colonel was effective at midnight at the end of September 23, 1920, and that relator 'was pursuant to said discharge, commissioned a major in said regular army effective at midnight at the beginning of the 24th day of September, 1920.' He was subsequently (beginning November 11, 1921) tried by court-martial and convicted.

It is contended by respondent that relator was never out of the military service. The traverse thus raises an issue of fact, which, however, becomes immaterial if the court-martial had jurisdiction notwithstanding the alleged hiatus.

* * * *

Whether the relator was badly advised, whether or not error was committed in the remarks of the trial judge advocate, or whether or not testimony was improperly admitted are all matters with which this court has no legal concern. Respondent, while not conceding the facts, assumes for the purposes of the argument:

'(1) That relator was a civilian from September 24, 1920, to February 5, 1921.

(2) That the army boards charged with recommending officers for commissions in the regular army made a determination in favor of relator's innocence of the offenses of which he was subsequently convicted.

(3) That the court-martial commented on relator's absence from the witness stand. * * *

(4) That relator's plea to the jurisdiction of the court-martial convened to try him for offenses under A.W. 95 was at first sustained by that court, and that thereafter, some of the testimony relevant to the charge based on A.W. 94 having meantime been taken, the court-martial, prior to the submission of its proceedings to the convening officer, recalled its former ruling, and overruled relator's plea to its jurisdiction of the charge based on A.W. 95.'

* * * *

In respect of article 95, I do not entertain any doubt as to the right to try relator. The question, under that section, is solely as to the power of Congress to regulate the administration of the military establishment. Surely,

for its own protection, there must be power to dismiss from the military service an officer or cadet whenever 'conduct unbecoming an officer or gentleman' is discovered, no matter when it happened.

Suppose it was discovered that an officer, before he entered the service, had committed a murder or was guilty of treason, can it be said that the Congress, in the interest of effective administration and regulation of the military forces, has not power to authorize a military tribunal to try such person, with the ultimate result of dismissal upon conviction? Picture the spectacle of a faithless and treasonable officer serving side by side with loyal men in combat with the enemy, because there was no power to dismiss such a man for previous disloyalty, discovered only after his entry into the service! The same view applies to lesser offenses, and I think is so obvious that extended discussion of this point is unnecessary.

In view of the foregoing conclusions, it is likewise not necessary to discuss some other points presented in the very helpful briefs of counsel.

An order dismissing the writ may be submitted on notice at noon on September 7, 1922." (Underscoring supplied)

The above mentioned opinions of The Judge Advocate General holding that an officer may be tried for an offense committed by him during his former status as an emergency officer, contract surgeon, officer of the United States Guards, and enlisted man, are all based upon the fact that in each case the service of the officer concerned had been continuous and that he had not been discharged.

The opinion of the court in the Joly case, supra, that an officer may be tried for an offense in violation of the 95th Article of War committed before the commencement of his status as an officer, is based upon a different premise but it directly supports the jurisdiction of the court in the instant case.

Accused was admitted as a cadet at the United States Military Academy on July 1, 1929, and commissioned a second lieutenant of Infantry in the United States Army on June 12, 1934, which status he occupied at the time of the trial (Exs. C, D and E). In this connection it is to be noted that five years elapsed between the time accused

entered as a cadet and the date of his commission as an officer, which is one year more than the prescribed course at the Military Academy. No evidence was introduced at the trial in explanation of this fact except the entry in the official Army Register, January 1, 1935 (Ex. E), which shows accused was a cadet continuously from July 1, 1929, to June 12, 1934. However, the following letter copied from the records of The Adjutant General's office explains this matter:

"AG 201, Sebastian, Henry Agnew
(1-8-32)Off-cha-445. January 8, 1932.

Subject: Turnback of Cadet Henry Agnew Sebastian.
Through: The Superintendent,
U. S. Military Academy,
West Point, N. Y.
To: Cadet Henry Agnew Sebastian, 2d Class, U.S. Military Academy.

Cadet Henry Agnew Sebastian, 2d Class, United States Military Academy, upon recommendation of the Academic Board, is turned back to join the next lower class (Class of 1933), and granted leave of absence until August 27, 1932.

By order of the Secretary of War:
C. H. Bridges
Major General,
The Adjutant General."

Lieutenant G. Ordway, Jr., Infantry, an officer on duty with the Tactical Department at the Academy, testified that he was familiar with the procedure at the Military Academy on graduation day and was present at the graduation of accused; that at the close of the ceremonies incident to graduation the cadets are presented with diplomas and commissions and are sworn in as officers of the Army; that cadets do not receive a discharge and there is no interval between the status of cadet and commissioned officer (R. 41-42). No attempt was made by the defense to controvert this evidence, and therefore it may be considered as conclusive on this point.

Accused entered the military service in 1929 and his service has been continuous to the present time. Cadets as well as officers are

subject to the jurisdiction of military courts (A. W. 2). His transition from cadet to a commissioned officer was a change of status within the military service. He did not receive a discharge as a cadet and there was no interruption in his service.

From the foregoing, the Board of Review is of opinion that the court had jurisdiction to try accused for the offenses committed by him as a cadet at the Military Academy.

4. After the plea to the jurisdiction of the court had been disposed of, the defense made a plea in bar of trial under the 39th Article of War, on the ground the specifications alleged accused was married in June, 1931, and that if an offense had been committed it had been committed when accused submitted a similar certificate upon his return from furlough in 1931, that the offenses alleged as committed in September, 1933, and May, 1934, were continuing offenses, and that the statute of limitations commenced to run with the signing of the first certificate in September of 1931 (R. 16).

This plea is untenable and does not warrant consideration. The signing of each certificate alleged in the specifications constituted a distinct and separate offense, requiring affirmative action on the part of accused, both of which occurred within the statutory period of two years. The Board of Review is accordingly of opinion that the plea in bar of trial was properly overruled by the court.

5. The summary of the evidence included in the excellent review of the staff judge advocate is clear and accurate and is adopted by the Board of Review. It is as follows:

The defense, although objecting to certain evidence offered by the prosecution, made no serious contest as to the facts of the case. They stipulated that on June 16, 1931, accused, under the assumed name of Henry Donald Moss, and Harriet Hagman, under the assumed name of Tanya Perander, procured a license to marry at the Marriage License Bureau, Brooklyn, New York, and thereafter did present themselves before Thomas F. Maher, Deputy City Clerk, and went through a marriage ceremony performed by him, and that "no legal action has ever been taken to annul said marriage ceremony". The theory of the defense was that accused did not believe he was legally married, and that therefore he did not

sign the alleged certificates "with intent to deceive the authorities of said academy".

In view of the foregoing, the evidence introduced by the prosecution need be but briefly referred to. The following documents were introduced:

a. The stipulation referred to above (Ex. A).

b. An exemplified copy of an Affidavit for License to Marry, applied for, subscribed and sworn to by Henry Donald Moss, groom, and Tanya Perander, bride; Marriage License issued to the same parties, and Marriage Certificate showing that these two persons were married on June 16, 1931, by Thomas F. Maher, Deputy City Clerk (Ex. B).

c. Extract from page 57 of the Official Register of the Officers and Cadets, United States Military Academy, 1930, showing Henry Agnew Sebastian as a cadet appointed from the Fourth Texas District and admitted July 1, 1929 (Ex. C).

d. Similar extract from page 48 of the 1931 Official Register (Ex. D).

e. Extract from page 615 of the Official Army Register, January 1, 1935, reading in part:

> "Sebastian, Henry A., ... Cadet M.A. 1 July 29; 2 lt. of Inf. 12 June 34." (Ex. E).

f. Extract from page 19 of the Regulations for the United States Military Academy, 1924, reading:

> "60. No cadet to be married.- No married person shall be admitted as a cadet; and if any cadet shall be married before graduation, such marriage shall be considered as equivalent to a resignation and he shall be required to leave the institution." (Ex. F).

g. Same from page 23 of the 1931 Regulations, reading similarly (Ex. G).

h. Orders No. 12, Headquarters United States Corps of Cadets, West Point, New York, May 13, 1930, requiring a cadet, on returning from leave of absence or furlough, to sign a certificate that he is not married (Ex. H).

i. A certificate, dated West Point, New York, September 20, 1933, reading:

"I certify that I am an unmarried person.
(Signed) HENRY A SEBASTIAN,
Cadet Sgt., 1st Class." (Ex. I).

k. A similar certificate, dated May 8, 1934 (Ex. K).

l. An extract from the CADET SERVICE RECORD of Henry Agnew Sebastian bearing the signature of "HENRY A. SEBASTIAN" and showing that he was sworn in July 1, 1929 (Ex. L).

m. Athletic records of Henry A. Sebastian, each signed with that name (Exs. M, O, P).

n. Letter, dated July 20, 1934, to Second Lieutenant Henry A. Sebastian, from J. J. O'Hare, Major, 16th Infantry (Ex. R).

o. Two letters, dated July 24 and September 6, 1934, in reply to the above, addressed to Major J. J. O'Hare, and signed "HENRY A. SEBASTIAN, 2nd Lieut., 16th Infantry" (Exs. S and T).

p. Photostats of signatures "HENRY A. SEBASTIAN" used by the witness Osborn (R. 54-62) in his testimony (Ex. U).

q. Statement of Lieutenant Henry A. Sebastian, 16th Infantry, to Colonel A. S. Williams, 16th Infantry, in the presence of Major W. G. Weaver, 16th Infantry, reading as follows:

"At the end of my second year at West Point, I was going on leave to Texas. I had known the girl before and we got to talking about getting married, in a speakeasy. That same night her sister and brother-in-law helped us plan it for the next day. The next day we went through a marriage ceremony, falsifying ages, addresses and occupations. My age was actually 20 years and I gave the

age of 21. She was 23 or 24 years old at that time. There was an agreement that I would not assume the responsibilities of marriage and her family understood this. We agreed that we would re-marry under correct names upon my graduation, which was done last June. After the first marriage, we lived together as man and wife for two or three nights. When I returned to the Academy, I certified that I was unmarried.

I did not think I was married and thought I could sign the certificate. My legal knowledge was limited." (Ex. V).

r. Copy of marriage ritual referred to in the testimony (R. 76-80) of the witness Jacob Hallerstein (Ex. W).

The following witnesses were called by the prosecution and testified substantially as follows:

Colonel Albert S. Williams, Commanding Officer, 16th Infantry, Fort Jay, New York, testified that he has known accused since September, 1934, and that accused had served as a company officer in his regiment during that time. About April 1, 1935, witness directed Major Weaver to investigate a matter concerning accused (R. 62-64) and thereafter Major Weaver came to witness and said that accused wished to see him. Accused did come to see him and Major Weaver was present during the entire interview (R. 66). Witness warned accused that he need make no statement whatsoever unless he desired to do so and that any statement he did make might be used against him. Accused replied that he understood and that he wanted to make a statement, and he then made a statement which was related by witness substantially as contained in Exhibit V (R. 64-65).

Major William G. Weaver, 16th Infantry, corroborated the foregoing testimony of Colonel Williams, stated that he was present at the interview between Colonel Williams and the accused, and identified Exhibit V as being in substance what accused stated to Colonel Williams. He understood accused to say that he did not believe he was legally married, that it was more the form of a prenuptial agreement that would be satisfactory to both families concerned and that, upon his graduation, a legal marriage was to take place. (R. 66-71)

Captain James L. Garza, 16th Infantry, testified that he made the formal investigation of the charges against the accused. He showed accused all of the evidence that was taken in the informal investigation by Major Weaver and accused stated "that was the substance of it" and that he did not care to cross-examine any of the witnesses. He showed Exhibit V to accused, who stated that "so far as he knew, that was what he said, in substance" and that he had been informed of his rights by Colonel Williams. (R. 72-75)

Major Joseph J. O'Hare, 16th Infantry, testified that, as commanding officer of the regiment, he signed and sent to accused a letter of which Exhibit R is a copy, and in reply received the letters marked Exhibits S and T, signed "HENRY A. SEBASTIAN" (R. 45-47).

First Lieutenant G. Ordway, Jr., Infantry, West Point, New York, testified that he knew accused for about nine months while he was a cadet at the Military Academy and witness was the tactical officer in command of accused's company. Witness identified the Official Registers of the Officers and Cadets, United States Military Academy, for 1930 and 1931, and the Army Register for 1935, and read therefrom the extracts which appear as Exhibits C, D and E. He also identified the Regulations for the United States Military Academy, 1924 and 1931, and Orders No. 12, Headquarters United States Corps of Cadets, May 13, 1930, and read therefrom the extracts which appear as Exhibits F, G and H (R. 23-31). He also identified the CADET SERVICE RECORD, an extract from which was introduced as Exhibit L, and stated that he personally obtained it from the files in the Rating and Disciplinary Division of Cadet Headquarters; and the three athletic records of Henry A. Sebastian introduced as Exhibits M, O and P, which he obtained from the same place; the two certificates introduced as Exhibits I and K he personally obtained from Lieutenant Colonel Hughes, the Adjutant of the Military Academy, and marked them at the time with his initials, by which he identified them in court. He was ordered to get all these records by Captain R. S. Williamson, the Assistant to the Commandant, who is their custodian. (R. 33-41) Witness stated that he is familiar with the procedure at the Military Academy on graduation day and was present at the graduation of the accused. At the close of the graduation ceremonies, the cadets are presented with their diplomas and commissions and are sworn in. They do not receive a discharge and there is no interval between the status of cadet and commissioned officer. (R. 41-42) The certificates concerning marriage are executed and turned in to the cadet first sergeant and then sent to headquarters for file. They are not signed

in the presence of an officer. (R. 43-44) The certificates (Exs. I and K) were signed pursuant to Orders No. 12 (Ex. H) and would not have been made out but for that order (R. 47-48).

Jacob Hallerstein testified that he had been a clerk in the Marriage License Bureau, Brooklyn, New York, since 1908. His duties pertain to the issuing of marriage licenses, getting affidavits or applications ready, writing the licenses, and also "helping in the Marriage Chapel for civil ceremonies". He has known Mr. Thomas F. Maher since 1908 and has seen him perform thousands of marriage ceremonies. Mr. Maher always used the ritual, a copy of which is introduced as Exhibit W. Witness examined Exhibit B, identified the signatures of the officials signed thereto, and stated that the papers were in proper form. (R. 76-79)

Albert D. Osborn, a civilian, whose business office is at 233 Broadway, New York City, testified as an expert on handwriting. He stated that he had studied the subject for about twenty years and for the last fifteen years has devoted all his time to this subject. He has appeared for several of the largest insurance companies and trust companies in New York City and testified in the Rothstein murder case in New York City, the Wendell will case, and for the State in the recent Hauptmann trial at Flemington, New Jersey. Mr. Osborn is acknowledged to be one of the foremost authorities in the United States on handwriting. His competency was conceded by the defense (R. 54-56). He stated that he had examined various exhibits in the case and, in his opinion, the person who wrote the signature and handwriting on Exhibits L, M, O, P and T also wrote the signatures on Exhibits I, K and B. Witness used Exhibit U in giving his testimony and furnished copies of it to the members of the court for use by them as he pointed out the reasons for his conclusions. (R. 57-62)

Captain Arthur C. Purvis, 16th Infantry, testified that he was Adjutant of the 16th Infantry and had known accused since September, 1934. He is familiar with the signature and handwriting of accused, which he has seen on letters, guard reports, ration returns, and pay vouchers, all of which papers pass over his desk. In his opinion, the signatures on Exhibits I and K are in the handwriting of the accused. (R. 49-54)

The trial judge advocate requested the court to take judicial notice of the Domestic Relations Law of New York, particularly that part

which provides that an action to annul a void or voidable marriage may be brought only as provided in the Code of Civil Procedure and that a marriage voidable under this section is valid for all purposes until judicially decreed void.

The evidence for the defense is substantially as follows:

As Exhibit 1, the defense introduced an original document written in Swedish, which was referred to in the stipulation introduced by the prosecution as Exhibit A, which was signed and sworn to before a notary by Harriet Hagman and Henry A. Sebastian on June 16, 1931, and a translation thereof reading as follows:

"For personal reasons Harriette Hagman and Henry Agnew Sebastian have joined in matrimony this day June 16th 1931, under the name of Tanya Perander and Henry Donald Moss. Two years from above date shall this two people remarry under their own names.

Which all herewith is testified under oath

name: Harriette Hagman
name: Henry Sebastian
Beatrice Scriber
Roland F. Scriber

City & State of New York
County of Kings
Sworn to before me this 16th day of June 1931
C. B. Gwathmey
Notary Public."

Mr. Clarence P. Sebastian, cotton buyer, residing at Sherman, Grayson County, Texas, testified by deposition that he is the father of accused, who visited him at his home in Sherman, Texas, in July, 1931. At that time accused told him that he had gone through some kind of a ceremony the previous month with Harriet Hagman in which both used assumed names and false ages and addresses. Accused stated that he did not believe he was married, and asked witness' advice in the matter. Witness told him that since he was a minor and had used an assumed name and a false age, he did not consider that he was legally married; it was only a false marriage and a mockery. He also told accused that he could return to the Military Academy with a clear conscience. Accused

also told witness at the same time that they desired to be legally and properly married after his graduation and had signed a written agreement in Swedish that they would be legally married after his graduation, and witness told him that this would be necessary if he desired Miss Hagman to be his legal wife (Ex. 1).

Mr. Benjamin R. Newcomb, 39 Pierrepont Street, Brooklyn, New York, a patent attorney and engineer, testified that he has known accused for about five years and that during the summer of 1931 accused visited him in Brooklyn for a considerable time. Lieutenant Haskell, who was a classmate of the accused, visited him at the same time. During that visit accused asked witness a hypothetical question as to the legality of a marriage ceremony in which the parties had given false names, false ages, false occupations and the groom was a minor. At the time witness did not know that the question concerned the accused but told him that he believed such a marriage would be voidable and that he would hesitate to have children under any such marriage contract. (R. 87-89) By voidable, witness meant that the marriage would be good until set aside but he did not explain that to accused. He does not think that accused would know the difference between a voidable and void contract. (R. 91-92)

First Lieutenant Willard L. Haskell, Air Corps, Mitchel Field, New York, testified that he graduated from West Point in 1933 and knew accused, who was his roommate for some time, quite intimately. Witness spent part of the month of August with accused at the apartment of Mr. Newcomb in Brooklyn. During that time accused informed witness that he had performed a ceremony with Harriet Hagman (R. 92-93), and that inasmuch as he was under age and did not have his parents' consent they had drawn up an agreement that they would be legally married after his graduation from the Military Academy. Accused stated that he did not think he was legally married. He did not ask the advice of witness about it. (R. 96-97)

Mrs. Florence Sebastian, the mother of accused, who was sick in the Post Hospital at Fort Jay, New York, testified by deposition. She stated that before accused came home to Texas on furlough in 1931 he had mentioned Harriet Hagman several times in letters. She was an artist's model. One evening, while driving along in the car, they passed her picture on an advertising billboard and accused stopped the car and said, "Mother, there is the girl I shall marry some day". She first met Harriet Hagman

at a football game at West Point, New York, in October, 1933, and at that time understood she was accused's fiancee. Witness attended the graduation of accused at West Point in June, 1934, and Harriet Hagman also attended as his guest. Miss Hagman said several times during June week, 1934, that she and accused were going to get married, and accused said, "Mother, Harriet and I are supposed to be already married but neither of us feel it was really a legal marriage, so we are going to get legally married today". Miss Hagman was present when he said this and agreed with him. After graduation they drove to Newburgh, where Harriet and the accused were married at the Calvary Presbyterian Church on the afternoon of June 12, 1934. Witness was present at the marriage and the signing of the Marriage Certificate attached to her deposition (Ex. 3).

Accused did not testify or make any statement to the court.

6. The evidence presents three questions for consideration, (a) was accused in fact legally married on the dates on which he signed the certificates, (b) did he know that he was legally married when he signed the certificates, and (c) did he intend to deceive the authorities at the Military Academy when he signed the certificates.

(a) The first question is easily disposed of. The principle that the laws of the place where a marriage takes place determine its validity is too well settled to require citations of authority. It was proved that accused, under the name of Henry Donald Moss, actual age 20 years and 8 months, and Harriet Hagman, under the name of Tanya Perander, age on certificate of marriage, 23 years, were married in Brooklyn, New York, on June 16, 1931, after having obtained the marriage license required by the laws of the State of New York. Certain other data on the marriage license and certificate is false, both with reference to accused and the said Harriet Hagman. However, neither party to the marriage was deceived as to the true facts as evidenced by the subsequent agreement entered into by them in Swedish, which in part reads, in English, as follows:

> "For personal reasons, Harriet Hagman and Henry Agnew Sebastian have joined in matrimony this day, June 16, 1931, under the name of Tanya Perander and Henry Donald Moss ***."

The Domestic Relations Law of New York (Book 14, McKinney's Consolidated Laws of New York, and 1934 Supplement) provides as follows:

"6. Void Marriages.- A marriage is absolutely void, if contracted by a person whose husband or wife by a former marriage is living unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person; * * *.

2. Such former husband or wife has been finally sentenced to imprisonment for life;

3. Such former marriage has been dissolved pursuant to section seven a of this chapter."

In regard to this class of marriages the courts of New York have held:

"Where a marriage is void, although the legislature has authorized the court in the interest of the public to enter a formal decree declaring it to be such, it is void from its inception without any decree of the court, and for all purposes." See citations listed in note following sec. 6, Book 14, McKinney's Consolidated Laws of New York.

The Domestic Relations Law of New York also provides:

"7. Voidable Marriages:- A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is eighteen years, provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage;

2. Is incapable of consenting to a marriage for want of understanding;

3. Is incapable of entering into the marriage state from physical cause;

4. Consents to such marriage by reason of force, duress or fraud;

5. Has been incurably insane for a period of five years or more; * * *."

In regard to this class of marriages the courts of New York have held:

> "It is well established that a marriage voidable under this section is valid for all purposes until judicially decreed void." See citation listed in note following sec. 7, Book 14, McKinney's Consolidated Laws of New York.

It is clear from the above cited laws that the marriage of accused was not void, ab initio.

(b) The next question for consideration is whether or not accused knew or believed himself to be married at the time he signed the certificates alleged in Specifications 1 and 2. At the time accused was first married to Harriet Hagman he was 20 years and 8 months old. He and his bride went to the office of the City Clerk in the Borough of Brooklyn, executed the affidavits required by law and obtained a marriage license, appeared before Mr. Thomas F. Maher, Deputy City Clerk, and were joined in holy wedlock by a ceremony which included the following significant words:

> "Do either of you know of any reason why you both should not be legally joined in marriage? * * *.
> Do you_____, take this woman as your lawful wedded wife * * *?
> For as you both have consented in wedlock and have acknowledged it before this company, I do, by virtue of the authority vested in me by the laws of the State of New York, now pronounce you husband and wife. And may God bless your union."

Subsequent to, but on the same day, accused and his bride executed in Swedish a supplementary agreement before witnesses and under oath, which reads in English as follows:

> "For personal reasons Harriette Hagman and Henry Agnew Sebastian have joined in matrimony this day, June 16, 1931, under the name of Tanya Perander and Henry Donald Moss. Two years from above date shall this two people remarry under their own names." (Underscoring supplied)

Thereafter, for several days accused and his bride lived together as man and wife. Under these facts it is incredible that any reasonable person could have regarded himself as other than married.

The whole defense rests upon the proposition that accused believed he was not married because he and his bride used assumed names in obtaining the marriage license and at the ceremony. The actions of accused subsequent to his marriage are inconsistent with any such belief on his part. The fact that he asked his father directly, and Mr. Newcomb, the patent attorney, indirectly, concerning the legal status of his marriage, clearly shows accused had a strong suspicion, if nothing more, that his marriage was in fact a valid one. If he had honestly believed the marriage was invalid, why did he not present the question to the authorities at West Point or to someone else competent to give him advice. The answer to that question is he did not want the authorities at West Point to know anything about the marriage and he did not want advice which would confirm the fact he already knew, to wit, that he was married.

(c) The next question pertains to the intent harbored by accused when he signed the certificates. Every act of accused in connection with this marriage is consistent with only one hypothesis and that is his intent to deceive the authorities at the Military Academy with these certificates. Accused knew that marriage was forbidden and that he would be required to submit certificates at various times while a cadet showing he was an unmarried person. He therefore used an assumed name in obtaining the marriage license, presumably so that newspaper publicity would be avoided. If in doubt as to the validity of his marriage he was careful to avoid presenting the question to the authorities at the Academy.

From the foregoing the Board of Review is of opinion that the evidence is legally sufficient to support the findings of guilty of Specifications 1 and 2 of the Charge.

7. The form for specifications alleging false official statements set forth as Form 119, Appendix 4, page 253, Manual for Courts-Martial, includes a direct allegation that the false matter was communicated to the person whom accused intended to deceive. Specifications 1 and 2 of the Charge now under consideration do not include any direct allegations to that effect. However, the language of each of these specifications, to wit, "with intent to deceive the authorities of said academy, falsely

certify in writing that he was not married, which certificate was known * * * to be false", infers that the certificates were submitted to the authorities of the Academy. The words "certify" and "certificate", from usage in the military service, are habitually associated with documents which are submitted for official consideration. While accused was not experienced in customs of the service he was represented by counsel of ample experience in and knowledge of these customs. If accused had been confused in regard to the offense alleged he could have made an appropriate motion prior to arraignment. However, he did not do so, but chose to plead not guilty. The evidence in the record shows that in fact the certificates were submitted to the authorities of the Academy, the proof of which was vigorously contested by accused, not on the ground of its irrelevancy or immateriality, but on the ground that the particular witness testifying was not competent.

From the foregoing the Board of Review is of opinion that accused was adequately apprised of the offenses charged and that his defense was in no way prejudiced by the form in which the specifications were drawn. The irregularity in pleading, if any, may be passed under the provisions of the 37th Article of War as not injuriously affecting any substantial right of accused.

8. Accompanying the record of trial are seven clemency recommendations signed by seven of the eight members of the court who sat at the trial. Four of these officers recommended that the sentence be suspended, two that accused be permitted to resign, and one that the sentence be commuted to the loss of 100 files and restriction to the limits of his post for six months. The grounds upon which these recommendations were based may be briefly summarized as follows:

1. Accused only 20 years of age at the time of his marriage in 1931;
2. Accused tried as an officer for offenses committed as a cadet;
3. Accused advised he was not married by persons whom he considered competent to give him advice;
4. Trial based upon voluntary statements made by accused; and
5. Mandatory sentence too severe.

With reference to reason 1 above, while accused may have been only 20 years and 8 months of age on the date of his first marriage ceremony in 1931,

he was over 23 at the time he committed the offenses alleged. Furthermore, he was a first classman at West Point who must have absorbed sufficient knowledge of the honor system in vogue at that institution to know full well the nature of his offenses and the penalties incident to their discovery. Reason 2, cited above, is not a sufficient ground for clemency. It does not follow that because his offenses escaped discovery while a cadet that they should be considered less serious when discovered after he became an officer, especially so when the offenses are equally dishonorable for officers and cadets. In view of the fact that accused carefully avoided seeking the advice of those he knew could give him the proper information, reason 3 above is not entitled to serious consideration. Reason 4 above is not an accurate statement of fact. The trial was not brought about through the voluntary statements of accused. Major Weaver, the investigating officer, had been directed to investigate accused's first marriage prior to the statements of accused. As to reason 5 above, a sentence of dismissal has always been considered as the appropriate sentence for an officer or cadet convicted of making a false official statement.

The matter of clemency was given considerable study by the staff judge advocate, an officer especially well qualified by experience to pass on matters pertaining to cadets and to the Military Academy. In regard to clemency this officer recommended:

> "It is evident that accused, during his five years at West Point, absorbed little, if any, of the principles of the honor system maintained there for generations past and that in moral character he is below the standard required of an officer. When he obtained the marriage license in 1931, he swore falsely as to his name, place of residence, age and occupation. He continued for the next three years to sign false official certificates as to his marriage status. From the background of nine years' duty at the Military Academy as an instructor and professor, I am convinced that the Cadet Honor Committee would not have required ten minutes to advise accused that he should resign as a cadet. I see no merit in the defense and no grounds for clemency, the exercise of which would not be understood by the Corps of Cadets and would necessarily have a bad effect."

Honorable Marvin Jones and Honorable Sam Rayburn, Representatives in Congress from the 18th and the 4th Texas Districts, respectively, appeared before the Board of Review on July 10, 1935, and urged the extension of clemency by commutation of the sentence to some punishment less than dismissal. They asserted that accused honestly believed he was not legally married at the times he made the alleged false certificates and contended that in any event the sentence is unduly severe. These matters have heretofore been discussed in this opinion and require no further consideration.

From the foregoing, the Board of Review is of opinion that clemency should not be granted.

9. At the time of the trial accused was 24 7/12 years of age, and his service as set forth in the Official Army Register is as follows:

"Cadet M.A. 1 July 1929; 2 lt. of Inf. 12 June 34."

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

Thodor Hall, Judge Advocate.

H. A. Trimbell, Judge Advocate.

L. W. Smith, Judge Advocate.

To The Judge Advocate General.

Form No. 34

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C.

Board of Review

C. M. No. 203511

JUL 22 1935

UNITED STATES vs. Private RAYMOND P. WEDMORE (6822967), Battery K, 6th Coast Artillery.	NINTH CORPS AREA. Trial by G.C.M., convened at Fort Winfield Scott, California, July 1, 1935. Dishonorable discharge and confinement for six (6) months. Fort Winfield Scott, California.

HOLDING by the BOARD OF REVIEW

HALL, TURNBULL and SMITH, L.M., 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.

Theodore Hall, Judge Advocate.

H. A. Turnbull, Judge Advocate.

L. M. Smith, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 27 1935 - to The Secretary of War.

1. The record of trial and accompanying papers in the case of Private Raymond P. Wedmore (6822967), Battery K, 6th Coast Artillery, and the holding of the Board of Review thereon are submitted herewith pursuant to Article of

War 50½ for the action of the President.

2. The Board of Review holds that the record of trial is legally sufficient to support the sentence. I do not concur in that holding, and for the reasons set forth below recommend that the findings and sentence be disapproved and a rehearing authorized before another court.

3. Private Wedmore was tried by a general court-martial at Fort Winfield Scott, California, on July 1, 1935, and convicted of wrongfully and knowingly selling about 100 pounds of white lead of the value of about $8.50, property of the United States, furnished and intended for the military service thereof (Specification 1); and of the larceny of the white lead involved in the alleged wrongful sale (Specification 2); in violation of the 94th Article of War. 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 might direct for six months. The reviewing authority approved the sentence, designated Fort Winfield Scott, California, as the place of confinement, and, pursuant to Article of War 50½, withheld the order directing the execution of the sentence pending examination of the record by the Board of Review and The Judge Advocate General. The following is a synopsis of the material testimony of witnesses:

First Lieutenant George F. Heaney, Jr., 6th Coast Artillery, Fort Baker, California. On or about May 15, 1935, witness was Quartermaster at Fort Baker, California. At that time accused was "post painter" and as such had charge of the paint shop and all paints and varnishes and had a key to the shop. Some paint was stored in barrels in an old magazine but all the paint kept in cans was stored in the paint shop. Witness does not know how much white lead was stored in the paint shop but estimates that the quantity was between five and ten 100-pound cans.

On May 22d witness went down to Mr. Madden's second hand store with the Chief of Police of Sausalito and they found the can of white lead then on the floor of the court room. Witness scratched his initials on the can at the time and also had Mr. Madden scratch his initials on the can. Witness took the can to the paint shop and compared it with the white lead stored there and found that "it was identical with the white lead on hand in the paint shop." After the discovery of the white lead at Madden's the witness inspected the paint shop and found seven cans of wnite lead there. The container recovered from Mr. Madden was exactly similar to the seven cans of white lead found in the paint shop, labeled identically the same. The Quartermaster paint shop at Fort Baker has, and has had in stock in constant use in the ordinary course of business, quantities of white lead similar in size of container, of identical

label and other markings, to the can recovered from Mr. Madden. Accused in the regular course of his duties had access to the place where the white lead was stored. The recovered can showed no markings indicating that it might have been condemned or sold. There never had been a sale of such property while he had been at Fort Baker, where he had been Quartermaster for over a year. With respect to the accounting for white lead at Fort Baker, "the property is just put in the paint shop and used whenever needed." No stock record cards are kept. The "stuff" is issued from the Quartermaster at Fort Scott and "we never pick it up on our records." Witness identified as a true copy of the original record of the Quartermaster at Fort Scott a paper indicating the purchase from the National Lead Company of California, San Francisco, California, of a thousand pounds of white lead in 100-pound containers in January, 1934, at $85.00. From the label on the can before the court witness would say that it was purchased from the National Lead Company of California. Much more than 1000 pounds would be used in about a year and a half. "But the apparent discrepancy is due to the fact that several purchases were made of white lead on C.W.A. funds and used instead of the white lead purchased by the Quartermaster."

Witness is unable to state that a can of white lead is missing from the paint shop or store room and cannot identify the white lead in the court room as the property of the United States.

Staff Sergeant George F. Romer, Quartermaster Detachment, Fort Baker, California. Identifies accused as the "post painter" at Fort Baker and states that accused had free access to the paint shop at that post. Witness cannot testify as to the amount of white lead on hand in the paint shop "at that time". (No time was mentioned in connection with this witness' testimony so far) Witness did have in stock in the paint shop cans of white lead similar to the can in the court room. Witness cannot identify this can as property of the United States and cannot state positively that any white lead was missing from the paint shop. Accused has always been a good worker. "He has a good character." Besides accused, the witness, the Quartermaster and the Utilities Officer had access to the paint shop, but nobody else that witness knew of.

Mr. B. T. Madden, Real Estate and Junk Dealer, 240 Caledonia Street, Sausalito, California. Does not know the accused. The only time he saw accused was at the investigation over at Fort Baker. On May 15, 1935, he bought a 100-pound container of white lead from a man who seemed a little taller than accused. A man named Czarnecki was with the seller. Witness paid for the lead by check for $5.40 in favor of Ray Wedmore. The seller was dressed in civilian clothes and was with Czarnecki. The same man was with Czarnecki "when the junk brass was sold" to witness. The lead transaction was later in

the same day as the "brass deal". The property was brought to the witness in an old car which the witness thinks was a dark blue color. The white lead is not of an unusual type and many cans are seen by the witness just like that. There is nothing to indicate that the can of white lead was used exclusively on military posts. Witness has been buying that type of white lead for his own use for years. No marks on the can indicate that it might ever have belonged to the Government.

Mr. Fred Perry, merchant, 54 Caledonia Street, Sausalito, California, testifies that he knows accused and that he cashed the check (Ex. B) for him on May 15, 1935.

Sergeant David Mallonee, 6th Coast Artillery, Fort Winfield Scott, California, knows the accused and saw him sign the receipt for the charges (Ex. C).

Corporal Irvin C. Williams, 6th Coast Artillery, Fort Baker, California. On or about May 15, 1935, he saw accused in Sergeant Eckels' car with Private Czarnecki, between 2:00 and 3:00 o'clock (whether A.M. or P.M. not stated). They were driving out of the post in the direction of Sausalito. Witness was commander of the guard. He did not inspect the car and cannot state whether they had anything in the car or not. The car was a Willys-Knight sedan, an old car of dark blue color. Witness testified that accused "has a good reputation for honesty", "so far as I know". "He has a good character."

Private Travis L. Johnson, 6th Coast Artillery, Fort Baker, California. Knows accused. About May 15, 1935, witness was on guard duty and saw accused driving Sergeant Eckels' car, a Willys-Knight sedan, between blue and gray in color. Private Czarnecki was with accused. Witness did not search the car and did not look in it at all, and cannot tell whether there was anything in it or not. This was between two and three o'clock "of day" (whether A.M. or P.M. not stated). They were going toward Sausalito.

Private Walter Czarnecki, 6th Coast Artillery, Fort Baker, California. Knows the accused.

"Q. Was Wedmore with you in the car when you drove off the post at Fort Baker, on the afternoon of May 15, 1935, driving toward Sausalito?
A. We took a ride around the post and went as far as the 'dump'.
Q. Where is the dump?
A. That is right near Battery Yates.
Q. Have you ever seen that can of white lead before?
A. There are lots of cans like that, but I have never seen that can before I don't believe.

Q. Did Wedmore go to Sausalito with you in the car?
A. No, sir, we went as far as the dump, or right near the dump.
Q. Did you go to Sausalito on the date in question.
A. Yes. Naturally."

"Q. * * * Was Wedmore present with you in Mr. Madden's junk shop when a one hundred pound container of white lead was sold to Mr. Madden?
A. Yes, he was."

Lieutenant Heaney recalled. Thinks the accused "has a good character."

4. From the above synopsis it is clear that the only material facts conclusively established by the evidence are as follows:

The accused was on duty as the "post painter" at Fort Baker, California, and on May 15, 1935, the date of the alleged offenses, there were in the paint shop to which he had access and carried one of the keys, from five to ten 100-pound cans of white lead belonging to the Government, of a type and kind which could be purchased in the open market. On that date the accused was seen leaving Fort Baker, between 2:00 and 3:00 o'clock "of day", with another soldier in an old dark blue Willys-Knight sedan. At some time on the same day, in an old car of dark blue color, he brought to a dealer in the nearby town of Sausalito and sold a 100-pound can of white lead of the same type and kind as that belonging to the Government and kept in the paint shop, for which he was paid about two-thirds of what similar white lead cost the Government in January, 1934. At the time of the sale the accused was with the same soldier and in an automobile similar to the one in which both had left Fort Baker on the same day. At the time the charges were investigated there were found in the paint shop seven cans of white lead. Witnesses testified to the good reputation of accused.

The facts so proven can hardly be said to amount to more than suspicious circumstances and fall short of establishing that a larceny of white lead belonging to the Government was committed by anyone or that the white lead sold was the property of the United States.

5. In order to sustain a finding of guilty of the specification alleging the wrongful sale of the white lead, it is necessary that it be established by competent proof that the can of white lead was in fact the property of the United States furnished and intended for the military service thereof. This

fact must also be proven before the findings of guilty of the larceny may be sustained and in addition it must be established that this property was missing and that it was taken by trespass. Though these facts may be established by circumstantial evidence (par. 150 i, M.C.M., 1928) nevertheless each of these elements of the offenses must be established beyond a reasonable doubt (par. 78, M.C.M., 1928). In paragraph 41 c of the Manual it is stated:

> "As to each offense charged, the burden is on the prosecution to prove beyond a reasonable doubt by relevant evidence that the offense was committed, that the accused committed it, that he had the requisite criminal intent at the time, and that the accused is within the jurisdiction of the court, except to the extent that such burden is relieved by a plea of guilty."

Notwithstanding the provisions of the Manual for Courts-Martial cited above which require the proof of every element of the offense beyond a reasonable doubt, the trial judge advocate in his closing argument in answering the assertion of defense counsel that the corpus delicti had not been established merely called the attention of the court to paragraph 114 of the Manual for Courts-Martial in connection with the second paragraph on page 185. Paragraph 114 treats of the rules of evidence with reference to confessions. As there was no confession in this case, it is not understood why this paragraph was cited unless it was for the purpose of conveying to the court the idea that the rule with reference to proof of the corpus delicti in larceny cases was the same whether there was or was not a confession. In that paragraph and on page 115, it is said:

> "This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense."

The paragraph then goes on to give an example and says that in an unlawful homicide case evidence of the death coupled with the evidence of circumstances indicating the probability that the person was unlawfully killed will satisfy the rule if the confession is otherwise admissible. It is also stated in that paragraph:

> "In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was missing under circumstances indicating in the first case that it

was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule."

The reference to paragraph 114 of the Manual could have had no other effect than to lead the court to the erroneous belief that it was unnecessary in this case to prove the corpus delicti beyond a reasonable doubt. This same error was carried to the reviewing authority, who in effect was advised it was not necessary that the corpus delicti be established beyond a reasonable doubt. The general court-martial cases of Mallon and Cooley (CM 202213 and 202928) cited by the staff judge advocate in his review, were cases in which confessions were in evidence. In the case under consideration there was no confession, and the rule, namely, that where there is a confession the corpus delicti need not be established beyond a reasonable doubt, by proof aliunde, but that some corroborative proof of the corpus delicti is necessary in addition to the confession, relied upon and invoked in those case, has no application here.

