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VOL. 9

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v. 9



Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume IX

including

CM 208296 to CM 210985

(1937-1939)

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

(1)

Board of Review
CM 208296

DEC 8 - 1937

U N I T E D	S T A T E S	)	FIRST CORPS AREA
)	
	v.	)	Trial by G.C.M., convened at
		)	Headquarters First Corps Area,
Major VICTOR G. HUSKEA		)	Boston, Massachusetts, October
(O-6099), Infantry.		)	14, 1937. Dismissal.

OPINION of the BOARD OF REVIEW
CRESSON, KRIMBILL and HOOVER, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Major Victor G. Huskea, Infantry, being then and there a married man having a lawful wife living and not divorced, did, at Bangor, Maine, on or about July 15, 1936, wrongfully, dishonorably, and unlawfully have sexual intercourse with one Beulah Virginia Cote, a woman not his wife.

Specification 2: (Finding of not guilty.)

Specification 3: In that Major Victor G. Huskea, Infantry, then and there being a married man, did, at Littleton, Massachusetts, from about June 20, 1937, to about July 9, 1937, lodge in the Tourist Home of Mrs. J. C. Cooper of said Littleton, Massachusetts, in the same room with a woman not his wife, under the assumed name of Mr. and Mrs. Rodger J. Barrett.

(2)

Specification 4: In that Major Victor G. Huskea, Infantry, then and there being a married man, did, at Ayer, Massachusetts, from about July 9, 1937, to about July 26, 1937, lodge in the home of Mrs. Wilfred J. Robichaud of said Ayer, Massachusetts, in the same room with a woman not his wife, under the assumed name of Major and Mrs. Miller.

He pleaded not guilty to the Charge and specifications, and was found guilty of the Charge and Specifications 1, 3 and 4 thereunder but not guilty of Specification 2. 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 Article of War 48.

3. As relating to Specification 1 of the Charge, there was received in evidence a birth certificate reciting the birth of a male child, "Victor Geoffrey Huskea", at Webster, Massachusetts, on March 15, 1937, to a mother whose maiden name was Beulah Virginia Cote (Pros. Ex. 4). This certificate, admitted following a statement by the defense that it had no objection thereto but that it did not admit "that the facts contained therein are other than prima facie evidence" (R. 7), names the father of the child as "Victor Geoffrey" (Pros. Ex. 4). Beulah Virginia Cote, age 22 years, and accused, age 48 years, were married at Putnam, Connecticut, April 2, 1937 (R. 8; Pros. Ex. 3). The marriage certificate recites the name of accused as "Victor Geoffrey" Huskea (Pros. Ex. 3). Accused and Florence Jeter Huskea were husband and wife during the year 1936, but this marriage was dissolved by divorce January 28, 1937 (R. 78; Pros. Exs. 1,2).

During the course of an investigation by a corps area inspector in August, 1937, prior to the trial, after having been warned that he was not required to make a statement and that whatever he said might be used against him (R. 10,11,63-65; Pros. Ex. 6), accused stated, in response to questions, that during the early part of 1936 he was on duty at the University of Maine and resided in Orono, Maine. His wife, Florence Jeter Huskea, left his home at this place on June 1, 1936, and at about this time accused took residence, with his mother, at 94 Court Street, Bangor, Maine. (R. 78,79) While living in Orono, accused became acquainted with "Beulah V. Cote", then a nursemaid in the home of a next door neighbor, and commenced an association with her which became "gradually more and more" intimate (R. 79). About

July, 1936, accused employed her as a domestic and companion to his mother in his home in Bangor (R. 79,80). He had sexual intercourse with her, which might have resulted in her pregnancy (R. 81,91), but did not have intercourse with her "while she was regarded as an employee" (R. 81). She and the mother of accused went to Putnam, Connecticut, in the fall of 1936 (R. 82). In response to a question as to whether he had acknowledged as his own the child born to "Beulah Cote" as a result of the admitted intercourse, accused stated "not as a result of such intercourse but for the reason stated previously" (the reason as stated does not appear in evidence) (R. 81). In response to a question as to the whereabouts of his "wife and baby" at the time of the investigation, accused answered "Putnam, Conn." (R. 88). Accused proposed marriage to Beulah V. Cote and married her willingly following some discussion between his legal representatives and a representative of the woman's mother (R. 81,82). At the time of the investigation, he was providing for his wife's support (R. 88).

