

OFFICE OF  
JUDGE ADVOCATE  
GENERAL  
OF THE ARMY

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BOARD  
OF REVIEW

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HOLDINGS  
OPINIONS  
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VOL. 8

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v. 8

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume VIII

including

CM 204405 to CM 208073

(1936-1937)

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

(1)

Board of Review  
CM 204405

MAR 4 1936

U N I T E D   S T A T E S	)	SECOND DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sam Houston, Texas, January
Private HOWARD E. ROSE	)	7, 1936. Dishonorable discharge
(6244764), 2d Veterinary	)	and confinement for six (6) months.
Company, 2d Medical Regiment.	)	Fort Sam Houston, Texas.

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HOLDING by 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 soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following charges and specifications:

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

Specification 1: In that Private Howard E. Rose, 2d Veterinary Company, 2d Medical Regiment, did, at Fort Sam Houston, Texas, on or about October 3, 1935, willfully and wrongfully suffer one  $1\frac{1}{2}$  ton "Chevrolet" cargo truck No. W-35450 of the value of about Five hundred and twenty-five dollars and seventy-four cents (\$525.74), military property belonging to the United States, to be wrongfully used and employed to the prejudice of good order and military discipline.

Specification 2: In that Private Howard E. Rose, 2d Veterinary Company, 2d Medical Regiment, with intent to defraud J. F. Yancey, did, at Blanco, Texas, on or about October 3, 1935, unlawfully pretend to J. F. Yancey that a certain check in the following words and figures, to wit:

(2)

"Blanco, Texas, October 3, 1935 No \_\_\_\_\_  
THE BLANCO NATIONAL BANK 88-948  
Pay To J. F. Yancey OR ORDER \$2.50/100  
Two and 50/100-----DOLLARS  
W. R. Dirikson,  
P.3566"

was genuine, well knowing that said pretenses were false, and by means thereof, did fraudulently obtain from said J. F. Yancey merchandise to the value of Two dollars and fifty cents (\$2.50).

Specification 3: (Disapproved by reviewing authority).

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

Specification 1: In that Private Howard E. Rose, 2d Veterinary Company, 2d Medical Regiment, did, at Blanco, Texas, on or about October 3, 1935, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

"Blanco, Texas, October 3, 1935 No \_\_\_\_\_  
THE BLANCO NATIONAL BANK 88-948  
Pay to J. F. Yancey OR ORDER \$2.50/100  
Two and 50/100-----DOLLARS  
W. R. Dirikson,  
P.3566"

which said instrument was a writing of a private nature which might operate to the prejudice of another.

Specification 2: (Disapproved by reviewing authority).

Accused pleaded not guilty to the charges 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 one year. The reviewing authority disapproved the findings of guilty of Specification 3, Charge I, and Specification 2, Charge II, approved

the sentence but reduced the period of confinement to six months, designated Fort Sam Houston, Texas, as the place of confinement, and forwarded the record under the provisions of Article of War 50 $\frac{1}{2}$ .

3. The evidence introduced by the prosecution under the specifications of which findings of guilty were not disapproved by the reviewing authority is substantially as follows:

First Sergeant Irvin J. Bland, 5th Motor Transport Company, Fort Sam Houston, Texas, testified that on or about October 2, 1935, motor truck number W-35450, belonging to the 5th Motor Transport Company, was sent to the 3d Motor Repair Section for repair. The truck had been run 263 miles after it was put in the shop, as shown by an examination of the truck and the operation sheet. Pursuant to orders, the truck had not been locked while in the shop, but the keys had been left in it. (R. 9-10)

Captain B. W. Kunz, (Infantry) Quartermaster Corps, 3d Motor Repair Section, Fort Sam Houston, Texas, testified that when a truck was parked on the repair line of the 3d Motor Repair Section, he was the only one authorized to allow the use or removal of the truck from the line. He did not give anyone permission to remove a truck from the line on or about October 3d. He further testified that the value of a one and a half ton Chevrolet truck is more than \$525. (R. 10,11)

It was agreed by stipulation that if Robert and J. F. Yancey of Blanco, Texas, were present, they would testify in substance as follows:

On or about October 3, 1935, two men came to their filling station at Blanco, Texas, in a truck numbered "U.S.A. 35450". One man, dressed in fatigue clothes, was driving the truck; the other was in uniform and has since been identified as accused. The two bought ten gallons of gasoline for the truck at a cost of \$1.85. Accused asked the Yanceys to cash a check for him, and, at accused's request, they made it out for \$2.50 on the Blanco National Bank, Blanco, Texas, payable to J. F. Yancey. Accused signed the name "W. R. Dirikson" to the check, and also wrote on the check Company No. 49 and his number P-3566. They thought at the time that his name was Dirikson and asked him if he had an account in that bank. He replied "that it was alright, that all he had to do was to put the Company number on it Company No. 49, and it would be good anywhere". The Yanceys wrote the truck number "U.S.A. 35450" on the

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check, accepted it and gave accused the change, \$0.65. Later they took the check to the Blanco National Bank and the cashier said that "W. R. Dirikson" had no account there, but that he would send it to the Army bank at Fort Sam Houston and see what they would do about it. At the time accused gave the check he was under the influence of liquor.

Staff Sergeant W. R. Dirickson, 2d Veterinary Company, 2d Medical Regiment, Fort Sam Houston, Texas, identified accused and testified that he was a member of the same organization. Witness examined an unidentified check and testified that the signature on it was not his. Accused was not with his company on the afternoon of October 3, 1935. He returned at some time during the night and was present for reveille on the morning of the 4th. (R. 14-16)

4. Specification 1, Charge I, is not laid under the 83d Article of War and no loss of or damage to military property is alleged. Persons subject to military law may be charged under the 83d Article of War with suffering military property willfully or through neglect to be lost, spoiled, damaged, or wrongfully disposed of, where the circumstances indicate that they knew the loss to be imminent or actually going on and took no steps to prevent it, or omitted to take such measures as were appropriate to prevent probable loss or damage. Par. 143, M.C.M. There is no evidence in the record that this truck was damaged or that the Government suffered any loss from its use other than the minor and incidental wear due to the mileage that it was driven. It does not appear that accused was the custodian of this truck or in any manner responsible for its proper use. From all that does appear in the record, accused may have been an innocent passenger in the truck without knowledge that the driver of the truck was making an unauthorized use of it. The fact that accused bought gas for it at Blanco in the manner that he did, for the return to Fort Sam Houston, does not necessarily imply his guilty knowledge of its wrongful use or that he was involved in the beginning of such wrongful use. It may as well be interpreted as an effort on his part to effect the return of the truck to the place where it belonged and thereby to prevent any loss or damage to it. The specification is inartificially drawn, and the evidence does not support the finding of guilty thereunder.

5. Under Specification 1, Charge II, while there is evidence that accused signed the name "W. R. Dirikson" to the check, and that "W. R.

Dirickson" is a sergeant on duty at Fort Sam Houston, there is no evidence that Sergeant Dirickson did not authorize accused to affix his name to this check, and no competent evidence that Sergeant Dirickson did not have an account at the bank upon which the check was drawn. Under the circumstances there is no proof that the check was falsely made with intent to defraud. Par. 148 j, M.C.M.; Dig. Ops. JAG, 1912-30, secs. 1567 (1)(2)(3); CM 185417, Sadler.

6. In the absence of competent proof, as stated in the preceding paragraph, that the check in question was falsely made with intent to defraud, it follows that the evidence is legally insufficient to support the finding of guilty under Specification 2, Charge I.

7. 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 Hall, Judge Advocate.

\_\_\_\_\_, Judge Advocate.

L. M. Smith, Judge Advocate.

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

Board of Review  
CM 204405

MAY 4 1936

U N I T E D   S T A T E S   )

SECOND DIVISION

v.                                 )

Trial by G.C.M., convened at  
Fort Sam Houston, Texas, April  
10, 1936. Dishonorable dis-  
charge and confinement for  
one (1) year. Fort Sam Houston,  
Texas.

Private HOWARD E. ROSE         )  
(6244764), 2d Veterinary         )  
Company, 2d Medical                 )  
Regiment.                             )

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

---

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

2. Accused was originally tried January 7, 1936, upon the following charges and specifications:

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

Specification 1: In that Private Howard E. Rose, 2d Veterinary Company, 2d Medical Regiment, did, at Fort Sam Houston, Texas, on or about October 3, 1935, willfully and wrongfully suffer one  $1\frac{1}{2}$  ton "Chevrolet" cargo truck No. W-35450 of the value of about Five hundred and twenty-five dollars and seventy-four cents (\$525.74), military property belonging to the United States, to be wrongfully used and employed to the prejudice of good order and military discipline.

Specification 2: In that Private Howard E. Rose, 2d Veterinary Company, 2d Medical Regiment, with intent to defraud J. F. Yancey, did, at Blanco, Texas, on or about October 3, 1935, unlawfully pretend to J. F. Yancey

that a certain check in the following words and figures, to wit:

"Blanco, Texas, October 3, 1935 No \_\_\_\_\_  
 THE BLANCO NATIONAL BANK 88-948  
 Pay To J. F. Yancey OR ORDER \$2.50/100  
 Two and 50/100-----DOLLARS  
W. R. Dirikson,  
 P.3566"

was genuine, well knowing that said pretenses were false, and by means thereof, did fraudulently obtain from said J. F. Yancey merchandise to the value of Two dollars and fifty cents (\$2.50).

Specification 3: (Disapproved by reviewing authority).

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

Specification 1: In that Private Howard E. Rose, 2d Veterinary Company, 2d Medical Regiment, did, at Blanco, Texas, on or about October 3, 1935, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

"Blanco, Texas, October 3, 1935 No \_\_\_\_\_  
 THE BLANCO NATIONAL BANK 88-948  
 Pay to J. F. Yancey OR ORDER \$2.50/100  
 Two and 50/100-----DOLLARS  
W. R. Dirikson,  
 P.3566"

which said instrument was a writing of a private nature which might operate to the prejudice of another.

Specification 2: (Disapproved by reviewing authority).

Accused pleaded not guilty to the charges 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

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confinement at hard labor for one year. The reviewing authority disapproved the findings of guilty of Specification 3, Charge I, and Specification 2, Charge II, approved the sentence but reduced the period of confinement to six months, designated Fort Sam Houston, Texas, as the place of confinement, and forwarded the record under the provisions of Article of War 50 $\frac{1}{2}$ .

The record of trial was examined by the Board of Review and held legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General concurred in the holding of the Board of Review and recommended that the findings of guilty and the sentence be vacated. The record of trial was returned to the reviewing authority for a rehearing or such other action as might be proper. The reviewing authority vacated the action previously taken in the case, disapproved the findings of guilty and the sentence, and ordered a rehearing of Specification 2, Charge I, and Specification 1, Charge II, before another court.

3. At the rehearing on April 10, 1936, accused was tried upon Specification 2 of Charge I, and Charge I; and Specification 1 of Charge II, and Charge II. He pleaded not guilty to the charges 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 one year. The reviewing authority approved the sentence, designated Fort Sam Houston, Texas, as the place of confinement, and forwarded the record under the provisions of Article of War 50 $\frac{1}{2}$ .

4. The evidence supports the findings of the court. The only question requiring special consideration is whether the sentence imposed is within the limits authorized upon a rehearing.

Article of War 50 $\frac{1}{2}$  provides that upon a rehearing "no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding". The sentence adjudged by the court in the original proceeding was dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The

reviewing authority in his action approved the sentence but remitted so much thereof as was in excess of dishonorable discharge, total forfeitures, and confinement at hard labor for six months. This was legally equivalent to approving only the sentence as reduced. Par. 87 b, M.C.M., p. 77. The sentence as acted on by the Board of Review and The Judge Advocate General under the provisions of Article of War 50 $\frac{1}{2}$  was a sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for six months, and in the opinion of the Board of Review this was the "original sentence" in the case and no sentence in excess of or more severe than this can now be enforced.

5. For the reasons stated above, the Board of Review holds the record of rehearing 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.  
H. A. Turnbull, Judge Advocate.  
L. W. Smith, Judge Advocate.



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

Board of Review  
CM 204461

MAR 5 1936

U N I T E D	S T A T E S	)	PANAMA CANAL DEPARTMENT
		)	
	v.	)	Trial by G.C.M., convened at
		)	Fort Amador, Canal Zone,
Private 1st Class ROY W.		)	January 16, 1936. Dishonorable
FISHER (6521588), Regimental		)	discharge and confinement for
Band, 4th Coast Artillery (AA).		)	three (3) years. Disciplinary
		)	Barracks.

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private 1st Class Roy W. Fisher, Band, 4th Coast Artillery (AA), did at Panama City, R. de P., on or about December 2, 1935, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Edward Osorio, per anus.

Accused pleaded not guilty to the Charge and Specification, and was found of the Charge, guilty, and of the Specification:

"Guilty, except the words 'Edward Osorio', substituting therefor the words, 'a human being, to wit, a Panamanian boy, name unknown'; of the excepted words, not guilty; of the substituted words, guilty."

No evidence of previous convictions was introduced. Accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to

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become due, and confinement at hard labor for three years. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$ .

3. The only question in this case requiring consideration is whether or not there is a fatal variance between the allegations of the specification and the finding thereunder. It is therefore deemed unnecessary to discuss the evidence in detail. Suffice it to say that it is established beyond a reasonable doubt by uncontradicted evidence that the accused committed sodomy at the time and place and in the manner alleged with a Panamanian boy; but there is no evidence to show who this boy was.

4. The accused was charged with having committed sodomy with a particular individual, namely, Edward Osorio. The court has found that accused did not commit sodomy with the person named in the specification but did commit the offense with some other person whose name is unknown. This finding constitutes an acquittal of the offense charged and a conviction of an offense not charged. Following principles of law announced in numerous opinions and holdings of The Judge Advocate General and of the Board of Review, the Board is of opinion that there is a fatal variance between the allegations of the specification and the finding thereunder in this case. CM 191369, Seluskey; CM 188432, Soderquist; CM 164042, Rodden; CM 157982, Acosta; CM 157842, Greening; CM 129356, Mumford; CM 128088, Lee; CM 110910, Brooks.

5. In an opinion concurred in by the Judge Advocate, Panama Canal Department, it is said with reference to the finding in this case:

"Such finding does not effect the legal sufficiency of the record in view of the opinion of the Board of Review and The Judge Advocate General in the following cases: CM 129845 - CM 188432 - CM 192319."

The opinion in CM 129845, Ramsey (April 1, 1919), was not by either The Judge Advocate General or the Board of Review. It was written in the Office of the Acting Judge Advocate General for the American Expeditionary Forces and was approved by him. So far as it can be discovered, it has never been followed by this office.

The opinion in CM 188432, Soderquist (December 11, 1929), does not support the view quoted above from the opinion concurred in by the Department Judge Advocate. On the contrary, it supports the conclusion reached in this holding.

CM 192319, Lindsay (August 19, 1930), has no bearing upon the point at issue in the instant case.

6. Since the accused has been acquitted of the specific offense charged, a rehearing is not authorized. From the papers accompanying the record of trial it appears that upon a preliminary investigation testimony was elicited from Edward Osorio, named in the specification, which, if introduced at the trial, would have established the fact that the person with whom accused committed sodomy was Edward Osorio. Consequently, the finding in this case is a bar to another trial upon a specification alleging sodomy with an unknown person. It appears that Osorio could not be found at the time of the trial.

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

Theodore Hall, Judge Advocate.  
G. L. L. L., Judge Advocate.  
S. W. Smith, Judge Advocate.





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hard labor for one year. No evidence of previous convictions was introduced. Defense counsel submitted a plea for clemency, based upon the fact that the prosecutrix had held herself out to accused and others as being eighteen years of age, and her previous lack of chastity. The reviewing authority approved the sentence, ordered it executed, but suspended that portion thereof as adjudged dishonorable discharge until the soldier's release from confinement, and designated the Guard House, Fort Armstrong, T. H., as the place of confinement. The sentence was published in General Court-Martial Order No. 3, Headquarters Hawaiian Department, January 24, 1936.

3. The statute referred to in the specification reads as follows:

"Sexual Intercourse with Female under Sixteen; punishment.

Whoever shall be convicted of having sexual or carnal intercourse with any female under the age of sixteen years, not his lawful wife, shall be imprisoned at hard labor for not more than ten years." Sec. 6243, Rev. Laws of Hawaii, 1935.

It is to be observed that the statute does not contain any words indicating that intent is to constitute an element of the act there made penal. It merely denounces the act itself.

4. Competent evidence in the record conclusively proved that the prosecutrix was less than sixteen years of age on July 31, 1935, the actual date of commission of the crime alleged, and not the lawful wife of accused (R. 8,12; Ex. 1), and that accused had sexual intercourse with her on that date (R. 13,34; Ex. 2). The prosecution offered no evidence that accused "wilfully" committed the act upon the prosecutrix with full knowledge of her age, and prevented the defense from introducing any evidence to the effect that the act had not been so committed (R. 14,15).

The specification alleged that the act had been "wilfully, unlawfully and feloniously" done. The only reasonable interpretation to place upon these words, which were not included in the statute, is that they apply not merely to the act of sexual intercourse itself, but also to the allegation that the female was under the age of

sixteen. In other words, the effect of the word "wilfully" was to allege that accused intentionally committed the act upon the female with full knowledge of her age. It would seem that since the Government elected to plead the act was so committed, it was bound thereby. CM 203589, Miller and King. If this view of the pleadings is taken, the prosecution not only entirely failed to prove the allegation of intent, but the court committed a prejudicial error in refusing to permit the defense to prove that accused acted under an honest mistake of fact. In offenses involving intent, ignorance of fact or mistake of fact will exempt a person from criminal responsibility. Par. 126 a, p. 136, M.C.M.; sec. 437, p. 291, Winthrop's Military Law and Precedents, 2d ed., 1920 reprint.

However, assuming without deciding that the allegation of intent may be disregarded as surplusage (since the specification alleged all of the essential elements of the crime denounced in the statute), then the conviction may be sustained as the proof supports the crime denounced in the statute, provided there are no errors in the record prejudicing any substantial right of accused.

5. The following occurrences during the course of the trial are considered sufficiently important to require consideration:

a. On cross-examination of the prosecutrix the defense brought out that accused had inquired of her as to her age, and, if it had not been for the objection of the trial judge advocate and the ruling of the law member striking out the answer of the witness to this question, presumably the defense would have continued this line of cross-examination to show that accused was not only ignorant of the female's true age but honestly believed after inquiry that she was in fact over sixteen years of age (R. 14,15).

b. In an attempt to establish that the prosecutrix was a girl of loose morals and not chaste, the defense called Miss Edith Field as a witness. Due to technical objections of the trial judge advocate, which were sustained by the law member, the defense was prevented from eliciting any important evidence from this witness as to the previous lack of chastity of the prosecutrix. (R. 28,29)

c. In an attempt to attack the credibility of the prosecutrix, the defense called her father as a witness. In an inartificial

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manner the defense counsel attempted to bring out from this witness the reputation of the prosecutrix for veracity. Due to continual technical objections on the part of the trial judge advocate, a Major in The Judge Advocate General's Department, the defense counsel, obviously unskilled in matters of evidence, however otherwise qualified, abandoned his efforts along this line. (R. 21-26)

d. Throughout the proceedings the trial judge advocate interposed numerous technical objections, in addition to those referred to above, which served no useful purpose and only served to harass and hamper the unskilled though obviously earnest efforts of the defense counsel (R. 15,16,17,20-22,25,26,27,36,37).

As to a and b, above referred to, the objections of the trial judge advocate were based upon rules of procedure of civil criminal courts as stated in sections 713 and 716, Wharton's Criminal Law, and 33 Cyc.1438. The Board accepts these authorities as representing the weight of authority in the civil criminal courts of the various states. However, in almost all instances, in civil criminal trials the verdict is by the jury, while the sentence is adjudged by the court. Evidence inadmissible for the jury may be considered by the court in awarding sentence. 16 C.J. 1297; United States v. Standard Oil Co., 155 Fed. 305.

Under the military code the court-martial is both judge and jury and the rules of procedure to be followed are prescribed in the Manual for Courts-Martial. It is only when these rules do not cover a situation that recourse is open to other authorities. Par. 111, p. 109, M.C.M., 1928. It is clear from the Manual for Courts-Martial that accused persons may introduce evidence in extenuation for consideration by the court in determining the measure of punishment. Pars. 45 b, 111, pp. 35, 109, M.C.M., 1928.

From the foregoing it is the opinion of the Board of Review that evidence showing that accused honestly believed the prosecutrix to have been more than sixteen years of age was an extenuating circumstance which accused had a right to have considered by the court in connection with the measure of punishment to be adjudged against

him. The Board also takes the same view with respect to the previous unchastity of the prosecutrix. In this connection see People v. Marks, 130 N. Y. Supp. 524, and King v. State, 152 S. W. 990. The fact that a confession including evidence tending to establish these points was subsequently introduced by the prosecution (R. 33-35; Ex. 2) does not render this error harmless, as it is manifest that the zeal of the trial judge advocate had convinced the court that it was not to consider such evidence for any purpose.

In regard to c, above referred to, it is clear that the father of the prosecutrix was competent to testify as to the reputation of his daughter for veracity and that this evidence was kept out because of the inability of the defense counsel properly to frame his questions to meet the technical objections of the trial judge advocate.

As to d, above referred to, the whole record reflects the dominance exercised by the trial judge advocate over the court, as well as over the defense counsel, which, in the opinion of the Board, was not calculated to give accused the fair and impartial trial he should have had.

From the foregoing, the Board concludes that on the whole record accused did not receive a fair trial and that all the errors taken together injuriously affected his substantial rights. CM 200989, Osman.

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

Theobald, Judge Advocate.  
William A. Turnbull, Judge Advocate.  
A. M. Smith, Judge Advocate.

To The Judge Advocate General.

Special Assignments  
CM 204483.

1st Ind.

MAY 23 1936

War Department, J.A.G.O.,

- To the Secretary of War.

1. As required by Article of War 50 $\frac{1}{2}$  in cases of this kind, regardless of whether or not The Judge Advocate General concurs in the opinion of the Board of Review, there are transmitted herewith for the action of the President, the record of trial and the opinion of the Board of Review in the case of Private Andrew F. O'Donnell (6851772), Depot Detachment, Quartermaster Corps, Fort Armstrong, T.H.

2. For reasons hereinafter indicated I am unable to concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings and sentence.

3. The accused was found guilty under the 96th Article of War, of a specification alleging that, at Honolulu, T.H., he "willfully, unlawfully, and feloniously" had sexual intercourse with one Catherine L. Wilson, a female, under the age of 16 years, not his lawful wife, in violation of Sec. 6243, Revised Laws of Hawaii. The statute in question makes the act alleged punishable by imprisonment at hard labor for not more than ten years. It contains no words making knowledge that the female is under age an essential element of the offense and the weight of authority is to the effect that proof of lack of such knowledge or even proof that the accused honestly believed the female to be over the age of consent is no defense. That accused committed the act alleged, a violation of the statute cited, is proved beyond peradventure of doubt and was fully admitted by him in a signed confession which was introduced in evidence (Ex. 2). It is true that there is no evidence that he knew the girl to be under the age of 16 years, but, since it was unnecessary to use the word "willfully" in the specification, which clearly alleges an offense under the statute involved, the allegation that the criminal act was committed "willfully" may be treated as surplusage and disregarded.

4. The conclusion of the Board of Review that accused did not have a fair trial and that, consequently, the record is legally insufficient to sustain the findings and sentence appears to be based upon certain alleged errors or irregularities, which are stated in Par. 5, of the Board's opinion and may be summarized substantially as follows:

a The defense, by reason of the court erroneously sustaining an objection by the trial judge advocate to a question asked the prosecutrix on cross examination, was prevented presumably from pursuing a line of examination designed to show that accused believed after inquiry that the girl in question was over 16 years of age;

b By interposing "technical" objections, which the court sustained, the trial judge advocate prevented the defense from eliciting from Miss Edith Field, Probation Officer of the Juvenile Court, any important evidence concerning previous lack of chastity of the prosecutrix;

c By continual "technical" objections the trial judge advocate caused the defense counsel, "obviously unskilled in matters of evidence", to abandon his efforts to show by the father of the prosecutrix what her reputation for veracity was; and

d The trial judge advocate, throughout the trial, interposed numerous technical and useless objections which "only served to harass and hamper" the efforts of the defense counsel.

5. Under the provisions of the 37th Article of War the findings and sentence of a court-martial are not to be disapproved because of improper admission or rejection of evidence or for any error in pleading or procedure unless, in the opinion of the reviewing authority, after an examination of the whole record, it appears that the substantial rights of the accused have been injuriously affected. It appears from the review of the staff judge advocate, upon whose recommendation the reviewing authority approved the sentence, that the errors in excluding evidence were considered but were not deemed to have injuriously affected the substantial rights of the accused. Careful examination of the entire record leads me to the same conclusion. The record leaves no doubt of accused's guilt. The evidence which the Board holds to have been erroneously excluded, was not proper to be considered as a defense but only in extenuation. The term of confinement adjudged is one year. Ten years was authorized by law. Under these circumstances it is impossible for me to say that admission of any testimony that was erroneously excluded would have resulted in a less severe sentence. Moreover, even if it be believed that the sentence would have been less severe if it had been more clearly established (a) that the accused had made inquiry and honestly believed the prosecutrix to be over 16 years of age, (b) that she was previously lacking in chastity, and (c) that she was untruthful, any possible injury that may have resulted from the errors may be cured by remitting the unexecuted portion of the sentence without vacating the findings and sentence, thereby in effect declaring to be innocent a man whose guilt has been clearly established and admitted.

6. When on cross examination the defense counsel asked the prosecutrix, Catherine L. Wilson, if accused had asked her her age and she answered in the affirmative, the trial judge advocate objected on the ground that it was immaterial whether accused knew that she was under age or not or had used reasonable care to ascertain her age, lack of

knowledge constituting no defense to a charge of statutory rape. The trial judge advocate read to the court certain authorities tending to support his objection and the law member sustained it on the ground that the question was "immaterial to the issue" and struck out the answer (R. 14, 15). The defense counsel did not pursue this line of questioning further.

I agree with the Board of Review that the defense was entitled to show in extenuation, if it could, that accused had made inquiry as to the age of the prosecutrix and believed her to be over sixteen years old. It is believed, however, that the effect, if any, of the error, was lessened by the following circumstances: The prosecution introduced in evidence as Exhibit 2, a confession, sworn to by the accused, in which he stated that he did not know that the prosecutrix was under 16 years of age; that when he first met her she was a hostess at a dance club; and that, from this fact, he believed she was at least eighteen years old because he knew that the law did not permit any girl under 18 years of age to be employed as a hostess in such a club. Moreover, the members of the court observed the prosecutrix and thus had an opportunity of judging whether or not her appearance was that of a girl only 16 years of age.

7. The Board of Review contends that the trial judge advocate by "technical objections" (R. 28, 29) prevented the defense from eliciting from the Juvenile Court Officer, Miss Edith Field, any important testimony concerning previous lack of chastity of the prosecutrix. No specific question as to chastity was asked of this witness and nothing in the record indicates that the witness had any knowledge concerning the chastity or lack of chastity of the prosecutrix prior to the date of the offense of which accused has been found guilty. The witness testified in substance that, in October, nearly three months after the offense here involved it was ascertained that the prosecutrix had had sexual intercourse and that she named the accused and another man as persons with whom she had had such intercourse (R. 30, 31). I cannot characterize as "technical" or improper the objections made by the trial judge advocate while Miss Field was on the witness stand. When the witness was asked if she knew "the deportment" of the prosecutrix, the trial judge advocate objected and the objection was sustained (R. 28) and, in my opinion, properly so. When the witness was asked if she knew "the character" of the prosecutrix the trial judge advocate objected and the objection was properly sustained (R. 29). The record fails to disclose that the defense attempted to introduce or could produce any evidence as to the chastity or lack of chastity prior to the commission of the offense here involved. When the trial judge advocate, through a misunderstanding of a question, argued that evidence of lack of chastity was not admissible, the defense counsel disclaimed any intention of showing lack of chastity on the part of the prosecutrix in the following language -

"May it please the Court, the defense is not in this case bringing up the question of the chastity of the daughter (Catherine L. Wilson), but the question is the credibility of the daughter as a witness." (R. 22).

Over objection by the prosecution, Miss Field was permitted to testify that almost all the friends of the prosecutrix "have records at the Juvenile Court" (R. 28). She also testified that the prosecutrix was one of a group of girls that had caused a great deal of trouble (R. 30) and that witness did not think the police paid enough attention to the prosecutrix (R. 31). Furthermore the prosecutrix herself testified to having had sexual intercourse with a man other than accused (R. 19). Thus it was clearly before the court that the prosecutrix was not a chaste girl and the court may have drawn, and probably did draw, its own conclusions as to whether or not the lack of chastity began prior to the offense.

8. When the father of the prosecutrix, called as a witness for the defense, was asked what his daughter's reputation for veracity was and answered "Not very well, sir," the trial judge advocate objected, but it soon became clear that he had misunderstood the question and thought it related to her reputation for chastity. Therefore the objection was overruled (R. 21, 22). When, on cross examination of this witness, it appeared that, while he knew his daughter to be untruthful, he had not discussed with others the subject of her veracity, the prosecution moved to strike out the previous testimony of the witness and the law member ruled that the witness' testimony concerning his daughter's reputation would be stricken out (R. 24). This ruling did not strike out the testimony that the witness would not believe the prosecutrix under oath (R. 22).

Miss Field testified that she knew the reputation of the prosecutrix for truth and veracity and that it was "not very good" (R. 27). Moreover the prosecutrix herself testified that a few days before the trial she had stated that she would be willing to testify that she had never had intercourse with accused (R. 15-17).

Thus the court had before it evidence, not only that the reputation of the prosecutrix for veracity was not good, but that she was in fact untruthful. Besides, even if all evidence as to her veracity had been excluded, the error would have been harmless in view of accused's confession (Ex. 2).

9. I do not agree with the statement of the Board of Review that, throughout the trial, the trial judge advocate interposed numerous technical and useless objections serving only to "harass and hamper"

the efforts of the defense counsel. It is true that the trial judge advocate prosecuted the case vigorously, as was his duty, and a few of his objections might, in my opinion, better have not been made; but I find nothing in the record to indicate an attitude of unfairness on the part of the trial judge advocate or of any one else connected with the trial.

10. For the reasons hereinabove indicated I am of opinion that the record of trial is legally sufficient to support the findings and sentence. In view, however, of the apparently loose character of the prosecutrix, of the probability that accused did not know that she was under the age of 16 years, of the fact, that, while the confinement adjudged is much lighter than might lawfully have been imposed, nevertheless, it is understood to be considerably more than is usually adjudged by the civil courts of Hawaii in like cases, of the fact that, if the dishonorable discharge, execution of which has been suspended until the release of the accused from confinement, is executed, this will constitute a severe punishment in addition to the confinement and forfeitures, and of the further fact that the accused has already been in confinement nearly seven months, it is believed that the ends of justice and discipline will be adequately served if the unexecuted portion of the sentence is remitted. This will result in saving to the service a soldier whose previous record has been excellent and in sparing him the disgrace of a dishonorable discharge.

11. I recommend that the findings be approved and the sentence confirmed and that the unexecuted portion of the sentence be remitted.

12. Inclosed, herewith, is a letter to the President, marked "A", prepared for your signature in case you concur in the above recommendations, together with a form of action by the President, also marked "A", designed to carry these recommendations into effect. Also inclosed herewith for use in case you concur in the opinion of the Board of Review is an alternative letter to the President marked "B" for your signature with an alternative form of action also marked "B".

5 Incls.

1. Record of trial
2. Let. to President
3. Form of action
4. Alternative let. to President
5. Alternative form of action.

  
A.W. Brown,

Major General,  
The Judge Advocate General.

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

Board of Review  
CM 204639

U N I T E D   S T A T E S	)	WAR DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Walter Reed General Hospital,
Colonel JOSEPH I. McMULLEN	)	Washington, D. C., January 9,
(O-1558), Judge Advocate	)	February 17, 18, 19, 20, 1936.
General's Department.	)	Reduction in rank to foot of
	)	list of colonels, reprimand,
	)	and forfeiture of \$150 per
	)	month for twenty-four months.

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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 96th Article of War.

Specification 1: In that Colonel Joseph I. McMullen, Judge Advocate General's Department, United States Army, assigned during the period from and prior to January 1, 1933, until and subsequent to January 20, 1934, to duty in the Office of The Judge Advocate General of the Army at Washington, D. C., and well knowing that during all of said period The Assistant Secretary of War was habitually accustomed to request and rely upon his legal advice and assistance relative to all transactions between the War Department and Joseph Silverman, Jr., and the corporations in which the said Joseph Silverman, Jr., was interested, did, at Washington, D. C., on or

about January 20, 1934, wrongfully and dishonorably accept from the said Joseph Silverman, Jr., and use two round trip railroad and Pullman car tickets between Washington, D. C., and San Francisco, California, of the total value of approximately \$369.70, as a gift and reward for legal advice in connection with such transactions, which he, the said Colonel Joseph I. McMullen, had rendered and furnished to The Assistant Secretary of War on or about January 25, 1933, and subsequent thereto, up to and including December 12, 1933, which said legal advice was favorable to the interests of the said Joseph Silverman, Jr., and the Brimley Corporation and the Breecot Company, Incorporated, in which the said Joseph Silverman, Jr., was interested.  
(Finding of not guilty.)

Specification 2: In that Colonel Joseph I. McMullen, Judge Advocate General's Department, United States Army, being at the time assigned to duty in the Office of The Judge Advocate General of the Army at Washington, D. C., and well knowing that The Assistant Secretary of War was habitually accustomed to request and rely upon his legal advice and assistance relative to all transactions between the War Department and Joseph Silverman, Jr., and the corporations in which the said Joseph Silverman, Jr., was interested, did, at Washington, D. C., on or about January 20, 1934, in violation of section 207, Title 18, United States Code, wrongfully and unlawfully accept and receive from Joseph Silverman, Jr., two round trip railroad and Pullman car tickets between Washington, D. C., and San Francisco, California, of the approximate value of \$369.70, with the intent to have his decision and action on the contract dated December 12, 1933, between the United States of America by Harry H. Woodring, The Assistant Secretary of War, and the Breecot Company, Inc., by Joseph Silverman, Jr., Sec'y., influenced thereby.  
(Finding of not guilty.)

Specification 3: In that Colonel Joseph I. McMullen, Judge Advocate General's Department, United States Army,

being at the time assigned to duty in the Office of The Judge Advocate General of the Army at Washington, D. C., and well knowing that The Assistant Secretary of War was habitually accustomed to request and rely upon his legal advice and assistance in connection with all transactions between the War Department and Joseph Silverman, Jr., and the corporations in which the said Joseph Silverman, Jr., was interested, did, on or about January 20, 1934, while such transactions between the War Department and the said Joseph Silverman, Jr., and the corporations in which he was interested, were still pending before the War Department and The Assistant Secretary of War, and while some of the undertakings under the contracts in connection with the same were still not completely executed, and while the said Colonel Joseph I. McMullen well knew that he was still subject to call by The Assistant Secretary of War for legal advice and assistance in connection with the same, wrongfully, dishonorably and to the discredit of the military service, accept and use as a gift from the said Joseph Silverman, Jr., two round trip railroad and Pullman car tickets between Washington, D. C., and San Francisco, California, of the total approximate value of \$369.70.

Specification 4: In that Colonel Joseph I. McMullen, Judge Advocate General's Department, United States Army, being at the time assigned to duty in the Office of The Judge Advocate General of the Army at Washington, D. C., and well knowing that The Assistant Secretary of War was habitually accustomed to request and rely upon his legal advice and assistance in connection with all transactions between the War Department and Joseph Silverman, Jr., and the corporations in which the said Joseph Silverman, Jr., was interested, did, on or about January 20, 1934, at a time when he well knew that the said Joseph Silverman, Jr., was seeking through The Assistant Secretary of War concessions under, and modifications of, existing contracts, and endeavoring to obtain new contracts, with the War Department, wrongfully, dishonorably and to the discredit of the

military service accept and use as a gift from the said Joseph Silverman, Jr., two round trip railroad and Pullman car tickets between Washington, D. C., and San Francisco, California, of the approximate value of \$369.70.

He pleaded not guilty to the charge and all specifications, and was found not guilty of Specifications 1 and 2, but guilty of Specifications 3 and 4, except the word "all" contained in each of these specifications, and of the Charge. No evidence of previous convictions was introduced. He was sentenced to be reduced in rank to the foot of the list of officers of his grade, to be reprimanded by the reviewing authority, and to forfeit \$150 per month for a period of twenty-four months.

3. In view of the fact that there are no substantial conflicts in the evidence, the material evidence in this case with respect to Specifications 3 and 4, both for and against the accused, may be summarized as follows:

Accused is a Colonel commissioned in The Judge Advocate General's Department, U. S. Army, with rank from November 1, 1932. For some time prior to January 1, 1921, he was Chief of the Patent Section in the Office of the Chief of Staff. Thereafter and until some time after January 20, 1934, he was continuously assigned to duty in the Patent Section in the Office of The Judge Advocate General, Washington, D. C. (R. 85; Fussell, R. 269,270; Butcher, R. 279,280; Pros. Ex. 2)

During the period May 8, 1930, to March 4, 1933, accused was also legal adviser to the Honorable Frederick H. Payne, then The Assistant Secretary of War, on certain matters which included matters pertaining to Joseph Silverman, Jr., and corporations in which Mr. Silverman was interested (Payne, R. 142,143,148). Between January 1, 1933, and March 4, 1933, accused visited the office of The Assistant Secretary of War thirty-eight separate and distinct times. During this same period Joseph Silverman, Jr., also visited the office of The Assistant Secretary of War nine different times. Many of the visits of Mr. Silverman either immediately preceded or immediately followed the visits of accused, but there is no evidence that both men were in the office of The Assistant Secretary of War at the same time. (Buckingham, R. 185,187; Pros. Exs. 25,26)

On or about January 9, 1933, Mr. Payne, in his official capacity as The Assistant Secretary of War, received a letter from Thomas Jefferson Ryan, attorney for Silverman, requesting his personal consideration of "the matters referred to in the attached papers". The attached papers consisted of eight letters, all addressed to The Assistant Secretary of War, dated January 7, 1933. Four of the letters were from the Breecot Company, Inc., and were signed in the corporate name by J. Silverman, Jr. The remaining four letters were from The Brimley Corporation and were also signed in the corporate name by J. Silverman, Jr. Mr. Silverman was interested in each of these companies and the address of both concerns was 594 Broadway, New York City. (Payne, R. 143,144; Ryan, R. 156,157; Pros. Exs. 8-15)

On January 25, 1933, Mr. Payne consulted with accused in regard to the requests contained in the eight letters, and accused submitted his views in regard to them on separate unsigned memoranda, all dated January 25, 1933 (Payne, R. 144,148,149; Block, R. 161,162; McKinnay, R. 153,154; Pros. Exs. 8-15,17,18). The first letter from the Breecot Company requested that the contract of that company of March 2, 1929, with the War Department, as modified by supplemental agreements of March 1, 1932, and January 4, 1933, be further modified to permit the corporation to reduce from \$25,000 to \$10,000 its deposit guaranteeing the faithful performance of the contract, and that the performance period be extended from March 1, 1933, to November 30, 1933. No new consideration was offered. The material part of accused's advice on this letter was as follows:

"There are no particular legal questions involved in this request. It appears to have been the practice to meet the requests of contractors in cases of this character because of financial and market conditions so that the transaction is largely a matter of discretion on your part." (Pros. Exs. 8,22)

The second letter from the Breecot Company also concerned the contract of that company with the War Department, referred to above, and asserted as a matter of law, under Article III of the first supplemental agreement to the contract, dated March 1, 1932, its right to use the par value of its bonds on deposit with the Government, and not the market value thereof, as a basis of payment for merchandise. The

remark of accused as to this proposal was as follows:

"The claim of the Breecot Company to credit of the par value of Liberty Bonds deposited, appears to be a fair interpretation of Article 3 of the Contract as quoted. I have not the contract before me, but if the statements of the Company that the first delivery of goods was a substantial equivalent of the par value of the bonds, this also lends force to the claim of the Company." (Pros. Exs. 9,22)

The third letter from the Breecot Company requested reconsideration of its offer of February 8, 1932, to purchase unused O.D. cotton coats for export. The remark of accused on this proposal was as follows:

"No legal question is involved in this case at all. It is purely a matter of discretion, and the bargain and sale on your part." (Pros. Ex. 14)

The fourth letter from the Breecot Company contained an offer of the company to buy unused O.D. cotton breeches provided terms mutually satisfactory could be arranged and requested a conference for that purpose. Accused's remark concerning this matter was as follows:

"This request involves no question of law and is purely a matter within your discretion, as to whether it is desired to sell the breeches in question on terms agreeable to the Company." (Pros. Ex. 15)

The first letter from The Brimley Corporation requested that the contract of that corporation of October 13, 1932, with the War Department be modified so that the "take-out price" on underwear be increased from \$0.145 each to \$0.15 3/8 each, and that "a corresponding average decrease be applied to the balance of the raincoats". The reason advanced for this request was to facilitate the banking transactions of the contractor and to "best serve the interests of the Government in a quicker disposal of the property". Accused's response to this request was as follows:

"As the arrangement of unit prices was a matter of mutual agreement, largely for the purpose of accounting

and as the change requested would under market conditions probably be of benefit to the United States and would not change the total amount the Government would receive under contract, there seems to be no doubt that it is clearly within your discretion to grant the change desired." (Pros. Ex. 12)

The second letter of The Brimley Corporation requested reconsideration of a former request for permission to substitute a surety bond "in a suitable amount" for \$25,000 in Government bonds then on deposit with the Government for the faithful performance of the contract of October 13, 1932. Accused's remarks on this request are in relevant part as follows:

"Upon the theory of a 'bird in the hand' is worth 'two in the bush', the Government to be properly protected would have to have a surety bond double the sum of the Liberty Bonds. I take it from the letter, that you previously held that the change could not be made. I do not understand that there is any such legal requirement, that the only legal requirement is that the Government should be protected and that therefore in your judgement the Government can be properly protected by the substitution of a surety bond of double the value of the Liberty Bonds, and that it is in your discretion to do so." (Pros. Ex. 13)

The third letter of The Brimley Corporation requested that its contract with the War Department dated October 13, 1932, be modified so as to postpone the completion of it for one year, and that the contractor be permitted to sell certain soiled or damaged articles in the domestic market. Accused's remarks were as follows:

"The Brimley Corporation in its letter of January 7, 1933, in regard to Contract of October 13, 1932, W-626 Q.M. 13175, requests a modification of the contract so as to permit them to sell locally in such a manner as in no way will affect the domestic market. This is purely a matter of discretion, in which you can decide in your own way and in your own judgment as to the circumstances.

All these letters involve questions largely of policy.

It must be realized that the commercial value of War goods of the United States are depreciating at a rate which will soon reach the vanishing point. This coupled with the economic conditions which are confronting us, you would probably want to consider the question whether the War Department will want to find itself loaded up with a lot of goods of practically no commercial value at some time in the near future. You only have to look at the prices received for these goods immediately after the war and the prices they are being sold for on the market at this time to realize the rapid depreciation, and this is a factor which you may properly take into consideration in dealing with the whole question." (Pros. Ex. 11)

The fourth letter of The Brimley Corporation contained a complaint against the Quartermaster Department for changing the markings on certain bales of merchandise covered by the contract of October 13, 1932, and billing the contractor as per the changed marking, this in violation of Article IV of the contract. As to this complaint accused advised as follows:

"In this letter the contractor asserts that the Quartermaster Department are not delivering the goods according to the terms of the contract. The contract is not before me, but the letter quotes what is purported to be Article IV of the contract, which indicates that the contractor is to receive the goods 'as is, where is', etc., but that the Quartermaster Department have been remarking bales and billing them in accordance with the remarking. If that is a fact, it is, of course, not in accordance with the terms of the contract, and it is suggested that both the Quartermaster Department and the contracting officer, Colonel W. R. Gibson, be asked the question whether bales have been remarked to show contents as different from what they were marked at the time the contract was made. The controversy hinges entirely upon the question of fact, which fact I take it is easily ascertainable." (Pros. Ex. 10)

It also appears that on January 25, 1933, Mr. Payne held a conference in his office at which Thomas Jefferson Ryan, attorney for Joseph Silverman, Jr., was present and several officers in the Quartermaster Corps. At this conference Mr. Payne reached a decision on the matters referred to in the eight letters and directed an officer in the Quartermaster Corps to draft the necessary letters in accordance with his decisions. In his decisions Mr. Payne granted some of the requests and denied others. If General DeWitt, The Quartermaster General, was not the officer to whom Mr. Payne gave the eight letters, they were delivered to General DeWitt by the officer who received them, because on January 27, 1933, General DeWitt turned the eight letters and the attached memoranda of accused over to Major, then Captain, E. H. Block, Quartermaster Corps. On February 2, 1933, in accordance with the policy of The Quartermaster General's Office, Major Block prepared answers to each of the eight letters denying the requests, secured the approval of The Quartermaster General, and took the letters to the office of The Assistant Secretary of War, where they were signed by Mr. Payne and then mailed to the Breecot Company and The Brimley Corporation. (Block, R. 161-163,165-167; Payne, R. 144, 149; Ryan, R. 156,157; Pros. Exs. 8-15)

Later the eight letters denying the requests of the Breecot Company and The Brimley Corporation were returned to The Assistant Secretary of War by Mr. Ryan. Thereafter, on February 6, 1933, a conference in regard to the matters covered in these letters was held by Mr. Payne in his office, with the following present: Mr. Payne, The Assistant Secretary of War, Colonel W. F. Jones, Quartermaster Corps, Major E. H. Block, Quartermaster Corps, representatives of The Quartermaster General, Mr. T. J. Ryan, and accused. At this conference the eight requests of the Breecot Company and The Brimley Corporation were discussed. Accused played a very minor part at this conference, at most answering about half a dozen legal questions. During the conference Mr. Payne reached decisions as to each of the requests and at the conclusion of the conference directed accused to dictate letters to the Breecot Company and The Brimley Corporation in accordance with his decisions, which were as follows:

(1) Partially approved the request of the Breecot Company for a reduction of its deposit guaranteeing performance of the contract. (See letter referred to supra as the first letter from that company.)

(2) Apparently took no action at this time on the request of the Breecot Company to use the par value of its bonds on deposit with the Government as a basis of payment. (See letter referred to supra as the second letter from that company.) This matter was referred to The Judge Advocate General's Office on February 9, 1933, where a recommendation was made against the granting of the request of the Breecot Company.

(3) Refused to consider the two offers of the Breecot Company to purchase additional surplus goods. (See the two letters referred to supra as the third and fourth letters from that company.)

(4) Granted the request of The Brimley Corporation as to changes in "take-out price". (See letter referred to supra as the first letter of that corporation.)

(5) Disapproved the request of The Brimley Corporation for a substitution of a surety bond for its deposit of Government bonds. (See letter referred to supra as the second letter from that corporation.)

(6) Partially granted the requests of The Brimley Corporation for an extension of time of performance of the contract and permission to sell certain articles in the domestic market. (See letter referred to supra as the third letter from that corporation.)

(7) Refused to consider the complaint of The Brimley Corporation in regard to the remarking, and billing as remarked, certain merchandise held by the Quartermaster Corps for delivery to The Brimley Corporation. (See letter referred to supra as the fourth letter from that corporation.)

Accused dictated letters to the appropriate company in the cases where the decision of The Assistant Secretary of War was favorable, which were immediately dispatched by special messenger to Mr. T. J. Ryan at the Carlton Hotel. Apparently no letters were dictated or dispatched covering the requests unfavorably considered by The Assistant Secretary of War. In this connection Mr. Payne testified that he took "full responsibility for any contract or renewal of contract with Mr. Silverman or anybody else during my term of office". (Payne, R. 145,146, 149-152; Block, R. 163,164,167-171; Rice, R. 173,174; Lanigan, R. 177-181; Pros. Exs. 8-15)

Copies of the various letters dispatched to Mr. Ryan apparently were sent to The Quartermaster General's Office because on February 13, 1933, The Quartermaster General addressed a memorandum to The Assistant Secretary of War expressing the following view: "It is the opinion of this office that these changes cannot legally be made in the manner that has been followed, but that supplemental contracts must be entered into before they can be carried out". The memorandum of The Quartermaster General was referred to The Judge Advocate General on February 13, 1933, and on February 16, 1933, the latter expressed the following opinion with respect to the requests contained in the letters from the Breecot Company and The Brimley Corporation referred to supra as the first letter from the Breecot Company and the third letter from The Brimley Corporation, respectively: "Except to the extent stated in paragraph 10 above, I am of the opinion that, in the absence of some benefit to the Government not disclosed by the attached papers, or of some new and valuable consideration, no legal authority exists for the modification of these contracts in the manner indicated". In paragraph 10, referred to in the above quoted opinion, The Judge Advocate General expressed the view that the contract of The Brimley Corporation might be legally modified in regard to the sales of surplus property in the domestic market, as this was a question of policy which could be properly determined by the Secretary of War. (Pros. Ex. 16) The Breecot contract of March 2, 1929, as amended, and the Brimley contract of October 13, 1932, as amended, were completely performed on April 1, 1934, and March 6, 1934, respectively (Block, R. 171,172,176).

On April 6, 1933, the Honorable Harry H. Woodring assumed the office of The Assistant Secretary of War, which office he still retained at the time of the trial. During 1933 and January and February of 1934, accused was "the legal representative of the Office of The Judge Advocate General in business relations with the Assistant Secretary of War". Mr. Woodring also discussed matters of policy with accused when such matters were pertinent to the transaction under discussion. Joseph Silverman, Jr., had numerous transactions pending in the office of The Assistant Secretary of War from the date Mr. Woodring took office, April 6, 1933, until he was barred from transacting business with that office by Mr. Woodring in February, 1934. Thereafter, until approximately July of 1934, Mr. Silverman, through

his attorneys, Palmer, Stellwagon and Scott, addressed his representations to the Secretary of War. (Woodring, R. 86-88,94-96,110,122, 123,126; Grimes, R. 130-137) Mr. Woodring frequently consulted with accused in regard to matters pertaining to Joseph Silverman, Jr., and in such cases relied upon the advice given him by accused. Mr. Woodring, however, did not consult with accused with respect to all matters presented by Mr. Silverman and at times consulted accused in regard to matters in which Mr. Silverman was not involved at all. (Woodring, R. 88,95,110-112) Also attorneys for Mr. Silverman had many conferences with Mr. Woodring when accused was not present and at some of these conferences the matters discussed were never discussed by the attorneys with accused (Mullen, R. 257-259; O'Neil, R. 240,241,247,248,253,254). Between May 3, 1933, and July 14, 1933, both dates inclusive, accused visited the office of The Assistant Secretary of War eight times, and on July 5, 1933, was consulted once by telephone. Mr. Woodring was abroad during the period July 14 to October 12, 1933. Between October 12, 1933, and February 12, 1934, both dates inclusive, accused visited the office of Mr. Woodring twenty-six times. Between April 12, 1933, and February 3, 1934, both dates inclusive, Joseph Silverman, Jr., visited the office of The Assistant Secretary of War twenty-three times. Only three of the visits of Mr. Silverman occurred on dates when accused also visited that office, and then at different hours. (Buckingham, R. 185-188; Pros. Exs. 25,26)

The contract of October 13, 1933, between The Brimley Corporation and the United States, covered the sale of various surplus property of the War Department and required that the property be accepted and paid for by the contractor by a certain date. It also contained a provision whereby the contractor was required to dispose of the surplus property abroad. (Pros. Ex. 21) Soon after Mr. Woodring took office as The Assistant Secretary of War, The Brimley Corporation requested an extension of time in its performance of this contract, which was denied by Mr. Woodring as his predecessor in office, Mr. Payne, had already granted the corporation one extension of time (Woodring, R. 89,113). At about the same time The Brimley Corporation also submitted a request that its contract of October 13, 1933, be modified to permit it to sell the surplus property in the domestic market as, due to the rise of nationalism and increased tariff rates abroad, that market was no longer open to it. Mr. Woodring considered

this matter for approximately two months and eventually reached the decision to grant The Brimley Corporation permission to sell the surplus property in the domestic market for one year. In reaching this decision Mr. Woodring considered the lenient policy of the Federal Government toward debtors, the demand in the domestic market for cheap goods, the fact that he had recently refused this corporation an extension of time and had forced it to make a very large payment, and the fact that Mr. Payne, his predecessor in office, had established a precedent for such action. This decision was set forth formally in a supplemental agreement with The Brimley Corporation dated July 10, 1933. (Woodring, R. 90,112-114; Pros. Ex. 3)

In the discussion which preceded the formal execution of this supplemental agreement, Mr. Woodring consulted accused many times with respect to its legal phases. Accused also drew up a tentative draft of a part of this agreement under the following circumstances: In June and July of 1933 The Brimley Corporation was represented in Washington by Ralph T. O'Neil and Robert Jackson, attorneys. These two gentlemen also at this time represented the Newbury Manufacturing Company, Inc., of Boston, Massachusetts. At this time Mr. Silverman did not have an interest in the Newbury Manufacturing Company but it had a contract with the War Department and was endeavoring to have its contract modified so that it might also make sales of surplus property in the domestic market. On a date early in July, probably July 5, Mr. O'Neil and Mr. Jackson had a conference with Mr. Woodring in regard to the modification of these two contracts and were desirous of drawing up the legal papers at that time, as Mr. Woodring had agreed to the proposed modifications. An unsuccessful effort was made to locate the Acting Judge Advocate General, Colonel Rucker, and, at the suggestion of Mrs. Buckingham, Mr. Woodring's secretary, accused was sought and eventually located at his residence as he was on leave at the time. At the suggestion of the attorneys, and with the approval of Mr. Woodring, an arrangement was made over the telephone for accused to draw a rough draft at his residence. Mr. O'Neil and Mr. Jackson then left the office of The Assistant Secretary of War and proceeded to the residence of the accused, where accused drew up in longhand a provision, applicable to both the Brimley contract and the Newbury contract, permitting domestic sales of surplus property. During the drafting of the document accused stated that in his opinion the modifications could be legally accomplished. On the following

day accused submitted the rough draft to Mr. Woodring, who referred it to The Judge Advocate General's Office, where the supplemental agreement with The Brimley Corporation was entirely rewritten. At the trial Mr. Woodring stated that he took full responsibility for this supplemental agreement with The Brimley Corporation, and considered it to have been for the best interests of the Government, and that he had not been unduly influenced in this transaction by accused. (Woodring, R. 91,92,95,114,115,120,121; O'Neil, R. 240-246; Jackson, R. 260-263)

For several months prior to December 1933, the Breecot Company, Inc., represented by Mr. Silverman and Mr. O'Neil, was negotiating with Mr. Woodring in regard to the repurchase by the War Department of certain underwear which theretofore had been sold as surplus property by the War Department to the Breecot Company, and the purchase by that company of certain other property of the War Department believed to be surplus. At this time the CCC was in need of underwear and the repurchase of the underwear from the Breecot Company was vigorously urged by Mr. Fechner and several members of Congress. The Government was at that time paying eighty cents to a dollar per garment for underwear and the price desired per garment by the Breecot Company was considerably less. The main controversy, which prolonged negotiations for weeks, concerned the price to be paid to the Breecot Company for this underwear. The company contended that the price per garment should be the original price plus interest, storage and carrying charges, while Mr. Woodring contended that the price should be the original price placed upon the underwear at the time it was sold by the War Department to the Breecot Company. The former price was thirty cents per garment and the latter price was either 12.5 cents or 15.75 cents per garment, both of these prices being mentioned in the record. Eventually, however, the price of 15 3/8 cents per garment was agreed upon. (Woodring, R. 92,93,115-117; O'Neil, R. 247-249; Fechner, R. 282; Pros. Ex. 4)

The other controversy, which eventually terminated the negotiations, concerned the property which the Breecot Company desired to purchase of the War Department. At some time during the fall of 1933, Mr. Woodring was given by the War Council a list of property which he understood had been declared surplus by the General Staff. This list was submitted to Mr. Silverman, who selected from it the property which he

wished to purchase. A contract was eventually drawn up containing provisions covering the purchase by the War Department of the underwear from the Breecot Company and the purchase by the Breecot Company from the War Department of certain of the property believed to be surplus. The prices set forth in this contract for the so-called surplus property were tentative as they were subject to approval by The Quartermaster General. The contract was executed by Mr. Woodring for the War Department and Mr. Silverman for the Breecot Company on December 12, 1933, and then referred to the General Staff. Thereafter, considerable discussion took place between Mr. Woodring and the General Staff as to whether the so-called surplus property was in fact surplus. Eventually the General Staff decided that this property was not surplus, but excess, and on December 28, 1933, the Chief of Staff returned the contract of December 12, 1933, to Mr. Woodring and advised him of the decision reached. Mr. Woodring then tore his signature from the contract and advised the Breecot Company of the decision of the General Staff. For possibly two weeks after December 28, 1933, Mr. Silverman continued to make representations to Mr. Woodring in regard to this contract. Thereafter, A. Mitchell Palmer, as attorney for Mr. Silverman, made representations to the War Department until June or July of 1934. (Woodring, R. 93,94,116,117,118,126; Grimes, R. 130-136; O'Neil, R. 250,251,252,255,256; Pros. Ex. 4; Def. Ex. 2)

The preliminary negotiations in regard to the so-called contract of December 12, 1933, were between Mr. Woodring, Mr. Silverman and Mr. O'Neil. After an agreement had been reached, Mr. Woodring discussed the result of these negotiations with accused and directed him to prepare the contract. (Woodring, R. 93,94,115,120; O'Neil, R. 242-243,247-249; Jackson, R. 263) Accused in conjunction with Mr. O'Neil prepared numerous drafts of the contract, and, due to the changes made by Mr. Woodring, it took approximately three weeks to put the contract in final form. During the time Mr. O'Neil and accused were working together on the drafts, accused displayed "an indifferent friendly" attitude toward the interests of Mr. Silverman. On December 12, 1933, the contract was signed by Mr. Silverman in the presence of accused, who also signed as a witness. Accused apparently took no part in the negotiations with the General Staff which followed the execution of the contract on December 12, 1933, and after December 28, 1933, was not consulted further on this contract by Mr. Woodring.

(Woodring, R. 111,119-121; O'Neil, R. 250-253,256) Mr. Woodring accepted full responsibility for this contract and denied that accused had attempted to influence him (Woodring, R. 121).

On January 5, 1934, accused dictated a memorandum to his stenographer in regard to the contract of December 12, 1933. This memorandum, obviously written for the signature of The Assistant Secretary of War, was not addressed to anyone but it contained a summary of the circumstances which had caused Mr. Woodring to act favorably upon the proposal of the Breecot Company and criticized The Quartermaster General and the General Staff for having blocked the contract. The concluding paragraphs of this memorandum are as follows:

"As a matter of fact 338,000 pair of breeches, wool, were declared surplus on March 21, 1933, as per 1st Indorsement of the AG of that date. However, under date of April 10, 1933, the Secretary of War decided to withdraw different and other materials of a nature suitable for use by Civilian Conservation Corps from surplus-----, which had not been obligated under sales contract as to the item of woolen breeches, and cotton coats and cotton breeches. The above quoted letter of Mr. F intimates that these items are not needed for these purposes but that woolen underwear is. As of March 3, 1933, the then Assistant Secretary of War, Honorable F. H. Payne, offered to sell Mr. Silverman 529,069 unused cotton coats at 7 $\frac{1}{2}$ ¢ each and 179,800 unused cotton breeches at 10¢ each, which were at that time surplus and which as above noted are not now needed by the Civilian Conservation Corps. This is confirmed by letter from Mr. Payne under date of November 21, 1933. I am advised that the cotton coats and the cotton breeches were still carried as surplus on the date I negotiated a contract and it was not until after I had advised the Chief of Staff of my desire to sell these materials that they were removed from the surplus list - that is to say, some time between December 15 and 20, 1933.

In these times of economic distress it requires no argument to justify purchase of materials at a saving of \$750,000. in order to hold in storage materials which are now 17 years old and many of them obsolete and which

will probably be entirely worthless in the course of another few years; and with respect to saddles, it seems obvious in view of our motorization plans that the number held for war purposes and current needs is entirely out of tune with the times.

If, for purposes of argument, the thought be suggested that the price at which the materials are suggested to be sold, are out of tune with their original cost, and that the price at which the materials are to be sold will be somewhere between 5 or 10% of their original cost, the answer is of course that in the first place a large portion of materials are horse equipment or things relating to horse equipment, and if one realizes that as a military proposition horses are rapidly becoming obsolete and motorizing is largely a matter of appropriations, and in the second place these materials are probably all over 17 years' old and in a short time will have practically no value at all. The price on the first three items of clothing were suggested by the Quartermaster General as a sales price a year or more ago."

Mr. Woodring denied having directed accused to write this memorandum or of having seen it before it was presented to him in court. The stenographer had no recollection of the memorandum other than it had been dictated to her by accused and that she had transcribed her notes and given the transcript to him. (McKinnay, R. 99-106; Woodring, R. 108-110; Pros. Ex. 5)

On or about February 14, 1934, a special messenger delivered to the office of the Secretary of War a letter addressed to the Secretary of War from Palmer, Stellwagon and Scott, attorneys for Joseph Silverman, Jr., inclosing a letter from Mr. Silverman to the Secretary of War. The letter of the attorneys referred to the fact that Mr. Silverman had been barred from doing business with the Office of The Assistant Secretary of War and requested careful consideration of the inclosed letter of Mr. Silverman. The letter of Mr. Silverman concerned further efforts on his part to sell to the War Department the underwear which had been the subject of the contract of December 12,

1933, and which had failed due to the opposition of the General Staff. (Grimes, R. 130-137)

At about 4:00 p.m. on January 19, 1934, accused received at his office a telegram informing him that his son, Bruce, was desperately ill in California. After reading the telegram accused departed immediately for the office of the Chief of Staff. Immediately after accused had departed, his chief clerk, Miss Fussell, telephoned the railroad station and ascertained the schedule of trains to San Francisco and the price of railroad and Pullman tickets, as in the past she had in most instances either secured the tickets for him or made arrangements for them, whether the travel was official or personal. Accused was not in the habit of purchasing the tickets himself. Miss Fussell saw accused that evening and at the train on his departure for California, but she was not asked at the trial as to what transpired then as to the tickets. (Fussell, R. 270-273,277,288)

Accused arrived at the office of the Chief of Staff at about 5:00 p.m. and shortly thereafter had an interview with the Chief of Staff. On leaving that office accused remarked that General MacArthur had granted him leave of absence in order to visit his sick son in California. Subsequently accused applied for and was granted a leave of absence from January 22 to February 6, 1934. He submitted a California address while on leave. (Butcher, R. 281,286,287; Pros. Exs. 2,34-37, incl.)

On January 20, 1934, Joseph Silverman, Jr., personally placed an order with the Mayflower Hotel of Washington, D. C., for two round-trip railroad tickets from Washington, D. C., to San Francisco, California, and two Pullman tickets from Washington, D. C., to San Francisco, California. On this same date Mr. Silverman paid the Mayflower Hotel \$370.70, \$368.70 for the transportation and \$2.00 as a service charge. These tickets in some way not definitely disclosed by the evidence were delivered to or picked up by accused between January 20 and 22, 1934, probably on January 20, as Miss Fussell testified she saw accused and his wife depart on a train for California at about 4:00 p.m. on that date. The tickets in question were used by accused and his wife on their trip to and from California. (Chamberlain, R. 190-196; Eldred, R. 197-200; Stipulation, R. 201; Fussell, R. 272, 273; Munson, R. 291-293; Pros. Exs. 27-37, incl.) While accused and

his wife were en route to California and while in San Francisco several letters and telegrams were exchanged between them and Miss Fussell with respect to the health of Bruce McMullen and other matters, Miss Fussell addressing her correspondence to accused care of the Letterman General Hospital, San Francisco, California (Fussell, R. 273-277).

In March, 1933, accused and his wife attended a dinner party given at the Carlton Hotel, Washington, D. C., by Joseph Silverman, Jr., and upon another occasion, about the same time, Mr. Silverman was a guest in the apartment of accused (Ryan, R. 157-159). In the fall of 1933 accused entertained Mr. Robert Jackson, who had been and who probably was at that time an attorney for Mr. Silverman, at a cocktail party, at which the Chief of Staff, General Douglas MacArthur, was also a guest (Jackson, R. 260-264). There is no evidence, however, that accused ever conducted any business in person, by telephone, or through correspondence with Mr. Silverman from his office in the Office of The Judge Advocate General (Fussell, R. 278,279).

The only direct testimony in the record as to whether accused reimbursed Mr. Silverman for the price of the tickets was elicited by the defense on the cross-examination of Lieutenant Colonel F. G. Munson, J.A.G.D., a prosecution witness. The pertinent parts of Colonel Munson's testimony is as follows:

Direct examination

"Q. In this second conversation, did Colonel McMullen discuss in your presence and within your hearing a trip he had made to San Francisco?

A. Yes.

Q. Did he tell you on or about what date he had gone there?

A. I do not think that the date was mentioned.

Q. Did he tell you the reason he went?

A. Yes; he did.

Q. What was the reason, as he told you. for going to San Francisco?

A. On account of the sudden illness of his son.

Q. Who was ill where?

A. In San Francisco, in a hospital, as I recall.

Q. In that conversation did Colonel McMullen state in your presence and within your hearing from whom he had obtained his transportation, including two round trip tickets from Washington, D. C., to San Francisco, California?

A. Colonel McMullen stated, as I recall, that Mr. Joseph Silverman, Jr., had volunteered to obtain the tickets for him when he, Colonel McMullen, had informed Silverman that he was in a hurry to get away from Washington on account of the serious illness of his son. As I recall that conversation was stated to have taken place over the telephone, and Mr. Silverman had stated, in order to help Colonel McMullen get away, he would be glad to do anything that he could and he had suggested the purchase of the tickets at some place where Colonel McMullen could pick them up. He suggested the purchase of the tickets and the leaving of them at some place where Colonel McMullen could pick them up, which offer Colonel McMullen accepted and stated that at some place he would later pick up those tickets. As I recall, he was not clear, or if he was clear and stated it clearly I did not catch it, as to the place he picked up the tickets.

Q. But he said that he, Colonel McMullen, picked up the tickets.

A. Yes." (R. 291-292)

Cross-examination

"Q. And while there Colonel McMullen told you that he had to go to California because of the sudden illness of his son?

A. As I recall he answered questions that Mr. Townsend asked him and that was his answer to one question.

Q. Further he stated in connection with the telephone conversation from Mr. Silverman that Silverman had represented himself as to be willing to do what he could do to aid Colonel McMullen get away to see his sick son?

A. Yes.

Q. Do you recall who made the suggestion that he buy the tickets?

A. As I recall it, Mr. Silverman suggested to Colonel McMullen that he, Silverman, buy the tickets and leave them at a convenient place so that Colonel McMullen could pick them up.

Q. Did Colonel McMullen in that same conversation state in what manner the tickets were paid for, if they were paid for?

A. Colonel McMullen stated, as I recall, that the tickets were paid for by the purchase price being applied on an automobile that he, Colonel McMullen, had sold to Mr. Silverman." (R. 293)

Accused elected to remain silent.

4. The only important question which suggests itself to the Board of Review with respect to the legal sufficiency of the proof of Specifications 3 and 4 is whether the allegation included in each of the specifications that accused accepted and used the tickets "as a gift from the said Joseph Silverman, Jr." was proved beyond a reasonable doubt.

The evidence in the record which may be regarded as tending to establish that the tickets were accepted as a gift by accused is as follows: For a number of years accused advised The Assistant Secretary of War (Mr. Payne and later Mr. Woodring) on legal matters pertaining to contracts in which Mr. Silverman was vitally interested. In most instances the legal advice given by accused was erroneous. This fact in itself is significant in view of the service and experience of accused. However, its significance is further emphasized by the consistency of this legal advice; mostly it was favorable to Mr. Silverman, at times it was noncommittal, but it was never unfavorable. Such consistency on the part of a lawyer in assiduously avoiding passing adversely upon legal matters pertaining to one individual, when many of them were obviously contrary to law and the best interests of the Government, is contrary to the rules of human conduct developed as the result of experience - unless self-interest dictated the consistency. Nor can lack of knowledge or faulty judgment account for this consistency, as it is to be observed no faulty judgment or lack of knowledge ever inured to the benefit of the Government. That accused was favorably inclined toward the interests of

Mr. Silverman is also very clearly evidenced by the memorandum he wrote on January 5, 1934, unsolicited by Mr. Woodring (partially quoted supra). It also appears that accused was on social terms with Mr. Silverman and Mr. Silverman's attorneys. The conclusion is inescapable that on January 20, 1934, Mr. Silverman was obligated to accused for many past favors. And in view of their friendly relations it may be conceded that Mr. Silverman was aware of his obligation.

It is now necessary to consider the evidence concerning the events occurring on or about January 20, 1934. Prior to that time accused almost invariably relied upon Miss Fussell to secure transportation for him, whether the contemplated travel was official or otherwise. In this instance, Miss Fussell, apparently of her own volition, telephoned to secure the necessary information as to trains and tickets, and no doubt went out to the residence of accused that evening to impart that information to him. Miss Fussell was not asked why she did not secure the tickets in this instance or as to any conversation she may have had with accused concerning the tickets. All that appears in the record is that accused accepted and used the tickets obtained by Mr. Silverman at the Mayflower Hotel. The prosecution offered no evidence as to whether accused paid Mr. Silverman for the tickets. No presumption may be indulged from the mere fact of the transfer of the tickets, that they were intended as a gift. Whether they were a gift depends upon all the facts and circumstances surrounding the transaction. See Roberts v. Moore, 181 N. W. 678, 679, and State of Ohio v. Henke (Ohio), 12 N. W. 477, 478.

The prosecution apparently relied upon the theory that the evidence above summarized established a prima facie case which, in default of an adequate explanation by accused, was sufficient to warrant conviction. This theory is well established in law in connection with larceny, embezzlement, burglary and kindred offenses where the recent unexplained possession of the fruits of a crime by an accused is deemed sufficient to warrant his conviction thereof. It is to be observed, however, in connection with these cases that the corpus delicti must first be proved beyond a reasonable doubt. Applying that rule to the instant case, it is necessary that the

proof show beyond a reasonable doubt that the tickets were transferred as a gift before any inference unfavorable to accused could arise out of his failure to offer any adequate explanation. M.C.M., par. 41 c, p. 31; CM 203511, Wedmore; McClain on Criminal Law, vol. 1, sec. 616-618; United States v. Gooding, 12 Wheat. 460, 471; Prettyman v. United States, 180 Fed. 30, 42-43; Chaffee & Co. v. United States, 18 Wall. 516, 545-546. It therefore appears that the failure of accused to offer an adequate explanation cannot be considered as proof tending to establish the allegations that the tickets were the subject of a gift to him by Mr. Silverman. Under these circumstances and in view of the further fact that Mr. Silverman was also available to the prosecution, no inference can arise against accused for his failure to call Mr. Silverman as a witness on the point whether the tickets were a gift. In this connection see Wharton's Criminal Evidence, 11th ed., vol. 1, sec. 112; 16 C.J., sec. 1023; United States v. Carter, 217 U. S. 286, 315-317. Nor may any presumption against the prosecution be indulged in for its failure to call Mr. Silverman as a witness in view of the fact that it is obvious from the nature of the charges against accused that he would be hostile to the prosecution and could claim his privilege against self-incrimination as he was an accomplice in the offense alleged in Specification 2. 22 C.J., sec. 56, p. 120; Wigmore on Evidence, 2d ed., vol. 1, sec. 287, and cases cited; Wharton's Criminal Evidence, 11th ed., sec. 738; Egan v. United States, 287 F. 958, 965.

The defense showed that Mr. Payne and Mr. Woodring (The Assistant Secretaries of War concerned) took full responsibility for all of the War Department contracts made with Mr. Silverman during their respective terms of office, and that neither of them considered that accused had exerted any undue influence in behalf of Mr. Silverman. In regard to the ticket transaction, it was shown that accused left suddenly for California on the receipt of a telegram informing him of the serious illness of his son, Bruce. As to the allegation that the tickets were a gift, accused relied principally upon the presumption of innocence and a self-serving statement made by him to Lieutenant Colonel F. G. Munson, J.A.G.D., to the effect that the tickets had been paid for by him "by the purchase price being applied on an automobile that he, Colonel McMullen, had sold to Mr. Silverman". This self-serving statement appears in the record as having been elicited from Lieutenant Colonel Munson, a prosecution witness, on cross-examination by the defense. The right of the defense to adduce this

testimony under the circumstances is unquestioned. There remains, however, the question as to what credit should be given to it. The court apparently disregarded it entirely. While the determination of the court is persuasive, it is not binding upon the Board of Review. The weight of authority on this question appears to be that such testimony may be rejected if it appears to be inconsistent, improbable, or rebutted by other circumstances in evidence. 22 C.J., sec. 499, and numerous cases there cited; Wharton's Criminal Evidence, 11th ed., secs. 506, 510, 606, 644; United States v. Williams, 103 F. 938. It does not appear that this statement is directly inconsistent with the proof offered by the prosecution, or that it is, in itself, so improbable as to challenge belief, or that it was rebutted at all by the prosecution. Under these circumstances the Board of Review is impelled to the conclusion that it cannot be rejected in its entirety. However, since it was wholly uncorroborated and it was within the power of accused to have corroborated it by documentary proof or by calling Mr. Silverman as a witness, the most that can be said is that it raises a doubt as to whether the tickets were a gift. In this connection see United States v. Schendler, 10 Fed. 547, 549-552.

As to what evidence is sufficient to convict, the Manual for Courts-Martial, 1928, paragraph 78 a, provides:

"Reasonable Doubt.--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."

In criminal cases the federal courts have also followed the rule that circumstantial evidence is insufficient to warrant a conviction unless it is such as to exclude every reasonable hypothesis but that of guilt of the offense charged and cannot be reconciled with the theory of innocence. Vernon v. United States, 146 Fed. 121, 123; Union Pacific Coal Co. v. United States, 173 Fed. 736, 740.