The court and the reviewing authority must be satisfied of the guilt of an accused beyond a reasonable doubt. However, the Board of Review and The Judge Advocate General in the examination of records of trial, except in cases which require approval or confirmation of the sentence by the President, do not weigh the testimony to determine whether the offense has been proved beyond a reasonable doubt, but must be satisfied that there is some substantial evidence tending to prove each element of each offense (CM 152797, Viens) and unless so satisfied the record of trial will be held to be legally insufficient to support the findings and the sentence (CM 150828, Robles; 150100, Bruch; 150298, Johnson; 151502, Gage; 154854, Wilson; 156009, Green).

Even if it were assumed that there is some substantial evidence tending to prove each element of the offenses charged, which I do not believe to be the case, the accused was entitled, as to each specification, to have the court weigh the evidence with respect to its sufficiency to establish the corpus delicti beyond a reasonable doubt. The evidence in this case does not in my opinion so establish the guilt of the accused, which view apparently was entertained by the staff judge advocate in his report to the convening authority, since he said:

> "It is not necessary to prove the corpus delicti beyond a reasonable doubt or by a preponderance of the evidence, but only some evidence must be produced which shows that the Government property was missing." (CM 202213, Mallon; CM 202928, Cooley)

As the evidence tending to establish the corpus delicti is, as has been seen, so meager, I think it may be assumed that the court in reaching its findings of guilty applied erroneously the rule in larceny cases involving confessions suggested by the trial judge advocate, and that the reviewing authority in weighing the evidence as was his duty, to determine whether it was sufficient to establish the guilt of the accused beyond a reasonable doubt, applied the same erroneous rule on the advice of his staff judge advocate, to the injury of the substantial rights of the accused.

6. In the event that you approve my recommendation, that the findings and sentence be disapproved and a rehearing authorized before another court, I inclose the draft of a letter for your signature, transmitting the record to the President for his action, together with a form of Executive action for his signature designed to carry that recommendation into effect, both of which drafts are marked in pencil "Draft A". An alternate draft of letter to and form of Executive action by the President, marked in pencil "Draft B", are submitted for use if, on the other hand, you approve the holding of the Board of Review that the record is legally sufficient to support the sentence and that the action of the reviewing authority should be confirmed.

Your attention is invited to the appended memorandum, dated August 10, 1935, addressed to me and signed by the members of the Board of Review in which the Board sets forth the reasons that move it to adhere to its holding that the evidence in this case is legally sufficient to support the sentence.

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

6 Incls.
Incl.1-Record of trial.
Incl.2-Memorandum by Bd. of Rev.
Incl.3-Draft letter for sig. Secy. of War ("A").
Incl.4-Draft letter for sig. Secy. of War ("B").
Incl.5-Form of Executive action disapproving sentence ("Draft A").
Incl.6-Form of Executive action confirming reviewing authority ("Draft B").

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Board of Review
CM 203511

AUG 1 9 1935

MEMORANDUM for General Brown.

Subject: Case of Private Raymond P. Wedmore, Battery K, 6th Coast Artillery.

1. This conviction rests upon circumstantial evidence, the independent facts of which are conclusively established and may be summarized as follows: Accused was the post painter at Fort Baker and had a key to the paint shop and access to the property in the shop at all times. On May 15, 1935, the date of the alleged offenses, there were stored in this shop between five and ten 100-pound cans of white lead of a certain brand, label and markings, purchased by the Government for use in the military service at a cost of $8.50 per can of 100 pounds. On that day accused and another soldier were seen leaving the post between 2:00 and 3:00 p.m. in an old dark blue Willys-Knight car. On the same day accused brought to a junk dealer in Sausalito in an old dark blue car a 100-pound can of white lead for which he received a check payable to himself for $5.40. This check was cashed by accused in Sausalito on or about that date. The can of white lead that he sold was similar to the cans stored in the paint shop in size of container, label and other markings. Other than the Post Quartermaster, the Utilities Officer, and Staff Sergeant Romer, no one but accused had access to the paint shop where the white lead was kept. On May 22, 1935, seven cans of such white lead remained in the shop. The reservation of Fort Baker is adjacent to the corporate limits of Sausalito.

No record was kept to show the amount of white lead in this shop on May 15, and there is no direct evidence that one can of such lead was wrongfully removed on or about that date. The fact that there had been from five to ten such cans in the shop and that on May 22 there were seven is not inconsistent with the allegation that one was wrongfully taken away on the 15th.

2. To prove the commission of the offense of the wrongful sale of this property by accused, it is necessary to establish the following:

a. That the accused sold the property in the manner alleged;

b. That such property belonged to the United States and that it was furnished and intended for the military service thereof;

c. That facts and circumstances of the case indicating that the act of the accused was wrongfully and knowingly done, as alleged; and

d. The value of the property, as alleged. See par. 150 i, M.C.M.

To prove the commission of the offense of the larceny of this property by accused, it is necessary to establish the following:

a. The taking by the accused of the property as alleged;

b. The carrying away by the accused of such property;

c. That such property belonged to the United States and that it was furnished and intended for the military service thereof;

d. That such property was of the value alleged;

e. The facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the Government permanently of its property. See par. 150 i, M.C.M.

The evidence for the prosecution meets these requirements of proof by direct evidence except that it does not show by such evidence that a 100-pound can of white lead was taken from the paint shop at the time alleged, and that the can sold by the accused was one of those that had been in the paint shop. The proof of these matters rests upon circumstantial evidence and is that of establishing the corpus delicti and the identity of the can sold by accused as one of those from the paint shop.

3. The only discussion of the corpus delicti found in the Manual for Courts-Martial is on page 115, and relates more particularly to the extent of evidence required to prove the corpus delicti where there has been a confession. Here it is stated,

> "* * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense."

This rule, while applied here in a restricted sense, is not inconsistent with the more general rule laid down by authorities where there has been no confession. The measure of proof necessary to establish the corpus delicti is well stated in Wharton's Criminal Law, section 352, pages 443, 444, as follows:

"While it is essential to conviction that the corpus delicti shall have been proved, it is not essential that this be done by full and direct evidence. Like any other fact the subject of judicial investigation, the corpus delicti may be proved by evidence which is probable and presumptive, - that is, circumstantial, - as well as by direct evidence, if satisfactory to the understanding and conscience of the jury beyond a reasonable doubt, but such evidence, where relied upon, must be strong and cogent, and leave no room for a reasonable doubt. The admission of proof of the corpus delicti by presumptive evidence of any kind is a manifest qualification of the rule laid down by Lord Chief Justice Hale and Lord Stowell; but the admission of such evidence is contended for by Benthan, Judge Best, Baron Rolfe, Wharton and Wells, because, 'until it pleases providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act upon presumptive proof, or leave the worst crimes go unpunished.'"

The Board of Review believes that the corpus delicti has been proved in this case in perfect consonance with the rule cited above. Accused had access to the paint shop at all times. He was seen by Corporal Williams and Private Johnson leaving Fort Baker on May 15, 1935, at about two or three o'clock, driving in the direction of Sausalito. He was driving Sergeant Eckle's old dark blue car and was accompanied by Private Czarnecki. While it is not shown in the record, it is a fact which must have been known by every member of the court that the reservation upon which Fort Baker is located extends to within a short distance of the corporate limits of Sausalito, and that there is no place between the reservation and the town where accused could reasonably be expected to find a can of white lead costing $8.50, which he could afford to sell for $5.40. Mr. Madden admitted buying a 100-pound can of white lead on May 15, 1935, which was brought to his place in an old dark blue car. He believed that the man from whom he bought the lead was a little taller than the accused, but we do not have to rely entirely upon the fickle memory of Mr. Madden for identification of the accused. It will be remembered that Private Czarnecki testified that accused was present at Mr. Madden's store when the lead was sold. Very naturally Mr. Madden did not care to be too certain in his identification of the man from whom he had bought property which was alleged to have been stolen from the Government, for under certain circumstances the law lays a heavy hand upon one who receives such stolen property. However, he did admit that he gave his check for $5.40, payable to Ray Wedmore, in exchange for the white lead. That check was later cashed for

accused by Mr. Fred Perry, who identified him as the man for whom he had cashed the check on May 15, 1935. This check (Ex. B) was before the court and the accused's indorsement thereon was doubtless compared by the court with known specimens of the accused's handwriting (Ex. C). It is true that Lieutenant Heaney could not positively identify as Government property the can of lead which was in evidence before the court, and which he had recovered from Mr. Madden, nor could he state definitely that there was any shortage in the stock of white lead kept in the paint shop, but he did testify that the lead recovered was identical as to label, marking and size with the seven containers left in the paint shop. The fact that it is sometimes impossible to secure direct evidence that the article stolen is the property of the United States, is recognized by the Manual for Courts-Martial. On page 185 of the Manual the following statement is found:

> "Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended."

It is also well recognized that it is not always possible to prove by direct evidence a shortage of Government property. In CM 202712, Sastre, the Board of Review and The Judge Advocate General upheld the conviction of a soldier for larceny of hay, though no definite shortage in any Government stock could be shown and no positive identification was possible.

4. In the discussion of the meaning of the phrase, "reasonable doubt", as used in the statement, "In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof" (par. 78, M.C.M.), it is said, "The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt". With reference to the exclusion of hypotheses other than of guilt the following is found in Wharton's Criminal Evidence, vol. II, p. 1839:

"The limitation applied is that where the criminal charge rests upon circumstantial evidence, the proof must not only be consistent with the guilt of the accused, but it must be inconsistent with any other reasonable hypothesis. Hence, with reasonable doubt as the measure of the sufficiency of the proof, limited by the qualification that the conclusion must not only be consistent with the guilt of the accused, but inconsistent with any other reasonable conclusion, and the further requirement that each independent fact must be proved to the same degree as if the whole issue rested on the proof of such independent fact, then the law has safeguarded life and liberty to the highest degree that can be devised by human intelligence." Penna. R.R.Co. v. Chamberlain, 288 U.S. 333; Gunning v. Cooley, 281 U.S. 90; Stevens v. White City, 28 U.S. 195.

The circumstantial evidence is remarkably strong in indicating that the 100-pound can of white lead sold by accused was taken by him from the paint shop. It may be said without hesitation, to paraphrase the language of Wharton quoted above, that the proof is "consistent with the guilt of the accused" and is "inconsistent with any other reasonable hypothesis". In proof of this nature it is not necessary to exclude "every hypothesis or possibility of innocence" but only "any fair and reasonable hypothesis except that of guilt". Par. 78, M.C.M., supra. That accused should have the legitimate ownership and possession of a 100-pound can of white lead, precisely similar to that purchased by the Government at a cost of $8.50 and stored in the paint shop on the post to which he had a key, which lead he would be willing to sell for $5.40, seems utterly improbable and quite unreasonable to believe. Possibly he could have purchased such a can of white lead in Sausalito and sold it to the junk dealer. But doubtless he could not have bought it for less than a similar quantity cost the Government, and that he should sell for $5.40 an article that cost him not less than $8.50 is not reasonable. A 100-pound can of white lead is not an article likely to be misplaced by the owner and found by the accused. Nor is such an article one that a soldier would be likely to have among his possessions in barracks, as a shirt, similar to an issue shirt but purchased by him from an Army and Navy sales store, might well be. There is no reasonable hypothesis to account for the legitimate possession of such a can of white lead by the accused, and the defense made no attempt to explain such possession. The conclusion is inescapable that accused took the 100-pound can of white lead from the paint shop and sold it.

5. In view of the above, the Board of Review adheres to its former holding that the evidence in this case is legally sufficient to support the sentence.

Theodore Hall, Judge Advocate.
N. A. Trunbull, Judge Advocate.
L. W. Smith, Judge Advocate.

President sustained The Judge Advocate General's views.

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

Board of Review
CM 203589

AUG 28 1935

UNITED STATES	)	SECOND DIVISION
v.	)	Trial by G. C. M., convened at Fort Sam Houston, Texas, July 25, 1935. As to each: Dishonorable discharge without confinement.
Private JAMES B. MILLER (6259046), and Private FORREST F. KING (6255614), both of Medical Department.	)	

HOLDING by the BOARD OF REVIEW
HALL, TURNBULL and SMITH, L.M., Judge Advocates.

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

2. Accused were jointly tried upon one charge and one specification as follows:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private James B. Miller, Medical Department, Station Hospital, Fort Sam Houston, Texas, and, Private Forrest F. King, Medical Department, Station Hospital, Fort Sam Houston, Texas, acting jointly and in pursuance of a common intent, did at Station Hospital, Fort Sam Houston, Texas, on or about June 17, 1935, assist one Private Robert G. Tyson, 6255115, Service Battery, 12th Field Artillery, a garrison prisoner duly placed and held in confinement in the Prison Ward at the Station Hospital at Fort Sam Houston, Texas, to escape from said confinement before he was set at liberty by proper authority, (by furnishing to the said Private Tyson the necessary tools, instruments and vehicle by means of which he, the said Private Tyson, was enabled to effect his said escape from confinement.)

Each accused pleaded not guilty to the charge and specification, and was found guilty of the charge, and guilty of the specification except the words "by furnishing to the said Private Tyson the necessary tools, instruments and vehicle by means of which he, the said Private Tyson, was enabled to effect his said escape from confinement." No evidence of previous convictions was introduced. The court sentenced each accused to dishonorable discharge and forfeiture of all pay and allowances due or to become due. The reviewing authority approved the sentence, but withheld the order of execution pursuant to Article of War 50½.

3. The evidence will be set out only to the extent necessary to illustrate and to support the position taken by the Board of Review.

The testimony of Private Robert G. Tyson is set out on pages 8 to 22, inclusive, and in Exhibit 1 of the record of trial, and includes the following: On or about April 1, 1935, Tyson was confined as a garrison prisoner in the post guardhouse, Fort Sam Houston, Texas, and six days later transferred as a prisoner to Ward 12-A, Station Hospital, same station. Several days thereafter Private John O. Sherrill was confined in the same ward. Private Forrest F. King, Medical Department, was night ward man and Private James B. Miller, Medical Department, was ward man on Wednesday afternoons only in Ward 12-A while Tyson was a prisoner therein. On or about June 14 or 15, Tyson, Sherrill and King conferred together in Ward 12-A. At this conference they discussed ways and means for the escape of Tyson and Sherrill. The escape was originally planned for that night, but due to Sherrill's objections it was postponed. Either at the conference mentioned above or subsequent thereto (the testimony of the witness is not clear on this point) it was decided that the escape would take place on the following Monday evening, Tyson and Sherrill to effect their escape from the ward by sawing the bars on a window and "Private King and Miller was supposed to held Sherrill and I get out and away, as King and Miller was partners in ownership of a 1930 Model Fort Coupe, and they both stated that they were disgusted with the Army"; and

> "Pvt. King and Miller was to meet us at the gate behind the grease rack off of the reservation between 10:00 and 11:00 P.M. *** All four of us was going to Austin and stay there for a few days with their (King's and Sherrill's) people, then we were going to Sherman, Texas, where Private Miller's home is. Then we all were going to my home at Hookerton, North Carolina."

On Monday afternoon at about 3:30 p.m., Sherrill produced five hack saw blades from his mattress and during that afternoon and evening he sawed

two bars out of a window. At about 10:30 p.m. Tyson jumped out of the window and "got into the car with King and Miller", who were in a car "at the grease rack at the garage at the Station Hospital." As Sherrill had not accompanied Tyson, King and Miller took Tyson to Brackenridge Park and returned to look for Sherrill. They were unable to find Sherrill so they returned and picked up Tyson and then drove to Sherman, Texas, arriving at that place Tuesday morning, June 17, 1935, where they remained as guests in Private Miller's home until apprehended by the civilian authorities on the following Thursday morning.

A written statement signed by Miller was introduced in evidence after the prosecution had shown that it had been voluntarily made. In this statement Miller stated that on or about June 17, 1935, he and Private Forrest F. King had parked their car, a 1930 model Ford Coupe, "behind the grease rack off of the reservation near the Hospital Area." Soon thereafter Private Tyson,

> "who was a prisoner in Ward 12-A * * * got into the rumble seat of the car and we went to Brackenridge Park and left Tyson there and drove back to see about Private John O. Sherrill, who was a prisoner there also, we did not see Sherrill at that time. We went back to Brackenridge Park and picked up Pvt. Tyson and started for Arustin, Texas. Both King and I drove the car, during this time when we got to Austin, King and I decided to go on to Sherman, Texas, which is my home. Later, after we left Austin, Texas, Tyson got into the front seat with us. We come on to Sherman, Texas, and went to my Mother's house at 514 W. Center Street, Sherman, Texas."

Three days later the three soldiers were arrested in Sherman, Texas, by the civil authorities.

A written statement, signed by Private Forrest F. King, was introduced in evidence after the prosecution had shown that it had been voluntarily made (R. 23-27;Ex.3). In this statement King stated that on or about June 15, 1935, Miller, Tyson, Sherrill and himself discussed

> "the possibility of Pvt. Miller and myself helping the two prisoners to escape. Finally we agreed to pick them up in our car in the rear of the grease rack off of the reservation near the Hospital Area and carry them to Austin, Texas, and then go on to Sherman, Texas."

King also "personally delivered to Pvt. Sherrill, five (5) hack-saw blades for the purpose of escaping from the Prison Ward." On June 17, 1935, Tyson and Sherrill "told me and Miller to wait for them on a street near the grease rack off of the reservation near the Hospital Area. We agreed to meet them at 10:30 P.M." After going to the show that evening Miller and King parked their car at the designated point and shortly thereafter Tyson got into the rumble seat. Since Tyson was not accompanied by Sherrill, Miller and King drove Tyson to Brackenridge Park and left him there while they drove back to find Sherrill. Being unable to locate Sherrill, Miller, King and Tyson proceeded to Sherman, Texas, where they went to Miller's home. On June 20, 1935, all three soldiers were arrested in Sherman, Texas, by the civil authorities.

General Prisoner John O. Sherrill was called as a witness for the prosecution (R. 28-33). His testimony in regard to the escape is obviously fabricated and does not throw any light on the innocence or guilt of accused.

Each accused, after having been advised of his rights, elected to take the stand as a witness in his own behalf. Each, however, confined his testimony to the fact that the Articles of War had not been read to him. (R. 34,38) Evidence as to the previous good character of each accused was also admitted (R. 43,44; Exs. 4,5,6,7).

4. Paragraph 139 b, page 154, Manual for Courts-Martial, 1928, provides:

> "An escape is not complete until the prisoner has, momentarily, at least, freed himself from the restraint of his confinement; so, if the movement toward escape is opposed, or before it is completed an immediate pursuit ensues, there will be no escape until opposition is overcome or pursuit is shaken off."

In the instant case there is no evidence to indicate that the escape was opposed or that there was any pursuit. The escape was complete the moment Tyson passed through the window and reached the ground. Furthermore, it is a well settled rule of law that where several persons join with a common design in committing an offense, all the acts and statements made by any one of them are admissible against all provided that they are made during the pendency of the criminal design and in furtherance of its object (Par. 114 c, page 117, M.C.M., 1928; Sec. 184 a, Vol. 1, Greenleaf on Evidence, 16th Ed.). It therefore appears that the utmost the evidence tends to establish is that prior to the escape of Tyson the two accused jointly

agreed to meet the prisoners at a designated point off the reservation in their car and to transport them to Sherman, Texas, and elsewhere, and that after Tyson had escaped from Ward 12-A, they met him in their car at the point agreed upon and transported him to Sherman, Texas, at which place they caused him to be furnished with food and lodging. The evidence also shows that prior to the escape, King furnished Sherrill with five hack saw blades with which to saw the bars of one of the prison ward windows. All of this evidence, except that with respect to the hack saw blades, which incriminates King only, tends to prove that the offense committed by the two accused was to assist an escaped prisoner to make good his escape rather than to assist him to escape.

Conceding for the sake of argument that the evidence in regard to furnishing the vehicle, the actions of the two accused in connection therewith, and the hack saw blades, does tend to establish that the two accused assisted Tyson to escape, let us examine the findings of the court. The court by an exception in its finding of the specification acquitted the two accused of assisting the escape of Tyson, "by furnishing to the said Private Tyson the necessary tools, instruments and vehicle by means of which he, the said Private Tyson, was enabled to effect his said escape from confinement." A fair interpretation of the excepted clause shows that it includes not only the furnishing of the vehicle itself but the personal actions of the two accused in connection with its operation. Conceding that the remainder of the specification, of which accused were found guilty, alleges an offense, nevertheless the Board of Review is of opinion that the evidence is all directed toward the proof of the clause (quoted above) of which they were found not guilty and cannot properly be used to support the finding of guilty of the remainder of the specification. It might be argued that the excepted clause was surplusage in that it amounted to a pleading of evidence. This may be true but as the Government elected to plead it and the court found both accused not guilty of it, the conviction cannot be based on the acts alleged of which accused were acquitted.

5. For the reasons stated above the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Theodore Kalt, Judge Advocate.

_____, Judge Advocate.

L. W. Smith, Judge Advocate.

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

Board of Review
CM 203609

SEP 28 1935

UNITED STATES	SEVENTH CORPS AREA
v.	Trial by G.C.M., convened at Fort Meade, South Dakota, July 18 and 19, 1935. Dismissal.
Major (then Captain) PHILIP R. UPTON (0-7591), 4th Cavalry.	

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

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

2. Accused was tried upon an original charge consisting of two specifications alleging the uttering of two checks without sufficient funds in the bank, in violation of the 95th Article of War, and upon an additional charge consisting of two specifications as follows:

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

Specification 1: In that Captain Philip R. Upton, 4th Cavalry, did, on or about December 25, 1934, visit a restaurant and beer-garden known as Donahue's at 311 Bay State Avenue, Pueblo, Colorado, where, in order to participate in a gambling game he wrongfully and unlawfully induced the proprietor of the restaurant to cash four separate checks, drawn upon the Bear Butte Valley Bank, Sturgis, South Dakota, post-dated December 26, 1934, all made payable to "CASH", and signed by him, the said Captain Philip R. Upton as maker thereof in the total sum of $175.00, he then having the dishonorable intent to stop payment on the aforesaid checks in the event he lost the proceeds in the gambling game, and, pursuant to such intent, did, on or about December 28, 1934, wrongfully and dishonorably stop payment thereon.

Specification 2: In that Captain Philip R. Upton, 4th Cavalry, did, on or about the evening of February 2, 1935, visit the Blakeland Night Club, near Littleton, Colorado, where, in order to continue participation in a gambling game, he wrongfully and unlawfully induced the manager of the aforesaid Blakeland Night Club, to cash two checks, one for $100.00 and one for $200.00, both dated February 2, 1935, and drawn upon the First National Bank, Denver, Colorado, to the order of "CASH" and signed by him, the said Captain Philip R. Upton as maker thereof, (he then having the dishonorable intent to stop payment thereon in the event he lost the proceeds thereof in the gambling game) and, (pursuant to such intent,) did, on or about February 3, 1935, wrongfully and dishonorably stop payment thereon.

Accused pleaded not guilty to all charges and specifications. He was found not guilty of the specifications of the Original Charge and of the Original Charge. He was found guilty of each specification of the Additional Charge, except the words "wrongfully and unlawfully" and the words "he then having the dishonorable intent to stop payment on the aforesaid checks in the event he lost the proceeds in the gambling game", and the words "pursuant to such intent", of which he was found not guilty. He was also found guilty of the Additional Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. All members of the court who sat at the trial joined in recommending that the sentence be commuted to the loss of 500 files. Defense counsel also submitted a plea for clemency and inclosed with his letter affidavits from various officers under whom accused had served. The reviewing authority approved the sentence, did not concur in the recommendation of the court as to clemency, and forwarded the record of trial for action under the 48th Article of War.

3. In the interest of clarity the specifications of which accused was convicted are set forth below, the excepted words of which he was found not guilty being omitted:

Specification 1: In that Captain Philip R. Upton, 4th Cavalry, did, on or about December 25, 1934, visit a restaurant and beer-garden known as Donahue's at 311 Bay State Avenue, Pueblo, Colorado, where, in order to

participate in a gambling game he induced the proprietor of the restaurant to cash four separate checks, drawn upon the Bear Butte Valley Bank, Sturgis, South Dakota, post-dated December 26, 1934, all made payable to "CASH", and signed by him, the said Captain Philip R. Upton as maker thereof in the total sum of $175.00, and did, on or about December 28, 1934, wrongfully and dishonorably stop payment thereon.

Specification 2: In that Captain Philip R. Upton, 4th Cavalry, did, on or about the evening of February 2, 1935, visit the Blakeland Night Club, near Littleton, Colorado, where, in order to continue participation in a gambling game, he induced the manager of the aforesaid Blakeland Night Club, to cash two checks, one for $100.00 and one for $200.00, both dated February 2, 1935, and drawn upon the First National Bank, Denver, Colorado, to the order of "CASH" and signed by him, the said Captain Philip R. Upton as maker thereof, and did, on or about February 3, 1935, wrongfully and dishonorably stop payment thereon.

4. At the outset of the trial accused, his counsel and the trial judge advocate entered into the following stipulation:

"It is stipulated by and between the accused and his counsel and the trial judge advocate in this proceedings that both parties will admit the following facts to be true and which may be considered by the court without the offer of supporting testimony.

1. It is stipulated and agreed that gambling is illegal, and was illegal at all times referred to in this proceedings; and that any form of gambling was a violation of the law in both the State of Colorado and the State of South Dakota.

2. It is further stipulated and agreed that any debt contracted in connection with any gambling scheme, plan or device or any money advanced for the purpose of enabling any person to engage in gambling with the knowledge on the part of the person so advancing the same that it is to be used

in connection with gambling, cannot be collected in any court for the reason that it is against public policy." (R. 8; Ex. 1)

This stipulation appears to correctly set forth the laws of the State of Colorado which are as follows:

"Wagering upon games - penalty.- If any person shall play at any game whatsoever, for any sum of money or other property of value, or shall make any bet or wager for any sum of money or other property of value, upon the result of such game, every such person shall, on conviction thereof, be fined in any sum not less than fifty dollars, nor more than one hundred and fifty dollars." Sec. 1924, Courtright's Mills Annotated Statutes of the State of Colorado, vol. 2, p. 842.

"Gaming contracts and instruments void - assignment of no effect.- All contracts, promises, agreements, conveyances, securities and notes made, given, granted, executed, drawn or entered into, where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing won by any gaming or by playing at cards, or any gambling device or game of chance, or by betting on the side or hands of any person gaming, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play, to any person or persons so gaming or betting, shall be utterly void and of no effect. No assignment of any bill, bond, note or other evidence of indebtedness, where the whole or any part of the consideration for such assignment shall arise out of any gaming transaction, shall in any manner offset the defense of the person or persons making, entering into, executing or giving such instrument so assigned, or the remedies of any person interested therein." Id., sec. 1928, pp. 843, 844. (Underscoring supplied)

5. The evidence for the prosecution in support of Specification 1 of the Additional Charge may be summarized as follows:

During December of 1934 Mrs. Josephine B. Donahue owned and operated a restaurant and beer garden at 311 Bay State Avenue, Pueblo,

Colorado, at which meals and drinks were served. The various tables, bars, etc., were all housed in one large room. In the rear of the restaurant, approximately fifteen or twenty feet from the bar, there was a separate room which Mrs. Donahue rented to a man named Lukovitch, entrance to this room being gained through a door opening into the restaurant. In this room Lukovitch operated a dice game, a card game and roulette wheel, at which the patrons used money and not chips to play. Thomas Francis Donahue, a son of Mrs. Donahue, was a waiter in the restaurant. Both Mrs. Donahue and her son Thomas denied having any interest in the gambling establishment. John W. Shemwell, a witness for the prosecution, however, testified that Thomas Donahue had told him several times that he (Thomas Donahue) was a one-third owner of the dice game (R. 17,23,24,28,30,32,55; Ex. 10).

On the evening of December 25, 1934, at about 10:00 o'clock, accused, accompanied by Mr. and Mrs. John W. Shemwell and Miss Shemwell, the latter a sister of Mr. Shemwell and apparently now the wife of accused, came to the restaurant and immediately entered into the gambling room. Accused was introduced to Thomas Donahue by Jack McQuillan and subsequently during that evening and before midnight he induced Donahue to give him $175 in currency and silver in return for four checks totaling that amount. All checks were drawn on the Bear Butte Valley Bank, Sturgis, South Dakota, dated December 26, 1934, and totaled $175. All of the checks were signed by accused in the presence of Thomas Donahue. Mr. Donahue professed that he did not know what disposition accused made of the proceeds of the checks other than that which he spent in the restaurant, although he admitted that he had been in the gambling room several times during the evening and had seen accused playing the dice game and that after cashing the checks accused always returned to the gambling room (R. 18-20,21,24,25,27,28,29; Exs. 5(a),6(a),7(a),8(a)). In regard to the cashing of these checks Mr. Donahue testified that he cashed all four of the checks "over the counter or the bar", while Mr. Shemwell, who was with the accused all evening, testified that "one was cashed at the dice game. The other two were cashed over the bar", all being made by accused in the presence of Mr. Donahue and cashed by Mr. Donahue. Mr. Shemwell also testified, "Mr. Donahue was paying off that evening part of the time and he had two other men. He cashed the checks while he was paying off". On cross-examination Mr. Donahue admitted that once during the evening in question he participated "in paying off" at the gambling table at which accused was playing as a favor to the owner of the game, and that his actions may have led people to believe that he, Donahue,

had an interest in the gambling game. Mr. Shemwell further testified that accused lost all of the proceeds of the checks and other money at the dice game (R. 27-30,55).

Mr. Donahue obtained the $175 in silver and currency from his mother, Mrs. Josephine Donahue, with which to cash the four checks presented to him by accused. Both Mr. Donahue and Mrs. Donahue claimed that the money used to cash these checks was Mrs. Donahue's personal funds derived from sources other than the gambling establishment. In this connection it is to be noted that there is no evidence in the record to indicate that accused was aware of the fact that it was necessary for Mr. Donahue to obtain the money to cash the checks from Mrs. Donahue. The four checks concerned in this transaction bear the indorsement of Mrs. Donahue (R. 18,20,25,26; Exs. 5(a),6(a),7(a),8(a),10). The manner in which the play at the dice game was conducted was described by Mr. Shemwell on direct examination by the prosecution as follows:

"Q. Did you have any special reason for stopping playing?
A. No, except that Captain Upton was losing a lot of money and I didn't like to see it - I was losing myself, too.
Q. Did you see any evidence of crookedness at the table?
A. I can not prove any crookedness, if that is what you mean. I believe it was tho, and the reason I believe it was crooked was the man throwing the dice - he was not allowed to touch the dice whatsoever. The rake-man would rake in the dice and put them in his hand and wait until all the players had faded, or bet - put their money on the table - and then he would throw the dice into the box.
Q. When did you first notice this?
A. When Captain Upton called me aside and said 'John, they're using three dice' -
Q. How long after that did you play?
A. About fifteen or twenty minutes. I told Captain Upton at that time that I did not think the game was crooked. I knew the Donahues but I didn't know much about dice. He also made a protest to the man across the table.
Q. How much money did he have when he quit?
A. I didn't see any more than a dollar on him" (R. 29),

and on cross-examination by the defense as follows:

"Q. You say a player can not touch the dice?
A. That is right.
Q. At the turn the man who had the stick or rake, picked up the dice and held them in his hand until all the money was placed on the table?
A. Yes.
Q. Then he placed the dice, or whatever they were, in a box?
A. Yes, in a leather box or leather cup.
Q. Then he would throw, or hand it to the player?
A. You had the cup in your own hand.
Q. The player held the cup?
A. Yes.
Q. But never could touch the dice?
A. Yes, that's right." (R. 31)

All four checks, after being indorsed by Mrs. Donahue, were deposited by Mr. Donahue the next day in the First National Bank, Pueblo, Colorado, and were subsequently returned marked "Payment stopped", as prior to the date on which the checks were presented for payment at the Bear Butte Valley Bank at Sturgis, South Dakota, that bank had received a telegram purporting to be from accused in which he directed, "Stop payment all checks cashed Pueblo Colo Refer Holder to me". On December 26, 1934, the date which appears upon each of the four checks, accused had on deposit with the bank in question $5.30, and on December 31, 1934, his balance amounted to $324.99, which amount was sufficient to cover all the checks (R. 21-23,35,36; Exs. 9-12).

The indorsements on the checks and the testimony of Mr. H. J. Walker, an official of the Bear Butte Valley Bank, Sturgis, South Dakota, indicate that the checks after deposit in Pueblo were cleared through Omaha, Nebraska, St. Louis, Missouri, and Minneapolis, Minnesota, before reaching Sturgis, South Dakota, where the drawee bank was located. Mr. Walker also testified that from his experience in banking it would have taken these checks "from three to four days" to reach the bank at Sturgis, South Dakota, after their deposit in Pueblo, and that the checks in question were presented for payment on "either the 30th or 31st day of December, unless such date fell on Sunday, in which case they were presented the following day". (Note: December 30, 1934, fell on Sunday.) (R. 35,38,39; Exs. 5(a),6(a),7(a),8(a),9).

After the checks had been received back, sometime in January, 1935, Mrs. Donahue and Thomas Donahue made a trip to Denver, where the latter talked with accused at Fitzsimons General Hospital in regard to the checks. At this time Mr. Donahue showed the checks to accused and "told him that I was sure surprised", whereupon Mr. Donahue claimed that accused said to him, "Give me a little time" and the checks will be taken care of. During their conversation about these checks, Mr. Donahue admitted that accused informed him that the game was crooked, to which statement Mr. Donahue stated he made the following reply, "I said that was no interest to me as I had the checks - 'I gave you the money', I told him". Mr. Donahue, however, denied that accused made any complaint to him in regard to the crookedness of the dice game at the restaurant on the evening in question. Accused did not inform Mr. Donahue to send the checks in again, although Mrs. Donahue claimed that he had made such a statement to her son (R. 21,22,25,27; Ex. 10).

Sometime after this trip, about February 15, 1935, Mr. Donahue talked with Mr. Shemwell in regard to these checks, and as a result of that conversation he again deposited the four checks in the Pueblo bank for collection. Several days later the checks were again returned, each with a slip attached to it stating, "No funds", and "Payment stopped" (R. 22,36,37; Exs. 5(b),6(b),7(b),8(b),10). In regard to this conversation between Mr. Donahue and Mr. Shemwell, Mr. Shemwell testified as follows:

"Q. Did you ever hear of the checks again?
A. Yes, Donahue came out to the filling station my brother and I run and said 'John, the checks came back "Payment stopped"'. He said Captain Upton had stopped payment on the checks. I told him to send them thru again and in the meantime I went to Denver and saw Captain Upton. I told him Donahue said the checks had been returned to him and payment stopped. He said 'Yes, I stopped payment on them because the game was crooked'. I then saw Tom, Mr. Donahue, a day or so later and told him what Captain Upton had said. I also saw Mrs. Donahue and talked to her about the checks. I told her I believed that if Captain Upton thought the game was on the level he would pay the checks. She said, well, if she got her own personal money out of it she wouldn't care. I asked her how much that was and she said she

didn't know.
Q. Did he tell you he would pay the checks?
A. If the game was on the level he would.
Q. Did you tell Mrs. Donahue he would pay the checks?
A. I did not." (R. 30)

On July 15, 1935, the date on which Mrs. Donahue accomplished her deposition, the four checks, totaling $175, were still in her possession and unpaid (Ex. 10).

At the time of the trial the gambling concession at the Donahue restaurant was no longer operating. Mr. Donahue, however, denied that it had been stopped by the authorities while Mr. Shemwell, on cross-examination by the defense, testified, "They were raided shortly after that. The night they raided them they arrested eight or ten men at the time". On cross-examination Mr. Donahue admitted that he had been convicted once of violation of the Colorado liquor laws (R. 24,25,32,56,60).

In defense to this specification, Mr. Shemwell was recalled as a witness and again testified that Thomas Donahue was one-third owner of the gambling establishment conducted in the room opening on the Donahue restaurant, and that shortly after the four checks were returned the first time Mrs. Donahue and Thomas Donahue came out to his gasoline filling station and informed him of what had taken place with respect to the checks. At this interview Thomas Donahue said, "John, I don't care about my personal money, but I have to pay my partners off", and that Mrs. Donahue said, "I don't care, so long as I get my money out of it" (R. 59,60).

Accused elected to take the stand in his own behalf, and in regard to this specification testified as follows:

"Q. Will you explain to the court the circumstances surrounding the events which occurred at Donahue's at Pueblo?
A. I had cashed checks at Donahue's that night for, I think the amount was $175.00. The reason I stopped payment on these checks was because I caught the stick-man handling a third dice. That place of Donahue's is a pretty tough place - its out in the out-skirts of Pueblo and a pretty tough crowd goes there. They were more than anxious to cash my checks and I did cash them there.

Q. When did you quit playing at Donahue's that night, and why?

A. I quit because I had lost a good deal of money and just before I quit I noticed the man palming the dice.

Q. From your knowledge of crap games, would that incident you refer to constitute a crooked deal or a crooked throw of the dice?

A. It certainly would. A person can palm the dice, and a great many dealers know how and are hard to detect doing so, and can make a 'come dice' or a 'no dice' very easily, whichever is necessary for them to throw.

Q. Did you have the intention to stop payment on the checks at the time you cashed them?

A. I did not.

Q. At what time did you stop payment on the checks?

A. The next day - I believe it was the 28th.

Q. What was the cause of your stopping payment on them?

A. Because of the crooked game.

Q. Did or did you not make a complaint at the time you were playing, to one of the dealers with reference to their manner of handling the dice?

A. I did. They changed the stick man at that time. At first I wasn't sure until he came back on again. In these games they generally change around and one man will pay off while the other handles the stick and when one gets tired he will go and take the stick and the other will pay off for a while and then they will change around again. The first time he had the stick I thought I caught him palming the dice but I wasn't sure until the second time that he took the stick. Then I was sure he was palming the dice on me.

* * * * *

Q. Did you continue playing after you detected that the game was crooked?

A. I don't recall. I know I played until I lost the dice.

Q. How much money did you have remaining from the checks at this time?

A. Only a matter of a few dollars. I don't know how much but it was only a few dollars." (R. 63,64,66)

He admitted having been interviewed by Thomas Donahue at Fitzsimons General Hospital and testified that at that time he (accused) informed Donahue that he had stopped payment on the checks because the game was crooked and that he would not pay the checks "unless I was convinced by other eyes than my own I would not pay them". He also testified that at the time he drew the checks at Donahue's "I knew that by the time the checks got to the bank there would be plenty of money there". On direct examination accused testified that he had been gambling for a number of years and "always try to pay up anything I lose providing I lost it honorably and honestly. But when I have been convinced that I have simply been robbed, I always take steps to immediately recover whatever I can", and on cross-examination admitted that at the time of the trial he had outstanding several checks covering gambling debts. (R. 64,66,68)

Reduced to its essentials the evidence above summarized establishes: On the evening of December 25, 1934, accused, accompanied by John W. Shemwell and two others, visited a restaurant in Pueblo, Colorado, in conjunction with which there was operated a gambling concession where the play was conducted with and for money. Accused participated in the game, and during the course of the evening induced Thomas Donahue, a waiter in the restaurant who, if he were not actually a partner in the gambling concession, was at least its agent on the night in question, to give him $175 in cash in exchange for four checks aggregating that amount, drawn by him on the Bear Butte Valley Bank, Sturgis, South Dakota. From the circumstances shown Mr. Donahue must have known that accused was going to use the proceeds of the checks for gambling. After accused had lost practically all of the proceeds of the four checks, he and Mr. Shemwell departed from the gambling room. The next day the four checks totaling $175 were deposited by Mr. Donahue at the First National Bank of Pueblo, Colorado, and were subsequently returned by that bank because accused had stopped payment on them. At the time the checks were presented for payment at accused's bank in South Dakota there was sufficient funds on hand to meet all of the checks.