Accused testified, in his own behalf, that he married "Virginia Cote" on April 2, 1937, "because we had agreed a long time ago, * * *, and that was my first opportunity" (R. 101). At the time of trial accused was not living with her, and a divorce suit instituted by her at the instigation of her parents was pending (R. 105).

Beulah Virginia (Cote) Huskea was sworn as a witness, but, beyond relating her marriage to accused, declined to testify (R. 7-9).

4. Thus the evidence shows that at about the time and at or near the place alleged in Specification 1, accused, while married to Florence Jeter Huskea, had unlawful sexual intercourse with Beulah Virginia Cote, a woman not then his wife. Accused confessed the adultery charged, in his statement to the corps area inspector. The circumstances as admitted by him and as otherwise proved leave no room for doubt that accused was the father of the child born to the woman March 15, 1937. His marriage to her occurred after the birth. Ample corroboration of the confession of accused in its essential particulars as required by paragraph 114 a of the Manual for Courts-Martial is found in the recitals of the birth certificate, which was properly received as prima facie evidence of the facts therein recorded. Par. 117 a, M.C.M.

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The offense of adultery here charged and proved, amounting to a felony under the laws of the state in which it was committed (chap. 135, Revised Statutes of Maine, 1930), as well as being recognized as an offense of felonious nature by the laws of the United States (U.S.C. 18:516), must be deemed to have been violative of the 95th Article of war. CM 202212, Coulter; CM 203719, Sullivan.

5. The evidence with respect to Specifications 3 and 4 of the Charge is substantially as follows:

Mrs. Juliet Grace Cooper testified (Specification 3) that she operated and maintained a "tourist home" in Littleton, Massachusetts. On June 19, 1937, accused came to her place of business, rented a room, with board, for a woman whom he introduced as his wife, and registered the woman in the book kept by witness for that purpose as "Mrs. Rodger J. Barrett Bangor Maine" under the date "June 20, 1937". (R. 13-17, 22, 30, 31) This woman was not Beulah Virginia (Cote) Huskea (R. 21). Accused said that he was "Major" or "Major General" Barrett and that he was going to Camp Devens (R. 23). The woman asked witness to call her Ruth (R. 21), and on one occasion talked over the telephone to a hairdresser who had called for "Mrs. Miller" (R. 19, 20). She occupied the room until July 9 (R. 15, 30). Accused "occupied it the first night (Saturday) with her and he was back every week and also over the 4th of July at my home" (R. 15). He remained at witness' house "Saturday nights, and the Saturday night before the 4th and until about 10 o'clock of the evening of the 5th" (R. 17). (The calendar shows three Saturdays during the period June 19 to July 9, 1937, inclusive.) The room in question was on the second floor, and witness habitually occupied a room downstairs from which she observed persons entering and leaving the house (R. 23-28, 30). "Mrs. Barrett" paid cash weekly in advance for the room and board (R. 27, 29). On the last day of occupancy accused asked for and received a duplicate receipt covering the final week, stating that his wife had not received an original receipt (R. 27).

Lucy M. McNiff testified (Specifications 3 and 4) that about the latter part of June, in Littleton, Massachusetts, a woman for whom she had done some hairdressing, known to witness as "Mrs. Miller", introduced accused to witness as her husband, "Major Miller". Accused made no correction as to the name used. (R. 32-34, 38) Later witness took

Mrs. Miller to the home of witness' sister, a Mrs. Robichaud of Ayer, Massachusetts (R. 32,36). "Mrs. Miller" was not Beulah Virginia (Cote) Huskea (R. 37).