The Board of Review has given most careful consideration to the evidence for the prosecution, but, in the light of the foregoing, is impelled to the conclusion that the evidence does not establish beyond a reasonable doubt that the accused accepted the tickets as a gift from Mr. Silverman.

5. After his arraignment and before the introduction of any evidence, accused interposed certain special pleas and motions, which in so far as they relate to Specifications 3 and 4, of which accused was convicted, may be briefly stated as follows:

a. "Motion to strike out" on the grounds that (1) no offense was alleged and no wrongful intent charged, (2) there was duplication and multiplication of specifications since substantially the same offense was alleged in Specification 1, and (3) the offense was alleged in its most serious aspect in Specification 2 (Def. Ex. A; R. 18-50).

b. "Plea in bar of the statute of limitations", including a motion that the court rule that no evidence relating to events which occurred prior to January 9, 1934, be admitted (Def. Ex. B; R. 50-56,87).

c. "Plea in bar of immunity under Section 859, Revised Statutes and the Fifth Amendment to the Constitution" (Def. Ex. C; R. 58-84).

These were argued at length at the trial after accused had submitted them in writing accompanied by memoranda in support of his contentions. Mr. William E. Leahy, individual counsel, also referred to some of these pleas and motions in his brief submitted to, and in his argument before, the Board of Review. All of these special pleas and motions were denied by the court and properly so. In view of the conclusion heretofore reached by the Board of Review in this opinion, no useful purpose would be served by a detailed discussion of them. Neither would any useful purpose be served by discussing the various rulings of the court adverse to the accused revealed in the record of trial and argued, and referred to in the brief filed with the Board of Review, by individual counsel for accused.

6. At the time of the trial accused was 61 8/12 years of age. His service as shown by the Army Register is as follows:

"Maj. of Inf. N.A. 5 Aug. 17; accepted 23 Aug. 17; hon. dis. 30 Sept. 19.--Pvt. corp. sgt. and 1 sgt. Tr. H 6 Cav. 11 Apr. 96 to 3 May 01; 2 lt. of Inf. 2 Feb. 01; accepted 4 May 01; trfd. to Cav. 22 May 01 (to rank from 2 Feb. 01); retired 20 Sept. 06; active duty 28 Mar. 16 to 19 July 16; (Restored to active list; act Mar. 4, 15) 1 lt. of Cav. 3 June 16 (to rank from 21 Sept. 08); accepted 20 July 16; capt. 1 July 16; maj. 1 July 20; trfd. to J.A.G.D. 18 Aug. 21; lt. col. 17 June 21; col. 1 Nov. 32."

7. 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.  
H. A. Turnbull, Judge Advocate.  
D. 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 204673

APR 17 1936

U N I T E D	S T A T E S	)	FIFTH CORPS AREA
		)	
	v.	)	Trial by G.C.M., convened at
		)	Fort Knox, Kentucky, February
Private 1st Class ROBERT		)	10, 1936. Dishonorable dis-
R. IHM (6843269), Head-		)	charge and confinement for
quarters Troop, 1st		)	nine (9) months. Disciplinary
Cavalry (Mech).		)	Barracks.

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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 specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class Robert R. Ihm, Headquarters Troop, First Cavalry (Mechanized), did, at Fort Knox, Kentucky, on or about January 22, 1936, feloniously take, steal, and carry away 1000 Cartridges ball, cal. .45 M/11, value \$18.17; 1000 Cartridges ball, Cal. .22 L.R., value \$3.71; 1 quart paint and varnish remover, value .28 cents; 1 pint varnish, value .14 cents; 10 forks, table, S.P., value \$2.00; 9 knives, table, S.S., value \$3.15; 9 spoons, tea, S.P., value .99 cents; 1 spoon, table, value .21 cents; 1 dish, vegetable, value .30 cents; 1 bowl, value .11 cents; total value \$29.06, property of the United States, furnished and intended for the military service thereof.

Accused pleaded not guilty to the charge and specification 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 nine months. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record under the provisions of Article of War 50<sup>1</sup>/<sub>2</sub>.

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

Accused was honorably discharged from the Headquarters Troop, 1st Cavalry (Mecz), October 11, 1934, reenlisted the following day in an organization not identified in the record, and was serving as a private in the Headquarters Troop named above on the date of his trial (R. 8,31). During the "last year range season" (presumably in 1935), accused had driven the truck which hauled ammunition to the target range and for two months prior to January 22, 1936, he had performed the "ordinary duties of a driver", presumably in both instances for the Headquarters Troop. Also during the period May 1, 1935, to January 20, 1936, accused had performed duty as "KP" in the Headquarters Troop mess. (R. 13-14,25)

On or about January 22, 1936, shortages in dining room and kitchen ware and ammunition came to the attention of Captain C. A. Thorp, Cavalry, who at that time was taking over the command of the Headquarters Troop. The shortages in the former articles included shortages in "Quartermaster" knives, forks, spoons and dishes, all of which had been issued for use in the troop mess and exceeded in value those alleged to have been stolen by accused. These shortages had occurred between May 1935 and January 20, 1936, "not only lately but over a period of months". The shortages in ammunition consisted of a shortage of at least 1500 or 2000 rounds of .45 caliber ammunition, and an unspecified amount of .22 caliber ammunition. The shortage in the .45 caliber ammunition had been discovered after the 1934 pistol target practice season, "two and a half or two years ago". At that time this shortage had been reported to the then troop commander who instituted an unsuccessful search for it. Other shortages which came to the attention of the troop commander in January 1936 included a shortage in varnish, tools, "and many other things of that nature". At the trial the supply sergeant testified that all of the articles found in the quarters of accused "are similar to

the items that had been lost in the troop". (R. 8,14-16,19,22-26)

On January 22, 1936, the troop commander, having reason to believe that some of the missing articles might be found in the quarters of accused who resided on Middle Street in West Point, Kentucky, made application to the proper civilian authorities for a search warrant, which was issued to him. Thereafter the troop commander, accompanied by the town marshal and several members of the military establishment, proceeded to the quarters of accused and searched them. (R. 8-9,15,20; Exs. A,B,C) The search revealed the following property: 1000 rounds of .45 caliber ammunition, lot No. 473, 1000 rounds of .22 caliber ammunition, 950 rounds lot No. 86 and 50 rounds lot No. 130, 9 knives marked "U.S. Q.M.C.", 10 forks marked "Q.M.C.", 9 teaspoons marked "Q.M.C.", 1 spoon marked "Medical Department U.S.A.", several dishes, one of which was a vegetable bowl marked "Quartermaster Corps", 1 quart of paint and varnish remover, and one pint of varnish. Most of the "silverware" was found on the kitchen table, while the other articles were found partially concealed in an unlocked cupboard. (R. 9-12,16-17)

All of the above described property was introduced in evidence at the trial. The knives, forks, spoons and dishes were identified as being exactly similar to like articles in use in the troop (R. 10-11, 19-20); the varnish remover and varnish as being similar to like articles issued to troops by the Ordnance Department (R. 11,20). The .45 caliber ammunition was identified as being lot No. 473, Frankfort Arsenal, and similar to that issued to the Headquarters Troop in September of 1934 (R. 10,16,19,22-23; Ex. D). The .22 caliber ammunition was identified as being similar to ammunition of that caliber issued to the troops, but the supply sergeant was unable to testify when it had been issued to the Headquarters Troop (R. 19,22). As to the .22 caliber ammunition, lot No. 86, the prosecution introduced, without objection by the defense, correspondence from the Western Cartridge Company showing that this lot of .22 caliber ammunition had been manufactured by it for the Government and shipped only to Columbus General Depot on February 9, 1933 (R. 27-29; Exs. E,F,G).

Evidence was also introduced to the effect that none of the articles found in the quarters of accused had been issued to him on memorandum receipt (R. 13,22).

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The value of the articles found in the quarters of accused was proved as alleged, except for the value of the 1000 rounds of .45 caliber ammunition, which was proved to be \$14.17 instead of \$18.17 (R. 20-22,26-27).

4. Accused elected to remain silent and no evidence was introduced in his behalf (R. 29).

5. The foregoing evidence establishes that on January 22, 1936, 10 forks, table, S.P., value \$2.00; 9 knives, table, S.S., value \$3.15; 9 spoons, tea, S.P., value \$0.99; 1 spoon, table, value \$0.21; 1 dish, vegetable, value \$0.30; and 1 bowl, value \$0.11; total value \$6.76, were found in the quarters of accused, and that articles similar in all respects to them had disappeared from the Headquarters Troop mess during the period May 1935 to January 20, 1936, when accused had access to them.

The evidence also establishes that on the same date as stated above 1000 rounds of .45 caliber ammunition, lot No. 473, value \$14.17; 1000 rounds of .22 caliber ammunition, lots Nos. 86 and 130, value \$3.71; 1 quart of paint and varnish remover, value \$0.28; and 1 pint of varnish, value \$0.14, were found in the quarters of accused, and that articles similar to them in all respects, except as to the amount of .22 caliber ammunition, were missing from the property of the Headquarters Troop in January 1936. The evidence also shows that the .45 caliber ammunition had been missing from the Headquarters Troop for more than a year. There was no evidence to show how long prior to January 22, 1936, the .22 caliber ammunition, paint and varnish remover, and varnish had been missing, nor was there any evidence to show that accused ever had access to these articles or to the .45 caliber ammunition prior to the date it was discovered missing.

The conviction of accused, if sustained at all, must rest upon the inference which arises from the similarity of the property found in the possession of accused and the missing Government property (M.C.M., 1928, p. 185) and the presumption of guilt which arises from the possession of recently stolen property. Par. 112, p. 110, M.C.M., 1928; sec. 1575, Dig. Ops. JAG, 1912-30.

As to the kitchen ware, total value \$6.76, specified supra, it is the opinion of the Board of Review that the evidence is legally sufficient

to warrant the conviction of accused.

As to the .45 caliber ammunition, the Board is of the opinion that the mere unexplained possession by accused of ammunition similar in all respects to missing Government ammunition, more than a year after the Government's loss, is legally insufficient to raise the presumption that accused stole the missing Government ammunition.

As to the .22 caliber ammunition, the date and amount of the Government's loss are too indefinite and uncertain to raise the presumption that the 1000 rounds found in the possession of accused were stolen by him, especially so since the evidence failed to show that accused ever had access to the Government's .22 caliber ammunition.

As to the paint and varnish remover and the varnish, not only is the date of the loss of the Government property indefinite and uncertain, but there is no evidence that accused ever had access to the missing Government property. This evidence, in the opinion of the Board, is legally insufficient to prove that the articles found in accused's quarters were the missing Government property, and, even if they were, that accused was the thief.

6. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification as finds that accused did, at the time and place alleged, feloniously take, steal and carry away 10 forks, table, S.P., value \$2.00; 9 knives, table, S.S., value \$3.15; 9 spoons, tea, S.P., value \$0.99; one spoon, table, value \$0.21; one dish, vegetable, value \$0.30; one bowl, value \$0.11; total value \$6.76, property of the United States, furnished and intended for the military service thereof; legally sufficient to support the finding of guilty of the Charge, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

Thaddeus Hall, Judge Advocate.  
H. A. Turnbull, Judge Advocate.  
L. M. Smith, Judge Advocate.



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

(57)

Board of Review  
CM 204790

MAY 27 1936

U N I T E D   S T A T E S	)	PHILIPPINE DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Manila, P. I., January 16,
Private MICHAEL J. HAYES	)	1936. To be hanged by the neck
(R-905176), Company E,	)	until dead.
31st Infantry.	)	

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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 soldier named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Michael J. Hayes, Company E, 31st Infantry, did, at Manila, P. I., on or about November 12, 1935, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Corporal Henry C. Head, Company E, 31st Infantry, a human being, by shooting him with a rifle.

He entered no plea, his counsel stating that "at this time" accused did not desire to make a plea and requesting that the court direct that a plea of not guilty be entered. There being no objection, the court ordered that the plea of not guilty be entered. He was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence with the recommendation that the President commute it to dishonorable discharge, forfeiture of all pay and allowances due or to become due,

and confinement at hard labor for the term of the soldier's natural life, and forwarded the record of trial for action under the 48th Article of War.

3. The testimony of the witnesses for the prosecution who observed the homicide and the actions of accused immediately before and after the killing was not controverted by the defense and may be summarized briefly as follows:

Before reveille, at about 5:30 a.m. on the morning of November 12, 1935, accused, who was a private in Company E, 31st Infantry, was observed holding a lighted match in the vicinity of the rifle racks in his squadroom, which was on the second floor of the barracks. Accused appeared to be looking at the serial numbers of the rifles, which were locked in the racks. No particular place in the racks was prescribed for the rifle of any individual soldier and when the racks were unlocked in the morning, usually at about 7:00 a.m., considerable confusion habitually resulted when "they all get them at once". On the morning of November 12 the rifle racks were unlocked at approximately 6:45 a.m. (McNabb, R. 21-26; Walker, R. 75,76)

At about 7:00 a.m. that morning, when about thirty of the occupants of the squadroom were present and getting ready for their duties, accused called out, "Get out of the way". At the time accused shouted he had his rifle at his shoulder and appeared to be deliberately aiming it at Corporal Henry C. Head, Company E, 31st Infantry, who also occupied a bunk in the squadroom and who at this instant was partially facing toward accused about thirty to fifty feet away while engaged in putting on his fatigue blouse. Corporal Head was not pointing at anyone or laughing, but was talking to Corporal Burchell and struggling to get into his blouse. After shouting, accused continued to aim his rifle at Corporal Head, who had not moved due to the difficulty he was having with his blouse and who was not paying attention to what was taking place, and, when accused's line of sight was unobstructed by the other soldiers, he deliberately fired a shot which struck Corporal Head on the right shoulder, penetrating his chest, and passing out his back, and knocking him to the floor. Accused then stepped forward, reloading his rifle without removing it from his shoulder, and fired two more shots at Corporal Head as he lay on the floor. The last two shots entered Corporal Head's body at the chin and abdomen. The corporal was either killed instantly or died within a very few minutes, his death being due to any one of the three wounds, each of which was

inflicted by "guard ammunition" and each being a fatal wound. (Bouldin, R. 27-29,31,34,35,36,38,39; Bohanan, R. 39-46; Keffer, R. 48-51,54; Loader, R. 59,60; Perton, R. 10,11; Philips, R. 11-13; Plew, R. 13-15; Avery, R. 15-18; Johnson, R. 19,20)

After accused fired the first shot, Corporal Tom W. Bouldin ordered the men in the squadroom "to get the hell out of quarters, that the man was crazy". Thereupon all occupants of the squadroom departed in haste except accused and Corporal Head, who was lying on the floor. The first and second shots were fired before all the soldiers had vacated the squadroom and were observed by some of them; the third shot was not actually observed by anyone, but the report was heard by several. (Bouldin, R. 28,29,30,32,34-36; Bohanan, R. 42; Keffer, R. 49-51)

As soon as Corporal Bouldin reached the bottom of the stairs on leaving the squadroom, he shouted in a loud voice "to the first sergeant to get a gun, that Private Hayes had just shot Corporal Head". The first sergeant, Sergeant Loader, directed the supply sergeant to get a pistol, and, while waiting for the pistol, accused came down the stairs with his rifle at the trail with the bolt open, and said, as he approached the first sergeant, "You don't need no pistol. It is all over with", and mumbled something about a "rat". Accused surrendered his rifle without resistance and was taken to the guardhouse for confinement. At the time he surrendered, he appeared to be sober, "very calm", and normal in every way, except that he had a "kind of a blank expression on his face". (Bouldin, R. 29-31; Loader, R. 57-59,63-66)

En route to the guardhouse accused said, "Here's another round", and handed one of the guards a round of guard ammunition, and asked the question, "Is he dead?" Upon being told that Corporal Head was probably dead, he remarked that he hoped so, "that he didn't deserve to live", and that "He wasn't going to make no punk out of me and get away with it". And in answer to a question as to what he meant, accused said that while he was drunk in bed out in his shack Corporal Head got in bed with him "and fucked him while Hayes' squaw stood by and watched him". (Huit, R. 77-81; Stevens, R. 83,84)

In its case in chief the evidence of the prosecution as to the motive which prompted the homicide was confined to the statements

made by accused en route to the guardhouse, referred to supra. No witness for the prosecution testified that any ill feeling existed between accused and Corporal Head, while several testified that they were on friendly terms. All witnesses agreed that accused was sober at the time of the homicide, although there was some evidence to the effect that at times wholly unrelated to the homicide accused had drunk considerable intoxicating liquor. Accused also appeared to have been calm, collected, and normal in his actions and expressions immediately prior to, during, and immediately following the homicide. The only evidence in the least contrary to the above statement was the exclamation of Corporal Bouldin made at the time of the homicide that accused was crazy, and the testimony of the first sergeant that at the time accused surrendered to him he had a "kind of a blank expression on his face". (Bouldin, R. 32,33; Bohanan, R. 44-47; Keffer, R. 54,57; Loader, R. 61,65,66,68; Euit, R. 77-81)

Accused was examined as to his sobriety by Captain Armin W. Leuschner, Medical Corps, at about 8:00 a.m. on the morning of the homicide. During the examination, which took about ten minutes, Captain Leuschner asked accused "sufficient questions to form an opinion as to the manner of his speech and his general condition", and reached the opinion that "at the time of the examination the man was sober and in possession of all of his mental faculties". (R. 85,86)

Presumably for the purpose of proving the element of premeditation, the prosecution proved that accused with some nine or ten other soldiers of Company E was detailed for guard duty on November 6, 1935. Considerable testimony was adduced as to the method employed in Company E in regard to the issue and return to the company of guard ammunition. Suffice it to say that the method employed was too loose and inadequate to insure that the ammunition issued would be returned. The prosecution offered no direct evidence that accused drew any of this ammunition when on guard on November 6, 1935, or that he failed to return it at the end of his guard tour. However, the evidence did show that an opportunity existed for accused to obtain ammunition, if he so desired. In this connection accused substantially admitted in his unsworn statement to the court that he used the guard ammunition issued to him during his guard tour on November 6, 1935, in the homicide of November 12, 1935. (Loader, R. 60,66,67; Spangler, R. 68-71; Zmuidina, R. 73-75; accused, R. 160,161,163,165)

4. The sole defense consisted of evidence to the effect that at the time of the homicide accused was insane. In support of this defense the proceedings of a board of medical officers properly convened by the department commander, and identified as such, were introduced in evidence. (Ex. A; R. 87,88) The findings of this board were as follows:

"Findings: As a result of this examination of Private Michael B. Hayes, (R-905176), Company E, 31st Infantry, and all the evidence obtainable and pertinent to this case, it is the opinion of the Board:-

1. That at the time of the commission of the alleged act, Private Hayes was suffering from a mental derangement, marking him as temporarily abnormal, to wit, a transient, acute alcoholic hallucinosis, which condition rendered him not susceptible to ordinary human motives or appreciations of right or wrong or to the normal control of his actions.

2. That at the present time this soldier shows no evidence of gross mental abnormality.

3. That at the time of the commission of the alleged offense he lacked the ordinary understanding of right and wrong and also lacked the ordinary capacity to control him-self from wrong actions.

4. That Private Michael B. Hayes, (R-905176), Company E, 31st Infantry, is mentally capable of communicating intelligently with his counsel, of understanding the nature of the proceedings and of doing the things necessary for an adequate presentation of his defense."

The findings of the medical board were apparently based principally upon the following:

(1) The physical condition of accused, which showed that he was suffering from arteriosclerosis, generalized, moderately severe.

(2) Past history of accused as related by him, which showed that he had used alcohol since seventeen years of age and had used it to excess since his arrival in the Philippine Islands in March, 1933, and for a considerable period before that date.

(3) Statements made by accused as to his reasons for committing the homicide, which are briefly as follows: Remarks made to him by Corporal Head on November 9, 1935, to the effect that accused was a pervert and that he (Head) had had sexual intercourse with him in a

shack in the presence of a native woman while accused was drunk; subsequent actions of Corporal Head and other soldiers indicating to accused that Corporal Head had talked around the company about accused being a pervert despite the corporal's agreement to drop the matter, with the result that he (accused) was an object of ridicule; actions of Corporal Head in grinning at accused on the morning of November 12, 1935, thereby causing accused to lose all self-control.

(4) Statement of accused that he had no clear realization of shooting Corporal Head until informed afterwards.

(5) Statements made by accused to the guards while en route to the guardhouse on November 12, 1935, that he was glad Corporal Head was dead and that he could not make a "punk" out of him.

(6) Unsworn statements of seven soldiers of accused's company, who had known accused for periods ranging from four months to almost two years to the effect that accused habitually used alcohol to excess, particularly after pay day, and at times drank hair tonic. It also appears from these statements that accused muttered and carried on imaginary conversations, often when drunk and occasionally when sober; that accused apparently had stopped drinking several days before the homicide and during that period kept to himself, appeared moody and brooding, and was overheard on one occasion carrying on an animated conversation with an imaginary person. Accused was also observed watering some flowers with hot soapy water at about 8:00 p.m. on November 10. As far as these soldiers knew, accused was on friendly terms with everyone in the company, including Corporal Head. (Exs. A and B; Kenner, R. 90; Mueller, R. 107-109, 116-119)

Major Albert W. Kenner, Medical Corps, president of the medical board, was called as a witness for the defense, and, after testifying that his experience in mental cases consisted of "the usual experience of twenty years in the handling of soldiers", and that he had observed accused during the time accused was in the hospital (November 20 to 28, 1935), expressed his opinion as follows: At the time accused was admitted to the hospital (November 20) he "was normal in the sense that he was not at that time laboring under any hallucinations", although accused spoke "of hallucinations he had had", but "he was not so sure but that they might have occurred, although he remarked that his judgment now would indicate that they must not have been so". (R. 87, 89, 90)

In regard to arteriosclerosis, cerebral type, this witness testified that a man with this type of disease "has undergone certain more or less degenerative or deteriorative changes which may very well impair his judgment", but that accused did not have "that degree of arteriosclerosis", which would cause a reoccurrence of hallucinations and delusions (R. 90).

In regard to "transient acute alcoholic hallucinosis", this witness testified that a person suffering from this disease would actually believe his hallucinations to be true and would react accordingly, and that the mind of such a person might "suddenly snap and go blank for a few minutes or half an hour" (R. 91).

This witness also testified that there was no disagreement between Major Mueller (also a member of the board) and himself as to the findings of the board of medical officers and that his conclusions were the same as Major Mueller's. Major Kenner also expressed the opinion that accused's mental condition was not caused entirely through the use of alcohol, but "that had it not been for this use of alcohol he would not have developed that delusion system that he was laboring under before and after this episode". (R. 125)

The qualifications of Major W. B. Mueller, Medical Corps, as an expert witness on mental diseases were stipulated by the prosecution, although later in the trial it was brought out that he had made a special study of mental diseases since his graduation from medical school in 1899 and had taken a post graduate course in psychiatry in 1910. Major Mueller also testified that from 1900 to 1917 while in civil life he had been employed in a state hospital for the insane and since that date had specialized in mental diseases in the Army, and had often testified as an expert witness on mental disorders in civil life and in the Army. (R. 92,114,115)

While on the stand Major Mueller was asked a great many hypothetical questions as well as questions bearing directly upon the mental condition of accused. In the interest of clarity, Major Mueller's views in general as to arteriosclerosis and transient, acute, alcoholic hallucinosis will be set forth first, followed by his views in regard to the mental condition of accused.

"Any individual who has arteriosclerosis or any other deteriorating condition, especially if the brain or the vessels of the brain are effected, which they usually are in generalized arteriosclerosis, would render the individual more susceptible to intoxication, alcoholism, more susceptible than an average individual without this condition." (R. 93)

"There are a number of characteristics of the alcoholic hallucinations, not necessarily pathognomonic always, but usually; the hallucinations stand out very prominently, are very vivid. They affect the sense of hearing, to a much less extent the sense of vision, and they very frequently pertain to sexual matters, especially sexual perversion. They hear voices accusing them of having committed perverted sexual acts. It depends upon the degree of this condition an individual might be suffering from these hallucinations. He hears these various voices and yet outwardly he may appear to others practically normal. He might show no outward evidence of having these experiences, and when he is spoken to he will respond in an ordinary manner and apparently is not affected especially and you can get his attention and he will go about his work in his usual manner, and yet he may be experiencing these hallucinations. Of course in a more severe grade it would then be shown outwardly, but a man can be suffering from very active hallucinations and still be apparently normal to the casual observer." (R. 95-96)

"A man may have these alcoholic hallucinations which are quite active, and left to himself the hallucinations will annoy him very much. He will hear these words and he probably would be accused of various things by others, by some individual he might know. Very actively hallucinated, he might even speak out and answer these voices if he were alone and answer the voices and say what he was going to do, and so forth. Another individual stepping into the room at that time, getting into conversation, the hallucination might entirely cease to exist and often they do. That is a peculiarity of this type of alcoholic hallucinations. They actually subside and are not present

at the time they are occupied with something else, but when left to their own devices they become very pronounced. That is of course in the mild cases. Those cases with the extreme grade of these hallucinations would be so disturbed that any one could see at any time. You could not gain their attention. There are various degrees of this thing. But an individual can have very active hallucinations and if his attention is directed to something else the hallucinations will not be apparent or will not exist. He won't have any." (R. 113-114)

"These cases of alcoholic hallucinosis develop on the withdrawal of alcohol; that is usually the case. Not always. It might come on while a man is drinking, but it is more frequently the case that these alcoholic hallucinations come with the withdrawal of alcohol." (R. 95)

"These alcoholic hallucinations, when a man is suffering from alcoholic hallucinations, are of varying severity and also of varying duration. They might be of several days duration or again might be of several weeks or even months duration, before the individual clears up mentally." (R. 95)

"It is my opinion that there would be no actual premeditation as we understand it, as we ordinarily understand premeditation. A man might be hallucinated and feel that others were against him and were trying to injure him or say they might injure him, even to the extent of taking his life, and the individual might think of means to take against his persecutors, which in his disordered state of mind, in his mental state, wouldn't be a real premeditation." (R. 95)

"Q. One in his border-line mental condition might easily have his mind snapped so that over a period of half an hour or even an hour, or some short period of time, that his mind would be absolutely a blank and he would not know what he had done?

A. I hardly think that would be exactly correct.

He might for a short interval not realize what had taken place. He might not realize the details. Of course, if it was extremely severe he might not recognize anything, but I think then that it would be apparent to others that the individual had lost his mind completely.

Q. One in his border-line condition, then, might hallucinations drive him to sudden uncontrollable impulses?

A. It would be very likely, frequently does happen in these conditions." (R. 94)

"Q. A person performs an unusual act under an active alcoholic hallucination. What would be the condition of that patient two hours after the act was committed as regards to hallucination? Would his hallucination be readily determined by a medical officer on a short examination? Would they be apparent?

A. They might not be outwardly apparent two hours or more after, but he still might have hallucinations and they were not in evidence, were not brought out upon questioning or observation where questioning or observing more closely hallucinations might have been detected, discovered." (R. 113)

"Q. Should a man who suffers from those delusions be given some sort of mental treatment?

A. Should he be given some? Well, probably not. He should be-- A man that is going to become deranged from drinking should be placed where he couldn't get alcohol, because he would be a definite menace, be a danger to others." (R. 101)

Witness also testified that a person might be suffering from hallucinations of a particular kind and appear normal in all other respects, including his memory (R. 111).

Accused was under Major Mueller's immediate observation for a period of nine days from November 20 to 28, 1935. Accused did not have any hallucinations when he was admitted to the hospital, during the time he was in the hospital, or on the date of his return to

duty, November 28, but when admitted to the hospital he was not entirely clear as to the motive which prompted him to commit the homicide; "However he became clear and had a good conception of the affair at the time he left the hospital". (R. 92,93,110,112,121,122) In the opinion of this witness accused's hallucinations were very vivid to him and were principally caused by his long and continued use of alcohol (R. 94,105,111). He was also of the opinion that accused became hallucinated on or about November 9, 1935, after he had stopped drinking, and had a definite mental condition at the time of the homicide to the extent that he did not know at that time the difference between right and wrong and was mentally irresponsible for his actions (R. 94,102,107,112,123) Witness also partially ascribed the emotional dullness of accused to arteriosclerosis, which was very mild at present, but which might develop later (R. 93, 102). If accused left alcohol alone, witness believed the hallucinations would not return but if accused continued to use alcohol the hallucinations might return and "very likely" cause him to commit another crime, and that a man deranged from drinking alcohol should be put in a place where he could not obtain it (R. 96,101,120). Witness also thought accused sane at the trial, although it was possible for accused to be sane and still believe his past hallucinations true (R. 93,101,110,111,112)

Witness did not believe accused was feigning, and testified that he based his opinion that accused was insane upon all the facts in the case, including accused's story in regard to the act of sodomy committed on him by Corporal Head, which "was one of the principal features" (R. 106-109,115). However, if certain of these features, such as the sodomy episode, turned out to be true instead of hallucinations, his opinion as to the mental condition of accused at the time of the homicide would remain unchanged (R. 105-106,109,110). Witness also did not regard accused's actions during the homicide in singling out Corporal Head as his victim, or his actions and statements to the first sergeant after the homicide, as being inconsistent with hallucinosis (R. 120,121).

Witness further testified that the medical officer who had examined accused within two hours of the homicide was not called as a witness before the medical board, and that accused might have shown more definite manifestations if the medical board had commenced its examination and observation of him sooner than eight days after

the homicide (R. 117,118,121). Witness also stated that all members of the board (three officers) agreed upon the findings, but that another medical board might reach contrary findings (R. 118).

The testimony of the remaining witnesses appears in a summarized form on pages 10 to 13, inclusive, of the review of the assistant staff judge advocate. These summaries are adopted by the Board of Review as a part of this opinion and are as follows:

"Private first class John M. Neary, Company E, 31st Infantry, testified: That on a Saturday immediately after (October) payday he, in company with Corporal Head and Corporal Burchell, left Estado Mayor to go to Corporal Burchell's shack; that while they were there accused and his woman came there and they had some beer; that they then went to the shack in which Hayes' woman lived and obtained a peck of gin (a little more than a quart), which they drank in part; that accused was very drunk and most of the time was lying down on a straw mattress; that they had chicken soup to eat and that he does not remember whether Hayes got up and ate some or not; that he had never had any reason to be offended at accused, whom he has known for about two years, the same length of time he had known Corporal Head; that relations between accused and Corporal Head were friendly and that he himself went about with Corporal Head 'quite a bit;' (R. 126,130-132); that he never heard Corporal Head make any threats against accused and that if accused believed that on the night in question he heard one of the three, that is, the witness, Corporal Head or Private Dickerman, say in effect, 'Let's get him down and hit him over the head' or 'Let's send the squaw out and get some poison and poison his gin,' accused must have been imagining that the remark was said, witness stating that no such remark was ever said; that witness had never heard Corporal Head say that he had 'used' the accused or words to that effect nor had he ever heard Corporal Head make any remarks about accused being a 'binabay' (R. 127); that so far as he knew there was no Filipino in the shack at the time other than accused's woman, and in effect that the only possible place that anybody could be

without being seen was a very small room used by the woman's 'old man', which room he described as a 'little cubbyhole.' (R. 135). The extended cross-examination is not material as it was merely designed to shake the witness's story and did not have that effect.

Corporal Clarence E. Burchell, Company E, 31st Infantry, testified: That on the second of November he was out in Maypajo with Corporal Head and Private Neary and accused was there at that time; that he never heard Corporal Head or Private Neary make the remark, 'Hayes gets drunk we will hit him over the head,' nor had he ever made such a remark himself; that he had never heard Corporal Head say anything against accused nor accused say anything against Corporal Head and that they always seemed to be good friends; that he himself was always friendly with them; that he had never known of any unnatural acts between accused and Corporal Head nor had he ever heard Corporal Head say that such an act had been committed; that he had never heard Corporal Head say anything to ridicule Hayes in any way (R. 136-138).

Private Andrew Arroyo, 66th Service Squadron, Air Corps, testified that he has known accused since June 17, 1934; that accused was a heavy drinker and that during the periods he was drinking he was accustomed to sitting around on his bunk talking to himself; that witness did not know what he was talking about as his bunk was four or five bunks away from his; that one night when he came down from the squadroom he saw accused standing in the doorway of the sergeants' room gesturing and carrying on an animated conversation although witness could not distinguish the words; that witness in passing looked into the sergeants' room, which was merely screened from the hall, and saw to his surprise that there was no one inside; that accused was drunk; that he was not singing but was actually conversing, although there was no one with whom he could converse (R. 139-142).

In rebuttal the prosecution called Catalina Robias, who testified through an interpreter that she knows accused and while they are not legally married they live together as wife and husband in Maypajo; that after payday in November accused brought three soldiers to her house and

they told her to buy something to eat; that among those present was Private Neary and another man whom they called 'Head' (R. 143,144). That while there she saw Corporal Head approach accused in a little room off the kitchen and that Corporal Head was forcing accused to submit to an act of sodomy although accused resisted but that Corporal Head was too strong for him; that at the time the other soldiers, whom she described as being 'half sober', were in another room used as a bedroom and directly adjoining the room in which Head was supposed to be forcing accused (R. 145-147). She further testified that she was in the kitchen at the time and that her son was with her, and explained her failure to tell her story during the investigation of the matter by the fact that she was frightened when a member of the military police came to her home. She further testified she had never told accused about what she had seen (R. 147,148).

Mr. John Hayes, a witness for the prosecution, twenty-three years of age, testified that he is a son of Catalina Robias; that he was at her house in November when accused brought three other soldiers there and that when they came into the sala he left and went into the kitchen and was preparing a chicken which the soldiers were going to eat; that while he was in the kitchen he heard accused's voice say, 'No, don't like that;' that at that time accused was in the room adjoining the kitchen 'with a fat guy;' that the other man was trying to get accused's pants down and the accused was trying to get away; that accused was squatting down and not lying on the floor; and the other man was trying to commit an act of sodomy upon accused (R. 149,150); that at the time two soldiers were in the sala where he could see them by looking through the door; that witness wanted to go in and stop Hayes and the other man but his mother pulled him out, being scared; that the two soldiers in the sala were pretty drunk and looked like they were asleep (R. 151,152).

Private Albert G. Dickerman, Company E, 31st Infantry, called by the defense, testified: that in November, the first Saturday after (October) payday, he was in a shack

in Maypajo with Private Neary, Corporal Head, and accused; that they had chicken soup there that night; that there was a woman in the shack but he did not see her son; that he and the others had several drinks of gin; that Corporal Head was never out of his sight and that he did not see Corporal Head commit any unusual acts of any kind (R. 153-155); that he could not say that Corporal Head was 'exactly drunk' nor 'exactly sober;' that accused was likewise drunk, as apparently the others were also; that accused was always within his sight and he saw no evidence of any irregular acts at that time; that he wrestled a little on the floor with Corporal Head but with nobody else and that there was no other wrestling around that afternoon (R. 155).

First Lieutenant John H. Kane, 31st Infantry, assistant defense counsel, testified: That on two occasions he was present when Catalina Robias was interrogated, the first time accompanied by Captain Robal Johnson, the company commander, and the second time by Colonel Miller, the investigating officer; that the woman did not give any information whatever in regard to the alleged act of sodomy and when questioned specifically about it said, 'No, no, no,' and crossed herself several times; that he asked her the question four times that he remembers of and got the same answer (R. 158,159).

5. Accused made an unsworn statement which in pertinent part is substantially as follows: That on Thursday (November 7, 1935) he marched off guard about a quarter after or half past twelve and went to the supply room but found it closed; that he then went upstairs and prepared for luncheon, then some time later drew some cigarets and sold them, with the proceeds purchasing gin; that he came back early that night to prepare for participation in the guard of honor to be turned out for the Vice President of the United States the next morning; that in the meantime he had some drinks in the city after leaving his shack in Maypajo; that after arranging his equipment, etc., for the guard of honor he remarked, apparently to no one in particular, 'I guess I'll go over to the Walled City, get another drink and go to bed, if

no binabay stops me,' whereupon Corporal Head said, 'What you care? You're a binabay yourself,' and added, 'Anybody could prove that you were;' that accused wanted to fight Corporal Head but no fight took place; that accused went out and had a couple of drinks of gin; that after the guard of honor was dismissed the next day (November 8) he had some more drinks and then returned to barracks and there saw Corporals Head and Burchell and Private Neary together and from what he could hear they were talking about putting him on the spot; that instead of going in to dinner he went out to Maypajo and asked the woman if there was any truth in what Corporal Head had said; that at first she said, 'No,' and then she said, 'Yes,' and finally she said, 'No;' that while he was there Corporal Head, Private Neary and Corporal Burchell came and stood near the shack and he could hear them talking to the effect that they would smash accused's head with a bottle when he got drunk and also to the effect that they would get a couple bottles of gin and after he had finished one they would poison the other and people would think he had committed suicide; that then the three soldiers came into the shack and he asked Head what he was going to do and Head said, 'Let it drop,' and accused said that if Head would take everything back there would be nothing to it and added that he didn't 'believe it' and couldn't get any information at the shack and that nobody in the company seemed to know anything about it, to which remark Neary replied, 'No;' that later he went back to the city and was picked up by the first sergeant and given some fatigue; that that night being Friday (November 8) he was preparing for inspection the following day and on checking up on his equipment found the ammunition which he had retained when he found the supply room closed and decided to clean it up and turn it in; that he was interrupted by excessive calls for fatigue, etc., and so put the stuff in the cleaning bag and forgot about it; that Saturday night (November 9) they had a celebration for the men who were sailing on the November transport and he drank several glasses of beer, going to bed about nine o'clock; that Sunday and Monday (November 10 and 11) he

stayed in quarters; that Tuesday (November 12) he got up at reveille and after the formation made his bed and then had breakfast, which as he remembered consisted only of a cup of coffee and a little piece of toast; that he then returned to the squadroom and started to clean his equipment and was again called out on fatigue; that when that was finished he went into the latrine, where Corporal Head was shaving, and it seemed to him that every one quieted down as soon as he came in; that he washed his hands and went upstairs and took his rifle out of the rack and was cleaning it, for which purpose he dumped all the cleaning material out and the ammunition was with it; that he put the ammunition to one side, intending to turn it in before going to drill, and while cleaning his rifle he heard a lot of laughing behind him and turned and saw Corporal Head, Neary, Burchell, and some one else laughing; that he turned around and continued to clean his rifle and they continued to laugh and he turned again and it looked as though Corporal Head was pointing down at him and it looked as if he were sneering at him and after that accused remembers nothing (R. 160-165)."

5. The proof summarized supra squarely presents the issue of the mental responsibility of accused at the time of the homicide. It therefore becomes necessary to examine the evidence with the view of determining whether the prosecution met this issue and proved accused sane beyond a reasonable doubt. The court, which had the opportunity of observing the demeanor and the manner of testifying of each of the witnesses, including accused, while on the stand, unanimously by its verdict of guilty found accused sane. The findings of the court have great weight with the Board. However, the Board will proceed independently to determine for itself the mental condition of accused.

In arriving at its conclusion the Board will carefully weigh the findings of the medical board and the testimony of the medical witnesses in support thereof. This evidence may not be disregarded recklessly or capriciously. However, it was not binding upon the court, nor is it binding upon the Board as there is other evidence, including the testimony of a medical officer, which sheds light upon

the mental condition of accused at the time of the homicide and negatives several of the basic premises of the medical board and witnesses in support thereof. CM 116694, James; CM 124243, Hochberg; CM 128252, Heppberger; CM 130448, Hill; United States v. Chisholm, 149 Fed. 284, 287, 289; id. 153 Fed. 808, 813, 814; United States v. Harriman, 4 Fed. Supp. 186, 188.

6. The contention that accused was insane rests primarily upon the findings of the medical board as supplemented by the testimony of two of its members, Majors Kenner and Mueller, who were called as witnesses before the court. The grounds for the findings of the medical board are set out supra, together with a brief summary of the testimony of these two officers, and will not be repeated here. Other evidence as to the insanity of accused consisted of the spontaneous exclamation of Corporal Bouldin at the time of the homicide that accused was "crazy" and Sergeant Loader's testimony that accused appeared to have a "kind of a blank expression on his face" at the time of his surrender. There is also for consideration the unsworn statement of accused made at the trial and the testimony of Corporal Burchell and Private Neary to the effect that certain threats, which accused related as having been made on November 8 in their presence, had not occurred as far as they knew.

The exclamation of Corporal Bouldin and the testimony of Sergeant Loader as to the appearance of accused at the time of his surrender are not regarded by the Board of Review as being particularly significant, in view of the circumstances under which Corporal Bouldin made the exclamation and Sergeant Loader's other testimony that accused appeared very calm and perfectly normal in every other way.

Accused's statement at the trial is deserving of some attention. Major Mueller testified that when accused was admitted to the hospital he was not entirely clear as to the motive which prompted him to commit the crime, but that he became clear and had a good conception of the affair at the time he left the hospital. Yet at the trial accused recited the same story which he had told Major Mueller when admitted to the hospital. Major Mueller also testified that accused was sane at the trial, but that it was still possible for him to believe his past hallucinations true. It is not understood how accused could have had a clear conception of the affair when he left

the hospital, be sane at the trial, and yet relate a story at the trial which he must have known was not true if he had had a clear conception of the affair when he left the hospital. The only explanation is that accused either "stuck to his story" or intended to relate to the court what he had believed at the time he committed the homicide.

Another feature of accused's statement to the court is that which relates to threats made against him on November 8, when he was with deceased, Corporal Burchell and Private Neary (accused, R. 162,163). Corporal Burchell and Private Neary both denied that they ever heard the threats in question (Burchell, R. 136; Neary, R. 127). However, their testimony is not very convincing as it appears that they made these statements in response to questions concerning November 2 (Burchell, R. 136-138; Neary, R. 126,127).

7. It was the contention of the defense that at the time of the homicide accused "was suffering from a mental derangement, marking him as temporarily abnormal, to wit, a transient, acute alcoholic hallucinosis", complicated by arteriosclerosis, generalized, moderately severe. The latter physical ailment may be dismissed with the remark that even the medical witnesses for the defense placed little, if any, reliance upon it as a cause of accused's derangement. The board of medical officers consisted of three officers, Major A. W. Kenner, a medical officer of practically nineteen years' service, who was without any special training in mental diseases, Major W. D. Mueller, a medical officer with over thirty-five years' experience in civil life and in the Army, especially qualified in mental diseases, and Captain W. W. Nichols, a medical officer with little over three years' service and apparently no special training in mental diseases. From the evidence it appears that accused was under the immediate observation of Major Mueller, although observed occasionally by Major Kenner. There is no evidence as to the part taken by Captain W. W. Nichols other than that he agreed to the findings of the medical board. Under these circumstances it is only reasonable to presume that the report of the medical board primarily reflects the views of Major Mueller, and that this report and Major Mueller's testimony may be considered together.

The grounds for the findings of the medical board have been set forth supra in this opinion, and the first ground, arteriosclerosis,

already disposed of. The second ground was the past history of accused as related by him. It is enough to say in regard to this that it may or may not have been true. Accused was admittedly sane at the time of his admission to the hospital and must have realized why he was there. For him to present his past history in a light most favorable to him was only natural. The third ground was accused's reasons for having committed the crime, which were regarded by Major Mueller as hallucinations. One of the principal so-called hallucinations was the one in regard to the act of sodomy committed upon accused by the deceased. Major Mueller admitted this to be the case at the trial. Its importance is further emphasized because sexual perversion appears to be one of the chief characteristics of persons afflicted with alcoholic hallucinations.

The testimony as to the commission of the crime of sodomy upon the accused on November 2, 1935, is conflicting. Corporal Burchell testified that he was out at Maypajo, the locality in which accused's shack was located, on November 2 with accused, deceased, and Private Neary. He was asked questions concerning conversations which occurred, according to accused's unsworn statement on November 8. However, he denied knowing anything about any unnatural acts between accused and deceased. (Burchell, R. 136-137; accused, R. 162) On cross-examination Corporal Burchell admitted that in fact he was not even at accused's shack the afternoon in question (Burchell, R. 138). What he meant is not clear, but from the testimony of the other soldier witnesses who were present on November 2 Corporal Burchell was not at the shack of accused at the time the alleged act of sodomy was committed.

Private Neary testified that he was out at accused's shack on the Saturday after pay day (November 2) with accused, deceased, and Private Dickerman, and did not see any unnatural sexual acts between accused and the deceased. According to this witness, accused was drunk on the evening of November 2, while the rest of them, that is, deceased, Dickerman, and himself, were sober but had drunk some beer and gin. (Neary, R. 126-127, 130, 131)

Private Dickerman testified that on the first Saturday after pay day (November 2) he went out to the shack of accused, where he found accused, deceased, and Private Neary. He also testified that accused's "squaw" was there but that he did not see her son. This witness also denied having seen any unnatural sexual crime committed by deceased

upon accused, but admitted that all of them had been drinking to a certain extent. (Dickerman, R. 153-157)

Catalina Robias, the "squaw" of accused, testified that the soldiers were "half sober", and her son, "John Hayes", testified that they were "pretty drunk". These two latter witnesses also gave testimony to the effect that the crime of sodomy had actually been committed upon accused by the deceased. There is evidence to the effect that upon a previous occasion Catalina Robias had denied that the act had been committed, but the testimony of her son was unimpeached. On the whole, the Board of Review is inclined to the belief that the crime was in fact committed. (Robias, R. 143-148; Hayes, R. 149-153; Kane, R. 158,159)

Another "feature" was the grinning and pointing of the deceased, which precipitated the homicide. The evidence shows that the deceased was talking to a fellow soldier and struggling to get into his fatigue blouse about fifty feet from accused. It seems that even a sane man with a guilty conscience observing these maneuvers might think that he was the topic of the conversation.

The fourth ground was the statement of accused to the effect that he had no recollection of the actual shooting. In the face of the actions and statements of accused this challenges belief. Accused arose an hour or so before reveille, located his rifle in the racks, secured his rifle before most of the other men, deliberately aimed it at the deceased, shouted to the soldiers in between to "Get out of the way", waited until his line of sight was clear, deliberately fired three shots at deceased, two after deceased was on the floor, overheard Corporal Bouldin shout to the first sergeant to "get a gun", walked down the stairs and stated as he approached the first sergeant, "You don't need no pistol. It is all over with", inquired of the guards en route to the guardhouse if Corporal Head was dead and expressed satisfaction on hearing that he was probably dead, adding "He wasn't going to make no punk out of me and get away with it".

The fifth ground was the statements made by accused en route to the guardhouse. If the act of sodomy was actually committed, these statements lose all significance as hallucinations. The sixth ground

was the unsworn statements of soldiers who had known accused for sometime. It must be observed here that these statements were not under oath or subject to cross-examination by the prosecution, except in the case of Private 1st Class Arroyo, who was called as a witness at the trial. In his case it appears that before the medical board he stated that several days before the homicide he overheard accused carrying on an animated conversation with an imaginary person, no statement being made as to the sobriety of accused at that time. In his testimony before the court, however, this witness testified accused was drunk at the time. (R. 142) If muttering and carrying on a conversation with imaginary persons while drunk is a cogent characteristic of persons who may at any moment become violently insane, there are many such persons at large who should be locked up. The belief that accused had stopped drinking several days before the homicide was apparently founded on several statements by the soldiers who appeared before the medical board to the effect that accused "stayed in at night and apparently had stopped drinking", "seemingly had stopped drinking", and the statements of accused himself. It also appears that accused was in fact sober on the morning of the homicide.

The fact that Major Mueller, when questioned on cross-examination as to what his opinion would be if certain of the premises set forth in the report of the medical board were not in fact true, stated that his opinion would remain unchanged, has been carefully considered by the Board. The positiveness of Major Mueller's testimony does not, in the opinion of the Board, cure the defects in his original premise.

8. A great deal of the prosecution's evidence which tended to establish the sanity of accused at the time of the homicide has been referred to in connection with the analysis of the testimony for the defense, and will not be reiterated here. It is enough to say that the Board not only regards this testimony as impeaching the findings of the medical board, but also as affirmative proof of accused's sanity and motive for the commission of the homicide. In addition to this evidence, which showed accused acted in a normal manner immediately before, during, and after the homicide, there is for consideration the evidence tending to show accused obtained the ammunition which he used in the homicide while on guard November 6, 1935. It will be observed that this date antedates the one upon which accused is supposed to have stopped drinking and became hallucinated, November 9, and was after the date upon which the act of sodomy was alleged to

have taken place, November 2. Consideration must be given also to the opinion of Captain Armin W. Leuschner, a medical officer of more than five years' experience, who examined accused within two hours of the homicide and found him sane. It also appears that Colonel W. Lee Hart, a medical officer of more than twenty-seven years' service, also must have believed accused sane, as he was a member of the court and the vote was unanimously for the death penalty.

The Board assumes without deciding that in a proper case a person may be so afflicted with alcoholic hallucinations as to be mentally incapable of distinguishing right from wrong and adhering to the right. But the Board is of the opinion that in this case the evidence for the prosecution not only negated several of the major premises upon which the report of the medical board was based, but affirmatively proved beyond a reasonable doubt that accused was so far free from mental defect, disease, or derangement as to be able, concerning the particular act charged, both to distinguish right from wrong and to adhere to the right.

9. Two matters appear in the record which impress the Board as requiring remark. The first is the fact that the trial judge advocate read to the court, and distributed to the members of the court, mimeographed copies of the following quotation from Clark's Handbook of Criminal Law:

"Page 67. - Partial Insanity -- Insane Delusions. -  
'Another answer of the judges to the House of Lords, after the McNaghten Case, was in reply to the question whether a person would be excused if he should commit an offense under and in consequence of an insane delusion as to existing facts. The answer was, in substance, that if a person is laboring under a partial delusion, not being in other respects insane, he must be considered in the same situation as to responsibility as if the facts in respect to which the delusion exists were real; that if, for example, a person, under the influence of his delusion, supposes another man to be in the act of taking his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment, but if his delusion was

that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment. This rule has been generally followed, both in England and in this country, but has been severely criticized. It is necessary, however, to understand what the law means by an insane delusion. The delusion must be mental, and not moral; that is, it must not arise from moral degradation or passion, as this is mere moral insanity. There must be an actual delusion, and it is also necessary that the act shall be immediately connected with the delusion. If a person knows all the facts as to which he acts, he is not exempt, and it is immaterial that he has an insane delusion as to other facts. Another essential is that the delusion must not be the result of negligence. If a person has the opportunity, and has sufficient reason, to correct a delusion, and, instead of doing so, continues to nourish it, he is responsible. Mere false judgment does not amount to an insane delusion, nor do erroneous opinions on questions of religion or politics.'" (R. 103-105)

Without passing upon the correctness of the above quotation, the Board of Review is of opinion that it in no way prejudiced any substantial right of accused. The major portion of the mimeograph in question consists of quotations from the Manual for Courts-Martial, which included the rule as to insanity followed in courts-martial. It is not to be presumed that a court composed of officers of long experience and high rank would reject the law as set forth in the Manual for Courts-Martial and adopt that published in a textbook concerning which they probably had little, if any, knowledge.

The second point pertains to the statements of the defense counsel made in court to the effect that in his opinion accused was insane at the trial (R. 160). At the trial Major Mueller testified that, as far as he knew, accused was not insane (R. 111,112). On January 24, 1936, accused was again examined by Majors Kenner and Mueller, who reached the following findings:

"1. That at the time of his trial by General Court Martial, Private Michael J. Hayes was not suffering from

any gross mental disease or abnormality and was mentally capable of communicating intelligently with his counsel, of understanding the nature of the proceedings and of doing the things necessary for an adequate presentation of his defense.

2. That at the present time Private Michael J. Hayes presents no evidence of mental derangement marking him as abnormal mentally and that he is capable of communicating intelligently with his counsel, of understanding the nature of the proceedings of the General Court Martial, and of doing those things necessary for an adequate presentation of his defense." (P. 3, report of board of officers dated Jan. 24, vol. I of record of trial)

10. The Board, in considering the record of trial, has given careful consideration to the brief submitted in behalf of the accused by Messrs. James B. Hogan and Michael J. Lane, Washington, D. C., attorneys for the accused.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. However, in view of all the circumstances connected with the case, the recommendation of the reviewing authority, that the President commute the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the soldier's natural life, is concurred in. The death penalty is authorized by the 92d Article of War.

Wesley Hall, Judge Advocate.  
W. A. Turnbull, Judge Advocate.  
See dissenting opinion attached, Judge Advocate.

To The Judge Advocate General.

(82)

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

Board of Review  
CM 204790

U N I T E D	S T A T E S	)	PHILIPPINE DEPARTMENT
		)	
	v.	)	Trial by G.C.M., convened at
		)	Manila, P. I., January 16,
Private	MICHAEL J. HAYES	)	1936. To be hanged by the
(R-905176),	Company E,	)	neck until dead.
31st Infantry.		)	

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MEMORANDUM by SMITH; L.M., Judge Advocate.

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1. For reasons hereinafter indicated, I cannot concur with the majority of the Board of Review in its opinion that the record of trial in the case of the soldier named above is legally sufficient to support the findings of guilty and the sentence.

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Michael J. Hayes, Company E, 31st Infantry, did, at Manila, P. I., on or about November 12, 1935, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Corporal Henry C. Head, Company E, 31st Infantry, a human being, by shooting him with a rifle.

He entered no plea, his counsel stating that "at this time" accused did not desire to make a plea and requesting that the court direct that a plea of not guilty be entered. There being no objection, the court ordered that the plea of not guilty be entered. He was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence with the recommendation that the President commute it to dishonorable discharge,

forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the soldier's natural life, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence in the record is satisfactorily summarized in the excellent review of the assistant staff judge advocate. This summary is adopted for the purposes of this memorandum, and is as follows:

"2. Private James H. McNabb, Company E, 31st Infantry, testified: That about 5:30 of the morning of November 12, 1935, he arose for the purpose of going to the latrine; that reveille had not yet been sounded (R. 21, 23); that he stepped a few paces to the bunk of another soldier to obtain a match for the purpose of lighting a cigaret; that while there he happened to glance around and saw accused standing by the rifle racks with a lighted match, apparently looking at the rifles as if to examine the serial numbers (R. 21, 22, 24-26); that he did not pay any particular attention to the matter at the time (R. 25); that accused was recognizable as the light from the match was reflected on his face (R. 22).

Corporal Tom W. Bouldin, Company E, 31st Infantry, testified: That about seven o'clock in the morning he and Corporal Burkett went upstairs in the barracks in Company E Squadroom for the purpose of obtaining their rifles prior to drill (R. 27); that he stopped at his bed to get something and then as he proceeded toward the rifle rack he heard some one cry, 'Get out of the way,' looked up to see who it was and saw accused standing in the aisle with his rifle to his shoulder; that accused appeared to be taking deliberate aim at some person or object; that almost immediately as witness looked up and saw accused accused fired a shot from the rifle and Corporal Head, who was standing forty-five or fifty feet away, partially facing accused, engaged in putting on a fatigue blouse, fell (R. 27-29, 31, 34); that witness ordered the men to get out of quarters, stating that the man was crazy, and that all the men in the room, probably twenty or more, immediately left, including the witness (R. 28, 29, 32, 34-36); that witness, when he reached the ground floor, called to Sergeant Loader, the first sergeant of the company, to get a gun, stating that accused had just shot

Corporal Head; that witness and sergeant Diskin went to the supply room to obtain a gun; that at that time accused came down the stairs alone with a rifle in his hand; that accused surrendered the rifle to the first sergeant; that he did not hear accused make any remarks at the time; that while he was on his way downstairs he heard two more shots fired (R. 29-31). Upon cross-examination he stated that he could not state definitely that accused was aiming at Corporal Head (R. 31); that he had known both accused and Corporal Head for approximately a year; that they appeared to be on friendly terms and talked together while in the company; and that he had never heard or seen anything to indicate that there was any trouble or ill feeling between them (R. 32, 33). In elaboration of his account of the shooting witness stated that several men were in the near vicinity of Corporal Head when the shot was fired but that all of them ran out of the way when accused called out to the men; that Corporal Head apparently was struggling to free his arm, which seemed to be caught in the sleeve of the blouse, and did not look up toward accused as the others did (R. 28,31,34-36-38).

Private Edward J. Bohanan, Company E, 31st Infantry, testified: That about seven o'clock on the morning of November 12 he heard accused call out, 'Get out of the way;' that he saw accused with a service rifle at his shoulder taking aim in the direction of Corporal Head, who was standing about fifteen yards away from accused (R. 39-41, 43, 45, 46); that a couple of seconds after calling out the warning accused fired a shot and then took a step forward while reloading the rifle; that as the shot was fired Corporal Head started to fall and at the same time witness left the room; that after seeing the first shot fired he heard two more shots fired; that when he first saw accused pointing the rifle he did not think that the rifle was loaded (R. 40, 42, 43). Upon cross-examination witness reiterated that accused was aiming deliberately at Corporal Head prior to firing the first shot (R. 44). Witness stated that he knew of no reason why accused should have killed Corporal Head; that he, the witness, had never noticed accused particularly around the company and does not know whether accused was accustomed to drink much; and that so far as he knew accused and Corporal Head were on friendly terms (R. 44-46).

Private James L. Keffer, jr., Company E, 31st Infantry, testified: That about seven o'clock of the morning of November 12, 1935, he was standing by his footlocker in the squadroom

of Company E and that Corporal Head was directly in front of him, talking to Corporal Burchell, who was between Corporal Head and accused; that he heard accused call out, 'Look out. Get out of the way' (R. 48). At that time accused had the butt of a service rifle against his shoulder and the piece was pointed directly at Corporal Head. At accused's warning call Corporal Burchell did get out of the way and accused then fired a shot, apparently taking deliberate aim at Corporal Head; he then reloaded the rifle as he stepped forward, without removing it from his shoulder, and fired another shot, the muzzle being lowered at the time, and then fired a third shot which witness did not see fired; that the second shot was aimed at Corporal Head, who was then lying on the floor on his back; that when the second shot was fired witness left the room (R. 49-51); that in so far as he knew accused and Corporal Head were on friendly terms; that accused was accustomed to drinking 'very much' 'Maybe three days a week' and that this was particularly noticeable after payday; that at such times he appeared very stupid on the parade ground but seemed normal to witness, appearing to be neither drunk nor sober but just a little bit dull and stupid (R. 54).

First Sergeant Monroe D. Loader, Company E, 31st Infantry, testified: That about seven o'clock on the morning of November 12, 1935, he was in the orderly room of Company E and he heard what he thought to be shots fired in the squadroom; that he went out of the orderly room to the porch and as he arrived there met Corporal Bouldin, who told him that accused had shot Corporal Head; that he instructed the supply sergeant to get a pistol, and while he was waiting for the pistol accused came down the squadroom stairs with his rifle at trail and the bolt opened, saying, 'You don't need no pistol. It is all over with;' that witness reached for the rifle and accused surrendered it without resistance (R. 57-59); that witness examined the rifle and found the bolt open and with no cartridges in the rifle but with the bore powder-fouled, indicating that the rifle had been recently fired; that witness placed accused under the charge of the supply sergeant \* \* \* (R. 59, 60, 8). Witness stated that he observed accused closely when he came down the stairs and particularly when he was near enough so that he could reach for the rifle and that accused, whom he had seen under the influence of liquor, appeared to be very calm, completely sober, and perfectly normal in every respect except that 'he had a kind

of a blank expression on his face. As accused came down the stairs he was mumbling but witness could not understand what he was saying except that he did distinguish the word 'rat' (R. 60, 63-65). Witness further testified that to the best of his knowledge accused and Head were on friendly terms at all times (R. 61).

Private first class Harry E. Perton, Medical Department, Post of Manila, testified: That he knew Corporal Henry Head, Company E, 31st Infantry; that on the morning of November 12, 1935, while he was on duty in the dispensary at Estado Mayor he was called over to E Company and taken up to the barracks of Company E and saw Corporal Head on the floor; that he examined Corporal Head and felt his pulse and there was no pulse and that Corporal Head was dead; that after examining the body he had a litter brought in and the body was taken down and put on an ambulance from Sternberg General Hospital (R. 10,11).

Private Joseph H. Philips, Medical Department, Sternberg General Hospital, testified: That on the morning of November 12, 1935, while he was on duty in the receiving office of Sternberg General Hospital he was detailed to go to Company E, 31st Infantry, for a patient; that he went there with the ambulance and there was a patient already on a litter; that some men of Company E carried the litter down to the ambulance and put it in the ambulance; that the patient, whom he heard later was Corporal Head, had blood on him where he had been shot; that he took the body to Sternberg General Hospital and took it straight to the operating room; and that shortly thereafter Captain Plew, of the Medical Corps, came there to examine it (R. 11-13).

Captain Ralph V. Plew, Medical Corps, testified: That a little before seven o'clock on the morning of November 12, 1935, he was called to Sternberg General Hospital to receive a patient and that upon his arrival at the hospital he did see a body, identified to him by one of the privates on the ambulance as Corporal Head; that he examined the patient and found him dead, there being no beating of the heart and no breathing; that upon examining the body he found several gunshot wounds, one wound that entered at the chin and went upward into the left frontal region of the skull near the eye, another wound which entered the right hypochondriac and went into the liver and lung, and a third wound which passed through the right shoulder and right chest and showed that the bullet went out

the back (R. 13, 14); that the first two wounds described indicated that the course of the bullets was roughly from the direction of Corporal Head's feet toward his head and the third one indicated almost an opposite direction; that in his opinion the third wound described was received first and knocked Corporal Head down and the other two were fired as he lay on the floor (R. 14, 15).

Major Samuel D. Avery, Medical Corps, testified: That on the morning of November 12, 1935, he performed an autopsy on a body labeled with Corporal Head's name. He read to the court the protocol of that autopsy, which, of course, is expressed in technical terms. It may be briefly described as confirming the testimony of Captain Plew as to the presence and direction of three gunshot wounds. He testified that he recovered one bullet from the body but did not attempt to recover the only other one in the body because of the resulting mutilation of the face should he remove the bullet. He further testified that in his opinion any one of the three wounds would probably have proved fatal and that the wound which entered through the arm and axillary was probably inflicted first, knocking Corporal Head down; that from the course of the bullets it is probable that the other two wounds were inflicted upon Corporal Head while he was lying on his back; and that the three wounds, in his opinion, were inflicted approximately at the same time (R. 15-18).

Captain Robal A. Johnson, 31st Infantry, testified: That on November 12, 1935, he was commanding officer of Company E, 31st Infantry; that on that morning after an autopsy had been performed upon a body at the morgue he examined the body and identified it as Corporal Head. He read to the court extracts from the morning report of Company E for November 12, 1935, containing an entry, 'Corporal Head, duty to died.' (R. 19, 20).

Sergeant John Zmuidina, Company E, 31st Infantry, and Corporal John Walker, Company E, 31st Infantry, testified, the first witness that shortly before seven o'clock on the morning of November 12 he heard a couple of shots fired, walked out on the porch and saw accused in custody of two noncommissioned officers, First Sergeant Loader holding a rifle which he subsequently turned in and which the company records show to be one that had been issued to accused on March 16, 1934, and the second testified that on November 12, 1935, he was noncommissioned officer in charge of quarters and that on that morning approximately a quarter to seven he unlocked the arms racks, which up

to that hour were locked. The testimony, being unimportant, is not given in further detail (R. 72, 76).

Sergeant Evert L. Huitt, Company E, 31st Infantry, testified that on the morning of November 12, 1935, he, in company with one Private Stevens, was detailed to take accused to the guardhouse for confinement; that on the way to the guardhouse accused gave him a round of ammunition, which was similar to a cartridge shown witness in court (but not described); that on the way to the guardhouse accused asked the question, 'Is he dead?' and upon being told that witness was afraid that the man was dead accused remarked that he hoped so, 'that he didn't deserve to live.' The next words accused uttered were, 'He wasn't going to make no punk out of me and get away with it,' and as a result of a question as to what he meant by that witness said that accused told him that he was drunk in bed out in his shack and that Corporal Head came into the shack, got into bed and had intercourse with him while accused's 'squaw' stood by and watched him. Witness further testified that accused at the time was neither agitated nor nervous but was calm and collected (R. 77-81).

Private George Stevens, Company E, 31st Infantry, testified that on the morning of November 12, 1935, he was detailed to assist Sergeant Huitt to take accused to the guardhouse for confinement; that on the way to the guardhouse Sergeant Huitt and accused had a conversation, into which witness did not enter; that the first thing he heard accused say was, 'Punk. He won't make a punk out of anybody else;' that at the time accused was not talking to anyone but was apparently walking along talking to himself; that accused then asked Sergeant Huitt, 'Did I kill him?' and Sergeant Huitt said, 'I am afraid you did;' that accused then said, 'I hope so. He wasn't fit to live,' whereupon Sergeant Huitt asked him what the trouble was and accused said he had been out to his shack and drinking and Corporal Head had had intercourse with him with a 'squaw' looking on; that there was no attempt made by Sergeant Huitt to get any information from Hayes, he merely asking him what was the trouble, and that that question was asked after accused had started the conversation (R. 83, 84).

Captain Armin W. Leuschner, Medical Corps, testified that about eight o'clock on the morning of November 12, 1935, he was called upon to examine accused 'as to his sobriety;' that

he spent about ten minutes in the examination and formed the opinion that at that time accused was sober and in the possession of all his mental faculties (R. 85, 86).

All witnesses testified that accused at the time of the killing appeared to be sober \* \* \* \* \*

3. The foregoing is the substance of the testimony bearing upon the facts of the killing and accused's conversations in connection therewith given by the witnesses on direct and cross-examination while the prosecution was presenting its case in chief. In addition, the method of handling guard ammunition was developed at great length, presumably in connection with the element of premeditation. It was shown by the evidence, which need not be set forth in detail, that members of Company E going on guard received their ammunition from the company supply sergeant or the company mechanic and that they were supposed to turn it back when they marched off guard. The procedure was as follows: When the men were preparing to form for guard they went into the supply room, received a clip containing five cartridges of ball ammunition, and a check was made by the supply sergeant or the company mechanic against each man's name, indicating that he had received the ammunition. Upon marching off guard the following day the men were supposed to report to the supply room and turn in the ammunition, either to the supply sergeant or the company mechanic, at which time their names were checked off, indicating that the ammunition issued had been returned. On November 6, 1935, accused, with some nine or ten other men of Company E, was detailed for guard duty to supplement the guard furnished by Company H of the same regiment. There is no direct evidence that accused obtained any ammunition, but the circumstantial evidence indicates that he did, and he himself substantially states he did (R. 161, 163). When the man of that detail marched off guard the following day neither the supply sergeant nor the company mechanic were available and the result was that the ammunition was turned in by the men from time to time thereafter, some of it by voluntary action of the particular man who had the ammunition and in at least two instances because the company mechanic went to look for the men whose names had not been checked off, there being a shortage of ammunition for the next guard the company would furnish. No records were produced and presumably none were available. The system of issuing and receiving ammunition

was loose, as it involved issue in the individual companies instead of at the guardhouse, and no adequate method was adopted to insure that the ammunition would be turned in when the guard detail marched off guard.

4. The sole reliance of the defense was upon the prosecution that at the time of the killing accused was in such mental condition, due to an alcoholic hallucinosis, that he was not mentally responsible for his act. Stated in another way, it may be said that the defense relied upon the proposition that accused, at the time of the killing and for a few days before, was temporarily insane, using the word insane in the popular sense. Accused called as witnesses two members of the board of medical officers which had examined accused to determine his mental condition prior to trial. In order to make their testimony intelligible it is necessary to set forth a summary of the statements made to the medical board by various enlisted men in the company of which accused was a member. With one exception, none of the witnesses who gave evidence before the medical board were called as witnesses by the defense, defense apparently relying upon the fact that their testimony as given to the board of medical officers would be read in court, as it actually was read, for the consideration of the court. Two of such witnesses were called by the prosecution and testified substantially to the same effect as they did to the medical board.

Private first class John C. Keyser, Company E, 31st Infantry, testified before the board of medical officers: That he had known Private Hayes about eleven months. He slept in the same squadroom, across the aisle. That he was practically always under the influence of alcohol, although able to turn out for formations. About November 9th, he noticed that Private Hayes kept more to himself and seemed moody and brooding. He did not seem to be on bad terms with any one in the organization. On the morning of the tragedy he saw Hayes sitting on his bunk with the rifle nearby. He left the squadroom and a few minutes later heard the shots, then saw Hayes descend the stairway, go to the supply sergeant and hand him his rifle (Ex. A, p. 3).

Private first class Andrew Arrogo, Company E, 31st Infantry, testified before the board of medical officers: He has known Private Hayes for one and one half years. Slept two bunks away. Drank most of the time--had to have liquor. That about

two or three nights before the accident he heard Hayes carrying on an animated conversation with an imaginary person in the room of a N.C.O., but on investigation found the room empty. That Hayes seemed excited a few days before the accident; he seemed to keep to himself, seemed worried and moody (Ex. A, p. 3,4).

Private first class Joseph F. Levy, Company E, 31st Infantry, testified before the board of medical officers: That he has known Private Hayes for thirteen months. Sleeps next to him and in the same squad. That he was usually under the influence of alcohol--muttered to himself when drinking. Actions unusual a few days before the accident because he stayed in at night and apparently had stopped drinking. He seemed moody and worried. On good terms with the deceased. Private Hayes carried on conversations with unseen individuals often when drunk and occasionally when sober. Usually began drinking on payday and continued for ten days, then as opportunity offered (Ex. A, p. 4).

Private Thomas Hadley, Company E, 31st Infantry, testified before the board of medical officers: That he has known Private Hayes about four months, has been in the same squadroom and sleeps one bed removed from him. That in his opinion Hayes was a drunkard, being usually under the influence of alcohol. That he was a quiet drunkard. That Private Hayes' conduct was unusual a few days before the tragedy because he seemingly had stopped drinking. That when he had been drinking he would sit on his bunk and mutter to himself. Seemed to be talking to his squaw about money. That he seemed to be on good enough terms with every one in the company (Ex. A, p. 4).

Private first class Hyman Golinger, Company E, 31st Infantry, testified before the board of medical officers: That he has known Private Hayes for almost two years. That Hayes was a steady drinker. Given to mumbling and cursing to himself when drinking. That a few days before the accident he would not talk, kept to himself, seemed moody and worried. Expression on his face changed. That he seemed friendly enough with Corporal Head (Ex. A, p. 4).

Private first class Bill C. Hill, Company E, 31st Infantry, testified before the board of medical officers: That he has known Private Hayes one year and two months. That Hayes drinks pretty much all the time. After coming off his drunks, he walked about talking to himself. Sometimes did unusual things. About November 10, along about 8:00 p.m., Hayes came into the

latrine, took a bucket of hot soapy water and proceeded to water the flowers hanging outside, opened the door and threw the bucket into the latrine, seemed sober at the time. About the same date Hayes carried on a conversation with the mess sergeant in the N.C.O.'s room, but the sergeant was not there, seemed sober. Seemed to be on good terms with Corporal Head (Ex. A, p. 4).

Private first class John W. Bishop, Company E, 31st Infantry, testified before the board of medical officers: That he has known Private Hayes about one and one half years. Hayes drank excessively. Two or three drinks seemed to turn his mind. Carried on imaginary conversations. Used to drink hair tonic, etc. That Hayes seemed sober and sane the morning of the accident. Saw Hayes deliberately shoot down Corporal Head, step forward about three paces and shoot two more times. Seemed to be on good terms with Corporal Head (Ex. A, p. 4, 5).

Sergeant Evert L. Huitt, Company E, 31st Infantry, testified before the board of medical officers: That he was on duty with Company E November 12, 1935, about 7:00 a.m. Immediately after the accident, received orders from the first sergeant to take Private Hayes to the guardhouse. While taking Hayes to the guardhouse, Hayes asked the sergeant if Corporal Head were dead. Upon being told 'Yes' he remarked that he was glad of it because Corporal Head was not fit to live. A bit later he said Corporal Head could not make a punk out of him and get away with it. He told the sergeant that a few days before he was out at his shack in bed drunk when Corporal Head came in and while Hayes' woman was watching, Corporal Head f--- him (committed an act of sexual perversion). The sergeant states that Hayes' attitude seemed to indicate a complete satisfaction with his act of alleged murder (Ex. A, p. 5).

Private George Stevens, Company E, 31st Infantry, testified before the board: That about 7:00 a.m., November 12, 1935, he was ordered by the first sergeant, Company E, to help Sergeant Huitt take Private Hayes to the guardhouse. That en route to the guardhouse he heard Private Hayes ask Sergeant Huitt if Corporal Head was dead. Upon being answered in the affirmative, Private Hayes remarked that he was glad of it as the S.O.B.----- f----- him in front of his squaw while he was drunk and tried to make a punk out of him (Ex. A, p. 5).

Major Albert W. Kenner, Medical Corps, president of the board of medical officers appointed to examine accused, identified

the report of the board of officers and read to the court the opinion of the board following its examination (R. 88, 89). That opinion is as follows:

1. That at the time of the commission of the alleged act, Private Hayes was suffering from a mental derangement, marking him as temporarily abnormal, to wit, a transient, acute alcoholic hallucinosis, which condition rendered him not susceptible to ordinary human motives or appreciations of right or wrong or to the normal control of his actions.

2. That at the present time this soldier shows no evidence of gross mental abnormality.

3. That at the time of the commission of the alleged offense he lacked the ordinary understanding of right and wrong and also lacked the ordinary capacity to control himself from wrong actions.

4. That Private Michael B. Hayes (R-905176), Company E, 31st Infantry, is mentally capable of communicating intelligently with his counsel, of understanding the nature of the proceedings and of doing the things necessary for an adequate presentation of his defense (Ex. A, p. 7).

He testified that a person suffering from acute alcoholic hallucinosis would at the time he was experiencing the hallucinations believe them to represent actual happenings; that such hallucinations might last over periods of several days or weeks or even months, depending upon the precipitating cause; and that while experiencing the hallucinations a man's mind might go blank for a short space of time (R. 90, 91).