The defense consisted of the testimony of accused and that of John W. Shemwell. Mr. Shemwell was called as a witness by both the prosecution and defense, but the testimony hereinafter referred to was given by him while on the stand as a witness for the prosecution. Accused substantially admitted all the allegations of which he was convicted except that his actions in stopping payment of the checks were wrongful and dishonorable. Accused claimed that towards the end of the evening in question he detected that the dice game at which he was playing was crooked and that he

protested at the time. He also claimed that he quit playing after he lost the dice because he had lost a considerable sum of money and because of the crookedness of the dice game. Mr. Shemwell testified that during the time accused was playing the dice game accused spoke to him about its crookedness and also protested "to the man across the table" and that he (Shemwell) also believed the game to have been crooked. Mr. Shemwell also testified that when accused quit playing he was practically without funds. Mr. Shemwell did not testify how long accused continued to play after he (accused) discovered the game was crooked, but he did testify that he (Shemwell) continued to play fifteen or twenty minutes thereafter. There is no evidence in the record that the game was straight. In fact, the testimony of Mr. Donahue rather indicates it may have been crooked. Mr. Donahue visited accused at Fitzsimons General Hospital sometime after the evening in question in order to collect on the checks. At this interview accused informed him he believed the game was crooked, whereupon Mr. Donahue replied, "I said that was no interest to me as I had the checks - 'I gave you the money', I told him". Accused admitted he stopped payment the following day on the checks totaling $175 which he had given to Mr. Donahue on the night in question.

The evidence for the prosecution in support of Specification 2 of the Additional Charge may be summarized as follows:

On the evening of February 2, 1935, accused, accompanied by a lady (apparently Miss Shemwell, now the wife of accused) visited the Blakeland Night Club, near Littleton, Colorado, which was owned and operated by Mr. O. E. Stephens of Denver, Colorado. This establishment included a dining room, a floor show, a bar and gambling games. The latter activity consisted of a dice game, a twenty-one game, and a roulette wheel at which the patrons were required to use chips in the play. (R. 40,41,46, 47,49) At various times during the evening accused purchased from Mr. Stephens a total of $325 worth of chips with three personal checks in the amounts of $200, $100 and $25, respectively. All of the checks were dated February 2, 1935, and were drawn by accused on the First National Bank of Denver, Colorado. (R. 41-44; Exs. 13-15) Accused gave the lady who accompanied him part of the chips which she either cashed in for money or used in playing roulette. Accused confined his activities in the gambling establishment to playing the dice game, at which game he continued playing until all of his chips were exhausted. Mr. Stephens did not know how much money accused actually lost because he did not "know how many chips the lady cashed in" and because "she had plenty of money when she quit". (R. 41,43-47)

In regard to the cashing of the checks Mr. Stephens' testimony may be summarized as follows: The first two checks, the one for $200 and the one for $100, were presented to Mr. Stephens by accused at different times during the evening. Mr. Stephens cashed these two checks without any indorsement by any third party because "I had seen him in the place once before and I knew he was an Army officer". (R. 41,43) Later in the evening accused desired to get a third check cashed, but Mr. Stephens was unwilling to cash it so accused "called Colonel Nelson in". (Note: "Colonel Nelson" is a Lieutenant Colonel, Infantry Reserve.) Colonel Nelson talked accused into taking a lesser amount than the amount he first desired and upon Colonel Nelson's "OK" Mr. Stephens cashed a third check (the one for $25) for accused (R. 45). According to Mr. Stephens it appears that Colonel Nelson intended to indorse all three checks, that is, the $200 and the $100 checks, which had been previously cashed by Mr. Stephens, and the $25 check, but for some reason or other failed to indorse the latter check. Mr. Stephens did not claim that accused directly or indirectly asked Colonel Nelson to indorse the former two checks or that accused was present when Colonel Nelson indorsed the checks. Mr. Stephens admitted that he indorsed all three checks, but his indorsement does not appear upon the $200 and $100 checks, as the indorsements on those checks, except for a part of the last indorsement on each which is that of Colonel Nelson, have been cut off. It appears from Mr. Stephens' testimony that he indorsed the $200 and $100 checks before they were indorsed by Colonel Nelson. On cross-examination Mr. Stephens admitted having been convicted three times for violation of the Colorado Liquor and Gambling laws. (R. 45,46,48; Exs. 13-15)

In regard to the indorsing of the checks Colonel Nelson testified as follows:

"Q. Will you state the circumstances under which you met him that evening?

A. Well, Blakeland is a night club - it has a bar and cabaret and gambling. I was there that evening and Captain Upton came to me and told me he wanted some money. He told me who he was and I asked him why he come to me. He told me that Mr. Stephens, the proprietor of the club, wouldn't let him have any unless I said it was O.K. I asked Captain Upton some questions and also talked to some other people there that seemed to know him, and I forget what was said, but he convinced me that it was alright. When I was satisfied

> that he was an army officer and what he appeared to be, I told Stephens he was alright. I talked to Stephens and he told me the Captain had got some money already. He said he had cashed a check for a hundred dollars and another one for two-hundred. I asked what he had used the money for and he said he had spent it. I told the Captain he didn't need a hundred dollars and we had some argument about whether or not he needed it and I decided at first that I wouldn't let him have any money at all, but he told me he had to pay for some drinks and, it seems to me he said he had some people with him and had to pay some debts he owed them. I said 'You can get along with twenty-five dollars just as well as a hundred can't you?' I said he would have to take the twenty-five or nothing as that was all I would O.K. With that I went back to Stephens and told him not to let him have more than that amount and that would allow him to pay what he owed and he should settle up and get out. He said 'I'll let him have it then if you will guarantee these other checks'. I told him I would be glad to do that and I did. That was the end of it until a few days later Stephens came around with the checks and said the checks had been stopped and wanted me to give him his money." (R. 49)

Colonel Nelson also testified that he indorsed the $200 and the $100 checks "at the time Captain Upton got the money, the twenty-five dollars", but not the $25 check because "Stephens never brought that check around to be O.K'ed", knowing at the time that accused had already received chips for the $200 and $100 checks and that in order to get accused $25 worth of chips he obligated himself to the extent of indorsing checks to the amount of $300 (R. 50,52). It is to be noted that Colonel Nelson did not testify that accused asked him to indorse the $200 and $100 checks or was actually present when he indorsed them.

Mr. Stephens deposited all three checks at the United States National Bank, Denver, Colorado, and several days later the $200 and $100 checks were returned to him by the bank, each having "Payment Stopped" stamped across it. As the checks which were returned bore

the indorsement of Colonel Nelson, Mr. Stephens turned these checks over to Colonel Nelson and collected from him their full face value, $300 (R. 44,45,50,53; Exs. 13-15). Colonel Nelson did not have any interest in the night club nor did he have any business connections with it (R. 44,51,54).

In regard to the payment of these checks Colonel Nelson's testimony may be summarized as follows: Shortly after the evening in question Mr. Stephens informed Colonel Nelson that payment had been stopped on the two checks and asked him to make them good. Colonel Nelson endeavored to get in touch with accused but without success and finally wrote to The Adjutant General about the matter. In the meantime Colonel Nelson paid Mr. Stephens $300 and received in return the $200 and the $100 checks. After receiving the two checks Colonel Nelson again indorsed them and later cut off all indorsements except a portion of his last indorsement on each check. This testimony of Colonel Nelson implies that he indorsed each of the checks twice, once on the evening in question and again after he had received them from Mr. Stephens. During April, 1935, Colonel Nelson went out to see accused at Fitzsimons General Hospital, where accused apologized for the embarrassment he had caused Colonel Nelson and paid him "for the checks in full". At this time accused informed Colonel Nelson that he had stopped payment on the checks because he (accused) had been informed by one of the employees of the night club that the game was crooked. (R. 50-53)

It was stipulated that the bank statement of accused at the First National Bank, Denver, Colorado, for the month of February, 1935, would show the following balances:

February 2.....	$ 208.85	
" 4.....	208.85	
" 5.....	136.85	
" 25.....	.05	(R. 57; Ex. 16).

The defense to Specification 2 of the Additional Charge consisted of the following:

Mrs. Mary Jane Upton (wife of accused and formerly Miss Shemwell) testified that on the evening in question she and accused had dinner at Blakeland and after dinner went into the gambling room, where accused played the dice game and she played roulette. She admitted getting some of her chips from accused and that she cashed in some of them for

a total of about $55, but that in the end she lost all of her chips and she and accused left the night club with only thirty-five cents between them. She also testified that accused had a bank account in Deming, New Mexico, and that accused had a source of income other than his pay "from the ranch that we own". (R. 60-62) In regard to a conversation which took place between Colonel Nelson and accused at Blakeland she testified as follows:

"Q. What was the conversation?
A. Well, Captain Upton had eventually lost all his chips and what more money he had and what I had given him and he wanted to cash a check and he asked Mr. Nelson to O.K. the check. At first Mr. Nelson said no, he wouldn't, and then he left and went to the bar and he came back again and they talked some more about it and Mr. Nelson said 'Alright, if it is just for twenty-five dollars, of course I will'". (R. 61)

Accused testified in his own behalf as follows:

"Q. Captain, with reference to the Blakeland night club, will you explain to the court the circumstances occurring at that time?
A. I did cash checks for gambling chips at the Blakeland night club amounting to around $325.00. I stopped payment on two of them and allowed the one for $25.00 to go thru, in as much as I had asked Colonel Nelson to indorse it and I thought he had at the time. But, as it turned out later, he did not. The reason I stopped payment on the other two was because Mr. Stephens, or a man that looked like him, there were two of them there, convinced me that the game was crooked. That does not seem like a very reasonable statement for a man to make, but it is the truth. Colonel Nelson, he is a Colonel in the National Guard, was not asked to indorse the other checks and I certainly did not believe he had done so until Stephens convinced me that he had. A retired lieutenant at Fitzsimons with whom Colonel Nelson is very friendly, finally induced me to pay Colonel Nelson the money for the checks, and, being very sure by then that Colonel Nelson really had been out the

$300.00, I paid him the money. I did not feel that I should pay it but I paid it anyhow.

Q. Had you any intention of stopping payment on the checks until informed by an employee of the club that the game you were playing was crooked?

A. I did not have.

Q. Did you, or have you, made any gain financially whatsoever, from playing at that club?

A. No.

Q. About how much did you lose in addition to the sums for which you cashed the checks?

A. Something around a hundred dollars.

Q. Did you have any money when you left the Blakeland night club?

A. I don't recall just how much, but I had less than fifty cents. It wasn't enough to tip the man who brought the car to the door.

* * * *

Q. When did you discover that the game was crooked at Blakeland?

A. I detected that the game was crooked when they changed dice. They had two sets of dice and if a man was making a run of luck they swapped the dice on him. Say, if a man was playing a large sum on the 'don't', then they would use the other dice. The game looked pretty straight enough and they never changed the dice except when a man was making a big bet or was having a big run of luck, in which case the man would continue to play and shortly thereafter they would throw out what was, apparently, the 'don't dice' and the next throw would be a seven and he would lose on the 'come' dice. The same applied if a man was betting on the 'don't'. That, and the statement of the employee, Mr. Stephens, that was made to me, led me to believe it was all crooked.

Q. How long did you continue to play after you discovered this?

A. I don't recall. I might have gone over and played roulette a while.

Q. Did you have sufficient funds in the First National Bank at Denver to cover these checks?

A. I did not then, but I could have gotten money there before the checks were presented for payment.

Q. Where could you have gotten it?
A. From my home bank.
Q. What is your home bank?
A. My home bank is at Deming, New Mexico.
Q. What is the name of it?
A. Mimbres Valley Bank." (R. 64-67)

Reduced to its essentials the evidence above summarized establishes On the evening of February 2, 1935, accused, accompanied by a ·dy, now his wife, visited a night club near Littleton, Colorado, owned and operated by Mr. O. E. Stephens, at which gambling was one of the attractions. The play at the various gambling games was for chips, which were purchased from the management. Sometime during the evening accused purchased from Mr. Stephens $300 worth of chips with two of his personal checks, one check being for $200 and the other for $100, both dated February 2, 1935, and drawn on the First National Bank of Denver, Colorado. Mr. Stephens accepted these checks without any indorsement by a third party as he recognized accused as an Army officer Later in the evening accused desired to obtain additional chips and aske Mr. Stephens to honor a third check for $100. After some argument and after Colonel Nelson had agreed to "OK" accused's check for $25, an amount much less than the amount accused desired, Mr. Stephens accepted accused's check for $25, which was also drawn on the Denver bank, and gave him in return $25 worth of chips. Thereafter in the absence of accused and at the suggestion of Mr. Stephens, Colonel Nelson also agreed to indorse the $200 check and the $100 check, which Mr. Stephens had already accepted from accused. In fact, however, Colonel Nelson only indorsed the $200 and the $100 checks, but failed to indorse the $25 check. Subsequently, the $200 and the $100 checks of accused were returned to Mr. Stephens dishonored by the United States National Bank of Denver, Colorado, at which bank Mr. Stephens had deposited them for collection, as accused had stopped payment on them. Mr. Stephens then appealed to Colonel Nelson to make good the two checks which had been returned as they bore Colonel Nelson's indorsement. Colonel Nelson, after failing to locate accused and after writing to The Adjutant Genera in regard to the matter, paid Mr. Stephens $300 and took possession of the two checks. Sometime Later Colonel Nelson located accused, at which time accused paid Colonel Nelson $300, apologized for the trouble he had caused Colonel Nelson and also stated he had stopped payment on the checks because the game was crooked. On the date the three checks which totaled $325 were drawn, accused's balance at the bank on which these checks were drawn was $208.85, which balance depreciated without any additional deposits to five cents on February 25, 1935.

The defense consisted of the testimony of accused and that of his wife, the former Miss Shemwell. The latter's testimony was to the effect that accused had only asked Colonel Nelson to indorse the $25 check and that accused had a bank account in New Mexico and a ranch from which he derived income. Accused substantially admitted all the allegations of which he was convicted except that his actions in stopping payment of the checks were wrongful and dishonorable. He claimed that he had asked Colonel Nelson to indorse the $25 check but not the $200 and $100 checks, and that he had stopped payment on the latter two checks because he believed the game to have been crooked and would have stopped payment on the $25 check except for the fact that he had asked Colonel Nelson to indorse it. He further claimed that as soon as he became convinced that Colonel Nelson had indorsed the $200 and $100 checks and had no connection with the game he paid Colonel Nelson $300 and apologized for the trouble he had caused him. All of the claims of accused with the exception of his claim that the game was crooked were corroborated by other evidence introduced by the prosecution.

6. The Board of Review has not found any statute, Federal or of the State of Colorado, which makes the mere stoppage of payment of a valid check by its drawer a crime in itself, where the element of fraud is not involved. In fact, it is a well settled rule of law requiring no citation of authority that a drawer has a legal right to stop payment of a check before it is paid or certified and take upon himself the legal consequences of his act. It therefore appears that in so far as the civil criminal law is concerned accused has not been convicted of any offenses. However, it is equally well settled that certain acts not inhibited by public law, when committed by officers and enlisted men of the Army, may constitute offenses within the purview of the 95th and 96th Articles of War.

Neither has the Board of Review discovered any precedent of The Judge Advocate General covering transactions such as those of which accused was convicted. The acts themselves are not wrongful and dishonorable. The only way to determine whether or not they are wrongful and dishonorable is to examine the evidence and determine what was the result of accused's actions, since a sane person is presumed to have intended the natural and probable consequences of acts which he is shown to have committed. Par. 112, p. 110, M.C.M., 1928. The proof shows that his acts resulted in his failure, permanently in one instance and temporarily in the other, to pay his gambling debts. The real

question therefore presented is whether or not his failure to pay his gambling debts was wrongful and dishonorable. Failure by an officer to pay his debts under certain circumstances constitutes conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. Par. 151, p. 186, M.C.M., 1928. As to the circumstances under which an officer should not be brought to trial for failing to pay his debts, the Manual for Courts-Martial (p. 188) states as follows:

> "If an officer or soldier by his conduct in incurring private indebtedness or by his attitude toward it or his creditor thereafter reflects discredit upon the service to which he belongs, he should be brought to trial for his misconduct. He should not be brought to trial unless, in the opinion of the military authorities, the facts and law are undisputed and there appears to be no legal or equitable counterclaim or set-off that may be urged by the officer or soldier. The military authorities will not attempt to discipline officers and soldiers for failure to pay disputed private indebtedness or claims, that is, where there appears to be a genuine dispute as to the facts or the law. An officer may be tried for this offense under either A. W. 95 or A. W. 96, as the circumstances may warrant." (Underscoring supplied)

From the evidence it appears that accused not only contested the legality of the debts and the checks evidencing the debts but that he also disputed the fairness of the debts and of the games in which he lost money. A preponderance of evidence shows that the money at Donahue's (Specification 1) and the chips at the Blakeland Night Club (Specification 2) were knowingly advanced to accused at the time and place of the play by persons connected with the operation of the gambling games who knew accused was participating in the play, and that accused lost the major portion of the proceeds of each of the checks in the gambling games. Under these circumstances the Board of Review is of opinion that under the laws of Colorado, the state wherein the checks were negotiated by accused, all of the checks alleged in both specifications of the Additional Charge are void and of no effect as against accused, regardless into whose hands they may have passed.

As to the crookedness of the game at Donahue's (Specification 1), accused's testimony in that respect is corroborated by the testimony of Mr. Shemwell, a witness for the prosecution, and to a limited extent by that of Mr. Donahue, the prosecution's principal witness. Also there is no evidence in the record to indicate that the game was fair. Under these circumstances the Board concludes that the weight of the evidence indicates that the game at Donahue's was crooked.

With respect to the crookedness of the game at the Blakeland Night Club, the testimony of accused to that effect is uncorroborated by other evidence. However, accused testified that he believed the game to have been crooked and explained the grounds for his belief. His testimony as to the circumstances surrounding the negotiation of the checks and his reimbursement of Colonel Nelson was true. The fact that Colonel Nelson had indorsed these checks added nothing to the legal efficacy and made them no more collectible by legal process. Accused's recognition of his obligation to Colonel Nelson therefore must have been upon moral grounds. These actions on the part of accused certainly indicate his intent to do nothing wrongful and dishonorable. When it is also considered that the prosecution did not offer any evidence that the game was fair and that there is no presumption that a gambling game conducted in violation of law is fair, a grave doubt arises as to the fairness of the game in question.

The Board of Review is therefore of the opinion that the evidence does not establish beyond a reasonable doubt that the acts of accused in stopping payment on the checks which he negotiated at Donahue's (Specification 1) and at the Blakeland Night Club (Specification 2) were wrongful and dishonorable.

7. In connection with the rule set forth, supra, in regard to the circumstances under which an officer should not be brought to trial for failing to pay his debts, there should be considered certain opinions of The Judge Advocate General on the question of whether a discharge in bankruptcy relieves an officer of the obligation to pay his debts. The Board of Review has examined these opinions, some of which are digested in section 414, Digest of Opinions of The Judge Advocate General, 1912-30, page 199, and finds that the principle involved, as stated in the latest opinion on the subject, is as follows:

"* * * there is no law or regulation which prohibits an Army officer from invoking the aid of the bankruptcy court, but under the military code bankruptcy proceedings do not relieve an officer from the moral obligation to pay his just debts if and when he is financially able to do so, and that the determination of whether the military code has been violated depends upon the specific facts in each case." Ops. JAG 013.3, June 18, 1935.

In the instant case it is not established beyond a reasonable doubt or even by a preponderance of evidence that the debts of accused were just and that a moral obligation existed for him to pay them. The Board therefore believes that the principle enunciated in this line of opinions does not affect the conclusions hereinbefore reached by the Board.

8. The staff judge advocate, Seventh Corps Area, in his review of the record of trial, reaches the conclusion that the record is legally insufficient to support the findings and sentence but bases his conclusion on grounds other than those heretofore discussed in this opinion. In view of the Board's conclusions no useful purpose would be served by discussing the staff judge advocate's review and the Board expresses no opinion as to the merits thereof.

9. The court was legally constituted. 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 and the sentence.

Thorne Hall, Judge Advocate.

W. A. Ingwall, Judge Advocate.

L. W. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 203718

OCT 3 1935

UNITED STATES	)	FIRST CAVALRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Bliss, Texas, September 10, 1935. Dismissal.
First Lieutenant CARLISLE G. ADAMS (0-222853), Air Corps Reserve.	)	

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

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

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

CHARGE I: Violation of the 63d Article of War.

Specification: In that 1st Lieut. Carlisle G. Adams, Air-Res., United States Army (CCC), did at Camp DBR-3-N, Civilian Conservation Corps, Carlsbad, New Mexico, on or about August 10, 1935, behave himself with disrespect toward 1st Lieut. William L. Hagman, Jr., Inf-Res., his superior officer, by saying to him "I ought not to hit you with my fist, but should beat your brains out with my pistol, you Son-of-a-Bitch", or words to that effect.

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

Specification 1: In that 1st Lieut. Carlisle G. Adams, Air-Res., United States Army (CCC), did at Camp DBR-3-N, Civilian Conservation Corps, Carlsbad, New

Mexico, on or about August 10, 1935, strike 1st Lieut. William L. Hagman, Jr., Inf-Res., his superior officer, who was there in the execution of his office, in the face and on the head and jaw with his fist.

Specification 2: In that 1st Lieut. Carlisle G. Adams, Air-Res., United States Army (CCC), did at Camp DBR-3-N, Civilian Conservation Corps, Carlsbad, New Mexico, on or about August 10, 1935, offer violence against 1st Lieut. William L. Hagman, Jr., Inf-Res., his superior officer, who was there in the execution of his office, in that he, said 1st Lieut. Carlisle G. Adams, Air-Res., did then and there throw a metal pitcher and a waste basket at 1st Lieut. William L. Hagman, Jr., Inf-Res.

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

3. The evidence as to the military status of accused and First Lieutenant William L. Hagman, Jr., Infantry Reserve, the superior officer referred to in each of the three specifications, is confined to the testimony of these officers themselves and to that of certain other civilian witnesses. However, the staff judge advocate attached to his review duly authenticated copies of competent orders showing the following: Paragraph 2, Special Orders No. 5, Headquarters Eighth Corps Area, Fort Sam Houston, Texas, January 11, 1935, provides that by direction of the President and to carry out the provisions of the Act of March 31, 1933 (Public No. 5, 73d Congress), First Lieutenant William Louis Hagman, Jr., Infantry Reserve, was ordered to active duty with his consent for six months, effective January 14, 1935, with rank from December 31, 1934. This order was later amended by paragraph 4, Special Orders No. 52, same headquarters, May 20, 1935, to extend Lieutenant Hagman's active duty tour to October 13, 1935. Accused was likewise ordered to active duty with his consent for a period of six months, effective March 31, 1935, with rank from March 17, 1935, by paragraph 18, Special Orders No. 23, same headquarters, March 5, 1935.

4. The evidence with respect to all three specifications of the charges is so connected that to attempt to set it forth separately with respect to each specification would accomplish no useful purpose. Accordingly, the testimony will be summarized together. Also, the evidence for

the prosecution will be set forth in a narrative form, supplemented by the testimony of individual witnesses when it conflicts with the defense testimony.

On April 16, 1935, accused reported to a veterans' camp at Cave Creek, Arizona, commanded by First Lieutenant William L. Hagman, Jr., Infantry Reserve. On some date thereafter not shown by the evidence, but before August 10, 1935, the company, including Lieutenant Hagman and accused, was transferred to Veterans' Camp DBR-3-N, at Carlsbad, New Mexico. Lieutenant Hagman commanded this camp from an undetermined date before August 10, 1935, to the date of the trial, September 10, 1935, as on the latter date he testified that he was then in command of the Veterans' Camp DBR-3-N at Carlsbad, New Mexico, had been present at that camp on August 10, 1935, and that accused "up to July 31st was second in command at my Camp and after that he was second in command at F-37-N" at Dark Canyon, Arizona. Also, Orren S. Conner, CCC enrollee at Camp DBR-3-N, testified that Lieutenant Hagman was commanding officer of that camp on August 10, 1935. Lieutenant Hagman further testified that he was a first lieutenant, Infantry Reserve, from December 30, 1934, that accused was a first lieutenant, Air Reserve, that he (Lieutenant Hagman) was senior to accused "by three or four months. He ranks from March 31, and I rank from December 31, 1934", and that while accused was serving under him at Camp DBR-3-N there was no question as to who was senior. (Hagman, R. 15, 22-25,60,61; Brimhall, R. 30; Wilkinson, R. 14; Conner, R. 38)

As to the proper station of accused on the evening of August 10, 1935, Lieutenant Hagman testified:

> "Q. At this time, what was the proper station of Lieutenant Adams?
> A. To my knowledge he was assigned to my Camp and on detached service, as second in command in Camp F-37-N." (Hagman, R. 23,24)

Lieutenant Hagman apparently was mistaken in this testimony as paragraph 11, Special Orders No. 26, Headquarters Fort Bliss District, Civilian Conservation Corps, Fort Bliss, Texas, July 31, 1935, a duly authenticated copy of which is attached to the review of the staff judge advocate, shows the following:

> "First Lieutenant Carlisle Gilliam Adams, Air-Res., is relieved from further duty with CCC Company 1826, Camp

DBR 3 N, Carlsbad, New Mexico and from temporary duty at Camp F 37 N, Guadalupe, Carlsbad, New Mexico, is then assigned to duty with CCC Company 2868, with temporary duty station at Camp F-37-N, Guadalupe, Carlsbad, New Mexico and will report for duty accordingly."

The exact date accused departed from Camp DBR-3-N for his new station does not appear but it was probably around July 31, 1935, as Dr. E. T. Wilkinson, camp physician, testified that on August 10, 1935, accused had been away from Camp DBR-3-N "about two weeks" (R. 14).

The prosecution displayed upon a blackboard before the court a diagram of the officers' quarters at Camp DBR-3-N. This diagram was not introduced in evidence but it was identified as being approximately accurate by competent witnesses (Wilkinson, R. 8; Hagman, R. 18). Since a copy of this diagram was not attached to the record of trial it is not possible to locate definitely the rooms occupied by the various individuals living at the officers' quarters. However, it appears that the officers' quarters consisted of four bedrooms, a living room and a mess hall. All of the rooms were separated from each other by partitions which were about eight feet high and which extended about two-thirds of the distance from the floor to the ceiling. Before accused's departure he occupied the bedroom adjoining that of Lieutenant Hagman, and when he departed he left behind him in this bedroom some of his personal property. After accused's departure and before August 10, 1935, Lieutenant Hagman caused accused's property to be moved into the living room and later into an unoccupied room in the mess hall, and informed Dr. E. T. Wilkinson, physician of the camp, that he might move into the room formerly occupied by accused, which Dr. Wilkinson did at sometime prior to August 10, 1935. Lieutenant Hagman did not advise accused that his property had been moved "because I could not get in contact with him. Other than that I did not feel it necessary". Lieutenant Hagman admitted, however, that when accused departed from Camp DBR-3-N he left some unfinished business behind him which caused accused to return to his former camp on numerous occasions before August 10, 1935.

On the evening of August 10, 1935, the bedrooms of the officers' quarters were occupied by Lieutenant Hagman, Dr. Wilkinson, camp physician, and Mr. J. D. Brimhall, educational adviser of the camp. Dr. Wilkinson occupied the room formerly assigned to accused and which was adjacent to that of Lieutenant Hagman. Mr. Brimhall occupied one of the other bedrooms

which was across the hall from that of Lieutenant Hagman. The remaining bedroom was vacant. (Hagman, R. 17,18,20-22,24; Wilkinson, R. 6,8,9,11-13; Brimhall, R. 32)

Dr. Wilkinson and Mr. Brimhall each testified that he had known Lieutenant Hagman and accused for approximately two months and was able to recognize and differentiate between the voices of the two officers (Wilkinson, R. 7; Brimhall, R. 30).

At about 3 a.m. on the morning of August 10, 1935, Dr. Wilkinson was awakened in his room by accused striking a match and looking into his face. Accused asked Dr. Wilkinson where his property was located and Dr. Wilkinson informed him that it had been stored some place but its exact whereabouts was unknown to him. Accused then left Dr. Wilkinson's room. Fifteen or twenty minutes later Dr. Wilkinson heard a dull sound on Lieutenant Hagman's door and heard Lieutenant Hagman say "Come in". (Wilkinson, R. 6) As to what transpired in Lieutenant Hagman's room, Lieutenant Hagman testified as follows:

> "I was awakened at what I checked up later to be about 3:00 in the morning by Lieutenant Adams standing over me apparently having beaten me to awaken me and shouting in a very loud and very much disturbed tone, 'Where is my stuff. Where are my things' or words to that effect. He was trying to strike me and I sat up in bed. My bed is up on stilts and is about four feet in the air. I sat up in bed and kicked him off with my feet and he backed up across the room and said, 'What authority do you have to move my things?' I said, 'I have that authority as Commanding Officer of this Camp. I can assign quarters or I can move personal effects of anyone.' After that, he came on and struck me several times more, made rushes at me from across the room. When he saw he could have no effect that way, he attacked me verbally, called me various things, among them a low-down bastard. He said, 'By God, you are worse than a low-down bastard, you son-of-a-bitch, you are worse than a son-of-a-bitch. I dare you to come out and fight me.' He asked for a club. He said, 'Give me a club and I will beat you up.' He said, 'I ought not to beat you with my fists, I ought to take my gun and beat your brains out, you son-of-a-bitch' or words to that effect. I had a wastepaper basket in the corner of the room, in which I had set a metal pitcher. He picked the thing up and threw it at me. I dodged it and it came through and broke a window behind me and he backed up. I think after that, if I remember right, he made several

more rushes at me and exhausted himself and backed up across the room and attacked me verbally until he exhausted himself that way. Finally he left the building. After he left, I followed him to the door and turned out the light in the front room, which was shining down the front hall, and that is about the extent of it" (R. 15-17),

and as to the injuries he received as follows:

"The injuries about my face and head I can only tell that I assume I got them from Lieutenant Adams. When I went to bed I did not have them. When I woke up I sat up in bed and I do not believe after I sat up in bed, because of my height in the bed, that Lieutenant Adams struck me about the face and head. I know he struck me several times about the body. The next morning I asked the Doctor to examine me and I had the bruises on my face and head and I must have received them when I was asleep or when I was being wakened by Lieutenant Adams." (R. 19)

Lieutenant Hagman and accused were alone in the room except for a time when Mr. Brimhall came in and endeavored to stop the attack upon Lieutenant Hagman by accused (Hagman, R. 20,23; Brimhall, R. 32). Although there was no light burning in Lieutenant Hagman's room,sufficient light entered the room over the partitions from the light burning in the living room to permit persons and objects to be distinguished (Hagman, R. 21; Brimhall, R. 32,33). Lieutenant Hagman also testified that he did not attack accused and that it was not necessary for accused to defend himself in any way, that he did not leave his bed during any of the time accused was in his room, and that nothing happened between the time accused left his room and the following morning to have caused the injuries which he noticed in the morning (R. 23,24,26).

On cross-examination Lieutenant Hagman could not remember positively whether he was wearing shoes or was between the sheets at the time accused entered the room, but from his habits he believed he was not wearing shoes and was sleeping under the sheets, although there was a possibility that he might have had on his night slippers. Lieutenant Hagman admitted that his recollection of the affair which took place that evening was not clear except that he remembered clearly the words accused spoke to him and the fact that accused threw the water pitcher at him. He also admitted that

the relations between accused and himself were "rather strained" and that "so far as my reactions were concerned, I had been more or less trying to protect Lieutenant Adams". (R. 21,22,27,28)

Dr. Wilkinson testified that he overheard the following:

"* * * Lieutenant Adams went into the room and asked by what authority he had moved his things. Lieutenant Hagman's reply was that he was the Commander of the Camp and had the right. Then Lieutenant Adams disputed the fact that he had the right to move his stuff and they had a few words. Then I heard glass falling on the floor. I heard furniture moving as if being turned over, or partly turned over. Then I judged there was an attack by someone. I did not see it, I was in my bed. I got up about that time and went out to the door to get in and there were two, I believe three, I am satisfied there were three at the door at the time I got there, and I could not see in and I could not get in. I walked back, thinking I would find the Educational Advisor and ask him what he thought would be best for us to do, but I did not find him. During that time there was cursing, that is, Lieutenant Adams was cursing Lieutenant Hagman.

* * * *

Q. What did Lieutenant Adams say, in the way of profanity?

A. He said, 'You will tell some more damn lies on me, will you, you bastard, you son-of-a-bitch. Come out and fight.' That was repeated a number of times, about the same words.

Q. Do you or do you not recall hearing Lieutenant Adams say, 'I ought not to hit you with my fist, but should beat your brains out with my pistol, you son-of-a-bitch'?

A. It was about like this, 'I should not fight you with my fist but should get a pistol and beat your brains out. Give me a club'. He asked that of some one, I don't know who it was. No one gave him a club.

Q. Did you or did you not, at any time, hear Lieutenant Adams refer to Lieutenant Hagman as a son-of-a-bitch and bastard?

A. Yes, sir, several times.

* * * *

Q. Did you hear the breaking and clashing of glass at any time, as if a window were being broken?

A. Yes, sir" (R. 6-8,10-11),

and as to Lieutenant Hagman's injuries discovered the following morning as follows:

> "A. A bruise on the left jaw, lower jaw, a slightly abraded surface above the eye, and, at the time, I did not notice that he had received a blow over the eye, but there afterwards developed a black eye.
> Q. Did Lieutenant Hagman complain of his ribs to you, at the time?
> A. Yes, sir. That had been an old injury he told me. He had been hurt before and they hurt him then badly." (R. 11)

This witness also testified that he did not hear Lieutenant Hagman curse accused in the presence of accused (R. 11).

Mr. Brimhall testified that he was awakened at about 3 a.m. on August 10, 1935, by the conversation between accused and Dr. Wilkinson. Witness heard accused go into Lieutenant Hagman's room but did not hear any knock. He heard accused ask Lieutenant Hagman where his property was and heard accused call Lieutenant Hagman "a God damn son-of-a-bitch, a bastard and a son-of-a-bitch" numerous times. Witness then crossed the hall to Lieutenant Hagman's room and endeavored to induce accused to leave Lieutenant Hagman's room. While standing in the doorway witness saw accused make several rushes at Lieutenant Hagman and strike at him at least twice. During these attacks Lieutenant Hagman was sitting on the bed with his back to the wall trying to protect himself with his feet. Witness heard no profanity used by Lieutenant Hagman and did not recall whether or not Lieutenant Hagman was wearing his shoes. Witness also heard accused say to Lieutenant Hagman, "I should take my gun and beat your brains out", and heard the breaking and shattering of glass. (R. 31-36)

Mr. Orren S. Conner, an enrollee at Camp DBR-3-N, testified that he was a night watchman at the camp. At about 3 a.m. on the morning of August 10, 1935, this witness heard a commotion coming from the officers' quarters. Apparently he went into the officers' quarters for he testified he saw and heard accused call Lieutenant Hagman "a son-of-a-bitch and said, 'You are worse than a son-of-a-bitch'". He also testified that he saw accused trying to attack Lieutenant Hagman but, as Lieutenant Hagman's bed was about three and one-half feet tall and Lieutenant Hagman had retreated back into the corner of it, accused was unsuccessful. (R. 37,38)

Mr. Woodrow Clavin, an enrollee at Camp F-37-N, testified that on the evening of August 10, 1935, he accompanied accused to Camp DBR-3-N. After their arrival at the camp, which was after 12 o'clock midnight, accused said "he was going to get a few of his things and would be right back out". Accused went into the officers' quarters and returned shortly thereafter without his property and at this time said to witness, "He couldn't get away with that". Accused then returned to the officers' quarters and shortly thereafter witness heard scuffling inside "like furniture was being overturned". Witness testified he was familiar with the voice of accused and heard accused call someone "a yellow son-of-a-bitch and that he was lower down than a nigger". (R. 40-42)

The evidence indicates that both accused and Lieutenant Hagman were sober (Hagman, R. 25; Brimhall, R. 34-35; Conner, R. 38).

Accused elected to take the stand in his own behalf. He testified that after his departure from Camp DBR-3-N it had been necessary for him to return to that camp a number of times to finish certain work and that he had believed the room in the officers' quarters was still his, and that on one of these visits he had told Lieutenant Hagman that he would remove his property at his earliest convenience (R. 44,45). As to the trouble on the evening of August 10, 1935, accused testified as follows:

"Q. Tell the Court just exactly what happened the night of August 10th.

A. That night I came back from Carlsbad. I had been on a mission for the Camp at F-37-N, and stopped there to get some of my belongings which were in my quarters, just in the rear from Lieutenant Hagman's room. When I went in there I did not see any of them. I had had them packed up and laid on the floor and fixed to pick up the first opportunity I had, because I was going backwards and forwards a good many times. It kind of made me mad. I came back out and knocked on Lieutenant Hagman's door, which was right next to me, just as the door is shown there. He said, 'Come in . I came in and grabbed his bunk, it was sitting up that high from the floor on stilts, shook it and asked him where my stuff was and he said it was moved into the mess hall. I asked him what right he had to move my stuff and with that he said - and by the way he was lying there with his shoes on, on top of the bunk. When I asked him

by what authority he moved my stuff, he raised up and kicked me in the jaw, sat up in bed and then things commenced to happen. Then I am not clear just what happened, but there was a fracas. Of course, when Brimhall and Dr. Wilkinson came in, they stood in the door behind us. I moved up in the front and went out toward the front end of the building.

Q. When he turned around and kicked you out of the bunk, did he say anything?

A. When I asked him what authority he had, he said, 'I am the Commanding Officer and give the orders and you ought to know that', and by that he kicked me in the jaw. He also said, 'Get out of here and stay out of here'.

Q. After this fight started were you the aggressor or just defending yourself?

A. Well, I was more or less defending myself.

* * * *

Q. Did you fight, both of you standing up?

A. Yes, sir.

Q. Did he strike at you?

A. Two or three times.

Q. With his fists?

A. Yes, sir.

Q. Standing up?

A. Yes, sir." (R. 45-47)

Accused testified on cross and redirect examination that he and Lieutenant Hagman were not on friendly terms as while he was on duty at Camp DBR-3-N as summary court he had objected to Lieutenant Hagman discharging fifteen Mexicans without giving them a hearing of any kind, which objection on his part had resulted in the receipt by him of a reprimand from the Sub-district Commander and his transfer to Camp F-37-N (R. 45,47,48). Accused could not remember having used abusive language to or having thrown anything at Lieutenant Hagman on the evening in question. He further specifically denied attacking Lieutenant Hagman, calling him a "son-of-a-bitch" or a "bastard", or asking for a club during his altercation with Lieutenant Hagman. He testified he had drunk two or three bottles of beer that evening prior to his quarrel with Lieutenant Hagman and that he did not realize he was having an altercation with his commanding officer and

superior officer. Accused also testified that he had been originally commissioned in the Air Corps Reserve in 1925 and that his service in the reserve had been continuous since that date. He further stated that he had been promoted to First Lieutenant, Air Corps Reserve, in 1933, and did not know whether or not he was senior to Lieutenant Hagman (R. 49-54).

Lieutenant Hagman was recalled as a witness by the prosecution for the purpose of attacking the credibility of accused as a witness and for the purpose of explaining in more detail the relations existing between accused and himself prior to August 10, which matters had been originally brought out during Lieutenant Hagman's cross-examination and later referred to by accused in his testimony on cross-examination and redirect examination. Over the objection of defense counsel that the testimony was irrelevant, Lieutenant Hagman was permitted to testify that he had helped accused out of difficulties on several occasions prior to August 10. He was permitted to testify in detail as to the nature of these difficulties, as follows: About two weeks after accused joined Lieutenant Hagman's company, and in the absence of Lieutenant Hagman, accused had treated the Subdistrict Commander, who was then making an inspection, in a manner which caused the Subdistrict Commander to suggest to Lieutenant Hagman that accused be brought before "a board". Lieutenant Hagman succeeded in keeping accused from being brought before this board. Some time later accused, who was post exchange officer, was short in merchandise of the exchange as follows: June, $60; July, $70. The Subdistrict Commander suggested to Lieutenant Hagman that he prefer charges. Lieutenant Hagman, however, did not prefer the charges. After referring to the above instances, Lieutenant Hagman further testified that he knew accused to have been guilty on each of the occasions mentioned, whereupon the law member directed that the questions and answers in regard to these matters be withdrawn and not considered by the court. (R. 55,59)

Arthur C. Anderson, senior leader at Camp DBR-3-N, a witness in rebuttal for the defense, testified that prior to the second week of July, 1935, relations between accused and Lieutenant Hagman appeared to be friendly but that shortly before accused left Camp DBR-3-N accused and Lieutenant Hagman did not speak to each other (R. 62,63).