Mrs. Wilfred J. Robichaud testified (Specification 4) that about July 9, 1937, accused came to her home at 18 Highland Avenue, Ayer, Massachusetts, and was there introduced to her, by a woman known to witness as "Mrs. Ruth Miller", as her husband (R. 39,40). Accused, who was in uniform with gold shoulder ornaments (R. 41), rented a room in the home, which was occupied until July 26 by Mrs. Miller (R. 40,41). Mrs. Miller was not Beulah Virginia (Cote) Huskea (R. 43,44). Mrs. Miller and accused were "very affectionate, as a man and wife probably would be" (R. 50). Accused came to witness' home some week-day evenings and on "Saturday nights" (R. 41,42,59), and witness at times saw him and Mrs. Miller go upstairs where the rented room was located and remain there together (R. 53-55). On week-day evenings he arrived at about 7 p.m. and left at 9:30 or 10 p.m. On these evenings the two were upstairs for only brief periods (R. 60). Accused came to witness' home in his car (R. 61). On Saturday nights (the calendar shows three Saturdays from July 9 to July 26, inclusive) witness was absent from her home from about 6 p.m. to about midnight (R. 48,61), and on returning these nights she observed accused's car parked at her home, but did not see accused or Mrs. Miller (R. 61,62). The room occupied by Mrs. Miller adjoined that of witness (R. 45) but witness did not hear any conversation in Mrs. Miller's room (R. 48,49). Witness did not hear the car leave during these nights, but it was not there on the mornings following (R. 61). Accused "was supposed to be in camp early Sunday morning" (R. 47). On one occasion accused brought to witness' home some men's civilian clothes, which were placed in Mrs. Miller's room and the next day sent to the cleaners. When the room was rented, accused brought and placed in it two traveling bags, one large and one small (R. 57,58).

In the course of the investigation by the corps area inspector, accused stated that following the departure from his home in Bangor, Maine, of Beulah V. Cote, he became acquainted with Ruth Miller, who was then a waitress. She was well recommended and accused employed her as a housekeeper in his home. She did not, however, stay nights in his home except when he was absent. (R. 82,83) He paid her \$10 a week with extras "towards her maintenance and clothing" (R. 84). In

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February, 1937, he "authorized her admission and signed for" her hospitalization in a civilian hospital at a time at which she was very ill (R. 85). when accused left Bangor for Fort Devens, about June 20, she accompanied him in his car, and he left her in Lowell, Massachusetts, at the home of some of her acquaintances (R. 86). During his period of duty at Fort Devens he "gave her * * * a vacation with full pay" (R. 87). He did not at any time register her in a "tourist home" or private family while he was at Camp Devens (R. 89), and never rented overnight accommodations for her and himself (R. 87). He saw her at Fort Devens occasionally (R. 86,87) and he visited friends of hers in Ayer, Massachusetts, where he saw her several times (R. 89,90). He did not remain overnight in the same residence occupied by her (R. 90). When he left Fort Devens for his new station at Fort Williams, Maine, he took her with him (R. 87) and at the time of the investigation she was employed by him in his home at South Portland, Maine (R. 83). She is about 25 or 26 years of age (R. 91).

Accused testified, in his own behalf, that he did not lodge in or occupy a room with a woman not his wife in the "tourist home" of Mrs. Cooper at Littleton (R. 96) or in the home of Mrs. Robichaud at Ayer, Massachusetts, although he visited at both places. He denied that he signed the register kept by Mrs. Cooper, that he used the name of "Major Miller", or that he heard Miss Miller introduce him under the name of Barrett or Miller. (R. 96-99) He wrote in court the words "Mrs. Roger J. Barret Bangor Maine June 20, 1937", and the writing (Def. Ex. 1) was introduced in evidence for comparison with that in Mrs. Cooper's register (Pros. Ex. 5) (R. 96,97). He took Miss Miller to Mrs. Cooper's place (R. 105). During the periods covered by Specifications 3 and 4, she continued her duties as his housekeeper by doing his laundry and having his civilian clothes cleaned (R. 102). Once or twice a week he spent as much as fifteen minutes at a time in Miss Miller's room "gathering laundry" (R. 106,107). He had pajamas in her room at both places, but they were not normally kept there and "they were necessary to take care of" (R. 107,108). She was, at the time of trial, still in his employ (R. 105).