Major William D. Mueller, Medical Corps, testified: That from the information obtained from accused it appears that he was from a poor family and had very little educational advantage, having only spent two years in the grades. Later he went to night school for about two years and acquired a knowledge of reading and to some extent an ability to write; that at an early age he was required to help maintain the family and that he began drinking at the age of sixteen or seventeen years; that from his first entrance into the service in 1912 he drank habitually, particularly about payday; that he was out of the service from 1919 to 1924, during which time he drank considerably and apparently was unable to keep employed; that he

reenlisted on account of his drinking habits, being unable to work; that as he has grown older he has indulged more heavily and since being in the Philippines has used alcohol excessively; that he indulged habitually in alcohol whenever obtainable and then excessively for a week or more at the beginning of each month (R. 100). He further testified that accused, in his opinion, had suffered from an acute mental disturbance marked especially by active hallucination and that this condition evidently had existed for several days and then gradually subsided and prior to his admission to the hospital had cleared up (R. 93); that at the time of his discharge from the hospital he was considered as not suffering from any mental disturbance of sufficient degree or severity to make it necessary to remain in the hospital longer; that at the time of his admission to the hospital accused was not suffering from hallucinations but that he was not entirely clear about the reasons for the commission of the killing; that he became clear on this point while in the hospital and had a good conception of the affair when he was discharged (R. 92, 93); that an individual suffering from arteriosclerosis, if the brain is affected, would be more susceptible to alcoholism than an average individual; that arteriosclerosis in a person of accused's age has evidently begun earlier than it is usually found; that accused's hallucinations were evidently extremely vivid and to accused appeared to have been real, as if they were actual happenings; that a person in accused's mental condition, while his mind would not be absolutely a blank, for a short interval might not realize what had taken place, that is, the details of it; that in accused's mental condition hallucinations might drive him to uncontrollable impulses; that such impulses frequently happen under such conditions; that such alcoholic hallucinations as accused had are of varying severity and varying duration; sometimes lasting several days or even weeks or months before the individual clears up mentally (R. 93-95); that usually such cases of alcoholic hallucinosis develop upon the withdrawal of alcohol, although they might occur while a person is using alcohol; that such hallucinations stand out very prominently, very vividly, and affect the sense of hearing and to a much less extent the sense of vision and frequently pertain to sexual matters, especially sexual perversions; that persons suffering from such hallucinations hear voices accusing them of having committed perverted sexual acts and yet to outward appearance

may appear to others practically normal, showing no outward evidence of having such experience; that even during such experiences, if spoken to he will respond in an ordinary manner and go about his work in the usual manner; that with such hallucinations a person might take an attitude of defense against those he believed injuring him or he might try to escape from it all; that having recovered from such hallucinations it would be very unlikely that he would experience them again unless he again indulged in alcohol (R. 95,96,111); that he does not believe that a person who has recovered from such hallucinations would again suffer from them if placed in solitary confinement; that at the present time there is a similar case in the hospital, in which the man was actively hallucinated following the excessive use of alcohol over a period of about six weeks; that his hallucinations lasted about one week, during which time his conduct and actions were not especially noticeable or unusual; that the people with whom he was working and closely associated with noticed nothing unusual but that finally the condition grew so bad that he made an attempt to leave the company; that the patient is no longer hallucinated but has still not corrected the impressions and that the hallucinations were so vivid, so real to the patient, that he still believes in the actual occurrence of them (R. 97, 98); that while under observation accused was very cool and very calm and didn't seem to worry especially; that so far as he could learn accused's hallucinations consisted in hearing voices condemning him and telling him that he was a 'binabay' (a Tagalog word which literally means a hermaphrodite but which is frequently used to indicate a sexual pervert) and that at the same time he was having what are termed 'ideas of derision,' that is, he felt that the soldiers in the company knew about the accusations against him and were looking upon him with derision; that when accused looked about and saw people laughing or smiling he thought that it was directed at him; that finally accused developed the idea that the men in the company were laughing at him and pointing at him because he had had perverted sexual intercourse; that a person who had recovered from such hallucinations who still believed that the acts actually happened would be having delusions, that is, false beliefs; but that that would not of necessity show mental derangement; that a man who had recovered from such hallucinations is not in need of mental treatment but

should be placed where he couldn't get alcohol, because otherwise he would be a definite menace to others (R. 98-101); that accused's condition of arteriosclerosis at the present time is very mild; and that as a result of his observations he believes that accused was mentally irresponsible at the time of the killing and did not know the difference between right and wrong (R. 93, 102).

Prior to proceeding to the cross-examination of Major Mueller prosecution read to the court certain paragraphs from Clark's Handbook of Criminal Law with reference to partial insanity and insane delusions. Included in the text read to the court was the following: ' \* \* \* If a person is laboring under a partial delusion, not being in other respects insane, he must be considered in the same situation as to responsibility as if the facts in respect to which the delusion exists were real; that if, for example, a person, under the influence of his delusion, supposes another man to be in the act of taking his life, and he kills that man, as he supposes, in self defense, he would be exempt from punishment, but if his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.' (R. 103, 104).

Upon cross-examination Major Mueller stated that in the opinion of the board accused was clearly suffering from an acute alcoholic hallucinosis and that even if as a matter of fact Corporal Head had committed an act of sodomy upon him he would still say that accused was suffering from hallucinations and delusions, because the hallucinations were not merely with reference to the act which he believed Corporal Head had committed but involved other matters such as the fancied peculiar way that other soldiers in the company were looking at and acting toward him. He stated that without hallucinations such ideas would not exist. He further stated that he believed that accused was definitely hallucinative for three or four days prior to the killing and that he did not base his opinion alone on the statements of accused but upon all the facts which the medical board gathered from other witnesses (R. 106, 108, 110). He stated no one fact would indicate mental irresponsibility but the sum of the facts definitely did. During his cross-examination and the further examination by the prosecution and by members of the court he explained that in his opinion it was not possible that accused had fabricated his story; that he was

accustomed in his practice to observe men who feigned mental disorders and rarely had difficulty in detecting them; and reiterated the fact that a man could have hallucinations and still be apparently normal in his actions and conversation (R. 109, 110). In explaining his disagreement with the medical officer who examined accused for sobriety shortly after the killing, he stated that men suffering from hallucinations when undisturbed have them very vividly and yet if spoken to the hallucinations disappear temporarily and they react in a normal manner, and that a brief examination not aimed at the idea of mental disturbance would not bring out the true picture. He stated further that in his opinion accused's mental condition was due to long continued use of alcohol. Referring to the proposition of hallucinations, Major Mueller explained as follows:

'A man may have these alcoholic hallucinations which are quite active, and left to himself the hallucinations will annoy him very much. He will hear these words and he probably would be accused of various things by others, by some individual he might know. Very actively hallucinated, he might even speak out and answer these voices if he were alone and answer the voices and say what he was going to do, and so forth. Another individual stepping into the room at that time, getting into conversation, the hallucination might entirely cease to exist and often they do. That is a peculiarity of this type of alcoholic hallucinations. They actually subside and are not present at the time they are occupied with something else, but when left to their own devices they become very pronounced.' (R. 113).

Extended cross-examination by the court failed to shake witness' testimony in the slightest degree. He was definitely of the opinion that accused at the time of the commission of the offense and for several days prior to that time was in a mental condition which made it impossible for him to distinguish right from wrong or to abstain from doing a wrongful act. Major Albert W. Kenner, recalled for the defense, testified that there was no disagreement between him and Major Mueller as to the findings of the board. Upon being asked whether it was his opinion that accused's condition was caused primarily through the use of alcohol he stated in his reply that he would like to qualify that, stating, 'I can say that had it not been for this use of alcohol he would not

have developed that delusion system that he was laboring under before and after this episode.'

Private first class John M. Neary, Company E, 31st Infantry, testified: That on a Saturday immediately after (October) payday he, in company with Corporal Head and Corporal Burchell, left Estado Mayor to go to Corporal Burchell's shack; that while they were there accused and his woman came there and they had some beer; that they then went to the shack in which Hayes' woman lived and obtained a peck of gin (a little more than a quart), which they drank in part; that accused was very drunk and most of the time was lying down on a straw mattress; that they had chicken soup to eat and that he does not remember whether Hayes got up and ate some or not; that he had never had any reason to be offended at accused, whom he has known for about two years, the same length of time he had known Corporal Head; that relations between accused and Corporal Head were friendly and that he himself went about with Corporal Head 'quite a bit;' (R. 126, 130-132); that he never heard Corporal Head make any threats against accused and that if accused believed that on the night in question he heard one of the three, that is, the witness, Corporal Head or Private Dickerman, say in effect, 'Let's get him down and hit him over the head' or 'Let's send the squaw out and get some poison and poison his gin,' accused must have been imagining that the remark was said, witness stating that no such remark was ever said; that witness had never heard Corporal Head say that he had 'used' the accused or words to that effect nor had he ever heard Corporal Head make any remarks about accused being a 'binabay' (R. 127); that so far as he knew there was no Filipino in the shack at the time other than accused's woman, and in effect that the only possible place that anybody could be without being seen was a very small room used by the woman's 'old man', which room he described as a 'little cubbyhole' (R. 135). The extended cross-examination is not material as it was merely designed to shake the witness's story and did not have that effect.

Corporal Clarence E. Burchell, Company E, 31st Infantry, testified: That on the second of November he was out in Maypajo with Corporal Head and Private Neary and accused was there at that time; that he never heard Corporal Head or Private Neary make the remark, 'Hayes gets drunk we will hit him over the head,' nor had he ever made such a remark himself; that he had never heard Corporal Head say anything against accused nor accused say anything against Corporal Head and that they always

seemed to be good friends; that he himself was always friendly with them; that he had never known of any unnatural acts between accused and Corporal Head nor had he ever heard Corporal Head say that such an act had been committed; that he had never heard Corporal Head say anything to ridicule Hayes in any way (R. 136-138).

Private Andrew Arroyo, 66th Service Squadron, Air Corps, testified that he has known accused since June 17, 1934; that accused was a heavy drinker and that during the periods he was drinking he was accustomed to sitting around on his bunk talking to himself; that witness did not know what he was talking about as his bunk was four or five bunks away from his; that one night when he came down from the squadroom he saw accused standing in the doorway of the sergeants' room gesturing and carrying on an animated conversation although witness could not distinguish the words; that witness in passing looked into the sergeants' room, which was merely screened from the hall, and saw to his surprise that there was no one inside; that accused was drunk; that he was not singing but was actually conversing, although there was no one with whom he could converse (R. 139-142).

In rebuttal the prosecution called Catalina Robias, who testified through an interpreter that she knows accused and while they are not legally married they live together as wife and husband in Maypajo; that after payday in November accused brought three soldiers to her house and they told her to buy something to eat; that among those present was Private Neary and another man whom they called 'Head' (R. 143, 144). That while there she saw Corporal Head approach accused in a little room off the kitchen and that Corporal Head was forcing accused to submit to an act of sodomy although accused resisted but that Corporal Head was too strong for him; that at the time the other soldiers, whom she described as being 'half sober', were in another room used as a bedroom and directly adjoining the room in which Head was supposed to be forcing accused (R. 145-147). She further testified that she was in the kitchen at the time and that her son was with her, and explained her failure to tell her story during the investigation of the matter by the fact that she was frightened when a member of the military police came to her home. She further testified she had never told accused about what she had seen (R. 147, 148).

Mr. John Hayes, a witness for the prosecution, twenty-three years of age, testified that he is a son of Catalina Robias; that he was at her house in November when accused brought three other soldiers there and that when they came into the sala he left and went into the kitchen and was preparing a chicken which the soldiers were going to eat; that while he was in the kitchen he heard accused's voice say, 'No, don't like that;' that at that time accused was in the room adjoining the kitchen 'with a fat guy;' that the other man was trying to get accused's pants down and the accused was trying to get away; that accused was squatting down and not lying on the floor; and the other man was trying to commit an act of sodomy upon accused (R. 149, 150); that at the time two soldiers were in the sala where he could see them by looking through the door; that witness wanted to go in and stop Hayes and the other man but his mother pulled him out, being scared; that the two soldiers in the sala were pretty drunk and looked like they were asleep (R. 151, 152).

Private Albert G. Dickerman, Company E, 31st Infantry, called by the defense, testified: that in November, the first Saturday after (October) payday, he was in a shack in Maypajo with Private Neary, Corporal Head, and accused; that they had chicken soup there that night; that there was a woman in the shack but he did not see her son; that he and the others had several drinks of gin; that Corporal Head was never out of his sight and that he did not see Corporal Head commit any unusual acts of any kind (R. 153-155); that he could not say that Corporal Head was 'exactly drunk' nor 'exactly sober;' that accused was likewise drunk, as apparently the others were also; that accused was always within his sight and he saw no evidence of any irregular acts at that time; that he wrestled a little on the floor with Corporal Head but with nobody else and that there was no other wrestling around that afternoon (R. 155).

First Lieutenant John H. Kane, 31st Infantry, assistant defense counsel, testified: That on two occasions he was present when Catalina Robias was interrogated, the first time accompanied by Captain Robal Johnson, the company commander, and the second time by Colonel Miller, the investigating officer; that the woman did not give any information whatever in regard to the alleged act of sodomy and when questioned specifically about it said, 'No, no; no,' and crossed herself several times; that he asked her the question four times that he remembers of and got the same answer (R. 158, 159).

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5. Accused made an unsworn statement which in pertinent part is substantially as follows: That on Thursday (November 7, 1935) he marched off guard about a quarter after or half past twelve and went to the supply room but found it closed; that he then went upstairs and prepared for luncheon, then some time later drew some cigarets and sold them, with the proceeds purchasing gin; that he came back early that night to prepare for participation in the guard of honor to be turned out for the Vice President of the United States the next morning; that in the meantime he had some drinks in the city after leaving his shack in Maypajo; that after arranging his equipment, etc., for the guard of honor he remarked, apparently to no one in particular, 'I guess I'll go over to the Walled City, get another drink and go to bed, if no binabay stops me,' whereupon Corporal Head said, 'What you care? You're a binabay yourself,' and added, 'Anybody could prove that you were;' that accused wanted to fight Corporal Head but no fight took place; that accused went out and had a couple of drinks of gin; that after the guard of honor was dismissed the next day he had some more drinks and then returned to barracks and there saw Corporals Head and Burchell and Private Neary together and from what he could hear they were talking about putting him on the spot; that instead of going in to dinner he went out to Maypajo and asked the woman if there was any truth in what Corporal Head had said; that at first she said, 'No,' and then she said, 'Yes,' and finally she said, 'No;' that while he was there Corporal Head, Private Neary and Corporal Burchell came and stood near the shack and he could hear them talking to the effect that they would smash accused's head with a bottle when he got drunk and also to the effect that they would get a couple bottles of gin and after he had finished one they would poison the other and people would think he had committed suicide; that then the three soldiers came into the shack and he asked Head what he was going to do and Head said, 'Let it drop,' and accused said that if Head would take everything back there would be nothing to it and added that he didn't 'believe it' and couldn't get any information at the shack and that nobody in the company seemed to know anything about it, to which remark Neary replied, 'No;' that later he went back to the city and was picked up by the first sergeant and given some fatigue; that that night being Friday he was preparing for inspection the following day and on

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checking up on his equipment found the ammunition which he had retained when he found the supply room closed and decided to clean it up and turn it in; that he was interrupted by excessive calls for fatigue, etc., and so put the stuff in the cleaning bag and forgot about it; that Saturday night they had a celebration for the men who were sailing on the November transport and he drank several glasses of beer, going to bed about nine o'clock; that Sunday and Monday he stayed in quarters; that Tuesday he got up at reveille and after the formation made his bed and then had breakfast, which as he remembered consisted only of a cup of coffee and a little piece of toast; that he then returned to the squadroom and started to clean his equipment and was again called out on fatigue; that when that was finished he went into the latrine, where Corporal Head was shaving, and it seemed to him that every one quieted down as soon as he came in; that he washed his hands and went upstairs and took his rifle out of the rack and was cleaning it, for which purpose he dumped all the cleaning material out and the ammunition was with it; that he put the ammunition to one side, intending to turn it in before going to drill, and while cleaning his rifle he heard a lot of laughing behind him and turned and saw Corporal Head, Neary, Burchell, and some one else laughing; that he turned around and continued to clean his rifle and they continued to laugh and he turned again and it looked as though Corporal Head was pointing down at him and it looked as if he were sneering at him and after that accused remembers nothing (R. 160-165)."

4. The fact that accused killed Corporal Head at the time and place alleged in the specification is conclusively established by the testimony of numerous eyewitnesses. Prior to the trial a medical board consisting of Major Albert W. Kenner, Medical Corps, Major William D. Mueller, Medical Corps, and Captain William W. Nichol, Medical Corps, was appointed to inquire into the mental condition of accused. Two members of the board had accused under observation from November 20 to 28, 1935, and made a careful and thorough study of his physical and mental condition. "The study consisted of the complete physical examination, observation of his mental reactions and consideration of his history which was obtained from the soldier himself and his close associates." The report of the medical board and the clinical record of the accused were introduced in evidence

as Exhibits A and B, respectively, and are quoted at considerable length in the summary of evidence. Therefore, it will be necessary to set out here only the findings of the board, which read as follows:

"Findings: As a result of this examination of Private Michael B. Hayes, (R-905176), Company 'E', 31st Infantry, and all the evidence obtainable and pertinent to this case, it is the opinion of the Board:-

1. That at the time of the commission of the alleged act, Private Hayes was suffering from a mental derangement, marking him as temporarily abnormal, to wit, a transient, acute alcoholic hallucinosis, which condition rendered him not susceptible to ordinary human motives or appreciations of right or wrong or to the normal control of his actions.

2. That at the present time this soldier shows no evidence of gross mental abnormality.

3. That at the time of the commission of the alleged offense he lacked the ordinary understanding of right and wrong and also lacked the ordinary capacity to control him-self from wrong actions.

4. That Private Michael B. Hayes, (R-905176), Company 'E', 31st Infantry, is mentally capable of communicating intelligently with his counsel, of understanding the nature of the proceedings and of doing the things necessary for an adequate presentation of his defense."

Major A. W. Kenner, Medical Corps, and Major W. D. Mueller, Medical Corps, both members of the board, were called as witnesses by the defense and testified at great length. Searching cross-examination completely failed to shake their testimony that accused was insane at the time of the commission of the act charged, or to make them modify in any degree the findings of the medical board.

5. The issue in this case is clear cut and the question to be determined may be stated as follows: Was accused's mental condition such that at the time of the killing he was legally capable of forming the criminal intent involved in the offense? It was incumbent upon the prosecution to establish this element of the offense, as well as all others, beyond a reasonable doubt. The two medical officers, above referred to, testified that at the time accused killed Corporal

Head he was suffering from a mental disease known to the medical profession as acute alcoholic hallucinosis, and that he was actuated and impelled to the act by certain hallucinations, one of which was that Corporal Head had forced him while he was in a drunken stupor to be a passive partner to an act of sodomy. The prosecution contended that sodomy had actually been committed upon him by Head and that therefore accused's belief was founded upon fact and not hallucination. Two witnesses, Catalina Robias, a native woman, and her son, Mr. John Hayes, were introduced by the prosecution in rebuttal. Both of these witnesses testified that Corporal Head did commit an act of sodomy upon the accused. However, three soldiers, Corporal Burchell and Privates Neary and Dickerman, who were present at the time and place where the act was said to have been committed, testified that they saw no such occurrence. Catalina Robias twice made statements before the trial in the presence of two officers that no act of sodomy was committed by Head upon accused. It is significant that she repeatedly made the sign of the cross while making these statements and that upon the witness stand, when she reversed her testimony, she made no such devout gesture. The theory of the defense counsel as to why this witness changed her testimony is that some misguided friend of accused went to the woman and told her that it would help accused if she testified that sodomy had actually been committed upon him by Head. In view of the fact that accused was "her man" and that he had for six months been contributing to her support, this theory is a reasonable one. Major Mueller testified that, in his opinion, the act of sodomy was not committed and that the belief of accused that it was committed was based upon hallucination and not upon fact, and that in addition to this hallucination he suffered from hallucinations of persecution and ridicule.

The defense is by no means entirely dependent upon the testimony of medical witnesses for proof of accused's abnormal mental condition; much of the evidence adduced in behalf of the Government tends to substantiate the correctness of the board's conclusion and the testimony of medical officers. It will be remembered that a number of lay witnesses, associates of accused, who testified before the court, and others who gave statements before the medical board, said that accused had acted peculiarly for some time before the homicide. He would "mutter to himself, seemed worried and moody, and would not talk". "On one occasion for no apparent reason, while apparently

sober, he watered flowers with hot soapy water. On another occasion he appeared to be talking to a sergeant. This was observed by several soldiers. The incident was so unusual that the soldiers looked for the person with whom he might be having conversation and could find no one." Corporal Tom W. Bouldin, a witness for the prosecution, who was apparently the senior noncommissioned officer present at the moment of the tragedy, testified, "I looked back up at Private Hayes and the men were milling around the company and I turned around and told them to get the hell out of quarters, that the man was crazy".

Further evidence that accused was laboring under an hallucination at the time he fired the fatal shot is found in his statement that Corporal Head was laughing and pointing down at him at the moment Hayes seized his rifle to fire; "It looked to me like a sneer was on his (Corporal Head's) face," while Private James L. Keffer, Jr., a witness for the prosecution, testified that nothing of this sort actually happened; that Corporal Head was not laughing, that he was not pointing at anybody but was at the moment saying to Burchell, "Meet you in a few minutes down on the company street".

Another hallucination under which he labored was that Head, Burchell and Neary had plotted to kill him. In his statement he said, "I could hear them talking there and I could hear them say 'When he gets drunk we will smash his head with a bottle', and they kept talking and finally they said 'We will get two bottles of gin and after he drinks one we will put poison in the other and let him drink that one'. They said 'The squaw will get it and they will think he committed suicide himself.'" Both Burchell and Neary testified that no such conversation had ever taken place between them. It seems clear that accused not only believed that Corporal Head had committed sodomy upon him but that he (Head) had told his companions of the act. It is reasonable to believe that had he been rational he would have known that if sodomy had actually been committed, Head, a noncommissioned officer, would not have told the men of the company over whom he exercised authority and whose friendship and respect he must have valued that he had been guilty of a loathsome act for which he might have been tried by a general court-martial and sentenced to dishonorable discharge and imprisonment for five years in a federal penitentiary. There is no evidence in the record that Corporal Head had ever told anyone that he had ever committed

such an act. It is significant that not a single witness who testified knew of any bad feeling having existed between Corporal Head and accused before the tragedy. On the contrary, many of them said that they were friendly and were frequently seen together.

The prosecution in attempting to show premeditation laid stress upon the fact that accused had in his possession ammunition which he obtained when he did his last guard duty on November 6. The evidence is far from clear as to when the ammunition came into his possession, but granting, for the sake of argument, that he did get it on that day and for the purpose of killing Corporal Head, it is not reasonable to believe that had he been sane he would have waited for six days and then killed him in the presence of some twenty witnesses.

Let us now look at the qualifications of the two medical officers who testified for the defense. First, it must be conceded that they were absolutely unbiased. They had nothing to do with their selection as members of the medical board. They were not employed by accused, their compensation was in no way dependent upon their findings as members of the board or upon their testimony before the court. Major Kenner graduated from a recognized medical school and has had the usual experience with mental cases to be implied from the handling of soldiers for twenty years. Major Mueller, who bore most of the burden of the direct examination and the very lengthy and searching cross-examination, has made a specialty of diseases of the nervous system and mind since he graduated from medical school in 1899. For seventeen years he was employed in a state asylum for the insane. He took a special course at the post graduate school in New York in 1910, and has always specialized in nervous and mental diseases since he came into the military service in 1917. He has often qualified as an expert both in civil life and in the Army. This is indeed a remarkable record, and it is very doubtful whether there are many other medical officers in the Army who have had such a long and unbroken experience in the observation, diagnosis and treatment of diseases of the mind. Both Major Kenner and Major Mueller testified that accused had the physical symptoms which accompany the mental disease from which he suffered. Major Kenner said, referring to accused, "a man with arteriosclerosis of a brain type, cerebral type, has undergone certain more or less degenerative or deteriorative changes which may very well impair his judgment".

The correctness of the diagnosis and conclusions reached by Majors Kenner and Mueller in the case of accused are supported by the following extract from "Insanity and Law", a treatise on Forensic Psychiatry, by H. Douglas Singer, M.D., M.R.C.P. (London), and William O. Krohn, A.M., M.D., Ph.D.:

"ACUTE ALCOHOLIC HALLUCINOSIS:

Another acute mental disturbance is acute hallucinosis. In this, there is no clouding of consciousness and the man remains approximately oriented as to his surroundings. But he experiences a wealth of hallucinations, especially auditory but also involving other senses, which are so persistent that they occupy all his attention. The voices are generally threatening and insulting, and are reacted to in an entirely appropriate manner. The man answers them back, threatens to get even and may take violent measures in his efforts to deal with them. The fear of injury, which the voices threaten, may lead also to efforts to escape and even to suicide. During the acute phase of the disorder, no explanation may be offered for the occurrence of the voices, but, as the hallucinations subside and leave time for thought, a more or less well formed system of delusion may be developed to explain the persecution experienced. This paranoid state may persist for some time and may become chronic (chronic hallucinatory paranoia). The duration of the acute hallucinatory period is, as a rule, not more than a few weeks, though here again there may be a transition to a chronic hallucinosis resembling dementia praecox or to a Korsakow psychosis."

The prosecution offered no expert medical testimony to rebut that of Majors Kenner and Mueller, although it is probable that there were many medical officers available for that purpose. It is true that Captain Leuschner, a medical officer, did testify that by direction of the post adjutant he examined accused "as to sobriety" for about ten minutes, an hour or more after the tragedy and that "at the time of examination the man was sober and in possession of all of his mental faculties". This witness did not qualify as an expert in mental diseases. However, even if accused "was in possession of all

of his mental faculties" at the time Captain Leuschner made his cursory examination, this fact would not be inconsistent with the findings of the medical board or with the testimony of Majors Kenner and Mueller. Their belief was that the act was committed when accused was at the height of an intense emotional storm, and that he was actuated by a momentary, irresistible impulse, a condition that rendered him not susceptible to ordinary human motives or appreciation of right or wrong, or the normal control of his actions. This transitory form of insanity, which sometimes exists for only a moment and leaves the patient apparently normal after its passing, is well recognized by both the medical and legal professions.

6. The prosecution laid great stress upon the English rule in the McNaughten case and insisted upon its application to the instant case. The trial judge advocate went so far as to furnish the members of the court with mimeographed, underscored copies of the rule. This rule is not supported by the decisions of the Federal Courts nor by the holdings of the Board of Review and The Judge Advocate General. In Smith v. United States, 36 Fed. Reporter (2d series) 548, the court said:

"The English rule, followed by the American courts in their early history, and still adhered to in some of the states, was that the degree of insanity which one must possess at the time of the commission of the crime in order to exempt him from punishment must be such as to totally deprive him of understanding and memory. This harsh rule is no longer followed by the federal courts or by most of the state courts. The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases, where the defense of insanity is interposed. The accepted rule in this day and age, with the great advancement in medical science as an enlightening influence on

this subject, is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong."

The Supreme Court has announced and repeated the rule that in cases such as the instant one the United States must establish the mental responsibility of the accused beyond a reasonable doubt. Davis v. United States, 160 U. S. 469; Hotema v. United States, 186 U. S. 413. In the Davis case the court said:

"We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime. \* \* \* One who takes human life can not be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have 'a wicked, depraved, and malignant heart,' or a heart 'regardless of society duty and fatally bent on mischief, unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act. \* \* \* Neither in the adjudged cases nor in the elementary treatises upon criminal law is there to be found any dissent from these general propositions. All admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts. \* \* \*"

In discussing the question as to where the burden of proof lies, the court said:

"On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. \* \* \* and his guilt can not in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime."

And speaking further:

"Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt can not be said to have been proved beyond a reasonable doubt--his will and his acts can not be held to have joined in perpetrating the murder charged--if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased."

In the Hotema case the Supreme Court upheld the correctness of the following charge to the jury:

"If you find from the evidence or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease, and the homicide was the product of such disease, and that he was incapable of forming a criminal intent, and that he had no control of his mental faculties and the will power

to control his actions \* \* \* because he was laboring under a delusion which absolutely controlled him, and that his act was one of irresistible impulse and not of judgment, in that event he would be entitled to an acquittal."

In the following cases, where the mental capacity of accused to commit the offense charged was the issue, the courts-martial, disregarding the findings of medical boards and the testimony of medical officers to the effect that the several accused were insane, found them each guilty, and in each case it was held by the Board of Review and The Judge Advocate General that the findings and sentence should be disapproved. In the case of Private Layton James (CM 116694), who killed Private Michael Maloney and Mrs. Rose Harrity on May 5, 1918, The Judge Advocate General held:

"The court was lawfully constituted. This office is of the opinion that the findings are not supported by the evidence, for the following reasons:

(1) That the findings of the Medical Board and the testimony of its members in support of said findings were prima facie proof tending to sustain the plea of insanity, which was specially raised, aside from its implied inclusion under the general plea of 'not guilty'; (2) that the prosecution, having it peculiarly within its power, and, therefore, being under the legal duty, to rebut the proof that the accused, at the time of the commission of the wrongful acts charged, had not the necessary criminal mind to commit them or either of them, failed wholly to produce the requisite, or any, evidence to overcome the reasonable and persuasive hypothesis of the accused's insanity at the time of the commission of the offenses upon which he was arraigned and tried; (3) that this failure, upon the part of the prosecution, raises the presumption that the non-production by it of evidence in rebuttal of the defense's affirmative showing of insanity is to be ascribed to the fact that if such evidence had been produced the facts and proofs elicited thereby would have been unfavorable to the contention of the prosecution; (4) that the presumption, next above referred to, is

supported by the further fact that the prosecution wholly neglected to explain or furnish any plausible reason for its failure to assume or acquit itself of the burden which devolved upon it to establish the guilt of the accused beyond a reasonable doubt by proof of each and every one of the elements necessary to constitute each of the murders charged."

In the case of Private Sam Hochberg (CM 124243), the Board of Review said:

"3. The exhibit filed with the record shows that the Commanding Officer, Fort Brady, Michigan, the station of the accused, appointed a Board of Medical Examiners for the purpose of examining the accused as to his mental condition; that this Board consisted of Captains Edward A. Sweet, Rollin T. Adams and John H. Kimble; that the Board made an examination of the accused, and in the report made by it to the Commanding Officer, Fort Brady, said in part:

'2. Upon examination of Private Sam Hochberg, we find that he was suffering from Acute Melancholia or Emotional Insanity at the time he attempted to commit suicide by cutting his throat on September 27, 1918, but at the present time he is conscious of the quality of his acts.' (R. Ex. 1.)

On the trial the members of the Board were introduced as witnesses, and gave evidence to the same effect as the statement quoted above. The acts of which the accused is charged are the acts of an insane man; no evidence was adduced on the trial showing the accused was sane at the time they were committed, and it stands admitted on the record that the accused was at that time insane.

4. It is elementary that an insane person is guiltless of criminal intent, and is to be held as innocent of the offences committed.

5. It is recommended that the finding and sentence be disapproved; and as the record shows that the accused is now normal, that he be released from confinement and restored to duty."

In the case of Sergeant Russell L. Hill (CM 130448), it was held: \_

"4. The conclusion of the Board appointed by the court to examine into the mental condition of the accused clearly and positively sets forth that the accused from some time prior to February, 1918, to on or about February 7, 1919, was suffering from manic-depressive insanity, and that at the time the alleged offenses were committed accused did not have the necessary criminal mind to commit the wrongful acts charged, although at the time the report was made February 20, 1919, he was emerging into a normal state and on March 5, 1919, had sufficient mental capacity to justify his being brought to trial.

5. The testimony produced, showing that certain of the acts charged were committed, has slight relation to the question of sanity and is not inconsistent with the conclusion that the accused was insane when these acts were committed. The only evidence in the record, therefore, on the question of the insanity of the accused is the report of the medical examiners and the testimony of Captain Wetmore (R. 11-13). This evidence is clear and positive to the effect that the accused was insane at the time the alleged offenses were committed. While the issue of insanity was a matter to be determined by the court upon all the evidence in the case, a finding which is contrary to the unchallenged and undisputed report of a medical board, and which is supported by no direct evidence cannot be permitted to stand (C. M. No. 128252, Heppberger.)

6. The court was legally constituted. The record is not legally sufficient to support the findings and sentence. It is, therefore, recommended that the findings and sentence be disapproved, and that the accused be released from confinement and restored to duty."

In the case of Private John Heppberger (CM 128252), the Board of Review held:

"5. No evidence was introduced by the prosecution to refute the findings of the board of medical officers,

or to rebut the testimony of the member of such board. On the contrary, the evidence adduced in behalf of the government tends to substantiate the correctness of the board's conclusion. While it is the function of the court as triers of fact to consider the report of the board and accord to it that weight and credence to which, in the judgment of the court, it may be entitled, yet since the report of the board, supported by other evidence, was unimpeached by the prosecution, it is prima facie proof of mental derangement and the court could not entirely disregard such evidence. In the case of Private Layton James, C.M. #116694 (July 8, 1918), it was held that:

'The findings of the medical board and the testimony of its members in support of its findings, were prima facie proof tending to sustain the plea of insanity and where the prosecution introduced no proof to rebut such proof, or to explain or furnish any plausible reason for such failure, the finding of guilty should be set aside.'

The Board found that the accused 'did not have the necessary criminal mind to commit the wrongful act charged' and Captain Stockton testified that his mental condition deprived him 'of sufficient knowledge to entertain the intent to run away from his organization.' By the introduction of this evidence a reasonable doubt was raised as to the mental capacity of the accused to form an intention to desert. After the introduction of this finding of the board of medical officers, it was incumbent upon the prosecution to prove that the accused was capable of entertaining the intent necessary in the crime of desertion, and in the failure of any such proof, the finding of guilty should be set aside.

6. It is accordingly recommended that the findings and sentence be set aside and the accused be released from confinement and restored to duty."

7. It is true, with respect to weight and sufficiency of evidence, that no two cases are alike and every one must be judged upon its own facts. Nevertheless, a study of the cases above cited shows that in several of them there was much more direct and circumstantial evidence tending to rebut the findings of the medical boards and the testimony

of the members and to prove motive than is found in the instant case. These are all leading cases upon the law of insanity, selected from the Digest of Opinions of The Judge Advocate General, and, in my opinion, the instant case cannot logically be distinguished from them. Only one approved case has been found in which the court, disregarding the findings of a medical board that accused was insane, found him guilty, and in this particular case, Williamson (CM 125684), two medical officers testified in rebuttal that accused was actually mentally responsible at the time he committed the offense charged and was later feigning insanity. It so happens that one of the medical witnesses who testified in rebuttal in that case, that accused was in fact sane, was Major William D. Mueller, then Captain Mueller, who was a member of the medical board in the instant case and who testified, unequivocally, that accused was insane at the time he killed Corporal Head.

8. In the absence of any expert medical testimony rebutting the findings of the board and the testimony of its members, I cannot agree that the testimony of lay witnesses "impeaches" the findings of the medical board or affirmatively proves accused's sanity or motive for the commission of the homicide, particularly where so much of the testimony of lay witnesses is favorable to accused. To so hold would, in my opinion, violate the established precedents of The Judge Advocate General.

It is, as has been remarked, a well established principle of law that when the issue of sanity is raised by the defense it is incumbent upon the Government to prove beyond a reasonable doubt that accused was not insane at the time he committed the offense with which he is charged, as well as every other element of the offense. The prosecution failed to prove this element.

9. For the reasons hereinbefore stated, I am of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

 , Judge Advocate.

1st Ind.

War Department, J.A.G.O.,

- To the Secretary of War.

1. The record of trial and accompanying papers in the case of Private Michael J. Hayes, Company E, 31st Infantry, together with the opinion thereon of the Board of Review, signed by two of its three members, are transmitted herewith for the action of the President under Article of War 48. Also inclosed for your information is a memorandum by the third member of the Board of Review in which he dissents from the majority opinion of the Board that the record of trial is legally sufficient to support the findings and sentence.

2. In this case the fact of the homicide is abundantly established by uncontradicted evidence and has never been disputed. The only question is whether or not, at the time of the homicide, the accused was of sufficient mentality to be legally responsible for killing the deceased - whether or not, with reference to the act in question he had the mental capacity to distinguish between right and wrong and to adhere to the right. Careful examination of the entire record leads me to the conclusion that the evidence, considered as a whole, giving due weight to the expert testimony as well as to accused's conduct before, at the time of, and immediately after the shooting, leaves no room for reasonable doubt that his mind was such as to make him legally responsible for his act. Evidently the members of the court unanimously reached the same conclusion. This being so it became their duty to find the accused guilty. I therefore concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence to death, and I recommend that the sentence be confirmed.

However, there is in the record some evidence which, while not, in my opinion, sufficient to warrant a reasonable doubt of accused's legal responsibility, nevertheless, standing alone, might indicate a very remote possibility that he was not mentally responsible. The record also discloses that accused, in committing the homicide, was actuated by certain grievances, real or imaginary, but undoubtedly real in his mind, which would constitute grave provocation amounting to an extenuating circumstance though not reducing the offense to the grade of manslaughter. It is probable that consideration of this remote possibility of mental irresponsibility and this real or fancied provocation led the reviewing authority to recommend, and the Board of

Review to concur in the recommendation, that the sentence be commuted by the President to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the soldier's natural life. Because of like considerations I concur in this recommendation.

3. Inclosed herewith are a draft of a letter for your signature transmitting the record of trial to the President for his action and a form of Executive action designed to carry into effect the above recommendations, should they meet with approval. In the event the sentence is confirmed and commuted as recommended, I further recommend that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.



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

4 Incls.

- Incl. 1-Record of trial & accompanying papers, including brief filed by counsel for accused.
- Incl. 2-Dissenting memo. of Lt.Col. L.M. Smith.
- Incl. 3-Draft of let. for sig. of Secy. of War.
- Incl. 4-Form of Executive action.



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

(119)

Board of Review  
CM 204829

MAY 1 1936

UNITED STATES )

SECOND DIVISION

V. )

Private GUY D. BURROUGHS )  
(6249925), Headquarters )  
Battery, 15th Field )  
Artillery. )

Trial by G.C.M., convened  
at Fort Sam Houston, Texas,  
March 13, 1936. Dishonorable  
discharge and confinement for  
three (3) months. Fort Sam  
Houston, Texas.

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HOLDING by the BOARD OF REVIEW  
TILLOTSON, MORRISETTE and CAFFEY, Judge Advocates.

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1. The record of trial of the above named soldier has been examined by the Board of Review.
2. The accused stands convicted of a single charge and specification as follows:

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

**Specification 1:** In that Private Guy D. Burroughs, Headquarters Battery, 15th Field Artillery, did, at Fort Sam Houston, Texas, on or about October 12, 1935, feloniously embezzle by fraudulently converting to his own use one Blue plaid wool suit, value about \$15.00, the property of Private Henry W. Saye, Headquarters Battery, 15th Field Artillery, entrusted to him by Tuffe Satel, Regimental Tailor, 15th Field Artillery, for delivery to the said Private Saye.

The Board of Review is of the opinion that there is no competent substantial evidence in the record to sustain the allegation that the suit of clothes pawned by the accused was "entrusted to him by Tuffe Satel, Regimental Tailor, 15th Field Artillery, for delivery to the said Private Saye". So far as here pertinent, the evidence shows merely that the accused had Saye's suit in his possession (R.29) and that he pawned it (R.25, and letter there introduced) without Saye's authority (R.21) or knowledge.

Inasmuch as the evidence is not sufficient to establish the nature of the accused's possession or that it had been entrusted to him in the manner alleged, or by the owner, the conviction of embezzlement is not warranted. However, the record does contain ample evidence to show that after the accused had gained, in a manner not sufficiently established, possession of the suit of clothes he fraudulently converted it to his own use by pawning the same without the knowledge or consent of its owner in violation of the 96th Article of War, an offense included in the charge of embezzlement. Dig. Ops. JAG, 1912-30, sec. 1471 (2).

In arriving at the foregoing conclusion the Board of Review has not overlooked and does not intend to depart from the previous ruling of a former Board of Review concurred in by The Judge Advocate General in the case of Private Frank J. Cinkowski, June 19, 1934 (CM 201960). In that case competent evidence showed that the property was lent by one soldier to another, who pawned it without the knowledge or consent of the owner, and the Board of Review properly held that the offense of embezzlement was established.

3. For the reasons stated, the Board holds that the record of trial is legally sufficient to support only so much of the findings of guilty of the charge and specification as includes findings of fraudulent conversion under the 96th Article of War, and legally sufficient to support the sentence.

Justice, Judge Advocate.

\_\_\_\_\_, Judge Advocate.

Engel, Judge Advocate.

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

(121)

Board of Review  
CM 204879

U N I T E D	S T A T E S	)	SECOND CORPS AREA
		)	
	v.	)	Trial by G.C.M., convened at
		)	Governors Island, New York,
Captain RALPH E. FLEISCHER		)	March 18-27, 1936. Dismissal.
(O-9639), Quartermaster		)	
Corps.		)	

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OPINION of the BOARD OF REVIEW  
TILLOTSON, MORRISETTE and CAFFEY, 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 at Governors Island, New York, on March 18 to March 27, 1936, upon five specifications under the 93d Article of War, two specifications under the 95th Article of War, and twelve specifications under the 96th Article of War.

He pleaded not guilty throughout, and was convicted upon three specifications under the 93d Article of War, one specification under the 95th Article of War, and nine specifications under the 96th Article of War. He was sentenced to dismissal. The reviewing authority disapproved the finding of guilty of Specification 9, under the 96th Article of War, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The charges and specifications upon which the accused was convicted may be summarized as follows:

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

Specification 1: Embezzlement at Fort Slocum, New York, on or about July 3, 1935, of subsistence stores

valued at \$2.72 and belonging to the General Mess at Fort Slocum.

Specification 2: Embezzlement at Fort Slocum, New York, on or about November 28, 1934, of subsistence stores valued at \$15.68 belonging to the Infantry General Mess at Fort Slocum, New York.

Specification 3: Embezzlement at Fort Slocum, New York, during the period from about March 1, 1934, to about July 31, 1935, of the sum of \$234.25 belonging to the Infantry General Mess at Fort Slocum.

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

Specification 1: Making before a board of officers at Fort Slocum, New York, on or about July 3, 1935, a false official statement not under oath concerning his acquisition and possession of the subsistence stores described in Specification 1 of Charge I.

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

Specification 4: False swearing before a board of officers at Fort Slocum, New York, on or about July 9, 1935, concerning his acquisition and possession of the subsistence stores described in Specification 1 of Charge I.

Specification 5: False swearing before the Corps Area Inspector at Fort Slocum, New York, on or about August 30, 1935, concerning his acquisition and possession of the subsistence stores described in Specification 1, Charge I.

Specification 6: False swearing before the Corps Area Inspector at Fort Slocum, New York, on or about October 9, 1935, denying conversation with witnesses previously interviewed by the Corps Area Inspector.

Specification 7: False swearing before the Corps Area Inspector on or about August 30, 1935, denying the eating of meals at the enlisted men's messes.

Specification 8: Inducing at Fort Slocum, New York, on or about July 3, 1935, Private Ziegler to swear falsely before a board of officers that he had never taken packages from the General Mess to accused's quarters.

Specification 9: Inducing at Fort Slocum, New York, on or about August 31, 1935, Staff Sergeant John Maresca to swear falsely before the Corps Area Inspector that Captain Fleischer had paid for all the food he had eaten in the Infantry General Mess. (Finding of guilty disapproved by the reviewing authority.)

Specification 10: Inducing at Fort Slocum, New York, on or about September 5, 1935, Corporal Grochmal to swear falsely before the Corps Area Inspector that on July 3, 1935, Private Ziegler gave him four chickens (part of subsistence stores described in Specification 1, Charge I) to be cleaned for Captain Fleischer.

Specification 11: Attempting at Fort Slocum, New York, on or about July 3, 1935, to influence the testimony to be given by First Sergeant Dye before a board of officers by saying to Sergeant Dye, "You have not seen anything, you have heard nothing, and do not say anything".

Specification 12: Attempting at Fort Slocum, New York, on or about August 12, 1935, to influence the testimony of Technical Sergeant Walston to be given before the Corps Area Inspector by saying to Sergeant Walston, "You do not know anything, you have heard nothing, you have not seen anything and keep your mouth shut".

4. On the convening but before the organization of the court the defense announced that it had filed a petition with the President, the substance of which was to the effect that the court was illegally constituted in that the convening authority was the actual accuser; and on the strength of the filing of this petition the defense urged that the trial should not proceed. The court properly directed the trial to proceed. (R. 4,8,9,10) Immediately following the organization of the court, and prior to arraignment, the defense asked for a continuance, first, on the grounds contained in its petition to the President, which was read to the court, and second, in order that the defense might obtain through the War Department certain documentary evidence which had been denied it by the convening authority.

It appears that in its petition to the President the defense claimed not only that the court was illegally constituted because the appointing authority was in fact the accuser, but also that the court was without jurisdiction to proceed with the trial because the thorough and impartial investigation required by the 70th Article of War prior to trial had not been made. On the motion for continuance the defense did not amplify or stress its contention that it had been improperly refused documentary evidence, and it appears that counsel for the defense was fully advised by the court that the proper way of raising the questions submitted in his petition to the President was by appropriate pleas to the jurisdiction of the court. This counsel for accused declined and refused to do, and the request for a continuance was properly denied. The defense then submitted in an appropriate manner objections to the form and sufficiency of the specifications. These objections were overruled and the trial on the merits was then proceeded with. (R. 16-24)

Although, as pointed out above, the defense refused at the trial to raise by appropriate pleas the question of the jurisdiction of the court on the grounds contained in its petition to the President, this question has been subsequently raised by counsel in oral argument and by an extensive brief submitted to the Board of Review.

It therefore follows from the foregoing, and for the additional reasons hereinafter set out, that the record of trial presents the following questions for consideration by the Board of Review:

(a) Was the court legally constituted?

(b) Was there a failure to comply with the provisions of Article of War 70, requiring a thorough and impartial investigation prior to trial, such as to injuriously affect the substantial rights of the accused?

(c) Were the specifications or any of them objected to legally insufficient in form or substance?

(d) Did any of the rulings of the law member on the admission or exclusion of evidence injuriously affect the substantial rights of the accused?

(e) Is the evidence legally sufficient to sustain and warrant the findings of guilty and the sentence?

The discussion of the questions under (a) and (b) will be postponed until those raised under (c), (d) and (e) have been disposed of.

5. The defense objected to the form of Specification 3, Charge I, on the ground that "the embezzlement charged is over a period of March 1, 1934, to about July 31, 1935, about 15 months or 16 months", and argued that if it were intended to allege the embezzlement of a single amount the date should be more definite and if not a single amount but a total of many, then the respective dates should be reasonably specified. The practice of charging embezzlement in the manner followed in the specification objected to has been approved by the Federal courts as well as by the Board of Review on the ground that so long as the commission of the offense is laid within the statute of limitations the time of the same is immaterial, and it would be futile to require the pleader to allege a specific, definite time. Sec. 1564 (3), Dig. Ops. JAG, 1912-30, and authorities therein cited, including Moore v. United States, 160 U. S. 258. The objection was properly overruled.

Objections were raised to Specification 1 of Charge II, and Specifications 4, 5, 6, and 7 of Charge III on numerous grounds, none of which has any substantial merit. These specifications are

ineptly drawn in that they set forth at unnecessary length, and verbatim, testimony given by the accused in the form of questions and answers, all as being allegedly false, whereas some of the questions were manifestly introductory or immaterial and the answers thereto were manifestly true. However, it clearly appears that in spite of the unnecessary prolixity and awkwardness of the pleading, the accused was fully acquainted with the gist of the offenses charged and the material parts of the testimony alleged to be false, and was fully able to, and did in fact, address his defense to the statements which it was intended to charge as false. The Board is accordingly of the opinion that the action of the court in overruling the objections to these specifications did not injuriously affect the substantial rights of the accused.

The objections to Specifications 8 and 10 on the ground that they were indefinite and to Specifications 11 and 12 on the ground that it is not alleged that the accused knew what the witness was going to be called to testify to, or in what respect he was attempting to influence the testimony, were obviously without merit and were accordingly properly overruled. (R. 41-50)

6. The competent material evidence offered by the prosecution and by the defense as shown by the record of trial may, for the purposes of this review, be summarized as follows:

For several years prior to the dates of the alleged offenses the accused had been on duty at Fort Slocum, New York, a large recruit depot situated on a small island in Long Island Sound, a short distance from New Rochelle, communication with the mainland being maintained by a Government operated ferry supplemented at times by a smaller power boat. Accused was the Assistant Commandant of the Cooks and Bakers School located at Fort Slocum, and at the same time the mess officer of three large messes operated on the post. (R. 69-70) One, called the General Mess, serving the casuals passing through the post, another, the Infantry General Mess, serving the members of the recruit companies, and the third, the Detachment General Mess, serving the Quartermaster Detachment, Signal Corps, Ordnance, Bakers and Cooks School, and the 11th Bakery Company. The Post Commander was Colonel Carl A. Martin. (R. 128-130)

It sufficiently appears from the record that as a result of the accused's connection with numerous investigations, followed in some instances by court-martial trials or other disciplinary action, he had incurred the enmity of a number of the officers of the post, including Major Renn Lawrence and Captain Tacy, who were largely responsible for the original accusations against him. However, it likewise appears that the accused had gained the confidence of Colonel Martin and retained the same until the latter finally became convinced of the dishonesty of accused and signed the present charges against him.

On July 3, 1935, as a result of a report made to the Commanding Officer by Major Lawrence, the former directed Major Maul, the Post Quartermaster, and Captain Kielty, the Post Adjutant, to search the accused's automobile parked at Neptune Dock on the New Rochelle side. The car was locked but accused appeared shortly thereafter (about 2:00 p.m.) and voluntarily unlocked the car, whereupon it was searched in his presence and the articles of food described in the first specification of Charge I were found therein. (R. 71-75,138-142) Following this incident, the Commanding Officer on the same afternoon appointed a board consisting of himself, Major Maul and Captain Kielty to investigate the matter. Numerous witnesses, including the accused, testified before this board which sat for several days. Subsequently a report of the proceedings was forwarded to the Corps Area Commander and thereafter the Corps Area Inspector, acting under the orders of the Corps Area Commander, conducted another investigation extending over a period of several months. (R. 81,130-134,141,167-168)

It appears that the evidence obtained by the Corps Area Inspector in his extensive investigation resulted in preferring the present charges against the accused, which are obviously based upon the following suppositions:

That over a long period of time the accused had been guilty of dishonesty in connection with the enlisted men's messes under his control by habitually or almost daily eating his meals at one or more of them without compensating the mess concerned; by taking or causing to be taken from one or more of the messes food supplies, usually on Wednesdays and Saturdays of each week, and converting the same to his own use without compensating the mess concerned; by embezzling

various sums of moneys which came into his possession as mess officer; that when he learned on July 3, 1935, that his car containing subsistence stores improperly taken from one of his messes was to be searched, with the result that suspicion would inevitably be directed against him, he conceived and persistently pursued a plan or scheme to conceal his previous dishonesty, not only by testifying falsely himself before the board of officers appointed by his Commanding Officer and before the Inspector General, but by inducing or coercing, either through their sense of loyalty or by threats, the enlisted men acquainted with the facts concerning his alleged misconduct to testify falsely before Colonel Martin's board and before the Corps Area Inspector.

It further appears that several of the material witnesses did in fact exonerate Captain Fleischer before Colonel Martin's board, and on numerous occasions continued to adhere to and persist in their testimony, exonerating the accused before the Corps Area Inspector, until finally, after repeated examinations and after the accused was ordered away from Fort Slocum, they changed their testimony completely and gave evidence almost directly to the contrary. The theory of the prosecution is obviously that the original testimony of these witnesses was induced by Captain Fleischer in the manner indicated above and was persisted in as long as he was able to exercise control over them, but that as soon as that control was removed they testified truthfully before the Corps Area Inspector and subsequently before the court. The theory, of course, of the defense is that the original testimony was true and that the subsequent testimony incriminating him was given by these material witnesses under coercion and pressure brought to bear upon them by the Corps Area Inspector, representing the Corps Area Commander.

Considerable evidence was introduced by the prosecution tending to show that the accused had, for a considerable period, habitually taken his meals at the various messes of which he was in charge without paying for the same, and had regularly, on Wednesdays and Saturdays each week, caused packages of subsistence stores to be taken out of one of the messes and converted the same to his own use. There was no specification charging the accused with such general course of misconduct, but the evidence referred to was admissible in support of the specifications alleging the giving and inducement

of false testimony and was properly received by the court for this purpose. The Board of Review is of the opinion that evidence of such practices on the part of the accused was also admissible to show an established plan or scheme of the accused to subsist himself at the expense of the messes under his control, thus tending to support the specifications charging specific instances of such misconduct. Such evidence was likewise relevant and proper as bearing upon the credibility of the accused as a witness. In the discussion which follows, the evidence referred to will be considered as admissible for the purposes above indicated.

7. Specification 1 of Charge I alleges the embezzlement on July 3, 1935, of subsistence stores valued at about \$2.72 belonging to the General Mess at Fort Slocum. For about two or more years prior to July 3, 1935, Corporal Adam J. Grochmal had been on duty in the butcher shop of the General Mess at Fort Slocum and during that time, in accordance with instructions from his commanding officer, the accused, he prepared packages of food twice a week for the accused and put them in the ice box until Captain Fleischer's orderly came for them. The packages at first contained two tenderloin steaks or two chickens and two units of cheese, butter, bacon and fruit, all of which belonged to the General Mess. Later, the fruit was omitted. (R. 359-362)

During August, September and October, 1934, Private Aubrey E. Miles was accused's orderly; from November, 1934, to the latter part of January, 1935, Private Genaro Ortiz was accused's orderly, and he was succeeded by Private Herbert J. Ziegler, who served as orderly for accused from January, 1935, to October, 1935. During these periods these soldiers habitually, usually on Wednesdays and Saturdays, received the packages of food prepared by Corporal Grochmal and, after dividing them into two bundles, would put them into suitcases, take them to the dock and either leave them on the boat or carry them across and put them in accused's car at the Neptune dock. (R. 524-530, 536-539, 542-546) This practice had been observed on numerous occasions over a considerable period by Major Lawrence and Captain Tacy, as well as by three sergeants of the Military Police on duty at the Neptune dock (R. 577-586).

On July 3, 1935 (which was Wednesday), Major Lawrence and Captain Lester J. Tacy saw Private Ziegler, accused's orderly, take

some packages from a pushcart into the rear entrance of accused's quarters and then return with a suitcase and a handbag which he put into the pushcart, and with the help of another man pushed it in the direction of the dock (R. 548-550,555-556). Substantially the same occurrence was also witnessed by Captain McCullough (R. 570-571). About 12:30 of the same afternoon, Privates Ziegler and LeClerc were seen by Sergeant Andrew Kurapka, military policeman on duty at Neptune dock, to put two big packages, a suitcase and a handbag in Captain Fleischer's car (R. 578).

The articles of food found in accused's car by Major Maul and Captain Kielty substantially correspond with the list of such articles which Private Ziegler testified he had received from Corporal Grochmal and had placed in the car in the manner described above. It will be noted, however, that Grochmal testified that the packages he made up for Ziegler contained four chickens, two pieces of cheese, two pounds of butter and two pieces of bacon, and that the articles seized consisted of two and not four chickens, two tenderloins of beef, two pieces of cheese, three pounds of butter, and food supplies not described by Corporal Grochmal as having been prepared by him on July 3, but the list does correspond substantially with the list of articles which, according to Corporal Grochmal, he had been in the habit of preparing for the accused on each Wednesday and Saturday. (R. 361-363)

The articles of food were all obviously such articles as are usually and habitually carried among the food supplies of enlisted men's messes and on the date in question some nine hundred chickens had been received by the Infantry Mess, but it is also common knowledge that such articles of food can be bought at any public market or grocery store. In this connection, however, it is noted that the butter was exactly similar to what is known as "issue" butter, as distinguished from "sales" butter, the former habitually issued, but never sold, by the Commissary to enlisted men's messes, and each package of it bore the trade name "Emil Fleichl", who was the contractor supplying butter to the Fort Slocum Commissary at that time (R. 148). Likewise, it is noted that one of the beef roasts was marked "Ella", the first name of the accused's fiancee, a Miss Ella Anderson (R. 152).

The value of the foodstuffs, as alleged in the specification, was sufficiently established.

Specification 2 of Charge I alleges embezzlement on or about November 28, 1934, of subsistence stores valued at \$15.68 belonging to the Infantry General Mess at Fort Slocum.

. From about March 1, 1934, to October 1, 1935, Staff Sergeant John Maresca, who for about seven years had been instructor of students in the Cooks and Bakers School, was mess sergeant in charge of the Infantry General Mess under Captain Fleischer. November 28, 1934, fell upon the Wednesday immediately preceding Thanksgiving Day, and on the former date, in obedience to Captain Fleischer's instructions, Sergeant Maresca with the help of Private William A. Scheller, a student cook at the Infantry General Mess, prepared two packages, each containing one entire unit of the Thanksgiving menu, one for accused's mother and "one for his lady friend Ella". The packages together contained the items described in the specification under discussion and the same were laid aside. On previous occasions other packages had been prepared by Sergeant Maresca and Private Scheller under similar circumstances for Captain Fleischer's use. At the time of giving instructions for the preparation of the Thanksgiving packages, Captain Fleischer informed Sergeant Maresca that "he would take care of the mess for whatever he would get" but Sergeant Maresca never received any payment for the same and the accounts of the accused where such credits are required to be entered fail to show any payment whatsoever by Captain Fleischer for food supplies obtained by him from the mess. (R. 397-402, 428-430).

The value and ownership of the food supplies as alleged in the specification were established.

Specification 3 alleges the embezzlement during the period from about March 1, 1934, to about July 31, 1935, of the sum of \$234.25 belonging to the Infantry General Mess. During that period Harold L. Henry and N. W. Lantz, civilian employees in the Quartermaster's Office at Fort Slocum, boarded at the Infantry General Mess and Sergeant Maresca received, in his capacity of mess sergeant, \$200 from Mr. Henry and \$87.75 from Mr. Lantz, making a total of \$287.75, as board money, the property of the mess, which he in turn delivered to his commanding officer, Captain Fleischer. The receipt of this money is acknowledged by the accused.

The mess accounts show that Captain Fleischer charged himself with the receipt of board money amounting to approximately \$53.50 and it is evident that in drawing the specification the doubt was resolved in his favor, giving him credit for this amount, leaving a balance of \$234.25, which it is established and admitted by the accused he did not enter in his accounts in the manner prescribed and required or deposit in his unit fund accounts. (R. 199, Ex. 6; 260-265, 375-376, 403-404, 713-714)

In the opinion of the Board of Review the foregoing evidence standing alone and without explanation or denial is clearly sufficient to support and warrant findings of guilty of Specifications 1 and 3 of Charge I (sec. 1563, Dig. Ops. JAG, 1912-30), but for the reasons hereinafter stated is legally insufficient to support or warrant the finding of guilty of Specification 2 of Charge I.

Prior to the trial at the investigations referred to above and at the trial itself the accused, in the manner described below, denied and attempted to explain or discredit the foregoing evidence against him, and his conduct in this regard will now be discussed not only to the extent to which it bears upon his guilt or innocence under the specifications of Charge I of which he was convicted, but also in the respect to which it forms the bases of the specifications under Charges II and III.

Shortly after his car had been searched on July 3, 1935, accused appeared before the Martin board and, in an effort to explain the presence of the foodstuffs in his car, made the statement, not under oath, which forms the basis of Specification 1 of Charge II, to the effect that he purchased the two small roasts and the butter in town and that the cheese came from his ice box which he cleaned out on that date. He subsequently appeared again before the Martin board on July 9, 1935, where he gave under oath the testimony which forms the basis of Specification 4 of Charge III to the effect that he had bought the two chickens which were found in his car from Morley Markets in New Rochelle, and that these chickens had been taken by his orderly to the General Mess, cut, gutted and cleaned and then returned to the accused's quarters. He also stated that he had a bill for the same which he subsequently produced. (R. 94-95; Ex. 3-A)

Later on various occasions he appeared before the Corps Area Inspector where he made under oath the statements forming the bases of Specifications 5, 6 and 7 of Charge III, respectively, to the general effect that the chickens involved were the ones which he had bought from Morley Markets on June 19, 1935, that he had spoken to none of the witnesses previously examined by the Corps Area Inspector, and that he had never taken breakfast at the enlisted men's mess nor had he sat down to a table and been served a meal there (R. 167-205).

In addition to attempting to explain in the manner described above the accusations against him concerning the irregularities and misconduct in connection with his messes, the accused, according to evidence offered by the prosecution, prior to reporting to the Neptune dock where his car was searched, got in touch with Private Ziegler (R. 545-546), his orderly, and Sergeant Maresca (R. 423-424), who at that time was mess sergeant of the Infantry General Mess, and warned both of them against giving any damaging testimony at the investigation which the accused evidently knew was about to take place. Subsequently it appears from the testimony of the prosecution's witnesses, and of accused himself (R. 719-720), he called his mess sergeants together and discussed the investigation with them. There were present at this meeting in Captain Fleischer's office Technical Sergeant Troy Walston, Staff Sergeants Maresca and James P. Carroll, and First Sergeant Daniel Dye, and apparently two sergeants, Warren and Prince. According to the testimony of Sergeants Maresca (R. 425), Carroll (R. 602-603), Walston (R. 599-600), and Dye (R. 519), which is denied however by the accused, the latter told them in substance that they must remember that they did not know anything, had not heard anything, had not seen anything, and should keep their mouths shut. This alleged misconduct forms the bases of Specifications 8, 10, 11 and 12, and the proof shows that Private Ziegler and Corporal Grochmal did testify substantially as alleged.

The undisputed competent proof offered by the prosecution shows, and the accused admits, that during the period covered by the third specification of Charge I, from March 1, 1934, to July 31, 1935, the accused received the sum of \$287.75 from two civilian boarders, Mr. Henry and Mr. Lantz, who were permitted to eat their meals at the Infantry General Mess, and that at least \$234.25 of this amount was never, as the regulations required, taken up in any of his mess

accounts (citations supra). In an effort to explain his failure to do so the accused claimed that he carried this amount as a "slush fund", apparently in his own possession, which he used to purchase utensils which he could not get in the usual, regular way in his mess (R. 713-714). In partial support of this testimony he had produced before Colonel Spinks, Corps Area Inspector, receipted bills from Stone's of New Rochelle in the amount of \$19 and Del Gaudio of Brooklyn, New York, in the amount of \$74.75, and later claimed similar purchases from H. Weiss, Yonkers, New York, in the amount of \$63.80, a total of \$157.55.

It is conclusively shown (R. 200-204; Exs. 7,7-a,7-b,7-c, & 8, 8-a,8-b,8-c) that all bills from Stone's were made up and furnished to the accused at his own request long after the alleged sales had taken place, and that the individuals making out the bills had relied, not upon any record of such sales or on their own recollection, but solely upon the information furnished by the accused who claimed that he had on various occasions bought the articles for cash and requested receipted bills for the same long after the fact (R. 212-218).

The five bills from Del Gaudio covered the period from January 31 to May 21, 1935, and are made out against the Infantry General Mess, marked paid, and cover items of mess equipment and supplies, which bills are accompanied by duplicate delivery slips which are yellow, whereas if they had come from Del Gaudio records in support of the bills they should be white (original) and should bear the sergeant's signature as a receipt (Maresca, R. 412). Aside from being yellow instead of white, they are not signed by the mess sergeant who testified that he did not receive the property listed thereon and on the bills (Maresca, R. 412-413). The usual supplies bought from Del Gaudio were fruits and vegetables (Maresca, R. 412-413).

In March or April, 1935, Sergeant Maresca received at the Infantry General Mess a large assortment of kitchen utensils from a dealer named Weiss, all of which are shown on prosecution's Exhibit 7, a rebilling made at the request of the accused and running against the Infantry General Mess, but it is conclusively established that all of the equipment listed on this bill, with the exception of one eighty-cent item, was paid for, not out of the board money which

never appears on the books of the Infantry General Mess, but out of the regularly accounted for funds of the Infantry General Mess (Voucher 13, June 1935) and of the Detachment General Mess (Voucher 12, June 1935), \$20.80 by the former and \$43 by the latter (R. 409, 342-347; Ex. 17).

Accused offered no vouchers or receipts for the remaining \$76 which he also claimed to have spent out of his slush fund or board money for mess equipment.

The accused denied under oath before Colonel Spinks, as alleged in Specifications 6, 7 and 8, respectively, of Charge III, that he had ever interviewed witnesses previously testifying at Colonel Spinks' investigation, and that he had ever eaten a breakfast at any one of the messes or ever sat down to a table and been served a meal or breakfast. This testimony was disputed by the testimony of a number of enlisted men who swore positively that Captain Fleischer habitually took two or three meals a day at the mess, very often including breakfast, and post exchange and commissary bills were produced showing the purchase of unusual articles of diet which were charged to the mess and all of which, according to the testimony of prosecution's witnesses, were purchased and prepared for Captain Fleischer's meals. When Sergeant Herbert C. Longmore, who had seen Captain Fleischer taking his meals at the various messes, told him that the food bought at the post exchange and charged to the messes was for the exclusive use of the accused and should therefore be paid for by him, accused refused to do so on the ground that the purchase of such special items of food furnished the opportunity of training his men in the preparation of the same (R. 594). During the period involved the food purchased by accused from the post exchange and commissary at Fort Slocum was significantly inconsiderable and obviously insufficient for his subsistence. For instance, his post exchange meat bills for April, May, June and July, 1935, were \$1.69, \$0.85, \$3.50 and \$3.40, respectively, and the other food purchases were correspondingly small. (R. 754; Exs. E and F).

Accused, testifying as a witness in his own behalf (R. 706-759), denied that he had been guilty of wrongfully taking any supplies of foodstuffs from the various messes under his control; insisted that

he had not only not embezzled any of the money in the so-called slush fund but claimed to have spent money of his own for mess utensils; denied that, except on infrequent occasions in the performance of his duty, he had ever eaten meals at the messes; and insisted that he had been truthful throughout previous investigations in the explanation of his entire conduct. In addition to his own testimony and to the explanation previously discussed in this review, Captain Fleischer offered the testimony of his mother (R. 699,770), sister (R. 692), and his fiancée (R. 696-698), all of which tended to show that the accused did not make a practice of bringing foodstuffs from the mess to his or their homes for their personal consumption, and most particularly that he had not so supplied the Thanksgiving dinners at his home or at the home of his fiancée. Frank Johnson (R. 662-670), a friend of the accused and the manager of an automobile garage, particularly remembered the day before Thanksgiving, 1934, on which he had looked inside of accused's car and was positive there was nothing in it. Likewise, the witness had frequently seen accused's car in his garage without ever seeing any foodstuffs or anything that appeared to be such in the car. For the obvious purpose of explaining his frequent possession of food supplies similar in kind to those used in the messes and also in order to explain how he subsisted himself during the periods involved, the accused produced as a witness a fruit and vegetable dealer of New York City by the name of William Endico (R. 624-650), from whom Captain Fleischer was in the habit of purchasing mess supplies, who testified that he frequently sent Captain Fleischer samples of his fruits and vegetables, all of which, however, Captain Fleischer insisted upon paying for. The witness identified a number of bills covering the items, all marked paid, but could not give the dates of payment by the accused or state whether he made out the bills all at once or from time to time. However, the bills were apparently made out from records which Mr. Endico for some reason kept in a book for the month of August. All payments were made in cash, none by check. As bearing upon the claim of accused that the chickens found in his car on July 3, 1935, had been purchased by him on June 19, 1935, and kept in his ice box, two witnesses qualified as experts on the question of how long chickens could be kept, and their testimony is to the effect that they could be kept in an ice box for two or three weeks provided they had not been previously gutted.

8. From all of the foregoing, it is apparent that the issues at the trial were clearly defined, the prosecution claiming and offering evidence to show that the accused, during the period alleged, had been guilty of misappropriating supplies and funds of the enlisted men's messes under his control and that, in an effort to conceal such misconduct, he testified falsely at the investigation and tampered with the witnesses, succeeding in his effort to induce them to testify falsely only so long as they remained subject to his control and coercion. The accused, on the other hand, claimed that he was entirely innocent of any wrongful use of the money and supplies of any of his messes; that the original testimony of witnesses exonerating him was true and remained true throughout Colonel Spinks' investigation until they were forced and coerced through threats, intimidation and actual mistreatment to change their testimony and swear falsely against him, and that the original testimony of Major Lawrence and other commissioned officers was due to personal enmity and a desire for revenge. Counsel for the accused now contends most strenuously that the case depends in all of its essential elements upon discredited witnesses and that since there is not sufficient corroboration the testimony of these witnesses should be disregarded with the result that the prosecution's case falls.

The Board of Review recognizes the general rule that the uncorroborated testimony of a discredited witness should be given little, if any, weight. However, a discredited witness may be rehabilitated by showing that his previous testimony was given under duress, or to a less extent from a misguided sense of loyalty to a superior. Likewise, the corroboration required to support the testimony of a discredited witness need not always be by similar testimony of other unimpeached witnesses, but may consist of circumstantial evidence as well as the proof of conduct or testimony by an accused evidencing guilty knowledge on his part.

Many of the facts involved in this trial are undisputed with the result that it is not important whether some of the witnesses testifying to the same were discredited or not. However, it must be conceded that the principal witnesses testifying in support of the prosecution's contention that the accused was guilty of the embezzlements alleged and his subsequent effort to conceal the same by the

giving of false testimony and the tampering with the witnesses were to a greater or lesser extent discredited. The chief witnesses testifying directly to the facts relied upon by the prosecution were Sergeant Maresca, Corporal Grochmal and Private Ziegler, and to a lesser extent Major Lawrence, Captains Tacy and McCullough, Sergeants Dye, Kurapka, Rath, Brock, Longmore, Walston and Carroll. Of these, Sergeant Maresca, Corporal Grochmal and Private Ziegler had persisted on many occasions in their previous testimony before the Martin board and the Corps Area Inspector, completely and totally exonerating Captain Fleischer. Sergeants Dye, Walston and Carroll had likewise made previous statements entirely inconsistent with their testimony at the trial. Major Lawrence and Captain Tacy were admittedly hostile and resentful towards the accused.

To what extent then is the testimony of these witnesses corroborated? In the first place, the previous testimony of the enlisted men referred to above is at least partly explained by the coercive influence of the accused, and in this connection it is obviously more reasonable, in the absence of compelling facts to the contrary, that it was Captain Fleischer, the most interested party in the entire proceedings, who improperly influenced the witnesses than that it was the Corps Area Commander and his Inspector, whose only interests were presumably to ascertain the true facts. In the second place, the testimony of these witnesses at the trial was in practically all substantial parts corroborated by the testimony of other unimpeached, credible witnesses, such, for instance, as the testimony of Privates Miles and Ortiz which substantiated the testimony of Private Ziegler that all three of them habitually as orderlies for the accused obtained food supplies from the General Mess at Fort Slocum under orders from the accused and delivered the same to him in the manner described. Likewise, this testimony is to a very great extent corroborated by the military policemen, Sergeants Kurapka, Rath and Brock, all of whom were unimpeached and who testified that they had frequently seen the orderlies for the accused delivering packages to his car at the Neptune dock. Sergeant Longmore's testimony, already referred to, is likewise particularly enlightening. In the next and last place, the explanations offered by the accused are peculiarly unconvincing, as, for instance, his dealings with Stone's and the manner in which he attempted to support

the same by the production of bills which were made up entirely upon accused's instructions long after the alleged sales had taken place and without reference to any then existing records or independent recollection on the part of the individuals preparing the bills. The chief witnesses upon whose testimony he relied were all members of his own family or his intimate friends or in one case his fiancée, with the exception of some merchants with whom as mess officer of the various messes he had been trading. For the reasons pointed out in previous discussions the testimony of the latter is of little, if any, value. The testimony of the accused himself is full of improbabilities, as, for instance, that he did by chance obtain at a market in the Bronx butter exactly similar in quality and marked with the same brand as that issued by the Commissary at Fort Slocum; that he would keep chickens in an ordinary ice box from the 19th of June to the 3d of July; that an officer of his experience would fail to enter in the proper accounts collections for board money due his mess and then expend the same without obtaining the proper vouchers or making the proper entries in his accounts.

With particular reference to the third specification of Charge I alleging the embezzlement of mess funds, counsel for accused contended throughout the trial, and later in his oral argument and brief, that the definition of embezzlement contained in the District of Columbia Code and the requirements as to proof thereunder govern in this case. This may be and probably was true prior to the present Manual for Courts-Martial (sec. 443, p. 430, M.C.M., 1921), but the present Manual (par. 149 h) has abandoned that rule and correctly adopted the definition and principles contained in the case of Moore v. United States, 168 U. S. 268, which defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been entrusted or in whose hands it has lawfully come", and even under the old definition it was held (sec. 1561, Dig. Ops. JAG, 1912-30) 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.

"An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority can not complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting."

The explanations offered by the accused were thoroughly improbable and unconvincing. They were corroborated only as to a part of the funds involved, leaving only his bare general statement that he had spent in an unauthorized manner all of the board money and some of his own for mess equipment, and had not entered such transactions in his accounts.

It is the opinion of the Board of Review that the accumulation of inconsistencies, improbabilities and contradictions contained in the accused's testimony to rebut the testimony of the prosecution, together with the circumstantial evidence and the direct testimony of unimpeached witnesses, is clearly sufficient to supply the required corroboration of the impeached witnesses and to support and warrant all of the findings of guilty approved by the reviewing authority except, as noted above, the finding of guilty of Specification 2 of Charge I. The Board of Review has come to the conclusion that the findings of guilty under this specification cannot be sustained, not because the affirmative proof offered in support of the same has been discredited or disproved, but solely for the reason that the proof falls short of establishing the necessary fact that the supplies described in the specification were ever actually removed from the Infantry General Mess or received by the accused.

9. There now remain to be considered the jurisdictional questions under (a) and (b) of paragraph 4 above, suggested by counsel for the accused at the trial and subsequently raised before the Board of Review in his oral argument and brief.

It appears that on March 13, 1936, the date the court-martial convened for the trial of Captain Fleischer, his counsel, General Samuel T. Ansell, caused to be addressed and presented to the

President a communication in which he raised the question of the court's jurisdiction to proceed with the trial on the following grounds:

I. That the convening authority was in fact the accuser and prosecutor of the accused.

II. That the thorough and impartial investigation required by the 70th Article of War was not had prior to trial.

III. That the accused was deprived of his alleged right to the assistance of counsel at the investigation of the charges.