5. Before discussing the evidence it is desired to discuss briefly the ruling of the law member referred to supra. The testimony of Lieutenant Hagman with respect to the past misconduct of accused was inadmissible for the purpose of attacking the credibility of accused as a witness because it amounted to mere accusations. Convictions of

crimes involving moral turpitude may be shown as affecting the credibility of a witness but nothing short of conviction may be shown. Par. 124 b, p. 133, M.C.M., 1928; CM 202770, Cooley, and authorities cited therein. While it is proper on redirect examination of a witness to inquire into the cause of bias and ill feeling brought out on cross-examination, it is not proper to go into detail in regard to these matters. 2 Wigmore on Evidence, sec. 952; McCann v. State, 182 Pac. 96. In the instant case Lieutenant Hagman was permitted to testify in detail as to his previous relations with accused. It therefore appears that the admission of this testimony was in error. The Board of Review, however, is of the opinion that the error was cured by the action of the law member in directing that the objectionable matter be withdrawn and not considered by the court. In reaching this decision the Board of Review has given careful consideration to the rule covering such matters set forth in Hopt v. Utah, 120 U.S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, as follows:

> "But * * * as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with the accompanying instruction, cured the error. It is true, in some instances, there may be such a strong impression made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidehce retaken, when an error in the admission of testimony can be corrected by its withdrawal with proper instructions from the court to disregard it."

6. The evidence for the prosecution establishes beyond a reasonable doubt that accused said the words to Lieutenant Hagman alleged in the Specification of Charge I, that he struck Lieutenant Hagman in the manner alleged in Specification 1, Charge II, and that he offered violence against Lieutenant Hagman as alleged in Specification 2, Charge II. In regard to the latter specification of Charge II, the phrase, "offers any violence", as used in the 64th Article of War, has long been construed to include an assault. M.C.M., 1928, p. 148; Winthrop Reprint, p. 120; CM 196923, Frakes.

7. There remain, however, two questions for consideration, namely, first, was Lieutenant Hagman the superior officer of accused within the

meaning of the 63d and 64th Articles of War on August 10, 1935 (Charges I and II), and second, was Lieutenant Hagman in the execution of his office at the time he was attacked by accused within the meaning of the 64th Article of War (Charge II).

As to the first question, the testimony of Lieutenant Hagman shows that he, Lieutenant Hagman, was the senior officer; that he ranked from December 31, 1934, and accused from March 31, 1935. This testimony was not denied by accused. Section 127 a (8), National Defense Act, as amended, 41 Stat. 785, 43 Stat. 1078, U.S.C. 10: 511, provides:

> "Unless special assignment is made by the President under the provisions of the One hundred and nineteenth Article of War, all officers in the active service of the United States in any grade shall take rank according to date, which, in the case of an officer of the Regular Army, is that stated in his commission or letter of appointment, and, in the case of a reserve officer or an officer of the National Guard called into the service of the United States, shall precede that on which he is placed on active duty by a period equal to the total length of active Federal service and service under the provisions of sections 63, 64 and 65 of Title 32 of which he may have performed in the grade in which called or any higher grade."

That in fact Lieutenant Hagman was the senior officer appears from the duly authenticated copies of pertinent orders referred to supra in this opinion, which show that Lieutenant Hagman was ordered on active duty as a first lieutenant with rank from December 31, 1934, and that accused was ordered on active duty as a first lieutenant with rank from March 17, 1935. "Superior officer" is defined in the discussion of the 64th Article of War on page 147, Manual for Courts-Martial, 1928, as follows:

> "By 'superior officer' is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused."

In the view of the Board this definition is equally applicable to the like phrase used in the 63d Article of War.

Reserve officers on duty with the Civilian Conservation Corps are persons subject to military law. CM 202479, Babbington; CM 202366, Fox; CM 201678, Anderson; CM 202770, Cooley; CM 203356, Parkhill.

The Board therefore concludes that Lieutenant Hagman was the superior officer of accused on August 10, 1935, within the meaning of the 63d and 64th Articles of War.

The next question is whether Lieutenant Hagman was in the execution of his office within the meaning of the 64th Article of War at the time accused committed the acts alleged in the specifications of Charge II. The evidence indicates that Lieutenant Hagman was commanding officer of Camp DBR-3-N at the time these acts were committed against him, that he was probably asleep in bed in his quarters at that camp when he was struck "in the face and on the head and jaw" by accused (Specification 1, Charge II), and that he was arguing with accused concerning accused's personal effects left in the camp at the time accused threw the metal pitcher and waste basket at him (Specification 2, Charge II). As to the duty status of a commanding officer it is stated in the Manual for Courts-Martial, 1928, page 159, as follows:

> "The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty."

Paragraph 2, Army Regulations 210-70, August 20, 1934, provides, among other things, that a commanding officer will command all troops and administer all affairs connected with the post of which he has charge, that he will make all assignments of quarters, and that he is responsible for the discipline of all military personnel, the strict enforcement of laws and regulations, and the proper condition of quarters.

It is stated on page 148, Manual for Courts-Martial, 1928, as follows:

> "An officer is in the execution of his office 'when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage.' (Winthrop.) It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the

time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office."

In an opinion dated April 3, 1929, The Judge Advocate General held that the term, "in the execution of his office", is used in the 65th Article of War in the same sense as in the 64th Article, so that the views expressed in that opinion in regard to a noncommissioned officer in the execution of his office are equally applicable to the 64th Article of War. In that opinion it was held as follows:

> "In the specific case to which you refer, the noncommissioned officer appears to have been engaged in the duties of his office when the insult was offered. The particular nature of these duties is not material. What was said was under all the circumstances an insult to the office. To constitute an offense, it was not essential that the noncommissioned officer should have been giving the soldier an order, or instruction, within the company area. Whether or not the accused was a prisoner under a sentinel, or whether the noncommissioned officer had asserted specific and immediate authority over him, do not appear to have been determinative circumstances." JAG 250.46

From the foregoing the Board of Review is impelled to hold that Lieutenant Hagman was in the execution of his office at the time he was struck in the face by accused (Specification 1, Charge II), and that he was also in the execution of his office at the time the water pitcher and waste basket were thrown at him by accused (Specification 2, Charge II).

8. At the time of trial accused was 43 years of age. Records on file in The Adjutant General's Office show he enlisted in the Army on December 12, 1917; was commissioned a second lieutenant, Air Corps, on July 18, 1918; sailed for France on August 22, 1918, returned on September 5, 1919, and was discharged on October 24, 1919. He was commissioned a second lieutenant in the Air Corps Reserve on September 16, 1925. He was promoted first lieutenant, Air Corps Reserve, on January 22, 1930, and recommissioned a first lieutenant, Air Corps Reserve, on January 22, 1935. He has performed active duty service as a reserve officer as follows:

May 30, 1926, to June 13, 1926;
September 1, 1927, to September 14, 1927;
August 19, 1928, to September 1, 1928;
August 18, 1929, to August 31, 1929;
July 5, 1930, to July 18, 1930;
March 31, 1935, to date.

9. The court was legally constituted. Accused as a reserve officer is subject to military law (see authorities cited supra). No errors injuriously affecting the substantial rights of accused were committed at the trial. The record of trial is legally sufficient to support the findings of guilty and the sentence and warrants confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of the 63d or 64th Article of War.

Theodore Hall, Judge Advocate.
H. A. Trumbull, Judge Advocate.
C. M. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 203719

OCT 4 1935

UNITED STATES	)	FIFTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, August 13-17, 1935. Dismissal.
	)	
Major (then Captain) CHARLES J. SULLIVAN (0-8025), 10th Infantry.	)	

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

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

2. The accused, who has been promoted to Major since his trial, was tried upon the following charges and specifications:

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

Specification 1: In that Captain Charles J. Sullivan, 10th Infantry, did, at or near Elizabethtown, Kentucky, on or about June 10, 1935, with intent to deceive Willis Viers, who was then on duty as room clerk in Burnett's Hotel, at or near Elizabethtown, Kentucky, falsely state in substance to said Willis Viers that the woman for whom said Captain Sullivan was seeking to engage a room in said hotel was the wife of said Captain Sullivan which statement was known by said Captain Sullivan to be untrue in that said woman was not the wife of said Captain Sullivan.

Specification 2: In that Captain Charles J. Sullivan, 10th Infantry, having previously introduced to Second Lieutenant Charles J. Bondley, Jr., 10th

Infantry, a woman not the wife of said Captain Sullivan, with whom he, the said Captain Sullivan, was then registered as "Capt & Mrs Sullivan Ft Knox" at Burnett's Hotel, at or near Elizabethtown, Kentucky, did, at Fort Knox, Kentucky, on or about June 22, 1935, with intent to deceive said Second Lieutenant Bondley, falsely state in substance to said Second Lieutenant Bondley, that said woman was a relative of said Captain Sullivan, which statement was known by the said Captain Sullivan to be untrue in that said woman was not a relative of said Captain Sullivan.

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

Specification 1: In that Captain Charles J. Sullivan, 10th Infantry, did, at Fort Knox, Kentucky, on or about June 12, 1935, with intent to deceive Captain Francis M. Rich, 10th Infantry, and for the purpose of obtaining the permission of said Captain Rich to absent himself from said Fort Knox, officially state to said Captain Rich, in substance, that some relatives of said Captain Sullivan were to be in Elizabethtown, Kentucky, that afternoon and that he, the said Captain Sullivan, desired permission to absent himself from Fort Knox in order to meet his said relatives in Elizabethtown, which statement was known by the said Captain Sullivan to be untrue and misleading in that he, the said Captain Sullivan, was not expecting relatives to be in Elizabethtown that afternoon and was not intending to meet any of his relatives there.

Specification 2: In that Captain Charles J. Sullivan, 10th Infantry, at or near Elizabethtown, Kentucky, on or about June 12, 1935, did register himself and a woman not his wife as "Capt & Mrs Sullivan Ft Knox" in the public guests' register of Burnett's Hotel, at or near Elizabethtown, Kentucky, and, with said woman, under such registration, did enter into occupancy of a certain bedroom in said hotel.

Specification 3: In that Captain Charles J. Sullivan, 10th Infantry, did, at Elizabethtown, Kentucky, during the period from on or about June 12, 1935, to on or about June 24, 1935, occupy with a woman not his wife a certain bedroom in Burnett's Hotel, at or near Elizabethtown, Kentucky, he and said woman having been registered by him in the guests' register of said hotel as "Capt & Mrs Sullivan Ft Knox".

Specification 4: In that Captain Charles J. Sullivan, 10th Infantry, did, at Burnett's Hotel, at or near Elizabethtown, Kentucky, on or about June 24, 1935, without protest or objection or effort to correct the false impression conveyed, suffer a woman not his wife to introduce him as Captain Sullivan to Mrs. May Hamilton, wife of Captain Lewis H. Hamilton, Inf-Res., then on active duty, thereby conveying the impression that he, the said Captain Sullivan, was the husband of the said woman so introducing him, he and said woman being registered at said hotel as "Capt & Mrs Sullivan Ft Knox", as he then well knew.

He pleaded not guilty to all charges and specifications. At the close of the prosecution's case the defense moved for an acquittal on both charges and all specifications. The court sustained the motion as to Specifications 1 and 4, Charge II, finding the accused not guilty of these specifications, and overruled the motion as to all other specifications and both charges. After the introduction of evidence and the arguments by counsel had been completed, the court found accused not guilty of Specifications 1 and 2, Charge I, and of Charge I, but guilty of Specifications 2 and 3, Charge II, and of Charge II. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The Board of Review adopts and hereby makes a part of this opinion the summary of evidence and discussion thereof in

paragraphs 2 to 6, both inclusive, of the review of the Corps Area Judge Advocate, Fifth Corps Area, of the record of trial in this case.

4. Accused is 46 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."

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed at the trial. The record of trial is legally sufficient to support the findings of guilty and the sentence and warrants confirmation thereof. A sentence of dismissal is mandatory upon conviction of violation of the 95th Article of War.

Theodore Hall, Judge Advocate.

W. A. Trumbull, Judge Advocate.

S. W. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 203769

UNITED STATES	)	HAWAIIAN SEPARATE COAST ARTILLERY BRIGADE
	)	
v.	)	Trial by G.C.M., convened at Fort DeRussy, T.H., August 16, 1935. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
	)	
Private SIDNEY M. DICKEY (R-1462370), Battery D, 55th Coast Artillery.	)	

HOLDING by the BOARD OF REVIEW
HALL, TURNBULL and SMITH, L.M., Judge Advocates.

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

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

CHARGE: Violation of the 84th Article of War.

Specification 1: In that Private Sidney M. Dickey, Battery D, 55th Coast Artillery, did, at Fort Ruger, T. H., on or about June 29, 1935, unlawfully sell to Mr. Pedro Valera, Post Shoe Shop, Fort Ruger, T. H., one (1) pair of shoes, garrison, of the value of about two dollars and thirty cents ($2.30), issued for use in the military service of the United States.

Specification 2: In that Private Sidney M. Dickey, Battery D, 55th Coast Artillery, did, at Fort Ruger, T. H., on or about July 2, 1935, unlawfully sell to Mr. Pedro Valera, Post Shoe Shop, Fort Ruger, T. H., one (1) pair of shoes, service, of the value of about three dollars and one cent ($3.01), issued for use in the military service of the United States.

Specification 3: (Finding of not guilty)

Accused pleaded not guilty to the Charge and all specifications and was found guilty of the Charge and Specifications 1 and 2 thereunder, and not guilty of Specification 3. 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. In the opinion of the Board of Review the record is legally sufficient to support the findings of guilty of the Charge and Specification 1 alleging the unlawful sale on or about June 29, 1935, of one pair of garrison shoes of the value of about $2.30, issued for use in the military service of the United States. The evidence with respect thereto will not be set out except in so far as it is pertinent to the second specification.

4. Specification 2 alleges the unlawful sale on or about July 2, 1935, of one pair of service shoes of the value of about $3.01, issued for use in the military service of the United States. The court, without objection, took judicial notice of AR 30-3000, paragraph 5, May 10, 1934, which gives the value of shoes, service, as $3.01 (R. 5). The record shows that the shoes in question were issued to accused for use in the military service of the United States (Sgt. John O. Brown, Battery D, 55th C.A., R. 20,22). However, the evidence does not show that the sale of the second pair of shoes was not contemporaneous with the sale of the first pair, or that there were two separate and distinct transactions. The only competent evidence in the record on this point is found in the testimony of Mr. Pedro Valera, 2295 North King Street, Honolulu, T. H., the man to whom the shoes were sold, which is in pertinent part as follows:

"Q Do you know the man being tried?
A Yes, sir.
Q Do you see him in this room?
A Which one?
Q The man being tried. Is he in this room now?
A Yes sir, over there (indicating accused).
Q Do you know his name?
A Yes, sir.
Q What is it? What's his name?
A Sidney Dickey.
Q What was your occupation on or about June 28, 1935?
A No answer.

Q What kind of work were you doing around the end of June?
A I then was shoemaker, sir.
Q Where?
A Fort Ruger.
Q Did you run the Post Shoe Shop at Fort Ruger?
A No, sir.
Q You just worked there, did you?
A Yes, sir, only work there.
Q Mr. Valera, did you see the accused, Private Dickey on or about June 28, 1935?
A Yes, sir.
Q Where did you see him?
A Up at the Battery.
Q You saw him up at the battery on that date?
A Yes, sir.
Q Did you have any conversation with him at that time?
A No, sir.
Q Did he talk to you up there that day?
A Yes, sir. He talked to me about the shoes.
Q He what?
A I go up there and he talk to me about them garrison shoes.
Q What did he have to say to you about them?
A He said he want sell that there pair of garrison shoes to me, sir.
Q He wanted to sell you a pair of garrison shoes?
A Yes, sir.
Q Did he sell you a pair of garrison shoes that day?
A Yes, sir.
Q How much did you pay him for them?
A A dollar and a quarter.
Q Did you ever buy any other shoes from Private Dickey?
A I bought some more, yes.
Q You did buy some other shoes from the accused?
A One more pair I buy from him, yes sir.
Q What kind of shoes were they?
A Heavy shoes, you know, G I.
Q A pair of G I Service Shoes?
A Yes sir, that's heem.
Q And how much did you pay him for them?
A A dollar and a quarter.
Q Then in other words you bought two pairs of shoes from him, one pair of garrison shoes and one pair of service shoes, and you paid him a dollar and a quarter a pair for them, is that right?
A Yes, sir.

Q Would you recognize either or both pairs of shoes you bought from the accused if you were to see them again at this time?
A Yes sir.
Q I show you a pair of garrison shoes (handing witness Prosecution Exhibit C) and ask you to tell the court if this is the pair of garrison shoes you bought from the accused Private Dickey.
A (After examination of same) Yes sir, these them alright.
Q And this pair of service shoes Mr. Valera (handing witness Prosecution Exhibit B), please take a look at them and tell us, if you can, whether or not this is the pair of service shoes you bought from Private Dickey, the accused?
A (After examination of same) Yes sir, I buy them too.
Q Why don't you have those shoes in your possession now? Did someone take them away from you?
A No sir, Lieutenant Lewis he come in shop and he tell me about them and I give them to Lieutenant Lewis, sir.

CROSS EXAMINATION:

Questions by the defense:

Q How do you know that these are the two pair of shoes you bought from the accused?
A They both got that Seven-E inside them, sir.
Q What else have you got to identify them? They're not the only pair of size Seven-E shoes in the world, are they?
A This shoes I know that they got little wore already, that's how I know this is one I buy from Sidney Dickey. (Indicating Prosecution Exhibit 'C')
Q You mean that those garrison shoes were slightly worn when you bought them from the accused?
A Yes, sir.
Q And there's no other positive way that you can identify them? No other way that you can positively tell they're the same pair of garrison shoes you bought from the accused, except that they're slightly worn and are size Seven-E?
A That's all I can tell, yes sir.
Q How about that pair of service shoes, how can you tell they're the ones you bought from the accused?
A This one he never get any wore, brand new kind shoes when I buy.

Q Anything else you remember that'll identify them as the ones you bought from the accused?
A They got that Seven-E inside heem too, that's all." (R. 40-43)

The Board is of the opinion that the circumstances established by the evidence are consistent with the hypothesis that the two pairs of shoes were sold by accused at one time and that their sale, though alleged in two specifications, in fact constituted but one transaction. Thus the sentence is excessive as the total value of the property is only $5.31. In view of this conclusion it is not necessary for the Board to express an opinion on the question of whether the record supports the finding of guilty of Specification 2 considered as an independent offense.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

Theodore Hall, Judge Advocate.
N. A. Trumbull, Judge Advocate.
L. W. Smith, Judge Advocate.

WAR DEPARTMENT

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

Board of Review
CM 203869

1935

UNITED STATES	)	SECOND CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Governors Island, New York,
Captain PAUL C. LIENHARD	)	September 19 and 20, 1935.
(0-137680), Cavalry Reserve.	)	Dismissal, total forfeitures
	)	and confinement for two (2)
	)	years. Penitentiary.

OPINION of the BOARD OF REVIEW
HALL, TURNBULL and SMITH, L.M., 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 four specifications alleging embezzlement of funds of a CCC Company in the aggregate amount of $1147.37, in violation of the 93d Article of War (Charge I); and upon four specifications alleging the execution of false certificates with the intent to deceive superior military authorities, in violation of the 95th Article of War (Charge II). The specifications of which accused was finally convicted will be set forth subsequently in this opinion. Accused pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for two years. The reviewing authority disapproved the finding of guilty of Specification 4, Charge II, approved the sentence, designated the United States Northeastern Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The trial judge advocate was a reserve officer on active duty. The Board of Review has held, with the approval of The Judge Advocate General, that reserve officers on active duty may sit as members of a court-martial. CM 203393, Little; par. 206, Dig. Ops. JAG, 1912-30.

In tne opinion of the Board of Review a reserve officer on active duty is equally competent to serve as trial judge advocate of a general court-martial.

4. At the time of the commission of the offenses alleged and at the time of the trial, accused was a reserve officer on active duty with the CCC, with no break in his active duty between those dates. His tour of active duty expired November 16, 1935. (Pros. Ex. 47a-g, R. 155) The Board of Review, with the approval of The Judge Advocate General, has repeatedly held that reserve officers on active duty with the CCC are persons subject to military law, and that after jurisdiction has once attached it continues for all purposes of trial, judgment and execution. CM 202601, Sperti; CM 202770, Cooley; CM 203393, Little; and other cases too numerous to cite. The Board therefore concludes that the court had jurisdiction over the person of accused.

5. After accused had entered his pleas of not guilty, the defense counsel requested the court to "entertain a motion that the defense be given an opportunity to have the defendant given a thorough examination to determine his mental condition" (R. 13). The court was closed and upon opening the president announced "the court has decided that under paragraph 2 (sic 63), Manual for Courts-Martial, 1928, there is no evidence before this court indicating that the accused is insane; the counsel for the accused will now be given an opportunity to substantiate his statement as to the mental condition of the accused" (R. 16). The defense thereupon called Major Arthur D. Jackson, Medical Corps, Fort Wadsworth, New York, as a witness. While testifying, this witness was permitted to consult the hospital records of the Station Hospitals at Fort Jay, New York, and Fort Wadsworth, New York, and the report of the Disposition Board convened at Walter Reed General Hospital, Washington, D. C. These records were introduced in evidence by the prosecution with the consent of the defense as Prosecution Exhibit 1 (R. 28). The testimony of Major Jackson, as supplemented by the hospital records, shows the following: On April 21, 1934, accused was injured in an automobile accident and, after spending several days in a civilian hospital, was admitted to the Station Hospital, Governors Island, New York, on May 5, 1934, for observation and treatment. On May 11, 1934, he was transferred to Walter Reed General Hospital, where he remained until sometime in June, 1934. On June 4, 1934, he appeared before the Disposition Board at Walter Reed General Hospital, whose report includes the following

pertinent data:

"1. As a result of observation at this hospital the following diagnoses have been made: (1) Fracture, simple, linear, right side of occipital bone, starting from mid-point posterior running downward and forward 9.0 cm. to posterior portion of petrous bone where it stops, without involving mastoid 1.0 cm. anterior to lateral sinus. (2) Concussion, cerebral, severe, due to No. 1. (3) Wound, lacerated, 2 inches long, vertex region of scalp. (4) Psychosis, traumatic, mild, due to Nos. 1 and 2. Nos. 1-2-3 accidentally incurred April 21, 1934, on N.J. State Highway No. 29, near Maple Ave., Plainfield, N.J., when car which he was driving collided with another car, throwing him to pavement. (Officer states he was driving his automobile en route to his home, Hempstead, L.I., N.Y., from C.C.C. Camp No. 20, High Bridge, N.J., that he was absent from camp by competent authority and that he was sober.) (5) Dental condition: Non-vital L-2 with marked periapical resorption, probably cystic; non-vital R-12-13 with marked periapical resorption; L-1 pulpless with partial root canal filling; missing teeth R-4-5-6-8-14-15-L-4-5-6-8-14-16. (6) Defective vision: Presbyopia; vision 20/20 J-5 bilateral; corrected to J-1 bilateral. L.O.D. 1-2-3-4-Yes, per approved findings of Board of Officers, Camp Dix, N.J., dated April 23, 1934; 5-6-No; existed prior to and not aggravated by active military service. Condition on completion of case: 1-Cured. 2-4-Recovered from on admission to this hospital. 3-Healed on admission to this hospital. 5-No change. 6-Corrected.

* * * *

3. This officer was admitted to hospital with a diagnosis of traumatic psychosis due to skull fracture incurred in an automobile accident on April 21, 1934, near Plainfield, N.J. At the time of the accident the officer estimates that he was driving at a speed of about thirty five miles per hour and states that he was sober. He was apparently rendered unconscious as he remembers nothing further until he found himself in the Muelenberg Hospital, Plainfield, N.J. He remained in this civilian hospital until May 5, 1934, when he was transferred to the Station Hospital, Fort Jay, N.Y., from

which hospital he was transferred to Walter Reed General Hospital. He has been given a thorough neuropsychiatric examination while in hospital and now appears to be perfectly normal. He has presented no evidence of psychosis since admission. He has been pleasant and apparently rational at all times. He has received no special treatment. He is in need of dental treatment for which he has made arrangements after discharge from hospital.

FINDINGS:

After consideration of the above the Board finds that in the case of Captain Paul C. Lienhard, Cav. Res., further hospitalization is not necessary and that he is physically fit to be discharged from hospital.

RECOMMENDATIONS:

The Board recommends that Captain Paul C. Lienhard, Cav. Res., be relieved from further observation and treatment and returned to a duty status." (Pros. Ex. 1) (Underscoring supplied)

Accused was subsequently admitted to the Station Hospital at Fort Wadsworth on July 9, 1935, because of "a disturbance of his sense of taste", and on August 1, 1935, was found mentally and physically fit for active duty (R. 23,29). During the period accused was in the hospital at Fort Wadsworth he was under the observation of the witness. Witness testified that he did not believe accused insane and "saw no evidence of his having temporary spells of insanity", and that in his opinion accused at the present time (the trial) enjoyed full possession of all his mental faculties and was able to distinguish between right and wrong. (R. 25,26,28) Witness believed, however, that the injury which accused had suffered in 1934 "could easily affect his moral judgment as well as his intellectual judgment" (R. 29). At the conclusion of the testimony of Major Jackson the court was closed and upon being opened the president of the court announced: "The court will come to order. The objection of the accused is not sustained. The trial will proceed" (R. 30).

The testimony of Major Jackson and the hospital records of accused indicate that he was sane at the time of his appearance before the

Disposition Board at Walter Reed General Hospital on June 4, 1934, that he was sane at the time he was under observation and treatment at the Station Hospital, Fort Wadsworth, New York, during the period July 9, 1935, to August 1, 1935, and that he was sane at the time of the trial. No direct testimony was adduced as to his mental condition in March, April, May and June, 1935, the months during which it is alleged he committed the offenses for which he was being tried. However, there is no substantial evidence to indicate that he was insane during those months. The Board of Review is of the opinion that the issue of insanity was properly determined by the court.

6. Before summarizing the evidence with respect to each specification, certain evidence supporting all specifications will be set forth.

Accused was placed on active duty with the CCC for a period of six months on January 17, 1934, which active duty was extended to November 16, 1935, by competent orders of the Commanding General, Second Corps Area. On July 9, 1934, he was assigned to CCC Camp No. 23 (New Jersey), Englewood, New Jersey, for duty with CCC Company No. 1271, by paragraph 24, Special Orders 159, Headquarters Second Corps Area, July 9, 1934. On July 10, 1934, he took command of CCC Camp No. 23, Englewood, New Jersey, and of the 1271st Company, CCC, which camp and company he commanded until relieved in July of 1935. On July 13, 1934, he took over the company fund of the 1271st Company, CCC, from First Lieutenant Harvey N. Brown, Infantry Reserve, which fund remained in his custody until July 6, 1935, when he transferred it to Captain Russell P. Westerhoff, Coast Artillery Reserve. (R. 139,143,144,149,150-153,156-164; Pros. Exs. 2,7,8,47a-g).

7. The specifications, other than the one of which the finding of guilty was disapproved by the reviewing authority, will be set out separately below, together with the pleas of accused, findings of the court, and the summaries of the evidence for the prosecution.

The evidence for the prosecution consisted of the testimony of representatives from the various firms with which the 1271st Company, CCC, transacted business, and of Captain Ernest W. Wilson, Finance Department. The former testified that the various statements rendered by their respective firms, which were used by accused as vouchers to

the company fund book, had been raised. Captain Wilson testified as to the result of an audit he had made of the accounts of the 1271st Company, CCC, for the months of March, April, May and June, 1935. The documents upon which this audit was based, which included the company council books, vouchers supporting entries therein, canceled checks, bank statements, and photostatic copies of checks made by the drawee bank at time of payment, were before the court and the defense was given an opportunity to cross-examine with respect to them. In view of the fact the evidence for the prosecution was entirely uncontroverted, the defense consisting solely of an unsworn statement by accused, the evidence for the prosecution will be set forth in a narrative form.

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

Specification 1: In that Captain Paul C. Lienhard, Cav-Res., did at or near Englewood, New Jersey, during the month of March, 1935, feloniously embezzle by fraudulently converting to his own use the sum of Three Hundred Sixty Seven and 37/100 Dollars ($367.37), property of CCC Company No. 1271, entrusted to him as Commanding Officer of CCC Company No. 1271.

Plea: Not guilty.

Finding: Guilty.

On March 1, 1935, the company fund of the 1271st Company, CCC, consisted of $1040.80, of which $221.80 was cash in the hands of accused and $819 on deposit in the Citizens National Bank and Trust Company of Englewood, New Jersey (Pros. Ex. 2, R. 30,31; Pros. Ex. 7, R. 52). During the month of March, 1935, accused withdrew $103 in cash from the bank, received $2029.06 in cash from various sources, deposited $1956.99 in the bank, and paid out in cash $29.50. Therefore, on March 31, 1935, accused should have had $367.37 in cash in his personal possession. (Wilson, R. 113-116; Pros. Ex. 2; Pros. Exs. 3,4,5,6, R. 77 (withdrawn in part); Pros. Ex. 6a, R. 91; Pros. Ex. 7; Pros. Ex. 15,15c, R. 33; Pros. Ex. 16a-f, R. 35; Pros. Ex. 21,21a,21b, R. 51,52; Pros. Ex. 39, R. 108; Pros. Ex. 43, R. 117,118) On April 1, 1935, accused certified in the council book for the month of March, 1935, that he had no cash in his personal possession (Pros. Exs. 2,7).

Accused concealed this shortage of $367.37 in the following manner:

He made an entry in the company council book for the month of March, 1935, to show that he had paid J. Lind & Company, Palisades Park, New Jersey, $158.45, and altered the voucher supporting this entry (statement and sales slips of J. Lind & Company for February, 1935) to show the 1271st Company, CCC, had received merchandise from this firm during February, 1935, to the value of $158.45, when in fact he had paid J. Lind & Company only $58.45, and the statement and sales slips as rendered by the J. Lind & Company were for this latter amount only (Lind, R. 34-37; Pros. Exs. 2,7,15,15c,16a-f,39).

He similarly made an entry in the council book that he had paid Ad. Seidel & Sons, Chicago, Illinois, $140.32, and altered the supporting voucher to read $140.32, when in fact he had paid Ad. Seidel & Sons only $40.32, and that firm had billed the 1271st Company, CCC, for the latter amount only (Pros. Exs. 2,7,39,21,21a,21b).

He also made an entry in the council book to show that he had paid the Plaza Market, Englewood, New Jersey, $617.67, and altered the supporting voucher to read $617.67, when in fact he had paid the Plaza Market only $450.30, and that firm had billed the 1271st Company, CCC, for the latter amount only (Ridgway, R. 91,92; Pros. Exs. 2,6a.7,15,15d,39).

Specification 2: In that Captain Paul C. Lienhard, Cav-Res., did at or near Englewood, New Jersey, during the month of April, 1935, feloniously embezzle by fraudulently converting to his own use the sum of Two Hundred Dollars ($200.00), property of CCC Company No. 1271, entrusted to him as Commanding Officer of CCC Company No. 1271.

Plea: Not guilty.

Finding: Guilty.

On April 1, 1935, the company fund of the 1271st Company, CCC, consisted of $571.66, which was on deposit in the Citizens National Bank and Trust Company (Pros. Exs. 2,7). During the month of April, 1935, accused withdrew $200 in cash from the bank, received $2168.40 in cash from various sources, deposited $2112.40 in the bank, and paid out $35

in cash. Therefore, on April 30, 1935, accused should have had $221 in cash in his personal possession. (Wilson, R. 120-121; Pros. Exs. 2,3,4,5,6 (withdrawn in part); Pros. Ex. 7; Pros. Exs. 15,15a,15e, R. 33; Pros. Ex. 17, R. 42; Pros. Ex. 30a-i, R. 63; Pros. Ex. 40, R. 108; Pros. Ex. 44, R. 125) On May 1, 1935, accused certified in the council book for the month of April, 1935, that he had $20.40 in cash in his personal possession (Pros. Exs. 2,7). This amount is incorrect as accused held himself responsible for $21.40 in cash in his accounts for the month of May, 1935. This error in the accounts of accused was discovered by the regular auditor in May, 1935, and was unknown to the accused at the time he falsified his accounts for April, 1935. (Wilson, R. 122,123; Pros. Ex. 8, R. 52; Pros. Ex. 44)

Accused concealed the shortage which he believed to be $200 in the following manner:

He made an entry in the company council book for the month of April, 1935, to show that he had paid J. Lind & Company $183.75, and altered the voucher supporting this entry (statement and sales slips of J. Lind & Company for March, 1935) to show that the 1271st Company, CCC, had received merchandise from this firm during March, 1935, to the value of $183.75, when in fact he had paid J. Lind & Company only $83.75, and the statements and sales slips as rendered by J. Lind & Company were for this latter amount only (Lind, R. 30-40; Pros. Exs. 2,7,15,15a,17,40).

He similarly made an entry in the council book that he had paid to Englewood Food Center, Englewood, New Jersey, $298.49, and altered the supporting voucher to read $298.49, when in fact he paid the Englewood Food Center only $198.49 and that firm had billed the 1271st Company, CCC, for the latter amount only (Stimson, R. 60-64; Pros. Exs. 2,7,15,15e,30a-i,40).

Specification 3: In that Captain Paul C. Lienhard, Cav-Res., did at or near Englewood, New Jersey, during the month of May 1935, feloniously embezzle by fraudulently converting to his own use the sum of Five Hundred Dollars ($500.00), property of CCC Company No. 1271, entrusted to him as Commanding Officer of CCC Company No. 1271.

Plea: Not guilty.

Finding: Guilty.

On May 1, 1935, the company fund of the 1271st Company, CCC, consisted of $447.79, of which $21.40 was cash in the hands of accused and $426.39 on deposit in the Citizens National Bank and Trust Company (Pros. Exs. 2,7; Pros. Ex. 8, R. 52; Pros. Ex. 44). During the month of May, 1935, accused withdrew $381 in cash from the bank, received $2289.71 in cash from various sources, and deposited $2167.55 in the bank. Therefore, on May 31, 1935, accused should have had $524.56 in cash in his personal possession. (Wilson, R. 126-131; Pros. Exs. 2,3,4, 5,6, (withdrawn in part); Pros. Exs. 7,8; Pros. Ex. 4a, R. 83; Pros. Ex. 10, R. 76,77; Pros. Ex. 11, R. 32; Pros. Exs. 12,13, R. 94; Pros. Exs. 15, 15f, R. 33; Pros. Ex. 18a-e, R. 44; Pros. Ex. 31a-e, R. 66; Pros. Ex. 36, R. 87; Pros. Exs. 41,42, R. 108; Pros. Ex. 45, R. 132) On June 1, 1935, accused certified in the council book for May, 1935, that he had $24.56 in cash in his personal possession (Pros. Exs. 2,8).

Accused concealed this shortage of $500 in the following manner:

He made an entry in the company council book for the month of May, 1935, to show that he had paid Lind Produce Company, Inc., Palisades Park, New Jersey, $171.30, and altered the voucher supporting this entry (statement and sales slips of Lind Produce Company, Inc., for April, 1935) to show that the 1271st Company, CCC, had received merchandise from this firm during April, 1935, to the value of $171.30, when in fact he had paid Lind Produce Company, Inc., only $71.30 and the statement and sales slips as rendered by Lind Produce Company, Inc., were for this latter amount only (Lind, R. 42-44; Hamilton, R. 148; Pros. Exs. 2,8,15,15f,18a-e,41).

He similarly made an entry in the council book that he had paid to Widmann Bros. Bakery, Inc., Spring Valley, New York, $145.67 and altered or substituted a new voucher purporting to be a statement from Widmann Bros. so that it showed that the 1271st Company, CCC, had received $145.67 of merchandise from that firm during April, 1935, when in fact he had paid the Widmann Bros. only $45.67 and that firm had billed the 1271st Company, CCC, for the latter amount only (Thompson, R. 78-89; Hamilton, R. 147,148; Pros. Exs. 2,8,4a,36,41).

He also made an entry in the council book to show that he had paid the Englewood Food Center $218.89 and altered the supporting voucher to read $218.89, when in fact he paid the Englewood Food Center only $118.89 and the bills as rendered by that firm were for the latter amount only (Stimson, R. 65-71; Pros. Exs. 2,8,31a-e,32,41).

He also certified on June 1, 1935, in the council book for the month of May that the 1271st Company had $213.44 on deposit in the Citizens National Bank and Trust Company and altered the statement of that bank for the month of May, 1935, which was on file with the company records to show that the balance on May 31, 1935, was $213.44, when in fact the 1271st Company, CCC, had only a balance of $13.44 in the Citizens National Bank and Trust Company on May 31, 1935, and was overdrawn $12.96 on June 1, 1935, and the statement as rendered by the bank for the month of May, 1935, showed a balance of $13.44 only (Pavone, R. 93-101; Pros. Exs. 2,8,12,13,41,42).

Specification 4: In that Captain Paul C. Lienhard, Cav-Res., did at or near Englewood, New Jersey, during the month of June 1935, feloniously embezzle by fraudulently converting to his own use the sum of Eighty Dollars ($80.00), property of CCC Company No. 1271, entrusted to him as Commanding Officer of CCC Company No. 1271.

Plea: Not guilty.

Finding: Guilty.

On June 1, 1935, the company fund of the 1271st Company, CCC, consisted of $38.00, of which $24.56 was cash in the possession of accused and $13.44 on deposit in the Citizens National Bank and Trust Company. To further conceal the shortage of $200 which accrued during the previous month and which accused had concealed during that month by raising the bank statement $200 and by falsifying his certificate in the council book for May, 1935, accused carried this shortage into his accounts for the month of June, 1935, by starting his June account with amounts totaling $224.56, $200 more than he actually had. In order to cover up this preexisting shortage which actually occurred in May, 1935, and which is included in the amount alleged embezzled in Specification 3, Charge I, accused accumulated $200 by raising vouchers and making false entries in his council book for June, 1935. Therefore, the amount actually embezzled by accused during the month of June, 1935, must be shown as an additional shortage. (Wilson, R. 135; Hamilton, R. 148; Pros. Ex. 46, R. 136; Pros. Exs. 2,8,12,13,41,42)

During the month of June, 1935, accused received in cash or in transactions which resulted in increasing the amount of cash which he should have had in his personal possession, $2679.16, deposited $2538.56, and paid out in cash $61.60. Therefore, on June 30, 1935, accused should have had $303.56 in cash in his personal possession, or $103.56 if the

preexisting shortage of $200 which was carried forward into his June accounts is disregarded. (Wilson, R. 133-136; Pros. Exs. 2,3,4,5,6 (withdrawn in part); Pros. Ex. 8; Pros. Ex. 19a-e, R. 46; Pros. Ex. 20, R. 49; Pros. Ex. 3b, R. 90; Pros. Ex. 10; Pros. Ex. 10a, R. 91; Pros. Ex. 33a-j, R. 72; Pros. Ex. 34, R. 76; Pros. Ex. 42; Pros. Ex. 46, R. 136) On July 1, 1935, accused certified in the council book for June, 1935, that he had $23.56 in cash in his personal possession (Pros. Exs. 2,8).

Accused made up the preexisting shortage of $200 and concealed the shortage of $80 which accrued during the month of June, 1935, in the following manner:

He made an entry in the company council book for the month of June, 1935, to show that he had paid J. Lind & Company $185.40, and altered the voucher supporting this entry (statement and sales slips of J. Lind & Company for May, 1935) to show that the 1271st Company, CCC, had received merchandise from this firm during May, 1935, to the value of $185.40, when in fact he had paid J. Lind & Company only $85.40, and the statement and sales slips as rendered by J. Lind & Company were for this latter amount only (Lind, R. 45-50; Pros. Exs. 2,8; Pros. Ex. 19a-e; Pros. Ex. 20; Pros. Ex. 42).

He similarly made an entry in the council book that he had paid the Plaza Market $591.07 and altered the supporting voucher to read $591.07, when in fact he paid the Plaza Market only $491.07, and the statement and sales slips as rendered by the Plaza Market were for this latter amount only (Ridgway, R. 89-91; Pros. Exs. 2,8; Pros. Ex. 3b; Pros. Ex. 10a; Pros. Ex. 42).

He also made an entry in the council book that he had paid the Englewood Food Center $333.58 and altered the supporting statement and sales slips to read $333.58, when in fact he had paid the Englewood Food Center only $253.58 and the statements and sales slips as rendered by the Englewood Food Center were for the latter amount only (Stimson, R. 71-76; Pros. Exs. 2,8; Pros. Ex. 33a-j; Pros. Ex. 34; Pros. Ex. 42).