6. There is convincing direct and circumstantial evidence that within the dates alleged in Specifications 3 and 4 of the Charge accused, after his marriage to Beulah Virginia Cote, occupied for considerable periods the same room with Ruth Miller, a woman not his

wife. Mrs. Cooper testified that accused and Miss Miller, masquerading as husband and wife under the name of Major or Major General and Mrs. Rodger J. Barrett, occupied the same room in her house during the whole of four nights. Accused denied such cohabitation, but his veracity as well as that of Mrs. Cooper was for the court to determine. In view of the positive character of Mrs. Cooper's testimony and the circumstances of the admitted association of accused and Miss Miller, the court was fully justified in accepting as true the testimony of Mrs. Cooper. The association in Mrs. Cooper's house was continued in the Robichaud home. That accused, while at the latter place in the company of Miss Miller, was known, with his tacit consent, as Major Miller, and that the woman was known as his wife, is shown by the testimony of two witnesses. Mrs. Robichaud's testimony establishes circumstantial facts which leave no substantial doubt that on three Saturday nights, at least, accused and Miss Miller occupied the same room at the Robichaud home until after midnight. In the light of the convincing testimony of Mrs. Robichaud and of the entire course of conduct of accused in his relations with Miss Miller, the court was, as in the other case, justified in declining to accept as true his denials of occupancy of the room with the woman.

The gravamen of the offenses charged under Specifications 3 and 4 was the conduct of accused in illicitly "lodging", that is, dwelling or living with the woman as her husband. That accused and Miss Miller did live together as husband and wife is established beyond reasonable doubt. It is not shown that they lived together continuously in the sense that they occupied the same room each night during the periods involved, but their joint occupancy of the rooms, ostensibly as husband and wife, was of such frequency and continuity that it must be concluded that they lodged or lived together as husband and wife, as charged. This unlawful conduct, under all the circumstances, was no less indecorous than that charged in Specification 1, and must be deemed to have been violative of the 95th Article of War. CM 203719, Sullivan.

7. In the course of examination by the defense of Lucy M. McNiff, recalled as a witness for the defense, the law member sustained an objection by the prosecution to a question as to whether witness knew the reputation of Mrs. Cooper (a witness for the prosecution) "for reliability * * * in the community", the witness having previously

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testified that she did not know the general reputation of Mrs. Cooper for veracity (R. 95). Likewise, the law member sustained an objection to a question by the defense, addressed to accused while testifying in his own behalf, as to what he had found from conversations with persons in the vicinity of Ayer, Massachusetts, as to Mrs. Cooper's "reputation for veracity in the community" (R. 104). Inasmuch as neither Miss McNiff nor accused was shown to be conversant with the general reputation for veracity of Mrs. Cooper in the community in which she lived or pursued her ordinary business, the law member was not in error in sustaining the objections. Par. 124 b, M.C.M.

8. Accused is 49 years of age. The Army Register shows his service as follows:

"2 lt. of Inf. (temp.) 30 June 17; accepted 10 July 17; capt. of Inf. N.A. 15 Aug. 17; accepted 15 Aug. 17; hon. dis. 11 Oct. 19.--Pvt., corp. and sgt. Co. K 13 Inf. 7 Feb. 09 to 16 Jan. 15; pvt., corp. and sgt. Co. M 21 Inf. 12 May 15 to 9 July 17; 1 lt. of Inf. 1 July 20; accepted 30 Sept. 20; capt. 1 July 20; maj. 1 Aug. 35."

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

Charles L. Benson, Judge Advocate.

Walter M. Thimble, Judge Advocate.

Michael W. Hoover, Judge Advocate.

To The Judge Advocate General.

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

(9)

Board of Review
CM 208462

DEC 30 1937

U N I T E D	S T A T E S	)	SEVENTH CORPS AREA
)	
	v.	)	Trial by G.C.M., convened at
		)	Fort Snelling, Minnesota,
Private EARL MEIER		)	November 5, 1937. Dishonorable
(6731809), Company H,		)	discharge, suspended, and con-
2d Infantry.		)	finement for one (1) year.
		)	Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
GREGSON, KRIMBILL and HOOVER, Judge Advocates.