Although stated separately, it is obvious that the last two grounds are closely related and in substance rest entirely upon the claim that the investigation of the charges prior to the trial did not comply with the mandatory provisions of the 70th Article of War.

The communication to the President was accompanied by an affidavit sworn to by Captain Fleischer containing statements in support of the claims made by his counsel.

The communication and its inclosure were referred by the President to the Secretary of War, who in turn referred the same to The Inspector General for investigation and report. As a result, what the Board considers to be a thorough, exhaustive and impartial investigation was conducted by Colonel William S. Browning, assisted by Major C. C. Clarke, both of The Inspector General's Department, and on duty in The Inspector General's Office at Washington. During the examination of Major General Dennis E. Nolan, the Commanding General, Second Corps Area, and of Colonel Spinks, the Corps Area Inspector, Major General W. L. Reed, The Inspector General, was present.

The Inspector's report, together with a record of the testimony and exhibits obtained and considered by him, has been referred to the Board of Review for consideration in connection with the record of trial.

Although invited and afforded ample opportunity to appear before the Inspector and testify, both General Ansell and Captain Fleischer

declined to do so, and they likewise refused to offer any further assistance in obtaining testimony or other evidence in support of the allegations contained in the communication and its inclosure to the President.

A detailed discussion of the evidence obtained by The Inspector General's report is not believed to be necessary or desirable and it seems sufficient to say that, after a careful consideration of the same, the claims of the accused and his counsel are entirely unsupported by the facts. Except for the uncorroborated affidavit by the accused, no evidence was obtained by The Inspector General and none appears in the record of trial or the accompanying papers in support of his contention that the appointing authority was in fact the accuser and that the investigation of the charges was improperly or insufficiently conducted. On the contrary, it affirmatively appears that what the Corps Area Commander did was in strict accordance with his administrative duty in causing to be made, first by the Corps Area Inspector and later by a qualified officer, both of whom are shown to have been not only not prejudiced against the accused but in fact predisposed in his favor, the usual investigation necessary to determine whether the facts and circumstances required the trial of the accused. Thereafter, acting upon the advice of his Corps Area Judge Advocate and still in the strict performance of his duty, he referred the charges to a general court-martial as the best method of determining the guilt or innocence of the accused officer. It has been repeatedly and properly held that an accused is not entitled to the presence and assistance of counsel at the investigation required by the 70th Article of War. Sec. 1264 a, Dig. Ops. JAG, 1912-30.

10. In conclusion it may be safely said that in order to support the contentions of the accused that he is the victim of persecution, that the appointing authority was in fact the accuser, that the investigation prior to the trial and the trial itself was unfair, and that the evidence is insufficient to sustain the findings of guilty, it will be necessary to discredit not only the judgment but the motives and good faith of the Corps Area Commander, his Corps Area Inspector, the Post Commander and the Investigating Officer, all of whom it is conclusively shown had originally entertained high opinions of the

accused and only reluctantly changed when forced to do so by compelling facts; to disregard the positive and convincing testimony of witnesses merely because it is shown that they were either hostile to the accused, or had, on previous occasions fully explained by the accused's own control over them, testified falsely; to disregard the corroboration of such witnesses by the positive testimony of unimpeached witnesses and the mass of circumstantial and documentary evidence; likewise to disregard the findings of the court which heard and observed the demeanor of all of the witnesses; and in the end to believe and accept the testimony of the accused, full as it is of contradictions, inconsistencies and improbabilities, and supported only by the testimony of the immediate members of the family, his fiancée and intimate friends, or by the vague and unconvincing testimony of merchants who had been associated to their own advantage with him in selling supplies to the masses under his control. To state such a proposition is to answer it, and in the opinion of the Board of Review the contentions of the accused are not only not sustained, but are affirmatively shown by the overwhelming weight of the evidence to be without any merit at all.

11. The accused is 45 years of age. The statement of his service as it appears in the Army Register is as follows:

"Sgt. Q.M.C. N.A. 3 Oct. 17 to 11 Oct. 17; 1 lt. Sn. C.N.A. 8 Oct. 17; accepted 12 Oct. 17; capt. Sn. C. U.S.A. 20 Sept. 18; accepted 5 Oct. 18; vacated 22 Sept. 20.---1 lt. Q.M.C. 1 July 20; accepted 22 Sept. 20; capt. 4 Feb. 21;(a)-Discharged as captain and appointed first lieutenant Nov. 25, 22; acts June 30, 22 and Sept. 14, 22; 1 lt. (Nov. 25, 22); capt. 17 Sept. 27."

12. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of Charge I, and legally sufficient to support all other approved findings of guilty and the

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sentence; and warrants confirmation thereof. A sentence of dismissal is mandatory on conviction of violation of the 95th Article of War and authorized on conviction of violation of the 93d and 96th Articles of War.

L. S. Steaton, Judge Advocate.  
J. P. Marshall, Judge Advocate.  
Eugene M. Coffey, Judge Advocate.

To The Judge Advocate General.



Infantry, did, at Fort Francis E. Warren, Wyoming, on or about March 5, 1936, acting jointly, in pursuance of a common intent and in the execution of a conspiracy to desert the service of the United States previously entered into by them, desert the service of the United States and did remain absent in desertion until they were apprehended at Englewood, Colorado, on or about March 6, 1936.

It will be observed that the specification alleges the joint desertion of the accused in pursuance of a common intent and in the execution of a conspiracy previously entered into by them. For the reasons stated in paragraph 27, page 18, Manual for Courts-Martial, 1928, there can be no such offense as joint desertion, from which it follows that there cannot be a joint desertion in the execution of a conspiracy. However, the specification includes allegations that each accused deserted the service of the United States in the execution of a conspiracy to desert, previously entered into by them. The record contains competent evidence which is legally sufficient to support the conviction of each accused of this included offense. CM 196481, Anderson, et al.; Dig. Ops. JAG, 1912-30, sec. 1310 (3), CM 192882, Hilburn and Morgan.

The method of pleading here employed is irregular and its use is condemned, but in this case it does not appear that it resulted in injuriously affecting the substantial rights of either accused and may be passed under the 37th Article of War.

4. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification of Charge I as finds each of the accused separately guilty of desertion, commenced and terminated at the times and places alleged, in the execution of a conspiracy to desert the service of the United States, previously entered into by them; legally sufficient to support the findings of guilty of Charge I, Charge II and the Specification thereunder, and the sentence.

Theodore Hall, Judge Advocate.  
H. A. Turnbull, Judge Advocate.  
L. W. Smith, Judge Advocate.

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

Board of Review  
CM 204927

UNITED STATES	)	FOURTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort McPherson, Georgia,
First Lieutenant FELIX N.	)	April 7, 1936. Dismissal.
PARSONS (O-15454), U. S.	)	
Army, Retired.	)	

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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, who was retired August 31, 1934, for disability in line of duty, section 1251, Revised Statutes, was tried upon the following charges and specifications:

CHARGE: Violation of the 95th Article of War.

Specification: In that 1st Lieutenant Felix N. Parsons, Retired, having on or about the 16th day of June 1934, become indebted to the Post Exchange, Fort McPherson, Georgia, in the sum of thirty-nine and 73/100 dollars (\$39.73) for merchandise and having on or about the 10th day of July 1934, promised in writing to the Post Commander, Fort McPherson, Georgia, that he would "without fail" settle the said indebtedness on the 1st of August 1934, did without due cause at Fort McPherson, Georgia, to the disgrace of the Military Service fail to keep said promise.

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

Specification 1: Unlawfully making and uttering check in the amount of \$5.00. (Finding of guilty disapproved by reviewing authority.)

Specification 2: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, being indebted to O. C. Woodruff of Beaufort, S. C., in the sum of \$5.00 for gasoline and cash loaned, which amount became due and payable about July 30, 1934, did, at Beaufort, S. C., from July 30, 1934, to November 4, 1935, or thereabouts, dishonorably fail and neglect to pay said debt.

Specification 3: Dishonorably failing to keep a promise in regard to the payment of a debt of \$5.00. (Finding of not guilty.)

Specification 4: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, did, at Sarasota, Florida, on or about August 25, 1934, with intent to defraud, wrongfully and unlawfully make and utter to The Sport Shop, Sarasota, Florida, a certain check, in words and figures as follows, to wit:

Atlanta, Ga., August 25, 1934. No. \_\_\_\_\_  
The First National Bank of Atlanta,  
West End Branch  
Pay to the order of: The Sport Shop..... \$2.95  
Two and 95/100.....Dollars.  
Felix N. Parsons,  
P.O. Box 497. 1st Lieut., U.S.Army,

and did by means thereof obtain from said Sport Shop merchandise of the value of \$2.95, he, the said Lt. Parsons, then well knowing that he did not have, and not intending that he should have, sufficient funds in the First National Bank of Atlanta, West End Branch, for the payment of said check.

Specification 5: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, being indebted to the Sport Shop, at Sarasota, Florida, in the sum of \$2.95, for merchandise, which amount became due and payable on or about

August 30, 1934, did, at Sarasota, Florida, from about August 30, 1934, to about January 23, 1935, or thereabouts, dishonorably fail and neglect to pay said debt.

Specification 6: Unlawfully making and uttering a check in the amount of \$25.00. (Finding of not guilty.)

Specification 7: Dishonorably failing and neglecting to pay a debt of \$25.00. (Finding of not guilty.)

Specification 8: Dishonorably failing to keep a promise in regard to the payment of a debt of \$25.00. (Finding of not guilty.)

Specification 9: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, did, at Biloxi, Mississippi, on or about August 10, 1935, with intent to defraud, wrongfully and unlawfully make and utter to the Riviera Hotel, a certain check, in words and figures as follows, to wit:

San Antonio, Texas, Aug. 10, 1935. No \_\_\_\_\_  
Alamo National Bank  
of San Antonio, Texas.  
Pay to Cash or order \$10.00  
Ten and 00/100-----Dollars.

Felix N. Parsons,  
1st Lieut., USA., (Ret),

and by means thereof did fraudulently obtain from The Riviera Hotel \$10.00 in cash money, he, the said Lt. Parsons, then well knowing that he did not have and not intending that he should have sufficient funds in the Alamo National Bank of San Antonio, Texas, for the payment of said check.

Specification 10: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, did, at Biloxi, Mississippi, on or about August 14, 1935, with intent to defraud, wrongfully and unlawfully make and utter to the Riviera Hotel, a certain check, in words and figures

as follows, to wit:

San Antonio, Texas, Aug. 14, 1935. No \_\_\_  
Alamo National Bank  
of San Antonio, Texas.  
Pay to Cash or order \$10.00  
Ten and 00/100-----Dollars.

Felix N. Parsons,  
1st Lieut., U.S.A., (Ret.),

and by means thereof did fraudulently obtain from the Riviera Hotel \$10.00 in cash money, he, the said Lt. Parsons, then well knowing that he did not have and not intending that he should have sufficient funds in the Alamo National Bank of San Antonio, Texas, for the payment of said check.

Specification 11: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, did, at Biloxi, Mississippi, on or about August 15, 1935, with intent to defraud, wrongfully and unlawfully make and utter to the Riviera Hotel, a certain check, in words and figures as follows, to wit:

San Antonio, Texas, Aug. 15, 1935. No \_\_\_  
Alamo National Bank  
of San Antonio, Texas.  
Pay to The Riviera Hotel, Biloxi, Miss. or order \$35.00  
Thirty-five and 00/100-----Dollars.

Felix N. Parsons,  
1st Lieut., USA., (Ret.),

and by means thereof did fraudulently obtain from the Riviera Hotel \$35.00 in cash money, he, the said Lt. Parsons, then well knowing that he did not have and not intending that he should have sufficient funds in the Alamo National Bank of San Antonio, Texas, for the payment of said check.

Specification 12: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, did, at Biloxi, Mississippi, on or about August 19, 1935, with intent to defraud, wrongfully and unlawfully make and utter to the Riviera Hotel, a certain check, in words and figures as follows, to wit:

San Antonio, Texas, Aug. 19, 1935. No \_\_\_\_  
 Alamo National Bank  
 of San Antonio, Texas.

Pay to Cash or order \$10.00  
 Ten and 00/100-----Dollars.

Felix N. Parsons  
 1st Lieut. USA. (Ret.),

and by means thereof did fraudulently obtain from the Riviera Hotel \$10.00 in cash money, he, the said Lt. Parsons, then well knowing that he did not have and not intending that he should have sufficient funds in the Alamo National Bank of San Antonio, Texas, for the payment of said check.

Specification 13: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, being indebted to the Riviera Hotel, Biloxi, Mississippi, in the sum of \$104.17, which amount became due and payable on or about August 26, 1935, did, at Biloxi, Mississippi, from August 26, 1935, to February 7, 1936, or thereabouts, dishonorably fail and neglect to pay said debt. (Finding of guilty approved by the reviewing authority as to the failure and neglect to pay a debt of \$84.17 only.)

Specification 14: Dishonorably failing to keep a promise in regard to the payment of a debt of \$104.17.  
 (Finding of guilty disapproved by reviewing authority.)

Specification 15: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, having uttered to 1st Lieutenant Keff D. Barnett, U. S. Army, Retired, in exchange for cash lent him by said Lt. Barnett, a certain check in words and figures as follows, to wit:

San Antonio, Texas, Sept. 2, 1935. No \_\_\_\_  
 Alamo National Bank  
 of San Antonio, Texas.

Pay to Keff D. Barnett or order \$20.00  
 Twenty and 00/100-----Dollars.

Felix N. Parsons,  
 1st Lieut., USA., (Retired),

did, at Ensley, Alabama, on or about September 2, 1935,

with intent to defraud the said Lieut. Barnett, wrongfully and dishonorably direct the Alamo National Bank, drawee of said check, to stop payment thereon.

Specification 16: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, being indebted to 1st Lieut. Keff D. Barnett, U. S. Army, Retired, in the sum of \$20.00 for cash loaned, which amount became due and payable on or about September 2, 1935, did, at New Orleans, La., from September 2, 1935, to February 7, 1936, dishonorably fail and neglect to pay said debt.

Specification 17: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, having, on or about September 2, 1935, become indebted to 1st Lieut. Keff D. Barnett, U. S. Army, Retired, in the sum of \$20.00 for cash money, and having failed without due cause to liquidate said indebtedness, and having on or about October 28, 1935, promised in writing to said Lieut. Barnett that he would on or about November 10, 1935, pay on such indebtedness the sum of \$10.00, did, without due cause, at New Orleans, La., from about November 10, 1935, to February 7, 1936, or thereabouts, dishonorably fail to keep said promise.

Specification 18: In that 1st Lieutenant Felix N. Parsons, U. S. Army, Retired, did, at Birmingham, Alabama, on or about December 15, 1934, with intent to defraud, wrongfully and unlawfully make and utter to the Drennen Motor Car Company of Birmingham, Alabama, a certain check, in words and figures as follows, to wit:

No Protest First National Bank of Atlanta, \$115.80  
Ga. West End Branch

Atlanta, Georgia.....Dec. 15th 1934.

Pay to the order of Drennen Motor Car Company  
One Hundred fifteen and 80/100....Dollars

I hereby represent that the above amount is on deposit to my credit in said bank free from any claims, and I will reserve same for this check.

Write name of bank on this line Felix N. Parsons,  
1st Lieut., USA. (Retired)

Write city and state on this line 717 BAC,  
in payment of repairs to and labor on his car of the value  
of \$115.80, he, the said Lt. Parsons, then well knowing  
that he did not have and not intending that he should have  
sufficient funds in the First National Bank of Atlanta,  
Ga., West End Branch, for the payment of said check.

Specification 19: In that 1st Lieutenant Felix N. Parsons,  
U. S. Army, Retired, being indebted to the Drennen Motor  
Car Company of Birmingham, Alabama, in the sum of \$115.80  
for repairs to and labor on his car, which amount became  
due and payable on or about December 15, 1934, did, at  
Birmingham, Alabama, from December 15, 1934, to February  
7, 1936, or thereabouts, dishonorably fail and neglect to  
pay said debt.

Specification 20: In that 1st Lieutenant Felix N. Parsons,  
U. S. Army, Retired, being indebted to the Greystone Hotel  
of Montgomery, Alabama, in the sum of \$25.00, for room  
rent and cash advances, which amount became due and payable  
on or about September 25, 1934, did, at Montgomery, Alabama,  
from about September 25, 1934, to February 7, 1936, or  
thereabouts, dishonorably fail and neglect to pay said debt.  
(Finding of guilty except the words "cash advances",  
substituting in lieu thereof the word "Board"; of  
the excepted words, not guilty, and of the substi-  
tuted word, guilty.)

Specification 21: In that 1st Lieutenant Felix N. Parsons,  
U. S. Army, Retired, being indebted to the First National  
Bank of Birmingham, Alabama, in the sum of \$130.84, on  
a promissory note in words and figures as follows, to wit:  
Birmingham, Ala., July 5th, 1934. \$130.84  
August 6th, 1934 after date, I promise to pay to the  
order of The First National Bank of Birmingham,  
Birmingham, Ala.,  
One Hundred and Thirty and 84/100-----Dollars  
for value received with interest from maturity  
until paid.

Payable at The First National Bank of  
Birmingham, Birmingham, Ala.

No. 168422

Felix N. Parsons,

1st Lt. CAC P.O. Box 497, Atlanta, Ga.,  
which amount became due and payable on August 6, 1934, did,  
at Birmingham, Alabama, from August 6, 1934, to February  
7, 1936, or thereabouts, dishonorably fail and neglect to  
pay any part of said note.

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

Specification 1: In that 1st Lieutenant Felix N. Parsons,  
U. S. Army, Retired, being indebted to the Post Exchange,  
Fort Sam Houston, Texas, in the sum of \$37.75, which  
amount became due and payable on or about January 31,  
1935, did, at Fort Sam Houston, Texas, from February 1,  
1935, to February 8, 1936, or thereabouts, dishonorably  
fail and neglect to pay said debt.

Specification 2: In that 1st Lieutenant Felix N. Parsons,  
U. S. Army, Retired, did, at Atlanta, Georgia, on or  
about January 17, 1936, with intent to defraud, wrong-  
fully and unlawfully make and utter to the Great Atlantic  
and Pacific Tea Company, a certain check, in words and  
figures as follows, to wit:

San Antonio, Texas, Jan. 17, 1936. No. \_\_\_\_\_  
The National Bank of Fort Sam Houston  
Pay to order of Cash \$10.00  
Ten and 00/100-----Dollars.

Felix N. Parsons,  
Box 73, Station C. 1st Lieut., U.S.A., (Ret.),  
and by means thereof did fraudulently obtain from said  
company merchandise and cash, he, the said Lt. Parsons,  
then well knowing that he did not have, and not intending  
that he should have, sufficient funds in the National Bank  
of Fort Sam Houston, Texas, for the payment of said check.

Specification 3: In that 1st Lieutenant Felix N. Parsons,  
U. S. Army, Retired, did, at Atlanta, Georgia, on or  
about January 20, 1936, with intent to defraud, wrong-  
fully and unlawfully make and utter to the Great Atlantic



Register is as follows:

"Pvt. Pvt. 1 cl. and corp. 197, 278, 71 Aero Sq. S.M.A. and Av. Sec. Sig. C. 5 Dec. 17 to 11 June 19; 2 lt. Av. Sec. Sig. O.R.C. 9 June 19; accepted 9 June 19; active duty 15 July 23 to 29 July 23.--2 lt. A.S. 3 July 23; accepted 16 Oct. 23; trfd. to C.A.C. 14 May 24; 1 lt. 8 Nov. 28; retired 31 Aug. 34."

5. Accused was a person subject to military law and under the jurisdiction of the Commanding General, Fourth Corps Area. A.W. 2; sec. 2, National Defense Act, as amended (41 Stat. 759, 44 Stat. 780, 48 Stat. 806); par. 5 b, AR 170-10, Changes No. 3, Jan. 30, 1931; also see JAG 250.401, Nov. 22, 1921. The court was legally constituted and had jurisdiction of both the person and offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during 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 a violation of the 95th Article of War.

Theodore Hall, Judge Advocate.  
H. A. Turnbull, Judge Advocate.  
S. M. Smith, Judge Advocate.

To The Judge Advocate General.



of Ninety-Eight Dollars and Twenty Cents (\$98.20) and two (2) cartons of cigarettes of the value of Two Dollars and Twenty Cents (\$2.20), of a total value of One Hundred Dollars and Forty Cents (\$100.40), the property of the Post Exchange, Fort Williams, Maine.

He pleaded not guilty to the charge and specifications thereunder and was found not guilty of Specification 2, but guilty of Specification 1 and 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 five years. The reviewing authority approved the sentence but remitted three years of the confinement imposed, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$ .

3. The competent and undisputed evidence establishes the following facts:

Private G. C. Roy, Company G, 5th Infantry, was in charge of the bar at the post exchange, Fort Williams, Maine, on December 1, 1935. At closing time on that date, about 6 o'clock in the evening, Roy put the post exchange funds amounting to about \$100 in a strong box and placed the box in a cupboard under the bar. He locked both the strong box and the cupboard. He then locked the windows and doors of the exchange and departed. He was the last one in the exchange and did not see the accused around at the time. (R. 7-9) Thereafter, about 12:45, a sentry on the second round of his post discovered that one of the windows of the exchange was open, and on being notified a corporal of the guard, Corporal John A. Rowan, Company E, 5th Infantry, and the officer of the day, First Lieutenant Edward J. Burke, appeared and made an investigation, at which it was ascertained that one of the windows was open, that both cash registers were empty, and that the strong box or cabinet had been opened by removing the lock from the same, possibly by the use of pliers (R. 9-12). The next morning the post exchange officer, Captain William V. Gray, ascertained that \$98.20 and two cartons of cigarettes of the value of \$2.20 had been stolen (R. 12-14).

The foregoing facts are sufficient to establish the corpus delicti, that is, to show that at the time and place alleged the post exchange at Fort Williams, Maine, was unlawfully entered by someone with intent to commit the criminal offense of larceny, as alleged.

4. The accused was on furlough at the time of the foregoing events (R. 83) and, except for an alleged confession, there is no evidence in the record showing that he was at Fort Williams at the time, or that he was in any way connected with the unlawful entry of the post exchange and the larceny therefrom. In order to connect him with the offense the prosecution offered a confession (Ex. A) alleged to have been made on February 10, 1936, while accused was in a civilian jail at Auburn, Maine, in the presence of a police officer, Ralph A. Price, the county sheriff, Ralph J. Riley, and another civilian, W. R. Edwards, who acted as a sort of recorder. The defense strenuously objected to the admission of the confession on the ground that it had not been made voluntarily, but after the court had heard the testimony of witnesses for the prosecution and the defense the objection was overruled and the so-called confession admitted.

Thereupon, in an effort to show that the accused was in the vicinity of Fort Williams on the date of the alleged offense, the prosecution offered the deposition (Ex. B) of Charles T. Sinskie, the owner of an automobile repair shop at Farmington, Maine. He testified that accused was in his shop on Friday, November 29, 1935, where he discussed the purchase of an automobile and again on December 3, 1935, on which latter date accused stated that he had been to Portland or Lewiston, Maine, over the previous week-end of November 30-December 1, 1935. Thereupon the accused offered the testimony of four witnesses, Mrs. Nancy Howard, her husband, Guy H. Howard, and daughter, Beatrice Howard, and Mr. Lawrence O'Dell, all of whom testified positively that accused was at the Howard home at Farmington, Maine, on Saturday, Sunday night and Monday morning, November 30-December 1 and 2, 1935. (R. 71-74,76-77,78-82)

5. In an effort to establish the voluntary nature of the confession the prosecution called three witnesses, Ralph A. Price, a police officer of the South Portland, Maine, Police Force, Ralph J. Riley, Sheriff of Androscoggin County, Maine, and William R.

Edwards, of Portland, and their testimony may be summarized as follows:

On the night of February 10 accused was a prisoner in the county jail at Auburn, Maine. About 9 o'clock of that evening Mr. Price appeared at the jail and obtained permission from the sheriff to question the accused (R. 14-16,60), which he proceeded to do in the manner described below in the presence of the sheriff and Mr. Edwards, who acted as recorder, until about 2 o'clock in the morning, a period of about five hours (R. 60-62). Price, Edwards and Riley testified in substance that accused was warned of his constitutional rights before he made the written statement or confession offered by the prosecution, but the time at which the warning or explanation of his rights was made to the accused is not established, and the witnesses differ somewhat as to the language used. Mr. Price told him (R. 18) that "He had a right to tell the truth if he cared to, and that whatever he said would be used against him". He thinks that the sheriff, Riley, told him that he did not have to make any statement, but in any event such an explanation was claimed to have been made in Mr. Price's presence (R. 18). In answer to a leading question, Edwards testified that prior to signing the confession accused was "informed that he didn't have to make any statement and that if he did it could be used against him" (R. 31), and in reply to a similar question the sheriff, Riley, stated that "I understood that Mr. Price told him that anything he said could be used against him" (R. 59). In any event, it affirmatively appears that at the beginning of the interview accused declined to make any statement or to answer any questions, and seemed to be in a daze while Mr. Price plied him with questions not only concerning the post exchange robbery but other alleged offenses. Mr. Riley's testimony in this respect is as follows:

"When he first started in questioning, Mr. Price went over the details of the robbery in question and of course that was probably repeated a great many times and during the conversation Nottage seemed as though he were in a daze. He would just shake his head and say nothing. Mr. Price stepped out of the room and I told Nottage I would do anything I could to help him and urged him to tell the truth and help Mr. Price clear up the crime he was mixed up in. Then Mr. Price came in again and

questioned him again about these things that happened here in Portland. Some time during the questioning Nottage asked how much time he would have to do if he told the truth. We told him we would do what we could for him. Soon after that, after questioning him along that same line Nottage made the admissions contained in this statement, \* \* \*." (R. 61)

All three witnesses testified that there was no violence used and that there were no marks of such on the accused during or following the interview. However, accused was in a very nervous condition throughout the same (R. 61,64) and on at least one occasion, while he was sitting near the roll top desk, Price, who in questioning him was walking back and forth, stopped and pointed his finger at the accused and when he did, "he (Nottage) would go like that (indicating flinch), he would butt his head against this roll top desk" (R. 60-61). When asked whether he swore at him, Price replied, "I can't say that I did", and when asked if anyone else in the room swore at or struck the accused, Price's reply was, "Not to my knowledge" (R. 17). According to the sheriff, Riley, Price did "raise his voice" in the examination (R. 66). During the examination the accused was taken into another office and there he was shown what is described as a radio set by Price (R. 39) and as a violet ray lamp by Edwards (R. 34) and told that it was a lie detector (R. 34), to which, as will later appear from his own undisputed testimony, he was strapped and plied with a series of questions (R. 24). Finally, about 1:30, the examination was adjourned for a light lunch or supper, in which, however, the accused did not share, and at 2 o'clock, five hours after the questioning began, the statement was drawn up, signed by the accused and witnessed by Riley, Price and Edwards (R. 17,62). The confession concludes with the following language:

"I swear this to be the truth, the whole truth, and nothing but the truth; so help me God. I have given this confession of my own free will and accord. I have received no promises nor have I been threatened or abused. I understand my Constitutional Rights."

The accused testifying himself (R. 23-26) claimed that he was forced by threats and violence to sign the so-called confession, and in detail

testified that he was struck several times on the head and face by Mr. Price prior to making the statement, that the latter used loud and profane language, calling him all kinds of names, accusing him of numerous other offenses and informed him that his alleged accomplice, Private John E. Witkovic, had confessed to the post exchange robbery implicating him, and that finally he was strapped to a machine which he was told and believed to be a lie detector, all prior to his signing of the alleged confession. In support of the foregoing, the accused offered the testimony of three fellow prisoners, Charles Roberts, Laurice Howes, and John Fallon (R. 18-22, 42-44, 53-55), all of whom appeared to have been in a position to hear or witness the proceedings in the jail and who, except for the statement of one witness, corroborated with uniform consistency the testimony of the accused in substantially all of its details. The inconsistency or contradictory nature of Fallon's testimony consisted merely in that he claimed to have heard what sounded like a blow made with a leash, while neither the accused nor either of the other two witnesses claimed that he had been whipped with a leash, and all of the prosecution's witnesses denied it.

The Manual for Courts-Martial, paragraph 114 a (p. 116), provides that:

"It must appear that the confession was voluntary on the part of the accused. \* \* \* A confession not voluntarily made must be rejected; \* \* \*"

In discussing this mandatory provision of the Manual, the Board of Review in a previous case (CM 192609, Hulme, Oct. 20, 1930) said:

"It was necessary for the court-martial in this case, acting through the law member, to ascertain and determine as a question of law and as a preliminary question of fact, whether the confession was voluntary, and its decision with respect to the facts is entitled to such weight that it should not be disturbed on appellate review unless there be no reasonable basis and evidence for its action."

The Board then proceeded to examine the circumstances under which the confession there involved was made and concluded that the

confession was not voluntarily made in fact or law, and that its admission by the court was error.

Adopting as sound and correct the reasoning contained in the statements quoted above, the Board of Review is of the opinion that the admissibility of the confession in the instant case is, under the circumstances, a proper and necessary one for review.

In one of the leading American cases, Bram v. United States, 168 U. S. 532, the Supreme Court pointed out that in criminal trials in courts of the United States the issue of the voluntary nature of a confession is controlled by that part of the Fifth Amendment to the Constitution providing that no person "shall be compelled in any criminal case to be a witness against himself". In further explanation of this principle, the court said (p. 549):

"The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent."

In view of the mandatory provisions of the 24th Article of War and of the court-martial manual protecting an accused person under all circumstances against self-incrimination, and establishing his right to remain silent and to refuse to answer any questions which might tend to incriminate him, the rule announced by the Supreme Court is particularly applicable to court-martial procedure. The right is a real one and an explanation to an accused of his right to remain silent, followed with treatment such as shown by this record, constitutes a compliance with the form only and a direct defiance of the spirit of our laws. CM 131194, Price, 1919. A confession obtained by compulsion of any kind cannot be deemed to have been

voluntarily made, and compulsion, although usually exercised through violence or threats of violence, may be effectively exercised in other ways, as illustrated in the instant case where the accused, a prisoner in a county jail, after indicating his desire to make no statement at all, was plied with questions by a police officer in the presence of the county sheriff for a period of approximately five hours until at 2 o'clock in the morning he agreed to sign a statement. Likewise, a confession is inadmissible when it appears that it was obtained through promises, however slight, or by the exertion of any improper influence. Bram v. United States, *supra*, pp. 542, 543. It is undisputed that the accused persisted in his refusal to answer questions or make any statement until after the sheriff of the county where he was confined in jail had told him that he "would do anything I could to help him and urged him to tell the truth and help Mr. Price clear up the crime he was mixed up in", and the mere statement of the accused, a private soldier, testifying before a court-martial, that he did not know whether he believed the sheriff or not and did not see how the sheriff could help him is altogether insufficient to overcome the almost inescapable inference from the facts in this case that the accused's statement, following immediately the promise of the sheriff, would not have been made but for that promise.

It must also be remembered that the accused was not only told that his accomplice had confessed and implicated him, but he was also confronted with the statement that the civilian police officers in whose custody he was knew many damaging facts concerning other alleged offenses subjecting the accused to prosecution in the civil courts. In this connection attention is invited again to language of the Supreme Court in the Bram case, *supra*, where the court (p. 544, et seq.) said:

"While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and

to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition."

Applying the foregoing well established principles to the facts in this case, the Board of Review is of the opinion that the alleged confession was obtained by compulsion and/or promises of leniency and was therefore inadmissible, and its admission was an error of law which injuriously affected the substantial rights of accused. It is believed that this conclusion is supported by the undisputed testimony of the prosecution's witnesses and is not dependent upon, although strengthened by, the testimony of the accused and his fellow prisoners in the Auburn jail.

There is not only no other evidence directly connecting the accused with the offense, but there is positive evidence of an alibi which was attacked only by the testimony of one witness, who stated that the accused had made a statement to him inconsistent with the proof of the alibi, and it is also pointed out that the court, although finding the accused guilty of unlawful entry, found him not guilty of the larceny in the post exchange. It is therefore clear that with the exclusion of the confession as evidence, the remaining evidence is insufficient to support the findings of guilty.

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.

Frank D. Halliday Judge Advocate.  
W. A. Turnbull , Judge Advocate.  
J. B. Messitt , Judge Advocate.



*No point digested*

(167)

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

Board of Review  
CM 205134

U N I T E D	S T A T E S	)	UNITED STATES MILITARY ACADEMY
		)	
	v.	)	Trial by G.C.M., convened
		)	at West Point, New York,
Cadet WILLIAM M. HOGE, Jr.,		)	June 8, 1936. Dismissal.
Fourth Class, United States		)	
Corps of Cadets.		)	

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OPINION of the BOARD OF REVIEW  
HALLIDAY, TURNBULL and MORRISETTE, Judge Advocates.

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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 the following charges and specifications:

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

Specification: In that Cadet William M. Hoge, Jr., Fourth Class, United States Corps of Cadets, did, at West Point, New York, without proper leave, absent himself from the Cadet Hospital from about 11:00 p.m., May 23, 1936, to about 1:00 a.m., May 24, 1936.

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

Specification 1: In that Cadet William M. Hoge, Jr., Fourth Class, United States Corps of Cadets, did, at West Point, New York, on or about May 23, 1936, drink intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931.

Specification 2: In that Cadet William M. Hoge, Jr., Fourth Class, United States Corps of Cadets, was at West Point, New York, on or about May 24, 1936, in a public place, to wit, Thayer Road, drunk while in uniform, to the scandal and disgrace of the United States Corps of Cadets.

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

3. The material evidence of record may be summarized as follows:

Major Robert B. Hill, Medical Corps, a witness for the prosecution, testified in substance that accused was a patient under his charge in the station hospital at West Point on May 23, 1936; that as surgeon in charge he had authority to grant privileges to cadet patients to leave the ward for the purposes of attending classes, and other privileges (R. 13); that accused had blanket authority to attend athletic events and the movies on Saturday night (R. 15); that witness had no recollection of granting to the accused a dining permit as of the date in question (R. 15); that the blanket authority to attend a show would not include permission to be in the neighborhood of the Thayer Hotel around midnight (R. 16). Witness identified hospital orders No. 59, Station Hospital, West Point, New York, dated October 6, 1936 (Ex. A; R. 14).

Major Earle D. Quinnell, Medical Corps, a witness for the prosecution, testified that he is medical officer of the station hospital at West Point and as such is in charge of all hospital records (R. 17). Witness identified a document as "a register of cadets", which was received in evidence and marked Exhibit C; this register, he said, was signed when cadet patients report in or out of the hospital. Witness further testified that this register contained the entries of cadets who were registered in and out of the hospital on May 23 and 24, and that the same "shows no entry of Cadet Hoge going out to attend the motion picture show" (R. 18).

Other official records (R. 27,28) were considered by the court showing that accused had no authority to leave the hospital between the hours set forth in this specification for any purpose except to attend the motion picture performance, and Master Sergeant James B. Mahan, United States Military Academy Band, a witness for the prosecution, testified in substance that he was in charge of the motion picture show in the gymnasium on the West Point military reservation on the night of May 23, 1936, and that the last showing of the picture on that night started between 9:35 and 9:40 p.m. and ended about five minutes before midnight (R. 12).

Cadet C. F. Necrason, United States Corps of Cadets, a witness for the prosecution, testified that accused was known to him as Cadet Hoge and that he saw him at about 12:30 a.m., May 24, 1936, at a point between the hospital and the Thayer Hotel (R. 10); that accused was proceeding away from the hospital toward the hotel; that accused was alone at that time, and that he (the witness) advised him to proceed to his quarters (R. 11). Recalled by the defense the witness testified that he saw accused for about two or three minutes; that there was nothing about his conduct or demeanor which attracted his attention; that accused appeared sober when speaking and there was nothing to make the witness think accused was intoxicated; that the witness casually stated to Mr. Christensen, "Gee, maybe he is drunk" or "Gee, maybe he is tight"; that accused was fully dressed, had his cap on, and talked normally; that his attention was attracted to accused because it was 12:30 and he was a fourth classman (R. 28,29).

With respect to the specifications under Charge II, Major Quinnell further testified that when brought to him about 1:30 a.m. accused was "under the influence of intoxicating liquor" (R. 18); that he based his conclusion on the fact that accused was unable properly to handle himself with regard to walking, station, and his pupils were dilated. There was a strong odor of alcohol on his breath (R. 19); but accused exhibited no quarrelsomeness, no violence, no bestiality, no passion, and did not act silly (R. 19); when brought to the hospital accused was dressed in uniform, which was in good appearance.

Captain Edward H. Bowes, Jr., West Point, New York, a witness for the prosecution, testified that he was on duty as officer in

charge at cadet headquarters on the night of May 23-24, 1936; that at about 1:10 a.m., May 24, accused was brought to him by Captain Stevens; that he considered accused at that time drunk; that he based his opinion upon the "general appearance" of accused, "his manner of speaking and the odor of liquor on his breath"; that accused's hair was disheveled, eyes not normal, and his trousers were discreditable in appearance (R. 20); that at least two buttons of his trousers were unbuttoned, and that he wore no hat. Witness further testified that accused displayed no violence but a trace of belligerence, showed no quarrelsomeness, no bestiality, no silliness, and his passions were not aroused (R. 20-22).

Captain Francis R. Stevens, Infantry, West Point, New York, a witness for the prosecution, testified in substance that he knew the accused; that he saw the accused about 12:30 a.m., May 24, 1936, on the road between the hospital and the Thayer Hotel; that he saw three cadets standing talking, "One of them was at attention"; that he (the witness) drove on and then realized that the one standing at attention must have been a fourth classman; that he reported having seen the accused to the officer in charge and then drove his car back to try to find him (R. 23); that he drove back and forth between the hospital and the hotel looking for him for about half an hour; that he found him about one o'clock where he had first seen him; that accused at that time had no hat on, was perspiring profusely, had "very bad looking trousers", his shoes were scuffed and dirty; that "his hair was disheveled"; that when witness stopped his car accused started to run, but promptly came back after having been ordered to do so; that upon being asked his name accused said, "Cadet Hoge, Company A"; that upon being told to get in the car accused fell in the car, then he straightened up normally; that he drove him to the officer in charge, Captain Bowes; that at that time the fly of his trousers was "buttoned up with one button only"; that accused was wearing a full dress coat, "very neat in appearance" (R. 24,25).

Cadet John H. Van Vliet, Jr., Second Class, United States Corps of Cadets, a witness for the prosecution, testified that he knew accused; that he (witness) was on duty as cadet officer of the day for the period May 23-24, 1936; that at about 1:08 a.m., May 24, 1936, he observed the accused and smelled his breath; "It smelled

of liquor"; that in the opinion of the witness accused according to the court-martial manual definition of the term was drunk; he based his opinion upon the smell of liquor on his breath and upon the fact that accused was unable to stand erect without weaving and his clothing was disheveled, his hair mussed up, and his trousers unbuttoned (R. 26); that accused exhibited no violence, no quarrelsomeness or silliness; that his passions were not aroused, and that "He walked in a straight line" when told by Major Quinnell "to walk down the hall and back" (R. 25-27).

Cadet D. P. Christensen, First Class, United States Corps of Cadets, a witness for the defense, testified in substance that he knew accused; that he saw him about 12:30 a.m., May 24, 1936; that what attracted his attention to accused was the fact that "he was a fourth classman out at that time of night"; that accused was perfectly sober, properly dressed and presentable (R. 29,30).

Accused did not testify or make any statement to the court.

4. The absence of accused at the time and place specified in the specification under Charge I is established by the competent and undisputed evidence. Had he absented himself for the purpose of attending the moving picture performance on the night in question such absence for that purpose would have been authorized, but even had he done so his absence extended beyond the time permitted for that purpose, and when he was discovered he was proceeding from a spot not between the hospital and the moving picture theater in an opposite direction from that of the moving picture theater at a considerable time after the performance had terminated. The Board of Review is therefore of the opinion that the evidence is legally sufficient to support the findings of guilty of the specification under Charge I.

It is also clear from the competent evidence that accused was drunk while in uniform at the time and place alleged in Specification 2, Charge II. That he drank intoxicating liquor, as alleged in Specification 1, Charge II, is established by his drunkenness and the odor of intoxicating liquor on his breath.

The only remaining question requiring specific consideration is whether or not the drunkenness of the accused alleged in the second specification of Charge II, as established by the evidence, constitutes drunkenness to the scandal and disgrace of the United States Corps of Cadets.

The evidence clearly shows that accused was under the influence of liquor at midnight on the road between the hospital at West Point and the Thayer Hotel. He was away from the station hospital without authority, had drunk some intoxicating liquor and was apparently keeping out of sight. When Captain Stevens first saw accused there was nothing unusual in his attitude or appearance. He noted that accused stood at attention and later realized that he was a fourth classman. When Captain Stevens returned to look for accused, he had to hunt for him for over half an hour. Upon being asked his name accused answered properly. He had no cap, his hair was disheveled, he was perspiring profusely, had on very bad looking trousers, his shoes were scuffed and dirty, and his trousers were unbuttoned, but he was wearing a full dress coat which was very neat in appearance. When accused appeared before Captain Bowes, and it should be remembered that he was taken in the automobile directly to Captain Bowes, there was an odor of liquor upon his breath, his hair was disheveled, his eyes were not normal, his trousers were discreditable in appearance, at least two buttons of his trousers were unbuttoned, and he wore no hat. He displayed no violence, no bestiality, and no silliness.

He was not grossly drunk, he was not conspicuously disorderly, there was no military inferior present, and the two cadets who had seen him on the highway were attracted to him only because of the hour and the fact that he was a fourth classman. At its worst, the accused had been found on the highway between the station hospital and the Thayer Hotel at midnight and apparently trying to keep out of sight.

No shameful act was shown nor was there any evidence that accused had made a disgraceful exhibition of himself. In the opinion of the Board of Review the evidence totally fails to show that accused was grossly drunk or conspicuously disorderly, or that his conduct

was such as to stamp him as normally unfit to associate with officers or cadets. It follows, in the opinion of the Board of Review, that the evidence of record fails to show that the intoxicated condition of accused was to the scandal and disgrace of the United States Corps of Cadets.

With respect to the punishment adjudged, the accused being convicted legally of the absence alleged in Charge I and the specification thereunder and of drinking and being intoxicated, the Board of Review is of the opinion that the sentence of dismissal is unreasonably severe. It is believed that the ends of justice will be fully served by a reduction of the sentence from dismissal to suspension of the accused from the United States Military Academy for one year.

5. Accused was admitted to the Military Academy from the First District of Arkansas on July 1, 1935. He was 18 years and 3 months of age on June 8, 1936, the date of trial.

6. The court was legally constituted. Except as hereinabove noted, the record of trial discloses no errors or irregularities injuriously affecting the substantial rights of accused. For the reasons hereinabove indicated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, of Specification 1, Charge II, and of Charge II, and legally sufficient to support the finding of guilty of Specification 2, Charge II, except the words "to the scandal and disgrace of the United States Corps of Cadets", and is legally sufficient to support the sentence. However, for reasons stated herein, the Board of Review recommends that the sentence be confirmed and commuted to suspension from the United States Military Academy for the period of one year beginning July 1, 1936.

Frank M. Halliday, Judge Advocate.

W. A. Turnbull, Judge Advocate.

James M. [Signature], Judge Advocate.

To The Judge Advocate General.



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

(175)

Board of Review  
CM 205354

UNITED STATES )

PHILIPPINE DIVISION

v. )

Corporal JORGE MINA (6737107), )  
Regimental Band, 45th Infantry )  
(PS). )

) Trial by G.C.M., convened at  
) Fort William McKinley, P. I.,  
) June 16, 1936. Dishonorable  
) discharge and confinement for  
) one (1) year and six (6) months.  
) Bilibid Prison, Manila, P. I.

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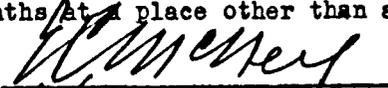
HOLDING by the BOARD OF REVIEW  
McNEIL, HALLIDAY and MORRISETTE, Judge Advocates.

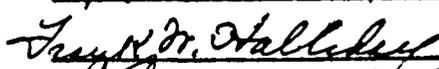
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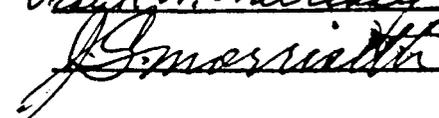
1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found to be legally sufficient to support the sentence to confinement at hard labor for one year and six months.

2. Confinement in a penitentiary in this case is not authorized under the 42d Article of War. Section 85, Title 6, Code of the District of Columbia, provides that whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, shall, if the value be less than \$35.00, be punished by a fine of not more than \$200.00 or imprisonment for not more than one year, or both. In this case the maximum value of the property alleged in any specification of which accused was convicted is 26 pesos. In order to determine whether confinement in a penitentiary is authorized, each specification must be considered by itself; the values stated in different specifications may not be aggregated for this purpose. Par. 104 c, M.C.M., 1928; CM 30-200, July 23, 1914; CM 121178, par. 1612, Dig. Ops. JAG, 1912-30.

3. For the reason hereinabove stated, the Board of Review holds the record of trial legally sufficient to support only so much of the approved sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months at a place other than a penitentiary.

 , Judge Advocate.

 , Judge Advocate.

 , Judge Advocate.



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

Board of Review  
CM 205427

U N I T E D	S T A T E S	)	EIGHTH CORPS AREA
		)	
	v.	)	Trial by G.C.M., convened at
		)	Randolph Field, Texas, July
First Lieutenant ROBERT J.		)	31, 1936. Dismissal.
DWYER (O-17173), Air Corps.		)	

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OPINION of the BOARD OF REVIEW  
McNEIL, HALLIDAY and MORRISETTE, Judge Advocates.

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

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

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

Specification: In that First Lieutenant Robert J. Dwyer, Air Corps, United States Army, did, without proper leave, absent himself from his proper station, at Randolph Field, Texas, from about 12:01 a.m., May 26, 1936, to about 5:00 p.m., June 5, 1936.

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

Specification 1: In that First Lieutenant Robert J. Dwyer, Air Corps, United States Army, being indebted to the Government Employees Finance Corporation of Fort Worth, Texas, in the sum of \$143.00 One Hundred Forty-three Dollars for a personal loan which amount came due and payable on or about October, 1935, did at Randolph Field, Texas, from October, 1935, to May 1, 1936, dishonorably fail and neglect to pay said debt.

Specification 2: In that First Lieutenant Robert J. Dwyer, Air Corps, United States Army, did, at Randolph Field, Texas, on or about May 2, 1936, with intent to deceive Captain Stanton T. Smith, Air Corps, his Squadron Commander, officially report to the said Captain Stanton T. Smith, Air Corps, that he "Has submitted check to apply on above account", which report was known by the said First Lieutenant Robert J. Dwyer, Air Corps, United States Army, to be untrue and was untrue, in that the check was never sent to the Government Employees Finance Corporation.

He pleaded guilty to Charge I and its Specification, not guilty to Charge II and the two specifications thereunder, 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 for the prosecution may be summarized as follows:

In addition to the pleas of guilty to Charge I and its Specification, it was established by competent and undisputed evidence that after the expiration of a ten days' leave of absence, beginning on May 15, the accused remained absent from his proper station without authority from May 26, 1936, until he was apprehended on June 5, 1936, at Comfort, Texas, about 40 miles north of San Antonio, and returned to his proper station by the military police (R. 10-12, 13-14; Prosecution's Ex. 1).

Likewise, it was established by competent and undisputed evidence that on October 10, 1935, accused was indebted to the Government Employees Finance Corporation of Fort Worth, Texas, in the sum of \$218.00, the balance then due on a loan of \$330.00 made to him by that company on October 9, 1934, payable in eleven monthly installments of \$28 each and one of \$22. Four installments were paid on this note, all in the year 1935, as follows: \$28 on April 25, \$28 on May 18, and \$56 on July 18. The full amount of the loan was due and payable on October 10, 1935, but it appears, as will be later shown by the

testimony of the accused, that some kind of new arrangement was made at that time for the liquidation of the remaining indebtedness probably in monthly installments. On November 7, 1935, the accused made one such payment of \$75 and on December 6, 1935, the corporation received his check in the sum of \$25, which check, however, was returned by the bank on which it was drawn for the reason that it had not been properly countersigned. No other payments were made on the indebtedness between the dates of October, 1935, and May 1, 1936, with the result that during all of the period covered by Specification 1 of Charge II, the accused was in fact indebted as alleged to the Government Employees Finance Corporation of Fort Worth in the sum of at least \$143.00, on which no payments of any kind were made or attempted to be made subsequent to the mailing of the improperly executed check for \$25, received by the company on December 6, 1935, and subsequently refused by the bank on which it was drawn (Prosecution's Ex. 2).

By means of a stipulation, it was shown that on April 8, 1936, Captain Stanton T. Smith, accused's squadron commander, wrote and caused to be delivered to the accused the following memorandum:

"1. You will reply by indorsement hereon the reasons for not taking proper care of note mentioned in attached letters from the Government Employees Finance Corporation.

The undersigned was of the opinion that you stated this had been taken care of on the first of April and desires information whether you have paid anything on this account."

Thereafter, on May 2, 1936, the memorandum was discussed by Captain Smith and the accused in the former's office and at that time and place returned by the accused to his commanding officer, Captain Smith, by the following formal official first indorsement, as alleged in Specification 2 of Charge II:

"First Lieut. Robert J. Dwyer, A.C. has submitted check to apply on above account."

Between the dates May 1, 1936, and June 8, 1936, no check or other payment was received by the Government Employees Finance Corporation

from the accused. (R. 25; Prosecution's Ex. 3) The account, however, was settled in full between June 8 and July 25, 1936 (Prosecution's Ex. 3).

Thereupon the prosecution rested.

4. The accused testified as a witness in his own behalf in denial or attempted explanation of all the offenses charged against him. His testimony is substantially as follows:

On the 15th of May, while he was in arrest in quarters awaiting investigation of charges which had already been preferred against him, he requested and obtained a leave of absence for the purpose of going to his home in Northampton, Massachusetts, where his mother had recently died. He was without sufficient funds to pay his transportation to Northampton, but was taken in a car as far as Fort Worth by some friends, where he hoped to obtain free transportation by air through these friends who were "connected with the oil business, with the Gulf people". No such transportation was obtained and the accused claims that, being unable to get any further because of lack of funds he became depressed and began to drink. He overstayed his leave, returned to San Antonio within a short distance of his station, but instead of returning thereto, he went, with friends again, to Comfort, Texas, where he continued to drink heavily until he was arrested while fishing by the military police and returned to his proper station. (R. 27-28, 38-41)

In October, 1935, he was indebted to the Government Employees Finance Corporation in the sum of \$218.00, the balance due on a previous loan (R. 28-29), all of which was due and payable on that date (R. 41). In November he paid \$75, leaving a balance of \$143.00 still past due and payable under what appears to have been some kind of a refinancing arrangement entered into sometime about the month of October, 1935. Between the date of that payment and May 1, 1936, the only remittance made by him to this creditor was in the form of a check for \$25, which he claimed to have turned over to his then squadron commander, Captain F. P. Booker, to be countersigned by the latter under an agreement which required all of the accused's checks during that period to be so countersigned. The check reached the

Finance Corporation without the squadron commander's signature and was consequently returned by the bank the latter part of the same month. (R. 29) He made no effort to obtain the necessary signature on the check, although Captain Booker was frequently on the post and he could have gotten in contact with him (R. 50-51).

He admitted that on April 8, 1936, he received a memorandum from Captain Stanton T. Smith, Air Corps, his squadron commander, requiring an explanation of his failure to meet his obligation to the Government Employees Finance Corporation. At that time he explained to Captain Smith that he had no money, whereupon the latter agreed to keep the letter until the next pay day. On May 2, Captain Smith called the accused into his office and as a result of the conference which then ensued between the two, the accused signed and submitted the first indorsement dated May 2, 1936, containing the statement quoted in Specification 2, Charge II. Accused, admitting that he had not then submitted any check to apply on the account involved, attempted to explain his statement to that effect by saying that at the time of their conference, Captain Smith was told by him and knew that the latter had up until that moment made no payment, but it was agreed between them that he should submit the indorsement in the form in which it was actually submitted with the understanding that he would go immediately to his quarters and mail a check to the Finance Corporation. The indorsement was accordingly submitted and the accused returned to his quarters only to find that on April 30, 1936, his bank, the First State Bank of South San Antonio, had, without any previous notice to him, applied \$250.00 of his pay check deposited in that bank on a note for \$250.00, signed by the accused to that bank, due on June 1, or on demand, which action left him only \$16.00 on deposit. Thereupon he made unsuccessful efforts in San Antonio to borrow the money and about that time he began receiving telephone calls concerning his mother, which continued daily until her death. He then became so depressed that he began to drink until he "got pretty drunk". He did not make any effort to recall or explain his indorsement containing the positive statement that the check had actually been mailed to the Finance Corporation. (R. 33-36, 45-47)

The accused's transactions with the First State Bank were briefly as follows: He kept his account there and on the 14th of

September negotiated a loan in the sum of \$250.00 to mature on demand or March 1, 1936, evidenced by a note indorsed by two other officers. This note was paid by charging the amount of the same to the accused's account on February 29, 1936, presumably the date on which his pay check was received by the bank. On the 13th of March (accused places the date as the middle of February but it seems clear that March 13th is the correct date), accused obtained another loan of \$250.00 from the same bank, evidenced by his note indorsed by the same two officers, and maturing on demand or June 1, 1936. Although this note could have run to June 1, 1936, it was collected by charging the amount of the same to accused's account on the 30th of April. This action was apparently taken on account of the receipt by the bank of information from the accused's squadron commander, Captain Smith, that the accused was in financial difficulties and that the bank should use efforts to protect itself (Defense Ex. A).

Accused's testimony that his first indorsement on Prosecution's Exhibit 3 was written after a conference with his commanding officer, Captain Smith, was corroborated by Private Merrill Woods Doyle, Jr., company clerk, 46th School Squadron, who testified that he wrote the indorsement in Captain Smith's office in accordance with instructions from the accused after a conference which he witnessed between the accused and Captain Smith in the latter's office. Private Doyle, however, did not hear any of the conversation which took place at that time. (R. 56-57)

It appears from the accused's testimony, as well as from the official pay schedules, that his pay and allowances, after deducting an insurance allotment of \$26.35, were approximately \$266.00 a month, presumably received regularly by him on the last day of each month during the entire period covered by Specification 1 of Charge II, that is, from and including October 31, 1935, up to and including April 30, 1936, with the result that during that period he received such pay and allowances for seven months in the sum of approximately \$1862.00, in addition to quarters and the necessary medical and hospital attention. Out of abundant fairness to the accused, it may be conceded that from this total amount there should be deducted the sum of \$250.00, applied by the bank on February 29, 1936, to the

payment of a loan which had been negotiated prior to October 1, 1935, but the accused is entitled to no such credit with reference to the second note because, although his pay was applied to the payment of the same, nevertheless he received in cash during that period the approximate amount of the loan so that the two transactions balanced each other. The result is that during the period covered by Specification 1 of Charge II, the accused received, in addition to his quarters and all necessary medical and hospital attention, pay and allowances amounting to \$1612.00, or an average of approximately \$230.00 per month, which, in the absence of any explanation to the contrary, should have been available for the payment of his current expenses and obligations. The accused did not claim that he had any dependents or other financial burdens or obligations beyond his own personal expenses, and, except for the general statement that he had other debts and was running pretty heavily in debt, he offered no explanation whatsoever of why such pay and allowances were not sufficient to meet his own current expenses and obligations promptly as they became due. His only explanation of his failure more promptly to make monthly payments on the Finance Corporation's loan was that he had other debts, was worried over finances and began to drink so heavily that his judgment must have become impaired.

On cross-examination the prosecution, over the objection of the accused, introduced in evidence Inclosures A and B to Prosecution's Exhibit 3, but the court excluded from consideration all statements with reference to failure to answer correspondence. Both inclosures consisted of letters from the president of the Government Employees Finance Corporation to the accused's commanding officer complaining about the accused's failure to meet his obligation with that corporation. Accused admitted that he had seen both of these letters prior to his first conference on April 8 with Captain Smith relative to what action should be taken to liquidate his indebtedness to the corporation.  
(R. 48-50)

5. In view of the pleas of guilty to Charge I and its Specification, the only questions presented by the record for consideration by the Board of Review are whether the evidence is legally sufficient to support the findings of guilty under Charge II and its specifications, and whether the record as a whole warrants confirmation of the sentence.

It is admitted by the accused and otherwise clearly established that the accused on October 10, 1935, was justly indebted to the Government Employees Finance Corporation in the sum of \$218, and that after making one payment of \$75 in November, he permitted the balance of \$143 to remain past due and unpaid until at least May 1, 1936, as alleged in the first specification of Charge II. It is also shown that during that period he knew that his creditor was complaining to his superior officers and consequently that his conduct in not meeting his obligation was becoming increasingly embarrassing to the military authorities and was bringing discredit on the military service. His only excuse is that he had other debts and that on one occasion his bank, without any previous notice, had unexpectedly applied \$250 of his April pay check to the liquidation of a note for \$250. During the entire period covered by the specification under discussion the accused was receiving approximately \$230 per month. It is a matter of common knowledge that \$100 a month is sufficient to meet the ordinary and necessary expenses of an unmarried officer, without dependents or other unusual obligations, living in Government quarters on an Army post in Texas. In this connection it should not be overlooked that the accused, an Air Corps officer on flying status, was drawing approximately \$91 more than officers of similar rank and length of service not on a flying status. An officer of the Army, finding himself under such circumstances, owes it not only to himself but to his creditors, and especially to the military service, to curtail his personal expenses and apply all of his available resources to the liquidation of his pressing obligations. Except for the general statement that he had other debts, the accused offered no explanation of why he could not make at least some substantial payments on his overdue indebtedness to the Government Employees Finance Corporation, and his whole conduct, as shown by the evidence summarized above, indicates very clearly an attitude of utter irresponsibility towards his obligations and the discredit which he must have known would necessarily result to the military service by reason of such an attitude. In this connection his irresponsibility is further illustrated by (a) his failure to make any effort to secure the signature of his commanding officer on the check for \$25 which was returned by the bank for that reason, and (b) the fact that after, according to his own statement, he had discovered that he was unable to keep the promise which on May 2 he made to his

commanding officer to make an immediate payment to the Government Employees Finance Corporation, he failed to notify Captain Smith that he was unable to comply with the statement contained in his formal official indorsement. Under these circumstances, the accused's failure and neglect to meet his obligation and to make any payment on it for six months was in fact inexcusable and therefore dishonorable, as alleged in Specification 1 of Charge II.

That accused made the statement which forms the basis of Specification 2, Charge II, is admitted and established by the competent, undisputed testimony. Likewise, it is admitted and similarly established that the statement when made was untrue and was known by the accused to be untrue, as alleged in the specification. The accused's explanation, if believed, negatives any intent to deceive, a necessary element of the offense, and in effect shows that Captain Smith was not deceived at the time. This explanation is to some considerable extent corroborated by the proof that the bank did in fact, and apparently without any previous notice, apply \$250 of accused's pay check of approximately \$266 to the liquidation of his note which might have run a month longer, and that this transaction unexpectedly left the accused without sufficient funds to make the payment which he says he had agreed to make. To some extent the accused is also corroborated by the testimony of the company clerk to the effect that there was a conference held between the accused and his commanding officer at the time and place claimed by the accused. For reasons not disclosed by the record, no arrangements had been made in advance by the prosecution for the presence at the trial of Captain Smith, the other party to the conference or conversation, and similarly, when it became evident that his testimony was material and vital, the prosecution failed to request a continuance in order to obtain it, with the result that the explanation offered by the accused remains uncontradicted and unrebutted. On the other hand, in his memorandum to the accused, Captain Smith referred to two letters from the Government Employees Finance Corporation complaining of accused's failure to meet his obligation, expressed the opinion that the accused had promised to take care of the obligation on the first of April, and then requested, not a promise or statement as to what he planned to do in the future, but information as to whether he had already paid anything on the account. This communication was dated

April 8, and the accused received it on or about that date, but for the latter's convenience the commanding officer kept it until May 2. Under these circumstances, it is perhaps improbable that Captain Smith would have contented himself with taking another promise from the accused instead of a direct statement as to what had actually been done, and this suspicion is strengthened by accused's subsequent conduct which, as described above, shows that after he had discovered that he was unable to make any payment on the account, he did nothing further about it and permitted Captain Smith to continue to believe that the payment had been made. In spite of these circumstances, however, the Board of Review is of the opinion that in view of the failure of the prosecution to make any intelligent effort to rebut the explanation offered by accused, the evidence of record is not sufficient to show beyond a reasonable doubt that the alleged statement was made with intent to deceive. The Board of Review has come to this conclusion not because the accused has satisfactorily disproved the allegation, but solely for the reason that the prosecution has failed to sustain the burden of proving one of the necessary elements of the offense, i.e., intent to deceive. The Board of Review is, therefore, of the opinion that the evidence is not legally sufficient to support the finding of guilty of Specification 2, Charge II.

In this connection, however, it is important to note that, although the proof of the offense alleged is not sufficient, nevertheless accused by his own explanation admits another offense of comparatively equal gravity and obliquity, namely, deceiving and imposing upon his squadron commander by not promptly reporting to him his inability to keep his promise, on which accused knew his squadron commander was relying, to make an immediate payment on the account.

All of the statements contained in Inclosures A and B to Prosecution's Exhibit 3, referred to above, were hearsay and inadmissible as proof of the truth of such statements. They were, however, admissible for the purpose of showing that the accused, at least prior to April 8, 1936, knew that the Government Employees Finance Corporation was dissatisfied with and was complaining to his commanding officer about his past due unpaid indebtedness. The law member excluded from consideration any reference to the accused's failure to answer correspondence, but he failed properly to limit

the consideration of the other statements to the purpose of showing that the accused knew of the complaints made against him. However, all of the statements, except the one referred to below, were substantially proved by competent evidence or admitted by the accused. The exception is a statement in Inclosure A that "His promises seem to be worth very little". Although this evidence should have been excluded from the consideration of the court, it is not believed under the circumstances that any of the accused's substantial rights were injuriously affected by its improper admission.

The explanation offered by the accused of his absence without leave not only does not excuse or extenuate that offense, but shows that it was committed under particularly aggravating circumstances. Although under arrest facing charges and in serious financial difficulties, accused was granted a leave of absence for the purpose of visiting his home in Massachusetts, where he stated his mother had recently died. He left his post without making any adequate arrangements for his transportation from Texas to Massachusetts, and apparently depended entirely upon the gratuity and generosity of friends for the same. As soon as he learned that these inadequate plans had failed, it was his obvious duty to return to his post and make some effort to put his tangled affairs in order, but instead of doing so, he overstayed his leave, went on a protracted drinking spree, and remained absent without authority until he was actually returned to his station under guard. How much longer his unauthorized absence would have been prolonged is a matter of mere conjecture, but there are no circumstances disclosed by the record indicating any immediate intention on the part of the accused voluntarily to return.

Absence without leave by a commissioned officer is always a serious offense, and the circumstances of this case show that the accused's offense was not only without excuse of any kind but shows that he has little, if any, regard for his military duties. Similarly, his failure without any excuse to pay the debt to the Finance Corporation shows him to be unreliable, irresponsible, and indifferent to the discredit which his conduct inevitably brings upon the military service. The Board of Review is of the opinion that the only reasonable conclusion that may be reached after a fair consideration of the whole record is that the accused by his conduct has demonstrated



1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Robert J. Dwyer, Air Corps.

2. I concur in the opinion of the Board of Review and, for the reasons therein stated, recommend that the finding of guilty of Specification 2, Charge II, be disapproved and that the sentence be confirmed.

3. Inclosed are a draft of a letter for your signature transmitting the record and accompanying papers to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made should it meet with approval.

4. The records of The Adjutant General's Office reveal the following information concerning this officer:

Lieutenant Dwyer was born at Florence (Northampton), Massachusetts, on the 26th of June, 1906, and entered the Military Academy July 1, 1924, from which he was graduated in 1928, standing 101 in a class of 261. He was appointed Second Lieutenant, Field Artillery, June 9, 1928; transferred to the Air Corps, November 21, 1929, and was promoted First Lieutenant, Air Corps, May 10, 1934.

On three of his efficiency reports he was given a general rating of "Excellent" and his reports contain two letters of commendation for performance of duties in connection with field maneuvers in 1930; on all of his other efficiency reports, his general rating has been "Satisfactory".

Within approximately two years after graduation, his superior officers began receiving complaints concerning unpaid debts, and these complaints continued at infrequent intervals up to the approximate date of the present charges against him. None of the amounts appear to be large, but all of the incidents show a lack of responsibility towards financial obligations and a failure to correct this deficiency after frequent warnings. On October 2, 1933, he was informed of a remark on his efficiency report that he was inclined to be lax in settlement of his accounts. Likewise, on October 25,

1935, he was informed of a similar unfavorable remark concerning his finances and again on February 15, 1936, there was referred to him a remark on his efficiency report that he was continually in difficulty due to personal debts. This efficiency report contains the following remark: "The little work this officer performs is so far overshadowed by the problems he gives his superiors that his value to the service is practically nil".

On April 25, 1933, he was given disciplinary punishment under the 104th Article of War on account of absence without leave for one day. On August 15, 1933, he was reprimanded for participating in a mixed party where intoxicating liquor was served at a bachelor's mess at Randolph Field on the night of August 5-6, 1933. On August 29, 1935, he was given disciplinary punishment for two days' absence without leave in connection with an unauthorized cross-country flight from Randolph Field, Texas, to Northampton, Massachusetts.

On June 15, 1935, he was cautioned with reference to his delinquency in Army Extension Courses and on January 6, 1936, he was informed that he was still delinquent in his Army Extension Courses, and directed to explain his negligence and failure to comply with instructions. He replied by indorsement admitting his negligence in that regard. On February 4, 1936, he was criticized for and admitted his failure to maintain satisfactory progress in complying with current War Department training directives.

On October 21, 1932, Lieutenant Dwyer was admitted to the Station Hospital, Randolph Field, suffering with gonorrhoea (chronic), initial infection January 20, 1931 (patient's statement).

During the month of June, 1936, and prior to his trial by general court-martial, Lieutenant Dwyer was examined by a medical board in order to determine his mental condition. The board found him sane at the time of the examination and mentally responsible for his acts on the dates of the alleged offenses. He stated to the board, among other things, that while on a spree in 1934, he married a woman from whom he secured a divorce after three days. He admitted that he had gonorrhoea in 1930 and again in 1932; that he was a moderate drinker up to a year previous to his appearance before the board, but had been drinking

excessively since, averaging almost a pint a day.

5. The record of this officer not only discloses no reason for the extension of clemency, but to the contrary it clearly demonstrates his unfitness as an officer and that his retention in the service is highly undesirable. Commutation of the sentence is not recommended.



A. W. Brown,  
Major General,

The Judge Advocate General.

3 Incls.

Incl. 1-Record of trial.

Incl. 2-Draft of let. for sig.  
of Secy. of War.

Incl. 3-Form of Executive action.



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

Board of Review  
CM 205475

SEP 16 1936

U N I T E D   S T A T E S	)	THIRD CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Monroe, Virginia, August
Private FLOYD B. KELLY	)	15, 1936. Dishonorable dis-
(6849260), Headquarters	)	charge and confinement for
Battery, 2d Coast Artillery.	)	one (1) year. Fort Monroe,
	)	Virginia.

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HOLDING by the BOARD OF REVIEW  
McNEIL, HALLIDAY and MORRISETTE, Judge Advocates.

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1. The record of trial of the above named soldier has been examined by the Board of Review.
2. Accused was tried upon the following charges and specifications:

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

Specification: In that Private Floyd B. Kelly, Headquarters Battery, 2d Coast Artillery, did, at Fort Monroe, Virginia, on or about May 6, 1936, feloniously embezzle by fraudulently converting to his own use the sum of Five Dollars (\$5.00), the property of Private Simon W. Raub and his mother, Mrs. S. Walker Raub, said Five Dollars (\$5.00) having been inclosed in a letter addressed to Mrs. S. Walker Raub, Lancaster, Pennsylvania, and coming into the possession of said Private Kelly for delivery to the post office by virtue of his employment as mail orderly at Fort Monroe, Virginia.

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

Specification: In that Private Floyd B. Kelly, Headquarters Battery, 2d Coast Artillery, having been duly appointed

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a mail orderly at Fort Monroe, Virginia, by his proper military superior, and also having taken the postal oath in accordance with postal regulations, and while acting as such mail orderly and having collected mail addressed to various individuals from Government mail boxes on the post, did, in violation of his duty and oath, between January 1 and May 8, 1936, unlawfully, willfully and maliciously destroy the said mail on which the proper postage had been prepaid, thus preventing its delivery to the various addressees.

He pleaded not guilty throughout, and was found guilty of Charge I and its Specification; of the Specification, Charge II, guilty except the words "and also having taken the postal oath in accordance with postal regulations", "and oath", "destroy", and "thus preventing", substituting therefor, respectively, the words, "open" and "and prevent"; of the excepted words, not guilty, of the substituted words, guilty; and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one year, designated Fort Monroe, Virginia, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$ .

3. The competent evidence in support of the findings of guilty of Charge I and its Specification is clear and conclusive, and legally sufficient to support the same.

For convenience, the specification as amended by the exceptions and substitutions contained in the court's findings is restated as follows:

In that Private Floyd B. Kelly, Headquarters Battery, 2d Coast Artillery, having been duly appointed a mail orderly at Fort Monroe, Virginia, by his proper military superior, and while acting as such mail orderly and having collected mail addressed to various individuals from Government mail boxes on the post, did, in violation of his duty, between January 1 and May 8, 1936, unlawfully, willfully and maliciously open the said mail on which the proper postage had been prepaid, and prevent its delivery to the various addressees.

The gist of the offense with which the accused was confronted at the trial was the destruction of mail matter coming into his possession as mail orderly, and the added allegation that he thus prevented its delivery to the various addressees was unnecessary surplusage describing not a distinct offense but merely a consequence of the offense previously charged, namely, the destruction of the mail matter. The court in its findings found the accused not guilty of destroying the mail as alleged and attempted to carve out of the offense charged apparently two other offenses, namely, in that he opened the mail and prevented its delivery to the various addressees.

The opening of mail is obviously not a lesser included offense of destroying the same, and the finding of the court to that effect is, therefore, unauthorized and illegal.

The accused was not charged with preventing the delivery of the mail to its addressees. He was charged with its destruction and the attempt of the court to find him guilty of an offense which was merely the consequence of the one alleged is likewise unauthorized and illegal.

If this be not true, then an accused who is charged with the larceny of property, thereby preventing its intended use in the military service, could properly be found not guilty of the larceny as alleged, but merely of the offense of preventing its intended use in the military service. Such a finding would be palpably unauthorized.

4. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification; legally insufficient to support the findings of guilty of Charge II and its Specification; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for six months.

\_\_\_\_\_, Judge Advocate.  
*Frank M. Hilliday*, Judge Advocate.  
*J. B. Smith*, Judge Advocate.



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

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Board of Review  
GM 205564

SEP 29 1936

U N I T E D    S T A T E S	)	PANAMA CANAL DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Amador, C. Z., August 31,
Privates WILLIAM A. ROSE	)	1936. As to each: Dishonorable
(6622835), and BEAR GILBERT	)	discharge and confinement for
(6357765), both of Battery	)	six (6) months. Fort Amador,
D, 4th Coast Artillery (AA).	)	C. Z.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and MORRISETTE, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private William A. Rose, Battery D, 4th Coast Artillery (AA), and Private Bear Gilbert, Battery D, 4th Coast Artillery (AA), acting jointly, and in pursuance of a common intent, did, at Fort Amador, Canal Zone, on or about July 26, 1936, feloniously take, steal, and carry away one raincoat, new pattern, of the value of about \$3.91, property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to the charge and specification and each was found guilty thereof. Evidence of one previous conviction as to accused Rose was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentences, designated Fort Amador, Canal Zone, as the

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place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The competent evidence introduced by the prosecution is summarized as follows:

On July 26, 1936, while sitting in his room talking to his roommate at Fort Amador, Canal Zone, Private 1st Class Eric Obst, Band, 4th Coast Artillery, happened to look out of the window and noticed two soldiers approaching from "No. 2 Gate" towards the clothes line where Obst had a short while previously hung his Government issue raincoat to dry. He did not at the time know the names of either of the two soldiers but learned them later and at the trial identified both of them as the accused, Privates William A. Rose and Bear Gilbert, both of Battery D, 4th Coast Artillery (AA). When the two soldiers reached the clothes line, one of them, positively identified by Obst as accused Rose, took Obst's raincoat from the clothes line, and the two soldiers then "kept going with that raincoat toward the road". After calling his roommate's attention to the incident, Private Obst followed the two soldiers and later ascertained that they had entered the band barracks. (R. 12-13) Obst's roommate also saw the two accused about twenty feet from the clothes line and the raincoat in the possession of accused Rose (R. 27). Obst reported the loss of his raincoat to Sergeant Bill Stanfill, who was then charge of quarters, and the two of them found accused Rose in the squadroom sitting on a bunk and confronted him with Private Obst's accusation that he had stolen the raincoat. He denied that he had just come through Gate No. 2 and claimed he had been in the barracks for two hours, but subsequently, when confronted by Private Everett Monday, Battery D, who had just seen him enter the barracks, in the company of accused Gilbert and with something on his arm that looked like a raincoat (R. 34-35), accused Rose admitted that he had come in through No. 2 gate with Gilbert but denied that they had the raincoat or anything else in their hands. Accused Gilbert, who, although he belonged to Battery D, was at the time on duty on the boat "Schum", was shortly thereafter located in the day room sitting at a table reading a magazine. Both accused were then called into the office of the first sergeant, where "they both claimed that they didn't get it and didn't know anything about it at all". Accused Rose admitted, however, that he did come through Gate No. 2 and claimed that he had never told Obst that he had not been out of the quarters for two hours. In the meantime a search was made of accused Rose's foot locker, wall locker and his bunk, but the

raincoat was not found and it had not been found or recovered at the time of the trial. (R. 14,19,37-45)

The defense introduced two witnesses, Privates William Sparks and Walter Stawaris, both of Battery D, who testified that they saw accused Rose enter the barracks about 2:30 on the afternoon of July 26, 1936, but did not see anything in his possession at the time. From the testimony of both witnesses, however, it is apparent that Rose might have had the raincoat in his possession without either one of them seeing it. (R. 45-51)

4. The foregoing evidence clearly establishes the guilt of accused Rose as alleged in the specification and found by the court.