As an example of the manner in which accused embezzled funds of the 1271st Company, CCC, during the month of June, 1935, the prosecution proved that on or about June 27, 1935, accused received a post exchange dividend in the form of a check in the amount of $50, payable to the Company Fund, 1271st Company, CCC, which he recorded properly in the

council book for June, 1935, indorsed it as custodian of the Company Fund, 1271st Company, CCC, and used the proceeds thereof to purchase for his personal use a Western Union Telegraph money order (Manjone, R. 101-107; Wilson, R. 134; Pros. Ex. 2; Pros. Ex. 3a, R. 77; Pros. Ex. 8; Pros. Ex. 35, R. 138; Pros. Ex. 38, R. 103).

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

Specification 1: In that Captain Paul C. Lienhard, Cav-Res., did at or near Englewood, New Jersey, on or about April 1, 1935, with intent to deceive superior military authorities, make and sign an official certificate in the council book of CCC Company No. 1271, of which company he was Commanding Officer, to the effect that "I certify that the foregoing account for the month of March 1935 is correct", which certificate was well known by the said Captain Paul C. Lienhard, Cav-Res., to be false.

Plea: Not guilty.

Finding: Guilty.

The falsity of the certificate alleged in the above specification and the fact that it was knowingly made by accused are shown by the evidence considered under Specification 1 of Charge I. Accused submitted this false certificate as true and genuine to Major Stewart S. Giffen, 62d Coast Artillery (AA), District CCC Inspector, on April 12, 1935 (Giffen, R. 150,151,153,154; Pros. Ex. 7).

Specification 2: In that Captain Paul C. Lienhard, Cav-Res., did at or near Englewood, New Jersey, on or about May 1, 1935, with intent to deceive superior military authorities, make and sign an official certificate in the council book of CCC Company No. 1271, of which company he was Commanding Officer, to the effect that "I certify that the foregoing account for the month of April 1935, is correct", which certificate was well known by the said Captain Paul C. Lienhard, Cav-Res., to be false.

The falsity of the certificate alleged in the above specification and the fact that it was knowingly made by accused are shown by the evidence considered under Specification 2 of Charge I. Accused submitted

this false certificate as true and genuine to Major Stewart S. Giffen, 62d Coast Artillery (AA), District CCC Inspector, on May 17, 1935 (Giffen, R. 151-154; Pros. Ex. 7).

Specification 3: In that Captain Paul C. Lienhard, Cav-Res., did at or near Englewood, New Jersey, on or about June 1, 1935, with intent to deceive superior military authorities, make and sign an official certificate in the council book of CCC Company No. 1271, of which company he was Commanding Officer, to the effect that "I certify that the foregoing account for the month of May 1935 is correct", which certificate was well known by the said Captain Paul C. Lienhard, Cav-Res., to be false.

The falsity of the certificate alleged in the above specification and the fact that it was knowingly made by accused are shown by the testimony considered under Specification 3 of Charge I. Accused submitted this false certificate as true and genuine to Major Stewart S. Giffen, 62d Coast Artillery (AA), District CCC Inspector, on June 10, 1935 (Giffen, R. 152-154; Pros. Ex. 8).

8. The defense consisted solely of an unsworn statement by the accused which may be summarized as follows: Accused took command of Camp No. 23 on July 10, 1934, and found the camp in a deplorable condition. The company fund was below $200. The departing company commander did not turn over the quartermaster property and when accused checked it he found the records incomplete and incorrect, with many shortages. In order to straighten out this property accused made numerous trips at his own expense to see the corps area quartermaster. Accused also purchased with his own funds various "paraphernalia" in order to keep the property records straight. At the end of a year the camp had greatly improved, and one of the inspectors stated to the accused during an inspection of the camp that "this company is rapidly approaching a state of excellence".

By October, 1934, accused had accumulated a company fund of $1245, an increase of $1000 since July, 1934. He bought gallons of paint and varnish and various tools and hardware with his own funds in order to improve the camp. At the time accused took command of the camp the lighting system was very poor, and in emergencies accused paid for repairs with his own funds. On one occasion when light was essential for an operation by one of the surgeons, and the lighting system was out of order,

accused, at his own expense, hired a mechanic to make the necessary repairs. Due to this unsatisfactory lighting system, candles were often used for the purpose of lighting with the consequent danger of fire. At sometime before accused took command of the camp the installation of commercial electricity had been definitely turned down as too expensive by the government, since the installation could not possibly be made for less than $2200. Through endless efforts and expense during the period October, 1934, to March, 1935, accused succeeded in getting commercial electricity installed in the camp at the cost of $215. Accused also installed in the camp a 280 gallon gasoline pump at the cost of only $30 to the government. He also constructed an athletic field, which would noramlly have cost over $7000, for about $250 of government funds.

Accused purchased with his own funds for the company four desks, an electric clock, and paint with which to paint 24 mess tables. He also purchased, partly with his own funds, a steel filing cabinet, a steel kitchen table, china dishes, commercial toilet seats, and paint with which to paint the latrine and mess hall. Accused spent his own funds in purchasing these various articles with the hope that his camp would be rated excellent by the inspecting officer, which rating was secured at the last inspection in June.

Accused also stated, "There is no voucher on file certifying to any refunds of personal funds which I should have done instead of changing vouchers". (Underscoring supplied)

On July 5, 1935, when the new district commander (Colonel Hamilton) and his executive officer (Major Morse) inspected the 1271st Company, the company had just finished feeding 180 men from another camp. As a result the mess hall, lavatory, etc., were not in as good a condition as they would have been under normal circumstances.

Accused claimed that he had spent all of the $1101 which he was charged with having embezzled and over $1000 of his own funds in making improvements at the camp. Accused made these improvements in his enthusiasm and anxiety to have his camp the best camp in the district. The morale of his company was of the best. Accused had received letters from the Mayor and Chief of Police of Englewood, New Jersey, and the Director of the Bergen County Selecting Agency in regard to the high standing of his camp in the community. Since being called to active duty accused's compensation totaled $5610. He spent the money in the following

manner: $2000 to his family; $250 for mess and orderly service; $80 for laundry and incidentals; $1800 for personal expenses; and $1500 for the benefit and improvement of the camp.

Since returning from Walter Reed General Hospital, two or three things had happened to him which indicated physical and mental weaknesses. As an example, he would drive a car a certain length of time and suddenly pass out, and then find himself in a police station or hospital as a result of having struck a telegraph pole or something else. Such incidents had happened twice since his discharge from Walter Reed General Hospital. Another example of his mental weakness was that at times he could not remember the identity of persons although he could remember very clearly what these persons had said to him, and at other times he could remember the identity of the persons but could not remember what they had said to him. Accused also did many things which in retrospection he regarded as being very illogical. (R. 156-164)

To rebut the testimony of accused in regard to the condition of the camp, the prosecution called Colonel Charles S. Hamilton, 18th Infantry, District Commander, who testified as follows: Witness inspected the camp of accused on or about July 5, 1935. At that time he found the grounds filthy, buildings dilapidated, the electric wiring poorly installed and a great fire hazard; the mess hall, kitchen and the latrines were especially filthy. (R. 165-167)

9. The evidence supporting Charge I and its four specifications is, in the opinion of the Board of Review, clear and conclusive, and fully warrants the findings of guilty except as to the amount alleged in Specification 2 to have been embezzled. The proof in support of this specification indicates that accused actually embezzled $199.60 instead of $200, as alleged in the specification. As this slight discrepancy does not affect the sentence, it may be disregarded. The record of trial shows that the various books and documents, in which the accounts of the 1271st Company, CCC, were kept, were in the handwriting of accused. The Board of Review has held, with the approval of The Judge Advocate General, that an officer may be convicted of embezzlement upon the uncorroborated evidence of the books kept by him in the course of his duties. CM 130989, sec. 1563(4), Dig. Ops. JAG, 1912-30. The explanation advanced by accused that he had used all of the money which he was alleged to have embezzled in improving his camp is wholly uncorroborated by any evidence, documentary

or otherwise. The Board has also held, with the approval of The Judge Advocate General, that an officer who receives large sums of money for which he is responsible and accountable and who wholly fails either to account for or to turn them over when his stewardship terminates cannot complain if the natural presumption that he spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence. CM 123488, sec. 1563(2), Dig. Ops. JAG, 1912-30.

10. The evidence supporting Charge II and its three specifications is, in the opinion of the Board of Review, clear and conclusive, and fully warrants the findings of guilty.

11. The only legal question of any importance appearing in the record is in regard to the testimony of Captain Ernest W. Wilson, Finance Department. The Board of Review is of opinion that his testimony was admissible. The council books, vouchers, and other documents upon which this audit was based were before the court and the accused had the opportunity of examining them and cross-examining the witness as to the conclusions he reached as a result of his audit. It is also apparent from the testimony of the witness and an examination of the council books, vouchers, and other documents that a result was capable of being ascertained by calculation. That Captain Wilson was "a person skilled in such matters, and capable of making the calculation" is obvious from the nature of his duties, as well as from the analysis that he presented. The testimony of Captain Wilson came within the exception to the best evidence rule set forth in paragraph 116, page 119, Manual for Courts-Martial, and was competent.

12. Attached to the record of trial is a letter from the defense counsel recommending clemency on the ground of the past medical history of accused. The clemency recommendation is not specific as to amount and character as required by paragraph 81, page 68, Manual for Courts-Martial. The physical and mental condition of the accused has been discussed in detail supra in this opinion. Suffice it to say here that in the opinion of the Board of Review the past medical record of the accused does not warrant the granting of clemency. The Board has also given careful consideration to the letter of Miss Josephine Lienhard, daughter of accused, addressed to the President of the United States, and its inclosures. In this letter Miss Lienhard states that her mother, wife of accused, and her three brothers and herself are all dependent upon accused for the necessities of life, and that if the President

approves the sentence it will be necessary for her brothers and herself to withdraw from high school and for the entire family to apply to the Emergency Relief Bureau for help. The Board has the utmost sympathy for the destitute circumstances of the family of accused but, in view of the serious nature of the offenses of which accused stands convicted, does not feel that clemency is warranted at the present time.

13. The reviewing authority in his action which is appended to the record of trial not only approved the sentence and forwarded the record of trial for action under the 48th Article of War but also designated the United States Northeastern Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. So much of this action as designated the place of confinement is surplusage. The reviewing authority is authorized to designate the place of confinement only when he has the authority to order the execution of the sentence. Par. 81 b, p. 78, M.C.M., 1928. In this case confirmation by the President is necessary before the sentence can be ordered executed. A.W. 48.

14. Accused was born July 13, 1889, in Switzerland, emigrated to the United States at some later date, and became a citizen through naturalization. His education, received in Switzerland, included five years in high school and two years in the Swiss Federal Railroad College. He served as an enlisted man in the United States Army from October 19, 1910, to October 18, 1913, and from May 5, 1917, to January 1, 1918. He attended the Third Officers' Training Camp, Camp Lewis, Washington, from January 1, 1918, to June 1, 1918, and on the latter date was commissioned a second lieutenant of Infantry in the United States Army. He was promoted to first lieutenant of Infantry October 12, 1918. During the World War he served at various stations in the United States and on October 18, 1919, departed from the United States for Germany, where he served with the American Forces in Germany until December 31, 1920, when he was discharged. He was commissioned a first lieutenant, Cavalry Reserve, on April 1, 1921, and promoted to captain, Cavalry Reserve, March 6, 1929, in which grade he is serving at the present time. While a reserve officer he has performed the following active duty:

November 15, 1925, to November 29, 1925;
December 1, 1926, to December 15, 1926;
August 4, 1929, to August 17, 1929;
August 3, 1930, to August 16, 1930;
August 2, 1931, to August 15, 1931;
September 10, 1933, to September 23, 1933;
January 17, 1934, to date (CCC duty).

15. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The conclusions of the Board of Review as to the legal sufficiency of the record to support the findings of guilty of the four specifications of Charge I, and of the three specifications of Charge II, have already been set forth in this opinion. The Board is also of opinion that the record is legally sufficient to support the findings of guilty of Charges I and II and the sentence, and warrants confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of the 93d Article of War and mandatory upon conviction of violation of the 95th Article of War. The extent of the sentence to confinement was discretionary with the court and in adjudging two years the court did not exceed the maximum limit of punishment prescribed for enlisted men in paragraph 104, Manual for Courts-Martial, 1928. Confinement in a penitentiary is authorized for embezzlement by the 42d Article of War and sections 98 and 401, title 6, Code of the District of Columbia.

Theodore Hall, Judge Advocate.

W. A. Turnbull, Judge Advocate.

E. M. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 203974

NOV 29 1935

U N I T E D S T A T E S	)	FOURTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort McClellan, Alabama, October 9, 1935. Confinement for six (6) months and forfeiture of $14.70 per month for a like period. Fort McClellan, Alabama.
Private JESSE O. RILEY (6368405), Company K, 22d Infantry.	)	

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

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Jesse O. Riley, Company K, 22d Infantry, Fort McClellan, Alabama, being on guard and posted as a sentinel, at Fort McClellan, Alabama, on or about 2:00 o'clock A.M., September 11, 1935, was found sleeping on his post.

He pleaded not guilty to, and was found guilty of, the Specification, except the word "sentinel", substituting therefor the word "watchman"; of the excepted word, not guilty, of the substituted word, guilty, and guilty of the Charge. 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 only so much of the findings of guilty of the Specification and Charge as involved a finding of guilty of the Specification as amended by the court, in violation of the 96th Article of War, and only so much of the sentence as adjudged confinement at hard labor for six months and forfeiture of $14.70 per month for a like period. As thus modified, the sentence was ordered executed and Fort McClellan, Alabama, designated as the place of confinement. The sentence was published in General Court-Martial Orders No. 156, Headquarters Fourth Corps Area, November 11, 1935.

3. The only question requiring special consideration is whether the offense of which accused is found guilty is a lesser included offense of that charged. The specification alleges that the accused "being on guard and posted as a sentinel * * * was found sleeping on his post". By words of exception and substitution the court found the accused not guilty in the capacity of a "sentinel" but guilty in that of a "watchman". The question now being considered has been passed upon in CM 137189, Gore, March 17, 1920, by The Judge Advocate General in the following language:

> "It is the opinion of this office that this finding is erroneous as it does not find the accused guilty of the offense charged or of a lesser included offense. A watchman is not a sentinel, his duties are separate and distinct from those of a sentinel. This distinction is recognized by the Manual for Courts-Martial. On page 242, M.C.M., it states that the 86th Article of War 'applies only to sentinels' and also that the term sentinel does not include a 'watchman'. * * * As the court did not find the accused guilty of a lesser included offense its finding is erroneous."

The 86th Article of War is one restricted in its application to offenses committed by a sentinel and is by the wording of the statute limited to "any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, * * *." The citation of M.C.M., page 242, supra, refers to the 1917 Manual for Courts-Martial, which was in effect at the time that opinion was rendered.

Paragraph 146, M.C.M., 1928, contains this provision:

> "The term 'sentinel' does not include a watchman, or a noncommissioned officer of the guard unless posted as such."

It is a well established principle of military law that authority to find guilty of a lesser included offense does not justify the conviction of the accused of an offense entirely separate and distinct in its nature.

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

Theodore Hall, Judge Advocate.

W. A. Trumbull, Judge Advocate.

D. M. Smith, Judge Advocate.

To The Judge Advocate General.

1st Ind.

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

1. The record of trial and accompanying papers in the case of Private Jesse O. Riley (6368405), Company K, 22d Infantry, and the opinion of the Board of Review thereon are submitted herewith pursuant to Article of War 50½ for the action of the President.

2. The Board of Review is of the opinion that the record of trial is legally insufficient to support the sentence. I do not concur in that opinion, and for the reasons set forth below recommend that the findings as modified by the reviewing authority be approved and the sentence as modified be confirmed.

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Jesse O. Riley, Company K, 22d Infantry, Fort McClellan, Alabama, being on guard and posted as a sentinel, at Fort McClellan, Alabama, on or about 2:00 o'clock A.M., September 11, 1935, was found sleeping on his post.

The evidence shows that a guard was maintained at the time and place of the offense alleged; that this guard included an officer of the day, noncommissioned officers and privates; that such guard was divided into reliefs and the members thereof were regularly posted on the various designated posts of the guard and likewise regularly inspected by the officer of the day and the noncommissioned officers of the guard; that the accused was a member of this guard and was duly posted on Post No. 1 at 12 o'clock of the night of September 10-11, 1935, and at 2:00 o'clock he was discovered by the officer of the day asleep on his post. The only explanation offered by the accused was that at the time he went on guard he was mentally and physically worn out and that he couldn't walk his post.

It may be inferred from the record of trial that the court was of the view, because of the length of tour of accused and perhaps because

designated by one of the witnesses as a "watchman guard", that he should be regarded as a watchman rather than as a sentinel, and such view was reflected in its finding by the substitution of the word "watchman" for the word "sentinel". Such finding standing alone and remaining under the 86th Article of War would, to say the least, have been of doubtful validity, but the reviewing authority pursuant to authority vested by Article of War 47 took curative action by approving only so much of the finding of guilty of the specification and charge as involved a finding of guilty of the amended specification in violation of the 96th Article of War and only so much of the sentence as adjudged confinement at hard labor for six months and forfeiture of $14.70 per month for a like period.

The question involved in this case is whether the accused, having been charged with sleeping on his post as a sentinel in violation of the 86th Article of War, may be legally convicted of the offense of sleeping on his post as a watchman in violation of the 96th Article of War.

The case cited by the Board of Review (CM 137189, Gore, March 17, 1920) was decided while the provisions of the Manual for Courts-Martial, 1917, were in effect. That Manual, like the present Manual for Courts-Martial, stated that the term "sentinel" does not include a watchman. In that case the court, by exceptions and substitutions, not only excepted the word "sentinel" but also the words "was found sleeping" and substituted therefor respectively the words "watchman" and "did neglect his duty". Although it was stated in the opinion in that case that a sentinel does not include a watchman, nevertheless it was also stated as an additional reason why the case should be disapproved, that by excepting the words "sleeping on his post", and substituting therefor the words "did neglect his duty", the court found the accused guilty of a separate and distinct offense from that alleged and not of an included offense. It is my view that the Gore case was properly disapproved for the reason last stated, but that such case was not subject to disapproval because of the statement in the Manual for Courts-Martial that a "sentinel" does not include a watchman. It is further my view that such statement was inserted for the purpose of preventing a mere watchman from being punished as a sentinel but not for the purpose of preventing any offense whatever from being carved out of the specification should the evidence show that he was a watchman instead of a sentinel.

It appears from the evidence that except as to the technical status of the accused as a sentinel at the time the offense was committed every element of the offense alleged has been proved, namely, that the accused was a soldier on guard, was posted, and was found sleeping on his post. Certainly these facts establish the commission of an offense against good order and military discipline; and since these elements of proof were all essential in proving the alleged offense, it follows that the offense thus proved is one necessarily included in the offense alleged, even without any finding as to the exact status of the accused at the time. A.W. 47; Winthrop's Military Law and Precedents (2d Ed.) 1920, p. 383; pars. 298, 299, 300, M.C.M., 1921; par. 78 c, M.C.M., 1928. This being true, the fact that the court substituted the word "watchman" for the word "sentinel" was immaterial and may be disregarded as surplusage. In view of the findings, the offense is not one inhibited by Article of War 86 but is violative of Article of War 96, and I consider it as an offense included within that alleged and not as a separate and distinct offense as viewed by the Board of Review.

It is my judgment, therefore, that the record of trial is legally sufficient to support the findings as modified by the reviewing authority. This view is sustained by the opinion of this office of February 10, 1931 (JAG 231.4). In that opinion it was stated:

> "* * * If, however, a person has been charged and tried under the term 'sentinel', for violation of the 86th Article of War, and evidence developed at the trial raises serious doubt as to whether he was in fact a sentinel, only so much of the findings might be approved as involve a violation of the 96th Article of War, as indicated above, and the sentence should be reduced accordingly."

Notwithstanding, therefore, the views expressed in the Gore case, I am of the firm belief that the record of trial in this case should be considered as legally sufficient and that in so far as that case announced a contrary view, it should not longer be followed.

4. In the event that you approve my recommendation, that the findings as modified by the reviewing authority be approved and the sentence as modified be confirmed, I inclose a draft of a letter for

your signature transmitting the record to the President for his action, together with a form of Executive action for his signature designed to carry that recommendation into effect, both of which drafts are marked in pencil "Draft A". An alternative draft of letter to and form of Executive action by the President, marked in pencil "Draft B", are submitted for use if, on the other hand, you approve the opinion of the Board of Review that the record is legally insufficient to support the sentence.

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

5 Incls.
Incl. 1-Record of trial.
Incl. 2-Draft of let. for sig. of Secy. War approving JAG's views (A).
Incl. 3-Draft of let. for sig. of Secy. War approving Bd. of Review's opinion (B).
Incl. 4-Form of Executive action, JAG's recommendation (A).
Incl. 5-Form of Executive action, Bd. of Rev. (B).

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

Board of Review
CM 203989

DEC 17 1935

UNITED STATES	)	HAWAIIAN DIVISION
v.	)	Trial by G.C.M., convened at Schofield Barracks, T. H., October 22, 1935. Confinement for six (6) months and forfeiture of $14 per month for a like period. Schofield Barracks, T. H.
Private CLOVIS W. FOX (6554191), Service Company, 35th Infantry.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Clovis W. Fox, Service Company, 35th Infantry, Schofield Barracks, T. H., having knowledge of the commission of a crime, to wit: the larceny of Ten Dollars ($10.00), lawful money of the United States, and twenty-four (24) Schofield Barracks theater tickets, of the value of One Dollar and Twenty-Cents ($1.20), the property of Private William V. Lore, Service Company, 35th Infantry, by Private Richard T. Cannon, Service Company, 35th Infantry, at Haleiwa Beach, T. H., on or about September 8, 1935, did, at Schofield Barracks, T. H., on or about September 8, 1935, and thereafter, wrongfully, unlawfully and wilfully conceal and fail and refuse to disclose and make known the same to any person in civil or military authority under the United States.

He pleaded not guilty to the Charge and Specification, and was found guilty as charged. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for six months and to forfeit $14 per month for a like period. The sentence was approved and ordered executed, the Post Stockade, Schofield Barracks, T. H., being designated as the place of confinement. The sentence was published in General Court-Martial Orders No. 66, Headquarters Hawaiian Division, Schofield Barracks, T. H., November 1, 1935.

3. The evidence shows that accused and Private Richard T. Cannon, Service Company, 35th Infantry, went to Haleiwa Beach together on the morning of September 8, 1935, and went swimming. While at the beach, without the knowledge of accused and not in his presence, Cannon took $10 and theater tickets of the value of $1.20 from the shoe of Private William V. Lore, Service Company, 35th Infantry. After the larceny was committed, Private Cannon and accused started back about eleven o'clock for Schofield Barracks. They walked until picked up by a motor truck. While riding in the truck, Private Cannon showed accused $10 and some show tickets, and told accused that he had gotten them at Haleiwa Beach. They rode on to Schofield where Cannon spent the money in company with accused. (R. 15,16) Private Lore reported his loss; the company commander of accused, Captain Russell C. Akins, 35th Infantry, made an investigation of the alleged larceny, and examined Privates Cannon, Lore and accused in the orderly room the same afternoon. The accused and Private Cannon were questioned by Captain Akins. Captain Akins asked Cannon and accused if either of them had taken the money, and each answered, "No". He then asked them if they had seen any man that they could identify who was present in the room at that time take the money from Private Lore's shoe, and each answered, "No". He also asked them if they knew anything about the case other than what they had told him, and each answered, "No". (R. 21)

The day following the larceny, September 9, 1935, while in the stockade, accused was informed by Cannon of all the particulars of the larceny and to whom the money and tickets belonged (R. 17).

It also appears that Major Paul L. Singer, 35th Infantry, about September 18, made a formal investigation of joint charges of larceny against accused and Private Cannon (R. 24). Accused was warned "that he did not have to make any statement but if he did make a statement it could be used against him or for him", and then questioned. He told Major Singer that he went to the beach with Cannon and while there saw Lore, and that they left before the latter. Accused said that Cannon

did not take the money and that he did not. They returned to Schofield Barracks and all the money they had between them was fifty cents of accused's own money. Accused insisted that the statement was the truth. (R. 24-25)

Two or three weeks after the date of the alleged larceny, Captain Akins again investigated charges of larceny against accused. Captain Akins read a confession made by Cannon to accused, warned accused of his constitutional rights, and asked him if the statements in the confession were true; accused answered, "Yes". Accused was asked if he desired to ask Cannon any question in regard to it, and he answered, "No". Captain Akins then asked him if he had taken the money, whether he saw Cannon take the money, if he could identify any one of about twenty-five men who were in the bath house at the time, if he saw any of them take the money, and if he knew anything further about the case, to all of which questions he answered, "No". (R. 21)

4. The evidence recited above does not disclose that accused had any actual knowledge of the commission of the larceny on September 8, 1935, the day it is alleged to have occurred, when questioned in the orderly room by Captain Akins. His knowledge that Private Cannon had money which apparently he did not have when they went to Haleiwa Beach cannot be considered as knowledge of the larceny. Private Cannon might have borrowed the money or have found it in so far as the knowledge of accused was concerned. The first information that came to accused that the money was acquired in an unlawful manner was on September 9, 1935, when Cannon told him all about it. He could not know whether Cannon was telling the truth. Cannon had made two conflicting statements in regard to the commission of the offense, one to Captain Akins on September 8, and one to accused on September 9. The specification (sworn to on October 2, 1935) alleges that the offense was committed by accused "on or about September 8, 1935, and thereafter". Accused evidently had no knowledge on September 8 of the commission of the offense.

5. The Criminal Code of the United States provides that:

> "Misprision of felony. Whoever, having knowledge of the actual commission of the crime of murder or other felony cognizable by the courts of the United States, conceals and does not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military

authority under the United States, shall be fined not more than $500, or imprisoned not more than three years, or both. (R. S. sec. 5390; Mar. 4, 1909, c. 321, sec. 146, 35 Stat. 1114.)" USC 18: 251.

The Criminal Code further provides that:

"Felonies and misdemeanors. All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors. (Mar. 4, 1909, c. 321, sec. 335, 35 Stat. 1152.)" USC 18: 541.

The maximum period of confinement that might have been imposed for the offense of larceny alleged to have been committed by Cannon, and concealed by accused, is six months. It follows that this alleged larceny is not a felony, but merely a misdemeanor, and that the specification in the instant case does not allege misprision of a felony, but misprision of a misdemeanor, if there be such an offense. Such an offense is not found under the Criminal Code of the United States or the Revised Laws of Hawaii. In fact it is unknown to the civil law.

"Misprision of Misdemeanor---is unknown equally in the facts and the language of the law; because, for reasons already explained, it is too trifling a derelicition from duty to engage the attention of the tribunals." Bishop's New Criminal Law, vol. I, p. 434.

Nor is "misprision of a misdemeanor" mentioned in any specific article of the Articles of War. It must be held, therefore, that it is not included under the 96th Article of War among those crimes or offenses, not capital and not made punishable by another Article of War, which are in violation of public law as enforced by the civil power, the "public law" in this instance including only the Criminal Code of the United States and the Revised Laws of Hawaii.

6. Since the offense alleged is not recognized as a violation of the public law, and may not be punished as such under the 96th Article of War, it must be considered whether it is a violation of the 96th Article of War as a disorder or neglect to the prejudice of good order or military discipline, or as conduct of a nature to bring discredit upon the military service. To so hold is to say that an individual

subject to military law who has been informed by another that he has committed a misdemeanor is subject to punishment by a military court if he fails or refuses to disclose that information. In the opinion of the Board of Review such a conclusion would result in an intolerable situation among the personnel of the service. It was said by Chief Justice Marshall in Marbury v. Brook, 7 Wheaton 556, 575, that:

> "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man."

7. An additional phase of the case which warrants consideration has to do with the constitutional provision that no person is required to incriminate himself. From the statement of facts it will be observed that accused, during the time the alleged failure to disclose occurred, was himself either suspected of, or charged with, the larceny (either separately or jointly with Cannon). Clearly here is a situation warranting full resort to the constitutional protection against self-incrimination. Although accused did not literally remain silent, having answered in the negative when asked what he knew about the larceny, he is not here charged with false swearing or with making a false official statement or with anything that he did say, but, on the contrary, with what he failed to say. Assume that accused, under the circumstances in question, remained literally silent, can it be said that he was not legally entitled to the full constitutional privilege to do so? There is no charge pertaining to what he said, but a clear allegation restricted to his failure to disclose certain information having to do with a crime of which he, at the time, was either suspected or charged. See Constitution of the United States of America, Annotated, 1924, pp. 586-591; A.W. 24.

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

Theodore Hall, Judge Advocate.
W. A. Trumbull, Judge Advocate.
C. M. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 204194

JAN 2 1936

UNITED STATES	)	SEVENTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at Fort Leavenworth, Kansas, November 25, 1935. Dishonorable discharge and confinement for four (4) years. Disciplinary Barracks.
Private BENJAMIN F. PRESTON (R-1007724), Headquarters Troop, 10th Cavalry.	)	

HOLDING by the BOARD OF REVIEW
HALL, TURNBULL and SMITH, L.M., 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 for forgery (2 specifications), in violation of the 93d Article of War (Charge I), and for uttering forged checks (3 specifications), in violation of the 96th Article of War (Charge II), all the offenses alleged to have been committed at Fort Leavenworth, Kansas, on or about August 1, 1935. 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 six years. The reviewing authority approved the sentence, reduced the period of confinement to four 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. The offenses described by Specifications 1 and 2, Charge I, and Specifications 1, 2 and 3, Charge II, for which accused was tried and of which he was convicted, are alleged and shown by the evidence to have been committed on August 1, 1935. The charge sheet accompanying the record of trial shows that accused was honorably discharged on August 18, 1935, as corporal, character excellent, and that he reenlisted on August 20, 1935. The trial judge advocate read to the court the data

from the charge sheet as to the service of accused (R. 24). Informal communication by The Judge Advocate General's Office with the Office of The Adjutant General confirms the fact that accused was discharged on August 18, 1935, and reenlisted on August 20, 1935.

4. It is a general rule, with certain prescribed exceptions, that court-martial jurisdiction over soldiers in the military service of the United States ceases on discharge from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by reentry into the service. Par. 10, M.C.M., 1928. Neither the offenses of which accused was convicted nor his status as a reenlisted soldier after honorable discharge bring his case within the exceptions to the general rule. The court was, therefore, without jurisdiction to try accused for offenses of this nature committed in a prior enlistment terminated by honorable discharge prior to the preferment of charges and trial. Dig. Ops. JAG, 1912-30, sec. 1436; CM 198340, Conyers; CM 199072, Hewitt; CM 200925, Mackiewicz.

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

Theodore Hall, Judge Advocate.

W. A. Trumbull, Judge Advocate.

S. M. Smith, Judge Advocate.

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

Board of Review
CM 204227

JAN 22 1936

UNITED STATES	)	PANAMA CANAL DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Randolph, C. Z., December
Private CHARLES A. MERCHANT,	)	3, 1935. Dishonorable discharge
Jr. (6719031), Panama Air	)	and confinement for two (2) years.
Depot, France Field, C. Z.	)	Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HALL, TURNBULL and SMITH, L.M., Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Private Charles A. Merchant, Jr., Panama Air Depot, Air Corps, did, at France Field, Canal Zone, on or about July 25, 1935, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

CRISTOBAL, CANAL ZONE, July 18th 193 5 No. 530

Pay to the order of THE CHASE NATIONAL BANK of the city of New York Cristobal Branch

Richard Cromwell $ 21.30

Twenty-one Dollars & Thirty Cents DOLLARS U.S.Currency.

Counter signatures:
Richard Cromwell
David Menahen,
Victoria Harari de Menahen.

JOHN J. DAVIS, Jr.

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that Private Charles A. Merchant, Jr., Panama Air Depot, Air Corps, did, at France Field, Canal Zone, on or about July 25, 1935, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

CRISTOBAL, CANAL ZONE, July 19 193 5 No. 465

Pay to the order of — THE CHASE NATIONAL BANK of the city of New York Cristobal Branch

James B. Rogers $ 25.15

Twenty-five Dollars & Fifteen Cents DOLLARS U.S.Currency.

Counter signatures:
James B. Rogers,
Tom Brady.

ROBERTO BARCENOS

which said check was a writing of private nature which might operate to the prejudice of another.

Accused pleaded not guilty to the charge and specifications and was found guilty thereof. 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 and nine months. 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 under the provisions of Article of War 50½.

3. The evidence in the case shows that accused signed the purported makers' names to the two checks set out in the specifications of the charge (Gov't. Exs. A,B,C; R. 19). The Davis check (Specification 1) was uttered by two men to David Menahen, whose name appears thereon as an indorser, but accused was not one of these men (R. 21,22). General Prisoner John J. McGlynn, a witness for the defense, testified he had been convicted of passing this check (R. 24). How, when or where the Barcenos check (Specification 2) was uttered does not appear. Both checks were presented to the bank on which drawn and payment refused because of "no such account". (R. 8-11) The purported makers of the checks appear to be fictitious persons.

The only evidence of the circumstances of the making of the checks by accused is found in a voluntary statement (R. 14-16; Gov't. Ex. D) he made out of court and in his testimony (R. 34-42) at the trial. His statement is as follows:

> "I was in the kitchen of the P.A.D. at France Field, C.Z., about 11 o'clock one morning during the month of July, 1935, when Private John J. McGlynn came in and asked me for my fountain pen. I gave him my pen, and he pulled out a lot of checks, sat down at my desk and began signing the checks. I noticed that the checks were filled in with a typewriter. McGlynn said he could not do so good signing them, and he asked me if I would sign some. I took the fountain pen and signed about four checks, and I remember that two of the names I signed were 'John J. Davis Jr.' and 'Roberto Barcenos', but I can not remember the others. At this time McGlynn made no statement regarding the passing of the checks, and it never occurred to me that he might attempt to do so. As a matter of fact I looked upon the whole matter as a childish prank; but about 15 minutes later McGlynn was upstairs in the barracks at Steligo's bunk, and he told me that I could expect to get my fountain pen tomorrow or the following day. I asked him why, and he replied that he was going to Panama City with the checks. Two days later McGlynn returned the pen to me, stating that he could not pass the checks in Panama City and almost got into trouble trying to do so. He also stated that he tore the checks up when he discovered that he could not pass them. He did not give me any money, nor did I expect any from him."

He testified in court to the same effect and further that he was then nineteen years old, having enlisted at the age of eighteen, never had a bank account, never signed a check before in his life, had two years of high school and two years in an automobile mechanic's course, and never had any connection heretofore with checks or commercial work (R. 35,36). He had a job prior to coming into the Army but was not paid by check and never received one (R. 37). He did not know that it was wrong to sign a fictitious name (R. 39). Neither did he know what McGlynn was going to do with the checks (R. 38). McGlynn testified that accused did not typewrite the checks (R. 24).

4. The intent to defraud or prejudice the right of another person is a necessary element of the crime of forgery and, like every other element of the offense, must be established by the evidence. Par. 149 j, M.C.M. Intent in forgery will not be presumed from the mere making of a false instrument; but it must be gathered from some affirmative act or from the existence of circumstances from which criminal intent may be inferred. Frisby v. United States, 38 App. D.C. 22. One who makes an instrument in good faith in ignorance of the effect of his act is not guilty of forgery. 26 Corpus Juris 904.

The Board of Review is of the opinion that the facts and circumstances of the case do not indicate an intent on the part of accused to defraud or prejudice the right of another person, but, on the contrary, show affirmatively a lack of such intent. This conclusion is supported by CM 183892, Rogers, in which the facts were practically on all fours with the instant case.

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

Theodore Cr., Judge Advocate.

W. A. Trunkell, Judge Advocate.

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

Board of Review
CM 204227

MEMORANDUM for The Judge Advocate General.

Subject: Record of trial of Private Charles A. Merchant, Jr. (6719031), Panama Air Depot, France Field, C. Z.

1. I cannot concur in the conclusion reached by the majority of the Board in this case. Accused testified that he was eighteen years and seven months old when he enlisted in the Army on August 6, 1934, although his service record shows that he was twenty years of age at that time; that he had spent two years in high school and two years in a vocational training school, and was employed as an automobile mechanic at the time he enlisted. In both his confession and his testimony before the court he freely admitted signing the checks in question but he maintained that he was innocent of any fraudulent intent, and that he regarded the whole matter as a childish prank upon the part of Private McGlynn, whose service record shows that he (McGlynn) was almost twenty-three and a half years old at the time the "childish prank" was perpetrated. Accused's confession, which is substantially the same as his testimony before the court, continues:

> "* * * but about 15 minutes later McGlynn was upstairs * * * and told me that I could expect to get my fountain pen tomorrow or the following day. I asked him why and he replied that he was going to Panama City with the checks. Two days later McGlynn returned the pen to me stating that he could not pass the checks in Panama City and almost got into trouble trying to do so." (Underscoring supplied)

Even if accused were as ingenuous as he claimed to be, all of the circumstances surrounding this transaction must have put him on notice that a fraud was about to be committed. He must have known that McGlynn was not going to Panama City with the checks, a distance of about forty-eight miles and an expensive trip, just for the ride, and yet he made no effort to recover his fraudulent handiwork nor did he bring this transaction to the attention of his officers at this time or even when McGlynn returned two days later and reported that he had tried without

success to cash the checks which accused knew were fraudulent. The record shows that the two checks signed by accused were actually cashed and that someone suffered loss by reason thereof. All of these facts and the intelligent and logical manner in which accused testified must have been taken into consideration by the court in weighing accused's protestations of ignorance and innocence of any wrongful intent, and evidently the credulity of the court was overtaxed. Under all the circumstances the court was, in my opinion, warranted in inferring fraudulent intent upon the part of accused, even if indeed it was not proven by direct testimony.

2. The following rule with reference to inferring fraudulent intent in cases of forgery is found in Wharton's Criminal Law, vol. 2, sec. 918:

> "* * * If the jury can infer from the circumstances that it was the defendant's intention to defraud the party averred, known or unknown, there being an apparent possibility of fraud, it is sufficient to satisfy such allegation in the indictment * * *."

This rule is not inconsistent with the law as stated in paragraph 4 of the majority holding. Here it is said:

> "* * *; but it (intent to defraud) must be gathered from some affirmative act <u>or from the existence of circumstances from which criminal intent may be inferred</u>."

The rule as expressed by Wharton is sound, for in many criminal cases it is impossible to prove intent by direct evidence.

3. I cannot concede that the facts in CM 183892, <u>Rogers</u>, cited in the majority holding "were practically on all fours with the instant case". Rogers was a boy of practically no education as is evidenced by his testimony, who had gone only through the seventh grade, and he was acting under the influence of a man nine years his senior in whom he evidently reposed great confidence, who had told him that it would be all right for him to sign the check.

4. In view of the strong circumstantial evidence in this case, all of which is, to my mind, eloquent of accused's fraudulent intentions, and in the light of office precedents, I do not believe that the Board of Review is warranted in attempting to disturb the findings and sentence of the court.

L. M. Smith,
Lieutenant Colonel, J.A.G.D.

1st Ind.

War Department, J.A.G.O., F[illegible] - To the Secretary of War.

1. The record of trial and accompanying papers in the case of Private Charles A. Merchant, Jr. (6719031), Panama Air Depot, France Field, Canal Zone, together with the holding thereon of the Board of Review, signed by only two of the three members, the third member being unable to concur in the views expressed in the holding, are transmitted herewith pursuant to Article of War 50½ for the action of the President.

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

3. Accused was convicted of forging two checks. The fact that he signed the checks, as drawer, was proved, and also admitted by accused, at the trial (R. 13,14,18, 19,34,39; Ex. D). Accused also admitted at the trial that the signatures appearing on the checks were the signatures of fictitious persons and that he left the checks in the possession of Private (now General Prisoner) John J. McGlynn (R. 35,39,41). One of the checks (Ex. A) bearing a signature purporting to be that of "John J. Davis, Jr." was negotiated for value to a merchant in Panama City by two men (R. 21,22). General Prisoner John J. McGlynn admitted at the trial that he had been convicted of uttering this check (R. 24). This check ultimately reached the bank upon which drawn, where payment was refused because the drawer had no account at that bank (R. 10). There is no direct testimony as to the course taken by the other check which bore a signature purporting to be that of "Roberto Barcenos" (Ex. B), except that it eventually reached the bank upon which drawn where payment was refused because the drawer had no account at that bank (R. 11).