1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found 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 charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Earl Meier, Company H, 2d Infantry, did, at Fort Wayne, Michigan, on or about September 23, 1937, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Snelling, Minnesota, on or about September 28, 1937.

He pleaded not guilty to the charge and specification but "guilty of violation of the 58th Article of War, absent without leave", and was found guilty as charged. Evidence of one previous conviction by summary court-martial for absence without leave for 26 days was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor

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for one year. The reviewing authority approved the sentence, but suspended that portion thereof adjudging dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement. The sentence was published in General Court-Martial Orders No. 177, Headquarters Seventh Corps Area, Omaha, Nebraska, December 6, 1937.

3. The evidence shows that accused absented himself without leave from his organization and station at Fort Wayne, Michigan, on September 23, 1937 (Ex. 1) and remained absent until September 28, 1937, on which latter date he surrendered at the guardhouse, Fort Snelling, Minnesota, stating that he was absent without leave and was "turning in for transportation to Fort Wayne" (R. 6,7). He was dressed in civilian clothes (R. 8), and was dirty, unshaven, and unkempt - "looked like he might have been on a drunk" (R. 24). He had a razor but no other personal effects and did not have any money (R. 25,26).

Accused testified that -

"* * * the last thing I remember was going in a cafe in Detroit, and I must have got drunk, and when I finally sobered up I found myself near Eau Claire, Wisconsin, and realized how far I was from my post, and inquired about the nearest army post, and turned in at Fort Snelling for transportation back to my own outfit." (R. 10,11)

He did not remember how he reached Eau Claire, but found himself near there, "in a ditch", on September 26, and made his way thence to Fort Snelling by automobile and afoot (R. 11,12). His home was in Milwaukee, but his parents were dead (R. 14).

A medical officer testified for the prosecution that in his opinion drunkenness of accused sufficient to cause total loss of memory for three days would probably have resulted in loss of his "powers of locomotion and co-ordination" and "he would have been down" (R. 28,29).

4. To prove desertion it was necessary to establish an intention by accused, entertained at the inception of or at some time during

his absence, not to return to the service of the United States. Proof of specific intention on his part not to return to his place of service, Fort Wayne, Michigan, would suffice. Par. 130 a, M.C.M.

The facts do not evidence an intention by accused to abandon entirely the service of the United States. He was absent for only a relatively short period of time. Considering the available means of travel and the circumstances, he did not go a relatively great distance away from his place of duty. He went toward the locality of his home. Upon reaching this locality, he promptly surrendered to a military post and requested means of return to his proper station, as he was by Army Regulations authorized to do. There is no evidence that he was dissatisfied with the military service as a whole.

Neither is there in the evidence sufficient basis for a reasonable inference that accused intended not to return to his proper station. There is no tangible indication that he was dissatisfied with his place of service or that he preferred another. His act in requesting return transportation to his proper station indicated a desire to return. His request for transportation was, to be sure, self-serving, but it was, nevertheless, the normal act of a soldier absent without leave and lacking funds to effect his intended return to his station. The court was not bound to accept as true the testimony of accused as to his loss of memory as to what occurred before he reached Eau Claire, that is, as to his lack of a responsible plan to go as far as that place, but the record, in its aspect most unfavorable to accused, shows no more than that he absented himself without leave and, while absent, went with conscious purpose to the general locality of his home before surrendering. In the opinion of the Board of Review, the mere fact that he traveled a considerable distance from his station, about 600 miles, is not, under the circumstances of the case and in the absence of other incriminating factors, sufficient to establish intent not to return thereto.

The following excerpt from a recent holding by the Board of Review, CM 205916, Williams, is pertinent:

"In the absence of any evidence tending to establish such an intent (to desert), 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,

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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."

The evidence sufficiently shows that accused absented himself without leave from September 23, 1937, to September 28, 1937, a period of five days.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave, at the time and place alleged, in violation of the 61st Article of War; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for fifteen days and forfeiture of two-thirds pay for a like period.

Charles L. Wilson, Judge Advocate.

Walter M. Krumhilt, Judge Advocate.

Arthur W. Hoover, Judge Advocate.