The evidence does not sufficiently show accused Gilbert's participation in the offense. There is proof that he and Rose were seen standing together some distance from the clothes line, that they approached it together, and that after accused Rose had taken the raincoat from the clothes line they continued together towards their own barracks, where apparently they separated, accused Rose going to the squadroom and Gilbert to the day room. The raincoat was never seen in the possession of accused Gilbert, but to the contrary Rose is positively identified as the person who took it from the clothes line and who had it on his arm when it was last seen at the time the two accused entered their barracks. There is no evidence of any conversation between the two accused at or about the time of the offense and nothing else in the testimony to form the basis of a reasonable inference that Gilbert intended to or did aid, abet, encourage, or otherwise assist Rose. Neither is there any proof that Gilbert's acts were conceived in any plan agreed upon by the two accused or that there was any other prearrangement between them.

It is well settled that the mere presence of an accused at the time and place of the commission of a crime by another, if he takes no part by word or act in the crime, and in the absence of evidence of preconcert or of intent to participate if need be, is not sufficient basis for an inference of his participation as an accessory or principal therein. Hicks v. United States, 150 U.S. 442, 16 C.J. 132; 36 C.J. 797; Sharp v. State, 15 S.W. 176; CM 186947, Bopp and Aldrich, 1929, sec. 1310 Dig. Ops. JAG 1912-30.

It is true that accused Gilbert's statement denying that he knew anything about the disappearance of the raincoat was obviously untrue. This statement is, however, consistent with his innocence of the theft itself and may be reasonably explained by a desire to protect his friend or companion. However reprehensible this latter conduct might be, it does not show or necessarily tend to show that he himself participated in the larceny.

It therefore follows that the evidence is not legally sufficient to support the findings of guilty as to accused Gilbert.

In arriving at the foregoing conclusion, the cases of People v. McElroy, 14 N.Y. Supp. 203; Regina v. Coney et al., 18 Q.B.D. 534, and other similar cases cited in 16 C.J. 133 have not been overlooked, but none of them is deemed applicable to the facts of the instant case.

5. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the findings of guilty as to accused Rose, except the finding that he acted jointly and in pursuance of a common intent with the accused Gilbert, and legally sufficient to support the sentence as to accused Rose; but not legally sufficient to support the findings of guilty and the sentence as to accused Gilbert.

J. P. McCreary, Judge Advocate.  
Charles L. Brown, Judge Advocate.  
J. E. Smith, Judge Advocate.

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

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Board of Review  
CM 205604

OCT 21 1936

U N I T E D   S T A T E S	)	THIRD CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Hoyle, Maryland, September
Private LLOYD C. MICKEY	)	3, 1936. Dishonorable discharge
(6891054), Headquarters	)	and confinement for one (1) year.
Battery, 1st Field	)	Fort Hoyle, Maryland.
Artillery Brigade.	)	

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and MORRISETTE, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Lloyd C. Mickey, Headquarters Battery, 1st Field Artillery Brigade, having taken an oath in an investigation of charges preferred against Private Joseph Lester, Headquarters Battery, 6th Field Artillery, before 1st Lieutenant B. A. Holtzworth, 6th Field Artillery, a competent officer, that he would testify truly, did, at Fort Hoyle, Maryland, on or about August 6, 1936, willfully, corruptly, and contrary to such oath testify in substance that the said Private Joseph Lester, Headquarters Battery, 6th Field Artillery, was not asleep when on duty as a sentinel at the Station Hospital, Edgewood Arsenal, Maryland, about 1:05 A.M., July 30, 1936, and that the said Private Joseph Lester, Headquarters Battery, 6th Field Artillery, was inspected only once by the Officer

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of the Day between the hours of about 12:01 A.M. and 2:00 A.M. July 30, 1936, which testimony was a material matter and which he, the said Private Lloyd C. Mickey, Headquarters Battery, 1st Field Artillery Brigade, did not then believe to be true.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated Fort Hoyle, Maryland, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence shows that the accused was duly sworn on August 7, 1936, by First Lieutenant B. A. Holtzworth, 6th Field Artillery, who was the officer appointed to investigate charges of sleeping on post against Private Joseph Lester, Headquarters Battery, 6th Field Artillery (R. 16,18,25-26). Lieutenant Holtzworth at that time was the "officer detailed to conduct an investigation" and under Article of War 114 had the "power to administer oaths for the purposes of the administration of military justice". Lieutenant Holtzworth testified that, after having been so sworn, the accused testified in substance that on the occasion on which Private Lester was accused of being asleep on post, he (the accused) was a prisoner in the hospital, one of the prisoners Private Lester was guarding; that between the hours of midnight and 2 a.m. on the night in question he had been playing cards with Lester and talking to him, and, while so doing, hearing the officer of the day approaching on the porch outside, they stopped and he (accused) got in bed; that he was awake during the inspection made by the officer of the day, who inspected only one time between the hours of midnight and 2 a.m., and that when the officer of the day entered the room Private Lester, the sentinel, stood at attention properly; and that he did not see the driver of the pick-up truck at any time (R. 16-17). The evidence given by the accused was so different from the testimony of the other witnesses that Lieutenant Holtzworth recalled the accused, reminded him that he was under oath, and asked him if he understood what the oath meant, whereupon accused stated he did and gave substantially the same testimony again as he had given the first time (R. 17).

The testimony of Lieutenant Holtzworth, as recited above, was corroborated by Second Lieutenant Howell C. Epperly, Field Artillery Reserve, the assistant investigator of the charges against Private Lester (R. 6-9); and to some extent by the testimony of Private Joseph Lester that accused testified he (Lester) was not asleep when inspected by the officer of the day (R. 26).

Second Lieutenant Jack H. James, 6th Field Artillery, testified that on July 30, 1936, he was officer of the day at Fort Hoyle, Maryland; that he inspected Private Lester, who was the sentinel over the prisoners in the Post Hospital; that about 1:05 in the morning he entered the room in which the prisoners were kept and saw Private Lester asleep; he was slumped in his chair with his hat over his face and did not know witness was there, although he stood within one foot of him; he then went outside, got Private Shellenberger, the driver of the truck, and with him went back to the room where the prisoners were; he again approached within one foot of Lester, whereupon he roused himself and stood up; he questioned Lester, who answered as if he had been asleep and did not know that witness had been in the room before; about 1:45 a.m. he again returned with a guard and relieved Private Lester (R. 9-15).

Private Charles J. Shellenberger, Service Battery, 6th Field Artillery, corroborated Lieutenant James as to the second inspection of Private Lester (R. 19-24).

The accused elected to remain silent.

4. In the opinion of the Board of Review the offense of perjury of which accused was found guilty is not proved for the reason that the record fails to show by any competent evidence that the false testimony was concerning a material matter. Lieutenant Holtzworth and Private Lester were permitted to testify that about August 7, 1936, the former was the official investigating officer appointed to investigate charges against Private Lester for sleeping on post in violation of the 96th Article of War, but neither the charge sheet against Lester nor the record of the investigation was introduced or accounted for as unavailable. Under the best evidence rule (par. 116 a, M.C.M.) oral testimony was not competent to prove the issues in the investigation of the charges against Lester, there having been nothing to

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show that the written evidence was unavailable by reason of its loss or destruction or from other cause. CM 192662, Rowe; CM 160345, Carter; CM 160343, Young; CM 160327, Sutton; CM 156858, Scarlett; CM 155728, Patterson; CM 152486, Bruton; CM 151969, Crow; CM 148578, Eason et al.

Though a specific objection was not positively made to the oral testimony of Lieutenant Holtzworth and Private Lester at the time it was offered, the defense, upon the prosecution resting (R. 30), made a motion for a finding of not guilty, quoting in said motion from the Digest of Opinions, JAG 1912-30, par. 1581, which states inter alia:

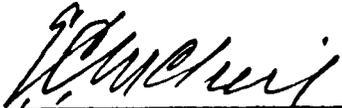
"The record of trial was not produced or accounted for, and no evidence as to the nature of the charges or the issues involved, other than the oral testimony of the summary court officer that accused was tried for drunkenness, disorderly conduct, and assault, was produced. In the absence of proof that the record of trial was lost or destroyed and could not be produced, parol testimony was not competent to prove the issues at the trial. Such issues not having been established the materiality of the false testimony--an essential element of the offense of perjury--is not proven."

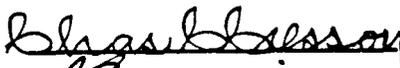
Therefore, the defense clearly raised before the court the question of the improper introduction of secondary evidence to prove the issues,--the offense for which Private Lester was being investigated. The Manual, paragraph 126 c, lays down the general principle that "If it clearly appears that the defense understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of such objection". However, the same paragraph further states that a mere failure to object does not amount to a waiver, and in the case at bar the defense in the motion for a finding of not guilty clearly asserted its right and directed the court's attention to the legal objection to the secondary testimony introduced. There was no waiver of the objection to the secondary evidence nor to the failure to show that the original documents were unavailable. Therefore, there was no competent, legal evidence before the court to show with what offense Private Lester was charged, and the Board of Review is unable to say that the materiality of the

false testimony given by the accused before the investigating officer was properly established beyond a reasonable doubt by legal evidence, an essential element of the crime of perjury. The evidence is, however, legally sufficient to support a conviction of the lesser included offense of false swearing in violation of the 96th Article of War, since it is clearly established what the accused stated under oath and that such statements were not true. Oral testimony is proper to establish these facts but not their materiality.

The remedial provisions of the 37th Article of War may not be invoked to make competent the oral evidence in the instant case which is inadmissible, since there was no accounting for the failure to produce the original documents. Neither can the provisions of the 37th Article of War be relied upon to supply the missing proof of the essential element of the offense. Without this oral, incompetent evidence, there is no proof in the instant case of the materiality of the false testimony of the accused.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involves findings of guilty of the lesser included offense of false swearing in violation of the 96th Article of War, and legally sufficient to support the sentence.

 , Judge Advocate.

 , Judge Advocate.

 , Judge Advocate.



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

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Board of Review  
CM 205621

U N I T E D   S T A T E S	)	SIXTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Chicago, Illinois, September
Major IVAN S. CURTIS	)	15-17, 1936. Dismissal.
(O-5161), Quartermaster	)	
Corps.	)	

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OPINION of the BOARD OF REVIEW  
McNEIL, CRESSON and MORRISETTE, 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 93d Article of War.

Specification 1: In that Major Ivan S. Curtis, Quartermaster Corps, being at the time Post Quartermaster, Fort Sheridan, Illinois, did, at Highland Park, Illinois, on or about December 19, 1935, feloniously embezzle by fraudulently converting to his own use the sum of about \$115.10, United States currency, the property of the United States, which came into the possession of him, the said Major Curtis, by virtue of his office as Post Quartermaster.

Specification 2: Embezzlement, at Fort Sheridan, Illinois, on January 10, 1936, of \$50.00, property of the United States.

(Found guilty of embezzlement of \$22.14)

Specification 3: Embezzlement, at Highland Park, Illinois, on January 14, 1936, of \$362.98, property of the United States.

Specification 4: Embezzlement, at Highland Park, Illinois, on February 5, 1936, of \$204.59, property of the United States.

Specification 5: Embezzlement, at Highland Park, Illinois, on February 9, 1936, of \$100.00, property of the United States.

Specification 6: Embezzlement, at Fort Sheridan, Illinois, on February 27, 1936, of \$115.00, property of the United States.

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

Specification 1: In that Major Ivan S. Curtis, Quartermaster Corps, then and there being the Post Quartermaster, Fort Sheridan, Illinois, and then and there as such having the sum of about \$115.10, United States currency, money of the United States in his possession as the proceeds of a salvage sale held at Fort Sheridan, Illinois, on or about December 16, 1935, and said \$115.10 being public money which he was not authorized to retain as salary, pay or emolument, did, at or near Fort Sheridan, Illinois, during the period from on or about December 19, 1935, to on or about March 21, 1936, feloniously fail to render his accounts for the same as provided by law and the Regulations of the United States Army pursuant thereto.

Specification 2: Feloniously fail from December 16, 1935, to March 21, 1936, to render account for \$22.14, proceeds of a sale of salvage.

Specification 3: Feloniously fail from December 10, 1935, to March 21, 1936, to render account for \$244.59, proceeds of a sale of salvage.

Specification 4: Feloniously fail from December 10, 1935, to March 21, 1936, to render account for \$322.98, proceeds of a sale of salvage.

Specification 5: Feloniously fail from December 16, 1935, to March 21, 1936, to render account for \$100.00, proceeds of a sale of salvage.

Specification 6: Feloniously fail from February 27, 1936, to March 21, 1936, to render account for \$115.00, proceeds of a sale of salvage.

He pleaded not guilty to, and was found guilty of, both charges and all specifications thereunder as drawn, except Specification 2 of the original Charge, of which he was found guilty of embezzlement of \$22.14 instead of \$50.00, as charged. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as involves dismissal from the service, and forwarded the record for action under the 48th Article of War.

3. The six specifications of the original Charge allege embezzlement of Government funds which came into accused's possession as post quartermaster, which is defined by the Supreme Court in Moore v. United States, 160 U. S. 268, as "the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come".

The six specifications of the Additional Charge allege in the usual and proper form (United States v. Dimmick, 112 Fed. 352; 121 Fed. 638; CM 201537, Fouts) statutory embezzlement, the failure by a public officer to render accounts for public money as prescribed by law and regulations. The pertinent statutes and Army Regulations are quoted below:

"Failure to render accounts. Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years."  
 UEC 18: 176; Criminal Code, sec. 90.

"The Secretary of War is authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department" (USC 5: 218),

and rules and regulations so prescribed have the force of law within the meaning of the criminal statute quoted above. Maryland Casualty Company v. United States, 251 U. S. 342, 349.

Army Regulations provide that the post quartermaster will be in charge of all salvage activities; that sales will be by auction or to the highest bidder on sealed proposals submitted after at least thirty days public notice; at least 20% of the total bid in the form of a certified check or other legal tender will accompany each bid as a guarantee of fulfillment; six copies of each circular advertisement and proposal (Form 328) will be furnished the Quartermaster General at the time distribution is made to prospective purchasers; an abstract of bids received will be prepared for each salvage sale; monies received from purchasers will be turned over to the local finance officer within twenty-four hours; the officer turning over the funds will furnish the disbursing officer with a proper statement concerning the funds, using W. D. Form 325 for funds received from sales of public property at public auction or on sealed proposals and from salvaged property; he will also forward directly to the Chief of Finance the carbon copy signed by the officer who made the sale (Form 325 or 1046). (R. 117-123) The following are extracts from pertinent Army Regulations:

"The deposit of the successful bidder will be turned over to the local finance officer who will receipt therefor and who will deposit it in a special deposit account until the transaction is completed, when the amount of the deposit will be credited to the last payment. Deposits of unsuccessful bidders will be returned when the award is made." AR 30-2145, par. 26.

"Certified checks or currency received from a bidder will be held at the bidder's risk. If the contract cannot be awarded within 48 hours after the bids are opened the check or currency will be turned

over by the purchasing officer to the local finance officer who will receipt therefor and deposit the check or the currency in the special deposit account. No check or currency of any unsuccessful bidder will be held by the contracting officer longer than 24 hours after the award has been made." AR 5-220, par. 5 b (2)(b).

"All funds derived from any authorized source and incident to salvage activities \* \* \* will be turned over daily to the quartermaster, who will be personally responsible for the disposition of such funds as prescribed in c below." AR 30-2110, par. 3 b.

"The quartermaster will turn over daily to the finance officer all funds received from sources mentioned above, using forms as prescribed in paragraph 2, AR 35-780." AR 30-2110, par. 3 c.

Circular 1-8, Office of the Quartermaster General, March 8, 1933, paragraph 11 a, provides:

"One carbon copy of the extract of bids covering each sale of \* \* \* salvaged property \* \* \* and one carbon copy of each War Department Form No. 325, signed by the finance officer, will be forwarded to the office of the Quartermaster General."

4. There is little or no dispute as to the essential facts involved in this case. The defense joined in thirteen formal stipulations prepared before trial, and during the course of the trial freely admitted many facts the proof of which would have caused delay. The first stipulation (Ex. 1) alone shows the various sales of salvage property made by accused, admits that the proceeds thereof came into his possession by virtue of his office as Post Quartermaster, that he indorsed the several checks and money orders involved, cashed them and received the money. Immediately after arraignment (R. 10-14) the defense raised the issue of the sanity of accused but the court, after receiving the report of a board of medical officers who examined accused, and after questioning counsel as to the nature of the evidence he desired to submit, directed the prosecution to

proceed with its case, but stated that this would not "prevent the defense from bringing out anything it desires when it comes its time to submit evidence". This aspect of the record will be discussed in a subsequent paragraph. The theory of the defense was that accused had no criminal intent; that he was inexperienced as a post quartermaster and had duties beyond the ability of one man to perform, that his assistants and office help were insufficient in number and generally incompetent, that he was so harassed by debts and domestic troubles that he became extremely nervous and took to drinking to excess, being actually drunk a large part of the period from December to March covered by the charges, and that any shortage of funds was caused by a combination of these circumstances and not by any willful, conscious act of the accused.

5. The evidence introduced by the prosecution which pertains generally to the situation at Fort Sheridan and the conduct of quartermaster activities there by the accused will be set forth first, and thereafter the evidence which relates to the particular offenses charged.

The accused was Post Quartermaster at Fort Sheridan from June 1, 1935, until he was relieved and placed in arrest on March 22, 1936. He succeeded Lieutenant Colonel C. C. Reynolds as quartermaster and in turn was succeeded by Major E. L. Lyons, who had been one of his assistants since June 30, 1935. There were many changes among the commissioned personnel on duty under the post quartermaster but normally he had one assistant as Sales officer in the commissary, one in charge of Utilities, both Quartermaster officers, and a line officer in charge of Motor Transport. (R. 142-143, 252-253)

During this period, ten sales of salvage property were held by the accused (Ex. 1). The proceeds of the first three sales, amounting to \$1098.50, and of two later sales totaling \$95.00, were promptly deposited with the Finance Officer (R. 158-159); the receipts from the other five sales, held on December 10 and 16, 1935, January 28, February 27, and March 3, 1936, totaling \$2492.31, were not deposited by accused (R. 155-156). Exhibits 2 to 8, inclusive,

never passed through the Finance Officer, Fort Sheridan, and are not indorsed as required by paragraph 2, AR 35-780 (R. 156-157).

On March 19, 1936, Captain W. A. Elliott, Infantry, was detailed by the post commander at Fort Sheridan to investigate the noncompliance by the accused with certain letters from the Quartermaster General calling for reports of salvage sales (Exs. 38,9-13,44), and he demanded of accused that he turn over all proceeds of salvage sales still in his possession (R. 60-61). At 6:50 p.m. on March 20, accused turned over to Captain Elliott \$415.00, of which \$85.00 was in cash, and at 7:50 p.m. the same evening he turned over an additional amount of \$532.00 in checks, a total of \$947.00; this money was to cover the \$925.90 due on the sale of December 16, but Captain Elliott found that some of the checks did not pertain to that transaction. He found that the total amount not deposited on these five sales was approximately \$2400. About 11:00 a.m. on Sunday, March 22, accused was sent to the post hospital for observation and treatment. On March 23, the three safes in the quartermaster officer were opened in the presence of Captain Elliott, Major Cook and Major Lyons; accused was notified but did not desire to be present. Two checks for \$8.25 and \$5.25, and thirty pennies were found in the safes. All these funds were turned over by Captain Elliott to Major Cook (Ex. 38), who turned them over, together with \$417.34, which he received from Major Lyons, to Colonel W. S. Wood, Inspector General. Later, Major Cook received the total of \$1364.34 back from Colonel Wood and delivered it to Major Lyons. (R. 57-58)

After Major Lyons became quartermaster, he checked over the records of the quartermaster office pertaining to these five sales; he found as to the first four sales that the deposits due unsuccessful bidders and refunds due successful bidders whose deposits more than covered their purchases, had been returned by the accused but they had not been made as to the sale of March 3, 1936; Major Lyons made these refunds (R. 127-128). In a drawer of a desk in the quartermaster office, he found a check for \$123.70, and an envelope containing \$17.17 in cash, marked "Skinner"; a man on duty in the warehouse used for summer camp property brought him a money order for \$60.00, which he found in a desk there (R. 136-138); the accused also sent him some checks which he said he found in his clothes at the hospital (R. 137). From these funds, after making refunds, Major Lyons had left \$1210.85, which he identified as received from

the sales of December 10 and 16, 1935, January 28 and March 3, 1936, and deposited with the Finance Officer. All of it was in checks which permitted identification except the \$17.17 in the envelope marked "Skinner" and \$50.61 in unidentified cash which he credited to the March 3 sale. (R. 130) He could identify no funds as pertaining to the sale of two horses on February 27, 1936 (R. 128-130; Ex. 54). The facts relating to the sales mentioned above are shown in the table below:

Salvage Sales at Fort Sheridan

<u>Date of Sale</u>	<u>Property</u>	<u>Amount</u>	<u>Deposited by accused</u>	<u>Deposited by Major Lyons on Apr. 23, 1936</u>	<u>Unaccounted for</u>
July 8, 1935	Garbage	\$ 30.00	July 8	---	---
July 11, 1935	Salvage	1063.50	July 27	---	---
Nov. 9, 1935	Dead Animal	5.00	Nov. 12	---	---
Dec. 10, 1935	Salvage	743.81	---	\$ 82.97	\$660.84
Dec. 16, 1935	Salvage	925.90	---	550.00	375.90
Jan. 8, 1936	Dead Animal	5.00	Jan. 9	---	---
Jan. 28, 1936	Salvage	228.22	---	183.70	44.52
Feb. 27, 1936	Auction, Horses	115.00	---	---	115.00
Mar. 3, 1936	Salvage	479.38	---	394.18	85.20
Mar. 5, 1936	Garbage	90.00	Mar. 6	---	---
				<u>\$1210.85</u>	<u>\$1281.46</u>

Accused stated to Colonel Wood, Inspector General, that he had no income outside his pay and what he borrowed from finance companies (R. 68); when he came to Sheridan he transferred his bank account from Jeffersonville (Clark County State Bank) to the First National Bank, Lake Forest, Illinois, but after a few months transferred it back again to Jeffersonville (R. 70). Accused was paid his official pay each month by the Finance Officer, Fort Sheridan; his pay averaged about \$335 per month (R. 160-162).

6. The material evidence relating to the specific offenses charged is substantially as follows:

Specification 1, Original Charge.

Exhibit 2, a Western Union money order for \$115.10, dated December 18, 1934, from the Dadourian Export Company, payable to Quartermaster, is indorsed by the accused and bears a bank stamp reading "Entered Jan. 6, 1936". Major Lyons testified that \$115.10 was the balance due from the Dadourian Export Company on account of purchases at the sale on December 16, 1935, and that he found no funds which he could identify as relating to that payment. (R. 132) Accused stated to Colonel Wood that he indorsed Exhibit 2 and personally cashed it at the telegraph station in Highland Park, Illinois (R. 68). This amount was never deposited or otherwise accounted for by accused (R. 128,156).

Specification 2.

United States Post Office money order, No. 624836, for \$50.00, was sent from Chicago, Illinois, December 14, 1935, by E. H. Rennicks, payable to Quartermaster, receipted by accused, and paid January 10, 1936 (Exs. 3,51). By stipulation Miss Mary Sweeney, Post Office employee, Fort Sheridan, Illinois, testified that she cashed this post office money order on January 10, 1936, and paid the money to the person who signed the receipt, "I. S. Curtis, Major, Q.M.C." (Ex. 32). Major Lyons identified this money order (Ex. 3) as a deposit made by E. H. Rennicks with his bid for purchases at the sale December 16, 1935 (R. 133). Rennicks' purchases at that sale amounted to \$22.14 (R. 129). Accused admitted to Colonel Wood that he indorsed Exhibit 3, but thought he sent a messenger to the post office at Fort Sheridan to get the money (R. 68-69). L. V. McCaffrey, Postmaster, Fort Sheridan, identified Exhibit 3 and said the sender was E. H. Rennicks. He stated that if a money order was indorsed on its face, it meant that the signer received the money. (R. 146-148) He also identified money order 118462 for \$27.71, and said it was sent on January 20, 1936, by I. S. Curtis, Quartermaster, Fort Sheridan, to E. H. Rennicks, 5525 Barry Avenue, Chicago, Illinois (R. 146; Ex. 50). The money order for \$27.71 sent by accused to Mr. Rennicks was the refund to which the latter was entitled out of his deposit of \$50.00 (R. 127), leaving a balance of \$22.14, which was the total of the purchases made by him at the December 16 sale and which was never deposited or otherwise accounted for by accused (R. 129,156).

Specification 3.

Cashier's Check No. 7983, for \$40.00, on the Bank of Ellsworth, Ellsworth, Wisconsin, dated December 7, 1935, payable to I. S. Curtiss, Major, Q.M. Corps, is indorsed by accused and stamped by the bank January 14, 1936 (Ex. 4). A similar check, No. 8016, for \$52.73, on the same bank dated December 16, 1935, is indorsed by accused and stamped by the receiving bank January 14, 1936 (Ex. 5). Check No. 5718 for \$270.25, on the Staten Island National Bank & Trust Co., dated December 18, 1935, from Paul Tavetian, payable to Quartermaster, Fort Sheridan, is indorsed by accused and stamped by the receiving bank on January 14, 1936 (Ex. 6). Major Lyons identified Exhibit 4 as a deposit of \$40.00 made by T. B. Todd of Ellsworth, Wisconsin, with his bid, and Exhibit 5 for \$52.73 as the difference between his deposit and the amount purchased by him at the salvage sale on December 10, 1935; and Exhibit 6, check for \$270.25, as balance due from Paul Tavetian on that sale, the difference between his total purchases of \$474.84 and his deposit of \$204.59 (R. 131-132). Accused stated to Colonel Wood that he indorsed Exhibits 4, 5 and 6 and personally cashed them at the Highland Park State Bank (R. 69). The total of these three checks, \$362.98, was never deposited or otherwise accounted for by accused (R. 128-129,156).

Frank C. Starek, who had been a Civil Service clerk in the Quartermaster office, Fort Sheridan, for five and a half years, and acting chief clerk from October, 1935, until he resigned June 12, 1936, testified that he made out the circular proposals covering salvage sales, received the bids when they came in, and kept them in the safe until the opening date, when he turned them over to accused to be opened. Accused handled the money. Starek identified a file containing completed War Department Forms 325, 1036 and 346 pertaining to the salvage sale of December 10, 1935, with a note attached which he wrote to accused sometime in February, 1936, reading "Major Curtis. Kindly deposit these salvage funds as they are too old. F.C.S." The forms report a sale of salvage property on December 10, 1935, totaling \$743.81; they are signed by accused (R. 100-103; Ex. 46), but he did not deposit the funds and the papers stayed on his desk (R. 110-111). Major Lyons deposited in April \$82.97 pertaining to the December 10, 1935, sale (R. 111,128;

Ex. 52), and this is the only amount of the total sum of \$743.81 which is accounted for.

Specifications 4 and 5.

Check No. 2408 for \$204.59, dated December 6, 1935, on the Treasurer of the United States, payable to the order of Paul Tavetian, indorsed by him to the Quartermaster, Fort Sheridan, is indorsed "I. S. Curtis, Major, Q.M.C., Q.M., Fort Sheridan", and stamped paid on February 10, 1936 (Ex. 7). Check No. 1376, December 13, 1935, for \$100.00, drawn by Dadourian Export Company to Quartermaster, Fort Sheridan, on the Corn Exchange Bank & Trust Company, New York, is indorsed by accused and stamped by the receiving bank on February 10, 1936, and paid February 13, 1936 (Ex. 8).

On February 7, 1936, Lieutenant Colonel C. B. Meyer, acting post commander, directed accused to go to the First National Bank at Lake Forest, Illinois, before 2 p.m. and see Mr. Read about a note of accused due the bank. Accused claimed that he arrived at the bank after 2 p.m. and found it closed; on the 8th, Colonel Meyer again directed him to see Mr. Read and furnished him with an official car for the trip. (R. 59-60; Ex. 28) Private John H. Clark, 14th Cavalry, was the driver of the car. Accused went first to the Highland Park State Bank, where Mr. Edward S. Marks, a teller, cashed for accused Exhibits 7 and 8, totaling \$304.59, probably paying him in 20 and 10 dollar bills as he usually did with a sum of that size. (R. 113,148-149) Mr. Marks talked to accused about an officer's fur cap which he was wearing. Accused's breath was "very strong of liquor" and he had kind of a glassy look in his eyes, but he walked all right, talked intelligibly and indorsed the checks "very well and very legibly". (R. 150-153) After leaving the bank, accused returned to his quarters at Fort Sheridan for five or ten minutes and then drove to the First National Bank at Lake Forest, where he gave Private Clark an envelope containing about \$280.00 and asked Clark to take it in the bank and give it to Lester Smith (R. 113-114). Mr. Smith testified by stipulation (Ex. 31) that on February 8, 1936, an enlisted man paid him \$280.32 in 20 dollar bills as a final payment to clear the indebtedness of accused to said bank. Accused admitted to Colonel Wood that he cashed Exhibits 7 and 8, and stated that he placed the proceeds of Exhibit 7 in the office safe (R. 69-70). Major Lyons testified that Exhibit 7 appeared to be a deposit made by Paul

Tavetian with his bid for the sale of December 10, 1935, and that Exhibit 8 appeared to be a deposit made by the Dadourian Export Company with their bid for the sale of salvage on December 16, 1935 (R. 131-132). These checks, \$204.59 pertaining to Specification 4, and \$100.00 pertaining to Specification 5, were never deposited or otherwise accounted for by accused (R. 128-129,156), and it seems clearly established that he embezzled at least \$280.32 of this total sum by using it in the manner described above to pay his note at the Lake Forest bank.

#### Specification 6

Private Mazzareno Sera was on duty as Salvage clerk at Fort Sheridan on February 27, 1936, when two horses, United States property, were sold at auction; he received \$115.00 in cash from Erick Dirks, Chicago, Illinois, and turned it over immediately to accused (Ex. 36). Accused admitted to Colonel Wood that he received \$115.00 in cash from Erick Dirks of Chicago for two Government horses and stated that he put the money in the Quartermaster office safe (R. 70). Exhibits 48 and 49 are bills of sale, dated February 27, 1936, to E. Dirks, for one horse, riding, at \$61.00, and one horse, riding, at \$54.00 (R. 135). This \$115.00 in cash was never deposited or otherwise properly accounted for by accused (R. 129-130,156).

#### Additional Charge and Specifications 1-6.

Major H. R. Priest, Finance Officer at Fort Sheridan, received no money from accused in connection with sales of salvage on December 10 and 16, 1935, January 28, February 27 and March 3, 1936. The records of that office show no vouchers signed by the quartermaster, neither Form 325 nor 1044, which should have been submitted had funds been turned in. (R. 155-156) Major Priest examined Exhibits 2 to 7 and testified that they had never passed through his hands as finance officer and that they were not indorsed as required by Army Regulations (R. 156-157). Army Regulations 35-780, paragraph 2, provides that officers of the Army who are not accountable disbursing officers, who receive public funds which under the law must be paid into the Treasury of the United States, will turn them over to the nearest disbursing officer for deposit. Checks, money orders, etc., drawn payable to an officer by name or in his official capacity will immediately, upon receipt by the officer making the sale, be indorsed "for deposit to the official credit of the Finance Officer, U. S. Army". Other forms of indorsement will not be made. A deposit of \$1210.85, money pertaining to the sales of December 10 and 16, 1935, and March 3, 1936, was made by Major Lyons on April 23, 1936 (R. 166; Ex. 54). This left a balance still due on the five sales of \$1281.46 (R. 168). Major Wilbert V. Renner, Q.M.C., on duty in the office of The Quartermaster

General, Washington, D. C., testified by deposition (Ex. 35) that he had examined the records in that office pertaining to salvage sales conducted by accused at Fort Sheridan, Illinois, during the period July 8, 1935, to March 20, 1936, and that said records showed:

<u>Date of Sale</u>	<u>Receipt in OQMG of Circular Proposals</u>	<u>Receipt in OQMG of Abstract of Bids</u>	<u>Receipt in OQMG of W.D. Form 325 bearing re- ceipt of Fin.Off.</u>
Dec. 10, 1935	Dec. 5	Feb. 25, 1936	May 12, 1936.
Dec. 16, 1935	Not rec'd.	Feb. 26, 1936	May 12, 1936.
Jan. 28, 1936	Jan. 13	Not rec'd.	May 12, 1936.
Feb. 27, 1936	Rec'd. but no date stamp	Not rec'd.	May 12, 1936.
Mar. 3, 1936	Feb. 24	Not rec'd.	May 12, 1936.

Exhibits 9 to 13 are correspondence from the office of The Quartermaster General with respect to reports of these sales which were not received as required by regulations. The Form 325 received by The Quartermaster General on May 12, 1936, represented the deposit made on April 23, 1936, by Major Lyons (R. 128; Exs. 52-54). The accused was paid his salary each month by the Finance Officer, Fort Sheridan (R. 161-162), and, of course, he was not authorized to retain any of the sums mentioned in the specifications of the Additional Charge as salary, pay or emolument.

7. The prosecution introduced much evidence intended to show that accused was in debt and was being pressed by his creditors (Exs. 14-27; R. 40,41). Such evidence was admissible as tending to establish a motive for the embezzlement. Dimmick v. United States, 135 Fed. 257-266; 20 C. J. 484, 9 R.C.L. 1294; Note to Fields v. DeWitt, 6 Ann. Cas. 349 - contra? Masters v. United States, 42 App. Cas. D. C. 356, 39 Ann. Cas. 1243. In brief, the proof shows that he had no income outside his pay (R. 68), his total pay from May 1935 to April 1936 was \$3997.95, and during that period he borrowed \$1050, \$500 in August, \$250 in October, and \$300 in November, 1935, making total receipts of \$5047.95. This gives a monthly average of \$420.60, or \$333.16 considering pay alone. Out of this he paid each month alimony of \$150 and his post exchange bill averaged \$54.52, leaving him each month an average of \$216.14, or from pay alone, \$128.64. (Exs. 30,33) These exhibits also show that in

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February 1936 accused owed:

Columbus Bank & Trust Co. (due before Dec. 1935)	\$191.11
Household Finance Co., Waukegan, Illinois	240.00
Monroe Loan Assn., Brooklyn, N.Y. (\$70 in arrears)	154.00
Community Grocery Co., Lake Forest, Ill. (due since Oct.)	47.30
First National Bank, Lake Forest	280.32
Total	<u>\$912.73.</u>

His February bills at the post exchange, \$93.07, and at the Officers' Mess, \$7.00, were also reported delinquent (Exs. 24-27). In July 1935, a letter through military channels requested aid in collecting a bill of \$54.40 for automobile tires purchased a year before (Exs. 18-20).

8. Immediately following the pleas of not guilty by accused, the trial judge advocate announced that he had been "informed by the defense that they have a special defense in the nature of a special plea touching on the sanity of the accused", and then stated that he believed that "this would be the proper time, if the Defense so desires, for the Court to permit the Defense to put in any evidence touching on that point, prior to going into all of the detail of the case". Thereupon, the court inquired whether there was a report, as authorized by paragraph 35 c, Manual for Courts-Martial, of a medical board on the accused's sanity and, upon being informed in the affirmative, had the same read, and it was subsequently introduced in evidence as Prosecution's Exhibit 45. (R. 10-12) The defense was then asked to "state briefly the nature of the evidence it desired to bring out, either documentary or by medical authorities", and replied as follows:

"I will bring in two medical officers who will testify as to the accused's condition at the time he was placed in arrest, the accused's condition, as a result of this Board report of which you have a copy. I will bring in a number of civilian clerks and non-commissioned officers who served under Major Curtis for a long period of time at Fort Sheridan, who will describe their relations to the accused, some of the acts that he did, some of the

acts of omission and commission which, to my mind, prove that the man's mind was certainly subnormal." (R. 12)

Thereupon, the court, through the president, announced that:

"The Court has decided that it will not at this time consider the plea in bar of trial, and the Prosecution will present its case.

I will state further that this decision of the Court does not, of course, prevent the Defense from bringing out anything it desires when it comes its time to submit evidence." (R. 13-14)

Paragraphs 63 and 75 a, Manual for Courts-Martial, provide, respectively, that:

"If such an inquiry (accused's insanity) is determined upon, priority will be given to the determination of the matter, and the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused", and

"The court may, in its discretion, give priority to evidence on such issue (accused's insanity) and may determine as an interlocutory question whether or not the accused was mentally responsible at the time of the commission of the alleged offense."

It is the opinion of the Board of Review that under the foregoing provisions of the Manual for Courts-Martial, as well as the established practice in such cases, the better procedure required that the court accept the question of accused's sanity as an issue at the trial and proceed at once to receive evidence offered by the accused and the prosecution on that issue, and then determine the issue as an interlocutory question by separate ballot. However, the record shows that subsequently the defense was given and availed itself of the full opportunity to present in detail exactly the evidence which it announced at the beginning of the trial it desired to submit. Under these circumstances, the Board of Review is of the opinion that the time and order in which such evidence was submitted to and received

by the court is immaterial, and that none of the substantial rights of the accused was prejudiced by the court's error in judgment in refusing to follow the usual and what, in the opinion of the Board of Review, would have been the better procedure.

The record does not show that the court balloted separately upon the question raised by the issue of insanity, but in view of the fact that the provision of the Manual for Courts-Martial, quoted above, is suggestive and not mandatory, and of the further fact that the accused was found guilty as charged, it cannot be said that the court's failure to so ballot, if in fact it did not do so, injuriously affected any substantial rights of the accused. CM 157854, Ireland, a case decided under the Manual of 1921, where paragraph 219 thereof prescribed such procedure.

The defense, in accordance with its preannounced intention (R. 12) mentioned above, introduced a number of witnesses whose testimony was apparently intended to corroborate the claim that due to long and excessive drinking the accused should not be held mentally responsible. The testimony of First Lieutenant Roger W. Moore (R. 226-231) and that of Major William C. Dunkel, Post Adjutant, admitted by stipulation (R. 170-171), was to the effect that accused was frequently drunk on duty, often if not usually in the forenoon, and on that account unable to perform his normal duties on such occasions. Likewise, and for the same purpose, the defense introduced as witnesses two sergeants, a private, and four civilian employees (R. 172-225), who had served under or with the accused and were in a position to see him frequently, some of them daily and at all times of the day. The substance of the testimony of these witnesses was that when the accused first reported at Fort Sheridan, he was alert, attentive to his duties, sober, and in all respects normal. Subsequently, a decided change took place and he became absent-minded, inattentive, neglectful, and apparently totally indifferent to his money responsibilities, leaving large sums of money unprotected and unguarded overnight on his desk or in an unlocked safe, and paying out official funds without taking the time or trouble to verify in any way the accounts on which he was making payments. These witnesses attributed the foregoing characteristics to the fact that the accused was drinking to excess,

and they testified almost unanimously to the effect that he was drunk practically every day during duty hours, as a result of which he behaved and acted in a manner in which no normal, sober officer would conduct himself or his business.

After laying the foundation described above, augmented by the report of the medical officers introduced in evidence by the prosecution and referred to below, the defense then qualified Major Robert A. Hale, Medical Corps, as an expert in psychiatry and asked him the following hypothetical question:

"Would you as an expert consider Major Curtis to have such mental powers as to render him responsible in every sense for his acts?" (R. 233)

After considerable preliminary discussion, the witness replied:

"I think that it can be assumed beyond reasonable doubt that a sufferer from chronic alcoholism cannot make the careful discrimination between conduct of rightfulness or conduct of wrongfulness" (R. 235),

but nowhere in his testimony does this witness state or infer that the accused was mentally irresponsible for his conduct by reason of insanity, or that he was not mentally capable of intelligently conducting his defense. Two members of the medical board, First Lieutenants William R. Albers, Medical Reserve, and David Fisher, Medical Reserve, witnesses for the prosecution but extensively cross-examined by the defense and the court, both identified the board's report (Ex. 45) and confirmed their opinion that the accused was suffering from moderate, chronic alcoholism, but that he was responsible for his actions (R. 77-97). The third member of the board, Major Arthur R. Gaines, Medical Corps, was not called as a witness. The prosecution offered considerable evidence, particularly that of Brigadier General Dana T. Merrill, commanding general at Fort Sheridan (R. 52-53), and of Major Lloyd H. Cook, Executive Officer (R. 56), which, although in negative form, tended very strongly to minimize, if not even to contradict, the testimony of the witnesses to the effect that the accused was continuously drunk over the period described above. But, even assuming that he was as

drunk and as often as the defense witnesses testified to, it merely proves that he had become an habitual drunkard and does not prove or tend to prove that he was not mentally responsible for his actions. This phase of the record is fully discussed in the review of the staff judge advocate, who it may be supposed, on account of his connection with the case prior and subsequent to the trial, was in a particularly advantageous position to understand it, and, in the opinion of the Board of Review, his discussion gives a clear and fair picture of the entire situation. It is quoted below as follows:

"The testimony introduced by the defense presents the picture of an officer who, upon reporting at Fort Sheridan, appeared keen and alive in the performance of his duties; it shows that he was from time to time loaded with more duty assignments than should be exacted of any one officer; that he was involved in domestic troubles and after two or three months at Sheridan, worried over a divorce proceeding between him and his wife, who was claiming alimony and the custody of their minor children; that he worried over financial difficulties also, having gotten heavily in debt and possessing no source of income but his pay; that he was being pressed by creditors and harassed by his wife, and began to neglect his duties, seeking solace in strong drink. Those who were most closely associated with him, the clerks and subordinates in his office, showed very clearly by their testimony that during a period of several months preceding his arrest in March 1936, the accused was in a condition of insobriety that was plain to them, and should have been plain to his superiors. It was shown that during all of the period covered by the charges, the accused was drinking so heavily that, while he talked intelligently and seemed to understand, yet he neglected to perform the most elementary duties with relation to the proper care of public money and the administration of his financial responsibilities to the government. He was loose and careless in his handling of funds; he left money lying upon his desk overnight; he went away from his office leaving wide open a safe containing hundreds of dollars in cash; he let papers that required execution go for

days unexecuted, notwithstanding the efforts of his office force to obtain his signature; he kept official funds, cash and checks commingled, in his pockets, and at sales counted out refunds to bidders without checking them: when sent for by the Commanding General or the Executive Officer, he was seldom to be found, and when located, would frequently answer that he would respond in a few minutes, and then fail to do so entirely. If his office associates are to be believed, and there is no reason to doubt them, the accused was drunk during at least 90% of their contacts with him from about August of 1935 to late in March 1936. Their testimony as to his usual drunken condition during this period is corroborated to some extent by the stipulated testimony of the then Adjutant at Fort Sheridan, Major Dunckel, who not only noticed it, but considered him unfit for duty. (See R. 170, 171, 172) On March 22, 1936, when placed in arrest and sent to hospital, he was in a condition of acute alcoholism, and it was several days before the medical authorities thought him in fit condition to be interviewed by the Corps Area Inspector, Colonel Wood. Finally, notwithstanding his precarious situation, he re-married during the pendency of these charges. The foregoing is a fair general summary (by no means complete as to detail) of the testimony introduced to show the mental irresponsibility of the accused during the period covered by the charges. No medical testimony was produced by the defense to show that a man under such conditions as were shown, would be unable to distinguish right from wrong, or would lack the ability to adhere to the right. The farthest extent to which any of the medical evidence went was that of Major Hale, a psychiatrist, whose testimony, when the medical lingua franca is untangled, seems to say that while a chronic alcoholic's sensibilities are dulled, they are not destroyed, and that during periods of acute alcoholism, he may, or may not, depending upon individual resistance, be compos mentis. The finding of the medical board was one of moderate chronic alcoholism at the present time, but of responsibility, both now and during the period covered by the charges.

Taken by the four corners, I do not think the testimony offered by the defense, even when given full credence and weight, establishes mental irresponsibility, or insanity. The picture is that of a man not strong enough in character to stand up and meet his troubles and difficulties, who undertook to drown both worry and grief - official, domestic and financial, in alcohol, and in so doing, became both careless of responsibilities and regardless of consequences. I do not think that the defense testimony showed a man who did not know what he was doing, but rather, a man who drank himself into a condition of reckless disregard of duties and realities. That is not insanity.

My own conclusion is, after carefully reading and weighing the testimony introduced by the defense, that standing alone, it fails to establish a defense." (pp. 3-4)

In view of the foregoing, the Board of Review is of the opinion that the court was fully justified in arriving, as is obvious from its findings of guilty and the sentence it must have done, at the conclusion that the accused was at the times of the commission of the alleged offenses mentally responsible for his actions, and at the time of the trial mentally capable of intelligently conducting his defense.

Immediately before resting its case, the accused made the following unsworn verbal statement through his counsel:

"One. That he was totally inexperienced as a Post Quartermaster.

Two. That he had insufficient and inexperienced subordinates.

Three. That he had domestic troubles that caused him great mental anxiety and extreme nervousness.

Four. That he drank heavily and constantly to help him forget his troubles and worries.

Five. That he was in debt.

Six. That his debts still exist but are gradually being liquidated.

Seven. That he took no government funds for his own use since, if he had, his debts would now have been liquidated." (R. 265)

9. Other than his unsworn assertion that "he took no Government funds for his own use since, if he had, his debts would now have been liquidated", and, of course, his pleas of not guilty, the accused made no direct denial of the allegations against him, and offered no evidence to rebut the proof offered by the prosecution. Likewise, except for evidence tending to show that he was drinking excessively, was worried over financial and domestic matters, and lack of proper qualifications himself and efficient personnel in his office, he made no attempt to explain his conduct, the established shortages in his accounts, or his failure to render his accounts in accordance with regulations having the force of law.

The only reasonable inference from the testimony is that the accused used \$280.32 of the official funds amounting to \$304.59 then in his possession to pay his note in the former amount then past due at the First National Bank of Lake Forest, Illinois, thereby, of course, embezzling that portion of the two amounts of \$204.59 and \$100.00 described in Specifications 4 and 5. With this exception there is no direct proof of the disposition of the other funds he is alleged to have embezzled, but the proof is undisputed that all of the amounts alleged in the specifications under the original Charge came officially into his possession as the result of the sales of Government salvage property, and that he failed on demand to deliver or properly to account for any of these sums, or to offer any adequate or reasonable explanation of his shortages. It is an elementary rule of law 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. CM 123488 (1918).

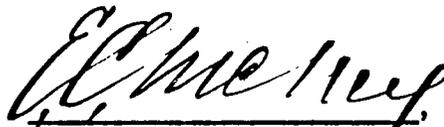
An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority can not complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting." Par. 1563, Dig. Ops. JAG 1912-30.

Likewise, it is clearly established by the competent and undisputed evidence that the accused feloniously failed to render his accounts as provided by law and the regulations of the United States Army pursuant thereto, as alleged in the specifications under the Additional Charge.

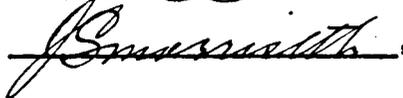
10. Accused is 42 6/12 years of age. The statement of his service as contained in the Official Army Register is as follows:

"(Non-Federal: 1 lt. Inf. Ind. N. G. 5 Apr. 16 to 18 June 16 and from 22 Feb. 17 to 25 Mar. 17.)--1 lt. Co. L. 2 Inf. Ind. N. G. 19 June 16 to 21 Feb. 17 and from 26 Mar. 17 to 11 Jan. 19.--1 lt. of Inf. 1 July 20; accepted 28 Nov. 20; capt. 1 July 20; Q.M.C. 22 Aug. 30; maj. 10 Dec. 31; trfd. to Q.M.C. 1 May 34."

11. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and warrants confirmation thereof. Dismissal is authorized for conviction of embezzlement in violation of the 93d Article of War and for embezzlement under the Federal Statute (TSC 18: 176) by failure to render his accounts in violation of the 96th Article of War.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

To The Judge Advocate General.

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

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Board of Review  
CM 205811

U N I T E D	S T A T E S	)	FIRST CAVALRY DIVISION
		)	
	v.	)	Trial by G.C.M., convened at
		)	Fort Bliss, Texas, October 16,
Private JOHN FAGAN (6249021),	)	)	1936. Dishonorable discharge
Troop A, 8th Cavalry.	)	)	and confinement for three (3)
	)	)	years. Disciplinary Barracks.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and MORRISETTE, Judge Advocates.

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

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

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

Specification: In that Private John Fagan, Troop A, 8th Cavalry, did, at Fort Bliss, Texas, on or about August 22, 1936, desert the service of the United States and did remain absent in desertion until he was apprehended at El Paso, Texas, on or about September 26, 1936.

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

Specification: In that Private John Fagan, Troop A, 8th Cavalry, did, at Fort Bliss, Texas, on or about August 21, 1936, feloniously embezzle by fraudulently converting to his own use one automobile of the value of about \$75.00, the property of Pvt 1cl Dwane A. Bowman, Troop A, 8th Cavalry, entrusted to him by the said Pvt 1cl Dwane A. Bowman for the purpose of making one trip to the Dona Ana Target Range, New Mexico, and return to Fort Bliss, Texas.

He pleaded not guilty to, and was found guilty of, the charges and specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for four years. The reviewing authority approved the sentence but remitted one year of the confinement imposed, designated the United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$ .

3. Competent evidence introduced by the prosecution shows, as alleged in the specification under Charge I, that the accused absented himself without leave from his station at Fort Bliss, Texas, on August 22, 1936, and remained absent until he was apprehended by the military authorities at El Paso, Texas, on or about September 26, 1936. At the time of his apprehension he was dressed in civilian clothes and asked the apprehending military policeman "to give him a break". (R. 5-8; Ex. 1) Fort Bliss is on the outskirts of El Paso.

On August 21, 1936, the accused borrowed Private 1st Class Dwane A. Bowman's automobile for the expressed purpose of going to the Dona Ana Artillery Range and with the understanding that he would return it that night. The automobile was not returned in accordance with this understanding and remained out of Bowman's possession until September 15, 1936, on which date it was returned to him by Corporal Claude Ferguson. According to Bowman's testimony "the front tire was off and the motor was shot, was burned up" when he recovered his car. (R. 9-13) Corporal Claude Ferguson, a witness for the prosecution, testified on direct examination, without objection by the defense, that on September 15, 1936, a Mexican named Joe Pardell reported to the military police station that for several days an automobile had been parked in the rear of his house at 4205 Railroad Avenue in Lynchville, opposite the Artillery Theater. Pardell also told Corporal Ferguson that "one Sunday afternoon" a young fellow and two ladies were pushing the car in front of his house and, being unable to start it, asked permission to leave it in the rear of the house, promising to return the next day for it, but the car "had been there ever since". Ferguson then went to the place indicated by Pardell, found the car with a flat tire and returned it to the post. The car was delivered to Bowman on that date. (R. 13-15)

On cross-examination Bowman, the owner of the car, at first repeatedly denied having received a message from anyone, and in particular from a man named Leonard, informing him of the location of his car, but when confronted with a prior statement apparently made to defense counsel, he finally admitted that "a fellow by the name of Leonard", who was drunk at the time, came in "next morning" and said the car was behind Sergeant Merritt's house. When he went there alone in search of his car it was not there. Private Leonard, who had been discharged, was not produced as a witness. (R. 10-12) Bowman paid \$125 for the car (R. 9), a 1929 Ford roadster (R. 15), about five months before he loaned it to the accused, and he and two automobile dealers valued it at \$75 (P. 10,15). Corporal Ferguson thought the car was worth about \$40 (R. 15).

4. The accused did not take the stand but introduced two witnesses, Private 1st Class James L. Forest and Private 1st Class Roden, whose first name is not disclosed by the record. The former testified that on or about August 28, 1936, while with a civilian boy named Billie Hartford, he saw accused "downtown" (apparently El Paso) and the latter asked him to tell Private Bowman that his car was in Lynchville, without giving any more definite location. Forest left for Cloudcroft, New Mexico, the next morning and failed to deliver the message. (R. 16-17) Private Roden testified that towards the last of August, he met the accused downtown, who asked him to tell Bowman that his car was at a place which the witness could not remember exactly but understood was "across from the Artillery Theatre". The witness forgot to deliver the message. (R. 17-18)

5. An official map of Fort Bliss and vicinity shows that the Field Artillery Theater referred to in the record is located in the southwestern portion of the military reservation, and that south and across the railroad therefrom is Lynchville, where is located the house of the Mexican referred to as Joe Pardell. The Dona Ana Artillery Range is shown as being 24 miles in a westerly direction from the military reservation and it appears that Lynchville is very close to the direct route from the range to the post. The first name and organization of the Sergeant Merritt referred to at the trial is not shown by the record, but the official map indicates that Sergeant Sylvester A. Merritt, Headquarters Train, 8th Cavalry, is the only Sergeant Merritt who has quarters on the post and they are

in the eastern portion of the reservation approximately one mile from the Artillery Theater.

6. The unauthorized absence of the accused for a period of a month and four days, terminated by apprehension in civilian clothes in the immediate vicinity of his station where, according to the evidence, he had been during a part, if not most, of his absence, is, in the opinion of the Board of Review, sufficient to support the finding of guilty of desertion as alleged in the specification under Charge I. Par. 130 a, M.C.M.

7. It is an elementary rule of law that in order to prove embezzlement, it must be shown, among other things, that the conversion of the property was fraudulent and with the intent to deprive the owner of the same. Inasmuch as in the instant case accused had a right to use the automobile temporarily and thus to deprive the owner of its use temporarily, it results that before he can be properly convicted of embezzling the automobile it must be shown that he intended to deprive the owner of his property, not temporarily, but permanently. In re Mutchler, 55 Kan. 164, 40 Pac. 283; Conley v. State, 69 Ark. 454, 64 S.W. 218; State v. Pratt, 114 Kan. 660, 220 Pac. 505. The prosecution undertook to sustain this burden merely by showing that accused, after having come lawfully into the possession of the automobile, failed to return it at the time he had promised to do so and left it in a damaged condition at a place adjacent to the post, where it remained for approximately three weeks before it was finally recovered by the owner. Such conduct by the accused was reprehensible and showed a scant regard for the duty he owed to the owner of the car, but it did not necessarily amount to embezzlement. The owner himself, while on the stand as a witness, reluctantly admitted that on a date not disclosed by the record but referred to by him as the "next morning", a drunken soldier, who was later discharged, brought him a message from accused that his car could be found behind Sergeant Merritt's house, where, however, the owner claimed, it could not be located when he went there to repossess it. It does appear, however, that the car was actually found just outside the military reservation, where it had been for sometime and that accused had left it there because it could no longer be moved under its own power. Likewise, there is no evidence in the record showing, or from which it can be inferred,

that the accused did not in fact use the car for the purpose for which it was borrowed, namely, to go to the Dona Ana Artillery Range, and neither is there any evidence in the record to negative the possibility that he might have been returning it to the reservation from the Artillery Range at the time it broke down. In addition to the foregoing, there is testimony by two soldiers that during the latter part of August the accused had asked them to inform the owner of the car that it could be found at a place approximately where it was actually located. The court had the right to disbelieve and consequently disregard the testimony of these two soldiers, but there would be no similar justification for disbelieving or disregarding the reluctant testimony of the owner himself, a witness for the prosecution, in admitting that he had in fact received some kind of a message from the accused about the location of his car.

In the absence of any positive proof that the accused embezzled the automobile, as alleged, the prosecution relied upon the foregoing circumstantial evidence to show that the conversion of the property by the accused was fraudulent, with intent to deprive the owner of the same, and it therefore results that the burden was upon the prosecution to establish a set of facts excluding every fair, reasonable hypothesis of accused's innocence. In Buntain v. State, 15 Tex. App. 490, the question, as remarked by the Board of Review in CM 195705, Tyson, in citing that case, was not one of weighing conflicting evidence or passing upon the credibility of witnesses or determining whether facts relied on to prove the ultimate fact in issue were themselves proved, but merely the question of law whether certain circumstantial facts established by the evidence of record justified the conclusion of guilt as a logical inference from such circumstantial facts. On that question the court in Buntain v. State, supra, said:

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions

based upon suspicions \* \* \*. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens."

In the opinion of the Board of Review the prosecution has failed to sustain the burden so required of it. CM 193315, Rosborough; CM 194359, Sadler; CM 197795, Hathaway, all involving larceny but also the same principle of law; In re Mutchler and Conley v. State, supra; State v. Davis, 38 N.J.L.R. 176, when correctly applied; United States v. Trinder et al., 1 Fed. Supp. 659.

8. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the finding of guilty of desertion as alleged in Charge I and its Specification, but not legally sufficient to support the finding of guilty of embezzlement as alleged in Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and a half years.

9. In view of the foregoing, the reviewing authority at the time of his supplementary action in the case should consider all the circumstances surrounding the desertion so that the sentence finally ordered executed will be appropriate for that offense alone.

*[Signature]*, Judge Advocate.  
*[Signature]*, Judge Advocate.  
*[Signature]*, Judge Advocate.

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

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Board of Review  
CM 205916

U N I T E D    S T A T E S	)	FIFTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Hayes, Ohio, November 3,
Private LEON E. WILLIAMS	)	1936. Dishonorable discharge
(6556572), Headquarters	)	and confinement for six (6)
Battery, 3d Coast Artillery.	)	months. Fort Hayes, Ohio.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and MORRISETTE, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leon E. Williams, Headquarters Battery, 3d Coast Artillery, did, at Fort McArthur, California, on or about September 6, 1936, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Hayes, Ohio, on or about September 23, 1936.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for six months. The reviewing authority approved the sentence, designated Fort Hayes, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The only evidence introduced by the prosecution shows that the accused absented himself without leave from his organization and station at Fort MacArthur, California, on September 6, 1936 (R. 8; Ex. A), and remained so absent without leave until he surrendered himself in uniform at Fort Hayes, Ohio, on September 23, 1936, stating at the time that he was absent without leave from his organization and station (R. 9).

The accused introduced no witnesses and offered no other evidence or explanation of his unauthorized absence except his own sworn testimony, which is briefly summarized as follows:

His home is in Canton, Ohio, and about one year prior to his enlistment on September 5, 1935, he lived in Detroit, Michigan, in Arizona, and in Los Angeles, California, during which time he had not visited his home. Shortly before he left his organization he requested a furlough from the first sergeant and his company commander for that purpose, but was informed by the first sergeant his request would not be considered until he had served at least one year in the Army, and by his company commander, that he would consider it after the firing practice was over. When the firing practice was over, he learned from the battery clerk on September 4, 1936, that no furlough papers had been prepared for him, and he was so homesick that he left his organization without leave and went to his home in Canton, Ohio, where he remained for about nine days and then surrendered at Fort Hayes for the purpose of obtaining transportation back to Fort MacArthur. He had \$60 when he left Los Angeles, California, which he spent, and did not have the money to pay his way back to his proper station. He intended to borrow the money from his brother but he went to Detroit and he did not know where to find him "up there", so he surrendered at Fort Hayes for transportation. He admitted that when he surrendered to Staff Sergeant Gliniski at Fort Hayes he did not immediately ask for transportation, but claimed that he "told them at the guard house" that he wanted the transportation. He denied that he ever entertained during the period of his unauthorized absence any intention to abandon the military service or not to return to his proper station after having completed his visit at home. (R. 11-17)

4. Although the accused was not permitted to corroborate by the introduction of his service record (R. 13) his sworn statement that

his home was in Canton, Ohio, the Board of Review is of the opinion that this fact, together with the fact that the soldier did return to his home in that city, is sufficiently established for the purpose of this discussion, with the result that the record discloses a case in which a soldier with approximately one year's service left his station at Fort MacArthur, California, without authority, proceeded with reasonable directness to his home at Canton, Ohio, and only seventeen days after his original absence from his post on the Pacific coast surrendered in uniform at Fort Hayes, Ohio, the military post nearest his home.

In the absence of any other proof, it seems clear that, without regard to the accused's explanation, the foregoing evidence, showing merely an absence of seventeen days terminated by surrender in uniform at the military post nearest the accused's home, where he must have known he was in danger of apprehension, is in itself insufficient to establish any intention to abandon entirely the military service. CM 196867, Swenson, and cases there cited. The result is that the sentence, if it is to be sustained at all, must be sustained on the theory that the foregoing evidence is sufficient to show that the accused sometime during his unauthorized absence entertained the intent never to return to his proper station, which was Fort MacArthur, California, and probably had in mind a transfer to a station near his home.

In the absence of any evidence tending to establish such an intent, the status of the accused was that of an enlisted man absent without leave, claiming to be without means to return to his proper station, who, under paragraph 10 AR 30-920, was authorized to report at another post, camp or station in order that he might be furnished with transportation necessary to enable him to return to his proper station, as provided in AR 615-290. In this case the accused found himself at Canton, Ohio, approximately 2400 miles from his proper station and he thereupon reported at Fort Hayes, the military post nearest Canton. There is no evidence tending to show that he was dissatisfied with the military service as a whole or with service at his proper station, and his conduct in reporting at Fort Hayes is not only entirely consistent with the reasonable theory of his innocence but is exactly what, under the circumstances so far as they are disclosed by this record, he was authorized, and in fact

what he was required, to do. The burden of proof to the contrary was upon the prosecution throughout, and inasmuch as it has introduced no evidence inconsistent with the entire innocence of the accused of desertion, it is the opinion of the Board of Review that the evidence of record is legally insufficient to support the finding of guilty of that offense.

Although the court had a right to disbelieve the testimony of the accused, it should not be overlooked that his statement that he left his organization with the sole intention of visiting his parents and then returning to his proper station, and that he did so attempt to return by surrendering at the nearest military station and announced that he was absent without leave and desired transportation back to Fort MacArthur, is undisputed by any evidence offered by the prosecution. The prosecution failed to sustain the burden of proof resting upon it.

From his own testimony, it is clear that accused left his station on September 5, 1936, and was absent without leave the entire day of September 6; and from the testimony of Sergeant Glinki, it is also clear that accused surrendered on September 23 during the normal duty hours. Accordingly, absence without leave for the period of eighteen days is established.

5. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave, at the time and place alleged, in violation of the 61st Article of War, and only so much of the sentence as involves confinement at hard labor for fifty-four (54) days and forfeiture of two-thirds of his pay per month for a like period.

*A. M. McKie*, Judge Advocate.  
*Charles C. Besson*, Judge Advocate.  
*J. G. Smith*, Judge Advocate.

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

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Board of Review  
CM 205920

U N I T E D   S T A T E S	)	FIRST DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Plattsburg Barracks, New York,
Private FRANCIS T. McCANN	)	October 13 and 14, 1936. Dis-
(6122950), Company E, 26th	)	honorable discharge and con-
Infantry.	)	finement for six (6) months.
	)	Disciplinary Barracks.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and MORRISETTE, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Private Francis T. McCann, Company E, 26th Infantry, Plattsburg Barracks, New York, did, at Plattsburg Barracks, New York, on or about August 21, 1936, feloniously embezzle by fraudulently converting to his own use money of the value of Forty six Dollars and Eighty Cents (\$46.80), the property of Non-Commissioned Officers Club, Plattsburg Barracks, New York, entrusted to him by the said non-Commissioned Officers club, Plattsburg Barracks, New York.

Specification 2: In that Private Francis T. McCann, Company E, 26th Infantry, did, at Plattsburg Barracks, New York, on or about August 21, 1936, feloniously embezzle by fraudulently converting to his own use eleven cartons (11) of Camel cigarettes, of a value of about Twelve Dollars

Thirty-two cents (\$12.32), property of the Non-Commissioned Officers Club, Plattsburg Barracks, New York, entrusted to him by the said Non-Commissioned Officers Club, Plattsburg Barracks, New York. (Finding of Not Guilty)

Accused pleaded not guilty to the Charge and both specifications thereunder and was found guilty of Specification 1 and of the Charge, but not guilty of Specification 2. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for six months. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence as disclosed by the record of trial in support of Specification 1 of the Charge is briefly summarized as follows:

Between 4:30 and 5:00 o'clock on the evening of August 21, 1936, accused, who was bartender, relieved Sergeant Foster J. Brissette, the club steward, in charge of the Noncommissioned Officers' Club at Plattsburg Barracks; at that time the secretary-treasurer of the club, Staff Sergeant Herman M. Fix, counted the cash in the cash register amounting to \$43.45, which, together with a check for \$10.00 signed by Sergeant Eugene Cole, was then turned over to accused and the register set back to zero (R. 9,14,15). Accused's instructions from Sergeant Fix were that upon closing at night he should take the money out of the cash register and put it in the field safe in the club (R. 10). When Sergeant Brissette returned to the club the next morning about 8 o'clock, he found the safe still open but the doors and windows of the club were closed and locked from the inside (R. 15-16). When Sergeant Fix arrived, he discovered that although \$3.35 had been rung up on the cash register after accused had taken charge, making a total of \$46.80, which should have been in the safe, all of the cash was missing but the check was in the cash register (R. 10). Accused was absent without leave and remained so absent until he voluntarily returned to his station at Plattsburg Barracks on the evening of August 25 (R. 17). About 6:30 the same evening, Sergeant Israel Sedofsky saw accused in the company kitchen and asked him when he got back, to which accused replied, "a while ago".

Accused then asked Sedofsky to do him a favor by asking "Sergeant Fix how much the shortage was". Sedofsky did not at the time know where Sergeant Fix lived but located him, ascertained the amount of the shortage, and informed accused, whereupon the latter immediately handed him \$46.80 in bills - four tens, one five, and some one dollar bills. Sedofsky went back to Sergeant Fix's home, but finding him absent kept the money until the morning of the 27th, when the entire amount was delivered to him. It took Sergeant Sedofsky between twenty and thirty minutes to locate Sergeant Fix's house and to go there and back, so that it was approximately that long from the time he first saw accused until the latter turned over to him the full amount of the money missing from the club. (R. 11,17-19)

Sometime during the evening of August 21, 1936, accused had changed three two dollar rolls of coins for six one dollar bills at the Post Exchange, and at the same time he had endeavored to change other similar rolls of coins for bills and to cash the check signed by Sergeant Cole, but the bookkeeper at the exchange had accepted only three of the two dollar rolls of coins and had declined to cash the check because it did not bear an officer's indorsement. The exact time of the foregoing occurrence is not fixed by the record, but apparently before going to the Post Exchange accused had asked Walter J. Donnelly, who was on duty at the moving picture theater, to change coins for bills, and at that time accused had a check in his hand. The time of this occurrence is fixed sometime after the first show (usually between 8 and 9 p.m. on Army posts) and Donnelly, who "had locked up", directed accused "to Mr. Goodrich in the office". (R. 5-8)

4. Accused testified as a witness in his own behalf substantially as follows:

On the night of August 21, 1936, he was bartender at the Non-commissioned Officers' Club at Plattsburg Barracks (R. 24). He had been drinking more than usual and shooting dice, and at closing time, about 11 o'clock, he ordered a taxicab to take him to town. In the meantime, he endeavored to put the money into the safe but the safe would not lock. (R. 26-28) The reason for this was that vinegar from a broken jar of pigs' feet had leaked on the safe with the

result that although the dial would turn, the safe would not lock (R. 30). On two other occasions the same thing had happened; the first time he was unable to lock the safe and kept the money in his foot locker until the next day, but on the second occasion he was able to bang it shut, although it was a hard job (R. 26). On the night in question the taxicab driver came a bit earlier than he had expected him to come, and before he had closed the club. Accused told the taxicab driver he had to take the money to the company; he went there in the cab with the intention of leaving it in his trunk locker, but when he arrived there he saw two other soldiers awake who slept near him, and decided that it would not be safe to leave the money in the foot locker so he took it with him. He then proceeded to a cabaret, called the taxicab driver again who took him "downtown", where he began drinking and where he met up "with some girls and fellows". The next thing he remembers is that he was drunk in Albany. He knew that he was absent without leave but continued to drink, went to New York, where he remained until about ten o'clock on the morning of the 25th, when he took a train back to Plattsburg, arriving there about 6:30 that evening. He went immediately to his company in order to see the first sergeant but, not finding him, went into the kitchen where he met Sergeant Sedofsky, who asked him what the trouble was. "I told him and asked him to do me a favor and see Sergeant Fix to see how much money I did take". When Sedofsky returned, accused gave him the money to pay Fix. When he took over from Sergeant Brissette, he did not count the money and therefore did not know how much he had taken away with him. (R. 27-30) He did remember, however, that his cash sales as shown by the cash register amounted to \$3.35 (R. 32). He had between \$38 and \$42 of his own money when he left Plattsburg. It cost him nothing to get from Plattsburg to Albany, where he spent between \$8 and \$10, and apparently most of the rest he spent in New York City because when he returned to the post he had only about eighty-five cents (R. 28-30). He denied spending or any intention of spending any of the Club money which he insisted he carried with him because he was unable to lock the safe and was unwilling to leave it in his trunk locker when he saw two other soldiers still awake near it (R. 28,29). He claimed that he had frequently changed coins into bills in order that he might make change in paper instead of giving the customers all of their change in nickels and dimes (R. 26,32).

The coins which he still had in his possession when he arrived in Albany he changed into bills in order that it might not be so much to carry around with him (R. 29). He was in the habit of cashing checks at the Post Exchange himself in order to save Sergeant Fix the trouble of doing so (R. 27).

Accused's testimony was to some extent corroborated by that of Fred J. Minshell, a restaurant owner and taxicab driver of Plattsburg, who testified that between 10:30 and 11:00 p.m. on August 21, 1936, in response to a call from accused, he reported to the Noncommissioned Officers' Club, where he immediately observed that the accused had had a few drinks. When he saw accused about to put money in his pocket, he asked him what he was doing with it, to which accused replied that he was going to put it in his foot locker and explained that he could not leave it at the club because the safe was locked and he did not know where else to leave it. Minshell drove accused to the company and when the latter came out again, Minshell asked, "What did you do with the money?" to which accused replied that he had left it in the company. Thereupon, Minshell drove accused to the Dew Drop Inn on Montcalm Avenue and shortly thereafter, in response to another call, he took him to City Hall Place, where he left him about midnight. (R. 21-23)

5. On cross-examination, both Mr. Goodrich (R. 6) and Mr. Donnelly (R. 7), witnesses for the prosecution, testified that accused had previously changed coins into bills, and the former that he had cashed at least one check for accused. Sergeant Fix, also a witness for the prosecution, testified on cross-examination, that on the 25th of August Sergeant Sedofsky came to his house, asked how much money was missing, was told that it was \$46.80, and on the morning of the 27th, turned that amount over to him (R. 10,11). Sergeant Brissette, a witness for the prosecution, likewise stated on cross-examination that prior to the occurrences on August 21, accused had on one occasion taken the money away and explained to him that, being unable to lock the safe, he kept the club money in his trunk locker, all of which he turned over the next morning, and when checked, "it was O.K." (R. 16). Brissette, recalled as a witness by the court, corroborated in considerable detail the accused's claim that the safe had been damaged by the contents of a broken jar of pickled pigs' feet seeping along the hinges and into the combination.

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The safe was cleaned, but it was always difficult to close; on the morning following accused's absence, Brissette was able to lock the safe himself but it was "a little hard to do it; had to bear down hard to turn the handle, and after the handle was closed, you touched the combination and it was locked". (R. 34-36) It also appears from the testimony of Captain Edwin O. U. Waters, a witness for the prosecution, and the investigating officer, but who testified from memory and not from the formal report of his investigation, that at the investigation of the charges accused made to him substantially the same explanation which he made at the trial except that Captain Waters testified that accused told him at the investigation that when he was unable to lock the safe, "he put the money in a bag and put it in his pocket and brought it to the company and put it in his foot locker, as he had done several times before". Likewise, Captain Waters testified that from his investigation he had learned that accused delivered the money over to Sergeant Fix within an hour after he got off the train and returned. (R. 20)

It seems evident from the record that the money was not actually delivered by accused to Sergeant Fix within an hour after his return but was so delivered to Sergeant Sedofsky, who later delivered it to Sergeant Fix, and, in view of this discrepancy in Captain Water's testimony, it is possible that he may not have remembered exactly the explanation made to him by accused, who admitted that he did not leave the money in his trunk locker, but took it away with him.

6. Stated in the most favorable light for the prosecution, the evidence shows that on the evening of August 21, 1936, the accused as bartender at the Noncommissioned Officers' Club came into possession of approximately \$46.80 belonging to the club, which it was his duty to lock in the field safe in the club upon closing for the night. Sometime during the evening he changed some and endeavored to change more of the coins forming about half of this sum into currency, attempted to cash a check from the club cash register, and later at Albany changed the remaining coins into currency. The next morning it was discovered that the accused was absent without leave, the safe was open, and all of the cash missing. The accused returned to his station four days later and, after promptly ascertaining the exact amount of what he described as "the shortage", he immediately turned the same over to a sergeant in bills, with the request that he

deliver it to the secretary-treasurer of the club. This sergeant was unable to find the secretary-treasurer until the second day following, at which time he did deliver the complete amount of the club's money to him.

7. Of course, the restitution of embezzled funds is no defense, but before this rule has any application embezzlement must first be established, and in order to do so the evidence must show that the conversion of the property by the accused was fraudulent with the intent to deprive the owner of the same. Ambrose v. United States, 45 App. D.C. 112; United States v. Summers, 19 Fed. (2d) 627; Moore v. United States, 160 U. S. 268.

Likewise, it must be remembered, as was pertinently suggested in State v. Strasser, 83 N.J.L. 691, 85 Atl. 227, "The defendant was not being tried for unprofessional conduct, or even for a breach of contract", (or in this case for neglect or violation of any regulation), "but for the criminal conversion of another's property". (Underscoring supplied) Certainly the mere fact that accused failed to lock the money in the safe as he was instructed to do is not sufficient under the circumstances shown to establish such an intent. Neither is proof that during the evening before leaving the post he changed a part of it from coins into currency and attempted similarly to cash a check sufficient. Neither is proof that he admittedly took the money with him while absent without leave, and while so absent changed the remaining coins into bills, followed by the prompt restitution of the full amount upon his return, sufficient in itself to establish any wrongful intent. Neither are all of these circumstances together legally sufficient to establish such intent.