In a statement made prior to the trial and in his testimony at the trial accused explained his connection with the two checks substantially as follows:

Accused was in the kitchen of the Panama Air Depot one morning in July of 1935, when McGlynn came in and asked to borrow his fountain pen. Accused let him have the pen and McGlynn signed several checks which already had been filled in with a typewriter. Subsequently, at the request of McGlynn, accused signed as drawer several of the checks with the names typed thereon. McGlynn made no statement concerning the checks, but pretended that he (McGlynn) was practicing and "he wanted to see if I could practice any better than he could" (R. 35), and "at this time McGlynn made no statement regarding the passing of the checks, and it never occurred to me that he might attempt to do so. As a matter of fact I looked upon the whole matter as a childish prank" (Ex. D). As McGlynn was dissatisfied with the manner in which accused was signing the checks, accused stopped after he had signed about four of them and went upstairs, leaving the checks which he had signed with McGlynn. About fifteen minutes later accused saw McGlynn upstairs and asked him for his fountain pen. McGlynn said he would give it back in a day or so and "he said he was going to Panama City with the checks - he didn't say he was going to cash them". Two days later McGlynn returned the pen to accused and "he told me that he had tried to cash those checks, and that he had almost gotten himself into serious trouble, and had torn the checks up and come back" (R. 35). Accused denied ever receiving or expecting to receive any money from McGlynn for signing the checks (Ex. D).

Accused admitted that he knew that he would be "doing wrong" if he signed the name of some one he knew to a check but insisted that he did not know that he would be "doing wrong" if he signed "nobody's name at all on there" (R. 39).

At the time of the commission of the alleged offenses accused was approximately 20 years of age and before enlisting in the Army he had attended high school for two years and an automobile mechanics school for two years (R. 36,37,43).

Accused did not report to the authorities his connection with the checks, which he knew McGlynn had attempted to negotiate on or about July 25, 1935, until he was questioned by Captain Mower on October 29, 1935 (R. 12).

4. The evidence summarized above shows conclusively that accused signed the two checks, as drawer with the signature of fictitious persons. The only question presented is with respect to the fraudulent intent entertained by him. In regard to this element of proof, it appears that the accused turned the two forged checks over to McGlynn, who took the checks to Panama City with the knowledge of accused and apparently without any objection or protest on his part. It also appears that both of the checks were uttered as true and genuine; the one bearing the purported maker's name, "John J. Davis, Jr." (Ex. A), by McGlynn, and the other, the one bearing the purported maker's name, "Roberto Barcenos" (Ex. B), by a person not definitely identified by the testimony. In this connection, however, it is noteworthy that the first indorsement on each of the two checks was obviously signed thereon by the same person. The fact that McGlynn reported to accused two days after accused signed the checks that he had been unsuccessful in his attempts to negotiate the checks in Panama City is also a circumstance of some significance.

Accused's denial of any complicity with McGlynn and his explanation of the manner in which he had been deceived by McGlynn was apparently rejected by the court as unworthy of belief, as the court had a right to do and as I believe it was fully warranted in doing.

Rejecting, as the court evidently did, so much of the explanation of accused as would tend to exculpate him from entertaining any intent to defraud, there is, in my opinion, substantial evidence to show that accused and McGlynn were accomplices in a common scheme to defraud. I, therefore, consider the evidence amply sufficient to support the conviction.

5. There is inclosed draft of a letter for your signature, in the event that you approve my recommendation that the action of the reviewing authority be confirmed, transmitting the record to the President for his action, together with a form of Executive action for his signature designed to carry that recommendation into effect, both of which drafts are marked in pencil "Draft A". There is also inclosed an alternative draft of letter to, and form of Executive action for, the President, marked in pencil "Draft B", for use if you approve the holding of the Board of Review that the record is not legally sufficient to support the sentence.

6. There is also inclosed herewith a letter to you from Honorable Isaac Bacharach, House of Representatives, dated February 3, 1936, requesting consideration and clemency on behalf of the accused in this case. Appended thereto is a copy of your reply to Mr. Bacharach advising him that you will communicate with him as early as practicable.

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

6 Incls.
Incl. 1-Record of trial.
Incl. 2-Draft of let. sig. Secy. of War (Draft A).
Incl. 3-Alternative draft of let. sig. Secy. of War (Draft B).
Incl. 4-Form of Executive action (Draft A).
Incl. 5-Alternative form of Exec. action (Draft B).
Incl. 6-Let. to Secy. of War, 2-3-36, from Hon. Isaac Bacharach & copy of reply thereto.

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

Board of Review
CM 204259

APR 16 1936

UNITED STATES	)	FOURTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Benning, Georgia, September
Captain VIRGIL G. ALLEN	)	3, 4, 5, 6, 7 and 9, 1935.
(0-11126), Infantry.	)	Dismissal.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Virgil G. Allen, Infantry, then a student officer of The Infantry School, did, at Fort Benning, Georgia, on or about April 25, 1935, while solving the second requirement of Marked Problem No. 10, Mimeograph 1-180 M, a prescribed written problem at said school which he was duly required to solve and submit in writing to the Assistant Commandant of the Infantry School, wrongfully and knowingly obtain unauthorized assistance in preparing his solution to the said problem by adopting and submitting in substance as his own solution, parts and portions of a solution which had been prepared by Instructors of The Infantry School and approved by the Assistant Commandant of the said school as The Infantry School solution but which had not at that time been authorized for issue to the student body of The Infantry School.

(Finding of not guilty.)

(Note: The language of each of the following twenty-one specifications is identical with that of Specification 1, recited above, except as to the date of the alleged offense, and the particular requirement, problem, and mimeograph involved, which exceptions are noted below.)

Specification 2: April 25, 1935, fifth requirement of Marked Problem No. 10, Mimeograph 1-180 M.
(Finding of not guilty.)

Specification 3: May 3, 1935, first requirement of Marked Problem, Mimeograph 2-29-M-1.
(Finding of not guilty.)

Specification 4: May 3, 1935, second requirement of Marked Problem, Mimeograph 2-29-M-1.
(Finding of not guilty.)

Specification 5: May 3, 1935, third requirement of Marked Problem, Mimeograph 2-29-M-1.
(Finding of not guilty.)

Specification 6: May 27, 1935, requirement of Marked Problem No. 13, Mimeograph 1-201-M.

Specification 7: May 8, 1935, first requirement of Marked Problem No. 19, Mimeograph 1-184 M.

Specification 8: May 8, 1935, second requirement of Marked Problem No. 19, Mimeograph 1-184 M.

Specification 9: May 8, 1935, third requirement of Marked Problem No. 19, Mimeograph 1-184 M.

Specification 10: May 22, 1935, first requirement of Marked Problem No. 17, Mimeograph 1-204 M.

Specification 11: May 22, 1935, second requirement of Marked Problem No. 17, Mimeograph 1-204 M.

Specification 12: May 29, 1935, first requirement of Marked Problem No. 22, Mimeograph 1-203 M.

Specification 13: May 28, 1935, third requirement of Marked Problem, Mimeograph 1-189 M (S-2-A).

Specification 14: May 29, 1935, first requirement of Marked Problem No. 23, Mimeograph 1-202 M.

Specification 15: May 29, 1935, second requirement of Marked Problem No. 23, Mimeograph 1-202 M.

Specification 16: June 4, 1935, first requirement of Marked Problem No. 21, Mimeograph 1-208 M.

Specification 17: June 4, 1935, second requirement of Marked Problem No. 21, Mimeograph 1-208 M.

Specification 18: June 4, 1935, third requirement of Marked Problem No. 21, Mimeograph 1-208 M.

Specification 19: June 4, 1935, first requirement of Marked Problem No. 20, Mimeograph 1-144 M.
(Finding of not guilty.)

Specification 20: June 4, 1935, second requirement of Marked Problem No. 20, Mimeograph 1-144 M.
(Finding of not guilty.)

Specification 21: June 4, 1935, first requirement of Marked Problem No. 20, Mimeograph 1-144 M (Supply).

Specification 22: June 4, 1935, second requirement of Marked Problem No. 20, Mimeograph 1-144 M (Supply).

Accused entered a plea to the jurisdiction of the court for reasons which will be subsequently stated and discussed. Upon the plea being overruled, he pleaded not guilty to the charge and all specifications thereunder. He was found guilty of Specifications 6 to 18, inclusive, of Specifications 21 and 22, and of the Charge, and not guilty of

Specifications 1 to 5, inclusive, and Specifications 19 and 20. 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. As mentioned in the preceding paragraph, before pleading to the general issue accused entered a plea to the jurisdiction of the court. His counsel contended that since it was apparent that in the selection of the court, for approval by the corps area commander, only graduates of The Infantry School had been considered, and since, with the exception of the law member, the court then sitting was the result of that method of selection, the court was improperly organized in that class and educational distinction had been resorted to in its selection.

It is provided by the 4th Article of War that:

> "* * * When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; * * *."

The Board of Review is of the opinion that in the selection of this court the appointing authority was guided by the provision quoted above, that there was no abuse of the discretion thereby granted to him, and that the plea of the accused to the jurisdiction of the court was properly overruled by it.

4. The record of trial in this case comprises 622 pages of the proceedings of the court and the testimony that was heard, together with a very considerable mass of documentary evidence relating to the 22 separate specifications upon which the accused was brought to trial. In view of the conclusions reached by the Board of Review, it is considered unnecessary to extend this opinion to the great length of including a detailed summary of the evidence relating to each of the 15 specifications upon which the court reached findings of guilty. Because of the similarity of the specifications and the nature of the evidence presented in proof of them, it is thought that the purposes of this opinion can be adequately served by a detailed study of the evidence under but one specification only, and that one under which the evidence appears to be perhaps the most damaging against the accused. Such plan will be followed.

5. The evidence for the prosecution which relates generally to the 15 separate offenses of which accused was convicted is summarized substantially as follows:

Major Frederick McCabe, Infantry, Secretary of the Academic Department, The Infantry School, Fort Benning, Georgia, stated the rank, name, branch and station of accused, and that he had known accused for just one year. Accused was a member of the regular class of The Infantry School for the school year 1934-35.

Witness identified a pamphlet entitled, "Instructions for Faculty and Students, The Infantry School, Fort Benning, Georgia, 1934-1935", a copy of which was furnished all students of the school for that school year (R. 23). On the opening day of the school when he organized the classes he announced to the class that they were required to read, study and know the contents of this document and to report to their student company commander that they had read the pamphlet and understood it. He received a report from the student company commander on the 7th of September (1934) that all students of the class had reported to him that they had read it. Paragraph 22 of the pamphlet, an official document of The Infantry School, states:

> "* * * Code numbers will be used instead of names in all graded tests.
>
> b. Each student will be assigned a code number. It will be entered in lieu of his name, on the upper right-hand corner of each sheet submitted, with the date immediately below. THE ENTRY OF THE CODE NUMBER WILL BE ACCEPTED AS THE STUDENT'S CERTIFICATE THAT THE WORK SUBMITTED IS ENTIRELY HIS OWN." (Ex. I-A; R. 24)

Witness was handed a card which he identified as a form used in the Assistant Commandant's office to issue code numbers to the students of the school, the code number being placed on the card, the card signed by the Assistant Secretary, and then placed in a sealed envelope and issued to the student. Witness read from the reverse of the card the following instructions:

> "All work is conducted on the 'honor system'. By placing his code number or name on any examination paper,

problem, or other written exercise, upon which he is to be graded, the student certifies that the work is entirely his own and that he has neither received or given unauthorized assistance in any way." (Ex. I-B)

Witness identified the academic record of accused in the regular course for the year 1934-35, which witness had compiled from the records in the Assistant Commandant's office and signed. The record was offered in evidence by the prosecution and objection to its admission was made by the defense "for the reason that accused is charged under some twenty-two specifications alleging that he secured and used unauthorized assistance in preparing his solutions to certain problems, and this paper offered includes many other things not brought out in those specifications". The objection was overruled and the document received in evidence as "Exhibit I-C", subject to the statement of the trial judge advocate that he would later establish the relevancy of the grades appearing in the record which do not relate to the problems referred to in the specifications. (R. 24-27)

This scholastic record (Ex. I-C) shows in columns the 64 problems solved by the accused during the school year, giving the subject of each problem, the date solved, the grade received, and the name of the instructor. Twenty-five of these problems relate to "Tactics", 10 to "Supply", and the remaining 29 relate generally to the use of the various weapons, rifle, automatic rifle, bayonet, grenades, pistol, machine gun, 37 mm. gun, and howitzer. The grades of the accused in the problems relating to "Tactics" and "Supply" include 22 A's (this being the highest grade), 7 B's, 1 C, 2 D's, and 3 E's. His grades in problems relating principally to the technical use of the various arms include 5 A's, 8 B's, 10 C's, 3 D's, and 3 E's. Prior to March 27, 1935, in 31 problems relating principally to the use of arms he had received but 3 A's. Commencing on March 27, 1935, in 33 problems relating, with but two exceptions, to "Tactics" and "Supply", he received 27 A's and but six lesser grades. The specifications under which he was convicted relate to problems solved on May 8, 22, 27, 28, 29, and June 4, 1935, in all of which but one on May 29, 1935, he received grades of A.

Major McCabe testified that he was the custodian of the records of the regular class for the school year 1934-35, and that, since

accused was a member of that class and was never absent from any problem during his term at the school, he was required to, and did, submit a solution to a problem if it was presented to the class during that school year (R. 31-32). The students were duly required to solve and submit in writing to the Assistant Commandant of The Infantry School their solutions to the prescribed written problems of the school. These problems and their solutions were not authorized for use by any student prior to the time they were issued to the class as a whole. (R. 68) If a student possessed a copy of the school solution prior to the time he turned in his own solution to that problem, he was not authorized to make any use of it.

Preparation and safeguarding of school problems and solutions.

In the first place an instructor writes a problem. It is then submitted to three officers, called the "solving committee", to solve. They solve it individually, and then make a composite solution of the problem. (R. 69) Then the president of the "solving committee" appears before the "review board", commonly known as the "murder board", where the problem is "finally arrived at". This is the original of the school problem and the school solution to that problem. They are then revised or changed, as seen fit, and written up as changed. This done, the problem is submitted to the Section Chief, and if he approves it he submits it to the Assistant Commandant across the desk of the Secretary (the witness). If approved by the Assistant Commandant, it is then sent back to the "editor for edit". When that is completed it is again sent to the Assistant Commandant's office where witness checks it, has a record made of the school number which is placed on it, and sends it back to the section which originated it. The problem is then cut on a stencil for mimeographing, and the original problem and the mimeograph stencil are sent back to the Assistant Commandant's office. It is again checked in that office, the original write-up sent back to the section originating it, and the mimeograph stencil sent by an officer of the section to the reproduction plant of the school for mimeographing and preparation for issue to the students. At the reproduction plant the entire problem is divided into its several parts, some to be mimeographed, another part requiring a special map or a map with an over-print, and perhaps some parts to be photographed. In this

connection it is necessary to rely on several enlisted men who have various connections with the preparation of the problem (R. 70). Each section of the reproduction plant is under a noncommissioned officer who has charge of the mimeographing or other handling of the various parts of the problem, and who is instructed as to their safe-keeping. He and the enlisted men under him have to be trusted to safeguard the problem. The mimeograph section is under a master sergeant. When he receives a problem to be mimeographed he has it done and when he finishes the mimeographing he reports to the clerk in the Assistant Commandant's office that it has been run off, fixing the date, the number of the problem, and the number of copies run off. The master sergeant then takes the copies which have been mimeographed, binds them into a bundle, puts the problem number on them, and turns them over to the sergeant in charge of the store room, who puts them under lock and key until they are called for. When the instructor calls for his problem, the sergeant in charge of the store room turns it over to the truck driver with a memorandum showing the date, problem number, and number of copies. The problem is then delivered to the instructor at the office of the Chief of the Section concerned, where the number of copies received is signed for. Thereafter the instructor has charge of the problem and solutions, and is responsible that they do not get into unauthorized hands until distributed to the class. Many people have to be trusted in the process of preparing problems and solutions and care is used in selecting trustworthy men for the jobs (R. 71). The school requirement is that a marked problem be in the office of the Assistant Commandant two months prior to the issue of that problem to the students. This is not always possible but is usually done, and means that in most cases a problem and its solution will be mimeographed not less than thirty days before it is issued to the class. It is possible that in the reproduction plant additional copies might be made and get into unauthorized hands.

Cross-examination of Major McCabe.

The problem has a mimeograph number for identification which appears on all problems (R. 72). The sergeant in charge of the mimeograph room is required to run off a certain number of copies and presumably does so. Witness had never known more copies to be run off than reported (R. 73). There is a possibility that this might be done. The man in charge is

trusted with that detail. Witness knew of no reason why he should not be so trusted. Were there such reason the man would not be there. During the last year some sections reported copies of mimeographed problems and solutions missing, stated that they were "some copies short", did not have sufficient copies, and called for extra copies. Of his own knowledge, witness could not say that one problem of those turned in by accused was missing last year. (R. 74-75) Before a problem is given to the students to solve, there are many instructional matters given to the students in the way of mimeographed matter, conferences, lectures, "dry-runs", and demonstrations leading up to the problem and explaining the principles to be employed in the problem. The problem is designed to bring out certain points that have been "put over to the student" from the platform, or in some other instruction, and the problem contains nothing else (R. 76). It is hoped that a student who follows closely the lectures and instruction given him will arrive at the same conclusions that the instructors reached. That is the object in teaching the student (R. 77).

Witness called into his office all of accused's classmates who had not at the time left Fort Benning and asked them if they could give him any information in this case. These officers had been in the class with accused since last September but witness received no information from any of them (R. 78). During the school year 1934-35 there were 64 marked problems issued and accused received a grade of "A" on 27 of them (R. 79). He is charged with receiving unauthorized assistance on ten of the problems on which he received the grade of "A". When "this thing" was discovered, many problems which had "A's" on them had already been returned to accused. The ten problems are those which were then in the hands of the instructors and had not been returned to accused. Solutions are returned to the student and he is not required to keep them but disposes of them as he sees fit (R. 80). There was "no point" (of suspicion) raised about accused until about the first of June, when the course was almost over. Witness knew nothing of any suspicious circumstances connected with any problem except those beginning about April 25, 1935, which had been called to his attention. This was after accused had been given some special additional instruction (R. 81) which began on April 27, 1935, and continued for three consecutive Saturday mornings (R. 571). Before the additional instruction accused's grades then on record in the office had not been up to a passing

point. At that time a number of his problems were in the hands of instructors for grading and correcting, and a complete record of his grades to date was not available. Accused was warned that "his grades were not passing marks", and he was also warned to take additional instruction if he thought he needed it, which he did. (R. 81-82) The complete record of accused's grades, which became available later, showed that at that time he did have a passing grade as a total average (R. 573). There was no improvement in his work after taking the special instruction (R. 575). It is a faculty requirement of The Infantry School that to pass the course successfully a student must pass at least three-fourths of all graded work with satisfactory marks (R. 83). Witness of his own knowledge knew of no unauthorized assistance accused obtained during the school year 1934-35 (R. 84).

Redirect examination of Major McCabe.

Accused received the series of "A" grades on his solutions subsequent to the period of the year when the problems had been mimeographed and approved solutions were available (R. 85). The rating of "A" is usually given to a solution that would be classed as "superior", and in terms of percentage would be rated along in the 90's; "B" is "very good", and on a percentage basis 80 to 90; "C" is "average" or "passing", and on a percentage basis from 75 to 80; "D" is "unsatisfactory", and on a percentage basis from 60 to 75; and "E" is "inferior", or below 60. Out of the first 30 "examinations" accused received 8 unsatisfactory grades of "D" and "E", and from then on he received 3 such grades. Particular care is taken to safeguard the problems and solutions during the process of mimeographing and later. The school depends upon the honesty of certain people and feels that it is justified in doing so (R. 87). It cannot devise a system to prevent a solution getting into unauthorized hands if somebody was determined to get it. No system could possibly be used which did not depend upon the honesty of several individuals. In the beginning the stenographer who copies the problem could make an extra copy. At the mimeograph room they generally run off several copies before they run off the copies they keep, in order to see that they have a clear copy and that it is spaced correctly on the paper. These copies are supposed to be destroyed, but it is possible for some of them to be thrown into the waste basket without being torn up. Or, it is possible, if someone in the mimeographing room should happen not to be honest, to run off extra copies and not

make a record of them. There are a number of ways in which copies might get into unauthorized hands. The school believed there was a leak somewhere but has been unable to find it (R. 88).

Recross-examination of Major McCabe.

There were certainly ways for accused to get good grades on his solutions without recourse to the school solutions (R. 89). Witness believed that most of the officers in the class were lieutenants several years younger than accused. The observations at the school prove that, as a general rule, the older officers are less proficient in tactics than the younger. The field of work covered by the class in the fall includes weapons, historical research, signal communications, motors, animal management, equitation, logistics, and medical service. Witness made an exhaustive effort to discover a leak in the handling of the school solutions, but discovered none (R. 90).

Examination by the court.

Accused started his special instruction about the first part of April. Various instructors gave accused special instruction. Three or four Saturday mornings were devoted to the special instruction of the group which included accused, a different instructor participating each morning either on the platform or holding a conference and talking about various tactical principles (R. 91). Accused was below average according to the records then in the Assistant Commandant's office, and, according to the practice, a letter was written to him asking if he wanted special instruction (R. 92).

Major McCabe was subsequently recalled by the prosecution and testified substantially as follows: In addition to the ways in which he had already testified that a copy of the approved solution might get into unauthorized hands, there was another possibility he had not thought of before, and he doubted if anyone else had thought of it (R. 397). There was a possibility that the thin sheet under the stencil might be unlawfully obtained. Under the blue sheet on the stencil there is a very thin sheet of white paper to which, in typing, the impression made on the stencil is transferred in blue type. When the stencil is placed on the machine to be run, this white sheet is removed and, as no one thinks anything of it, is usually wadded up and thrown

into the waste basket to be sent to the incinerator without first being torn up. It is quite possible that some of these thin sheets could be picked up by unauthorized persons and wadded up in their hands, or thrown into the waste basket and picked out later, since they are so thin that several could be wadded up in the hand and no one would notice them. That thin sheet has the impression of the stencil on it so plain that you can read it easily, or even "proof" it. If anyone got a copy of that he would have a copy of the stencil. These thin sheets are not preserved. They are supposed to be destroyed when the stencil is put on the machine, and the reproduction plant disposes of them. (R. 398-399)

On the morning of June 5, 1935, the Chief of the Second Section, with Major Robinson and Captain Clark, appeared in witness' office and made a report which resulted in the investigation of this case. All solutions to problems which had not been returned to accused were gathered up and entered into the case as evidence (R. 400).

To questions of the court, witness testified that each section of the Academic Department has a typist who does the stencil cutting in the office of the section for the work of that section. Stencils are not cut at the reproduction plant. Presumably one stenographer in the first section and two in the second section did the majority of the work in the two sections in making these stencils (R. 401). But the work might have been done by any one of several stenographers. The stiff back and the thin sheet are removed from the stencils at the reproduction plant, presumably by the operator of the machine (R. 402).

Further evidence relating to the safeguarding of the problems and approved solutions while in the hands of the several instructors is found in their testimony as follows:

Major William C. McMahon, Infantry, a witness for the prosecution, testified with reference to Specification 6 as follows: He prepared Marked Problem No. 13, for which there was a solution approved by the Assistant Commandant. The approved solution was not authorized for issue to the student body prior to the time they had turned in their solutions to this problem. It was, however, prepared and printed, so that a student might have obtained a copy prior to the time the students were required to turn in their solutions (R. 199). Witness

received in the neighborhood of 200 copies. He kept them in the steel filing cabinet adjacent to his desk, or else in his personal custody. His desk was in the First Section of the school. They were not under lock and key at all times (R. 200). Witness had no personal knowledge of accused having received any unauthorized assistance in the solving of this problem. Witness missed no copies of the approved school solutions that were delivered to him (R. 409).

Major Philip S. Wood, Infantry, a witness for the prosecution, testified with reference to Specifications 7, 8 and 9, as follows: He prepared Marked Problem No. 19, for which there was a duly approved school solution. The approved solution, although mimeographed, was not authorized for issue to the student body prior to the time they had solved and submitted their solutions in writing. He received approximately 140 copies and placed them in a steel filing cabinet in his "cubicle" in the First Section where they remained for three or four weeks before issued. (R. 441-442) Witness did not sign for these solutions when he received them, nor did he have to account for the number received. He did not know exactly how many were turned over to him. He never missed any of them. He never saw a copy of the approved solution in the hands of accused prior to the time accused turned in his solution, and he had no knowledge that accused used an approved solution or any other unauthorized assistance in solving this problem. (R. 483-485)

Major Vernon Evans, Infantry, a witness for the prosecution, testified with reference to Specifications 10 and 11, as follows: Marked Problem No. 17, was initiated by him, completed and approved in the customary way. There was a solution to this problem, approved by the Assistant Commandant, which was not authorized for issue to the student body prior to the time they had turned in their solutions to this problem. The solution was mimeographed and witness received about 140 copies two weeks before they were issued to the students in due course. While they were in his custody witness kept them in one of the drawers of a filing cabinet alongside his desk. There was no lock on the drawer. The room in which the cabinet was kept was not habitually locked. At night there was a padlock, usually locked, on each of the three doors of the room. There was opportunity for these approved solutions to get into unauthorized hands prior to their lawful issue. (R. 223-224) They could be had by anyone who could enter the building and get them from the filing cabinet while witness was not there. Witness never missed any of the copies he received, but never checked to see (R. 258).

(The evidence as to the safeguarding by the instructor of Marked Problem No. 22, to which Specification 12 relates, will be stated subsequently when the evidence under that specification is summarized.)

Major John A. Robinson, Infantry, a witness for the prosecution, testified with reference to Specification 13 as follows: He prepared the supply situations, requirements and solutions of terrain exercise S-2-A, mimeograph 1-189-M (R. 493). The solution was approved by the Assistant Commandant's office and was not authorized for issue to the student body of The Infantry School prior to the time they had turned in their solutions to this problem. The solution had been mimeographed earlier and witness received approximately 135 copies of it which remained in his possession from six weeks to two months before they were issued to the class in an authorized manner (R. 494). He placed them in an unlocked filing cabinet in his office. The door to the office was not habitually locked. (R. 495) Witness did not know of his own knowledge of any unauthorized assistance accused used or received in solving this problem, and he did not miss any of the copies of the solution which he kept in his custody until they were issued to the students at the proper time (R. 514).

Major Charles M. Ankcorn, Infantry, a witness for the prosecution, testified with reference to Specifications 14 and 15 as follows: He identified a mimeographed copy of Marked Problem No. 23, 1-202-M, and the approved school solution to that problem (R. 358). The solution was approved by the Assistant Commandant's office, and was not authorized for issue to the student body prior to the time their solutions to the problem had been submitted in writing. The solution had been mimeographed and he had received about 130 copies of it, a sufficient number for the class and the instructor's copies, about a week or ten days before they were issued to the students in the authorized manner, and had placed them in his desk. A copy of the solution could have reached unauthorized hands during that period (R. 359). His desk could not be locked, and was in a building which was open to anyone who wished to enter it during certain hours (R. 360).

Major Marcus B. Bell, Infantry, a witness for the prosecution, testified with reference to Specifications 16 and 17, as follows: He identified Marked Problem No. 21, which he prepared and gave to the regular class of the school year 1934-35 (R. 318). There was a solution

to this problem approved by Colonel Scott and Colonel Weeks, the latter the Assistant Commandant, but the approved solution was not authorized for issue to the student body of The Infantry School prior to the time the students had turned in their solutions to the problem. The approved solution had been mimeographed, and about a month before its issue to the students at the completion of their solutions witness had received a package of 125 copies marked for distribution to the class, and 10 copies for his own files. He checked them to see that they were correct and then placed them in the back part of the lower drawer of his personal steel filing case. This drawer was not locked and it was possible for any unauthorized person to secure one or more copies of the solution from that place. (R. 319-320) Witness did not tell anybody where the approved solutions were. He did not know whether anybody was standing around where they could have seen him put the solutions in this place. He did not remember seeing accused there at that time (R. 330). He did not remember ever seeing accused in his office. Witness never missed any copies of the solution, but he never counted them out when he issued them to see if any were missing, and there were enough to go around. He never saw accused in possession of one of the copies prior to the time he was authorized to have one. (R. 331-332)

Major Robert C. Macon, Infantry, a witness for the prosecution, testified with reference to Specification 18 as follows: He identified Marked Problem No. 21, 1-208-M, in which he participated with a supply situation and requirement. There was a solution to this approved by the Assistant Commandant which was not authorized for issue to the student body prior to the time they submitted their written solutions to the problem. (R. 338-339) The solution was mimeographed and witness received his official copy of it, either one copy or it may have been four or five, on the day the test was given to the class. He kept them in the drawer of his desk for the short time that he had them. It was possible for someone, who was unauthorized to have a copy, to obtain a copy from his desk. (R. 340)

Major Howard Clark, 2d, Infantry, a witness for the prosecution, testified with reference to Specifications 21 and 22 as follows: He prepared that part of Marked Problem No. 21, 1-144 M, which had to do with supply. There is a solution to this problem, approved by the Assistant Commandant, which was not authorized for issue to the student

body of The Infantry School prior to the time they had turned in their solutions to the problem. The solution had been mimeographed and witness received 130 copies of it in one bundle to be held until the problem had been completed and all students' papers turned in, and then to be distributed by him to the members of the class. He also received ten other copies for what is known as the "instructor's files". (R. 94-96)

6. Continuing with the plan adopted in paragraph 4 supra, there follows a detailed study of the evidence presented by the prosecution under Specification 12 of the Charge, which evidence appears to be perhaps the most damaging against the accused of all that was presented under the 15 specifications upon which findings of guilty were reached. This evidence is found in the deposition of Major John R. Brooke, Jr., Infantry (Ex. 12), and in the exhibits appended thereto.

Major Brooke, a witness for the prosecution testified substantially as follows: He is, and had been, an instructor in the Academic Department of The Infantry School for one year. In his official capacity he is required to prepare original tactical problems and solutions thereto for use as a part of the training at the school (p. 2). He identified a paper marked "Exhibit 3" (an exhibit attached to the deposition) as Marked Problem No. 22 of the regular course of the school 1934-35, serial number 1-203 M, a marked terrain exercise. He prepared the first and second requirements to this problem and the solutions to each requirement. On the afternoon of May 29, 1935, he presented this problem to the regular class and, as instructor of the school, supervised the class in the solution of its first and second requirements (p. 3). The solutions for both requirements were turned in to him at the end of the authorized period for each requirement, and he personally graded all the solutions to both requirements. The approved solution to the first requirement was issued when all students had turned in their solutions to this requirement. The solution to the second requirement was prepared by him after the students had turned in their solutions, and he posted this solution on the bulletin board of the regular class. This Marked Problem No. 22 was a duly prescribed written problem of the school, the first and second requirements of which the accused was required to solve and submit in writing to the Assistant Commandant. The first requirement of the problem and the solution thereto were submitted by witness to the Assistant Commandant, and upon receipt of his approval witness signed a request on the reproduction plant for the publication

of mimeograph 1-203-M (p. 4). The second requirement of this problem and the solution thereto were also submitted by him to the Assistant Commandant for approval. Marked Problem No. 22, identified by witness as "Exhibit 2", is an exact mimeographed reproduction of the problem prepared by him, the solution of which he supervised on May 29, 1935. All students of the regular class received identical mimeographed copies of this problem. Problems are sometimes issued orally but are usually issued in mimeographed form. In the solution of a problem it is desired to bring out certain principles, and if these principles are set forth in a student's solution he will receive a good grade on the particular requirement being graded (p. 6). The instructor is thoroughly familiar with the problem and knows what he expects the student's reply to be, so, except in case of doubt, it is unnecessary for him to refer to his notes. The normal procedure would be to take the mimeographed requirement, as issued to the student, and compare it with the solution turned in by the student. The approved solution to the first requirement of Marked Problem No. 22 was mimeographed. The beginning part of the second situation is the solution to the first requirement of the first situation. Witness received 140 copies of the problem and placed them in a filing cabinet in the office of the Chief of Section. Had accused by any means come into possession of a copy of the approved solution to the first requirement of Marked Problem No. 22, prior to the time witness supervised the solution of the problem, he was not authorized to refer to it in preparing his own solution (p. 6). Accused was familiar with this requirement. The approved solution to the second requirement of Marked Problem No. 22 was not mimeographed or printed. Witness had an approved solution which he prepared, after all the students' solutions had been turned in, "by placing symbols, boundaries, etc." on the half-tone reproduction of an aerial photograph that had been used by the students, and he posted this on the bulletin board of the class for the students' information. The approved solutions of the first and second requirements of Marked Problem No. 22 were not authorized for issue to the student body of the school prior to the time the students' solutions were turned in. It would not have been possible for accused to have procured a copy of the approved solution to the second requirement of this problem prior to the time his solution was turned in because there were only two solutions, prepared from different photographs, in existence prior to the time the class solved the problem, and these had been in witness' possession ever since the solution had been approved by the Assistant Commandant (p. 8).

Witness identified a paper marked "Exhibit 4" (an exhibit attached to the deposition) as a student's solution of the first requirement of Marked Problem No. 22, dated May 29, 1935, bearing the code number 156, and check marks which witness put on it as he graded it. (Code number 156 is the number assigned to accused for this problem. See Exhibit 1-D.) About May 31 witness was directed by the Secretary of the First Section to make a report on the solution bearing code number 156. This was the only problem with which he had had experience at the school (p. 8).

The witness was then asked by the prosecution to compare the student's solution of the first requirement of Marked Problem No. 22 with the approved school solution of that requirement, and to state any similarities or differences which he might detect.

In order to make such features apparent, and to clarify the comment of the witness, the "Situation and First Requirement" of this Marked Problem No. 22 are stated below and are then followed by an arrangement of the various parts of the accused's solution in a left-hand column with the corresponding parts of the approved school solution in a parallel column on the right.

"1. SITUATION.--a. Maps: Fire Control Map, Fort Benning, Georgia, 1:20,000, Sheet #1; Special Aerial Photographic Map (herewith).

b. The Blue First Army, in an offensive toward the south, astride the Chattahoochee River, reached a general east-west line through the mouth of the Upatoi Creek, by dark, 28 May.

c. The 5th Infantry, the right regiment of the 2d Division, attacked at dawn, 29 May, with its west flank on the Chattahoochee River. By 7:30 AM, this regiment, with its 1st, 2d and 3d Battalions in line from right to left, had reached the line; BM 252 (13.5-20.5)--Tank Barracks--circle on Lumpkin Road, S. (one-fourth mile south of intersection First Division and Lumpkin Roads)(Aerial Map)--southeast corner of Shannon Field (16.8-19.8). The 6th Infantry had advanced as far as the First Division Road on the left of the 5th Infantry.

d. Heavy small-arms and artillery fire all along the front prevents further advance. Any movement, except where screened by trees and buildings, would produce serious casualties.

e. At 8:00 AM, Lieutenant Colonel 2d Battalion, who is near the Children's School, received the following message from his regimental commander:

Air reconnaissance reports assembly strong hostile reinforcements, with some tanks, in woods south and southwest of McAndrew Range, indicating probable Red counterattack. This regiment will organize for defense in place. Your right boundary: Ingersoll Street; left boundary: road junction at (16.25-19.65)--Bachelors' Quarters (inclusive). Coordinate fires with 1st and 3d Battalions. 2d Platoon Howitzer Company and 2d Platoon Regimental Machine-Gun Company (caliber 0.50) remain attached to your battalion. Complete orders for the defense later.

f. At the time of the receipt of this message, Lieutenant Colonel 2d Battalion is familiar with the situation as follows:

(1) Small groups of riflemen and auto-riflemen of Companies E and F from right to left are firing from such scant cover as can be found 100-150 yards south of the Reproduction Plant and the Officers' Club. The remainder of each company is located in and around the buildings in rear of the advanced groups. Two platoons of Company G with a section of Company H are located in and around the officers' quarters and apartment buildings as far south as the circle on Lumpkin Road, the 3d Platoon being in Company reserve in the vicinity of the Bachelors' Quarters. The remainder of Company H is supporting the rifle companies with overhead fire and by firing through gaps, from positions located in and around the buildings north of Wold Avenue. One gun has just opened fire from the Officers' Club. The howitzer weapons are firing from positions near the Childrens' School. The antitank machine guns, though silent, are located to protect the battalion from tank attack.

(2) Contact with the 1st Battalion is being maintained near the southeast corner of the 29th Infantry Barracks.

(3) Adjacent elements of the 3d Battalion are in contact in the apartment area, just east of the north end of the circle on Lumpkin Road.

2. FIRST REQUIREMENT.--A brief statement of the plan of Lieutenant Colonel 2d Battalion to carry out the instructions

contained in the message from his regimental commander, prior to the receipt of the formal defense order.

NOTES.--1. The solution to this requirement to be written on a terrain exercise pad. Time allowed: 1½ hours. Turn-in point: intersection Wold Avenue and Lumpkin Road.

2. Reconnaissance prohibited south of Morrison Avenue (street just north of Officers' Club), except in the area where buildings are assumed to be in possession of the 2d Battalion (solvers will stay out of buildings)." (Ex. 3 of Ex. 12)

Specification 12
Marked Problem No. 22
First Requirement

Accused's solution	School solution
"Lt. Colonel 2d Bn. plans:	"The plan of Lieutenant Colonel 2d Battalion, to carry out the instructions of the regimental commander is:
To discontinue the attack at once, and organize the Bn. for defense, in place, making only such changes in present dispositions as will enable him to carry out the instructions of his regimental commander.	(1) To discontinue the attack, at once, and organize the battalion for defense, in place, making only minor changes of disposition at this time to meet the requirements of the new situation.
To notify the companies of his Bn to stop their attack at once and organize, in place, their units for defense.	(2) To instruct each of the rifle company commanders to discontinue the attack, and organize for defense in the area now held by their companies.
To notify company commander Co. H- to support the Bn. Have him place at least one section of M.G.'s on each flank in such positions as will enable them to coordinate their fire with the	(3) To have Company H support the battalion in the defense, emplacing one section near each flank so that they can fire on the front of each of the adjacent battalions, relocating only those guns that may be

1st and 3d Bns. by firing across their fronts.

To have the Howitzer Pl. support the Bn from present positions. Giving instructions to enable the Mortar to initially, concentrate its fires on the buildings in the general area south of the Lumpkin circle.

To instruct the Pl. leader of the 0.50 calibers to place his guns in position to protect front of Bn against possible tank attacks.

3d Pl. Co. 'G' to take cover in vicinity of the draw about 600 yds. N. of their present position (vicinity Bachelors' Qtrs) and await orders as Bn res." (Ex. 3 of Ex. 12)

necessary to better support the rifle companies.

(4) To have the howitzer platoon weapons continue to support the battalion from their present positions, directing that the mortar pay particular attention to the building area south of the circle on Lumpkin Road.

(5) To form a reserve consisting of one platoon from Company G and such stragglers as may be collected, holding it mobile under cover near the southeastern entrance to Austin Loop.

(6) To locate the caliber 0.50 machine guns to cover the front of the battalion against a tank attack."

(Ex. 4 of Ex. 12)

For a complete understanding of the subsequent testimony of Major John R. Brooke, Jr., Infantry, for the prosecution, it is necessary to insert here a statement of the situation as it continues after the solution quoted above, and also a copy of the second requirement.

"4. SITUATION, CONTINUED.--a. The organization of the battalion for the defense of the assigned area proceeded in accordance with the plan of the battalion commander. With the discontinuation of the attack, the hostile fire gradually slackened, until by noon it consisted of occasional light artillery fire and desultory rifle and machine-gun fire.

b. At 2:00 PM, a messenger delivered the order of the regimental commander for the defense, extracts of which follow:

The situation remains unchanged.

The regiment will organize and defend its present position, from BM 252 (Fire Control Map) to intersection First Division Road and Yeager Avenue (16.65-19.95) (both inclusive).

Formation: 1st and 2d Battalions abreast, 1st Battalion on the right.

Main line of resistance: general line now held by the advanced elements.

Boundary between battalions: tent area at southwest corner Gordon Field (main parade)--southwest corner Gowdy Field (baseball field)--street running north from southwest corner Gowdy Field (all to 1st Battalion).