It is true that the court had the right to disbelieve and therefore to disregard the testimony of an accused in explaining ambiguous or suspicious conduct, but in this case accused's explanation is in practically all of its substantial details corroborated by the testimony of the prosecution's own witnesses. His explanation of his failure to put the money in the club safe is corroborated by the prosecution's witnesses as well as by the testimony of the taxicab driver, a witness for the defense, which to some extent includes self-serving declarations by the accused, but which was not objected to by the prosecution. Similarly, it is

established by competent and undisputed testimony that promptly upon his return to his organization, accused ascertained the exact amount of money he had taken from the cash register and before he had had any reasonable opportunity of securing it, he immediately produced and turned over that amount to a sergeant with the request that it be returned to the secretary-treasurer of the club. In the absence of any direct evidence, the prosecution in this case must depend upon circumstantial evidence to show the necessary criminal intent to deprive the owner of his property by fraudulently converting it to his own use, as alleged. Such evidence constituting a basis for an inference of fact rather than of law (secs. 15 and 468, Underhill's Criminal Evidence, 3d ed.), must, therefore, be legally sufficient to exclude any reasonable hypothesis of accused's innocence. Even if his own explanation, corroborated as it is and undisputed by any evidence offered by the prosecution and accompanied by the prompt delivery of all of the funds immediately upon his return, may reasonably be disregarded by the court, the proof in this case fails to measure up to any such standard but to the contrary is entirely consistent with a reasonable hypothesis of the accused's innocence.

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

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

The Board then quoted from the cited case as follows:

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must

look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions \* \* \*. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens."

Applying the foregoing rules to the instant case, the Board of Review is impelled to the conclusion that the evidence is not legally sufficient to support the finding of the court that the accused fraudulently converted the funds to his own use, as alleged in the specification of which he stands convicted.

In this connection it may be added that, although the accused was acquitted on the second specification, since it alleges the embezzlement of property at the same time and place and from the same owner as the first specification, the evidence in support of it has been considered in order to determine whether it tends to show a criminal intent at the time and thereby furnishes some proof of the specific intent necessarily involved in the offense charged by the first, but, in the opinion of the Board of Review, the proof offered in support of the allegations of the second specification fails to establish any such criminal intent.

8. For the reasons stated above, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty and the sentence.

J. M. McCreary, Judge Advocate.  
Charles B. Bresson, Judge Advocate.  
J. B. Guersic, Judge Advocate.



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

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Board of Review  
CM 206090

U N I T E D	S T A T E S	)	THIRD DIVISION
		)	
	v.	)	Trial by G.C.M., convened at
		)	Fort George Wright, Washington,
Privates FRED KOEHLER		)	November 20, 1936. Dishonorable
(6558813) and WAYNE G.		)	discharge and confinement for
SKILLIN (6558817), both		)	six (6) months as to each accused.
Company F, 4th Infantry.		)	Fort George Wright, Washington.

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HOLDING by the BOARD OF REVIEW  
McNEIL, GRESSON and HOOVER, Judge Advocates.

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1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. The accused were jointly tried upon the following charge and specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Fred Koehler, Company F, 4th Infantry, and Private Wayne G. Skillin, Company F, 4th Infantry, acting jointly, and in pursuance of a common intent, did, at Fort George Wright, Washington, on or about October 8, 1936, feloniously take, steal, and carry away gasoline, value about one dollar (\$1.00), the property of Sergeant Ralph J. Leen, Company G, 4th Infantry.

Each accused pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. Each was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for six months. The reviewing authority approved the sentence as to each, designated Fort George Wright, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The competent and substantially undisputed evidence introduced by the prosecution is summarized below as follows:

About 5 or 6 o'clock on the afternoon of October 7, 1936, Private Lawrence M. Hascall, who was then sick in hospital at Fort George Wright, Washington, lent his 1928 Chevrolet coupe automobile to accused Skillin who stated at the time that he "wanted to go to his girl's house for dinner" (R. 9,12,13). Hascall habitually kept in an unlocked back compartment of the car a can and a hose (R. 9,12). Shortly after 12:10 on the morning of October 8, Skillin was observed "downtown" driving a car, and a few minutes later accused Koehler got into the car with him (R. 35,37). About an hour later, a Private 1st Class Walter E. Gay, who had just completed a tour of guard duty and was putting his own car in a garage "in the rear of Company G" (R. 14), observed by means of his spotlight a can and hose in the rear of a parked car belonging to Sergeant Ralph J. Leen, Company G, 4th Infantry. Gasoline was being siphoned out of the gas tank into the can which was running over (R. 14-15). Leen had parked the car at this place on October 7, with approximately 7 or 8 gallons of gasoline in the tank. On the following morning he found that about 5 gallons, of the value of about ninety-five cents, had been removed without his permission or authority. (R. 10,11) After stopping the siphon and looking around the other cars parked in the vicinity, Gay went to the edge of a nearby bank and there discovered Koehler "lying in the grass with his head resting on his arms and his heels down, in the approved prone position". Gay twice ordered Koehler to rise but he did not comply until Gay took out his bayonet and "scraped it along the ground". Gay questioned him about the gasoline, can and hose, but Koehler said he knew nothing about them. Gay took him to the guardhouse, there smelled Koehler's hands and found "they reeked of gasoline fumes". (R. 15) The sergeant of the guard also detected an odor of gasoline about Koehler at this time (R. 22). Koehler appeared to be in a daze and gave some evidence of intoxication (R. 19,22,28). The can and hose used to siphon the gasoline were identified as those habitually kept by Hascall in the car lent to Skillin (R. 11,12,15,20).

After arrival at the guardhouse, Koehler was questioned by the sergeant of the guard and stated that he had no knowledge of the theft of gasoline (R. 20). Very soon thereafter, Koehler reiterated to the officer of the day his ignorance of the transaction, but on being further questioned said that he had been asked by two civilians whom

he had met in town and who had brought him to the post to take the can and hose and "get some gas", but that he had "refused to take the can that was in the back of the car" and "went to the bank and fell asleep until awakened by the guard" (R. 22). The officer of the day, Second Lieutenant George B. O'Connor, 4th Infantry, at this time told Koehler that ("you don't have to tell me this if you don't want to, but it would be better for you to tell the truth. Anything you say will be used against you") (R. 25). On the afternoon of October 8, Koehler asked Lieutenant O'Connor to come to the guardhouse and stated that he wanted to make a complete confession. Lieutenant O'Connor then advised Koehler as before, and in addition told him that "I would do everything I could to help him if he told the truth". (R. 26-27) Thereupon Koehler said that he had, at Skillin's invitation, ridden with Skillin in the car to "F Company parking lot", where, after some discussion about "getting some gas", the two got out the can and hose. Skillin then got back in the car to watch "for sentry number 2. Then I went down to the car and started to siphon out the gasoline. Then I thought I heard someone coming so I went over the edge of the bank and lay down. I drowsed off to sleep, and was awakened by the sentry, who took me to the guard house". He stated that both had been drinking. R. 27; Ex. B) On October 12, after Skillin had been warned that anything he said might be used against him, this statement was repeated in Skillin's presence, and Skillin, in answer to questions, admitted the truth thereof (R. 27; Ex. B).

Neither accused testified. Some defense testimony that on the night in question accused had been drinking and were somewhat under the influence of intoxicants was introduced (R. 32,34,35,38).

4. The defense objected to the introduction of the statements of accused last above noted on the grounds that they amounted to confessions, that the corpus delicti had not been proved and that they were not voluntary because induced by offers by Lieutenant O'Connor to help them. After some discussion with respect to admissibility of the statements as confessions, the paper reciting them (Ex. B) was, in the course of the direct examination of Lieutenant O'Connor, again offered in evidence. At this point the record of trial shows the following:

"Prosecution: The prosecution desires to introduce this evidence----- (is interrupted by the defense).

Defense: The defense would like to ask Lieutenant O'Connor a question, which may have a bearing on the admissibility of the evidence.

Prosecution: The defense will have ample opportunity to cross-examine the witness at the proper time.

President of the court: Court is closed.

The court upon being opened, the president announced: The court rules on the admissibility of the document as admissible evidence, the court wishes to know if the defense has any statement to add to his objection which has already been stated?

Defense: The defense still objects and would like to ask Lieutenant O'Connor as to the means by which he obtained the confession from Private Skillin." (R. 27)

Defense counsel continued with a restatement of his contention that the confessions were not admissible in the absence of more complete proof of the corpus delicti. At the conclusion of the remarks by the defense counsel, the court, through the law member, announced that the paper (Ex. B) would be received in evidence. (R. 28) Specific reference to the defense counsel's expressed desire to cross-examine Lieutenant O'Connor was not made by the court. In the cross-examination of the witness which shortly followed, no questions relating to the circumstances under which the confessions were made were asked.

5. In view of the undertaking by Lieutenant O'Connor, officer of the day, expressed to Koehler, that he would do everything he could to help Koehler if he would tell the truth, the Board of Review is by no means free from doubt as to the voluntariness of Koehler's confession made on the afternoon of October 8, and repeated on October 12. It is well established that a confession in fact induced by hope of benefit, inspired by a person believed by the individual confessing to be competent to effectuate the hope, is involuntary and inadmissible. Par. 114 a, M.C.M.; Bram v. United States, 168 U. S. 532, 542. Koehler was warned that he was not required to make a statement and that whatever he said might be used against him, and his action in asking for the officer of the day in order that he might confess was indicative of spontaneity, but the taint of the inducing promise by the officer remained. There was, it is believed, little force in the contention by the defense that this confession, as well as that by Skillin, was not adequately

supported by other evidence of the corpus delicti. The direct proof that the offense charged was in fact committed by someone was plain and entirely adequate to justify admission by the court of a confession if voluntarily made.

The Board of Review is convinced, however, that, assuming the Koehler confession to have been improperly admitted in evidence, the remaining evidence is of such persuasive character that the error in this particular, if error it was, could not have injuriously affected the substantial rights of this accused within the meaning of the 37th Article of War. The remaining evidence shows that about an hour before the alleged larceny, Koehler was seen in Hascall's car, in which was habitually kept a hose and can. This hose and can were used in siphoning out of Sergeant Leen's car the stolen gasoline. Koehler was found concealed in the immediate proximity of Leen's car at the time the theft was being accomplished and it was established that when arrested his hands and clothing smelled strongly of the odor of gasoline. These circumstances, unexplained as they were by any evidence offered by the defense, appear to exclude any reasonable hypothesis of Koehler's innocence, and in themselves, without regard to the confession, compel a conclusion of guilt.

6. With respect to accused Skillin, it does not affirmatively appear that there was held out to him any inducement to confess, as in the case of Koehler, and he was warned that whatever he said might be used against him, though not specifically warned as to his right to remain silent. But the evidence, to say the least, did not exclude the possibility that inducements similar to those offered Koehler were in fact held out to Skillin, and the defense, though it urged its desire to do so, was denied the opportunity fully to develop the circumstances under which the Skillin confession was made. The court, in announcing its decision to admit the confessions in evidence, foreclosed the defense from any cross-examination upon the subject matter in question of the witness whose knowledge of the circumstances under which the confession was made was most complete. Its reception of the confession, without any intimation that the admission thereof was tentative or subject to further examination or the introduction of other pertinent evidence, in the face of the objections by the defense, was of such finality that the defense had no apparent alternative other than to assume that further insistence on its right to cross-examine would be

futile. The action of the court in denying to the defense the elementary and vital right of cross-examination and the right otherwise to seek to develop the involuntary nature of the confession, was manifest error. Alford v. United States, 282 U. S. 687, 694. In view of it, the Board cannot escape the conclusion that the admission in evidence of Skillin's confession was erroneous and highly prejudicial.

Without this confession, which must be excluded from consideration, the only evidence in support of the findings of guilty in Skillin's case is that he borrowed Hascall's automobile in which the can and hose used in stealing the gasoline were habitually kept, and was seen in it with Koehler about an hour before the larceny. There is no evidence of preconcert between the two nor is there any direct evidence placing Skillin or the borrowed car near the scene of the crime at the time of its commission. He was last seen "downtown", and so far as the evidence of record shows he may have remained there or may have gone to his barracks while Koehler, for purposes of his own, proceeded to commit the larceny. In the opinion of the Board, this evidence is far too tenuous and quite insufficient to justify a conclusion that the court would have reached findings of guilty had the erroneously received confession not been before it, and it follows that the errors in curtailing the cross-examination and admitting the confession were plainly injurious to the substantial rights of this accused within the intent of the 37th Article of War.

7. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the findings of guilty as to accused Koehler, except the finding that he acted jointly and in pursuance of a common intent with accused Skillin, and legally sufficient to support the sentence as to accused Koehler; but not legally sufficient to support the findings of guilty and the sentence as to accused Skillin.

[Signature], Judge Advocate.  
[Signature], Judge Advocate.  
[Signature], Judge Advocate.

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

(255)

Board of Review  
CM 206242

MAR 12 1937

U N I T E D   S T A T E S   )

HAWAIIAN DIVISION

v.                                 )

)                                 Trial by G.C.M., convened at  
)                                 Schofield Barracks, T. H.,  
)                                 November 27, 1936. Dishonorable  
)                                 discharge and confinement for  
)                                 five (5) years. Penitentiary.

Private TROY SLONE  
(6888138), Company L,  
19th Infantry.                 )

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Troy Slone, Private, Company L, 19th Infantry, did, at Schofield Barracks, T. H., on or about October 31, 1936, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by mouth with Willard Burman, Private, Company I, 19th Infantry.

Specification 2: In that Troy Slone, Private, Company L, 19th Infantry, did, at Schofield Barracks, T. H., on or about October 31, 1936, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by rectum with Willard Burman, Private, Company I, 19th Infantry.

He pleaded not guilty to the charge and specifications, and was found not guilty of Specification 2 but guilty of Specification 1 and the Charge. No evidence of previous convictions was introduced. He was

sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence of the prosecution is substantially as follows:

Sergeant Peter Intreiri, Headquarters and Military Police Company, Schofield Barracks, Hawaii, testified that on the evening of October 31, 1936, together with Privates Pickwick and Wood, he was on motor patrol (R. 7). As he "pulled up" the car at the Davis Field dugout, Private Willard Burman jumped out of the dugout; inside was accused who "was buttoning up his underwear and buttoning up his trousers"; when he first saw accused he was sitting in the dugout with his pants and underwear down about half way between his thighs and knees. Accused appeared to have been drinking but he was sober. (R. 8,9) He flashed his flashlight on Burman from about a foot away and saw "a creamy substance on the left side of his chin that appeared to be semen" (R. 8). There were semen stains on the bench about six inches to the right of where accused was sitting. Accused said nothing and immediately obeyed witness' order to get in the Ford car. (R. 9) There was an odor of vomit in the dugout, and "there was a whole lot (of it), all in the same place", of recent origin; accused had it on his lips (R. 10-11). The Davis Field dugout is about half a mile from the 19th Infantry Barracks and more than a quarter of a mile from the Post Exchange beer garden. If a man were sick at the beer garden, it would be closer to go to the 19th or 27th Infantry barracks rather than to the dugout. (R. 11) Witness saw no sexual intercourse of any nature between accused and anyone else (R. 13).

Privates First Class Walter H. Pickwick (R. 13-18) and Richard H. Wood (R. 18-21), both of Headquarters and Military Police Company, Schofield Barracks, who accompanied Sergeant Intreiri in the car and to the dugout, corroborated his testimony. Both stated that they saw Burman jump out of the dugout, that accused was in the dugout buttoning up his underwear, that he was sober and obeyed without protest the order to get into the car, that Burman had a white creamy substance on his chin which appeared to be semen, and that there was a similar substance on the bench near accused.

First Lieutenant Roy L. Leinster, Headquarters and Military Police Company, Schofield Barracks, testified as to circumstances under which a written statement signed by accused was made. Witness questioned accused for about two hours immediately after he was arrested in the officers' room at the military police company; he "considered it in the line of duty to obtain such things". Accused was "perfectly sober". He warned accused that he was conducting an official investigation and "that he was not required to answer, but that any question he might answer had to be the truth". (R. 22-24,29) Witness told accused that "it would be better if he told the truth" but that was merely an effort on his part to obtain the truth. Asked whether he had told accused that the object was to convict someone else and not himself, witness answered, "Well, I made no promises and I did not offer him anything". (R. 25-26) Over the objection of accused, the statement was admitted as Exhibit 1 (R. 23,25,27) In the so-called confession, accused stated that about 5:45 p.m. on October 31, 1936, Burman asked him to go to a party, that arriving there he bought some wine for a dollar and drank it; then they went to the Post Exchange beer garden where he drank five or six beers but Burman drank no beer with him. The statement then continues, in pertinent part:

"\* \* \* On the way to the Beer Garden, Private Burman tried to 'feel me up'. I tried to get away from him but he followed me into the beer garden. \* \* \* While I was drinking my last beer Private Burman came from around the counter and started talking to me. He said that I was sick and that he had better take me where I could get over it.

"We left the beer garden and went some place. When I arrived at this place I remember vomiting and after doing so, I remember having to button the top button of my trousers and buckle my belt.

"While I was buttoning my trousers, the Military Police appeared. \* \* \* Private Burman also told me to 'shut up', that the M.P.'s had nothing on him.

"When I sat down in the car I noticed that my rectum was sore. Although I do not remember all the details of the occurrence, I am quite positive that Private Burman had intercourse with me (just before the arrival of the M. P.) by way of the rectum. I believe that Private Burman is a pervert, because he has tried to 'feel me up' as if I were a woman, on two different occasions.

"Also, about seven weeks ago, on the first Saturday night that I was here, Private Burman had intercourse with me by way of the rectum, and also sucked me off. This occurred on the 19th Infantry drill field."

The last paragraph above was read to the court but the law member announced that it "will not be considered as evidence by the court" (R. 29).

4. For the defense, Private James I. Polly, Company K, 35th Infantry, testified that on Halloween night, October 31, 1936, he saw accused in the beer garden; he was "staggering around" and appeared to be "a well intoxicated man". On cross-examination, he was not positive that it was on Halloween night that he saw accused. He has known accused for three years and they were friends in civil life at Kona, Kentucky. (R. 32-34)

Accused did not testify or make any statement to the court.

5. Accused was charged with sodomy by mouth (Specification 1) and by rectum (Specification 2), both with Private Willard Burman at Schofield Barracks, Hawaii, on October 31, 1936. The court acquitted him of the latter offense and found him guilty of the former. There is no direct proof of penetration by mouth, an essential element of the offense of which he was found guilty. It is a settled rule of law that penetration may be proved by circumstantial evidence, but the testimony of record shows only that Burman and accused were together in a secluded place under suspicious circumstances and that something resembling semen was seen on Burman's chin and a similar substance on the bench near accused. These facts do not, in the opinion of the Board of Review, constitute a reasonable basis for an inference that the mouth of accused was penetrated, that is, that sodomy by mouth was accomplished. The so-called confession indicates that Burman probably had the intent to have unlawful copulation with accused but whether the offense as found was accomplished is mere speculation. Indeed, the confession, rendering strong support of a theory of accused's guilt of the offense of which he was found not guilty, contains nothing of substance to indicate commission of the offense of which he was convicted.

The following from the opinion of the Supreme Court of Appeals of Virginia in Hudson v. Commonwealth, 127 S. W. 89, is pertinent:

"The evidence relied on need not be fully recited. The two men had been drinking heavily together, were

found in the same bed so stupefied that water had to be thrown on both of them before either regained consciousness. There is no direct evidence that the specific crime charged, copulation per os, was committed. The conviction rests solely upon the fact that when they were with difficulty aroused, the head of the accused was resting upon the stomach of Shaffer, and that he held the penis of Shaffer in his hand. That this creates a strong suspicion is unquestionably true, but this is all of the incriminating evidence, for the other circumstances related do not tend to show guilt or in any wise strengthen this incriminating evidence. There is nothing else to discredit the denial of the accused, supported as it is by proof of his good reputation.

"Under this evidence the court erred in giving the instruction and in sustaining the conviction which so manifestly rests only upon suspicion. Evidence of penetration is necessary to establish this revolting crime, and, while this may be and generally can only be shown by circumstantial evidence, such evidence must be convincing to a moral certainty and sufficient to exclude every reasonable doubt.

"The judgment is therefore reversed and the case remanded, for a new trial, if the commonwealth elects to continue the prosecution."

In the view we take of this case, it becomes unnecessary to decide whether the statement of the accused was properly admissible, as, even with it, the evidence is insufficient to sustain the conviction.

6. For the foregoing reasons, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty and the sentence.

 Judge Advocate.  
 Judge Advocate.  
 Judge Advocate.



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

(261)

Board of Review  
CM 206280

FEB 9 1937

U N I T E D     S T A T E S     )

THIRD DIVISION

v.     )

Private TRUMAN F. TAYLOR     )  
(6559900), Company H, 7th     )  
Infantry, Private ERNEST W.     )  
LEE (6385918), Headquarters     )  
Company, 7th Infantry, and     )  
Private ROBERT MORGAN (6550260),     )  
Company D, 7th Infantry.     )

Trial by G.C.M., convened at  
Vancouver Barracks, Washington,  
December 29, 1936. As to each:  
Dishonorable discharge and con-  
finement for six (6) months.  
Vancouver Barracks, Washington.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. The accused were jointly tried upon the following charge and specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Robert Morgan, Company D, 7th Infantry, Private Truman F. Taylor, Company H, 7th Infantry, and Private Ernest W. Lee, Headquarters Company, 7th Infantry, acting jointly and in pursuance of a common intent, did, at Portland, Oregon, on or about November 2, 1936, by force and violence and by putting her in fear feloniously attempt to take, steal, and carry away from the person of Nellie Strait, \$20.00, the property of the said Nellie Strait.

Each accused pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced.

Each was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for six months. The reviewing authority approved the sentence as to each, designated Vancouver Barracks, Washington, as the place of confinement, and forwarded the record of trial for action under Article of war 50<sup>1</sup>/<sub>2</sub>.

3. The evidence shows that during the evening of November 2, 1936, the three accused went together to a rooming house in Portland, Oregon, and there entered a room with the proprietress, one Nellie Strait (R. 8,14). Accused Taylor asked the woman if she knew anything about "racketeering", told her that she was in danger of which she would learn the meaning if she did not "pay them twenty dollars a week", stated that "they" would give her protection such as the police department could give and "also wanted me to give them the money". Taylor or accused Morgan told her that if she did not give them the money she could no longer operate her place of business and "wouldn't be walking around any longer". (R. 8,10,13-15) One of these two accused also said that "a pineapple could be easily thrown into the place" (R. 22). Taylor and Morgan both took part in the statements, but accused Lee said nothing (R. 8,13,14). The statements were made "in a very demanding tone of voice" (R. 14). The three men were in civilian clothes (R. 9). One of them "stood in front" of the woman "and talked. One stood by the door, and the other one (Lee) sat on the davenport" (R. 13). The woman testified that "one had his hand in his pocket. That was the only reason I would have to believe they were armed" (R. 22). She also testified that "the others agreed" with what Taylor said but that Lee said nothing (R. 8). After the statements and demands as described had been made, the woman, somewhat in fear, stated that she did not have any money and "they" said that one of them would return later for it (R. 9). On the following night, Morgan returned to the rooming house and was then arrested by the civil police (R. 9,15-17). With Morgan on this occasion was a man named Vance who did not accompany accused the night before (R. 12,17). At about the same time, Taylor was arrested while walking along a street somewhat less than a block from the rooming house (R. 17,19). After their arrests and after they had been warned that whatever they said might be used against them (R. 23), Taylor and Morgan, apparently voluntarily, made separate statements in which they admitted having planned and attempted to obtain money from rooming houses, and having demanded money from Nellie Strait for "protection" (R. 25,26). Morgan stated that they intended only to "bluff" the proprietors of the houses (R. 25), and Taylor stated that they told Nellie Strait that "we would

take action if we were not paid. \* \* \* We just wanted to scare her into giving us the money" (R. 26).

Neither accused testified but the defense introduced evidence of statements made by Taylor and Morgan to the officer who investigated the charges, to the effect that they had not threatened the woman involved (R. 28; Exs. 1,2).

4. The evidence sufficiently shows that at the time and place alleged accused Morgan and Taylor, acting together with a common purpose, by means of threats of bodily injury, by some display of force, and by putting her in fear, attempted fraudulently to take and carry away from the person of the woman, Nellie Strait, money in the amount of \$20.00, as charged. Both these accused assumed attitudes during the transaction designed to impress the victim with an intention and ability to support their demands by the use of force and violence and both participated in the threats of bodily injury.

As to accused Lee, the only proof of participation by him in the attempted robbery lies in his arrival with the other accused and his presence at the scene. He took no part in the conversation or threats and was seated in the room in a position apparently free from any suggestion of threatened force or violence. In so far as appears from the evidence, Lee may have gone to the scene of the offense in ignorance of the purpose of his companions. He remained in the room during the commission of the attempt but it is well established that the mere presence of a person at the time and place of the commission of an offense, without other proof of aiding or abetting the same, is not sufficient basis for an inference of participation therein. CM 205564, Rose and Gilbert, and cases cited; Bopp v. Aldrich, sec. 1310, Dig. Ops. JAG 1912-30. In the opinion of the Board of Review, the evidence is not legally sufficient to support the findings of guilty as to accused Lee.

5. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the findings of guilty as to accused Morgan and Taylor, except the finding that they acted jointly and in pursuance of a common intent with accused Lee, and legally sufficient to support the sentences as to accused Morgan and Taylor; but not legally sufficient to support the findings of guilty and the sentence as to accused Lee.

\_\_\_\_\_, Judge Advocate.  
Chas. L. Larson, Judge Advocate.  
Arthur P. Hoyle, Judge Advocate.



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

(265)

Board of Review  
CM 206323

U N I T E D   S T A T E S	)	FIFTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Hayes, Columbus, Ohio,
Second Lieutenant FRANCIS	)	December 11, 1936. Dismissal
G. SCHNEIDER (O-308396),	)	and total forfeitures.
Infantry Reserve.	)	

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OPINION of the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, 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 specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Francis G. Schneider, Second Lieutenant, Infantry Reserve, while on active duty, being at the time Camp Exchange Officer, Company 3515, CCC, Camp D-2, Defiance, Ohio, and as such custodian of the moneys of the camp exchange of said company, did, at or near Defiance, Ohio, between September 30, 1936, and November 2, 1936, both dates inclusive, feloniously embezzle by fraudulently converting to his own use moneys in the sum of one hundred and twenty-three dollars and eighty-six cents (\$123.86), property of the said camp exchange, which moneys came into his possession by virtue of his said office.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and

allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence but remitted the confinement imposed, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence may be summarized as follows:

Accused, a Second Lieutenant, Infantry Reserve, while on a tour of active duty beginning April 17, 1936, and extending to December 16, 1936 (par. 4, S.O. 88, Hqrs. 5th Corps Area, April 14, 1936, and par. 8, S.O. 226, Hqrs. 5th Corps Area, Sept. 23, 1936), was assigned as Camp Exchange officer, Company 3515, Civilian Conservation Corps, Defiance, Ohio, and served in that capacity from May 11, 1936, to November 8, 1936 (R. 12,13; Exs. A-D). During the month of October 1936, as such Exchange officer, he received from day to day, on behalf of the Exchange, cash aggregating \$602.66, being proceeds of cash sales in the amount of \$288.71 (R. 30; Ex. G), proceeds of redemptions by collection sheet and individual cash payments of notes signed by enrollees in the purchase of "canteen checks" in the amount of \$300 (R. 34; Ex. G), and proceeds of a merchant's refund in the amount of \$13.95 (R. 41; Ex. G). A Post Exchange Fund Book, kept and signed by accused, shows for the period cash receipts of \$592.66, and a cash disbursement to the Exchange steward of \$10, making the same aggregate \$602.66 (Ex. F). At the end of September 1936, accused had in his possession and in bank, for the account of the Exchange, \$500.87 (R. 38; Exs. E,F), which sum added to cash receipts for October made \$1103.53 in cash, for which he became responsible during the latter month. He had on deposit at the end of September, and deposited in the bank to the credit of the Exchange during October, sums aggregating \$470.95. (R. 45,52; Exs. E,H,I) He made, or authorized, during October proper cash disbursements amounting to \$22.80 (R. 31,35; Ex. G), and on October 31, through error, deposited to the credit of the Company Fund, \$217.75, which should have been and later was deposited to the credit of the Exchange (R. 43-45; Ex. H). He was responsible then, on the last day of October 1936, for \$392.03, that is, for \$1103.53 less authorized deposits and disbursements of \$711.50.

Late in the day of October 31, the company commander, First Lieutenant Charles E. Fulton, Infantry Reserve, commenced a check of the Exchange records and in the course of his audit inquired of accused as to the reason for what appeared to him to be an abnormally small

balance in the bank. Accused replied that he had deposited \$250 that afternoon to be credited to the Exchange account the following day. Lieutenant Fulton then consulted the bank and found that the item of \$217.75, above mentioned, should have been deposited to the credit of the Exchange. He then returned to camp and requested accused to turn over his cash on hand for deposit. (R. 42-46) Accused produced \$263.17 in cash and a receipt from the Exchange steward for \$5 in change, thus accounting for only \$268.17 of the sum \$392.03 for which he was responsible, and thus leaving a shortage of \$123.86 (R. 46). When accused was asked about the shortage, he acted "a little nervous" and said he could not understand why the fund was short (R. 47). The deposit book of the Exchange bank account contained under the dates October 5 and 13, notations of two deposits aggregating \$217.75 (Ex. H), but these deposits were not in fact made on these days and the notations on the deposit book were not made by the bank (R. 52). No deposit of \$250, as stated by accused, was made (R. 53; Ex. H).

In the course of investigation of the shortage by a board of officers, accused, after having been advised of his right to remain silent and that whatever he said might be used against him, stated that he had known of the shortage before it was discovered by the company commander, that he was unable to explain the shortage, that he had not been "robbed", that he had not appropriated the monies to his own use, and that he expected "to make it up" (R. 60,61,65). With respect to the deposit entries of October 5 and 13, he stated that he knew they were false (R. 64,66).

4. Accused did not testify or make an unsworn statement. The defense did not introduce any evidence. The defense counsel in his argument contended that the prosecution had failed to prove fraudulent conversion by accused of the monies involved.

5. The evidence, including the admissions of accused, clearly establishes the receipt by accused in a fiduciary official capacity of monies in the amount of \$123.86, the property of the Camp Exchange, as charged, for which he did not account when demand therefor was made. The circumstances under which the monies were received, the failure of accused to account therefor, his concealment of the shortage, and his statements that he intended to make good the loss and knew that the erroneous entries in the deposit book tending to conceal the shortage

were false, left no reasonable alternative to the court other than to conclude that, as charged, the monies were fraudulently converted by accused to his own use. Embezzlement in violation of the 93d Article of War is established beyond reasonable doubt.

6. Accused, was, with his consent, ordered to tours of active duty, the last of which expired by its terms on December 16, 1936. The proceedings by the court were completed prior to the last mentioned date. Jurisdiction of the court-martial having attached while the individual was on active duty, and therefore subject to military law, it continued for all purposes of trial, sentence and execution of the sentence. CM 203869, Lienhard, and cases cited.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority, and warrants confirmation thereof. Dismissal is authorized upon conviction of violation of the 93d Article of War.

E. C. Miller, Judge Advocate.  
Charles Johnson, Judge Advocate.  
Robert W. Hoover, Judge Advocate.

To The Judge Advocate General.

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

(269)

Board of Review  
CM 206350

25

U N I T E D	S T A T E S	)	THIRD DIVISION
		)	
	v.	)	Trial by G.C.M., convened at
		)	Vancouver Barracks, Washington,
Privates KENNETH E. McADAMS		)	January 9, 1937. As to each:
(6560214) and FRANKLIN S.		)	Dishonorable discharge and con-
TEDDER (6558102), both of		)	finement for six (6) months.
Company I, 7th Infantry.		)	Vancouver Barracks, Washington.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and found to be legally sufficient to support the sentence as to each accused.

2. The evidence sufficiently shows that at the time and place alleged accused, acting jointly and in pursuance of a common intent, wrongfully took and carried away the automobile described, of ownership as alleged, and of the approximate value found by the court. With respect to proof of the remaining element of the offense of larceny as charged, i.e., intent permanently to deprive the owner of his property in the automobile, the evidence shows only that accused, or one of them, at about 2:40 a.m., took the car from the street in front of the post office in Portland, Oregon, that both drove rapidly in it in the direction of their nearby station, Vancouver Barracks, Washington, until stopped by the civil police a few minutes later, and that, when stopped, one of accused sprang from the car with an evident purpose of escape. (R. 23,24,26,27,33) Each accused made an unsworn statement that they intended to leave the car by a fire hydrant in Vancouver where it would be found and returned to the owner. Both stated that accused Tedder got in the car shortly after McAdams took it. (R. 43,44) These facts sufficiently show an intent by accused wrongfully to use the car for a period of short duration, but in the opinion of the Board of Review are not such as to form an adequate basis of a reasonable inference of intent permanently to deprive the owner of his

property. CM 193315, Rosborough; CM 194359, Sadler, par. 1488 a, Supp. V, Dig. Ops. JAG, 1912-30; CM 197795, Hathaway; CM 205811, Fagan. The offense proved, the wrongful taking and carrying away of the automobile by accused, without the consent of the owner, violative of the 96th Article of war, was less than and included in the offense charged. CM 193315, Rosborough, and CM 194359, Sadler, above cited.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involves findings of guilty as to each accused of wrongfully taking and carrying away the automobile described, at the time and place alleged, without the consent of the owner, in violation of the 96th Article of war, and legally sufficient to support the sentence as to each accused.

J. M. Miller, Judge Advocate.  
Charles J. Messon, Judge Advocate.  
Robert W. Harvey, Judge Advocate.

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

(271)

Board of Review  
CM 206522

U N I T E D	S T A T E S	)	SECOND DIVISION
		)	
	v.	)	Trial by G.C.M., convened at
		)	Fort Sam Houston, Texas,
Private HARRY P. YOUNG		)	February 1, 1937. Dishonorable
(6351814), Detachment		)	discharge and confinement for
Quartermaster Corps (DS),		)	six (6) months. Fort Sam
Fort Sam Houston, Texas.		)	Houston, Texas.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Harry P. Young, Detachment Quartermaster Corps (DS), did, at Camp Bullis, Texas, on or about November 26, 1936, feloniously convert to his own use and benefit 52 bars Issue Soap, G.I., value about \$2.08, 19 boxes Nectar Brand Black Pepper, value about \$.76, 9 boxes McCormick's Bee Brand Ginger, value about \$.90, 4 boxes Astor Brand Pure Cinnamon, value about \$.16, 4 cans General Jackson Brand Pumpkin, value about \$.36, 3 cans Stokely's Finest Cranberry Sauce, value about \$.51, and 2 cans Pantry Brand Pimentos (Sweet Peppers), value about \$.12, total value about \$4.89, the property of the Officers' Mess.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement

at hard labor for six months. The reviewing authority approved the sentence, designated Fort Sam Houston, Texas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The material evidence shows that about 10:30 p.m., November 26, 1936, accused and another soldier, a Corporal Baumann, went in the latter's automobile to a point in the immediate vicinity and in front of the officers' club building in Camp Bullis, Texas, and there placed in the car four small boxes of "groceries", which were by the side of the road between the road and the building and some sixty or seventy feet from the building (R. 8,9,12,13). Accused, when asked by Baumann what he was going to do with the groceries, said that he was going to "get rid of them". The two, after making an unsuccessful attempt to sell the goods at a filling station, went "about midnight on the night of November 26th, Thanksgiving night" to the Buckhorn Cafe (R. 9,22) in San Antonio, Texas, and there accused sold to the proprietress the contents of the boxes, some soap resembling government issue soap, some canned goods including pumpkin, pimentos, and cranberry sauce, and some spices including pepper. (R. 9,10,18-21) The proprietress paid to accused for the goods about \$1.50 or \$2.00 in money in addition to crediting him with the price of some beer or coffee consumed at the time by the two soldiers (R. 24). When the sale was first broached, accused said, in response to questions by the proprietress, that the soap was not government property although "maybe it had been" and that "they had broken up a mess (or officers' mess) and had divided this stuff among the boys that worked in the mess, and that he was one of them and was at liberty to do what he wanted to with it" (R. 18,23). About December 10, it was discovered that the officers' mess building at Camp Bullis and a large ice box therein (R. 29,30) which had not been in use since October 26,--the 69th Coast Artillery occupied the building from October 21 to the latter date (R. 43,44; Ex. B), had been unlocked (R. 31) and that supplies left in the ice box were disarranged and scattered about (R. 35,40). The supplies had originally included pumpkin, cranberries and similar goods (R. 46,47). The ice box was locked on the day the Coast Artillery unit moved in (Ex. B). On December 10, the military police received from the proprietress of the cafe to whom accused had sold merchandise, 52 bars of soap, 19 boxes Nectar Brand black pepper, 9 boxes of McCormick's Bee Brand ginger, 4 boxes of Astor Brand Pure Cinnamon, 2 cans cranberry sauce, 2 cans General Jackson Brand pumpkin, and one can of Pantry Brand pimentos (R. 26,27). These articles were turned over to Captain Knight, post commander, who prepared a list of them at

the time (R. 31). On December 21, an inventory of the mess was made, which disclosed a shortage of supplies of the value of about \$124.70,-- about \$150 was the value of the inventory on October 5 and on the "day the 69 CAC moved in", \$25.30 was the value on December 21. The officer who made this inventory testified by deposition that he had left in the building supplies similar to those described on "a list of the articles turned over to Capt. Knight" (Ex. B). The contents of such a list were not proved except as it might be implied that the list referred to was that prepared by the post commander when the articles seized by the military police were turned over to him (R. 22,31; Ex. A).

4. In the course of examination by the court of a Sergeant Baird, the witness was permitted to testify that a Mr. Battersby had reported to witness that accused and Corporal Baumann had offered to sell Battersby a quantity of groceries and that "these two boys had told him that they had cleaned out the Officers' Mess at Camp Bullis" (R. 38). The defense objected to this testimony and asked that it be stricken as hearsay, but the objection was overruled by the law member (R. 39).

5. The evidence sufficiently shows that accused, at about the time and place alleged, applied to his own use and benefit the articles described in the specification, this by his sale of the goods with the assertion that they had been given to him upon the closing of a mess or officers' mess.

The proof in support of the allegations that the articles so applied were the property of the officers' mess at Camp Bullis and that the application thereof by accused to his own use amounted to wrongful (charged as felonious) conversion consists of the admission by accused that the goods came from a mess or officers' mess and the circumstances that the articles were taken by accused from the vicinity of the officers' mess building at Camp Bullis, that the physical condition of the building and ice box some two weeks later indicated that it had been wrongfully entered within the preceding six weeks, that a shortage of some kind was discovered still later, and that articles similar in some respects to those sold by accused had been in the mess building. There is no proof that articles of the kind applied by accused to his own use were missing from the mess or that the shortage found was of goods of this type. There is no satisfactory proof as to whether the ice box was unlocked and the contents disarranged before vacation of the building by the

Coast Artillery unit, which vacated it on October 26. The admission by accused to the cafe proprietress did not include a statement that the mess from which he obtained the goods was the officers' mess at Camp Bullis. The proof, circumstantial and slender though it is, might permit an inference of ownership and wrongful conversion as alleged. It by no means compels that inference. In considering the sufficiency of the circumstantial evidence to constitute a basis of an inference of guilt, the following is pertinent:

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions \* \* \*. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens." Buntain v. State, 15 Tex. App. 490.

See also CM 197408, McCrimon, and cases cited; and CM 186632, Graulau.

Such being the competent evidence of guilt, it becomes necessary to determine whether the manifest error of the court in admitting in evidence over the protest of the defense the hearsay statement of Sergeant Baird purporting to relate an attempt by accused to dispose of groceries, coupled with his declaration that he had, together with Baumann, "cleaned out the Officers' Mess at Camp Bullis", was of prejudicial effect. The Board of Review cannot escape the conclusion that it was highly prejudicial. Containing, as it did, the elements of a confession of wrongful conversion of groceries belonging to the officers' mess at Camp Bullis and thus supplying most convincing and the only definite evidence of the alleged ownership of the articles in question, as well as of fraud, it is not to be doubted that it bore substantial weight with the court in consideration of the findings. It cannot in fairness be said that findings of guilty could, with reasonable certainty, have been expected had this hearsay testimony been excluded from consideration. It must be concluded that the

error noted adversely affected the substantial rights of accused within the meaning of the 37th Article of War.

6. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty and the sentence.

*J. C. Miller*, Judge Advocate.  
*Edgar E. Bresson*, Judge Advocate.  
*Michael B. ...*, Judge Advocate.



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

(277)

Board of Review  
CM 206640

MAR 31 1937

U N I T E D   S T A T E S	)	UNITED STATES MILITARY ACADEMY
	)	
v.	)	Trial by G.C.M., convened
	)	at West Point, New York,
Cadet RAYMOND FOSTER MAHOOD,	)	February 15, 1937.
Fourth Class, United States	)	Dismissal.
Corps of Cadets.	)	

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OPINION of the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the cadet named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Cadet Raymond Foster Mahood, Fourth Class, United States Corps of Cadets, being engaged at a blackboard in a written recitation in French at the United States Military Academy at West Point, New York, and having written on the blackboard a translation to French of an exercise consisting of a sentence in English furnished by his instructor, which translation was required to be made by him, the said Cadet Mahood, without the aid of any person or writing, did, on or about the 15th day of December, 1936, with intent to deceive his instructor, 1st Lieutenant Charles B. Duff, Coast Artillery Corps, U. S. Army, and by such deception to obtain a higher mark than he otherwise would obtain, wrongfully compare his own translation with a translation made and written on the blackboard by Cadet Jack A. Drown, Fourth Class, United States Corps of Cadets, and did wrongfully change

his own expressions by inserting the words "ce qu'il expliquais" and "a appele le courage", thereby causing his own expressions to conform to the translation made by the said Cadet Drown, except for the final letter of the word "expliquais".

Specification 2: \* \* \* did, on or about the 15th day of December, 1936, with intent to deceive his instructor, 1st Lieutenant Charles B. Duff, Coast Artillery Corps, U. S. Army, and by such deception to obtain a higher mark than he otherwise would obtain, wrongfully compare his own translation with a translation made and written on the blackboard by Cadet Jack A. Drown, Fourth Class, United States Corps of Cadets, and did wrongfully change his own expression in said sentence by inserting the words "un pli aupres de", thereby causing his own expression to conform to the translation made by the said Cadet Drown, except for the word "aupres".

Specification 3: \* \* \* did, on or about the 17th day of December, 1936, with intent to deceive his instructor, 1st Lieutenant Charles B. Duff, Coast Artillery Corps, U. S. Army, and by such deception to obtain a higher mark than he otherwise would obtain, wrongfully compare his own transcription with a transcription made and written on the blackboard by Cadet Jack A. Drown, Fourth Class, United States Corps of Cadets, and did wrongfully change his own transcription from "idio" to read "i d j o", thereby causing his own transcription to conform to the transcription made by the said Cadet Drown.

Specification 4: \* \* \* did, on or about the 5th day of January, 1937, with intent to deceive his instructor, 1st Lieutenant Thomas W. Hammond, Jr., Infantry, U. S. Army, and by such deception to obtain a higher mark than he otherwise would obtain, wrongfully compare his own translation with a translation made and written on the blackboard by Cadet Robert L. Colligan, Jr., Fourth Class, United States Corps of Cadets, and did wrongfully change his own expressions by inserting the words "ici" and "ma valise", thereby causing his own expressions to conform to the translation made by the said Cadet Colligan.

Specification 5: (Finding of Not Guilty)

Specification 6: \* \* \* did, on or about the 5th day of January, 1937, with intent to deceive his instructor, 1st Lieutenant Thomas W. Hammond, Jr., Infantry, U. S. Army, and by such deception to obtain a higher mark than he otherwise would obtain, wrongfully compare his own translation with a translation made and written on the blackboard by Cadet Robert L. Colligan, Jr., Fourth Class, United States Corps of Cadets, and did wrongfully change his own expression in said sentence from "que elle" to read "qu'elle", thereby causing his own expression to conform to the translation made by the said Cadet Colligan.

Specification 7: \* \* \* did, on or about the 13th day of January, 1937, with intent to deceive his instructor, 1st Lieutenant Thomas W. Hammond, Jr., Infantry, U. S. Army, and by such deception to obtain a higher mark than he otherwise would obtain, wrongfully compare his own translation with a translation made and written on the blackboard by Cadet Robert L. Colligan, Jr., Fourth Class, United States Corps of Cadets, and did wrongfully change his own expression "C'est avocat" to read "Il est avocat" and did wrongfully change his own expression "c'est moi qui ai" to read "c'est moi qui suis", thereby causing his own expressions to conform to the translation made by the said Cadet Colligan.

He pleaded not guilty to the Charge and specifications, and was found not guilty of Specification 5, but guilty of the remaining specifications and of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

On December 15, 1936 (Specifications 1 and 2), accused was a member of a first section (R. 13) of Fourth Class French at the United States Military Academy. With other cadets present, he was sent to the blackboard to prepare and write on the board, without aid from any other

person or writing, translations into French of certain sentences in English borne on a typed or mimeographed sheet given him (R. 9,10). The recitation involved in the translation was to be graded (R. 9). The cadet at the second board on the left of accused, Cadet Jack A. Drown, had identical sentences to translate (R. 10,11; Ex. A). During the course of the recitation, the instructor, First Lieutenant Charles B. Duff, Coast Artillery Corps, who had been instructed particularly to observe the actions of accused, and who was sitting at his desk which directly faced the blackboards at a distance of somewhat over twenty feet and to which accused's back was turned (R. 13,14,17,18), observed accused turn his head to the left (R. 14) in the direction of Cadet Drown's board (R. 11) from a position from which the board could be seen (R. 15). After apparently looking at the board (R. 14), which was on the same wall of the room as accused's board (R. 10; Ex. A), for about thirty seconds (R. 15), he changed his translation of the expression, "what he was going to explain", to the French words, "ce qu'il expliquais", which latter words were written on Cadet Drown's board except that Cadet Drown had the last quoted word written "expliquait" (R. 11). The translation in the form to which accused finally changed it was correct. Cadet Drown's use of the letter "t" of the last word of the translation was incorrect (R. 14). The instructor testified that he did not "recall exactly what Cadet Mahood had written for the translation" before he changed it (R. 11). The English expression next following that above noted was "summon the courage". Accused did not at first write on the board his translation, but after turning his head and apparently looking at Cadet Drown's board, as before, wrote "a appelle le courage", the translation exactly as written on Cadet Drown's board. (R. 11,14,15) The translation was correct (R. 14; Ex. A). (Specification 1) Later in this recitation there was a translation of an English expression, "a depression near". Again, accused failed to write a translation until, as on the previous two occasions, he had turned his head to the left as if looking at Cadet Drown's board, whereupon he wrote on his board, "un pli auprès de", the translation as written on Cadet Drown's board except that Cadet Drown had written the third French word "après". (R. 11,14,15) The translation as written by accused was the correct one (R. 14). Accused's work in this section during December 1936 was about the average of that of the other members of the section (R. 13). (Specification 2)

On December 17, 1936 (Specification 3), accused was sent to the blackboard for a similar graded and unaided recitation in the same section and subject as described above, the recitation consisting, in part, of writing phonetic symbols of the French word "idiot". He and Cadet Drown

stood at the same blackboards. (R. 10-12,17; Exs. A,B) The instructor, sitting at his desk (R. 13), and an associate professor of Modern Languages, Major William A. Jenna, Infantry, who was in attendance for the purpose of watching accused (R. 16), standing near the instructor's desk (R. 17), observed that accused wrote as the symbols the letters "i d i o" (R. 12,17), and, after writing symbols for two other words, turned his head to the left as if looking at Cadet Drown's board (R. 12, 14,17) and changed the third letter of the symbol noted to "j", thus making it "i d j o" (R. 12,17; Exs. A,B). The latter symbol, as changed, was correct and was the symbol as it appeared on Cadet Drown's board (R. 12). The instructor testified that accused turned his head towards the left from a position from which Cadet Drown's board could be seen and remained in that position about thirty seconds (R. 14,15). Major Jenna testified that accused took a step backward, looked to the left for "two or three seconds perhaps", then stepped up to the board, lifted his hand, "made a few vague motions and extended the third symbol" (R. 17).

On January 5, 1937 (Specifications 4 and 6), accused was sent to the blackboard for another graded and unaided recitation consisting, as before, of translations from English to French, in Fourth Class French, his board being located as that previously described (R. 18,19,25; Exs. C,D). At the second board to his left was Cadet Robert L. Colligan with the same task as accused (R. 20,26). No one was between them (R. 26). The section instructor, First Lieutenant Thomas W. Hammond, Jr., Infantry, standing at his desk facing the blackboards at the other end of the room (R. 22), and another instructor, Captain G. Arthur Hadsell, Infantry, in charge of Fourth Class French, sitting "beside" the desk and about ten feet directly behind accused, observed that accused, in writing his translation for one of the sentences, "Has the porter taken my suitcase?" omitted the French word for "porter", which should have been the first in the translation, wrote some other French words and left a further blank space for the French word for "suitcase", and that he then stepped back, turned his head to the left as if looking at Cadet Colligan's board, and thereupon wrote in the appropriate blank space for "suitcase" the French word "valise" or "ma valise" as it appeared on Cadet Colligan's board. He also filled in the translation for the word "porter". (R. 20,26) Captain Hadsell testified that when accused turned his head in the direction of Cadet Colligan's board, he did so "very furtively" (R. 26). In a sentence later translated, accused left a blank space for the French word corresponding to the English word "here" and, after completing the rest of the sentence, again stepped back, turned his head

to the left as before and thereupon filled in the blank space with the French word "ici" (R. 20,21,27) as it appeared on Cadet Colligan's board. This latter French word is a very common translation of the English word "here". Lieutenant Hammond testified that it was not unusual for cadets to change their blackboard work before they turn around to signify completion of their work. (R. 23) (Specification 4) Captain Hadsell testified that in the sentence containing the word "ici", accused wrote the words "que elle" as a translation for the English words "that she", and that after stepping back and turning his head in the direction of Cadet Colligan's board he crossed out the first "e" and substituted an apostrophe, making the translation read, "qu'elle", as it appeared correctly on Cadet Colligan's board (R. 26,27; Ex. D). (Specification 6)

On January 13, 1937 (Specification 7), in a recitation similar to those heretofore described (R. 21,22), accused was required to write on the board, without aid, a translation to French of the English sentences, "He is a lawyer, isn't he? No, it is I who am a lawyer". He wrote, "C'est avocat, n'est, ce pas? Non, c'est moi qui ai", and was then observed by the instructor, Lieutenant Hammond, to step back and turn his head to the left as if looking at the board at which Cadet Colligan was working at the same translation. As before, Cadet Colligan was two boards away and no one was at the board between the two. After turning his head towards Cadet Colligan's board, accused slowly picked up his eraser, erased the word "ai", the last word of the sentence, and substituted the word "suis". He thereupon stepped back a second time, turned his head to the left in the same manner, stepped up to the board slowly, picked up his eraser, erased the first letter "C" with the apostrophe and substituted "Il" therefor. After these changes had been made, the substituted words were the same as appeared on Cadet Colligan's board. (R. 22; Ex. C)

4. Two cadets, roommates of accused, testified for the defense that they had observed accused while he was preparing his work in his room and that he frequently looked up and about although apparently having no trouble in doing the work correctly (R. 30,31). These cadets testified that accused did his work in his room without assistance except from his text book, which he was allowed to use, and that they were never "suspicious" of his actions (R. 29-31).

Accused testified, at his own request, that although he had not studied French prior to entering the Military Academy, except at a

preparatory school at Fort Winfield Scott, California, he did not have difficulty with the subject at the Military Academy (R. 34,35). He looked in the direction of Cadet Drown's and Cadet Colligan's blackboards, as shown by the prosecution witnesses, but did not look at these boards and did not copy or otherwise get aid therefrom (R. 35). He has the "habit of looking" to the left (R. 35,38) and, while doing so on the occasions described, was thinking of the problems before him and of the application of rules he had learned. As to the expression, "ce qu'il expliquais" (Specification 1), he was thinking of the rule of elision of the "e" in "que". With reference to the expression "a appelé le courage" (Specification 1), he was attempting to apply a rule as to the use of a double or single "e" in the verb "appelé". In regard to the expression "un pli auprès de" (Specification 2), he was considering a choice of the words "auprès" and "après" meaning the same thing. (R. 35) "Après", as he wrote, was correct. He "stopped a moment" to consider the phonetic symbol "i d j o" (Specification 3) because on the previous night he had looked up and written this symbol. He changed the expression "que elle" to "qu'elle" (Specification 6) because he had in his hurried writing overlooked the rule of elision applicable and had noticed the error in reading over his work. (R. 36) He changed "ai" to "suis" (Specification 7) because he noticed the error in reading over his translation. The reason for his habit of stepping back from the board was that he was tall, six feet one inch, and wrote his work very high or low on the board where it was difficult to read it when close to the board. Only a short time was allowed to do the writing. (R. 37) He had had the habit of looking around the section rooms since becoming a cadet and had been warned about it by cadets in the "honor lectures" (R. 38). The Professor of Modern Languages had told him in September or October that he should not "create any suspicion" by "looking around" or by "taking things off other boards". Accused had made an effort to discontinue his habit of looking about but had not succeeded. (R. 38)

5. In rebuttal for the prosecution, Lieutenant Thomas W. Hammond, Jr., testified that accused continued as a member of witness' section during January 1937 and that "several days after January 13" he discontinued the practice of looking about the section room during recitations. Witness never saw accused turn his head and look at things in the room other than the other blackboards. (R. 39)

6. There is no substantial dispute in this case as to the physical acts of accused upon which are primarily based the inferences of

cheating, that is, of his deceit and wrongful use of written work of other cadets, which constitute the essence of the dishonorable conduct charged. But accused wholly denies any deceit or wrongful use of the work of other cadets. He admits having turned his head towards the blackboards of Cadets Drown and Colligan on the occasions described in the specifications but asserts that in so doing he did not look at these blackboards, - mentally visualize their contents, or copy or use the solutions thereon as his own. He states that his proved acts in stepping back from his own board and in looking to the left were natural movements resulting from his posture at the blackboard, his preoccupation and his involuntary habits which, after warning, he had tried to break. There is, in the testimony of his roommates, some corroboration of his assertion that he was the victim of a nervous habit of looking about while preparing his lessons. It is suggested by the defense, also, that some of the work alleged to have been copied was so simple as to imply the absence of any motive for a member of a first section in French, as accused, to desire or use unauthorized aid therein.

Despite the assertions of innocence by accused, the Board of Review is of the opinion that the circumstantial evidence of deliberate cheating is so persuasive as to leave no reasonable doubt of guilty intent, as found by the court. Not only did accused on each occasion described in the specifications assume a physical position from which he could read the writing on the blackboards to his left, but immediately thereafter he made changes in his own solutions or supplied omissions therefrom which corresponded exactly or in substance with the writings towards which his head had been turned. It would be taxing the credulity of reasonable men to conclude that these acts were under all the circumstances of this case merely the result of habit and coincidence. Human experience may permit the conclusion that in moments of preoccupation the eyes may rest upon objects without forming mental pictures of those objects, but when mental pictures of the objects are repeatedly and at once expressed or recorded by the person looking, the only reasonable inference is that the person saw what he looked at. The work copied by accused was in part possibly so simple that he need not have copied it, but the fact remains that his actions were those which a person so copying would take. A motive to cheat is found in accused's natural desire to maintain his high standing in the subject in which he was reciting. Exactitude in detail and in simple tasks was needful to fulfillment of such a purpose.

The testimony of the prosecution witnesses that accused apparently looked at, that is, with deliberation sought to read, the writing of Cadets Drown and Colligan before making his corrections and supplying his original omissions, was competent as immediate conclusions or "shorthand" inferences of what the witnesses saw. Wharton's Criminal Evidence, paragraph 458; 16 Corpus Juris 749. The impressions of these experienced officers support the other evidence of guilt.

The acts of accused proved with respect to each specification were properly in evidence with respect to the remaining specifications, closely allied in time and fact. As stated in the Manual for Courts-Martial, paragraph 112 b,

"When criminal intent, motive, or guilty knowledge in respect of the act is an element in the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that intent, motive, or knowledge, is not made inadmissible by reason of the fact that it may tend to establish the commission of another offense not charged."

See also 16 Corpus Juris 588-591; Paine et al. v. United States, 7 Fed. (2d) 263; CM 195772, Wipprecht. In the instant case the repetition by accused of his incriminating acts is strongly indicative of intent to cheat in each case.

The Board of Review is of the opinion that the evidence establishes beyond reasonable doubt the guilt of accused as found, and warrants confirmation of the findings of guilty and the sentence. The offenses charged and proved are violative of the 95th Article of War as charged and found.

7. Accused was admitted to the United States Military Academy as a cadet on July 1, 1936, from the 16th District of California by appointment of Congressman John F. Dockweiler. He was born March 12, 1915, and is now 22 years of age.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial

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is legally sufficient to support the findings of guilty and the sentence and warrants confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of the 95th Article of War.

E. M. Cheney, Judge Advocate.

Shas. S. Brown, Judge Advocate.

Richard W. Harvey, Judge Advocate.

To The Judge Advocate General.

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

(287)

Board of Review  
CM 206670

U N I T E D	S T A T E S	)	FOURTH CORPS AREA
		)	
	v.	)	Trial by G.C.M., convened at
		)	Fort Oglethorpe, Georgia,
Private TUNIS BLAIR		)	February 23, 1937. Dishonorable
(6654084), Company K,		)	discharge and confinement for
10th Infantry.		)	one (1) year. Fort Oglethorpe,
		)	Georgia.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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

2. By the Specification, Charge II, laid under the 94th Article of War, there is alleged the larceny by accused of a uniform coat, property of the United States, issued to Private Roy A. Ferguson, Company K, 10th Infantry, and furnished for the military service of the United States. The evidence shows that Ferguson, to whom the coat had been issued about June 9, 1936, as a part of his initial clothing allowance, lent it to accused during the evening of December 31, 1936, at Fort Thomas, Kentucky, at the request of accused, to wear while attending a show, Ferguson understanding that it would be returned the same evening. The coat was not so returned, but accused absented himself without leave on January 2, 1937, placing on Ferguson's bunk a note to the effect that accused was returning another coat in place of that borrowed. (Exs. 4,7) There is no evidence that at the time accused originally received the coat he intended to deprive the owner of his property. Thus the evidence shows that there was no trespass by Ferguson or accused in the loan of the coat, an essential element of the offense charged, unless there was a constructive trespass founded upon the theory that Ferguson had naked custody only of the property. It has been held that while this theory has been applied

to the conversion of articles such as small arms issued for temporary use in the service of the United States, it will not support a conviction of larceny of articles such as is here involved, issued to a soldier for indefinite periods for his general use and of which he has possession as distinguished from custody. Par. 1533, Supp. V, Dig. Ops. JAG 1912-30; CM 197396, Christopher. The coat in question having lawfully come into the possession of accused, his subsequent fraudulent conversion thereof was embezzlement rather than larceny as charged, distinct offenses not included one in the other. CM 197396, Christopher.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, and the sentence, but not legally sufficient to support the findings of guilty of Charge II and its Specification.

W. H. H. H. H., Judge Advocate.

W. H. H. H. H., Judge Advocate.

W. H. H. H. H., Judge Advocate.

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

(289)

Board of Review  
CM 206971

MAY 28 1937

U N I T E D	S T A T E S	)	UNITED STATES MILITARY ACADEMY
		)	
	v.	)	Trial by G.C.M., convened at
		)	West Point, New York, March
Cadet LUIS RAUL ESTEVES, Jr.,		)	22 and 23, 1937. Dismissal.
Fourth Class, United States		)	
Corps of Cadets.		)	

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OPINION of the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the cadet named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Cadet Luis Raul Esteves, Jr., Fourth Class, United States Corps of Cadets, did, at West Point, New York, on or about November 30, 1936, with intent to deceive Captain John L. Whitelaw, Infantry, U. S. Army, his instructor in the Department of English, United States Military Academy, West Point, New York, present to said instructor, as an assigned written recitation in English which was required and upon which he was to be graded, a written composition over his own signature, indicating by the submission of said composition over his signature that the composition was his own honest, personal work, when in truth and in fact the said Cadet Esteves well knew that it was not his own honest, personal work, but was in substance and in effect a portion of Halleck's New English Literature by Reuben Post Halleck, M.A., L.L.D., which appears on page 90 of said Halleck's New English Literature.

Specification 2: In that Cadet Luis Raul Esteves, Jr., Fourth Class, United States Corps of Cadets, did, at West Point, New York, on or about November 30, 1936, with intent to deceive Captain John L. Whitelaw, Infantry, U. S. Army, his instructor in the Department of English, United States Military Academy, West Point, New York, knowingly and willfully make and submit to said instructor, in connection with a written composition entitled "Chaucer's Humor", a false official written statement as follows:

"I certify that I have not adapted the organization, or used the wording or paraphrased the sentences of my source article. Since writing my theme I have reread my source article and have placed in quotation marks all material taken directly from it", which statement was known by the said Cadet Esteves to be untrue in that he had adapted the organization, used the wording and paraphrased the sentences of a portion of a book entitled Halleck's New English Literature, without placing in quotation marks all material taken directly from it.

Specification 3: (Finding of Not Guilty)

Specification 4: In that Cadet Luis Raul Esteves, Jr., Fourth Class, United States Corps of Cadets, did, at West Point, New York, on or about December 21, 1936, with intent to deceive the Superintendent, United States Military Academy, state in an official communication addressed to the Superintendent, United States Military Academy, that "I wrote the paragraph as my own work, and as such I checked it against my textbook Canterbury Tales and enclosed in quotation marks all statements which I copied from the tales", which statement was known by the said Cadet Esteves to be untrue in that the quoted statements contained in the paragraph submitted as his own work do not appear in his textbook Canterbury Tales as he quoted them but do appear as he quoted them in Halleck's New English Literature.

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

3. The evidence shows that on November 30, 1936, accused submitted to Captain John L. Whitelaw, Infantry, his instructor in Fourth Class English, a composition entitled "Chaucer's Humor" required as a graded recitation (R. 18,19), the body of which was as follows:

"Chaucer's kindly sympathetic humor is especially characteristic. We can see him looking with twinkling eyes at the Pardoner, showing a piece of the sail from St. Peter's ship, or the pig's bones in place of a saint's. Chaucer's description of the Squire, keeping the nightingale company, and of the Miller, breaking down a door with his head, are greatly humorous. Likewise are those of the Doctor's practice, prescribing by the rules of astronomy and of the lawyer.

'No-wher so bisy a man as he ther was  
And yet he semed bisier than he was.'  
Even the Nun feels a touch of his humor:  
'Ful wel she song the service divyne,  
Entuned in hir nose ful semely.'

Sometimes Chaucer's humor is so delicate as to be lost on those who are not quick-witted. In the case of the Friar, who, 'before setting himself softly down drives away the cat' it is evident for those who have acute understanding that he has chosen the snuggest corner. Chaucer's humor and excellence in lighter vein is, in my opinion, one of his chief qualities and the one which has helped him more to win universal reknown." (Ex. D)

The subject was optional except that it was required to be on recent literature assignments - one of which had been Chaucer's Canterbury Tales as contained in an assigned textbook, Everyman's Library Edition (R. 14,18). After receiving the composition, the instructor read it, among others, and commented favorably upon it. Thereafter, before the section was dismissed, accused asked for return of the paper for the

purpose of adding a required form certificate. He wrote a form certificate as follows at the foot of the paper:

"I certify that I have not adapted the organization, or used the wording or paraphrased the sentences of my source article. Since writing my theme I have reread my source article and have placed in quotation marks all material taken directly from it",

and again submitted the paper to the instructor. He was given a grade of 2.6 on it. (R. 19) At this time his general average in English was 2.075 and he stood 531 in that subject in his class of 568 cadets (R. 17). Accused is a native of Puerto Rico (R. 54). The instructor testified that he attributed the cadet's relatively low standing to his lack of knowledge of idiomatic English (R. 17,18). Accused had been warned through a written pamphlet and oral instruction of the meaning and wrongful character of plagiarism (R. 9,11,15; Exs. B,C). Cadets were authorized to use texts other than the prescribed textbooks in preparation of their lessons in English (R. 14).

At the time the composition was submitted and for some time prior thereto, accused had in his possession (R. 31,55) a book entitled Halleck's History of English Literature, which contained matter closely similar to the composition. The comparative columns below set forth the composition of accused and the pertinent text of Halleck. The phrases and clauses of each which appear in the other are underscored. Words, phrases and punctuation in each resembling but not exactly corresponding to similar words, phrases and punctuation in the other are inclosed in parentheses.

Accused

Chaucer's kindly sympathetic humor is (expecially) characteristic. We can see him looking with twinkling eyes at the Pardoner, showing a piece of the sail from St. Peter's ship, or the (pig's bones) in place of (a saint's). Chaucer's description of the Squire, keeping the nightingale company(,) and of the Miller, breaking down a

Halleck

Chaucer's kindly, sympathetic humor is (especially) characteristic. We can see him looking with twinkling eyes at the Miller, "tolling thrice"; at the Pardoner, showing a piece of the sail from St. Peter's ship, or the (pigs' bone) in place of (those of a saint); at the Squire, keeping the nightingale company(;) at the (Doctor),

Accused

door with his head, are greatly humorous. Likewise are those of the (Doctor's) practice, prescribing by the rules of (astronomy) and of the lawyer,

"No-wher so bisy a man as he ther (was) And yet he semed bisier than he was."

Even the Nun feels a touch of his humor(:)

"Ful wel she song the service divyne, Entuned in hir nose ful semely."

Sometimes Chaucer's humor is so delicate as to be lost on those who are not quick-witted. In the case of the (Friar), who, "before setting himself softly down drives away the cat(") it is evident for those who have acute understanding that he has chosen the snuggest corner. Chaucer's humor and excellence in lighter vein (is), in my opinion, one of his chief qualities and the one which has helped him more to win universal renown. (Ex. D)

It is to be noted that the order in which the passages relating to the "lawyer" and the "Nun" appear in accused's composition is reversed in Halleck.

A few days after accused submitted his composition, the instructor detected the similarity between it and the language from Halleck (R. 20). On December 17 the Superintendent of the Military Academy addressed to accused, through channels, a letter advising him that records in his case were being submitted to the Academic Board for consideration under paragraph 118, Regulations for the United States Military Academy (prescribing procedure for discharge of cadets on account, among other things, of traits of character seeming to render their retention undesirable), inclosing a copy of the Superintendent's report to the board, and affording

Halleck

prescribing by the rules of (astrology). The Nun feels a touch of his humor(:-)

"Ful wel she song the service divyne, Entuned in hir nose ful semely."  
Of the lawyer, he says:-

"No-wher so bisy a man as he ther (nas), And yet he semed bisier than he was."

Sometimes Chaucer's humor is so delicate as to be lost on those who are not quick-witted. Lowell instances the case of the (Frier), who, "before setting himself softly down, drives away the cat(,") and adds what is true only of those who have acute understanding: "We know, without need of more words, that he has chosen the snuggest corner."

Although Chaucer's humor and excellence in lighter vein (are) such marked characteristics, we must not forget his serious qualities, for he has the Saxon seriousness as well as the Norman airiness. (Ex. 1)

him an opportunity to submit a written statement for consideration by the board. On December 21 accused submitted, through channels, a 2d Indorsement to the Superintendent (R. 27,28; Ex. G) in which, among other things, he said, referring to the composition above set forth:

"I wrote the paragraph as my own work, and as such I checked it against my textbook Canterbury Tales and enclosed in quotation marks all statements which I copied from the tales." (Ex. G)

The assigned textbook, Everyman's Library Edition of Canterbury Tales, contained verses similar to but not identical with those quoted by accused. The following comparative columns set forth the quoted portions of accused's composition, the similar passages from Halleck, and the verses appearing in the prescribed text version of Canterbury Tales. Words and punctuation from Halleck which differ from those of accused's composition are placed in parentheses. Words, punctuation, phrases and clauses from the Canterbury Tales which differ from those of accused's composition are underscored.

<u>Accused</u>	<u>Halleck</u>	<u>Canterbury Tales</u>
"No-wher so bisy a man as he ther was And yet he semed bisier than he was."	"No-wher so bisy a man as he ther (nas,) And yet he semed bisier than he was."	<u>Nowher so busy a man</u> <u>in eny case,</u> And yet he <u>semed busier</u> than he was.
"Ful wel she song the service divyne, Entuned in hir nose ful semely."	"Ful wel she song the service divyne, Entuned in hir nose ful semely."	Ful wel she <u>sang</u> the <u>services</u> divyne, <u>Entuned in her</u> nose ful <u>seemely;</u>
"before setting himself softly down drives away the cat." (Ex. D)	"before setting himself softly down(,) drives away the cat." (Ex. 1)	<u>And fro the bench he drof</u> <u>away the cat,</u> <u>And layd adoun his potent</u> <u>and his hat,</u> <u>And eek his scrip, and</u> <u>set him soft adoun.</u> (Ex. A)

4. Cadet Private J. H. de Russy, Fourth Class, testified for the defense that he had been a roommate of accused since September 1, 1936, and knew him intimately. He saw accused very frequently study the book, Halleck's New English Literature, belonging to accused and kept in their room. Witness was in the room and saw accused write a draft of his composition on Thursday afternoon, November 26, Thanksgiving Day. On the following Sunday afternoon he likewise saw accused write a second draft, the first having apparently been lost. On the following Monday morning, November 30, just before accused went to class, witness saw accused copy the second draft for submission. The drafts were shown to witness. On all of the occasions on which accused was writing the drafts of the composition, the book by Halleck was on top of the wall locker in the room and accused did not use or refer to it. The prescribed textbook, Canterbury Tales, was on the desk at which accused sat while writing, but witness did not know whether accused used it in preparing the composition. (R. 30-34) In preparing the lesson assignments theretofore, accused used both books - "he would read the 'Canterbury Tales' and then refer to Halleck's to clear anything up that he couldn't understand in 'Everyman's Edition of Canterbury Tales'". Accused "has an exact memory", and during the time the two were studying Canterbury Tales accused became familiar with the work to the extent that he quoted parts of it, in about the words of the text, without using the book. (R. 34) Witness and accused attended classes at the same hours (R. 31), and the two were together most of the time. "There were times when" witness "wasn't with him in the room \* \* \* but they weren't very long", and it would have been "practically impossible" for accused to have copied from Halleck without the knowledge of witness (R. 36).

Dr. Harry Bone, a consulting psychologist of New York City, testified for the defense as an expert in psychology. Quoting from medical works and explaining his reasoning at some length (R. 42-49), he expressed the opinion -

"that the mind may retain in photographic form details of experiences which, when they are reproduced, are not always recognized by the individual experiencing them as memories from his own past experience.

In conclusion, I will say, that in view of the fact that the mind often and perhaps always retains a photographic record of experience, even in its most minute details; and

in view of the fact that past experiences and perceptions can be reproduced by an individual without being recognized by him as memories from his own past, the appearance verbatim even of extensive connected sections of published material in a supposedly original composition cannot be considered ipso facto as an indication of conscious intention to deceive." (R. 49)

Shown a copy of the composition by accused and the passages from Halleck above quoted, and asked whether there was reason for concluding that the one was a "conscious copy or a conscious reproduction" of the other, witness testified that:

"There would be reason to suppose or be suspicious that this might be the case, due to the relative infrequency of unconscious photographic memory, but from internal evidence, there is no conclusive proof that the document is either a conscious deception or not." (R. 50)

Accused testified, at his own request, that his native tongue was Spanish, and that he had studied English primarily as a subject in Spanish schools. Much of his instruction in the subject was in Spanish. He still has difficulty with English. In connection with preparation of his lessons at the Military Academy on Chaucer, he used the book by Halleck (R. 54,55), given to him by his father (R. 59), as a reference book, studying it about five times for twenty or thirty minutes each time (R. 55). He chose the subject of Chaucer's Humor for his composition because he thought himself more familiar with this subject than with any other appropriate one. He did not make any special preparation for the composition, but prepared a draft on Thursday afternoon. That week-end, they went to the Army-Navy game. On Sunday, being unable to find the draft previously written, he wrote another, trying, from memory, to reproduce the first draft. He did not use Halleck and considered his textbook, Canterbury Tales, his source material. "When I wrote the composition, I wrote it all by memory and those quotations that are in the composition, I wrote them out, enclosed them in quotation marks without referring to the book 'Canterbury Tales', or copying them word for word" (R. 56). The second draft was put away and on the following Monday morning, before class, accused copied it for presentation, making such corrections as he found necessary. At this time he "went over the composition to see that I had in quotations those parts of the composition

which I knew appeared in 'Canterbury Tales'. I did not actually go to the book 'Canterbury Tales' for a word by word check of these quotations", believing his knowledge and memory of the tales were sufficient to enable him to give credit for all parts thereof used. He forgot to add the customary certificate at this time, but, in class, remembered and gained permission to add it. He hurriedly copied the certificate and resubmitted the composition just before the section was dismissed. He did not at any time refer to Halleck or use notes therefrom between the time the composition assignment was given out on November 25 and the time of final submission of the composition. (R. 57,61) To witness' knowledge, the parts of the composition which he put in quotation marks appear in Canterbury Tales in "meaning and idea" though not in the same words, and, in submitting his indorsement to the Superintendent, he so regarded them and had no intention to deceive by saying that he had checked the quotations against the tales (R. 59,63-65). He accounted for the identity of words in his composition with those of Halleck by the probability that he unconsciously memorized the words through his thorough study of this book and by the limited scope of the subject as treated by Halleck (R. 62,67). He memorizes unconsciously to considerable extent (R. 66).

Five cadets and the Catholic Chaplain of the Military Academy testified for the defense that the reputation of accused in the Corps of Cadets for truth, honesty and veracity was good (R. 34,40,68-71).

It was stipulated, at the request of the defense, that if the persons named below were present in court they would testify substantially as follows (R. 58,72):

Dr. Ernest Gruening, Director of the Division of Territories and Island Possessions in the Department of the Interior. The Spanish system of education places far greater emphasis on memory training than the system followed in America, and under the Spanish system memorization of passages appears to be an accepted method of learning the contents of given subjects. "Under the Hispanic system, practiced in many countries of Hispanic origin, the more faithful the reproduction of the text - whether written or spoken - the better would be deemed the pupil's showing." (Ex. 2)

L. R. Gignilliat, Brigadier General, Reserves, the Superintendent, and W. E. Gregory, the Dean of the Faculty, of Culver Military Academy. While a student at Culver accused made an excellent record in all his

subjects except English, in which he was "somewhat handicapped". He graduated with honors in Science and Commerce and ranked 12 in a class of 108 students. He was given the maximum rating in Integrity and Responsibility. (Exs. 3,4)

Major General Blanton Winship, Retired, Governor of Puerto Rico (Ex. 6); Captain Generoso Vazquez, 295th Infantry, Puerto Rico National Guard (Ex. 5); Major Harry R. Simmons, Infantry, Senior Instructor, Puerto Rico National Guard (Ex. 7); Captain Miguel Montesinos, Infantry, District Instructor, Puerto Rico National Guard (Ex. 8); John J. O'Brien, High School Principal and Superintendent of Schools in Puerto Rico (Ex. 9); and Captain E. Andino, Infantry, Professor of Military Science and Tactics, University of Puerto Rico (Ex. 10). Attested to the excellent family and upbringing of accused, and his gentlemanly qualities, integrity and high standing in Puerto Rico schools and University, and as a member of the Puerto Rico National Guard and R.O.T.C. at the University.

5. Specifications 1 and 2 are closely related, alleging the deceitful submission and certification as his own work by accused of a composition which, in substance, organization and wording, appeared in the book, Halleck's New English Literature. The close similarity in substance and organization, and the identity of the bulk of the unquoted words used in the composition with passages from the book exclude any possibility that the unquoted portions of the composition were the constructive work of accused. His composition was a repetition or paraphrase almost in its entirety of the work of the author of the book. This the defense did not deny but asserted that the composition and certificate were nevertheless submitted honestly and without intent to deceive, and that the reproduction by accused of the work of Halleck was the innocent recording of the substance, phrasing and wording of passages unconsciously memorized by accused through his study of the book.

The evidence of intent to deceive, as found by the court, is necessarily circumstantial, consisting of inferences to be drawn from comparison of the composition with the context of Halleck and from the circumstances under which the composition and certificate were prepared and submitted. In the ordinary case these inferences would, in the absence of other proof, lead to a conclusion of guilt, for human experience does not admit of the reasonable possibility of a student precisely reproducing the literary work of another without copying it

or in some other way gaining knowledge of the work reproduced. But there is testimony of record which contradicts the first impression inferences of deceitful intent.

The denials by accused, consistently repeated, of any conscious purpose to plagiarize or deceive, must be considered in the light of his human motive to serve his own interests. His denials, supported by facts and circumstances attested by witnesses whose veracity is not open to question, gain weight to the extent of such support.

In the testimony of Cadet de Russy, we find proof of most convincing nature that in the actual writing of the composition accused did not have before him and did not use the text from which it is alleged he took the material incorporated in the composition. Giving accused the advantage of the reasonable doubt which is his due, it must be concluded that in writing the composition he did not copy it from the book.

The record contains evidence that accused has a marked aptitude for precise and idiomatic memorization, and that his early schooling developed and encouraged this aptitude. Considering the fact that he did not copy from the book, the simplicity and brevity of the pertinent passages from Halleck and the repeated study thereof by accused, it is most probable that he did in fact memorize the quoted and unquoted words, clauses and phrases appearing in that book and recorded and certified them from memory. This was deceit and plagiarism if he knew that he was thus using or paraphrasing the matter as it appeared in the book without giving credit to the author. If he wrote the memorized unquoted passages believing that they were his own work, the intent to deceive, which is the gravamen of the offenses charged, did not exist.

From the evidence the Board is not convinced that the composition was prepared, submitted and certified by accused with conscious knowledge that he was using without credit the words and expressions of another. The testimony of accused and his roommate, the opinion of the expert in mental processes, the special background, schooling and training of accused, the proof of his previous reputation for integrity and honesty, and the probability that had accused consciously reproduced the passages from Halleck, he would have made some apparent attempt to disguise such reproductions by copious changes in the wording and arrangement of his composition, all considered in the light of human experience, go far to

create a substantial doubt as to his guilty intent. This doubt, coupled with circumstances surrounding the reference to trial and the action of the reviewing authority as hereinafter discussed, constrains the Board to the conclusion that the findings of guilty of Specifications 1 and 2 are not supported beyond a reasonable doubt by the record of trial and ought not to be confirmed.

6. By Specification 4, it is charged that accused did -

"with intent to deceive the Superintendent of the United States Military Academy, state in an official communication addressed to the Superintendent, United States Military Academy that, 'I wrote the paragraph as my own work, and as such I checked it against my textbook Canterbury Tales and enclosed in quotation marks all statements which I copied from the tales.', which statement was known by the said Cadet Esteves to be untrue in that the quoted statements contained in the paragraph submitted as his own work do not appear in his textbook Canterbury Tales as he quoted them but do appear as he quoted them in Halleck's New English Literature."

It is not possible for the Board of Review definitely to determine from this language what part of the statement by accused was alleged to have been untrue. In pleading the alleged untruth, evidence that the quoted statements appear in a book other than that described in the challenged statement is set forth. No other charge of falsity is made. Whether this evidential allegation raises by implication an averment of falsity in stating that the composition was the work of accused, or an averment that accused did not in fact check his composition against the textbook, Canterbury Tales, or whether the allegation avers falsity in both respects, is left to inference. The record of trial does not remove the uncertainty.

If it was intended by this specification to allege intentional falsity by accused in asserting that the composition was his own work, the remarks above, relative to failure of proof to establish intent to deceive in submission of the composition, are applicable with respect to this alleged offense.

If the specification was intended to allege intentional falsity by accused in asserting that he had checked his composition against Canterbury Tales, the evidence, in the opinion of the Board, still leaves

a substantial doubt of intent to deceive. It is manifest that accused's check of his quotations by memory, as he testified and as appears probable, was not literally a check against the textbook as asserted by his certificate. His official and explicit statement that he made such check fell short of that high standard of strict exactitude expected of cadets of the United States Military Academy, a standard which is to be maintained by all proper means. But the fact remains that the check by memory was a verification from what the cadet recalled and believed to be the substance of the book. Of the three passages placed in quotation marks by accused, two closely followed couplets from Chaucer, and the third was similar in substance. It is not unreasonable to believe that, having memorized these passages from Halleck, as the testimony indicates he did, accused put the quotation marks around them without knowing that there were differences between the reproductions of Chaucer appearing in Halleck and in the textbook, Canterbury Tales, that is, believing that he was quoting from Canterbury Tales. Under all the circumstances of the case, the official statement that a check against the book was made, based on the memory check, was sufficiently accurate to leave a real doubt as to a conscious purpose to mislead. In interpretation of the statement, accused is, as a matter of law, entitled to every reasonable implication indicative of innocence. Par. 78 a, M.C.M. Assuming that a check by memory was made, it may with reason be inferred that the explicit assertion by accused that he had checked his composition against his "textbook" was made carelessly and without attentive regard to the reach of the language he used, yet without that conscious sense of untruthfulness which would brand his conduct as unworthy a cadet and gentleman.

As with Specifications 1 and 2, the Board of Review cannot escape the conclusion that in view of the doubt of guilty intent left by the evidence and the other circumstances of the case, the record of trial is not legally sufficient to justify confirmation of the finding of guilty of Specification 4 of the Charge.

7. The Superintendent of the Military Academy, having stated, by 1st Indorsement, February 9, 1937, that he deemed himself disqualified legally to act in court-martial proceedings in this case, the charges, report of investigation and consolidated 201 file of accused from the Office of The Adjutant General were, after reference to this office, by 4th Indorsement from The Adjutant General, dated February 18, 1937, referred to the Commanding General, Second Corps Area, for disposition. By 5th Indorsement, dated March 2, 1937, the latter officer returned the

papers to The Adjutant General recommending reconsideration by the War Department of a recommendation by the Superintendent and the Academic Board, appearing in the correspondence, that accused be discharged under paragraph 118, Regulations for the United States Military Academy, for traits of character serving to render his retention at the Academy undesirable as evidenced by the transactions involved in the submission of the composition and the certifications described in the charges herein. This 5th Indorsement was as follows:

"1. These charges have been transmitted to this headquarters for final disposition, including trial by court-martial, if deemed appropriate. (Paragraph 1, 4th indorsement, A.G.O., February 18, 1937). Such final disposition would include quashing the charges, action under the 104th Article of War, or trial by general court-martial.

In my opinion, none of these measures would be appropriate. For this reason, I am returning these papers to the War Department with the recommendation that the action embodied in 5th indorsement, A.G.O., January 18, 1937, on recommendation by the Superintendent of the Military Academy that Cadet Esteves' separation from the Academy be effected through the use of paragraph 118, Regulations, U.S.M.A., 1931, rather than by court-martial, be reconsidered with a view to approving the Superintendent's original recommendation.

I am taking this action after mature consideration not only because of my intense interest in the welfare of the Military Academy but also because I believe it to be in the interest of the Cadet himself.

2. The fact that the handling of questions of discipline and personal qualifications of cadets at the Military Academy presents a problem by itself, separate and apart from the methods applicable to the Army at large, has been recognized in the provision in paragraph 118, Regulations, U.S.M.A., 1931, of a different procedure for such cases.

3. This procedure has been successfully followed for many years, and a departure from it in this case would constitute a precedent that would inevitably induce many appeals for court-martial procedure in the future.

The procedure provided for by paragraph 118, Regulations, U.S.M.A., 1931, is in accord with the practice in all institutions

of learning with which I am familiar and with the long established practice at the Military Academy.

4. The extension of our court-martial system to the trial of cadets whose cases can more expeditiously, more appropriately, and more satisfactorily be determined by long established and well recognized academic disciplinary procedure, would disadvantageously affect the welfare of the Military Academy.

5. This Cadet is accused of cheating and lying. If the charges are true, he has exhibited traits of character which render his retention in the Military Academy highly undesirable. The Academic Board, in accordance with the provisions of applicable regulations (paragraph 118, Regulations, U.S.M.A., 1931) has determined that the Cadet does possess such traits. In my opinion, the board itself is the most competent authority to decide this question. The board had before it the Cadet's own explanation of the charges against him. Moreover, Cadet Esteves appeared in person before the board and presented his side of the case.

In his request for trial, he has offered nothing new to justify any review of the board's action. If the Cadet has exhibited such traits of character, the time to terminate his military service is now and not later. The only method that will insure such action is that prescribed by regulations of the Academy.

If this Cadet is tried by court-martial and escapes dismissal, a most unfortunate situation will thereby be precipitated which should be avoided at all costs.

6. If my recommendation for reconsideration is disapproved, trial by general court-martial will be ordered in this case upon the return of these papers. It is requested this matter be brought to the personal attention of the Chief of Staff."

The recommendation of the Commanding General, Second Corps Area, was not approved and the charges and accompanying papers were returned to him, without reference to this office, whereupon the charges were referred for trial by his order before a court appointed by him.

By the fifth paragraph of his indorsement above quoted, the appointing authority, with statements of the evidence in the case before him, urged discharge of accused upon the basis of the findings of the Academic Board that accused through cheating and lying had exhibited undesirable traits of character, and stated that if accused should be tried by court-martial and should escape "dismissal, a most unfortunate situation

will thereby be precipitated which should be avoided at all costs". This was tantamount to an expression of a conclusion that accused was guilty of cheating and lying and that in the event of trial he should be dismissed. The conclusion was formed and expressed before the trial of accused and without opportunity to examine the record of trial. When the record of trial reached him, the Commanding General, Second Corps Area, acted upon it as reviewing authority.

But the accused was entitled, as a matter of legal right, to have action upon the record of trial considered and taken by the reviewing authority in a judicial capacity, free from preconceived conclusions of guilt and the measure of punishment to be imposed. "The reviewing authority", to quote The Judge Advocate General in a case similar to the present one (CM 195322, Henderson - a cadet case in which accused resigned before action on his record of trial was taken by the President), "is in legal effect a member of the court and as such must base his judgment on the record alone." (He is, equally with a member of the court, disqualified to act upon a record of trial if through previously formed conclusions he has impaired his capacity to reach a judicial determination upon the evidence.) CM 195322, Henderson. The following from the opinion of the Supreme Court of the United States in Runkle v. United States, 122 U. S. 543, 557, is pertinent and persuasive:

"Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment, and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a

commission in the army of the United States shall be dismissed from service as a punishment for an offence with which he has been charged, and for which he has been tried. In this connection the following remarks of Attorney General Bates, in an opinion furnished President Lincoln, under date of March 12, 1864, 11 Opinions Attorneys General, 21, are appropriate:

'Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law.'"

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

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

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., JUN 5 1937 - 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 Luis Raul Esteves, Jr., Fourth Class, United States Corps of Cadets.

2. I do not concur in the holding implied in the opinion of the Board of Review that the Commanding General, Second Corps Area, Major General Frank R. McCoy, was through previously formed conclusions disqualified to act upon the record of trial in this case. I do, however, concur in the holding of the Board of Review that the evidence is not legally sufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

3. Inclosed herewith are the draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to disapprove the findings and the sentence, should such action meet with approval.



Allen W. Gullion,  
Colonel, J.A.G.D.,

Acting The Judge Advocate General.

3 Incls.

- Incl. 1-Record of trial.
- Incl. 2-Draft of ltr. for sig.  
of Secy. of War.
- Incl. 3-Form of Executive action.

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

(307)

Board of Review  
CM 207104

U N I T E D	S T A T E S	)	HAWAIIAN DIVISION
		)	
	v.	)	Trial by G.C.M., convened at
		)	Schofield Barracks, T. H.,
Private ROBERT E. DUNN		)	March 29, 1937. Dishonorable
(6559013), Company H,		)	discharge and confinement for
21st Infantry.		)	six (6) months. Disciplinary
		)	Barracks.

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HOLDING by the BOARD OF REVIEW  
MCNEIL, CRESSON and HOOVER, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Robert E. Dunn, Company H, 21st Infantry, did, at Schofield Barracks, T. H., on or about February 9, 1937, with intent to defraud, falsely sign the name "John D. Atwood" to a certain promissory note, in the following words and figures, to wit:-

Serial No. E 5731.

Schofield Barracks, 2/9/1937.

I, Atwood, J. D., promise to pay to the 21st INFANTRY RESTAURANT CONCESSION NO. 4 on my next pay day the sum of \$1.00 for value received.

Signature John D. Atwood.

Rank Pvt. Org. H

K.J.

Issued this ticket,  
which said promissory note was a writing of a private nature, which might operate to the prejudice of another.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence but reduced the period of confinement to six months, 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 Article of War 50 $\frac{1}{2}$ .

3. The undisputed evidence shows that on February 9, 1937, a clerk of the 21st Infantry Restaurant at Schofield Barracks, T. H., issued to some unidentified person a meal ticket good for one dollar's worth of merchandise and received therefor the note set forth in the specification, signed by the recipient of the ticket (R. 29; Ex. 1). Private John D. Atwood, Company H, 21st Infantry, whose name is signed to the note, testified that he did not sign the note and did not authorize accused to sign his name thereto (R. 7,8). The clerk saw accused on March 2, 1937, but was unable to recognize him as the person who signed the note (R. 29). The serial number of this ticket and note was E 5731 (Ex. 1). Ticket E 5730 was drawn at the restaurant about 8 p.m., February 9, by a non-commissioned officer who observed that the person next behind him in line was about five feet five inches in height, with dark hair and light complexion, and was dressed in fatigue pants and an O. D. shirt. This noncommissioned officer testified that prior to trial he picked from a line of men, which included the accused, and identified as the person behind witness when he drew his meal ticket, a person other than accused, but that he was not positive in his identification. (R. 26-28,67-70) A similar meal ticket was drawn by accused and a similar note was signed by him, with his own name, both bearing the number E 5681, on February 9 (R. 14; Ex. 5). Ticket number E 5687 was drawn between 10:30 and 11 a.m., February 9 (R. 15-16); ticket number E 5709 was drawn after 4 p.m. of that day (R. 24); and ticket number E 5708 was drawn about 7 p.m. of the same day (R. 22,23). Accused had an authorized credit of one dollar at the restaurant for that month (R. 13). Proved or admitted specimens of the handwriting of accused were received in evidence (R. 9-14; Exs. 2-5).

Edward A. Wootton, assistant branch manager of the Bishop National Bank of Hawaii, Schofield Barracks Branch, who stated that he had examined signatures for the bank over a period of fifteen years and had qualified as a handwriting expert before numerous courts-martial, testified

for the prosecution that the forged note and the proved or admitted specimens of the handwriting of accused had been in his possession for several days and that, in his opinion, the signature on the note and the specimens of the handwriting of accused were written by the same hand (R. 18,19).

Henry Chang, assistant manager of the 21st Infantry Restaurant, testified for the prosecution that meal tickets issued by the restaurant came in lots of 500 (R. 31) and were issued "as they come" (R. 35), "from one to five hundred" - "we start with the lowest number first and take one hundred tickets at a time". Higher numbers were "very seldom" issued prior to lower numbers "unless shaken from the bundle" or "unless the lowest bundle has been broken by mistake". (R. 31) He also testified that "in the case a package is dropped, we fix them so that they are in numerical order" (R. 35). More than 200 tickets were issued on February 9 (R. 32) against company rosters showing names and authorized credits (R. 30). No identification was required except by the "handwriting on the roster", and no record by number and name was kept of the tickets issued (R. 31,33).

4. Private 1st Class Mike Johns, Jr., Company H, 21st Infantry, testified for the defense that he was standing near accused in the 21st Infantry Restaurant at about 8:15 p.m., February 9, and saw accused draw a one dollar meal ticket and sign his own name therefor. Accused then sat down at a table with other soldiers including witness. (R. 39-45,63-66) Accused was not dressed in fatigue clothes (R. 65).

Private 1st Class Frederick J. Stutevoss, Company H, 21st Infantry, testified for the defense that at about 8:25 p.m. on February 9, accused came to a table in the 21st Infantry Restaurant where witness was seated, arose after about five minutes with a remark that he was going to draw a ticket, and then went to the counter and "drew a check". Accused thereupon returned to the table with Private Johns. While at the table, accused laid thereon a "check" bearing his own name. Witness did not remember that accused was dressed in fatigue clothes. (R. 58-62)

Accused testified that he drew the meal ticket, number E 5681, at about 8 p.m., February 9. He did not draw any other. (R. 51) On arrival, in the company of Private Johns, at the restaurant, he went to the counter, signed the ticket and roster and then went to the table where he paid with his meal ticket for part of the food consumed by himself and companions (R. 51-57). While at the restaurant, he was dressed in "Suntan slacks and an O.D. shirt" (R. 54).

5. After the prosecution and defense had rested and presented arguments, the court was closed and, upon being reopened, recalled a witness for the prosecution, Corporal Lauriston M. Gamwell, company clerk of Company H, 21st Infantry. This witness, in response to questions by the court, testified that he and his company commander compared the "signatures on the tickets (apparently including the forged note) with the signatures on the pay roll", which contained about 73 names, and found only one, that of accused, which, in witness' opinion, resembled the signature on the forged note. Witness also identified a restaurant credit authorization list of his company, containing the signatures of accused and Private Atwood, and what purported to be the signatures of almost all of the remaining men of the company, and testified that this list was turned over, on discovery of the forgery, to Mr. Wootton, the handwriting expert, with other specimens and the forged note, for comparison. (R. 71-76) The list was received in evidence and an extract copy appended to the record (R. 79; Court Ex. A). As to the genuineness of the signatures on the credit authorization list, witness testified that lists of this kind were habitually signed by the men in securing credit tickets (R. 79).

Vigorous objections were made by the prosecution to the testimony concerning comparison by the witness Gamwell of the handwriting, and to the introduction in evidence of the credit authorization list. Objections were made, among other things, upon the grounds that the witness was not qualified as an expert in the comparison of handwriting and that the signatures on the credit authorization list had not been proved to be genuine. (R. 73-78) To meet an objection by the prosecution to the credit authorization list on the ground that it would disclose, by comparison with proved specimens of the handwriting of accused, a forgery by accused not charged, the law member stated:

"The court will confine its examination of this list to the exclusion of any comparison of signatures. Thus, it will not in any way prejudice the rights of the accused. If I understand you clearly, any forgery on the authorization list is not the issue before the court, and it is not being so considered. I think the court realizes the accused is not on trial for any offense other than the forgery on the meal ticket known as Prosecution's Exhibit Number 1." (R. 82)

The objections described were made by the prosecution and not by the defense, but there is nothing in the record to indicate that the defense

did not concur therein or that it intended to waive any objections which might lie to the proffered evidence.

The signatures on the pay roll referred to were not proved to be genuine, nor were they received in evidence. The reception of the testimony of the company clerk with respect to his comparison of the forged signature therewith was erroneous. Even assuming waiver by the defense of objection to consideration of the inadequately proved standards of comparison used, the witness was not shown to be qualified (in fact he disavowed expert capacity) to make such comparison and express an expert opinion thereon. As stated by Wharton in his Criminal Evidence, 10th ed., page 876:

"It is clear that no comparison of handwritings can be made by a nonexpert witness where he has no other knowledge than from the writings in evidence."

See also paragraph 112 b, M.C.M.

It was error, moreover, for the court to receive in evidence the credit authorization list for the purpose of using the various signatures thereon as a basis of comparison. But such was an apparent purpose of its introduction. The statement by the law member, quoted above, read in its entirety and in connection with the objection to which it was an answer, amounts to no more than an assertion that the court, in considering the credit authorization list, would not make any comparison of signatures thereon for the purpose of discovering a forgery by accused not charged. It must be assumed, as examination of the witness by the court indicates, that the list was received in evidence in order that this additional basis of original comparison by Mr. Wootton, as suggested by the company clerk, might be before the court and in order that it might serve the court as a comparative basis for determining whether the forged signature on the note was made by any member of the company other than accused. The fact that the list was a paper used in official business did not dispense with the necessity of proving the genuineness of the signatures thereon. In referring to the introduction in evidence of official documents, the Manual for Courts-Martial (par. 116 b) prescribes that:

"The signature \* \* \* should be proved to be genuine if that is not admitted",

and further that:

"before admitting \* \* \* specimens of handwriting (as a basis for comparison), satisfactory evidence should be offered as to the genuineness of the same."

It cannot be said that proof of genuineness of the handwriting was waived, for objections on the ground of lack of such proof were urged. Par. 116 b, M.C.M.

6. It becomes necessary to determine whether the errors noted injuriously affected the substantial rights of accused.

The main and narrow issue in the case was whether the signature appearing on the note described in the specification was that of accused. Accused denied that it was, and his denial was supported by the testimony of disinterested witnesses, one of whom testified that he saw accused sign his own name, not that of Private Atwood, to a restaurant meal ticket at about the time, according to the theory of the prosecution, at which the forged writing was made. The competent proof of guilt was limited to the opinion testimony of the handwriting expert based on his comparisons of the forged signature with established specimens of the handwriting of accused, and to the circumstance, at best uncertainly established, that the forged note was probably made at about the time accused was observed drawing a restaurant ticket. The evidence, in other words, was far from compelling but was contradictory and closely balanced for and against accused.

Faced with the duty of resolving the doubts left by the competent evidence, the court, over objection, erroneously insisted upon receiving in evidence the incompetent testimony of comparison of handwriting on the pay roll and the purported signatures on the credit authorization list, for a purpose of satisfying itself that the forged signature was not made by any member of the company other than accused. This was not merely cumulative to the expert's testimony, but went beyond it. Had the other members of accused's company been eliminated as suspects, such elimination would have materially supported the prosecution's case. The court's insistence in following its line of inquiry in this direction leaves little doubt that the improper evidence of elimination of other members of the company as suspects was deemed to be of decisive weight and value in consideration of the findings.

Under all the circumstances of the case, the Board of Review is convinced that the errors described injuriously affected the substantial rights of accused within the meaning of the 37th Article of War.

7. For the reasons stated, the Board of Review holds the record of trial to be not legally sufficient to support the findings of guilty and the sentence.

J. Miller, Judge Advocate.

James B. Benson, Judge Advocate.

Arthur H. Kowalski, Judge Advocate.



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

(315)

Board of Review  
CM 207203

JUN 24 1937

UNITED STATES )

SECOND DIVISION

v. )

Private AVERY N. ALLEN )  
(6385390), Battery C, 36th )  
Field Artillery, and Private )  
CHARLES J. SHARP (6275641), )  
Service Battery, 12th Field )  
Artillery. )

) Trial by G.C.M., convened at  
) Fort Sam Houston, Texas, May 25,  
) 1937. As to ALLEN: Dishonorable  
) discharge and confinement for  
) four (4) months. As to SHARP:  
) Confinement for three (3) months  
) and forfeiture of \$14 per month  
) for a like period. Fort Sam  
) Houston, Texas.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOCVER, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Avery N. Allen, Battery C, 36th Field Artillery, attached to Service Battery, 12th Field Artillery, and Private Charles J. Sharp, Service Battery, 12th Field Artillery, acting jointly, and in pursuance of common intent, did, at Fort Sam Houston, Texas, on or about April 30, 1937, feloniously take, steal, and carry away one pair of shoes, value about \$2.50, the property of Private Webster R. Barnes, Service Battery, 12th Field Artillery, and one pair of shoes, value about \$1.00, the property of Private Frank A. Richter, Service Battery, 12th Field Artillery.

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

the charge but guilty of violation of the 96th Article of War. No evidence of previous convictions was introduced as to accused Sharp; evidence of four previous convictions was introduced as to accused Allen. Sharp was sentenced to confinement at hard labor for three months and forfeiture of \$14 per month for a like period, and Allen was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for four months. The reviewing authority approved the sentences, designated Fort Sam Houston, Texas, as the place of confinement, withheld his order directing the execution of the sentence in each case, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence shows that at the time and place alleged accused, acting together, pursuant to a plan previously made, surreptitiously took and carried away from the barracks of Service Battery, 12th Field Artillery, the two pairs of shoes described in the specification (R. 7,12; Exs. 3,4), and that one of the accused shortly thereafter pawned them and divided the money with his companion (R. 16; Exs. 3,4). The shoes were taken without the knowledge or consent of the owners (R. 7,14).

4. The only question in this case requiring consideration is whether the offense of accused found by the court, i.e., knowingly and willfully misappropriating and applying to their own use and benefit the property described in the specification, in violation of the 96th Article of War, is included in the offense charged, i.e., larceny in violation of the 93d Article of War.

That part of the findings by exception and substitution that accused did "knowingly and willfully \* \* \* apply to their own use and benefit" the property described does not, standing alone, state an offense violative of the Articles of War, for the acts so found were not of themselves wrongful or of criminal nature. Only as this part of the findings is associated with the finding of misappropriation knowingly and willfully committed, is an offense found. The question presented is therefore narrowed to that of the legal propriety of finding misappropriation of property as a lesser included offense of larceny.

5. Although the misappropriation is found as violative of the 96th Article of War, the words substituted by the finding and describing the gist of the offense are words of the 94th Article of War defining the

offense of knowingly and willfully misappropriating property of the United States, furnished or intended for the military service thereof. In so far as the inherent nature of the offenses is concerned, no reason appears for giving to these words of the finding any meaning other than is attributed to the words of the statute.

With respect to the terms in question as used in the Article of War, the Board of Review has said:

"Wilful misappropriation of property was an offense unknown to the common law. A careful search of state and federal statutes fails to disclose a single instance where an act of misappropriating property is denounced as an offense where it is not predicated upon some sort of rightful custody, management, care, control, supervision or possession of the property in the person charged. 'Misappropriating means devote to an unauthorized purpose'. Par. 150 i, M.C.M. One cannot misappropriate that over which he has no control or supervision. Neither can one devote property to a purpose where he exercises no lawful authority respecting such property. The term is usually, if not exclusively, used in statutes denouncing fraudulent deals by bankers, brokers, factors, agents, trustees, officers and others who fraudulently misapply property over which they exercise some supervision and control." CM 199841, Miotke.

Bouvier's Law Dictionary defines "misappropriation" as follows:

"It is not a technical term of law, but it is sometimes applied to the misdemeanor which is committed by a banker, factor, agent, trustee, etc., who fraudulently deals with money goods, securities, etc., entrusted to him, or by a director or public officer of a corporation or company who fraudulently misapplies any of its property."

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

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

6. For the foregoing reasons, the Board of Review holds the record of trial to be not legally sufficient to support the findings of guilty and the sentence as to each accused.

*E. M. M. M.*, Judge Advocate.

*S. H. S. S.*, Judge Advocate.

*S. H. S. S.*, Judge Advocate.

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

(319)

*Received Jan 15, 1938.*

Board of Review  
CM 207212

U N I T E D   S T A T E S	)	N I N T H   C O R P S   A R E A
	)	
v.	)	Trial by G.C.M., convened at
	)	the Presidio of Monterey, Cali-
First Lieutenant WILLIAM H.	)	fornia, May 17, 19 and 20, 1937.
THOMPSON (O-19178), 11th	)	Dismissal.
Cavalry.	)	

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OPINION of the BOARD OF REVIEW  
MCNEIL, CRESSON and HOOVER, 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 95th Article of War.

Specification 1: In that First Lieutenant William H. Thompson, 11th Cavalry, being indebted to Hotel Del Monte, Del Monte, California, in the sum of twenty-five dollars and seventy-eight cents (\$25.78), for hotel service purchased by him from said hotel, which amount became due and payable on or about September 1, 1936, did, at Presidio of Monterey, California, and elsewhere, from about September 1, 1936, to about January 11, 1937, dishonorably fail and neglect to pay said debt.

Specification 2: In that First Lieutenant William H. Thompson, 11th Cavalry, being indebted on August 31, 1936, to Las Tiendas Drive-In Market, Monterey, California, in the sum of sixty-three dollars and thirty cents (\$63.30), for

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food supplies purchased by him from said Market, which amount became due and payable on or about August 31, 1936, did, at Presidio of Monterey, California, and elsewhere, from about August 31, 1936, to about January 11, 1937, dishonorably fail and neglect to pay said debt.

Specification 3: (Finding of not guilty.)

Specification 4: In that First Lieutenant William H. Thompson, 11th Cavalry, being indebted to Heidrick and Heidrick, Monterey, California, in the sum of thirteen dollars and twelve cents (\$13.12), for merchandise and photographic service purchased by him from said firm, which amount became due and payable on or about August 10, 1936, did, at Presidio of Monterey, California, and elsewhere, from about August 10, 1936, to about January 11, 1937, dishonorably fail and neglect to pay said debt.

Specification 5: (Finding of not guilty.)

Specification 6: In that First, formerly Second, Lieutenant William H. Thompson, 11th Cavalry, being indebted to Standard Oil Company of California, Monterey, California, in the sum of thirty-three dollars and seventy-four cents (\$33.74), for merchandise purchased by him from said company, which amount became due and payable on or about February 1, 1936, did, at Presidio of Monterey, California, and elsewhere, from about February 1, 1936, to about January 1, 1937, dishonorably fail and neglect to pay said debt.

Specification 7: (Finding of not guilty.)

Specification 8: In that First Lieutenant William H. Thompson, 11th Cavalry, being indebted to Abinante Palace Music Store, Monterey, California, in the sum of thirty-three dollars and forty-three cents (\$33.43), for merchandise purchased by him from said store, which amount became due and payable on or about September 1, 1936, did, at Presidio of Monterey, California, and elsewhere, from about September 1, 1936, to about January 12, 1937, dishonorably fail and neglect to pay said debt.

Specification 9: (Finding of not guilty.)

Specification 10: In that First Lieutenant William H. Thompson, 11th Cavalry, did, at Monterey, California, on or about August 22, 1936, with intent to defraud, wrongfully and unlawfully make and utter to L. Abinante, owner, Abinante Palace Music store, Monterey, California, a certain check, in words and figures as follows:

MONTEREY, CAL. August 22, 1936

:90-257 : MONTEREY BRANCH : 90-257 :  
BANK OF AMERICA

National Trust & Savings Association

Pay to the order of L. Abinante \$30.00  
Thirty &-----no/100-----Dollars  
Refer to maker William H. Thompson  
Payment Stopped.

and by means thereof, did fraudulently obtain from L. Abinante, owner, Abinante Palace Music Store, Monterey, California, the sum of ten dollars (\$10.00) in cash and credit to the amount of twenty dollars (\$20.00) on his account with said store, he the said First Lieutenant William H. Thompson then well knowing that he did not have and being without reasonable expectation that he would have sufficient funds in said bank for the payment of said check.

Specification 11: In that first Lieutenant William H. Thompson, 11th Cavalry, did, at Presidio of Monterey, California, on or about August 19, 1936, with intent to deceive Colonel Troup Miller, 11th Cavalry, the Commanding Officer, 11th Cavalry and Presidio of Monterey, California, officially and falsely state to the said Commanding Officer, by 3d Indorsement, dated Presidio of Monterey, California, August 19, 1936, as follows: "I mailed a money order to the Household Loans Inc., on the 7th" which statement was made by said First Lieutenant William H. Thompson, in said indorsement upon a communication dated Salt Lake City, Utah, August 14, 1936, received by Captain D. H. Nelson, 11th Cavalry, Adjutant 11th Cavalry and Presidio of

Monterey, California, from Household Loans, Inc., Salt Lake City, Utah, relating to the alleged payment that the said First Lieutenant William H. Thompson stated he had made to said Household Loans, Inc., on August 7th--the said indorsement being made by the said First Lieutenant William H. Thompson, upon reference to him of said communication for explanation, and which said indorsement was untrue and was known by the said First Lieutenant William H. Thompson to be untrue, in that he did not on August 7, 1936, mail a money order to the Household Loans, Inc., Salt Lake City, Utah.

Specification 12: In that First, formerly Second, Lieutenant William H. Thompson, 11th Cavalry, being indebted on January 8, 1936, to Household Loans, Inc., Salt Lake City, Utah, in the principal sum of one hundred fifty dollars (\$150.00), for money loaned to him by said Company, which loan in the total principal sum of one hundred fifty dollars (\$150.00) became due and payable in installments of ten dollars (\$10.00), plus interest, on the fifth of each month commencing February 5, 1936, did, at Presidio of Monterey, California, and elsewhere, from about February 5, 1936, to about January 10, 1937, dishonorably fail and neglect to pay the installments so becoming due during said period.

Specification 13: (Finding of not guilty.)

Specification 14: (Finding of not guilty.)

Specification 15: (Disapproved by reviewing authority.)

Specification 16: In that First Lieutenant William H. Thompson, 11th Cavalry, having on or about December 7, 1936, made and uttered to the Presidio Post Exchange, Presidio of San Francisco, California, a certain check for ninety dollars (\$90.00), on the Bank of America, Monterey Branch, Monterey, California, dated December 6, 1936, signed by him and payable to Post Exchange, Presidio of San Francisco, California,

said check having on or about December 15, 1936, been returned unpaid to the said Post Exchange by the bank upon which drawn, and the said First Lieutenant William H. Thompson having on or about December 30, 1936, in 8th Indorsement to the Commanding Officer, Troop B, 11th Cavalry, Presidio of Monterey, California, on an official communication dated December 15, 1936, from the Presidio Post Exchange, Presidio of San Francisco, California, concerning the said check, promised among other things that he would make this check good as soon as he received his pay for the month of December, and having on or about January 14, 1937, received such pay, did, at Presidio of Monterey, California, and elsewhere, from about January 14, 1937, to about January 20, 1937, dishonorably fail and neglect to keep said promise.

Specification 17: In that First, formerly Second, Lieutenant William H. Thompson, 11th Cavalry, being indebted on October 25, 1935, to Monroe Loan Society of New York, Inc., Brooklyn, New York, in the principal sum of one hundred dollars (\$100.00), for money loaned him by said company, which loan, in the total principal sum of one hundred dollars (\$100.00) became due and payable in installments of five dollars (\$5.00), plus interest, on the fifth of each month commencing with November 5, 1935, did, at Presidio of Monterey, California, and elsewhere, from about May 5, 1936, to about January 5, 1937, dishonorably fail and neglect to pay the installments so becoming due during said period.

Specification 18: In that First Lieutenant William H. Thompson, 11th Cavalry, did, at Presidio of Monterey, California, on or about September 28, 1936, with intent to deceive and injure, wrongfully and unlawfully make and utter to Monroe Loan Society of New York, Inc., Brooklyn, New York, a certain check, in words and figures as follows, to wit:

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MONTEREY, CAL. September 28, 1936.  
( 90-257 ) MONTEREY BRANCH (90- 257 )  
BANK OF AMERICA

National Trust & Savings Association

Pay to the order of Monroe Loan Society -----\$7.00  
Seven & -----00/100-----Dollars

Refer to Maker William H. Thompson

in payment of an installment then due on his loan, in the principal sum of one hundred dollars (\$100.00), procured from Monroe Loan Society of New York, Inc., Brooklyn, New York, October 25, 1935, he the said First Lieutenant William H. Thompson then well knowing that he did not have and being without reasonable expectation that he would have sufficient funds in said bank for the payment of said check.

Specification 19: (Finding of not guilty.)

Specification 20: (Finding of not guilty.)

Specification 21: (Finding of not guilty.)

Specification 22: (Finding of not guilty.)

Specification 23: (Finding of not guilty.)

Specification 24: (Finding of not guilty.)

Specification 25: In that First Lieutenant William H. Thompson, 11th Cavalry, being indebted on July 10, 1936, to Armed Service Finance Co., Montgomery, Alabama, in the principal sum of about one hundred sixty-seven dollars and fifty-five cents (\$167.55), plus interest, for money loaned to him by said company, which loan became due and payable in installments of about thirteen dollars and ninety-six cents (\$13.96) on the tenth day of each month, commencing August 10, 1936, did, at Presidio of Monterey, California, and elsewhere, from about August 10, 1936, to about January 20, 1937, dishonorably fail and neglect to pay the installments so becoming due during said period.

Specification 26: (Finding of not guilty.)

ADDITIONAL CHARGE: Violation of the 95th Article of War. (Finding of not guilty.)

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

He pleaded not guilty to the charges and specifications, and was found not guilty of Specifications 3, 5, 7, 9, 13, 14, 19, 20, 21, 22, 23, 24, and 26 of the Charge and of the Additional Charge and its specifications, guilty of Specifications 1, 2, 4, 6, 8, 12, 17, and 25, except the word "dishonorable" (the word is written "dishonorably" in the specifications), substituting therefor the words "under such circumstances as to bring discredit upon the military service", in violation of the 96th Article of War, and guilty of Specifications 10, 11, 15, 16, and 18, and of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were not announced. The reviewing authority disapproved the finding of guilty of Specification 15, approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Under Specifications 1, 2, 4, 6, 8, 12, 17, and 25 of the Charge, accused was, by exceptions and substitutions, found not guilty of "dishonorably" failing and neglecting to pay certain debts described, in violation of the 95th Article of War, but guilty of failing and neglecting "under such circumstances as to bring discredit upon the military service" to pay said debts, in violation of the 96th Article of War.

The evidence with respect to these specifications shows that the debts described were due and owing substantially as alleged, and that accused failed, as alleged, to pay them. Various dunning letters were written by creditors and other complaints because of nonpayment were made. To some of the letters accused did not respond. (R. 18,19 - Spec. 1; R. 21 - Spec. 2; R. 29,32 - Spec. 4; Exs. 1,2 - Spec. 6; R. 32,33,36 - Spec. 8; Ex. 4 - Spec. 12; Ex. 9 - Spec. 17; Ex. 15 - Spec. 25) In April, 1936, accused purchased, on the installment plan of payment, a radio at a price of about \$105 (R. 34), and there is reference in the record to his recent purchase of an automobile on similar terms, later returned to the seller (Ex. 3). Accused, testifying in his

own behalf, admitted the debts and stated that his failure to pay them was due wholly to his lack of funds. He testified that at the time of trial his total indebtedness was about \$1100. (R. 57,58) He is married (R. 62). By an indorsement dated September 28, 1936, introduced in evidence by the prosecution, accused listed payments on sundry debts from February 1, 1936 (Ex. 3). Such of these payments as were not disputed, together with other payments shown by the evidence (R. 31,33), amounted to \$305. Prior to June 13, 1936, his pay and allowances amounted to \$143 per month, and after that date, \$211 per month. From his bank deposits (Ex. 16) and the amount of his pay for one month specifically shown (Ex. 8), it appears probable that he had an allotment of pay of \$8.45 per month. He testified that he "received \$10.00 a month from home usually" (R. 72). From some time in October, 1936, to December 19, 1936, he was on duty at Headquarters, Ninth Corps Area, Presidio of San Francisco, California, in connection with the hearing of his Class B case before a court of inquiry, his permanent station being the Presidio of Monterey, California (R. 65).

As the findings of these specifications stand, accused is absolved of dishonor in his failure and neglect to pay the debts. Having been found not guilty of dishonorable conduct in this regard, the finding that he failed and neglected to pay the debts under circumstances of a nature to bring discredit on the military service must be construed to embrace only such discreditable circumstances as were not dishonorable or morally unworthy of an officer of the Army. The circumstances tending to bring discredit upon the military service, as found, could not, therefore, extend beyond the effect upon civilian creditors which might be expected from a culpable and protracted failure to pay just debts.

It is conceivable that accused, through his failure to pay his just debts, brought discredit upon the military service in that the good reputation of members of the service for prompt payment of their debts might thus have been impaired, but unless his failure and neglect to pay his debts involved some species of evasion or indifference to his just obligations (not amounting to dishonor or moral fault), there would not appear to have been an offense cognizable by the articles of war. If he made reasonably diligent efforts to pay his just debts but was financially unable to do so, the customs of the military service relieve his insolvent acts from the taint of criminality. The Judge Advocate

General has so held. With respect to convictions of failure and neglect to pay just debts to the discredit of the military service, in violation of the 96th Article of War, it was stated:

"Neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. Where the non-payment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit or specific promises of payment, it may be properly deemed to constitute an offense." CM 121152, Robertson; par. 1494, Dig. Ops. JAG, 1912-30.

Again, with respect to similar charges:

"The record shows no false representations by the accused, nor a failure to pay, characterized by deceit, evasion, or dishonorable conduct. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. Inasmuch as this specification does not allege or the evidence prove any circumstances amounting to dishonorable conduct in the non-payment of this debt, the finding of guilty of specification 4, charge II, cannot be supported." CM 123090, Hansbrough; par. 1494, Dig. Ops. JAG, 1912-30.

In listing instances of punishment for dishonorable neglect to discharge pecuniary obligations, Winthrop, in his Military Law and Precedents (Reprint, p. 715), states:

"In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, etc., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law."

From the evidence in this case, the Board of Review is not convinced that accused's failure promptly to meet his obligations was attributable to an evasive motive or to indifference to his legal obligations. For some undisclosed reason, perhaps inexperience and bad judgment, accused allowed himself to become immersed in debt beyond his ability to pay. But during the period covered by the charges he made substantial disbursements to his creditors (the record does not purport to show all payments made), and it is not plainly demonstrable how, from the income he received and while maintaining himself and wife under reasonably adequate living conditions, he could, in fairness to his other creditors, have paid substantially more than he did pay to those named in the specifications under consideration. There is evidence that the debts in question were long overdue and that accused did not always respond to demands for payment, but, under the circumstances, there is nothing of substantial weight to indicate that he intended finally to avoid his obligations or that he did not make reasonable efforts to discharge them. Such being the case, it is believed that his acts were not proved beyond reasonable doubt to have been discreditable within the meaning of the 96th Article of War.

In view of the foregoing, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specifications 1, 2, 4, 6, 8, 12, 17, and 25 of the Charge.

4. Under Specification 10 of the Charge, accused was found guilty of wrongfully and unlawfully making and uttering a check for \$30, with intent to defraud, knowing that he did not have, and being without reasonable expectation that he would have, sufficient funds in bank to pay it. Under Specification 11, he was found guilty of making a false official statement that he had mailed a certain money order. The transactions involved in these specifications are related and may be considered together.

As to Specification 10, the evidence shows that on August 22, 1936, accused made and delivered to the Abinante Palace Music Store, Monterey, California, operated by Leonard Abinante, a check for \$30, for which the store allowed him credit of \$20 on a standing account and paid him \$10 in cash (R. 33,44). The check was not introduced in evidence. The bank on which it was drawn does not directly appear but accused had an account at the Monterey Branch of the Bank of America, Monterey,

California, at this time (Ex. 16). A clerk of the store testified as to the check: "I think it was probably dated 22nd August, 1936", and that it was made payable to the Abinante Palace Music Store (R. 34). On July 31, \$203.75 was deposited to the credit of accused in the bank mentioned, but on August 4 the balance credited to him had fallen to \$3.66. No deposits were made and on August 22 his balance had been reduced to \$1.16. On September 1 a deposit of \$203.75 was made in the account. On September 2 the balance had fallen, through the cashing of nine checks, to \$12.03. No further deposit was made until September 30, on which date the account was credited with \$202.55. (Ex. 16) On a day not directly shown, the check was presented for payment to the bank on which drawn, but returned with the notation "Refer to Maker" (R. 33,44). Later, on a date not directly shown, it was "redeposited and returned" to accused (R. 44). During the month of August, charges were entered by the bank against the account of accused on thirteen occasions because of presentations of overdrawn and dishonored checks (the charge was twenty-five cents for each presentation) (R. 42,43; Ex. 16). One such charge was made on August 24 and others were made on August 27 (Ex. 16). An official of the bank testified that some of the dishonored checks presented to the bank during the life of the account were presented and charged for more than once (R. 43). Some of such charges during the life of the account were for postdated checks given by accused to various loan companies during preceding months (Exs. 4,10). At some time prior to the trial, accused made good the check given to the Abinante Palace Music Store (R. 44).

Accused testified that beginning about July, 1936, he was harassed by many dunning letters and complaints from creditors, and as a result of this and his outstanding postdated checks was never certain as to where he stood with respect to bills, debts and outstanding checks (R. 58,70). The postdated checks were taken from a book of checks other than that currently used. Counter checks of which he kept no record were drawn, and this added to his uncertainty as to the state of his account. (R. 71) When he gave the check to the Abinante Palace Music Company he had no idea or intention of defrauding Mr. Abinante (R. 59).

As to Specification 11, the evidence shows that on August 17, 1936, a letter to the Adjutant, 11th Cavalry, from Household Loans, Inc., making inquiry concerning a payment on account reported to have been mailed on August 7, 1936, to the concern by accused, was referred to accused for explanation. By 3d indorsement submitted to the Commanding Officer, 11th Cavalry, on August 19, accused stated:

(330)

"I mailed a money order to the Household Loans Inc., on the 7th. I am certain that it has arrived at their office by now. I have sent them an Air Mail letter asking if it has arrived so that I can investigate it with the Post Office." (Ex. 27)

The Adjutant testified that about September 9, 1936, he asked accused to show him the receipt for the money order and accused handed him a post office receipt showing the issue of a money order for \$7 payable to Household Loans, Inc. (R. 50,51; Ex. 18). The date stamp on this receipt was so affixed that it showed the year but not the month and day the receipt was issued (Ex. 18). The money order was in fact issued on August 22, 1936 (R. 45-47; Ex. 17).

Accused testified that at the time he wrote his indorsement referred to, he thought that he had mailed a payment on account to Household Loans, Inc., but, after receiving a letter from the concern, he went to the post office and learned that he had not sent the money order as he had stated. He "immediately" purchased the order and sent it to the creditor. He did not intend to deceive his commanding officer by his indorsement, and had no reason to do so, as he could readily have admitted, as in other cases, that the payment had not been made. (R. 65, 66,73) He had paid several accounts by money order, but could not say whether he had paid more than one during August (R. 72).

Thus it appears that on August 19 accused, in explanation of the letter advising of nonreceipt of a payment previously reported, falsely and officially stated that he had mailed a money order in payment on August 7. Three days later, on August 22, he purchased a money order in favor of the creditor, and, still later, when asked to display his receipt for the money order which he had falsely stated was mailed on August 7, produced, without explanation, the receipt for the order purchased on August 22, the receipt bearing no evidence of the day of its issue. On August 4 his bank balance had been reduced to less than the amount involved in the money order, and his balance remained in that condition for the remainder of the month. On August 22 he sold his worthless check to the Abinante Palace Music Company, obtaining money sufficient to cover the purchase of the money order on the same day. These facts, together with all the other circumstances of the case, leave no reasonable inference other than that accused, confronted with

the necessity of admitting or concealing an erroneous statement that he had made a remittance by mail to the Household Loans, Inc., chose the path of deceitfully reiterating that he had made the payment on August 7 and then, further to conceal his false statement, made and uttered the worthless check to obtain funds with which to buy the money order on August 22.

Accused must have known that his balance in the bank was insufficient to meet this check. He asserts that he was confused as to his bank balance, but in so far as his testimony shows he made no special effort to ascertain it, the logical and normal thing for him to have done, but used his check to obtain money acutely needed without any prospect of depositing funds to meet the check prior to receipt of his pay at the end of the month. There is nothing in the record suggestive of any reasonable expectation on his part that the check could be made good when presented in usual course. Examination of his bank statements for the year 1936 (Ex. 16) discloses that on February 22 his balance was \$61.39; in no other month of the year did his balance on the 22d day exceed \$5.78, and for the two months preceding August and the four following, his account was overdrawn on the 22d. On August 22, his balance was \$1.16. The circumstances of the two transactions, brought to light, refute the assertions by accused of his lack of dishonest motive and intent, and furnish convincing proof of the deceitful and fraudulent intent alleged in the specifications under discussion.

In the opinion of the Board of Review, the acts of accused proved under Specifications 10 and 11 fall below the standards of honesty and probity to be expected of an officer, and amount to conduct unbecoming an officer and a gentleman within the meaning of the 95th Article of War.

The defense made a motion to strike Specification 10, as well as Specification 18 to be hereinafter considered, as failing to allege offenses cognizable by the 95th Article of War, this upon the ground that they failed to allege that accused, in making and uttering the checks, did not intend to have sufficient funds in bank to pay them (R. 16). The motion was denied by the court. By each of these specifications, it is alleged that the check described was made and uttered by accused "with intent to defraud", he "then well knowing that he did not have and being without reasonable expectation that he would have sufficient funds in said bank for the payment of said check". The

language used sufficiently alleged that the acts of accused were intended by him to defraud and injure, the gist of the dishonorable conduct involved. The allegation that he had no reasonable expectation of having funds in bank to meet the checks was but another and equivalent way of alleging that he did not intend to have funds in bank to meet them. Proof of either allegation would establish the substance of the other. The specifications were sufficient to apprise accused of the nature of the offenses intended to be charged and to support conviction of violation of the 95th Article of War. Findings of guilty of similar specifications laid under the 95th Article of War were confirmed in CM 202819, Rogers.

5. Under Specification 16 of the Charge, accused was found guilty of dishonorably failing and neglecting, from January 14 to 20, 1937, to keep a promise officially made to his troop commander, to pay a check for \$90 in favor of the Presidio Post Exchange, Presidio of San Francisco, California, payment of which had theretofore been refused by the bank on which the check was drawn.

The evidence shows that on December 7, 1936, accused presented to the Presidio Post Exchange his check for \$90, and through it obtained credit against a standing account for \$77.64 and \$12.36 in cash (Ex. 6). Payment of the check was refused by the bank (Ex. 5), and on December 15 nonpayment of the check and further indebtedness to the Exchange were reported by letter to the Commanding General, Ninth Corps Area (Exs. 7,33). This letter was referred to accused for report and, after receipt of the report, to the Commanding Officer, Presidio of Monterey, California. The latter officer referred the correspondence, by 6th indorsement, to accused "For explanation and definite statement of his plans for settling this obligation". By 8th indorsement to the Commanding Officer, Troop B, 11th Cavalry, dated December 30, 1936, accused stated:

"See the 3rd Indorsement for explanation. At the time I issued this check I believed that the bank would cash this check as I directed in a letter written to them before I gave this check to the Post Exchange, which they failed to do. I will make this check good as soon as I receive my pay for the month of December. I also plan to pay as much on this months account as I am able, and will clear this account when I receive my pay for the month of January, on or about February 2, 1937." (Ex. 33)

Accused did not make the check good in January, 1937, but paid \$10 on account on February 10, and similar amounts in March and May, 1937 (Ex. 6). He was placed in arrest on January 5. Pursuant to orders (Ex. 29), he closed his account with the Monterey Branch of the Bank of America on January 13 (R. 40; Ex. 16). On December 9, his balance with this bank had been reduced to 19¢, and the account was overdrawn from that date until closed (Ex. 16). Of his December pay, he drew \$26.72 in cash on December 5 and \$42.20 in cash on December 11 at the Presidio of San Francisco. A check for the balance, \$134.83, was mailed to him at the Presidio of Monterey on January 12. (Ex. 8) At the time his bank account was closed, accused had outstanding checks that had not been paid (R. 64). By indorsement to the Commanding Officer, 11th Cavalry, dated September 28, 1936, accused listed his debts and outlined a plan of payment. Among other things, he made statements that he would make payments on specified debts in January to aggregate \$128.45. (Ex. 3) It does not appear that any part of these payments were made in January, 1937.

In view of the wording of the indorsement by accused of December 30, written in compliance with an order that he submit a plan of payment, it is believed that the indorsement must be construed to have been intended to present a "plan" of payment only, and not to involve a pledge or promise by accused to take up the check from his December pay. But in any event, the specification does not charge more than a dishonorable failure and neglect to pay a just debt to a government agency at a designated, specific and agreed time. As with other debts, no dishonor could be imputed to a failure to pay if the debtor did not have the means of payment, and there is no proof of fraud, deceit or evasion. The evidence shows that accused received pay in the amount of \$134.83 about January 14, but this was the full amount of his pay for December received during January. It does not appear that he received other funds during the month. He was overwhelmed with debt, and his immediate living expenses were impending. Under such circumstances, accused's failure for a period of six days to make the payment falls short of demonstrating such moral or military dereliction as is cognizable under the articles of war.

In the opinion of the Board of Review, the evidence is not legally sufficient to support the finding of guilty of Specification 16 of the Charge.

6. Under Specification 18 of the Charge, accused was found guilty of wrongfully and unlawfully making and uttering a check for \$7, with fraudulent intent, as in the case of Specification 10 above discussed.

The evidence shows that about September 28, 1936, at Monterey, California, accused made and mailed to the Monroe Loan Society of New York his check for \$7, described in the specification, to be applied in payment of an installment due on a loan of \$100 made to him by the Society in October, 1935 (Exs. 9,21). The check was presented for payment to the bank on which drawn, the Monterey Branch of the Bank of America, about October 10, and was by the bank dishonored because of insufficient funds (Ex. 21). On September 4, accused's balance with the bank was 53¢, and no deposit was made until September 30. On September 28 the account was overdrawn \$4.47. (Ex. 16) After a deposit of \$202.55 was made on September 30, a series of fifteen checks was cashed with the result that the balance in the account was reduced to 62¢ on October 5. No further deposit was made until December 8. (Ex. 16) During the period September 5 to October 10, charges were entered against the account because of 26 presentations of overdrawn and dishonored checks (R. 42,43; Ex. 16).

Accused testified that by the use of this check he obtained nothing other than a temporary credit on his obligation to the loan company, that he did not intend to defraud and that when he wrote the check, although confused as to the state of his bank account, he expected to have money in bank to pay the check upon presentation (R. 62).

By the making and passing of this check, accused gained some delay in the settlement of an overdue obligation, but gained nothing further. Any motive to defraud that he may have entertained was not, therefore, a strong one. The evidence shows, moreover, that at the time the check was made accused had ample reason to expect that his pay check would be deposited prior to the time at which the check would be presented for payment. The fact that other checks were subsequently cashed, which exhausted the proceeds of the deposit, before the \$7 check reached the bank on which it was drawn, certainly shows carelessness at some time on the part of accused as to the regularity of his account. It does not preclude the reasonable possibility that at the time the check was made he expected to have sufficient funds in bank for payment of it.

In the opinion of the Board of Review, the evidence is not legally sufficient to remove all reasonable doubt of fraudulent intent in this transaction, and is not, therefore, legally sufficient to support the finding of guilty of Specification 18.

7. The Army Register shows that following graduation from the United States Military Academy, accused was appointed a second lieutenant of Cavalry on June 13, 1933. He was promoted to first lieutenant on June 13, 1936. Proceedings for his classification in Class B are now awaiting action by the Final Classification Board.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings of guilty of Specifications 1, 2, 4, 6, 8, 12, 16, 17, 18, and 25 of the Charge, but is legally sufficient to support the findings of guilty of the Charge and Specifications 10 and 11, and the sentence, and warrants confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of the 95th Article of War.

*J. M. C. J.*, Judge Advocate.  
*Shas. B. Besson*, Judge Advocate.  
*Robert H. Kowalsky*, Judge Advocate.

To The Judge Advocate General.



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

Board of Review  
 CM 207264

*July 22, 1937.*

UNITED STATES ) ) v. ) ) Private DAVID J. WILSON ) (6684293), Headquarters ) Battery, 1st Battalion, ) 51st Coast Artillery. )	FOURTH CORPS AREA  Trial by G.C.M., convened at Fort Screven, Georgia, May 17, 1937. Dishonorable discharge, suspended, and confinement for six (6) months. Fort Screven, Georgia.
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HOLDING by the BOARD OF REVIEW  
 McNEIL, CRESSON and HOOVER, Judge Advocates.

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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 to be not legally sufficient to support the findings of guilty and the sentence in part, has been examined by the Board of Review and held to be legally sufficient to support the findings of guilty and the sentence.

2. Accused was found guilty, among other things, of fraudulent enlistment on December 18, 1936, by willfully misrepresenting that he was single when in fact he was married. In proof of the fact of marriage, there was received in evidence what purports to be a copy of a certificate of his marriage on March 7, 1936, at Norfolk, Virginia, attested by the Clerk of the Corporation Court of the City of Norfolk, Virginia, under the seal of said court (Ex. F). This certificate of marriage was offered with the statement by the prosecution that it was duly authenticated, and the defense stated that it had no objection to its introduction (R. 9). The court-martial by which the case was tried sat at Fort Screven, Georgia.

3. The certificate of marriage received in evidence was, in the state in which it was recorded, prima facie evidence of the fact of marriage as therein recited. Sec. 5074, Va. Code of 1936. Under section 687, Title 28, United States Code, and paragraphs 111 and 116 of the Manual for Courts-Martial, this record of a court of Virginia, if properly

admitted in evidence before the court-martial, had the same probative force and effect there as in Virginia (Town of South Ottawa v. Perkins, 94 U.S. 260, 271, 272), that is, was competent prima facie proof of the marriage.

4. Section 687, Title 28, United States Code, in providing for the admission in evidence by the federal courts of the records of state courts, applicable to courts-martial by virtue of paragraph 111 of the Manual for Courts-Martial, requires "attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge \* \* \* that the said attestation is in due form". The authentication of the marriage certificate in this case does not fully conform to the requirements of the statute in that it consists only of the attestation by the clerk, under seal, without a certificate of the judge of the court that the attestation was in due form. There is nothing in the record of trial to suggest that the attestation by the clerk is not in proper form.

It is believed that the court-martial was authorized to take judicial notice of the seal under which the attestation was made, the Corporation Court of the City of Norfolk being a state court (sec. 5905, Va. Code of 1936) of general jurisdiction (secs. 5890, 5910, Va. Code of 1936), in which marriage certificates are required to be recorded (sec. 5076, Va. Code of 1936), and which must be deemed to be a court of record. In Virginia and West Virginia Coal Co. v. Charles, 251 Fed. 83, 104, a Circuit Court of Virginia, of jurisdiction similar to the Corporation Court of the City of Norfolk, has been recognized as a court of record by a federal court.

In defining the principal matters of which courts-martial may take judicial notice, paragraph 125 of the Manual for Courts-Martial lists "the seals of all courts of record \* \* \* of the several States" as one of such matters. The paragraph also lists as a proper subject of judicial notice "the laws of the State \* \* \* in which the court is sitting". It may be inferred from the language last quoted that a court-martial is not authorized generally to take judicial notice of the laws of a state in which it is not sitting. However this may be, the Board of Review is of the opinion that paragraph 125 of the Manual for Courts-Martial, taken as a whole, does not preclude courts-martial from taking judicial notice of a state court's seal such as is affixed to the certificate of marriage in this case. To say that courts-martial are

authorized judicially to notice the seals of state courts of record and at the same time refuse them the power to know without special proof the laws of the states determining the nature of their courts as courts of record, would so negative and restrict the scope of the authority given to take judicial notice of seals as to destroy its practical usefulness. Such could hardly be the intent of the Manual.

In CM 160036, Abendschein, it was held by the Board of Review, with the concurrence of The Judge Advocate General, that a court-martial could not take judicial notice of the seal of the City Jail of Baltimore, Maryland, affixed to a paper entitled "Commitment to Jail (in Default of Fine)", with attestation by the warden of the jail, the paper reciting the conviction by a civil court of accused Abendschein and his imprisonment. The paper was received in evidence without objection by the defense to prove said conviction and confinement. This holding pertained only to the power of the court judicially to notice the purported seal of a city jail. The seal obviously was not the seal of a state court, and the holding is not pertinent in the instant case.

5. But whether or not the court in this case was empowered to take judicial notice of the seal under which the clerk's attestation was made, and although the marriage certificate was not in any event fully authenticated as required by statute, it is nevertheless the opinion of the Board of Review that the copy of the marriage certificate was properly received in evidence. Paragraph 116 a of the Manual for Courts-Martial expressly provides that an objection to proffered evidence of the contents of a document based on the ground that it "does not appear that a purported copy of a public record is duly authenticated" may be regarded as waived if not asserted when the proffer is made. The defense having expressly waived any objection it might have had to the copy of the certificate of marriage on the grounds of faulty authentication, the copy of the certificate, regular on its face in all respects and competent to prove the recitals contained therein, was properly for the consideration of the court. Together with the other evidence, it legally supports, prima facie, the findings of guilty of the charge and specification alleging fraudulent enlistment.

In the Abendschein case, above referred to, the paper bearing the purported seal of the city jail was admitted in evidence without objection

by the defense. The Board of Review did not discuss possible waiver of objection to this paper because of lack of authentication. It is to be noted, however, that the Abendschein case was tried and the holding submitted in 1924, prior to the promulgation of the Manual for Courts-Martial now in effect. The 1921 Manual, effective in 1924, did not contain provisions with respect to waiver of objections on the ground of lack of authentication similar in effect to those of the present Manual above noted.

6. The name borne upon the marriage certificate is identical with that of accused as shown by his enlistment records and as proved at the trial, and it may therefore be presumed that the certificate pertains to him. Par. 112 a, M.C.M. There is nothing in the record of trial which substantially weakens this presumption. Accused, in his testimony, did not deny his marriage and, although not expressly admitting it, made reference to his "wife" (R. 13).

J. M. Ches, Judge Advocate.  
Blas B. Bessons, Judge Advocate.  
Hubert W. Kooze, Judge Advocate.

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

Board of Review  
CM 207466

U N I T E D   S T A T E S	)	E I G H T H   C O R P S   A R E A
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sill, Oklahoma, July 10,
Private HUGH W. PHILPOTT	)	1937. Dishonorable discharge
(6260062), Headquarters	)	and confinement for six (6)
and Headquarters Battery,	)	months. Fort Sill, Oklahoma.
1st Battalion, 77th Field	)	
Artillery.	)	

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Hugh W. Philpott, Headquarters and Headquarters Battery, 1st Battalion, 77th Field Artillery, did, at Fort Sill, Oklahoma, on or about March 13, 1937, feloniously take, steal and carry away one suede jacket, value about seven dollars and twenty-five cents (\$7.25), the property of Private Cecil Black, Combat Train, 1st Battalion, 77th Field Artillery.

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

Specification: In that Private Hugh W. Philpott, Headquarters and Headquarters Battery, 1st Battalion, 77th Field Artillery, did, at Fort Sill, Oklahoma, on or about March 6, 1937, feloniously take, steal

and carry away one pair of civilian trousers, value about eight dollars (\$8.00), the property of Corporal Leslie W. Smith, Headquarters and Headquarters Battery, 1st Battalion, 77th Field Artillery.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for six months. The reviewing authority approved the sentence, designated Fort Sill, Oklahoma, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$ .

3. As to the Original Charge and its Specification, the evidence shows that at about 11 a.m., March 13, 1937, accused went to a squadroom in the 2d Ammunition Train Barracks at Fort Sill, Oklahoma (R. 8,9), located some considerable distance from his own quarters in that post (R. 24), and there, in the presence of another soldier, a Private Joe E. Smith, took from the open, unlocked locker of Private Cecil Black, Combat Train, 77th Field Artillery, the leather jacket described in the specification (R. 8,9,21), of the approximate value alleged (R. 18,25). Accused and Black were well acquainted, having come from the same small town, Heavener, Oklahoma, and having known each other for about eight or ten years (R. 7,21,24). Black had not given accused permission to take the jacket and had not previously lent him any other clothes (R. 6,7). That afternoon accused wore the jacket to Lawton, Oklahoma, and there, at a bus station, met a Private Vitatoc of the 1st Field Artillery and turned over the jacket to him in exchange for a sweater Vitatoc had been wearing (R. 10,11,21,27). Vitatoc was also from Heavener, Oklahoma (R. 7), and accused had known him well for many years (R. 21,24). A soldier who witnessed the exchange of clothes testified that accused and Vitatoc "met in front of the union bus station in Lawton and Vitatoc was going visiting in Oklahoma City and wanted to wear this jacket and they were old pals and they just traded or exchanged and let Vitatoc wear that to the city". The three then separated. (R. 11) A day or so later, Private Joe E. Smith told Black that accused had taken the jacket, whereupon Black talked to accused, who said he had let vitatoc have it and would get it from him the first time he saw him. The jacket was not returned by accused (R. 6) but was finally recovered from a pawnshop in Lawton (R. 13), where it had been sold on April 10, 1937, by a person who signed a bill of sale with the name "John L. vitatoc". (R. 12,14; ex. 1) vitatoc did not appear as a witness.

Accused testified that in taking the jacket he intended to wear it that evening and return it the same evening. He met Vitatoo in Lawton and the latter said he was returning to Fort Sill, whereupon, since accused did not intend to return until about two hours later, he gave the jacket to Vitatoo upon the latter's promise to return it to Black. (R. 21,22,26,27) Accused later learned that Vitatoo went to Oklahoma City (R. 22) and had not returned the jacket. Accused then told Black what had occurred, and offered to buy him another jacket (R. 22,23). About a week after the jacket was taken, after Vitatoo's return, accused questioned Vitatoo, who said that he still had it and would return it to Black. He failed to do so (R. 22). Accused intended to buy another jacket for Black in June, but was prevented from doing so by his confinement (R. 23).

Except as to the circumstances under which accused turned over the jacket to Vitatoo, there is no substantial dispute as to what occurred. There is no doubt that accused, as alleged, took and carried away the property described without the consent of the owner, applied it temporarily to his own use and deprived the owner temporarily of his rights of ownership therein. But the Board of Review finds in the record of trial no substantial evidence that accused intended permanently to deprive the owner of his property in the jacket. Without proof of such intent, the record of trial does not legally support the finding of guilty of larceny under this charge and specification. Par. 149 g, M.C.M.

The jacket was taken by accused openly under circumstances which do not allow an inference of stealth or secrecy in the taking. With respect to such a taking, it has been authoritatively said that:

"Where the taking is open, in the presence of others, not amounting to a robbery, and there is no concealment, or, in short, where the testimony as to the taking, standing alone, raises a presumption of fact in favor of an innocent taking, and there is nothing in it from which a jury may legitimately infer a felonious purpose, then a verdict against the accused cannot be sustained, and it would be the duty of the court to set it aside." Long v. State, 32 So. (Fla.) 870, 872. See also cases listed to this effect in 36 Corpus Juris 913.

Not only was the property taken without any suggestion of clandestineness, but it was taken from the open locker of a friend of long standing who,

though he did not consent to the taking, might reasonably have been expected willingly to lend the jacket to accused for temporary wear had he been present.

Soon after the taking, accused passed possession of the property to a mutual friend, but considering this transaction in its aspect most unfavorable to accused, there is nothing therein upon which an inference other than that accused intended a temporary unauthorized use by Vitatoo of the jacket might be based. The jacket was pawned some weeks later, but the circumstances of the pawning do not justify an inference that accused had any knowledge thereof, or was in any way a party thereto. The evidence, on the contrary, indicates that accused, in good faith, attempted to arrange return of the property to Black before it was pawned.

There is in the evidence, then, proof only that accused wrongfully took and carried away the property, used it temporarily and failed to return it. In the absence of any other circumstances indicative of the required animo furandi, mere trespass, asportation and temporary use of property wrongfully taken have been held insufficient to justify findings of guilty of larceny. CM 193315, Rosborough; CM 194359, Sadler; CM 197795, Hathaway; CM 205811, Fagan; CM 206350, McAdams et al.

In the opinion of the Board of Review, the evidence is not legally sufficient to support the findings of guilty of the Original Charge and its Specification, but is legally sufficient to support findings of guilty of the lesser included offense of wrongfully taking and carrying away the property described in the specification without the consent of the owner, in violation of the 96th Article of War.

4. As to the Additional Charge and its Specification, the evidence shows that about March 6, 1937, accused took from a locker, assigned to Private 1st Class Leslie W. Smith, in the barracks of accused's battery at Fort Sill, Oklahoma, the trousers described in the specification (R. 15,23,27), of the approximate value alleged (R. 18). That night the owner, Smith, saw accused in Lawton wearing trousers that "looked like" those belonging to Smith (R. 15). Accused was later that night placed in confinement for some offense not specified, and about three days later the trousers were obtained by Smith, with the approval of accused, from the guardhouse (R. 16; Ex. 2). Smith testified that he did not authorize accused to take the trousers (R. 16,29), although he

had known accused about two years while both were members of the same organization, and had on one occasion lent clothes to him (R. 16). When Smith went to the guardhouse to get the trousers, accused did not make any attempt to conceal the fact that he had taken them (R. 20).

Accused testified that on the day before he took the trousers, he obtained permission from Smith to do so (R. 27,28), and that he intended to return them that evening but was prevented from returning them by his confinement (R. 23,24). When Smith came to the guardhouse, he said that he had come for the trousers and accused approved the delivery thereof to him (R. 24).

As in the case of the jacket above described, the Board of Review is unable to find in the record any substantial evidence of an intent on the part of accused permanently to deprive Smith of his property in the trousers described in the specification.

There is evidence that accused did not have express permission to take the trousers and the court was justified in concluding that they were taken by trespass. But beyond the absence of consent to or knowledge by the owner of the taking, no fact or circumstance is disclosed which indicates stealth or secrecy in the trespass or asportation. The fact that the two men were friends in the same organization, and that Smith had previously lent clothes to accused tend to negative any suggestion that the taking was clandestine. The actions of accused subsequent to the trespass were devoid of any suggestion of a purpose permanently to deprive the owner of his property. Again, mere trespass in the taking, asportation and temporary use of property are not sufficient legal proof of intent to steal.

In the opinion of the Board of Review, the evidence is not legally sufficient to support the findings of guilty of the Additional Charge and its Specification, but is legally sufficient to support findings of guilty of the lesser included offense of wrongfully taking and carrying away the property described in the specification without the consent of the owner, in violation of the 96th Article of War.

5. The offense of wrongfully taking and carrying away property without the consent of the owner, in violation of the 96th Article of War, is not listed in the table of maximum punishments set forth in paragraph

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104 c of the Manual for Courts-Martial, but, being lesser than and included in the listed offense of larceny, in violation of the 93d Article of War, may be punished as authorized for the latter offense. Par. 104 c, M.C.M.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the charges and specifications as involves findings of guilty of wrongfully taking and carrying away the property described in the specifications, of the ownership and approximate values alleged, at the times and place alleged, and without the consent of the respective owners, in violation of the 96th Article of War, and legally sufficient to support the sentence.

W. M. Lewis, Judge Advocate.  
Ernest J. Johnson, Judge Advocate.  
Hubert W. Hoover, Judge Advocate.

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

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Board of Review  
CM 207523

U N I T E D   S T A T E S	)	THIRD CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Hoyle, Maryland, July
Private JAMES M. MCKINNON	)	22, 1937. Confinement for
(R-425093), Headquarters,	)	six (6) months and forfeiture
Headquarters Battery and	)	of \$15 pay per month for like
Combat Train, 1st Battalion,	)	period. Fort Hoyle, Maryland.
6th Field Artillery.	)	

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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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 not legally sufficient to support the findings and sentence in part, has been examined by the Board of Review; and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: Violation of the 84th Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: In that Private James M. McKinnon, Headquarters, Headquarters Battery and Combat Train, 1st Battalion, 6th Field Artillery, did, at Fort Hoyle, Maryland, on or about June 17, 1937, through neglect lose two (2) each blankets, woolen, olive drab, @ \$2.50, of the total value of five dollars (\$5.00), issued for use in the military service of the United States.

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

Specification: In that Private James M. McKinnon, Headquarters, Headquarters Battery and Combat Train, 1st

Battalion, 6th Field Artillery, did, at Fort Hoyle, Maryland, on or about June 18, 1937, wrongfully introduce into quarters one half pint, more or less, whisky.

He pleaded not guilty to the charges and specifications, and was found guilty of Charge I and Specification 2 thereunder and of Charge II and its Specification, but not guilty of Specification 1, Charge I. No evidence of previous convictions was introduced. He was sentenced to confinement at hard labor for six months and forfeiture of \$15 per month of his pay for a like period. The reviewing authority approved the sentence and designated Fort Hoyle, Maryland, as the place of confinement. The sentence was published in General Court-Martial Orders No. 132, Headquarters Third Corps Area, Baltimore, Maryland, July 31, 1937.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder.

4. With respect to Charge II and its Specification, the evidence shows only that about the date alleged accused introduced into quarters at Fort Hoyle, Maryland, some intoxicating liquor (R. 6-9). No evidence was introduced sufficient to show that such introduction was wrongful as alleged and, unless the court was empowered to take judicial notice of a military order or regulation making such an act wrongful in a military sense, the record of trial is not legally sufficient to support the findings of guilty of this charge and specification.