Left boundary 2d Battalion: east edge of pine grove south of polo field--intersection First Division Road and Yeager Avenue--Station Hospital (inclusive)--filter plant just north of Rainbow Avenue (exclusive).

The 3d Battalion under cover of darkness will be withdrawn to regimental reserve, and held mobile in the woods west of Russ Pool.

Battalion commanders will submit their plans for the organization of their positions without delay. Fires furnished adjacent battalions to be shown.

Movements of units to effect adjustments in accordance with this order will be made under cover of darkness tonight.

5. SECOND REQUIREMENT.--The plan of Lieutenant Colonel 2d Battalion, to be submitted on the Special Aerial Map, using appropriate symbols to designate the following:

a. Company area assigned each rifle company (blue pencil).

b. Location of each caliber 0.30 machine gun, to include the rifle-company machine guns, with solid-line arrows showing the principal direction of fire, and broken-line arrows indicating other limit of sector of fire. (Use red pencil. Use company letter in angle to indicate rifle-company machine gun.)

c. Position of each of the howitzer platoon weapons. Show in which area the mortar will fire. (Red pencil)

d. Position of each antitank (caliber 0.50) machine gun, using arrows, as for the caliber 0.30 machine guns. (Red pencil)

e. Ammunition distributing point or points. (Blue pencil)

f. Location of the battalion aid station. (Blue pencil)

NOTES.--1. Solutions will be turned in at A. H. No. 4. Time allowed: 2½ hours.

2. Reconnaissance restricted to the area assumed to be in possession of the Blue forces.

3. Solvers will remain out of buildings, and will exercise care in and around cultivated plots within the area under consideration.

4. If machine guns are located in buildings, place a small letter or numeral beside such position, indicating the floor on which the gun is emplaced, viz., B--basement; 1--1st floor; 2--2d floor; A--attic." (Ex. 3 of Ex. 12)

The summary of Major Brooke's testimony continues: In paragraph 1, the first 16 words of the approved solution and the student's solution are exactly the same, including the punctuation, with the exception of the word "Battalion" which is abbreviated in the student's solution. The remainder of that paragraph and all other paragraphs have the same meaning and are in the same order as they appear in the approved solution, with the exception of paragraphs 5 and 6, which are transposed. There are 6 paragraphs in the approved solution to the first requirement, and there are also 6 paragraphs in the student's solution. Witness compared the solution of the second requirement of this problem, as submitted by student with code number 156, with the approved solution of the problem (p. 9). The student's solution of the second requirement was radically different from the approved solution. The latter used two companies supported by machine guns to defend the main line of resistance, one company in reserve; the student's solution had three companies on the main line of resistance. The witness was then asked by the prosecution how he was able to compare these solutions so readily and testify about the similarities or differences so accurately. To which the witness replied that having been directed by the Section Secretary to compare these papers, to make a special grading of this paper, he naturally had it called to his attention. He went to where the solutions were kept, pulled out the solution with code number 156, and in going through the first requirement was impressed with the solution. It was very good, an excellent solution to the first requirement. He checked off all the principles, and then unfolded the reproduction of the airplane photograph which was used in solving the second requirement, and, as he believed, remarked to himself at the time, "Well, this fellow has ruined a mighty fine solution", because his solution to the second

requirement was so different from that approved by the Assistant Commandant. Witness reported to the Section Secretary that the student in question had received a grade of at least "C", probably a "B" grade on this problem. Witness was then told to compare it with the approved solution. He did this and found it very similar, using the same number of paragraphs, and the wording of the first paragraph so much like the first paragraph of the approved solution (p. 10). He reported this fact to the Chief of the First Section, Colonel Scott. At that time witness did not know to whom this solution belonged. He had corrected approximately 120 students' solutions since he had been an instructor at The Infantry School, and could not recall any solution "having this comparison, with regard to this problem, other than code number 156". This was the only marked problem that he had prepared and graded at this school. If the student in his solution has all the principles which the instructor expects to be brought out, the student will receive a very excellent grade, and it is "not essential that his solution follow the approved solution verbatim".

To cross-interrogatories, Major Brooke testified substantially as follows: As an instructor in The Infantry School it was his duty to "put over to the students", to the best of his ability, the ideas of the school with respect to tactical problems (p. 11). The student should arrive at a satisfactory solution if he follows the principles which are brought out. Witness did not believe that there was anything contained in the solution of the first requirement of this problem which had not been taught at the school. In preparing the problem he discussed with Major McMahon the various things to be brought out in it and requested that he mention them in his conference on special types of defense. Witness attended this conference and found that Major McMahon did bring out the principles. Witness would not put anything into a school solution that had not been previously taught to the class. There were, however, no illustrative problems used in the classes on this particular type of terrain exercise. When he first examined the solution to the first part of this problem he was not looking for anything suspicious (p. 12). He was then grading the problem and did not compare it with the school solution, but merely noticed that all the principles were in the solution. As an instructor he did not think there was anything criminal about a student making a good mark.

As a matter of fact it was a pretty good thing for all students to make good marks, and this does the instructors no harm. In the original preparation of this problem in making the solution to the second requirement, he made an over-lay on another mosaic and submitted that to the Assistant Commandant for approval. It was on a different map of an entirely different scale from that presented for the students to use. Until all the solutions to that requirement had been turned in he had not made an approved solution on the same airplane mosaic on which the students prepared their solutions, the one which he posted on the board for the information of the students (p. 13). Accused's solution to the second part of this problem was not as good as his solution to the first part, nor was it as good "as the majority of the solutions submitted by the majority of the class". There had been a limited amount of instruction given to the class on the second phase of the problem, but there had been no illustrative problem similar to that used in the class (p. 14). Certain principles had been brought out by Major McMahon dealing with a requirement similar to the second part of this problem with reference to the location, organization, and disposition of machine guns. At least ninety per cent of the class had very favorable solutions to this problem, indicating that the principles were understood by the majority of the class. Witness believed that records of the school for quite a number of years would indicate that there were approximately ten per cent unsatisfactory solutions turned in to all problems. He had no knowledge of the truth of the charge against accused. Accused never obtained any unauthorized assistance from him, nor did he ever permit accused to have, or have knowledge that he did have, access to the approved solutions of the problems prior to their issue to the student body (p. 15). While witness had stated that the first 16 words in the first paragraph of accused's solution were identical with the first 16 words of the school solution, with the exception of the abbreviation of the word "Battalion", there were no words or phrases contained in those 16 words which are not ordinarily accepted as military terminology and it was entirely possible that the same language might be used (p. 16).

7. While the plan of this opinion, previously stated in paragraph 4, included a detailed study of the evidence under but one of the fifteen separate specifications upon which findings of guilty were reached, it appears to be desirable to show, as briefly as may be done, certain other noteworthy and emphasized similarities between accused's

solutions and the approved school solutions, as they are disclosed by the evidence under some of the other specifications.

a. Use of term "control point" by accused.

As a part of his solution of the first requirement of Marked Problem No. 19 (Specification 7) accused used the following language:

> "To establish a control point at the Columbia end of the Columbia-Wrightsville bridge, in order to enforce the following priority of movement * * *." (Exs. 7,8,9-a)

The approved school solution to this requirement contains the following:

> "To establish a control point on the Columbia-Wrightsville Bridge with the following as a tentative plan for priority of crossing: * * *." (Exs. 7,8,9a-b)

Major Philip S. Wood, Infantry, a witness for the prosecution, testified in part as to this substantially as follows: He wrote the "decision problem" and the school solution of Marked Problem No. 19 (R. 441). The words "control point" were "more or less" a coined phrase, coined by him in preparing the solution to this particular problem, and he did not believe it had previously ever appeared by that name in any publication. In preparing the original solution to this problem he wanted to find a name by which to designate a point where he desired to have a staff officer located who would control the march of this brigade in the event that there was some confusion at the "point of conversion" of the two moving columns, the east end of the Wrightsville bridge. Not being able to think of a name by which to designate that position he thought up the phrase which he used, and designated the position as a "control point". This phrase cannot be classified as "canned military language" (R. 455). To his knowledge the phrase, "control point", had not been given to the class in any lecture or conference at the school last year. He believed that he had seen it in another problem, but not at this school. He had seen the principle employed before, but it was not in common use in military problems at this school. (R. 457) He did not expect to find it in the students' solutions. The matter came up in a discussion at a meeting of the review board. The phrase was apparently unusual and they wanted an explanation from him as to why he used it, and he explained what he meant by it (R. 458).

Upon cross-examination by the defense Major Wood testified in part substantially as follows: In this problem as given to the student only one bridge could be reasonably used by the brigade in making the crossing of the Susquehanna (R. 468). The establishment of a "control point" was not essential in this problem. The situation in the possession of the student "apparently" did not indicate a "control point" being established on the Columbia side of the river to direct the brigade's crossing. The bridge was definitely a "bottle neck" where all the troops of the two columns moving on it by different routes would converge. Witness thought a commander would be subject to severe criticism if he did not establish some sort of a "control point" at that place. He also believed that the accused's solution to the problem was a logical solution, "but not logical to be used in the circumstances". The school solution was logical, and the accused's solution was similar to the school solution, but the establishment of a "control point" by accused was not logical "because no one else in the class did it". Witness solved it in that way and the accused, following his instruction on the subject, could have solved it similarly. (R. 469) Witness was then asked to read the following matter from Mimeograph 2-35-M, a conference on troop movement by motor transport, which he said was a part of the instruction given at the school last year:

> "19. * * * If the congestion is great it may even become necessary to run the traffic by a time table."

Reading from page 6 of the same document, subparagraph 3 under paragraph 24, the latter paragraph having the general heading "COMMAND AND STAFF DUTIES" and having reference to orders of a commander directing movement of unit by motor transport:

> "The routes available for the move, and any restrictions or other control exercised by higher authority."

Reading subparagraph b under the same paragraph 24:

> "Upon receipt of orders directing the movement of a unit by motor transport, the unit commander must make timely and intelligent decisions respecting the troops and the material to be moved by motor transport, time at which

animals and animal transportation will march and in general, the order in which all units should arrive in the new areas."

Reading from the same document subparagraph 6 under paragraph 11:

"Consults with S-1 as to marking and policing entrucking and detrucking points, and traffic-control arrangements en route."

Reading from subparagraph a of paragraph 25:

"Traffic control must insure that road blocks be avoided. This applies to movements by motor transportation, by marching, or to a combination of the two."

Witness believed that the point at issue in the earlier question was the use of the phrase "control point", which he did not believe had ever been contained in any instruction at the school. When the review board objected to its use and he explained it they said that it carried the meaning they wanted there as well as any, and, for lack of a better word at that time, they let it go through as a "control point". He did not believe that his earlier answer carried the impression that the subject of traffic control had never been taught. (R. 470-471) While preparing the solution, and in "groping around" for a word by which to designate the position of the staff officer he had selected to be on the bridge to control traffic, the phrase "traffic control station" or "traffic control point" might equally have come into his mind, but, as it happened, the phrase "control point" came to his mind and he used it. He could not think of a better phrase at that time, but now he would call it a "traffic control post", as it is being taught in the Second Section (R. 472). The matter of traffic control and priority of schedule would probably come under the teachings of the Second Section, and witness presumed that the students had instruction on that subject (R. 474).

b. Similarity of sketch map of accused to that of approved school solution.

The second requirement of Marked Problem No. 17, Exhibits 10 and 11, a-b (Specification 11), contained in part the following:

"NOTE.--1. Indicate on your sketch as much of your plan as practicable. Use the space under 'Remarks' on the sketch (and the back of it) for any explanatory notes required and for such part of your plan as cannot be indicated graphically."

Major Vernon Evans, Infantry, a witness for the prosecution, testified in part as to this substantially as follows: He initiated Marked Problem No. 17 of the regular course last year and on May 22, 1935, held this "terrain exercise" out in the field for the regular class (R. 222-223,225). The second requirement of the problem was a continuation of the first part and called for so much of the plan of the battalion commander as would be included in paragraphs 2 and 3 of a formal written order, and one or two additional details to be put on the sketch (R. 227). The school solution to the second requirement was a sketch supplemented by explanatory and additional remarks on the back thereof (R. 233). At the request of the prosecution, witness prepared an over-lay on thin paper (Exs. 10 and 11-x) of the sketch submitted by the accused as a part of his solution to the second requirement (Exs. 10 and 11-s)(R. 235). When the second situation of this problem was issued to the students they had in their possession the situation sketch (p. 3 of Exs. 10 and 11a-b) on which they turned in their solutions to the second requirement (R. 236). Witness then indicated the following similarities between the sketch of the accused (Exs. 10 and 11-s) and that of the school solution (Exs. 10 and 11a-b): 1. The size of the "goose eggs" for Companies A and B showing the areas to be occupied by those companies. 2. The position of the machine guns. Both solutions have one platoon, two sections and both are located in the same place. The sectors of fire as indicated by the machine guns in that platoon are in the same direction. 3. The A Company position has an anti-tank gun on both solutions the same, with the field of fire the same. 4. The lengths of the arrows indicating the line of tank fire for the .50 caliber machine guns in Company A area are the same on both solutions, both pointing in the same directions. 5. In the B Company area both solutions show no change in the positions of the machine gun platoon and the two anti-tank guns already there (R. 237). 6. The attached platoon - detached platoon of Company C with one section of machine guns - is shown on accused's solution one-fourth inch from the position shown on the school solution; both have one section of machine guns attached to that platoon and so indicate on the sketch. 7. The

position indicated on the sketch for the location of the remainder of Company C - Company C less one platoon - in the accused's solution is three-eighths of an inch from where it is located on the school solution. 8. Accused and the school left the mortar where they found it, not moving it. 9. The first aid station is located in the same position in both solutions. 10. The command post in accused's solution is within one-fourth of an inch from where it is located on the school solution (R. 238).

Upon cross-examination by the defense Major Evans testified in part substantially as follows: He corrected this paper when it was handed in and at that time did not notice anything suspicious about it. He only found the suspicious circumstances when he was directed to look for them (R. 239). There was not anything in the school solution to this problem which had not, in general, been taught at the school (R. 257-8). While he said that the "goose eggs" indicating the positions of Companies A and B in accused's solution were similar in size to those in the school solution, he did not call the court's attention to the difference between the two solutions in the symbols in the section of machine guns. There was a difference in the type of symbol used (R. 266). For the detached parts of Companies A and B in the assembly position in the two solutions the size of the "goose eggs", and their contours and areas, are somewhat different, but the symbol itself is not very different (R. 267).

c. Location of an ammunition distributing point.

Major John P. Robinson, Infantry, a witness for the prosecution, testified in part as to this substantially as follows: He prepared the supply situations and requirements and the solutions of those requirements, the fourth and fifth sections of a terrain exercise known as Marked Problem 1-189-M (S-2-A)(Specification 13)(Ex. 13a-b; R. 493). He was in charge of the class in the afternoon of May 28, 1935, to issue Section IV, the third requirement of this marked problem and to receive the students' solutions (R. 495). Subparagraph c of this requirement reads:

> "c. Give location and hour of opening of the brigade distributing point for artillery ammunition." (Ex. 13a-b)

Accused's solution reads:

> "c. Near bridge over Upatoi on south bank - (Columbus-Cusetta Road) Open 9:40 P.M.
> Ammunition for 1st Bn 3d FA to be supplied direct, by their own motors." (Ex. 13-s; R. 498)

The school solution to that part reads:

> "c. To open a distributing point for artillery just south of the Upatoi bridge at 9:45 P.M. The 1st Battalion 3d Field Artillery to be supplied direct by its own motors." (Ex. 13a-b)

The instruction of the school upon the location of such a point is as follows: The ammunition distributing point may be in the light artillery area or just in rear of it. It should have some cover. It should, as in this case where animal drawn and motor transportation will use it, be in a place where both can reach it. It should not be in a position which will block traffic on a main route of advance or a main supply road. Witness had several times personally visited and looked at the area designated for this ammunition distributing point, and on the day of the problem took the whole class by that spot on their motor reconnaissance (R. 504). On this day, May 28, it was apparent to him that motor vehicles could not get into that area which is designated in the school solution as the location of the artillery distributing point, although it had not been apparent to him previously. It had seemed to be a good place, but on May 28, due to some work being done along the road, there was a big cut there and a bank over which motor vehicles would be unable to proceed. The place at that time would not "satisfy all the attributes" for a brigade distributing point (R. 505). On the date he solved the problem accused had an opportunity of making a personal reconnaissance of that terrain in connection with his solving of the problem since the whole class passed by that point on a motor reconnaissance. The point selected by accused "was taken" by witness to be the identical point selected by the school solution. When witness discovered on the date of this problem that the location selected in the school solution did not "satisfy all the attributes" necessary for a satisfactory artillery ammunition distributing point, he reported it to the Chief of Section, Major Hearn (R. 506). In

compliance with his instructions no cut was given for any solution that selected the same point as the school solution. There was nothing in the requirement calling for the student to tell how the 1st Battalion, 3d Field Artillery, is to be supplied with ammunition. Accused did so, and so did the school in its solution (R. 508).

Upon examination by the court Major Robinson testified in part substantially as follows: The location of the artillery distributing point in his solution, the school solution, was just south of the Upatoi Creek bridge (R. 518) originally, but it would not be his selection on the date the problem was solved. It was his prior selection upon his previous recollection of the terrain, and selected from a map without having seen the terrain for some little time before he prepared his solution. In making his original solution from the map he did not know of that change in the terrain. On the date the problem was given he was "particularly careful" to observe that point when they passed it in making a motor reconnaissance of the area, and then noticed it was changed from its original features. The facts that caused him on May 28 to consider that this point did not meet the requirements the school teaches for such locations were these: that previously this was a level area, so indicated on the map, and might well be used for an artillery distributing point, but on the ground on May 28 it was discovered that there was a high fill (R. 519) in the road at that point, placed there by workmen on the road since he had last passed the area. Without engineer troops working several hours to level out that high fill or cut part of it away the point was unsatisfactory for an artillery ammunition distributing point, since it was not accessible to either trucks or animal-drawn vehicles (R. 520).

Upon recross-examination witness testified that he prepared his solution from the map which appeared to indicate that this was a suitable place. The problem was not solved by the students from the same map. They passed through the area on a motor reconnaissance and the solutions were turned in at Road Oval 243 at the end of the motor reconnaissance. Accused could have used this same map in solving the problem after the motor reconnaissance, but witness did not know whether he solved it from the map or from notes made on the reconnaissance (R. 521). Accused's paper was the best that was turned in by 122 students who took the problem (R. 522).

8. The prosecution having rested its case (R. 523), the defense moved that all approved solutions be withdrawn from evidence, and all testimony regarding them be stricken from the record, for the reason that there had been no evidence submitted to connect the accused with any one of them. This motion was denied (R. 524).

Thereupon the defense moved, under the provisions of paragraph 71 d, Manual for Courts-Martial, that there be entered a verdict of not guilty as to the charge and each specification thereunder. The reasons advanced by the defense in support of this motion, accompanied by a recital of the evidence relating to the preparation and safeguarding of the approved solutions, were, in brief, the failure of the prosecution to prove that any one of these solutions had ever reached the hands of the accused prior to the time they were issued to the whole class in the due course of events, and also to prove that accused had used any unauthorized assistance. This motion was not sustained. (R. 524-527)

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

The accused was sworn at his own request and testified substantially as follows: He was a student of the regular class at The Infantry School, 1934-35, from about September 1934 until June 1935. Since June 29, 1935, he had been in arrest. In 1922 when he returned from overseas he entered the regular tank course of 1922-23 and graduated from the Tank School. Subsequently for five years he was the Tank School librarian and the junior member of the first Tank Board that was organized in the United States Army. The last three months of his service with the tanks was with the Tank Maintenance Company at what was then known as "Camp Meade", Maryland (R. 530). In 1927 he was detailed on the Detached Officers' List and assigned to the First Corps Area as assistant recruiting officer at New Haven, Connecticut. In addition to those duties he was detailed with the Organized Reserves as instructor of the 417th Infantry. Within a short time he was relieved from his recruiting assignment and detailed for full time with the Organized Reserves in charge of the New Haven Reserve District. He remained on that duty for approximately seven years until he reported for duty in the 1934-35 class of The Infantry School.

The work in New Haven with the Organized Reserves is in some respects different from the work in other Reserve organizations because the congested area of that locality permits more than the average interest to be attained in such affairs. The distances were not great and the interest of reserve officers could be more easily appealed to than in some of the more rural districts. His duties generally consisted in holding bimonthly infantry conferences and lectures at New Haven and Meriden. Officers of practically every branch of the service were present at these meetings. That district of Connecticut is a manufacturing one and there are a large number of officers directly under the Assistant Secretary of War because of the procurement phase of their training in the Meriden district (R. 531). At New Haven he conducted a monthly school for the quartermaster officers of the state of Connecticut, the only quartermaster school in the state. In years that money was available he took the regiment to which he was assigned to summer training camp in which he usually had about eighty officers. It was necessary during the winter to prepare schedules of instruction for these infantry officers. These schedules were furnished in advance to the reserve officer concerned, and he was also furnished with instruction references, material and text, as far as possible, so that when he came to camp he would be in position to carry on his work intelligently from the first day of the camp. This required the mimeographing of problems and their solutions, a "goodly portion" of which were covered by comment sheets. As a basis of instruction there were used the two volumes published by the General Service Schools at Fort Leavenworth, Kansas, known as "Tactical Problems and Decisions", the Mailing List of The Infantry School, to which he was a subscriber, and also the text of the Army Extension Courses, in recent years prepared by The Infantry School. In addition to that summer training, accused as a rule reported to camp as an instructor in the Civilian Military Training Corps. At Fort Adams, where he was assigned every year for this duty, he was usually designated with some others in charge of infantry instruction. When the Civilian Conservation Corps program was begun he mobilized one of the first three companies in the First Corps Area and took them to this camp, where he remained as camp commander until the regular tour of summer training and then joined his reserve regiment at Fort Adams. After returning from that duty in 1930, he was in charge of the New Haven Reserve District again until reporting for duty at The Infantry School.

While on duty in the New Haven Reserve District he was able to increase the enrollment in the extension courses about 900%. To do this he devoted the larger portion of his time to the handling of extension courses (R. 533). In that area there were a large number of reserve officers who were Yale graduates and most of them were enrolled in the extension courses. They entered upon the work with enthusiasm and their interest had to be retained. There was never a day that the morning mail did not bring in a large number of extension course lessons to be corrected and graded. These extension courses, except those applicable to the technical courses, originated at The Infantry School (R. 534). The lessons given to the student were like those given to students at this school in that they included a situation and a requirement. When completed they were returned to accused for correction. The yard stick by which the proficiency of the student officers was measured was furnished in the solution by the instructor who prepared the lesson. Upon the return of the student's solution it was graded by comparison with this solution. The Infantry School also furnished a "comment sheet" and a "cut sheet" on the solution. The "comment sheets", particularly, on the different problems enabled accused to become more familiar with the teachings of this school than did the problems or the solutions, since the "comment sheets" gave the "why" of the school solution. When he completed the grading of the student's solution he returned it with corrections, and also included The Infantry School "comment sheet" and the approved solution (R. 535). Accused estimated that, due to the large enrollment at New Haven, he handled approximately 3000 or 3500 problems in the period of almost seven years that he was there. The military terminology used in these problems, solutions, and "comment sheets" was no different from that used at The Infantry School last year (R. 536).

About one year after he reported for duty as part-time instructor of the Organized Reserves, at the request of the regimental commander through the Chief of Staff of the 76th Division the War Department assigned him to full time duty with the unit in which he was then serving as only part-time instructor. Some two or three years later, when his normal tour of duty there would have expired and he was ordered to The Infantry School, the officers of the regiment petitioned the regimental commander to make an effort to have his tour of duty extended. This was done by the War Department but he was first required to take this Civilian Conservation Corps company out. After

that was done he was allowed to return to the regiment as the instructor and remained there until he reported at The Infantry School for duty.

In his instruction to the Organized Reserves of his area he did not include weapons, except that in one year, he believed 1931, he obtained permission to use the rifle range at the Naval War College near Fort Adams. There were no range facilities at Fort Adams. Prior to that time, because of the nature of his service, he had had no instruction or experience with weapons since 1922.

When he first reported as a student at The Infantry School, he was seated in the back row at the back of the classroom, which was about 60 by 90 feet in size (R. 538). A condition developed during the first month at the school that caused him to believe that there was something wrong with his eyes, and he thought this was due to the fact that he sat so far from the platform as to place a constant strain upon his eyes, and also that because of his lack of weapon experience he had to give a little more study to the weapon course than the average officer. On that account he requested to be allowed to change his seat to the front row, and his request was granted. Beginning in the month of September, the first month of the school, and continuing as late as April, he received innumerable treatments for this eye condition. Upon his first examination glasses were prescribed and the surgeon recommended that he "wear them religiously". Accused did so but within a very short time his eyes began to blur and the left eye was very painful and bloodshot. The surgeon then found that the tear duct to the left eye was closed, a condition which allows the tears to go down the outside rather than the inside. (R. 539) The tear duct then had to be cleared by repeated use of surgical instruments. This treatment continued through October, November and a part of December. During this period he had tears rolling down his cheeks most of the time and it was quite impossible to do much reading. At one time the surgeon told him he had to choose between using his eyes and failure to obtain benefit from the treatments. (R. 540)

In the fall and winter his record would show that he had a "liberal sprinkling" of unsatisfactory marks, but his record on the whole was in excess of the minimum requirements for passing the weapons course.

During the late winter or early spring accused received additional instruction in tactics from Majors Terrill, Murray, and Evans, one of whom devoted a period to the approach to a tactical problem and an estimate of the situation, the other to defense, and the third to attack. Accused's grades improved subsequent to this instruction, and he was quite sure that it had an effect upon his ability to solve problems and grasp the technique of the school (R. 541), and was a contributing factor in the improvement of his grades.

With the exception of Major Dawley, in whose office he had once been for less than thirty seconds at the request of and in the presence of Major Dawley, he had never been in the office of any one of the several instructors who gave the problems described in the specifications of the charge. He had never been in the reproduction plant on the post. Asked particularly as to each of the problems involved in the charge against him he stated that he had received no unauthorized assistance in solving it, and that he had never had in his possession, had access to, or had used the approved solution of the problem before it was regularly issued to him and to the other members of the class. (R. 542-546)

Captain John S. Miller, 13th Infantry, a witness for the defense, testified substantially as follows: He had been in the same class with accused at The Infantry School during the school year 1934-35. They had occupied adjoining desks. At the beginning of the year their desks were in the back of the room on the left as they faced the rostrum, and in the latter part of the year they were in the front of the room next to the rostrum and on the same side as before. He had studied with accused at his home and had been closely associated with him in the field in the solution of problems. (R. 550) During the school year he had never observed the accused using or having in his possession at any time unauthorized material, including approved school solutions, prior to the time he was authorized to have them in his possession. Witness believed that from his position in the classroom in relation to accused he would have observed accused had the latter used any unauthorized materials in the solution of his problems. He had no reason to believe that accused at any time had in his possession any materials that he was not supposed to have in the solution of a problem. He had known accused at the Tank School at Camp Meade, Maryland, in 1924, and met him again when he came to The Infantry School last year.

He knew accused's general reputation among other officers of the Army with whom both had served, and that reputation with reference to truth, honesty, and integrity was excellent.

To questions of the court, witness testified that on quite a number of occasions during the latter part of the year when they were having their tactical problems he studied with accused on the night before the problems were to be given (R. 551).

Lieutenant Colonel Henry Terrill, Jr., Infantry, a witness for the defense, testified substantially as follows: He is infantry instructor in the First Section of The Infantry School, the tactical section, and chief of what is called the "Attack Committee". Last spring (1935), the exact date he did not recall, special instruction was directed to be given to a group of about twenty officers, including accused, and the group was assembled for the purpose for three consecutive Saturday mornings. (R. 552) The instruction was not individual. The officers were assembled as a group and various instructors conducted the review work. The instructor went over certain points which were considered "primary points" and others on which the students "had fallen down in". The period of instruction was then opened for discussion and questions of the students answered. Later the group was divided into smaller groups of four or five and an instructor, and the same plan of questions and answers followed. (R. 553) The object of the instruction was to improve the students' ability to solve problems (R. 554). During a field exercise on or about May 22, in which troops of the garrison were turned over to the Academic Department and student officers assigned to various staff and command functions, accused participated as regimental executive officer and performed his duties in an excellent manner deserving of commendation (R. 554-556).

Captain George H. Rarey, Infantry, a witness for the defense, testified substantially as follows: His present assignment at Fort Benning is "test officer" with the Department of Experiment. He has known accused since they served together at Camp Meade, Maryland, in 1925. Accused has a reputation with him as an honest and efficient officer. He had never heard an officer speak in a derogatory manner of accused as to his honesty or "as to his taking care of his job" (R. 558).

Major Charles R. Lanahan, Medical Corps, a witness for the defense, testified substantially as follows: His duties at Fort Benning were

those of assistant to the surgeon, eye, ear, nose and throat clinic of the Station Hospital. Accused was sent to this clinic in September, 1934, for treatment of an eye condition of refractive error with which was associated a chronic conjunctivitis. Witness determined the refractive error, prescribed glasses, and treated the conjunctivitis over a period from September through November, with one other visit in April. He saw accused first on September 8, then on October 26, 27, 28 and 29, November 3, 10, 17, 24, 27, 28 and 29, and on April 13. For a number of these visits witness had to dilate a tear duct to remove an obstruction. (R. 559-560) It was necessary to produce some anaesthesia as this is rather a painful operation. Since he used an anaesthetic it was not painful but was uncomfortable, an inconvenience and an annoyance. When the eye is irritated there is usually a production of tears and if they are not drained away through the tear duct they run out over the face causing annoyance and obstructing the vision somewhat. That condition "obtained" in this case during this time in October and November. Accused was marked "duty". (R. 561)

Captain George E. Elliott, 24th Infantry, a witness for the defense, testified substantially as follows: During the period September 1934 to June 1935 he was a student at The Infantry School in the same class with accused. Between June 5 and 20, witness was called into the office of Major McCabe (R. 562) and asked if at any time he had seen accused or anyone else in the class using material which was of a "cribbing nature". He replied that he had not, and that accused had sat across the hall from him during the term and he had never seen accused using anything of that nature. Before Major McCabe asked the question, and before witness answered, Major McCabe said that he was in no hurry for an answer, and that witness should go out and think it over and to come back in and answer when he was ready to say anything. Witness replied that "as far as he knew of" he could think it over "forever" and could never tell him any more than that he sat across the hall from accused during the whole term and never saw him doing anything suspicious nor saw any unauthorized material in his possession. Witness went in with Lieutenant McGraw (R. 563) and knew that other students were called in (R. 564).

Captain James P. Wharton, Infantry, a witness for the defense, testified substantially as follows: His duty at Fort Benning is that of Public Relations Officer and Recruiting Officer. He had known

accused since 1922 (R. 564). They served together in the "Tanks" at Fort Meade, Maryland, from 1922 to 1927. He knew accused's reputation as an officer at that time and it was excellent, and his reputation for veracity, honesty, and integrity was the best (R. 565). Witness was a student in the 1933-34 class at The Infantry School (R. 566). During the school year he found it necessary and desirable to take additional and special instruction by means of which he was very materially aided in his ability to solve problems. He thought his marks increased about 100% after such instruction. Prior to coming to The Infantry School he was "publicity officer" for about seven years in Baltimore. (R. 567)

Mr. John L. Gilson, a witness for the defense, testified by deposition substantially as follows: He is "Civilian Aide" to the Secretary of War for the State of Connecticut, and Judge of the Court of Probate, New Haven, Connecticut. As such "Civilian Aide" he had been responsible for obtaining the state quota for the Civilian Military Training Camp, and for maintaining the state enrollment organization. Between the years 1927 and 1934, and during accused's term of service in New Haven, he permitted accused to share his office in the United States Federal Building reserved for the "State Civilian Aide". Accused was extremely cooperative in helping to enroll candidates for the CMTC camps and made a splendid record with the Organized Reserves. Through his association with accused witness was enabled to form an opinion of his character and ability as an officer which he expressed in the following statement:

> "I think he is an extremely capable infantry officer, an efficient instructor in tactics, an unselfish, loyal, and honorable soldier who commanded the respect and esteem of those who came into official contact with him here." (Ex. D-L)

Colonel Charles C. Rossire, Jr., Infantry Reserve, commanding 417th Infantry, a witness for the defense, testified by deposition substantially as follows: He has known accused since early in 1928, and between the years 1928 and 1934 was intimately associated with him in the usual relations between Executive Officer, and later Commanding Officer, of the 417th Infantry, and the Unit Instructor, and constantly in touch with him in supervising training and instruction. He was in a position to

observe accused's work probably better than that of any other officer of the regiment. This work unquestionably "savored of intelligent understanding of our present day tactical principles to include at least the workings of an infantry brigade". Witness had never known an officer below field grade with as thorough a knowledge of tactical principles. Accused knows the subject and in addition has the ability to instruct others. Accused based the "majority of his teachings" on texts and materials emanating from The Infantry School, properly utilizing the printed materials and texts of The Infantry School Extension Courses, including Volumes I and II of The Infantry School Mailing List, in his regularly scheduled conferences with the officers of the 417th Infantry. A large percentage of these officers were enrolled in the Extension Courses of The Infantry School. Accused was thoroughly familiar with the teachings of The Infantry School, as outlined in these materials, particularly so since he had charge of all the work in connection with the Extension Courses, including the correction of all lessons. He attempted to teach these officers the methods outlined in those courses, particularly with reference to the use of terms used in the military service by well schooled tacticians, and it was seldom that an officer had such a thorough knowledge of the correct and accepted terms, as they are used in the Extension Courses and the General Service Schools. The "majority of the instruction" of the 417th Infantry by accused was devoted to the study of tactics, almost entirely so, except where other subjects were specified by higher authority. The greater portion, if not the entire time, of each conference was devoted to tactics. Almost no time was devoted to the study of infantry weapons, due to the fact that the 417th Infantry had no regular quarters where such weapons could be stored, demonstrated, or used. Such instruction in weapons as was possible was usually given by officers of the regiment who had recently returned from The Infantry School. Witness was in command of a reserve officers' camp at Fort Adams, Rhode Island, in 1931 and in 1933, at which accused served as a Regular Army instructor. Accused's work there was entirely satisfactory. The schedule and tactical problems worked up by accused were unusually interesting and instructive. His critiques were especially clear and showed conclusively his grasp and thorough understanding of tactical problems and language. The teaching methods used by him at these summer encampments were based largely on data obtained from The Infantry School. During the time accused was Unit Instructor of the 417th Infantry, the attendance at school conferences was greatly increased.

More officers enrolled in the Extension Courses and greater interest was displayed in every way. Accused paid particular attention to the training of junior officers for instructors in tactics. In May, 1933, witness requested Congressman Maloney to use his influence to have accused continued for another year as instructor of the 417th Infantry. Witness did this entirely because of accused's recognized ability as an instructor. He felt that the fine work accused had started would suffer greatly by losing him. His marked ability as tactical instructor and in training other instructors was such that witness wanted to have him as long as possible. During the years of his association with accused witness could hardly fail to form an opinion as to his character and ability as an officer, and he stated it as follows:

> "He is an officer of the highest type, a credit to the Military establishment. Absolutely honest and trustworthy, hard working, courteous at all times. A brilliant instructor, especially in tactical subjects. His influence among the junior officers was most marked. He has a brilliant mind and a remarkable memory. Invaluable as an instructor. A man to whom any officer could come to for help and advice. A most capable officer and a gentleman at all times."

Witness would be pleased to have accused serve in his command, in peace or in war, in any capacity, and would particularly like to have him as regimental G-3 due to his knowledge of tactical principles and training.

Upon cross-interrogatories of the prosecution, witness testified that his earlier statement that he "had never known an officer below field grade with as thorough a knowledge of tactical principles" as accused, was based largely upon comparison of accused with other instructors of the Regular Army observed during summer training and conferences, and upon accused's ability to make the subject clear and at the same time interesting. Witness based his information as to the teachings of The Infantry School upon the "Mailing List" of The Infantry School and the Extension Courses from 1928 to the present time, as well as upon conferences conducted by the graduates of the school.

Upon a redirect interrogatory of the defense, witness testified that so far as he knew there had been no change in military terminology during the existence of The Infantry School. (Ex. D-M)

Colonel George E. Hall, Auxiliary Reserve, a witness for the defense, testified by deposition that he has known accused for seven or eight years. Witness has been "connected with the military of the United States" since the National Defense Act of 1920. Accused was associated with him as Unit Instructor of the 417th Infantry while witness was in command of this regiment. Accused came to the 417th Infantry as a first lieutenant, dividing his time between the duties of Unit Instructor and Recruiting Officer. His personality, enthusiasm, qualities of leadership and broad knowledge of military subjects impressed itself upon the officers of the regiment to such an extent that they desired that he give more of his time to his duties as Unit Instructor of the 417th Infantry. The high opinion of accused by officers of the regiment obtained while he was acting as part-time instructor was notably increased when he gave his entire time to the organization. His qualities of leadership and his personality were markedly noticeable in his method of instruction and teaching, which was more that of an associate than that of a professor. His complete mastery of the subjects taught by him won for him the high regard and admiration of the officers of the regiment. Witness never knew him to be at a loss for a proper and accurate answer to any question submitted by students in his classes, and recalls one officer saying that it seemed that "he knew everything". His solution of map problems was especially impressive, as well as his frequent references to actual experiences of similar groups and units overseas. He required each officer, upon all occasions, to arrange his orders and instructions to correspond with the prescribed forms of orders, and insisted that military terms and phrases should always be used, because such terms and sequences of parts have fixed and definite meanings, and are more clearly understood by reason of their brevity, without needless and unnecessary words that are liable to result in ambiguity. The number of officers taking extension courses was very materially increased during accused's service as Unit Instructor. As a result of his successful efforts his work as examiner of papers in the courses was increased, and he marked an unusually large number of answers submitted by the students in these courses. Witness found accused to be a man of mature judgment, whose advice and counsel were of material help, and whose grasp of the subjects and work assigned to him was complete. Witness' estimate of the work done by accused is set forth in a letter addressed to The Adjutant General of the Army under date of January 29, 1931, a copy of which he presents. The pertinent parts of this

letter are in substance as follows:

> The work of the 417th Infantry under Lieutenant Allen's instruction has reached a state of efficiency not heretofore attained, due in a large measure to his splendid and intelligent efforts. He is an inspiring instructor and exhibits to a marked degree the character of leadership. The officers of the regiment are very much interested in their work and the attendances at our conferences, especially among the junior officers, has substantially doubled. My comments concerning his duties with the regiment, and the very efficient and remarkable work done by him, are the composite opinion of the officers of the regiment. I respectfully request that Lieutenant Allen be reassigned to Organized Reserve duty with the 417th Infantry for the full period of four years, knowing from experience that such assignment will be highly beneficial both to the regiment and the Organized Reserve.

Witness also called personally to see The Adjutant General at the War Department and requested that accused be permitted to remain with the 417th Infantry as its instructor, and was informed that this request would be granted. Early in 1933, having learned that accused was about to be relieved as Unit Instructor of the 417th Infantry, witness called the War Department by telephone and asked that he be retained owing to his very excellent service as such instructor and the marked improvement in the extent of military knowledge of the officers of the regiment during his incumbency. Subsequently the orders transferring accused were revoked and he was permitted to remain with the regiment for another year. Accused had supervision of the Extension Courses from the time he came to the 417th Infantry in 1928 until he was transferred in 1934. Such records of the Extension Courses as are now available disclose an increase of 900% in the enrollment of students in the courses while accused was instructor. He examined and corrected approximately 3000 papers in the Extension Courses while on such duty. He not only increased the enrollment but the enthusiasm of the enrolled officers. He tried to impress upon the officers of the regiment the value of learning military language and of adopting it in their work within the regiment. Accused appeared to be familiar with the subjects with which he was dealing, in fact he appeared to have an unusually

accurate and complete knowledge of such subjects, as evidenced upon frequent occasions by his prompt and accurate replies to questions submitted to him by the officers. The majority of his instruction was devoted to tactics. Instruction in infantry weapons was given by accused during this time only to a limited degree. There were several lectures by officers in the Ordnance Department who gave instruction on this subject. The subject of weapons was not covered as completely and thoroughly as the subject of tactics because the regiment had no weapons, no place to keep them, and no range whereon they could be used. At the several camps some instruction was given in infantry weapons and upon one or more occasions there was rifle practice. Witness considered accused an unusually faithful, loyal, and industrious officer. During his years of association with accused he formed an opinion as to his character and ability as an officer which he stated as follows:

> "The accused was an officer of marked ability and excellent character, always courteous, ready and willing to impart to the officers associated with him his mature knowledge of the subjects under discussion and consideration. His desire to conform to the regulations of the War Department and customs of the service was demonstrated upon several occasions, particularly in his handling of two Regular Army officers who were assigned with him in his work in this area, one of whom was particularly offensive in his habits and caused the accused considerable anxiety. His handling of this problem I have always considered as masterly, highly diplomatic and as preserving the best traditions of the service."

Witness would be pleased to have accused serve as a member of his command, in peace or in war.

Upon cross-interrogatories of the prosecution witness testified that his statement, that accused based his instruction of the regiment almost entirely on texts and materials emanating from The Infantry School, was upon information he had from conferences with accused in arranging the several schedules of instruction, from the schedules of instruction prepared and forwarded to the several officers of the

regiment wherein it appeared that the texts and material were from The Infantry School, and from the announcements made from time to time by accused to the regimental officers.

Upon redirect interrogatories of the defense, witness testified that so far as he knew there had been no change in military terminology during the existence of The Infantry School. (Ex. D-N)

Lieutenant Colonel E. J. Hall, 417th Infantry, a witness for the defense, testified by deposition substantially as follows: He has known accused six or seven years. Between the years 1928 and 1934 witness was intimately associated with accused as an officer of the 417th Infantry, of which accused was acting, and later assigned, as Unit Instructor. Witness served as "Plans and Training Officer" of the 417th Infantry during the period that accused was Unit Instructor of the 417th Infantry. In his work on such duty witness was associated with accused in preparing schedules of instruction for the 417th Infantry, and the advice, assistance, and supervision of the accused was largely responsible for the commendations on the success of the plans. These schedules were based almost entirely upon texts and materials emanating from The Infantry School. Accused was familiar to an exceptional degree with the technique embodied in these texts and materials. The system of instruction in the 417th Infantry, while accused was its instructor, closely followed the precepts outlined in the texts and materials published by The Infantry School. Accused taught the officers of the 417th Infantry to become familiar with the systems contained in The Infantry School teachings, particularly as to the phraseology and use of terms ordinarily used in the military service by well-informed tacticians. Witness was both "Plans and Training Officer" and "Executive Officer" at the summer encampment of the 417th Infantry at Fort Adams, Rhode Island, August 2 to 15, 1931, at which accused was the Regular Army Instructor. Accused's ability in this "field service" was of very superior quality, inspiring the officers of the regiment to devote themselves assiduously to study of the solution of problems. In the preparation of their camp schedules accused's assistance proved very efficient and intelligent. In the preparation of these schedules accused had maps made on the three-inch scale from the Geodetic Survey maps, scale 1 over 62,500; obtained a copy of the tactical problems and decisions of the General Service School, Fort Leavenworth, Kansas; also the Mailing List, The Infantry

School, Fort Benning, Georgia, as well as certain Training Regulations, with which they worked out together the terrain exercises for the camp. The instruction given by accused to the 417th Infantry was mostly tactical. Very little time was devoted to the study of infantry weapons because no place was available for the proper storage and care of them. At only one summer encampment at which accused was Unit Instructor was it possible for the regiment to fire the rifle on the range. Instruction in weapons was limited largely to reports by reserve officers recently returned from The Infantry School. The efficiency of the 417th Infantry at the time accused left it was greater than at the time he began serving as Unit Instructor as a result of his emphasis on training the reserve officers to act as instructors and to have experience in the responsibility of leadership. Their esprit de corps and knowledge of military tactics, technique, and phraseology was greatly improved. In his association with accused witness formed an opinion as to his character and ability as an officer which he stated as follows:

> "He has an excellent character typical of the ideal officer and gentleman. During the World War I served for more than a year on the Division Staff of the 76th Division under General Hodges and of the 12th Division under General McCain so that I was amazed to find in a Unit Instructor in the grade of First Lieutenant superior ability comparable with that of Field Officers during the serious days of the war. From my observation and conversation with those who met him during his period here the standing and reputation of the military service was benefited by his excellent character and superior ability."

Upon cross-interrogatories by the prosecution witness testified substantially as follows: Accused repeatedly emphasized the importance of using the exact signs, words, and terms of military phraseology because of its conciseness and clearness, which make it quite distinct from the language in average use by civilians, and furthermore, because it was essential for all elements of the service to use the same phraseology to avoid ambiguity. He stressed the fact that the successful accomplishment of the mission of the officers and the safety of their men might depend upon their mastery of the "military language". In critiques on problems and terrain exercises he frequently pointed out

as defects the failure to use accepted military terms and phrases. He made available at regimental headquarters his copies of The Infantry School Mailing List and recommended that the officers, if possible, subscribe to it themselves, because the publications of The Infantry School "formed the last word" in military progress for officers of that branch. Witness stated that the publications and material referred to were as follows: Infantry School, Fort Benning, Mailing List, vol. I, 1929-30, vol. II, 1930-31, vol. III, 1931-32; Tactical Problems and Decisions, The General Service School, Fort Leavenwroth, Kansas, vol. I, 1929-30; Map Reconnaissance, The Infantry Journal, 1930. So far as witness knew there had been no change in military terminology during the existence of The Infantry School. (Ex. D-0)

Lieutenant Colonel Harry B. Crea, Infantry, a witness for the prosecution, was called as a witness for the defense, and testified substantially as follows: He has known accused since 1919, first meeting him at Camp Dix, New Jersey, in the fall of that year when accused was an officer of the 50th Infantry of which witness then took command. Later they went to Germany together. Witness was then second in command of the regiment in which accused was a lieutenant. They served together until about January 1922. Accused's character at that time was excellent. He had a very excellent reputation in the regiment as an officer and did his work very well. Witness position in the regiment was such that had accused's reputation for honesty and veracity not been of the highest, witness would have known about it, and he "never heard anything to the contrary but that his reputation was excellent". (R. 196-7)

Upon cross-examination by the defense, Major Marcus B. Bell, Infantry, a witness for the prosecution, testified as to the reputation of accused substantially as follows: From September 1919 until March 1920 witness and accused served in the same battalion, and witness "knew him closely" during that time. He next saw accused when the latter reported at The Infantry School as a student about September 1, 1934, and had since been a close friend of accused. Accused's general reputation as to truthfulness, honesty and integrity had been excellent wherever witness had known him and among all officers with whom they had served together. (R. 331-332)

Upon cross-examination by the defense, Major Charles M. Ankcorn, Infantry, a witness for the prosecution, testified as to the character of accused substantially as follows: He had known accused since 1919 when they were in the 50th Infantry in Germany, the same regiment that Lieutenant Colonel Crea was then in. Witness and accused served together a little more than a year on that occasion. Witness saw accused frequently, although not closely associated with him, and "thought him of excellent character". He considered accused an excellent officer, and never heard any other officer with whom both he and accused had served make any derogatory remarks of any nature concerning accused's character, honesty, or integrity. (R. 385-386)

10. Upon the date that the findings and sentence were announced by the president of the court, all the members of the court except the president, who was also the law member, signed the following recommendation for clemency:

> "In view of the long and faithful service of the accused, together with evidence of his previous excellent character and reputation as an officer, the undersigned members of the Court recommend clemency in the case of Captain Allen to the extent of suspending sentence to permit him to retire under the provisions of the Promotion Act, Session of Congress 1935."

After the conclusion of the trial a voluminous brief in two parts was filed in behalf of the accused, the first part signed by Lieutenant Colonel Sidney G. Brown, Infantry, defense counsel, and the second part by accused.

The first part of this brief alleges that the court was not legally constituted, that errors prejudicial to the substantial rights of the accused were committed during the trial, that none of the specifications charge an offense, and that the findings of guilty were against the evidence. The attack upon the legality of the court and the charge of prejudicial error are not supported by the facts. The sufficiency of the specifications to allege an offense, and that of the evidence to support the findings of guilty will be discussed later.

The second part of this brief is preceded by the sworn statement of accused to the effect that the instructional matter which he refers to and describes in his following brief was taught or made available to the students at The Infantry School during his school year; that each problem was based upon the instruction given; and that it was through such instruction solely, without unauthorized assistance, that he was enabled to solve the problems in issue. The brief which follows is a remarkable document in that it displays the reasoning of the trained and logical mind of a very able tactician. It is signed by accused, and it may be assumed, in the absence of anything to the contrary, that it was prepared by him. Under each of the several specifications upon which he was convicted the accused shows the information that was given him directly in the situation of the problem, and what further information could be gathered from that information by reasonable inference and logical deduction, and he then shows minutely and painstakingly the mental processes through which the trained student meets the given requirement and comes to the final solution. The matter contained in this brief is of great interest, particularly in its disclosure of the tactical ability of accused, if it is his own original work. Further reference will be made to it later.

Colonel George E. Hall, Auxiliary Reserve, who testified by deposition (Def. Ex. D-N) as a witness for the defense, appeared before the Board of Review on February 3, 1936, in behalf of the accused, and also filed a brief. Subsequently he filed a supplemental memorandum.

11. Sufficiency of the specifications to charge an offense.

In the brief filed by Lieutenant Colonel Sidney G. Brown, Infantry, defense counsel, and in that filed by Colonel George E. Hall, Auxiliary Reserve, in behalf of the accused subsequent to his trial, it is asserted that the specifications do not charge an offense. This objection was not raised at the trial, as it might have been done upon a plea in abatement at the arraignment upon the ground that the specifications were inartificial or indefinite. The reasons upon which this objection was based are that the specifications fail to allege that the school solutions had been printed or mimeographed and issued to authorized persons, and that accused had seen these solutions prior to the date set forth in the specifications (brief, Lt.Col. Brown,

pp. 7-9; brief, Col. Hall, pp. 3-5), and further that the specifications are indefinite in that they fail to allege and set forth with particularity the parts and portions of the approved school solution accused is charged with adopting and submitting as his own (brief, Lt.Col. Brown, p. 10; brief, Col. Hall, p. 5).

It will be noted that each of the specifications alleges in part that accused did "wrongfully and knowingly obtain unauthorized assistance in preparing his solution to the said problem by adopting and submitting in substance as his own solution, parts and portions of a solution which had been prepared * * * and approved * * * but which had not at that time been authorized for issue to the student body * * *". The allegation that the school solution had been "prepared" appears to be a sufficient allegation that it had been put in some substantial form, whether in writing, typing, printing, or mimeograph, and to negative any inference that it existed only in the minds of those who had participated in its preparation. There is, however, merit in the objection to the failure of the specifications to allege that these approved solutions had been issued to authorized persons and that the accused had seen these solutions. Only by implication does it appear in the specifications that these approved solutions were in the hands of authorized persons. Much evidence was introduced by the prosecution to establish this implied fact, and doubtless it would have been better pleading to have made the definite allegation. And again only by implication is it alleged that accused had seen these solutions. Unquestionably this was the allegation of a fact which should not have been left to implication, since the case for the prosecution rests upon proof by direct evidence, or by reasonable and inescapable inference from clear circumstantial evidence, that accused did see these approved solutions from which he is alleged to have wrongfully and knowingly obtained unauthorized assistance.

There is also merit in the contention that the specifications are indefinite in that they fail to set forth the particular parts and portions of the approved school solutions accused is charged with adopting and submitting as his own. Accused was entitled to be informed with reasonable precision what parts of his own solutions are alleged to have been wrongfully taken from the approved school solutions. To one familiar with the evidence available to the prosecution for introduction, in so far as it is indicated by that which

was actually introduced, it is apparent that the problem presented to the pleader in this respect was extremely difficult of practical solution. The "parts and portions" of the approved school solutions the accused is charged with having adopted and submitted as his own appear to have been not so much the phrases and expressions of those solutions, which are the technical and commonly used language of the art of military tactics, and could have been set forth, as they were the plan of action and the selection and sequence of movement of military units which could only have been shown by including practically the whole of the approved solution in the pleading. A pleading of this sort would have been of extreme length and complexity, and would not have satisfied the requirement that a specification should include a statement in "simple and concise language of the facts constituting the offense". Par. 29, M.C.M. A compromise was called for in this case, and it is thought that the form of the specifications, although subject to the criticism which has been made above, was adequate in the absence of objection to it upon the arraignment to apprise the accused of the offenses with which he was charged. Because of the conclusions hereinafter expressed as to the legal sufficiency of the record of trial to support the findings and sentence, no further discussion of the sufficiency of the specifications to charge an offense is deemed necessary.

12. Discussion.

Each of the fifteen specifications upon which the accused was convicted alleges in part that he did, on or about a date named, "wrongfully and knowingly obtain unauthorized assistance in preparing his solution to the said problem by adopting and submitting in substance as his own solution, parts and portions of a solution which had been prepared by Instructors of The Infantry School and approved by the Assistant Commandant of the said school as The Infantry School solution but which had not at that time been authorized for issue to the student body of The Infantry School".

Of the statement in a specification of the facts constituting the offense it is said: "The facts so stated and those reasonably implied therefrom should include all the elements of the offense sought to be charged". Par. 29, M.C.M. That accused, at some time, after the preparation of the approved school solution and before properly receiving a copy of it after submitting his own solution, had access

to the contents of that approved solution or had a copy of it in his possession, is an essential element of each of the offenses with which he is charged. The situation here is not dissimilar to that in which the charge of larceny of property is made. In such case there must be proof of the felonious taking and carrying away of the property by the accused, that is, it must be established beyond a reasonable doubt that the property described was taken from the possession of the owner by the accused with such intent and that it was actually in the possession of the accused after such taking. It is not only reasonable to imply from the language of the specification the allegation of the fact that accused did so have access to, or possession of the approved solution, but it is a necessary implication from the language used. This being the case, to support a conviction there should be evidence in the record to establish this implied allegation of fact beyond a reasonable doubt.

The prosecution has shown in great detail the procedure in preparing, safeguarding, and using these approved school solutions, from the time the problem and its solution are first initiated by the instructor until the problem is issued to the student for his study and the approved solution given to him after he has submitted his own solution. In all this evidence it is not shown that any one of these solutions was ever missed from the place where it was kept, or that any one of them was ever, even for the moment, in the possession of or seen by accused. It is assumed by the prosecution that at some point in the career of these solutions, from the time they were first initiated until distributed to the class, there must have been a "leak" by means of which accused obtained advance and irregular information of their contents. It is evident from the record that exhaustive, but wholly unsuccessful, effort was made by the authorities of The Infantry School to show that such a "leak" existed. The suggestions in the evidence as to ways and means by which accused might have obtained such information are fanciful and extreme. They include the possible corruption of the stenographers who first worked on the typing of the solutions and the cutting of the stencils; the corruption of the highly trusted, and apparently trustworthy, noncommissioned officers at the reproduction plant; the searching of waste baskets and refuse from the reproduction plant for defective mimeograph copies and discarded tissue imprints; and the unnoticed entry of the accused by stealth into the offices of

the several instructors and the unlawful removal of the solutions from the various places where they were kept by these instructors. None of these ingenious theories of possible access to the approved solutions appear, under the circumstances, to be either reasonable or plausible, and there is not a scintilla of evidence in support of any one of them.

There is no evidence in the record that accused, while working on a problem, or at any other time, was ever seen to have had any unauthorized materials in his possession, or to have had anything or to have done anything which aroused the slightest suspicion of misconduct by him. Such evidence was industriously sought by the authorities from those instructors who were in charge of the solving of problems by the students, and from other students who were intimately associated and in close contact with accused while he was engaged in the solution of the problems. Work in the classroom was open, with no apparent opportunity for concealment of the use of unauthorized materials, and accused was seated at a desk in the front row and in the immediate view of the instructor in charge. Work in the field was in a group of some one hundred or more students who were scattered about upon a limited range of the terrain, and little more opportunity was available there for the concealment and use of unauthorized materials. If the accused did actually make wrongful use of the approved solutions either in the classroom or in the field, it is remarkable that no evidence was introduced indicating at least a suspicion of such use.

The proof of the wrongful and unauthorized use by accused of the approved solutions must be found, if found at all, in the similarity between his own solutions and those approved solutions. And it was upon this similarity in the absence of any other evidence that the prosecution relied for conviction. In weighing such evidence as this, certain very illuminating and highly important facts in evidence must be kept in mind. Accused, before entering The Infantry School in September 1934, had for nearly seven years been a unit instructor with the Organized Reserves. Throughout the entire period of this duty he had been conducting correspondence courses and bimonthly lectures and conferences mainly upon the subject of "tactics". In the correspondence courses which originated at The Infantry School he had examined and corrected the solutions in approximately 3000 separate student papers. He had based his instruction entirely upon the texts and materials published by The Infantry School, and in his work had

closely followed the precepts and phraseology of these publications. While engaged in this work he was considered by his superior officers to have had an unusually accurate and complete knowledge of the subjects that he taught, and to have been familiar to an exceptional degree with the technique of the publications of The Infantry School. One of these superior officers testified that he had never known an officer of field grade with as thorough a knowledge of tactical principles as accused. It thus appears that when accused entered The Infantry School he had for a period of nearly seven years been almost wholly engaged in the teaching of military tactics, and that he had established for himself a reputation quite beyond his rank for unusual ability and skill in this particular subject. In addition to this earlier training and experience he enjoyed all the instruction which the school was able to give him, and it must be assumed that this was adequate, as it must have been intended, to fit the student to meet the school requirements. But during the period before entering the school he had had little or no contact with the technical use of weapons. With such a foundation for the work of the school it was to be expected that his grades prior to March 27, 1935, in the problems in the use of arms would not be as high as those that he would achieve in problems relating to tactics and supply, for which he was unusually well prepared by training and experience. And under these circumstances it is exceedingly strange that he should have made use of unauthorized assistance, as alleged by the prosecution, in tactical problems in preference to those relating to the use of weapons. There is no apparent reason why, if he did this later in the course, as alleged, he could not have availed himself earlier of such assistance when the need was greater, had he been so disposed.

It will be helpful in weighing the evidence against the accused to discuss some of the alleged incriminating similarities between accused's solutions and the approved solutions which have been mentioned in paragraphs 6 and 7 above.

Under Specification 12 much was made by the prosecution of the fact that the first 16 words of the accused's solution to the first requirement of Marked Problem No. 22, including the punctuation, were identical with those of the approved solution, except that accused abbreviated the word "Battalion" to "Bn." which the school did not. Accused, in his brief, shows that the phrase "continue the attack

at once" was one taught by the school, and that the word "discontinue", to express the contrary, was commonly used. As to the phrase "and organize the Bn. for defense, in place", he states that he was given this in the problem itself where as a part of the situation it is stated, "This regiment will organize for defense in place". The battalion was a part of and included in the regiment. The facts appearing in the situation are such as to make it quite obvious, even to one unskilled in tactics, that the plan of the battalion commander should include an immediate halt in the attack, and the language used by accused in this part of his plan is undoubtedly that which he had been trained to use. That accused, in the second requirement of this problem for which an approved solution was not obtainable, did not do as well as in the first part, is by no means incriminating. While unusually skilled in tactics accused was not infallible. Since his grade in this problem was "B", his grade in the second requirement of the problem could not have been so low as to make it conclusive that he must have had unauthorized assistance in the first requirement to have done as well as he did. Many of his questioned solutions were not so good as the approved solutions. There is evidence, however, that in one solution of a problem under a specification of which he was not convicted, a part of his solution was even better than that of the school solution. (See testimony of Lt.Col. Dawley, F.A., under Specifications 1 and 2, R. 419.)

The use by the accused of the term "control point" in his solution of the first requirement of Marked Problem No. 19 (Specification 7) is regarded by the prosecution as incriminating because of the fact that the same term was used in the approved solution and is not "canned military language". In addition to the school instructional matter introduced in the cross-examination of Major Wood, mentioned in paragraph 7 a above, accused refers in his brief (p. 12) to other school instructional matter which contains the following very suggestive language:

"2. Control.
   a. At what point may there be traffic congestion, or traffic tangles occur?
   b. How will I insure a smooth flow of traffic at these points?"

With such instruction behind him it does not appear strange, and certainly not incriminating, that accused used the term "control point"

in his solution. The term is a simple one, and doubtless came to the mind of the accused, after the instruction he had received, as readily as it did to the mind of the instructor. The testimony of Major Wood in cross-examination upon this matter, mentioned under paragraph 7 a above, is perhaps stranger than the coincidental use of this term by accused. Major Wood states that he thought a commander would be subject to severe criticism if he did not establish some sort of a "control point" at that particular place. He concedes that accused's solution was logical, "but not logical to be used in the circumstances", so he says. He admits that the school solution was logical and that the accused's solution was similar to the school solution, and then makes the strange assertion that the establishment of a "control point" by accused was not logical "because no one else in the class did it". That the use of this term by accused was merely a coincident and not a copying of the school solution is rather emphatically indicated by the circumstances themselves. Had the accused been making wrongful use of the approved solution he must be credited with more intelligence than to have thus earmarked his own solution with fraud by clumsily copying into it a little used and unconventional term, however simple and apt to express the thought it may have been.

Under Specification 11, relating to the second requirement of Marked Problem No. 17, under which accused was called upon to complete a situation sketch furnished him, much is made by the prosecution of similarities between his sketch and the approved school sketch. (See paragraph 7 b above.) The size and shape of the so-called "goose eggs", as pointed out by accused in his brief, was dictated by the size of the force to occupy the area, and particularly by the contours of the map. The latter factor is evident from a glance at the map where it appears that the "goose eggs" are drawn to include the higher parts of each of the two hills. The similarities in the lengths and directions of the arrows indicating the line of tank fire for the .50 caliber guns appear to be accidental as to the lengths and logical deductions as to directions, since the directions of fire are to cover that part of the terrain accessible to the movement of tanks in attack. In general the similarities of accused's solution to those of the approved solution appear to be no other than those which should be expected in the solution of an able student. Major Evans, the instructor in this problem, testified upon cross-examination that when he first corrected accused's solution he did not notice anything suspicious about it, and

that he found the alleged "suspicious circumstances" only when directed to look for them. He further said that there was nothing in the school solution which had not been taught at the school. In other words, accused was asked to do only what he had been taught to do, and this he did in the excellent manner for which his experience and training both at the school and before had fitted him.

The prosecution finds alleged incriminating evidence in the location of an artillery ammunition distributing point by accused in his solution of the third requirement of a marked problem on May 28, 1935 (Specification 13). The suspicion here is based not merely upon the fact that accused picked the same point that the school had done, which from the map and until the day the problem was solved upon the field was a proper selection, but because of the fact that on that day, due to some recent work done upon the road, the place was no longer suitable and the selection of the school no longer an appropriate one. On that day the instructor and the class passed this point upon a motor reconnaissance and the instructor, knowing what point he had named in the approved solution, was "particularly careful" to observe it as they passed, and then saw for the first time that it was unsuitable. It does not appear that accused's attention in passing was called to the unsuitability of this point. The instructor testified that in solving the problem accused could have used the same map from which the approved solution was prepared, but that he did not know whether accused solved it from the map or from notes made on the reconnaissance. In his brief accused states that this "reconnaissance" was made from the rear of a truck moving by this point at a speed of 35 miles per hour, and that prior to the ride the students had not been told to be on the lookout for ideal ammunition point locations. He further states that in solving the problem he relied upon the same map used by the school in the original selection.

It is necessary, in giving appropriate weight to the recurring similarities between accused's solutions and the approved solutions, not only to keep in mind the facts of his earlier training and experience, and the instruction he received while in the school, but also to keep in mind the character of accused, as shown by the testimony in the record.

It was said by the court in Kreuner v. United States, 11 F. (2d) 726:

> "In cases in which the proof is circumstantial, evidence of previous good character has more scope and force than in cases where the proof of the offense is positive and direct. In the language of an eminent judge, speaking upon this point: 'There may be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character would outweigh the evidence which might otherwise appear conclusive'".

Accused may introduce evidence of his own good character in order to show the probability of his innocence. M.C.M., p. 112. As expressed in Wharton's Criminal Evidence, 11th ed., p. 456:

> "It is relevant for the defendant to offer affirmative evidence of character, with regard to the particular trait involved in the nature of the charge, and to prove that his character was such as to make it unlikely that he would have committed the act charged against him."

The charge in this case is that of violation of the 95th Article of War, that is, that accused's conduct, as alleged in detail in the several specifications under the charge, was "unbecoming an officer and a gentleman". The specifications, reduced to simple terms, allege that he cheated in his work at the school by wrongfully using material which he was not authorized to use. Accused did not hesitate to put his character in evidence to show that it was unlikely that he would have committed the acts charged against him. This evidence of his good character, elicited not only from witnesses for the defense but also from witnesses for the prosecution, a number of whom had known accused for more than fifteen years, is expressed in such terms as the following: "excellent character" - "typical of the ideal officer and gentleman", "reputation for truth, honesty, and integrity, excellent" - "the best", "an honorable soldier who commanded the respect of those

who came in contact with him", "never heard an officer speak in a derogatory manner of accused as to his honesty", "never heard anything to the contrary but that his reputation was excellent", "an officer of the highest type, absolutely honest and trustworthy". As to negative evidence relative to character, it is said in 10 Ruling Case Law, paragraph 126:

> "Indeed, negative evidence is the most cogent evidence of a man's good character and reputation, because a man's character is not talked about till there is some fault to be found with it. It is the best evidence of his character that he is not talked about at all."

In all the testimony relative to the character of accused, there is not one jarring or questionable expression to throw the slightest cloud upon the very high reputation for truth, honesty, and integrity that accused enjoyed among the officers with whom he had served.

13. To warrant the confirmation of the sentence the evidence must show, beyond a reasonable doubt, that the accused is guilty of the offenses with which he is charged, and of which the court has found him guilty. "The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt." M.C.M., par. 78 a. The Manual follows the interpretation of this rule which prevails in the courts and is stated as follows:

> "A limitation, however, is applied where circumstantial evidence is relied upon. It is that the proof must not only be consistent with the guilt of the accused, but it must be inconsistent with any other reasonable doubt as the measure of the sufficiency of the proof, limited by the qualification that the conclusion must not only be consistent with the guilt of the accused, but inconsistent with any other reasonable conclusion, and the further requirement that each independent fact must be proved to the same degree as if the whole issue rested

on the proof of such independent fact, then the law has safeguarded life and liberty to the highest degree that can be devised by human intelligence." Wharton's Criminal Evidence, 10th ed., p. 1839; 11th ed., par. 865.

The Board of Review is of the opinion that the evidence in this case is not sufficient to establish the guilt of the accused beyond a reasonable doubt. The evidence does not exclude the fair and reasonable hypothesis that accused was quite able by reason of his earlier training, experience, and recognized ability, and through the added instruction he received at The Infantry School, to solve the problems in the manner that he did without recourse to any unauthorized assistance whatsoever. The Board has carefully compared each word and phrase of accused's solutions with those of the approved school solutions, has studied each of the situations he was furnished and the requirement that was presented to him, and is satisfied that the alleged incriminating similarities are no other than those which should reasonably be expected to appear in the solution of a student with the ability and skill in the subject possessed by accused. Any fleeting doubt that might be entertained in this respect is wholly dissipated by the uncontroverted evidence of the high character of accused, which alone would outweigh much stronger evidence of guilt than is found in the record. High character and high scholarship demand recognition other than that accorded accused.

14. At the time of his trial accused was 42 7/12 years of age. His service is shown by the Official Army Register as follows:

"Pvt. Co. I, 41 Inf., and sgt. Co. E, 11 Inf. Repl. and Tng. Bn. 4 Inf. Repl. Regt. 27 June 17 to 4 June 18; 2 lt. of Inf., N.A. 1 June 18; accepted 5 June 18; 1 lt. of Inf., U.S.A. 19 Sept. 18; accepted 28 Sept. 18; vacated 6 Oct. 20.---1 lt. of Inf. 1 July 20; accepted 6 Oct. 20; capt. 1 Jan. 33."

15. 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 insufficient to support the findings and sentence and warrants disapproval thereof.

Theodore Fall, Judge Advocate.
W. A. Turnbull, Judge Advocate.
L. W. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 204275

APR 3 1936

UNITED STATES	)	SECOND DIVISION
v.	)	Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, December 2, 13, 16, 17, 1935. Reduction on the promotion list fifty files.
Captain FRANKLIN L. LICHTENFELS (0-16355), 20th Infantry.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Franklin L. Lichtenfels, 20th U. S. Infantry, Fort Francis E. Warren, Wyoming, was, at Fort Francis E. Warren, Wyoming, on or about September 5, 1935, drunk and disorderly in station to the discredit of the military service.

Specification 2: In that Captain Franklin L. Lichtenfels, 20th U. S. Infantry, Fort Francis E. Warren, Wyoming, did, while drunk at Fort Francis E. Warren, Wyoming, on or about September 5, 1935, fire pistol shots in the vicinity of his quarters and did thereby cause the guard to be alarmed.

(Motion by the defense for a finding of not guilty sustained by the court.)

Specification 3: In that Captain Franklin L. Lichtenfels, 20th U. S. Infantry, Fort Francis E. Warren, Wyoming, on or about September 5, 1935, as a result of being drunk, had to be forcibly restrained by members of the guard, to the prejudice of good order and military discipline.

(Motion by the defense for a finding of not guilty sustained by the court.)

He pleaded in bar of trial to the charge and specifications, basing his plea on a written reprimand previously administered to him as punishment under the 104th Article of War. The court sustained the plea as to Specification 1 and overruled it as to Specifications 2 and 3 and the Charge. Accused then pleaded not guilty to Specifications 2 and 3 and the Charge. At the close of the case for the prosecution accused made a motion for findings of not guilty on the ground of insufficient evidence. The court sustained the motion and found accused not guilty of the Charge and Specifications 2 and 3 thereunder. The reviewing authority returned the record of trial to the court under the provisions of paragraph 64 a, M.C.M., 1928, with the direction to reconvene and reconsider its action in sustaining the plea in bar of trial to Specification 1 of the Charge. Accused objected to the reconsideration but the court complied with the direction. Accused then interposed a plea of former jeopardy in bar of trial but this plea was overruled. He then pleaded not guilty to the Charge and specification thereunder. He was found guilty of the specification, except the words "and disorderly", of which he was found not guilty, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be reduced on the promotion list fifty files. The reviewing authority approved the sentence and directed its execution. The sentence was published in General Court-Martial Order No. 2, Headquarters Second Division, Fort Sam Houston, Texas, January 6, 1936.

3. The only question presented by the record of trial in this case requiring consideration here is whether or not the first plea in bar to Specification 1, based on former punishment, should have been sustained. It is the opinion of the Board of Review that this question should be answered in the affirmative.

4. It appears from the evidence that accused was intoxicated on September 5, 1935, after attending a party at the Plains Hotel, Cheyenne, Wyoming (R. 79,81,82,84,87,104,105). He was incoherent and unable to help himself (R. 82) and, while in that condition and over his objections (R. 80,84,86,87,90), was taken in an automobile to his quarters, No. 19 Fort Francis E. Warren, Wyoming, by several officers, all of whom were attending the same party (R. 79,86,87,90). He was dressed in civilian clothes at the time (R. 82). Upon arrival at his quarters about 10:30 p.m., he resisted being taken in (R. 80,84,91,92), but later was left alone in his living room as he then appeared to be quiet and subdued (R. 79,89).

Some twenty or thirty minutes later a number of pistol shots were heard in the vicinity of the quarters of accused (R. 21,22), and people on the post were awakened (R. 21,111). An officer phoned the guardhouse and soon members of the post guard and provost guard appeared at the quarters (R. 21,22,33,49,77,78,93,101). Upon their arrival accused was seen to leave the front porch of No. 18, the adjoining quarters (R. 24,98). Some members of the guard took him by the arm and assisted him into No. 19, his quarters (R. 99,102). Shortly thereafter the officer of the day (R. 37) and provost marshal (R. 41,42) arrived and questioned accused in connection with the pistol shots that had been heard. To each of them accused disclaimed all knowledge of the shots and stated that he had not fired a pistol (R. 37,42,45). Accused was drunk at that time (R. 29,31,36,38,84,91,92,99). He was taken upstairs, and a search made of his quarters by the provost marshal (R. 43). An Army pistol, .45 caliber, was found under a mattress in the bedroom of accused (R. 44). This pistol showed evidence of having recently been fired (R. 42,43). A further search revealed several empty .45 caliber pistol shells outside on the porch and around his front lawn (R. 26). One of the pillars on the porch of the quarters of accused also appeared to have been recently scarred, apparently by a pistol ball (R. 7-8,42).

By direction of the provost marshal the officer of the day remained at accused's quarters for some time to prevent any further disturbance (R. 38,46,106,107). The officer of the day testified that accused "talked as though he was befuddled. He spoke incoherently" (R. 104). Accused's wife was brought home and the officer of the day heard accused say to her as she was coming up the stairs, "You dirty bitch, if you had been with me this wouldn't have happened", or words to that effect (R. 84-86,105).

5. The reprimand which formed the basis for the plea in bar of trial in question was administered in substantial compliance with the provisions of Article of War 104 and Chapter XXIV, Manual for Courts-Martial, and was embodied in the following correspondence:

"HEADQUARTERS TWENTIETH INFANTRY
Office of the Regimental Commander
Fort Francis E. Warren, Wyoming

In Reply Refer To:
201-Lichtenfels, F L (Off) 10 Sept 55

SUBJECT: Disciplinary action.
TO: Captain Franklin L. Lichtenfels, 20th Infantry.

Preliminary investigation has indicated that an offense against good order and military discipline of which you are fully cognizant has been committed by you. It is my intention to impose punishment under A.W. 104. In accordance with par. 107 M. C. M. you are notified of this intended action. You will acknowledge receipt of this communication by indorsement which will include a statement as to whether you demand trial in lieu of action under A. W. 104.

(Sgd) Lester L Lampert
(Tpd) LESTER L. LAMPERT,
Major, 20th Inf.,
Comdg.

201-Lichtenfels, F. L. (Off) 1st Ind.

Ft F E Warren Wyo 10 Sept 55 To CO 20 Inf

Receipt acknowledged Disciplinary action under AW 104 is acceptable

(Sgd) F L Lichtenfels
(Tpd) F. L. LICHTENFELS,
1 Lt., 20 Inf.

201-Lichtenfels, F. L. (Off) 2d Ind.

Hq 20 Inf Ft F E Warren Wyo 10 Sept 55 To Capt F. L. Lichtenfels, 20th Inf THRU CO 2d Bn 20 Inf

1. You are hereby reprimanded for conduct to the prejudice of good order and military discipline. You are fully cognizant of the facts and should realize the seriousness of your misconduct. Charges were not preferred against you for the following reasons:

a. This is your first offense coming to my official notice.

b. You have agreed to abstain from the use of intoxicating liquors for the period of one year.

c. Your military record during the period of my command shows that you can continue to prove yourself a valuable officer.

2. This reprimand which will become a part of your personal record is considered adequate.

3. You are advised of your right to appeal in accordance with par. 108 M. C. M. and are directed to reply by indorsement hereon which will include date of receipt of this indorsement and any appeal you may desire to make.

(Sgd) Lester L. Lampert
(Tpd) LESTER L. LAMPERT,
Major, 20th Inf.,
Comdg.

3rd Ind.

C.O. 2nd Bn., 20th Inf., Ft. F.E.Warren, Wyo., Sept. 11/35
To Capt. F. L. Lichtenfels, 20th Inf.

1. For compliance with 2nd Ind. Contents of 2nd Ind. has been noted by the undersigned.

(Sgd) Robert E Frye
(Tpd) ROBERT E. FRYE,
Major 20th Infantry.

4th Ind.

Capt. F.L. Lichtenfels, 20th Inf., Ft. F.E.Warren, Wyo., Sept. 11/35 To Commanding Officer, 20th Infantry. (Thru C.O. 2nd Bn. 20th Inf.)

1. Contents noted. No appeal.

(Sgd) F L Lichtenfels
(Tpd) F. L. LICHTENFELS,
Capt. 20th Infantry.

5th Ind.

CO 2nd Bn 20th Inf., Ft. F.E. Warren, Wyo., Sept. 11/35
To Commanding Officer, 20th Infantry.

1. Complied with.

(Sgd) Robert E Frye
(Tpd) ROBERT E.FRYE,
Major 20th Infantry." (Def Ex. 1)

The reprimand did not recite the exact offense or offenses for which it was administered, nor the date upon which such offense or offenses were committed, and it is necessary to look to the testimony of Major Lampert for information as to the conduct to which the reprimand refers. Major Lampert testified that in his opinion there was not sufficient evidence to show that accused fired the pistol (R. 7) nor that he had to be restrained by any member of the provost or post guard (R. 9,18,19). On direct examination he testified that the reprimand was administered for "being drunk in station to the prejudice of good order and military discipline" (R. 6), and when recalled he stated that it was administered "solely" for being drunk and disorderly in station "plus the fact that I believed that he was, at least, partially responsible for the firing of the gun which I considered an outgrowth of being drunk and disorderly". On September 26 the then post commander, after causing a further investigation to be made of accused's conduct and of the reprimand (R. 14; Def. Ex. 2), preferred the charges on which accused was later brought to trial.

6. "The 104th Article of War authorizes the imposition of disciplinary punishments by a commanding officer without the intervention of a court-martial for minor offenses only. A reprimand administered under the 104th Article of War for a major offense is void." JAG 250.3, Jan. 14, 1935, AG 201 Craw, Demas T.; JAG 250.3, Aug. 15, 1935, AG 201 Lynch, Francis H. In the instant case, if the offense involved was a minor one the reprimand constituted "former punishment" and was a bar to accused's trial for the same offense. Par. 69 e, M.C.M.

"Whether or not an offense may be considered as 'minor' depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking, the term includes derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial. An offense for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement is not a minor offense." Par. 105, M.C.M.

The offense in question does not involve moral turpitude and is not one for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement. It is one which is frequently disposed of by disciplinary punishment under the 104th Article of War.

It may be contended that the reprimand which was administered "for conduct to the prejudice of good order and military discipline" was not a bar to trial for the same conduct described in the specification as "to the discredit of the military service". In the opinion of the Board of Review this contention is untenable. From the reprimand and the testimony of Major Lampert, the officer who administered it, there appears no doubt that the reprimand was administered as punishment for drunken and disorderly conduct in violation of the 96th Article of War, and that though Major Lampert described such conduct as to the prejudice of good order and military discipline it was not his intention to limit the punishment only to that aspect of the 96th Article of War and leave open and undisposed of the question of whether the conduct was to the discredit of the military service, another aspect of the same Article. It was his intention to take final disciplinary action on accused's drunken and disorderly conduct. The offense for which accused was reprimanded is the same offense of which he was found guilty and the provision of paragraph 69 c, Manual for Courts-Martial, that punishment under the 104th Article of War "does not bar trial for another crime or offense growing out of the same act or omission" does not apply to this case. That provision relates to two crimes or offenses growing out of the same act and does not apply to a single

act considered to be to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service.

The question then arises as to whether the determination of Major Lampert that the offense was a minor one is subject to review by higher authority. The principle followed by the civil courts in matters of this kind is set out in 46 Corpus Juris 1033 as follows:

> "Where the decision of a question has been committed to a particular officer, his determination will not ordinarily be reviewed by the courts, except as may be provided for by statute, although they may interfere in the case of an abuse of discretion."

In several cases in which was involved the question of whether an investigation was a thorough and impartial one within the meaning of the 70th Article of War, it has been held "that the determination of whether or not there has been a thorough and impartial investigation is a question of fact primarily for the decision of the appointing authority and that in the absence of an abuse of discretion his determination is conclusive". CM 182225, Keller; CM 183183, Claybaugh; CM 183364, Jurkowski. It is the opinion of the Board of Review that the same principle of law applies in the instant case, that there was no abuse of discretion on the part of the officer administering the reprimand, that the offense involved was a minor one, and (no appeal having been taken) that his determination that it was a minor offense is final and conclusive.

The reprimand was legal punishment for the offense for which it was administered. Specification 1 alleged the same offense. The plea in bar by accused was within his legal rights, was warranted by the facts and the law, and should have been sustained. To hold the record of trial legally sufficient to support the sentence would result in twice punishing accused for the same offense.

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

Theodore Hall, Judge Advocate.

William A. Trumbull, Judge Advocate.

S. W. Smith, Judge Advocate.

To The Judge Advocate General.

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