The president of the court stated at the trial that the court would take judicial notice of "General Orders No. 2, Headquarters, Fort Hoyle, Maryland, dated January 31, 1936" (R. 18), but neither the order nor a copy thereof was read or introduced in evidence. Accompanying the record of trial but not a part thereof is what purports to be a copy of General Orders No. 2, Headquarters Fort Hoyle, Maryland, January 31, 1936, which, among other things, prohibits the introduction of intoxicating liquors into barracks at Fort Hoyle, Maryland.

5. Was the general court-martial appointed by the Commanding General, Third Corps Area, sitting at Fort Hoyle, Maryland, authorized to take judicial notice of a general order issued by the post commander?

In the opinion of the Board of Review, this question must be answered in the negative.

Paragraph 125 of the Manual for Courts-Martial lists, among those matters of which judicial notice may be taken by courts-martial:

"General orders, bulletins, circulars, and general court-martial orders of the War Department; general orders, bulletins, circulars, and general court-martial orders of the authority appointing the court and of all higher authority."

Inasmuch as the post order under consideration was issued by an authority lower than the authority appointing the court, no explicit authorization for the court to take judicial notice thereof may be found in the clause quoted. Neither may it be implied from the language of the clause that a court-martial is authorized judicially to notice orders issued by an authority inferior to the authority appointing the court, for such an implication would negative the express definition of the power as applicable to orders issued by the appointing or higher authority. The Judge Advocate General has expressed like views with respect to a similar provision of the 1921 Manual for Courts-Martial (par. 289, 2(6)). CM 156326, Spence; see also CM 155893, Johnson.

It is true that under the authority quoted a special or summary court-martial convened by the post commander at Fort Hoyle might judicially notice the post order which the general court-martial sitting at that post (composed of officers on duty at and stationed within the post) might not recognize without proof. But this result is not inconsistent with the rules of judicial notice generally applicable, which rules limit judicial knowledge to public acts "operative within the jurisdiction of the court" (Wharton's Crim. Evid., 11th ed., par. 26) and deny to civil courts of general jurisdiction the power to take judicial notice of laws such as municipal ordinances which the local municipal courts of limited jurisdiction may judicially notice. Wharton's Crim. Evid., par. 30; 15 R.C.L. 1077; 23 Corpus Juris 137, 138.

The listing in paragraph 125, Manual for Courts-Martial, of matters of which courts-martial may take judicial notice is not, by its terms, exclusive of all other matters but, because of the civil rule noted, the possible impracticability of superior commanders securing prompt



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

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Board of Review  
CM 207588

U N I T E D	S T A T E S	)	SEVENTH CORPS AREA
		)	
	v.	)	Trial by G.C.M., convened at
		)	Army and Navy General Hospital,
Second Lieutenant WILLIAM		)	Hot Springs National Park,
C. LIZOTTE (O-20050),		)	Arkansas, July 26, 1937.
Medical Administrative		)	Dismissal.
Corps.		)	

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OPINION of the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, 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. The accused was tried upon the following charges and specifications:

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

Specification: In that Second Lieutenant William C. Lizotte, Medical Administrative Corps, United States Army, did, at Army and Navy General Hospital, Hot Springs National Park, Arkansas, on or about February 1, 1937, feloniously embezzle, by fraudulently converting to his own use, forty-seven dollars and eight cents, money of the United States, the property of the United States, entrusted to him by Captain Raymond W. Bryant, Quartermaster Corps, Finance Officer, Army and Navy General Hospital, Hot Springs National Park, Arkansas, for payment to Para Lee C. Waggoner.

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

Specification: In that Second Lieutenant William C. Lizotte, Medical Administrative Corps, United States

Army, did, at Army and Navy General Hospital, Hot Springs National Park, Arkansas, on or about March 25, 1937, with intent to deceive Colonel William H. Moncrief, Medical Corps, his commanding officer, officially state to him that he, the said Second Lieutenant Lizotte, had paid to Para Lee C. Waggoner the sum of forty-seven dollars and eight cents, due her as pay for services as a Civilian Conservation Corps nurse, or words to that effect; which statement was untrue and was then known by the said Lieutenant Lizotte to be untrue.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as involved dismissal from the service, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that on February 1, 1937, accused was assistant adjutant of the Army and Navy General Hospital, Hot Springs National Park, Arkansas, and as such officially witnessed payments at a pay table by the finance officer of the hospital, Captain Raymond W. Bryant, Quartermaster Corps, to certain civilian employees (R. 6,8). The name of Miss Para Lee C. Waggoner, a civilian nurse employed at the hospital from January 12, 1937, to January 27, 1937, appeared on a pay roll handled that day (R. 8; Pros. Exs. 2,3), but she was not present to receive the pay due her (R. 8; Pros. Ex. 3). The amount shown on the pay roll, \$55.90, was paid by the finance officer (R. 7,8,10; Pros. Ex. 2). Accused, as the witnessing officer, was the person to whom, as a rule, such payments were delivered (R. 8,10). A receipt dated February 1, 1937, purporting to bear the signature of accused, for the sum of \$55.90 less \$8.82 refunded, leaving a balance of \$47.08 retained by the maker of the receipt, was turned over to the finance officer (R. 5,8; Pros. Ex. 1). Miss Waggoner did not receive her pay, and, on March 7, 1937, wrote from Sisseton, South Dakota, to the chief nurse at the hospital making inquiry. On March 10, she wrote to the commanding officer of the hospital complaining of nonpayment, and on March 22 again wrote to him in similar tenor. (Pros. Ex. 3)

Payment was actually made about March 30 by the executive officer of the hospital from funds furnished by the mother of accused at the request of the executive officer (R. 18; Pros. Exs. 3,7). About March 10, the chief nurse, upon receipt of the letter to her, talked to accused concerning the payment and he said that he "had taken care of it". He then took the letter and stated that he would answer it. (R. 12) Miss Waggoner did not receive any communication or payment from accused at any time (Pros. Ex. 3).

About March 12, 1937, Colonel William H. Moncrief, Medical Corps, commanding officer of the hospital, having received the letter by Miss Waggoner dated March 10, called accused before him and questioned him, whereupon accused stated that he had mailed the payment to the nurse and produced what purported to be a carbon copy of a letter from accused to Miss Waggoner, dated March 11, saying that he had mailed the payment to her on February 1, and, in view of her nonreceipt of the payment, was inclosing his personal check for \$47.08 to cover (R. 14; Pros. Ex. 4). Colonel Moncrief told accused to prepare for Colonel Moncrief's signature a letter to Miss Waggoner acknowledging her communication, advising her that the matter was being investigated, and requesting her to let him know if she obtained information concerning the payment stated by accused to have been made on February 1 (R. 14). Subsequently, on a date not stated, Colonel Moncrief demanded this letter, and an unsigned original draft with carbon copies reciting among other things that accused had stated that Miss Waggoner's pay had been mailed to her on February 1, was produced by accused with the statement that Colonel Moncrief had directed him to hold the letter (R. 16,28; Pros. Ex. 8). About March 25, Colonel Moncrief received the second letter from Miss Waggoner and again called accused before him and questioned him in the presence of his executive officer and a stenographer. Accused thereupon officially stated that the payment in question had been made to Miss Waggoner, but that he was uncertain as to whether the payment was made by post office money order or by check on "the Carlisle Trust" of Carlisle, Pennsylvania. Colonel Moncrief then "gave him 24 hours to secure the receipt for the money order or show me the stub of the check". Accused failed to produce a receipt or check stub. (R. 15,17) No money order was in fact purchased by accused in favor of Miss Waggoner at the post office in Hot Springs, Arkansas, between January 30, 1937, and February 4, 1937 (R. 19). Accused did not have any account with the Carlisle Trust Company of Carlisle, Pennsylvania, on February 1, 1937, or thereafter

(Pros. Ex. 5). In February or March, accused asked the money order clerk of the Hot Springs, Arkansas, post office to examine his records to determine whether he had purchased a money order in favor of Miss Waggoner (R. 20).

4. Accused made an unsworn written statement that he reported at the Army and Navy General Hospital on June 2, 1936, following graduation from the basic class, Medical Field Service School, and was thereafter detailed as and performed the duties of Medical Supply Officer, Commanding Officer and Supply Officer of the Medical Detachment, Hospital Mess Officer, Commanding Officer of the Signal Detachment, Assistant Adjutant, and Officer in Charge of Civilian Employees. On February 1 he witnessed the payment of the enlisted personnel. There were many absentees for whose pay he became responsible.

"We paid so many people that it is impossible to remember each individual case, but it is apparent by the Finance Department Records that sometime during that morning I received either Fifty Five Dollars and Nine Cents (\$55.09) or Forty-Eight Dollars and Seven Cents (\$48.07) to be forwarded to a former nurse, Para Lee Waggoner.

\* \* \*

Whether the total amount was given to me or whether the refund was deducted by some clerk, returned to the Finance Officer, receipt thereof received and place into the files, how this was done I do not remember.

During the time of performing these duties as mentioned above the Finance Officer at this station had occasion to turn over to me hundreds of times, pay of civilians and enlisted men, when for some reason they could not be present at the pay-table. Also during the month I would receive pay due individuals at that time. My concern then was to turn over, as soon as practicable, the money to the person concerned. Many times I would have to wait until such persons came back from furlough, or leave or until I could get their proper addresses. As stated above, according to the records of the Finance Office, the money for Miss Waggoner was turned over to me, together with money due all absentees from the pay-table. When all the individuals for whom money had been entrusted to me had been paid I was of the opinion and belief that each and every one had received their money as I did not have any extra money in my possession.

On March 10, 1937, the letter received by the Chief Nurse, Miss Morgan and turned over to me by Private 1/c1 Clarence W. Reinhardt, was immediately answered by myself. I had an account with the Arkansas National Bank in Hot Springs, Ark., but had allowed the balance to become zero, therefore after writing her the letter, I placed the letter in my desk drawer with the intention of depositing the money in the bank without delay, and then send the check to Miss Waggoner. Even though it is hard to understand somehow in the rush of my innumerable duties, the letter apparently became mixed up with the papers and correspondence I was receiving daily pertaining to my duties and was not mailed, and until Colonel Moncrief called me into his office March 25th nothing further had happened to bring my attention to the matter. When Colonel Moncrief on March 25th, asked me if I had paid the money it immediately flashed into my memory that I had written the letter and not taking time to verify the records further, I replied that I had paid the account, believing at the time that I was telling the truth and as testified by the Commanding Officer, Colonel Moncrief I stated that I did not recall if it were a check or money order. After being excused by Colonel Moncrief and leaving his office I immediately started to check the records as I began to wonder why I was being so quizzed. I went to the local Post Office and had them check their records to find out if I had sent a money order on February 1st. After ascertaining that no money order had been sent that day I began scrummaging around in my desk and other places trying to locate data and receipts that might not through error been given to the filing clerk for file. Upon finding the letter which I had written to Miss Waggoner in which I stated I was enclosing a check, I therefore immediately went to the Colonel's Office to tell him of my misstatement but he had left his office for the day. I then wrote him a note asking him to call me to his office upon his arrival thereat. The purpose of this interview was to correct my statement and acquaint him of the true facts in the case. Colonel Moncrief upon his arrival in his office next day called me as I had requested and I told him the facts and that the money had inadvertently not been sent. There absolutely had been no intention to steal the money." (Def. Ex. 12, pp. 2,3)

When called before Colonel Moncrief on March 25, accused did not "realize the seriousness of it all", and had he been warned he would have refreshed his memory from the records and would thus have been able to state the actual facts. Because of his many duties and inexperience he became confused at times but

"had no intention to steal this money, Forty Seven Dollars hardly appears to be worth risking an entire career when I had my Mother and family to care for. The statements made to Colonel Moncrief were made from memory, I had no intention of telling him untruths. But when I checked and found the true facts in the case I did go to him and tell him the true facts in the matter."  
(Def. Ex. 12, p. 4)

He made reference to previous enlisted service from July 1, 1923, to August 19, 1935, with five discharges with character excellent in noncommissioned grades, the last discharge having been given to enable him to accept his commission (Def. Ex. 12).

Evidence of numerous duties of accused was introduced by the defense (R. 21-26; Def. Exs. 3-11, incl.).

5. In rebuttal, Colonel Moncrief testified that he did not recall that accused came to him with a statement that the payment had not been sent because of inadvertence (R. 28), but that after March 25 accused came to him for an interview and was told that the whole matter had been referred for investigation and that whatever he might wish to say could be presented to the investigating officer (R. 29).

6. Thus the evidence, including the unsworn statement by accused, plainly shows that at the time and place alleged in the Specification, Charge I, there was intrusted to accused by the finance officer named the sum of \$47.08, public funds, for payment to Miss Waggoner as compensation for services rendered as a nurse. The money was not paid to her, and the circumstances leave no substantial doubt that it was fraudulently converted by accused to his own use. Confronted with Miss Waggoner's demand for her pay, accused did not produce the money. Temporizing, he reported payment on February 1 by post office money order or check, and displayed to his commanding officer a carbon copy of what purported to be a letter dated March 11 transmitting his own

check in payment. No money order was purchased, no check was drawn, and no letter was sent. According to his own statement, his bank account, on March 11, was without funds.

After a delay of two weeks following his assertion that the money had been transmitted to Miss Waggoner, accused, again confronted with his dereliction, positively and officially stated to his commanding officer, as alleged in the Specification, Charge II, that he had paid Miss Waggoner. Not only was the statement false, but in the light of the circumstances it must be concluded that it was known by accused to be untrue and was made by him deceitfully with intent to conceal his wrongdoing. Accused, in his unsworn statement, contended that due to press of duties he did not learn of the nonpayment until March 10; that, still owing to the confusion of his many duties, he neglected to deposit money in his bank to cover the check he intended to send and neglected to send the letter to Miss Waggoner; and that when questioned by Colonel Moncrief he answered carelessly and on the spur of the moment, without knowledge of the falsity of what he said or of the seriousness of his statements. In view of the uncontradicted evidence of the receipt of the money by accused, his long continued failure to pay it over, his previous conversations about nonpayment and all the other circumstances of the case, the court could not reasonably have been expected to accept as true these assertions by accused of inadvertence and innocence in his wrongdoing.

In the opinion of the Board of Review, the evidence establishes beyond reasonable doubt the embezzlement by accused of the money intrusted to him and the false official statement by him in relation thereto, as charged. The latter offense was violative of the 95th Article of War as conduct unbecoming an officer and a gentleman.

7. The defense suggested, through cross-examination of Colonel Moncrief and through the unsworn statement of accused, that before interviewing accused on March 25, Colonel Moncrief should have warned him of the seriousness of the matter under investigation. The omission so to warn accused did not violate his legal rights, and, in view of the nature of the wrongdoing under consideration and the previous transactions connected therewith, it does not appear to the Board of Review that there was any element of unfairness or other impropriety in the omission.

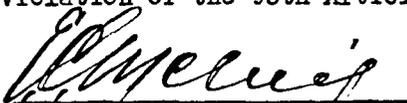
8. Papers accompanying the record of trial (letter dated June 27, 1937; radio dated July 5, 1937) show that prior to trial accused requested the detail as his individual counsel of two officers, one stationed at Fort Sam Houston, Texas, and the other at Fort Riley, Kansas, and that the request in each case was finally, on appeal, refused by the War Department upon the ground that neither officer was available to act as individual counsel (5th Ind., W.D., July 19, 1937, A.G. 201 Lizotte). Accused was defended by the appointed defense counsel and assistant defense counsel, Lieutenant Colonel Clark Blance, Medical Corps, and First Lieutenant Joe E. McKnight, Medical Administrative Corps. In his unsworn statement accused expressed the belief that he was unjustly treated by the refusal to detail individual counsel of his selection, and stated that he was financially unable to employ civilian counsel or pay the expenses of military counsel of his own choice not detailed. (Def. Ex. 12)

Article of War 17 and paragraph 45 a of the Manual for Courts-Martial provide for military counsel selected by an accused only if such counsel be reasonably available. The administrative determination by the War Department that the military counsel selected by accused were not available for that duty was conclusive as to availability. Civilian counsel is not provided at government expense. Par. 45 a, M.C.M. There is nothing in the record of trial to suggest that any substantial right of accused was injuriously affected by the refusal to detail the officers requested by accused as individual counsel.

9. Accused is 33 years of age. The Army Register shows his service as follows:

"Pvt., corp., sgt. and staff sgt. Med. Dept. 1 July 23 to 19 Aug. 35; 2 lt. Med. Adm. C. 1 Aug. 35; accepted 20 Aug. 35."

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 of guilty and the sentence, and warrants confirmation of the sentence. A sentence of dismissal is authorized upon conviction of violation of the 93d Article of War and mandatory upon conviction or violation of the 95th Article of War.

 Judge Advocate.

 Judge Advocate.

To The Judge Advocate General.  Judge Advocate.

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

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Board of Review  
CM 207591

SEP 20 1937

U N I T E D   S T A T E S	)	FOURTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bragg, North Carolina,
Private JOE M. NASH (6844142)	)	July 20, 1937. Dishonorable
and Private JAMES R. MORRIS	)	discharge and confinement for
(6395739), both of Service	)	six (6) months, as to each.
Battery, 17th Field Artillery.	)	Fort Bragg, North Carolina.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. The accused were tried upon the following Charge and Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Joe M. Nash, Service Battery, 17th Field Artillery, and Private James R. Morris, Service Battery, 17th Field Artillery, acting jointly, and in pursuance of a common intent, did, at Fort Bragg, North Carolina, on or about June 9, 1937, feloniously take, steal, and carry away about twenty five (25) gallons of gasoline, value about two and no/100 dollars (\$2.00), the property of the United States, furnished and intended for the military service thereof.

They pleaded not guilty to, and were found guilty of, the Charge and Specification. No evidence of previous convictions was introduced as to accused Morris; evidence of three previous convictions was introduced as to accused Nash. Each was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for six months. The reviewing authority approved the sentences, designated Fort Bragg, North Carolina, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The evidence shows that on June 9, 1937, accused were assigned drivers of motor trucks operated at Fort Bragg, North Carolina, by the Service Company, 17th Field Artillery (R. 24,25,27). Accused Nash was the driver of truck No. 84 (R. 25), which, on June 9, was dispatched for police work (R. 27) on a run of about 30 or 35 miles (R. 33). At about 4 or 5 p.m., June 9 (R. 29), 30 gallons of gasoline were placed in the tank of this truck, "filling" it "to the nearest gallon" (R. 40). Thirty gallons was about the amount normally consumed by the truck on the run in question (R. 33). The tank had a capacity of 50 gallons (R. 31). Because of a slant of the ground at the gasoline pump, this tank and the tanks of similar trucks could not be completely filled (R. 33,38), but, filled to the point of overflowing at the pump, would, when taken to level ground, lack about one and three-quarters inches or about 7 gallons of being filled to capacity (R. 31,32,39).

At about 7:30 p.m., June 9, the two accused appeared at the home of a brother of Nash, in Spring Lake, North Carolina, and remained there until about 9:30 p.m. Mrs. Nash, the sister-in-law of accused Nash, then took the two accused with her (R. 41,42) in her Ford coupe (R. 8) to the vicinity of their barracks at Fort Bragg. There Nash asked her to take them "on a little business they had" (R. 42) and she drove them along a "rock road" to the vicinity of "what they called the 'S' curve" and asked her to stop (R. 42,44,46,47). The exact location of this "'S' curve" is not shown. When the car stopped, accused alighted and promptly put in the front of the car a can and one or more in the back. Following directions given by both accused, Mrs. Nash then turned about and returned "to the post". (R. 43) At about 10:30 p.m. at a road crossing at "Smoke Bomb Hill, McCloskey Drive", about three-fourths of a mile from the "post proper", the car was stopped by military police, one of whom testified that accused "were leaving the post on a road that was restricted, leaving it on a back road, heading west, on McCloskey Drive" (R. 8). The car was searched and in the front compartment a can and a "siphon hose" were found, while in the rumble seat compartment another can was found. Both cans were filled with gasoline, one holding about 10 gallons and the other about 15 gallons. One of the containers was stoppered with a small potato. (R. 9-12) A seam of one of the containers had been caulked or "stuffed" with issue soap (R. 21).

A military policeman asked accused where they had obtained the gasoline and Nash said "from a tractor, parked on the side of the road",

but soon after said he got it "from a CCC truck, parked down at the CC Camp between here and Manchester" (R. 13). Nash asked the policeman at this time "why can't we just say nothing about this and it will blow over. We have this lady along here with us and we don't want to get into trouble". (R. 14) The party was taken to the guardhouse and on arrival there accused Morris asked Nash to "tell the truth, let's don't lie about it, tell the man the truth". Nash then said that he got the containers "on the back road at the dump, between there and the balloon hangar, on the road that runs between here and the balloon hangar by the post dump". (R. 14) One military policeman testified that Nash said "they found the gasoline on the 'S' curve--down about the dump" (R. 17).

On the morning of June 10, the motor park containing the trucks used by the Service Company was examined. A small potato, similar to that used as a stopper, and a bar of issue soap which bore on its surface scratches or indentations which appeared to correspond in some respects with the shape of that part of the container on which soap had been placed, were found on the floor of the cab of truck No. 84. (R. 11,12,21,22) A footprint with a rubber heel mark resembling a heel on a boot taken from Morris was found beneath or near the truck (R. 20,27). Morris might properly have been in the vicinity of the footprint, he being driver of a truck kept in the park (R. 27). Many rubber heels of the type in question (as many as 200 per month) were placed on shoes at Fort Bragg by a local post exchange shoe repair shop (R. 27,28). One officer testified that he found near truck No. 84 an imprint in the sand which might have been made by one of the containers found in Mrs. Nash's car (R. 20,24) and on the running board a very faint wetness suggestive of "a ring of some greasy liquid" (R. 24). Another officer testified that he examined the imprint in the sand and, comparing it with the container, was of the opinion that the imprint could not have been made by the container in question (R. 26). Measurements of gasoline in truck No. 84 were taken, and it was estimated that the tank lacked about 7 gallons of being completely filled (R. 31-35), that is, it was "an average full tank" (R. 39). Measurements of gasoline in all the other trucks in commission within the park (some 3 or 4) were also taken and it was found that each tank contained about the same amount as truck No. 84 (R. 35-39).

Both accused remained silent at the trial.

4. To establish the offense charged, it was necessary to prove by direct or circumstantial evidence that the gasoline shown to have been in the possession of accused was property of the United States, furnished and intended for the military service, that is to say, that issued military property of this description was in fact stolen. In the opinion of the Board of Review, the evidence is not legally sufficient to prove such ownership or theft.

It was apparently the theory of the prosecution that the gasoline was taken from truck No. 84, and circumstances somewhat suggestive of that source were shown, to wit, the finding on the truck of the bar of soap with which one of the containers might have been caulked, of the potato similar to that used to stopper one of the containers, of the footprint near the truck that might have been made by one of accused, and of some markings near and on the truck that might have been made by one or the other of the containers. But it was not proved that any gasoline was taken from truck No. 84 during the day on which accused were shown in possession of gasoline; in fact, the evidence indicates the contrary. It was likewise shown that the tanks of the other trucks in the motor park were found to be normally filled on the morning following the apprehension of accused. No shortage of government gasoline at any time was proved. These circumstances, considered in conjunction with all the other circumstances of the case, fall short of justifying a reasonable inference that the gasoline found in the possession of accused was taken from truck No. 84 or other government trucks at the time alleged. It may be conjectured that the gasoline was taken from the government at some time and place not indicated by the evidence, but no legal inference to that effect sufficient to support conviction is justified.

Other circumstances in the case suggestive of wrongdoing by accused were shown, i.e., the fact that accused were, at night, probably leaving the post by an unfrequented road with the gasoline when arrested, the fact that the gasoline had been cached at a place (whether on or off the military reservation is not clearly proved) in the general neighborhood of the reservation, and the fact that they had in their possession a hose which might have been used to siphon gasoline. One of accused, also, made inconsistent statements containing admissions that the gasoline was obtained from a tractor and from a CCC truck. But neither these circumstances nor the statements were of any

substantial probative value to show that the gasoline was military property issued or intended for the military service. The circumstances raise a suspicion of wrongful possession by accused of gasoline obtained from some source, but throw no appreciable light upon the particular source from which it was obtained. The admissions by Nash (whether they or any of them were admissible against Morris is not decided) carrying implications of government ownership of the gasoline, and tending to establish larceny thereof in violation of the 94th Article of War, were not corroborated by the evidence upon the issue of ownership, and are not, in themselves or in conjunction with the other evidence, sufficient to establish the offense charged or any lesser included offense.

It is well established that all of the elements of an offense, including the corpus delicti, may be proved by circumstantial evidence. 16 Corpus Juris 766. It is equally well established that mere conjecture or suspicion do not warrant conviction. 16 Corpus Juris 779, and cases cited. The following has been heretofore quoted, with approval, by the Board of Review (CM 197408, McCrimon; CM 206522, Young) with respect to circumstantial proof:

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions \* \* \*. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens.' Buntain v. State, 15 Tex. App. 490."

In the opinion of the Board of Review, the evidence, considered as a whole, is not legally sufficient to support the findings of guilty.

5. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty and the sentence as to each accused.

W. H. Jones, Judge Advocate.

W. H. Jones, Judge Advocate.

W. H. Jones, Judge Advocate.



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

(365)

Board of Review  
CM 207652

U N I T E D   S T A T E S	)	FIRST CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Army Base, Boston, Massachusetts,
Privates HERBERT S. FAY	)	July 29, 1937. As to each:
(6130184), Detachment	)	Dishonorable discharge and con-
Quartermaster Corps, Fort	)	finement for one (1) year and
Banks, Massachusetts, and	)	three (3) months. Disciplinary
CHESTER MORRIS (6139777),	)	Barracks.
Headquarters Battery, 9th	)	
Coast Artillery.	)	

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HOLDING by the BOARD OF REVIEW  
GREGSON, KRIMBILL and HOOVER, Judge Advocates.

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

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

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

Specification: In that Private Herbert S. Fay, Detachment Quartermaster Corps, Fort Banks, Mass., and Private Chester Morris, Headquarters Battery, 9th Coast Artillery, Fort Banks, Mass., acting jointly and in pursuance of a common intent, did, at Deer Island Reservation on June 16, 1937, feloniously take, steal and carry away, about five thousand one hundred fifty (5,150) pounds, steel rail, value about Thirty Eight (\$38.00) dollars, the property of the United States.

CHARGE II: Violation of the 84th Article of War.

Specification: In that Private Herbert S. Fay, Detachment Quartermaster Corps, Fort Banks, Mass., and Private Chester Morris, Headquarters Battery, 9th Coast

Artillery, Fort Banks, Mass., acting jointly and in pursuance of a common intent, did, at Chelsea, Mass., on June 16, 1937, wrongfully dispose of about five thousand one hundred fifty (5,150) pounds, steel rails, by sale, to the Everett and Chelsea Iron and Steel Company, 285 Second Street, Chelsea, Mass., of the value of about Thirty eight (\$38.00) dollars, military property belonging to the United States.

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

Specification: In that Private Herbert S. Fay, Detachment Quartermaster Corps, Fort Banks, Mass., and Private Chester Morris, Headquarters Battery, 9th Coast Artillery, Fort Banks, Mass., acting jointly and in pursuance of a common intent, did, at Fort Banks, Mass., on June 16, 1937, knowingly and willfully apply to their own use and benefit without proper authority, one GMC 5-ton Dump Truck, No. W-5318, of the value of about Two thousand nine hundred ninety six (\$2,996) dollars, property of the United States furnished and intended for the military service thereof.

They pleaded not guilty to all charges and specifications, and were found guilty of Charges I and III and the specifications thereunder, and of the Specification, Charge II, guilty except the word "Chelsea" appearing in lines 5 and 9 of the specification (as written above), substituting therefor in each case the word "Everett", and guilty of Charge II. No evidence of previous convictions was introduced. Each accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year and three months. The reviewing authority approved the sentences, 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 Article of War 50 $\frac{1}{2}$ .

3. The evidence, including admissions by both accused prior to trial and their testimony at the trial, shows that about 1:30 p.m., June 16, 1937, at Fort Banks, Massachusetts, accused took from a garage at which they were on duty the government truck described in the Specification, Charge III (R. 85,88,100,101,119,122), drove it to nearby Deer Island Reservation, there loaded somewhat over 5000

pounds of old steel rails which three or four years previously had been taken up from a light railway on the reservation and discarded and left lying in a pile on the ground near a searchlight position (R. 10,19-22,68-70), thereupon drove to the premises of the Everett and Chelsea Iron and Steel Company in Everett, Massachusetts, where they sold the rails to a representative of the concern for \$23.15 (R. 68), and then returned the truck to the garage (R. 104). When taking the rails, one of accused told a noncommissioned officer who was present that they had spoken to a Sergeant Settle about taking them, and that they were to be applied to the use of the Government (R. 9,11,13). Accused had not received permission of the warrant officer who usually dispatched trucks to use the truck in question on this occasion, although accused Fay was in charge of the garage and had some limited authority to dispatch trucks normally assigned to specific duties (R. 15-17).

There is proof of the joint commission by accused in the course of the transaction described of the acts involved in the offenses charged, i.e., larceny of the rails, wrongful disposition thereof by sale, and misapplication of the government truck. The defense contended that accused were induced by an agent of the United States to commit the offenses and, because of such entrapment, were entitled to acquittal.

The evidence with respect to the issue of entrapment shows that about June 3, 1937, after Fay or Morris had "gone to a sergeant in the Coast Artillery" about the rails and had been referred to Staff Sergeant James M. Settle, 9th Coast Artillery, chief clerk in the "artillery engineer's office" (R. 56), Fay approached Settle, said he was thinking of getting and disposing of the rails on Deer Island, and asked if they were the property of the artillery engineer, if they were carried on the property records, and if "it would be all right" to take them (R. 24,36,97). Settle testified that he answered that he thought the rails were marked U.S.E., indicating that they were property of the United States, and that it would not be all right to take them (R. 24). Settle promptly reported this conversation to Captain John A. McComsey, 9th Coast Artillery, Ordnance Officer (R. 25). Having been advised by the officer to get further information as to the plans of accused (R. 76) and having the impression that the officer wished him to urge accused on in order that they might be "caught in the act" (R. 37,38), Settle thereupon, on the same day, talked further to both accused. He testified that on this occasion

he discussed with them the details of the enterprise (R. 26), told them again that they were doing wrong in taking the government property, but also told them, in substance, in response to questions, that he would tell them "when would be the best time to go get them" or "when there would be no one at Deer Island" (R. 41-45). On this or the previous occasion, he also told accused that the rails were "serving no purpose" and were then of "no use" (R. 57).

On June 4, Settle told accused there would not be anyone at Deer Island that day, and Settle and Captain McComsey lay in wait for them near the Deer Island Reservation for some time during the afternoon for the purpose of arresting them should they be found carrying away the rails, but accused did not appear (R. 48,77). Settle testified that some days later Fay told him that he intended, as soon as the time was right, to get the iron (R. 28), and on June 16 Morris telephoned Settle asking if anyone was working at Deer Island, Settle replying that a Private Uhlig was there that day. At noon, however, of June 16, Morris told Settle that accused were going for the iron that afternoon (R. 28,29). At about 3:15 of that day accused approached Settle and left on his desk a five dollar bill as his share of the proceeds of the sale (R. 30). Settle testified that in the course of a conversation with Fay, the latter remarked that accused would have no trouble in disposing of materials - that "we have gotten rid of other stuff before" (R. 53). In his statement made prior to trial, Fay said that during one of the conversations with Settle in which the latter had said that accused might take and dispose of the iron, Fay told Settle that the latter "would get his cut out of it" (R. 86).

Both accused testified that some time after the first series of conversations related above, Settle suggested that accused go that afternoon to get the rails, but that they did not do so (R. 99,120). Fay testified that Settle told them at noon, June 16, to "go down and get" the iron that day (R. 100). Both accused denied that Settle told them that they should not take the property, and testified that they took it only because Settle led them to believe that they might properly do so (R. 101,122).

5. The law of entrapment as a defense to criminal prosecution in the federal courts is stated in Butts v. United States, 273 Fed. 35,38, and quoted with recent approval by the United States Supreme

Court in Sorrells v. United States, 287 U. S. 435, 444, as follows:

"The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it."

The Board of Review, in considering the subject (CM 187319, Line), has said:

"The public policy preventing the criminal prosecution of persons whose acts are induced by Government agents, is accentuated in military law. One of the principal duties of an officer of the Army is the development, training, discipline and leading of the soldier he commands. When an officer becomes aware that the soldier is about to commit a criminal offense it becomes his positive duty immediately to restrain that soldier, certainly not to encourage and incite him to violate the law. No justification for instigation by the Military Police based upon proof that accused was a practiced criminal, or that he was engaged in an unlawful business, is found in this case. Such being the fact, it was the duty of the officers involved to prevent the offense, not to incite it in order that accused might be criminally prosecuted."

The evidence leaves no substantial doubt that the offenses of which accused were found guilty in this case were inspired and incited by Sergeant Settle, with at least tacit approval of superior authority, and that the three offenses, different aspects of a single transaction, would not have been committed had accused not been persuaded and

allured thereto by the government agent. To be true, the genesis of the idea of disposing of what appeared to be property of the United States sprang from accused or one of them, but in view of the actions of accused in making frank and preliminary inquiry of those in apparent authority as to whether they might properly take the rails, and in refraining from steps towards accomplishment of their purpose pending approval of that apparent authority, it must be concluded that they did not in the beginning actually intend criminal offenses - did not intend to proceed with the business unless they obtained such approval of superior authority as would in their minds validate their actions. They were, of course, charged with a presumptive knowledge of the law and, therefore, of the unlawfulness of their proposed acts, but the only reasonable inference to be drawn from the evidence is that in fact they believed that the discarded property might properly be disposed of if consent were first obtained from those in charge of it.

Such being the original proposal of accused, Sergeant Settle told them that the property was useless to the United States and that he would advise them when they might take it. He told them also that the property belonged to the Government and that they should not take it, but in view of his contemporary actions plainly indicative of acquiescence in the scheme, and of his remarks in substance authorizing accused to proceed, his avowals must have been construed as a declaration that the proposed action was wrong only in a technical sense. This inescapable implication could only serve to induce accused to carry out the project. The record of trial allows of no reasonable conclusion other than that the sum total of Settle's actions and words induced and actively persuaded accused to enter into the execution of their wrongful ventures with knowledge of the unlawful nature of their acts. It allows of no tenable conclusion other than the offenses charged would not have been committed had accused not been led thereto by Settle's actions. Had the wrongdoing been forbidden or otherwise discouraged or restrained by the superior authority to whom the incipient plans were divulged, the plans would not have been carried out.

Even assuming that in a legal sense any criminal design in the transaction originated with accused, the record contains uncontradicted evidence that this design was abandoned by them and reconceived through the suggestions of Sergeant Settle, for accused did not

carry out their plans as first made with Settle to get the rails on June 4, and took no further steps in the matter until after further conversations with Settle in the course of which Settle's inducements to go forward with the scheme were renewed. It has been held that where a criminal design is abandoned but later reconceived and instigated by government agents, the subsequent acts and designs of accused are to be treated as having been instigated and originated by the government agents, in which case criminal prosecution is foreclosed. CM 187319, Line.

There is no substantial evidence that either accused was a habitual criminal, or that either prior to the transaction here involved had been engaged in unlawful practices, and the somewhat liberal rules of the federal courts (see Cain v. United States, 19 Fed. (2d) 472, 475) permitting the use of decoys and trickery to entrap habitual wrongdoers do not apply in this case.

In the opinion of the Board of Review, the findings of guilty were not, in view of the entrapment proved, legally justified.

6. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty and the sentence as to each accused.

Charles B. Bresson, Judge Advocate.

Walter M. Kymlick, Judge Advocate.

Richard D. Hoover, Judge Advocate.



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

(373)

Board of Review  
CN 207730

SEP 10 1937

U N I T E D    S T A T E S    )	E I G H T H   C O R P S   A R E A
)	
v.                                    )	Trial by G.C.M., convened at
)	Fort Sill, Oklahoma, August 3
Private VIRGIL S. EARP            )	and 10, 1937. Dishonorable
(6251167), Battery E,            )	discharge and confinement for
1st Field Artillery.            )	one (1) year. Disciplinary
)	Barracks.

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HOLDING by the BOARD OF REVIEW  
McNEIL, CRESSON and HOOVER, Judge Advocates.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Virgil S. Earp, Battery E, 1st Field Artillery, did, at Fort Sill, Oklahoma, on or about August 4, 1934, desert the service of the United States and did remain absent in desertion until he was apprehended at Lawton, Oklahoma, on or about August 1, 1937.

Upon arraignment the defense pleaded the statute of limitations. The plea in bar of trial was overruled and accused then pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The only question in this case requiring consideration is whether the plea in bar of trial, based upon the statute of limitations,

was properly overruled. Accused was arraigned on August 3, 1937. If, as contended by the defense, his desertion occurred not later than August 3, 1934, the arraignment was not within the three year limitation prescribed by the 39th Article of War and trial was barred. Paragraph 67, M.C.M.

4. In response to a question addressed to him by the trial judge advocate following arraignment, accused stated that he went "over the hill from the hospital and left on the night of August 1st" (R. 5). The morning report (Ex. 1) and the sick report (Ex. 2) of accused's organization, and a clinical record (Ex. 4) and admission and disposition sheet (Ex. 3) from the station hospital, Fort Sill, Oklahoma, pertaining to accused, were introduced in evidence. These records show that accused was sick in the hospital mentioned from July 26, 1934. The clinical record, signed by the ward surgeon "when case is completed", contains the following entries:

"Disposition - Duty  
Date - Aug. 3-34".

The entry "Duty" was written over an entry in red pencil "A.W.O.L." which had been erased. (Ex. 4-A) This record also shows that he last received care and treatment at the hospital on August 2, 1934 (R. 15; Exs. 4-B, 4-C). The morning report recites, under August 4, 1934, "hosp to duty 9:00 A.M." and, under August 5 "duty to AWOL 9:00 A.M. 4th" (Ex. 1). The first sergeant of accused's battery, under whose supervision the morning report was prepared, testified that the entry "hosp to duty 9:00 A.M." as of August 4 was based on information taken from the battery sick report, which, under the latter date, contains a recital "Duty" (Ex. 2). In so far as witness knew, accused did not return to his battery after his discharge from the hospital (R. 12). He also testified "He was actually supposed to have been back on the 3rd, but still the hospital marked the sick book 'hospital' on the 4th" (R. 13). The sick report was submitted to the "infirmary" and not to the hospital (R. 12). The entries made on the sick report by the infirmary in hospital cases normally were based on the admission and disposition sheets furnished by the hospital (R. 16).

5. The morning report entry reciting accused's absence without leave at 9 a.m., August 4, 1934, was competent evidence only to the

extent that it was based on personal knowledge of the officer attesting the entry and was not compiled from other original sources. Par. 117, M.C.M. While the entry was prima facie evidence of the facts recited, it was subject to explanation and contradiction. CM 183513, Lang. The uncontradicted evidence, wholly consistent with the probabilities, shows that the entry as of August 4, stating the change of status of accused on that date from sick in hospital to duty, was not an original entry but was based on another record, the sick report, and it must be inferred from all the entries and the circumstances that the entry as of August 5, reciting that accused absented himself without leave on August 4, was likewise based on the sick report entry reciting the change of status to duty as of that date. The sick report entry itself was not based on personal knowledge of the officer making it at the infirmary, but was based on the admission and disposition sheet prepared at the hospital. No conclusion can fairly be reached other than that the morning report recital as to the date of absence was of hearsay and secondary origin. The defense did not specifically object to the introduction in evidence of the morning report entries upon the ground that they were taken from other sources, but pointed out the defects and contended that the entries were inaccurate and insufficient to prove the date recited (R. 10-20). Such being the case, the failure to object may not be regarded as a waiver of the defects.

The only record in the case appearing actually to have been based on personal knowledge of the recording officer was the clinical record of the hospital, which shows that accused was in fact disposed of by the hospital by return to duty on August 3. It must be assumed that accused's return to his organization within the post on the same day was obligatory. So far as the evidence shows, he did not return at all, and the competent evidence must therefore be construed to show that in fact he absented himself without leave on August 3, 1934, more than three years prior to his arraignment on August 3, 1937.

In the opinion of the Board of Review, the plea in bar of trial should have been sustained.

6. For the reasons stated, the Board of Review holds that the court erred in overruling the plea in bar of trial, that this constituted an error of law which injuriously affected the substantial rights of accused, and that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

Edwin J. Lee, Judge Advocate.

Shas J. Johnson, Judge Advocate.

Arthur H. Hayes, Judge Advocate.



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

(377)

Board of Review  
CM 207887

U N I T E D	S T A T E S	)	SECOND CORPS AREA
		)	
	v.	)	Trial by G.C.M., convened at
		)	Governors Island, New York,
Captain RICHARD C. LOWRY		)	August 17, 1937. Dismissal.
(O-8393), 52d Coast		)	
Artillery (Ry).		)	

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OPINION of the BOARD OF REVIEW  
CRESSON, KRIMBILL and HOOVER, 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. The accused was tried upon the following charges and specifications:

CHARGE: Violation of the 95th Article of War.

Specification: In that Captain Richard C. Lowry, 52d Coast Artillery (Ry), was, at Fort Hancock, New Jersey, on or about April 18, 1937, in a public place, to wit, the Officers' Club, so drunk while in uniform, in the presence and hearing of several persons, as to disgrace the military service.

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

Specification: In that Captain Richard C. Lowry, 52d Coast Artillery, was, at Fort Hancock, New Jersey, on or about August 9, 1936, drunk in a public place, to wit, the Officers' Club, Fort Hancock, New Jersey.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority

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

3. Inasmuch as the occurrence involved in the Specification, Additional Charge, preceded that involved in the Specification, Original Charge, the Additional Charge and its specification will be first considered.

The evidence with respect thereto shows that during the afternoon of Sunday, August 9, 1936 (R. 31,38) accused was observed in the Officers' Club at Fort Hancock, New Jersey, by Lieutenant Colonel Edward B. Dennis, Coast Artillery Corps, in what appeared to the latter to be a drunken condition. His "eyes were a little bit glassy. Liquor was on his breath". (R. 32,34) Colonel Dennis stood at the bar "within a foot and one-half" (R. 32) and accused did not recognize him. The two did not converse (R. 33,34). There was liquor on the bar in front of accused (R. 33). Colonel Dennis, because of the condition of accused, asked another officer, Major Delbert Ausmus, Coast Artillery Corps, of whom accused was a close personal friend, to have accused taken to his quarters as soon as possible (R. 32,33). Colonel Dennis did not report the matter to the commanding officer (R. 33,34). A short time before or after Colonel Dennis saw accused, the officer of the day also observed accused in the barroom of the club, at a distance of ten or twelve feet. At this time accused was sitting down, apparently asleep, his chin on his chest. (R. 35,37) The officer of the day, thinking that accused and his wife as well should be taken home, went to the quarters of Colonel Dodson, regimental commander, to report what he had seen. He did not find Colonel Dodson, but First Lieutenant Paul A. Roy, Coast Artillery Corps, and Mrs. Roy, house guests in the quarters, volunteered to help in getting accused and his wife to their quarters. (R. 35; Ex. 3) Major Ausmus went to the club and endeavored to induce accused to go to his quarters. Accused protested and the two talked for almost an hour. Accused had a bottle of beer before him but Major Ausmus did not see him drink it. Major Ausmus testified that accused's speech was not wholly normal, he had an odor of alcohol on his breath, and staggered when he walked to the car in which he went to his quarters. Major Ausmus concluded that he was drunk. (R. 38-41) Major Ausmus testified that he did not have anything to drink with accused. While Major Ausmus and accused were talking, Lieutenant and Mrs. Roy joined them, and about twenty-five minutes

later the three succeeded in getting accused and his wife to accompany Lieutenant and Mrs. Roy to accused's quarters. (R. 40; Ex. 3)  
Lieutenant Roy concluded that accused was drunk. He testified:

"I went to the Officers' Club and found Captain Lowry at the bar, highball in hand. Major Ausmus and I persuaded and pulled Captain Lowry away from the bar and out of the Club, allowing Captain Lowry to stop at the lavatory on the way out. \* \* \*

"Captain Lowry was persuaded with difficulty to leave. His clothing was in slight disarray. He refused assistance in adjusting his collar and shirt, and while in the lavatory splashed considerable water over himself while washing his hands. At his quarters I tried to guide him into the house but he angrily refused assistance & went inside and to bed \* \* \*

"His mental faculties were sensibly impaired; physically he was but slightly impaired." (Ex. 3)

In going to his quarters accused and his wife rode in a car driven by Mrs. Roy (Ex. 3).

For the defense, First Lieutenant Thomas K. McNair, 7th Coast Artillery, testified that he saw accused in the club barroom with Major Ausmus, and asked accused to drink with him and introduced to accused witness' brother-in-law, a Mr. Mayers. Accused appeared to be drinking, but witness did not consider him drunk and did not think it necessary for accused to leave the club. His clothes were not in disarray. (R. 43-45) Mr. Mayers testified that he was introduced to accused and shook hands with him, and that from his contact he did not think accused was drunk (R. 47).

Mrs. Richard C. Lowry, wife of accused, testified for the defense that accused was not drunk on the afternoon of August 9, 1936, and that she did not see him asleep on that afternoon (R. 55). Colonel Dennis was "particularly jolly and nice". Major Ausmus drank some beer with accused and remarked that he had consumed two highballs before coming into the barroom. Witness talked to the Roys in a friendly way and Mrs. Roy suggested they go to witness' quarters to see a kitten. Major Ausmus and Lieutenant Roy "seemed to be in a

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great rush to go home". After going home with the Roys, accused "seemed peeved" with Lieutenant Roy. At no time did anyone suggest that accused or witness had been drinking too much, and witness "had no idea I was being brought home". (R. 53-55) About two weeks after the occurrence, Colonel Dodson, apparently in a teasing mood, made a remark to her to the effect that she and accused had been taken home, and, when witness asked if he intended to speak to accused about it, said "That is some more of the Dennis stuff" (R. 56,57).

Accused declined to testify or make an unsworn statement.

4. There is, as appears above, evidence that about the date alleged in the Specification, Additional Charge, accused was, as alleged, drunk in the Officers' Club, Fort Hancock, New Jersey, a public place. The testimony to this effect by Colonel Dennis, Major Ausmus and Lieutenant Roy was positive and convincing. Three witnesses, including the wife of accused, testified to the contrary, but with the exception of the wife the opportunities for observation by these witnesses were admittedly limited. The wife not only denied that accused was drunk but at least insinuated that one or more of the prosecution witnesses was under the influence of liquor at the time of the event. The court, having heard her testimony and observed her on the witness stand, did not accept her expressions of opinion as determinative. On the entire record the Board of Review is of the opinion that the allegation of drunkenness was established beyond a reasonable doubt, and that the offense charged amounted to discreditable conduct properly found to have been violative of the 96th Article of war.

5. As to the Original Charge and its Specification, the evidence shows that at about 5 p.m., April 18, 1937, accused, in uniform, accompanied by his wife, entered the barroom of the Officers' Club at Fort Hancock, and ordered a bottle of Old Currency whisky. Between that hour and 7 p.m., accused drank, straight, four jiggers, amounting to about six ounces, of the liquor. Mrs. Lowry and the bartender, a retired noncommissioned officer, had drinks from the bottle. Between the three about a pint of the liquor had been consumed by 7 o'clock. The bartender testified that, in so far as he knew, accused was sober when he entered the barroom. At 7 p.m., accused remarked that he would "sign for the bottle", and suggested to his wife that they go home and get something to eat. Mrs. Lowry said that she wanted

another drink, and accused then went into the adjoining room, a library, and sat down. The bartender testified that accused "struck himself as he went through the door, and he staggered a little to one side", but that in witness' opinion accused was not then drunk. A few minutes later the bartender turned off the lights in the library and observed that accused was sitting with his eyes closed. Accused did not sign for the bottle until the following day. (R. 13-19)

At about 9 p.m., following a disturbance in the kitchen of the club, adjoining the library, in which Mrs. Lowry, the bartender and his wife took some part, Major Edward G. Cowen, 7th Coast Artillery, who lived at the club, and the officer of the day, Second Lieutenant Earl J. Davis, Coast Artillery Reserve, were called (R. 21,82; Ex. 1). The bartender telephoned the station hospital and asked the medical officer of the day, First Lieutenant James W. S. Stewart, Medical Corps, to come to the club to attend the bartender's wife who was "agitated and upset". Lieutenant Stewart, accompanied by a Sergeant Trank, went in an ambulance to the club. (R. 24; Ex. 2) Upon arrival at the club, Major Cowen, Lieutenants Davis and Stewart and Sergeant Trank saw accused lying on the floor of the library, apparently asleep. He was in uniform, his blouse open and up about his head (R. 20,25,27; Ex. 1), and his trousers were wet (R. 26). His breath bore an odor of alcohol. The medical officer examined him, and he was then placed on a stretcher and taken in the ambulance to his quarters. (R. 20,21; Ex. 2) Major Cowen and Lieutenant Stewart testified that they were of the opinion that accused was drunk (R. 21; Ex. 2). Lieutenant Stewart testified that:

"My opinion is based upon the following observed facts:

(1) His breath smelled strongly of alcohol. (2) His eyes were suffused and the pupils were dilated. (3) His skin was warm and moist. (4) His pulse was rapid, regular, and full. (5) He was breathing regularly, deeply, and loudly. (6) He was in a comatose condition, but made efforts to resist the handling incident to the examination. \* \* \*

"I carefully examined him for any signs of injury, especially of a fractured skull. Under the conditions the examination was quite complete. \* \* \*

"The clinical picture was entirely that of acute alcoholism." (Ex. 2)

Lieutenant Davis testified that in his opinion accused "might have been drunk because of the position he was in" (Ex. 1). In response to questions as to whether he thought accused was drunk, Sergeant Trank testified that "he was unconscious. I did not smell his breath" (R. 25), although there was an odor of alcohol in the room where accused was lying and in the ambulance when he was taken to his quarters (R. 26,28). At the time accused was observed lying on the floor of the library, there were present, in addition to the persons named above, a Lieutenant Armstrong, Lieutenant and Mrs. Jordan, Lieutenant Norton, and possibly one or two others (R. 21,52; Ex. 2). They did not testify.

Mrs. Lowry testified for the defense that she and accused had dinner between 3 and 4 o'clock and then went to the club. Witness was of the opinion that accused was not drunk when he left the barroom to sit down. (R. 50,51) The bartender's wife created a disturbance. Upon arrival of the medical officer witness asked him if accused was sick and the medical officer replied sarcastically, "No, drunk". (R. 52) After accused was taken home in a comatose condition witness next saw him in his bed at 6 o'clock the following morning when she tried to arouse him and at which time "he did not have much to say" (R. 52,53). Following his annual examination in 1936, accused was hospitalized for observation for diabetes and for a time he went on a restricted diet. Later he appeared tired and nervous, had pains in the back of his legs and complained of ringing in his ears. Following the occurrence of April 18, witness was "upset \* \* \* horribly" and as a result went, at accused's suggestion, to her home. (R. 49.50) Accused came to her there, on leave, on May 6 and told her that he had been sick for about ten days and had gone daily to a doctor. He returned about May 30, feeling "quite miserable" and went to the hospital where sugar was found in his urine, and as a result of which she was told he had diabetes. The mother, father and a brother of accused had suffered from this ailment, and an uncle died from it. (R. 50)

Captain Lewis W. Kirkman, Medical Corps, Assistant Surgeon at the Station Hospital, Fort Hancock, testified for the defense that the annual physical examination of accused in 1936 showed sugar in his urine, and that a blood test on January 14, 1936, showed "high blood sugar, 140 milligrams per 100 cc's of blood", the normal being between 80 and 120 milligrams, and that this was a symptom of diabetes. In June, 1937, accused was admitted to the station hospital where repeated urine analyses showed a high percentage of sugar. Witness diagnosed

his ailment as "Diabetes, Mellitus, moderate severe". (R. 58,59) In witness' opinion the condition of accused was of sufficiently serious nature to disqualify him for promotion, and, if not cleared up, would possibly cause his retirement. The disease may be hereditary. (R. 59,60) It sometimes results in a deep stupor and unconsciousness, called "diabetic coma", which may be fatal (R. 60-62). The symptoms of the disease vary with its severity, the moderately severe cases being characterized by lassitude, but not by coma. Alcohol is a food for diabetics and "there is no reason why they cannot take it in moderate doses". Witness prescribes liquor in small quantities for the disease. Accused did not suffer from coma while under the observation of witness. (R. 61) Witness did not believe that the consumption within two hours of six ounces of liquor by a diabetic who had just previously eaten a heavy meal would result in a coma if the person were a moderate drinker. If he had a low tolerance for alcohol, coma might result under these conditions. (R. 60)

Dr. Lewis R. Adams, a practicing physician of Brooklyn, New York, testified for the defense that the symptoms of diabetic coma and alcoholic coma are similar, and that either condition may be mistaken for the other. It is easier to arouse a person from an alcoholic coma than from a diabetic coma (R. 64). Witness believed that the two, however, could not be positively distinguished "without blood chemistry" (R. 68). In response to a hypothetical question based upon the coma described by the prosecution witnesses, symptoms described by Mrs. Lowry, the sugar content of the urine and blood of accused as described, and the medical treatment related by Captain Kirkman and Mrs. Lowry, witness was of the opinion that the coma of April 18 "might have been a diabetic coma". His opinion would not be affected by a showing that accused had "three or four drinks of whiskey" between 5 and 7 p.m., some two hours before the coma was discovered. (R. 65) He was of the emphatic opinion that this amount of liquor would not ordinarily produce alcoholic coma (R. 65,66). Witness believed that the percentage of sugar in accused's blood - 140 milligrams to 100 cc's of blood, was indicative of a moderately severe case of diabetes, which might result in coma (R. 67). "Without premonition they may go into a coma. There are three classes. In the first class, the symptoms are deep, slow respiration, face flushed, pupils dilated, and the individual goes from the state of sleeping into a deep coma. The second class of cases is where a man has some premonition, he feels tired and

fatigued. He sits down and goes to sleep, and gradually goes into a coma. The third class of cases, we have the usual symptoms, and the individual falls rapidly into a coma". (R. 67,68) In severe cases the sugar content of the blood of diabetics would "run from 130 to 180 or 200", and to witness' knowledge, in one fatal case, had reached 1010 milligrams (R. 66). A patient suffering from diabetic coma might recover without medical attention (R. 69).

In rebuttal Captain Kirkman testified for the prosecution that in his opinion and judging from his experience in the treatment of 10 or 12 diabetics, a person in a diabetic coma could probably not recover without medical attention (R. 72,73,74). The condition of accused when witness first saw him in the course of his treatment at the hospital, that is, on June 28, 1937, was not such that he was apt to go into a diabetic coma (R. 73). Lieutenant Colonel John H. Sturgeon, Medical Corps, officer in charge of the medical service of the station hospital, Fort Jay, New York, testified that accused was a patient in witness' care and ward from January 27, 1936, to February 5, 1936, and again from July 3, 1937, to August 5, 1937. On the first admission the diagnosis was: "diabetes, none found". On the second admission the diagnosis was that there was no diabetes but "glycosuria, mild, renal", with a "low sugar tolerance", a condition which would not make accused subject to diabetic coma. (R. 76) In witness' opinion medical attention is necessary to the recovery of a diabetic suffering from diabetic coma (R. 76,77). The sugar in accused's urine was enough to "cause his rejection in the army" (R. 78,79).

6. The uncontradicted evidence relating to the transactions of April 18, 1937, thus shows that accused consumed about six ounces of intoxicating liquor and soon thereafter exhibited the usual symptoms of drunkenness, walking from the barroom with impaired control of his physical faculties and later falling into what appeared to be a drunken stupor. This occurred in public rooms of a club building open to the commissioned personnel of the post, their families and guests. Officers, noncommissioned officers, and the wives of some of them observed accused while lying in a disheveled condition, in uniform, on the floor of the library. The place of the occurrence must be deemed to have been a public one; and the occurrence was in the presence and hearing of several persons, as charged.

The defense was based upon the theory that accused was not drunk, as charged, and that his stupor was caused by a diabetic seizure. By competent expert medical testimony it was shown that the symptoms of diabetic coma are quite similar to those of alcoholic coma. It was shown that for brief periods in January, 1936, and in July, 1937, accused had sugar in his urine and blood, and that one medical officer who observed accused late in June, 1937, was of the opinion that he was then afflicted with moderately severe diabetes. A medical officer who observed and treated accused immediately thereafter over a period of about a month, however, did not find diabetes. There was a conflict of opinion between the medical experts as to whether diabetic coma might result from a diabetic condition only moderately severe, a civilian physician testifying that it might do so, and the two medical officers taking the opposite view. Mrs. Lowry testified that accused told her that he received medical attention during the last few days of April, 1937, and early in May, but this was hearsay. No competent evidence of such treatment was produced. The two medical officers testified that recovery from diabetic coma without medical attention would be highly improbable, but the civilian physician testified that such recovery might occur without treatment.

The evidence does not show that within any close period before or after the occurrence of April 18 accused was suffering from diabetes, and the weight of the evidence shows that if he suffered from this disease at any time, the attack was only moderate in severity. Both the medical officer who saw accused lying on the floor of the club library and took him to his quarters and examined him, and Major Cowen were of the opinion that accused was drunk. The condition in which accused was found was a logical outcome of drinking. His general physical condition may have affected his ability safely to indulge in alcohol in any considerable amount. The fact remains that he drank an intoxicant and in due time exhibited the normal effects of drinking. To infer in this case that accused was not drunk and that the proved impairment of his mental and physical faculties was not due to his drinking would be to deny ordinary human experience, to accept conjecture in contradiction of strong probabilities revealed by a common sense interpretation of the evidence, and reject the weight of medical opinion in the case. That accused was drunk, as charged, is proved beyond any doubt which the Board of Review can accept as reasonable.

There is a remaining question as to whether the conduct of accused involved in his drunkenness of April 18 was properly found to be a violation of the 95th Article of War.

7. The Manual for Courts-Martial, paragraph 151, lists, as an instance of violation of the 95th Article of War, "being grossly drunk and conspicuously disorderly in a public place". The Manual also, in the same paragraph, describes "conduct unbecoming an officer and a gentleman" (A.W. 95) as including:

"action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms,"

and states further:

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

The Article in question makes sentences of dismissal mandatory for courts-martial upon conviction of violation thereof. The test to be applied in each particular case would appear to rest in a determination as to whether the conduct involved proves moral unfitness to continue as an officer. Winthrop, reprint, p. 712; CM 202846, Shirley; CM 202290, Lowry; CM 197398, Mini; CM 197011, Kearney; CM 196426, Fleming; CM 195373, Beauchamp.

Accused was extremely drunk. His drunkenness came to the eyes of military associates including military inferiors, and to the observation of female members of military families. On the other hand, the evidence does not show that he was grossly immoderate in his consumption of liquor, and his physical condition may have made him, without his knowledge, abnormally susceptible to its effects. There was no disorder on his part, and there was no responsible display of drunkenness. His last conscious public act before falling into the coma was apparently an endeavor intended to take him to a place of relative privacy. His condition would not in all probability have been seen by persons other than the bartender and Mrs. Lowry had it not been for the disturbance in the club with which accused was not connected. Under all the circumstances, the Board of Review is not convinced that the conduct of accused in this particular instance and standing alone amounted to such aggravated indecorum as to mark him morally unfit to continue as an officer of the Army, or to constitute violation of the 95th Article of War. His drunkenness was, of course, a discredit to the military service and falls within the purview of the 96th Article of War.

8. Attached to the record of trial is a brief by the individual defense counsel. The contents thereof have been considered by the Board of Review.

9. Accused is 42 years of age. The Army Register shows his service as follows:

"2 lt. C.A. Sec. O.R.C. 15 Aug. 17; accepted 15 Aug. 17;  
active duty 15 Aug. 17; vacated 6 Sept. 20.--2 lt. C.A.C.  
1 July 20; accepted 6 Sept. 20; 1 lt. 1 July 20; capt.  
2 July 20; 1 lt. 18 Nov. 22; capt. 23 Dec. 25."

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 only so much of the findings of guilty of the Specification, Original Charge, and of the Charge, as finds that accused was, at the place and time alleged, in a public place, to wit, the Officers' Club, drunk while in uniform, in the presence and hearing

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of several persons, in violation of the 96th Article of War, legally sufficient to support the findings of guilty of the Additional Charge and its Specification and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of the 96th Article of War.

Charles Lawson, Judge Advocate.  
Walter M. Kinnell, Judge Advocate.  
Richard W. Howell, Judge Advocate.

1 Incl.

Brief in behalf of accused.

To The Judge Advocate General.

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

(389)

Board of Review  
CM 208002

OCT 13 1937

U N I T E D	S T A T E S	)	FOURTH CORPS AREA
		)	
	v.	)	Trial by G.C.M., convened at
		)	Fort Benning, Georgia, September
Private ERNEST J. GILBERT		)	16 and 17, 1937. Dishonorable
(6922667), Headquarters		)	discharge and confinement for
and Headquarters Company,		)	two (2) years. Disciplinary
29th Infantry.		)	Barracks.

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HOLDING by the BOARD OF REVIEW  
CRESSON, KRIBBILL and HOOVER, Judge Advocates.

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

2. Accused was found guilty of one specification alleging larceny on August 1, 1937, of a Hamilton watch and band, an Illinois watch, and an Eastman Kodak camera, found, by exceptions and substitutions, to be of the value of \$30, \$25, and \$12, respectively, total value \$67. The theft of the several articles was a single transaction. The owner of the Hamilton watch and band testified that this watch was given to him in 1935, that the "price tag" on the container in which the watch was received "was \$47.50", and that he "would not part with the watch for less than \$30.00" (Ex. 2). The owner of the Illinois watch testified that his watch was given to him in 1929, that he then saw a price tag on it indicating its cost as \$42, and that he "would not part with it for less than \$25.00" (Ex. 3). The owner of the camera testified that this article was given to him at Christmas, 1936, that he had "seen prices" on similar cameras of about \$12, that the camera was "practically new and the value to me is still \$12.00" (Ex. 4). The stolen articles were introduced in evidence. It was stipulated that a representative of a certain concern dealing in jewelry would, if present at the trial, testify that the watches were at the time of trial of a "retail value" of \$12.50 each; and that a representative of a certain concern dealing in Eastman Kodaks would, if present, testify that the camera was at the time of trial of a "retail value" of \$10.

[ There is not sufficient evidence to justify a finding of values in excess of the values estimated by the dealers, that is, a value of \$12.50 as to each watch and a value of \$10 as to the camera, a total value of \$35. In view of the evidence and the nature of the property, the inspection of the articles by the court did not justify a finding of values in excess of those estimated by the dealers, who might properly be accepted as experts, although such inspection alone might have been a basis of an inference of some value with respect to each article. CM 195212, Robinson; CM 192911, Weckerle; par. 149 g, M.C.M. It does not appear that the owners were experts or were otherwise qualified to make appraisals of market values, or that they did so. Each owner testified as to the special value to him of the article which was stolen from him, but such special value, as distinguished from market value, was not, within the law of larceny, the value to be considered in determining the punishment authorized. McClain on Criminal Law, sec. 585; People v. Gilbert, 128 N. W. (Mich.) 756. ]

The maximum punishment by confinement authorized by paragraph 104 c of the Manual for Courts-Martial for larceny of property of the value of more than \$20 and not in excess of \$50 is confinement at hard labor for one year.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the specification as involves a finding of guilty of larceny by accused, at the place and time alleged, of the Hamilton watch and band described, of the value of \$12.50, the Illinois watch described, of the value of \$12.50, and the camera described, of the value of \$10, of ownership as alleged, of a total value of \$35; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Charles B. Besson, Judge Advocate.

Walter M. Thimble, Judge Advocate.

John W. Hoover, Judge Advocate.

REC'D  
OCT 23 1937  
J. A. G. O.

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

(391)

Board of Review  
CM 208073

29 1937

U N I T E D	S T A T E S	)	N I N T H	C O R P S	A R E A
		)			
	v.	)			
		)			
Corporal JAMES J. MORAN		)			Trial by G.C.M., convened at
(6122584), Base Headquarters		)			Hamilton Field, California,
and Fifth Air Base Squadron,		)			October 4, 1937. Dishonorable
GHQ Air Force.		)			discharge without confinement.

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HOLDING by the BOARD OF REVIEW  
CRESSON, KRIMBILL and HOOVER, Judge Advocates.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Corporal James J. Moran, Base Headquarters and Fifth Air Base Squadron, did, at Hamilton Field, California, on or about June 24, 1937, wrongfully, willfully and lewdly touch the body of Melvia Hagain, a female minor under the age of fourteen years, with the intent of arousing and appealing to the lust and passions of the said Corporal James J. Moran.

Specification 2: In that Corporal James J. Moran, Base Headquarters and Fifth Air Base Squadron, did, at Hamilton Field, California, on or about June 24, 1937, wrongfully touch and fondle Melvia Hagain, a female minor, on the body with his hand.

He pleaded not guilty to the Charge and specifications and was found guilty of the Charge and Specification 2, but not guilty of Specification 1. No evidence of previous convictions was introduced. He

was sentenced to dishonorable discharge and forfeiture of all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of war 50 $\frac{1}{2}$ .

3. The only question requiring consideration here is whether the sentence to dishonorable discharge and total forfeitures is authorized by paragraph 104 c of the Manual for Courts-Martial for the offense of which accused was found guilty under Specification 2 of the Charge.

4. This specification alleges that accused did "wrongfully touch and fondle" the minor female child named, "on the body with his hand." It is not expressly alleged that the acts charged were lewd, lascivious, cruel or abusive.

The word "wrongful" legally connotes only an invasion of a right (Bouvier's Law Dictionary; Webster's New International Dictionary), that is, as applied to an act such as touching the body of another, it means a mere invasion of the right of a person to be free from physical molestation. Thus every act amounting to a simple assault and battery may be described as "wrongful" without imputing to the act any element of aggravation. The term "fondle", used in the specification, in its ordinary signification does not import lewdness, but means, according to Webster, to "treat or handle with tenderness or in a loving manner; to caress; as, a nurse fondles a child." See also Gay v. State, 2 Tex. App. 127, 134. Wrongfully to fondle a female child is to be taken, therefore, as meaning only to treat or handle her with tenderness, in the absence of a legal right to do so. A plain implication of libidinous conduct or other aggravation of the assault and battery found may not be drawn from the words as pleaded.

There is in the record of trial evidence from which the court might have been legally justified in concluding that accused acted lewdly and with lascivious intent, and it may be conceded that had Specification 2 been the only one charged, a liberal construction of the language thereof, in the light of the evidence, might conceivably have justified a conclusion that by its finding of guilty the court intended to find that the touching and fondling of the child was lewd or lascivious, or both. But it was specifically alleged in

Specification 1 of the Charge that the act of accused in touching the child was lewd and lascivious, and of that specification the court found accused not guilty. There was but a single transaction proved, and in view of the finding of not guilty of Specification 1 the Board of Review cannot escape the conclusion that the court was not convinced beyond a reasonable doubt that the transaction involved any lewd or lascivious conduct. Such being the case, and in view of the language of Specification 2, it would be unreasonable to impute to the finding of guilty of Specification 2 a finding that the acts of accused were lewd or lascivious.

Reasonable implications may be drawn from the words of a specification (par. 29 a, M.C.M.), but to imply facts specifically found by the court to be not proved would go beyond the liberal rules of military pleading designed to encourage simplicity and brevity in charges, and would inject a manifest inconsistency into the findings.

Inconsistency in the findings, if such there was, must be resolved in favor of the accused. Par. 1547, Dig. Ops. JAG, 1912-30. It has been held in this connection that inconsistency in findings of guilty with respect to facts alleged in separate specifications, the one charging an assault with intent to do bodily harm, and the other assault with intent not to do bodily harm, based upon the same transaction, required the setting aside of that finding of guilty not consistent with the facts shown. CM 194289, Ray. It has also been held that a conviction of an offense alleged in general terms, assisting a certain prisoner to escape, could not legally be based on acts specifically alleged, furnishing the prisoner means of escape, of which accused was acquitted. CM 203589, Miller, et al.

In CM 197115, Froelich (sec. 1563, Supp. V, Dig. Ops. JAG, 1912-30) the Board of Review expressed the opinion that a finding of guilty of a specification alleging housebreaking with intent to commit fraudulent conversion was not vitiated by a finding of not guilty of a fraudulent conversion alleged to have been committed in the course of the transaction involving the housebreaking. But in that case the inconsistency in the findings was only apparent and not real, for the offenses charged were distinct and separate, and housebreaking without actual accomplishment of the fraudulent conversion intended might have been

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committed. The intention of the court by its findings to find accused guilty of the one offense and not the other, which it had the power to do, was entirely clear. The language of that opinion, which might be read to lay down a broad rule that inconsistency in findings may legally be ignored, is to be interpreted in the light of the decision there required, and, so interpreted, is not in conflict with the previous and subsequent holdings relating to inconsistent findings to which reference has been made above.

In the opinion of the Board of Review, the offense of which accused was found guilty in the present case must be treated as amounting only to an assault and battery, not involving any element of aggravation which permits punishment in excess of that prescribed by paragraph 104 c of the Manual for Courts-Martial for assault and battery, to wit, confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. Dishonorable discharge is not authorized for this offense. No confinement was adjudged. Only so much of the sentence adjudged is authorized as involves forfeiture of two-thirds of the soldier's pay per month for six months.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves forfeiture of two-thirds pay per month for six months.

*Charles L. Benson*, Judge Advocate.

*Walter M. Thompson*, Judge Advocate.

*Arthur O. Brown*, Judge Advocate.

Executive  
CM 208073

1st Ind.

War Department, J.A.G.O.,

NOV 19 1937

-To the Secretary of War.

1. The record of trial and accompanying papers in the case of Corporal James J. Moran (6122584), Base Headquarters and Fifth Air Base Squadron, GHQ Air Force, Hamilton Field, California, together

with the holding thereon of the Board of Review, are transmitted herewith pursuant to Article of War 50 $\frac{1}{2}$ , as amended by the act of August 20, 1937 (Pub. No. 325, 75th Cong.), for your action.

2. The holding of the Board of Review finds that the record of trial is legally sufficient to support only so much of the sentence as involves forfeiture of two-thirds pay per month for six months. 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. The accused was tried on two specifications each under the 96th Article of War.

Specification 1: In that Corporal James J. Moran, Base Headquarters and Fifth Air Base Squadron, did, at Hamilton Field, California, on or about June 24, 1937, wrongfully, willfully and lewdly touch the body of Melvia Hagain, a female minor under the age of fourteen years, with the intent of arousing and appealing to the lust and passions of the said Corporal James J. Moran.

Specification 2: In that Corporal James J. Moran, Base Headquarters and Fifth Air Base Squadron, did, at Hamilton Field, California, on or about June 24, 1937, wrongfully touch and fondle Melvia Hagain, a female minor, on the body with his hand.

The court found the accused not guilty of the first specification, guilty of the second specification and imposed a sentence of dishonorable discharge and total forfeitures.

Under the maximum limits of punishment prescribed by Executive order, a sentence imposed upon a finding of guilty of a single offense, without evidence of previous convictions, may not include dishonorable discharge unless confinement for a period, in excess of six months is authorized.

The only question in this case is whether the offense of which the accused was found guilty is one for which more than six months' confinement is an authorized punishment.

The Board of Review held that the offense of which the

accused was found guilty must be treated as amounting only to an assault and battery which does not permit punishment in excess of confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

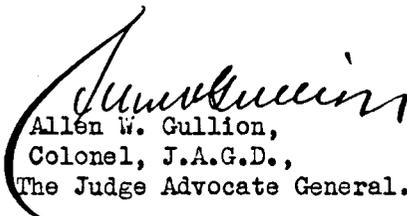
3. Had the accused been tried on the second specification only the Board of Review holds that a liberal construction of the language thereof, in the light of the evidence, might conceivably justify a conclusion that by its finding of guilty the court intended to find that the touching and fondling of the child was lewd or lascivious or both, but that such a construction is not warranted in this case in view of the court's finding of not guilty as to specification one in which "willfully and lewdly touch" is specifically charged.

4. Both specifications upon which the accused was tried are based upon the same occurrence. In the first specification it is charged that the accused did "wrongfully, willfully and lewdly touch the body of Melvia Hagain, a female minor under the age of fourteen years". In the second specification it is charged that the accused did "wrongfully touch and fondle Melvia Hagain". The second specification includes an act not included in the first specification, namely, fondle. If technical reasoning is necessary to avoid the Board of Review's holding it may be said that the finding of not guilty as to the first specification which includes only the act of lewdly touching the child cannot impute innocence of indecent and lascivious conduct in the fondling of the child. I do not, however, rest my conclusions alone on this technical construction of the law. The taking of indecent liberties with the person of a female child of tender years, is an act that is so revolting to the sensibilities of the American people, that I cannot class such an offense as a simple assault and battery. I am therefore of the opinion that the limit of punishment authorized for assault and battery by Executive order should not be applied in this case to prevent the execution of the sentence as imposed by the court and approved by the convening authority. I therefore recommend that the Commanding General, Ninth Corps Area, be advised that the record is legally sufficient to sustain the sentence.

5. This case is submitted to you for your action under Article 50 $\frac{1}{2}$  as amended by the act of Congress approved August 20, 1937. The pertinent provisions of the amendatory act provide that the functions prescribed in third and fifth paragraphs of Article of War 50 $\frac{1}{2}$  to be performed by the President may be performed by the Secretary of War or Acting Secretary of War.

6. There are inclosed herewith drafts of two actions identified

as "Draft A" and "Draft B". "Draft A" is in language appropriate to carry out the recommendations of the Board of Review. If this action is signed the accused will remain in the service and suffer only a forfeiture of two-thirds of his pay per month for six months. "Draft B" is in language appropriate to carry out my recommendations which are in accord with the action of the court and of the Commanding General, Ninth Corps Area. If "Draft B" is signed the accused will be dishonorably discharged the service and forfeit all pay and allowances.

  
Allen W. Gullion,  
Colonel, J.A.G.D.,  
Acting The Judge Advocate General.

3 Incls.  
Record of trial.  
Drafts of two actions.

Note: The Secretary of War concurred in the opinion of  
The Judge Advocate General - G.C.M.O. 274, 20 Nov. 1937.