To The Judge Advocate General.

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



Board of Review
CM 208481

Dec. 22, 1937

UNITED STATES	)	THIRD CORPS AREA
)	
v.	)	Trial by G. C. M., convened at
	)	Fort Myer, Virginia, December 3,
Private WALTER B. RAGSDALE	)	1937. Dishonorable discharge and
(6732008), D.E.M.L., The	)	confinement for two (2) years.
Army War College Detachment,	)	Disciplinary Barracks.
Fort Humphreys, D. C.)	

HOLDING by the BOARD OF REVIEW
CHESSON, KRIMBILL and HOOVER, Judge Advocates.

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

2. Accused was found guilty of the larceny of a watch, chain and knife of the value of about \$75.00. The owner testified, in response to a question as to the value of the watch, "As I remember, I paid \$65.00 for it on G Street, Northwest, Washington, D. C." (R. 9). He did not state the time of purchase. He testified that the chain and knife "are worth \$10.00" (R. 10). The watch was sold by accused in a second-hand store or pawnshop for \$9.00 (R. 15,21,22,25). The purchaser testified that in his opinion the watch cost approximately \$60.00 when new (R.26). A soldier to whom accused showed the watch testified that he told accused that he should be "able to get \$15 or \$18 for it" (R. 15). The watch, a Howard with 17 jewel movement (R. 17), was received in evidence (R.9).

The value of personal property to be considered in determining the punishment authorized for larceny thereof, is the market value when, as in this case, the chattels have a readily determinable market value. CM 208002, Gilbert; sec. 585, McClain on Criminal Law; People v Gilbert, 128 N.W. (Mich.) 756.

There was testimony which was not challenged that the chain and knife were "worth" \$10.00. The watch was sold to a second-hand dealer

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subsequent to the larceny for \$9.00, and it may be reasonably inferred that the dealer believed that it had a market value appreciably greater than that amount, for, in the usual course of his business, he would not have undertaken a profitless venture. But beyond the sale transaction there was no substantial evidence as to the market value of the watch when stolen. The original cost price of the article was not positively established, and, in any event, in the absence of proof as to the age, use and degree of deterioration of the watch, the evidence as to cost did not suffice to prove its definite market value at the time it was stolen. The court could, from its inspection of the property, determine that it had some value (par. 149 g, M.C.M.), but to permit the court-martial, from its inspection alone, to find that this second-hand watch was of market value in excess of \$40.00, the minimum required to bring the aggregate value of the stolen property above \$50.00, [would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed.] CM 208002, Gilbert.

The Board of Review is of the opinion that from all the evidence the court was legally justified in finding that the stolen property was of aggregate value in excess of \$20.00, but that there was no reasonable basis in the evidence for an inference that the value of the property was in excess of \$50.00, the minimum valuation required by paragraph 104 c of the Manual for Courts-Martial to support a sentence to confinement in excess of 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 watch, chain and knife described, of ownership as alleged, of value more than \$20.00, but not more than \$50.00; 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.

Ernest Larson, Judge Advocate.

Walter M. Kinnick, Judge Advocate.

Richard A. Hoover, Judge Advocate

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

(15)

Board of Review
CM 208545

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.)			
)			
First Lieutenant CLARENCE E.		)			Trial by G.C.M., convened at
POLK (O-180725), Cavalry		)			Fort Bliss, Texas, October 21
Reserve, alias Private		)			and November 12, 1937.
Douglas B. Van Dyke (6608568),		)			Dismissal and confinement for
Headquarters 5th Composite		)			two and one-half (2½) years.
Group, Air Corps.)			

OPINION of the BOARD OF REVIEW
CRESSON, KRIMBILL and HOOVER, Judge Advocates.

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

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

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

Specification 1: In that First Lieutenant Clarence E. Polk, Cavalry Reserve (promoted from Second Lieutenant, March 30, 1937), alias Private Douglas B. Van Dyke, Headquarters 5th Composite Group, Air Corps, while on active duty and being at the time custodian of the company fund of Conservancy Beach Fly Camp, Civilian Conservation Corps, Albuquerque, New Mexico, did, as custodian of said fund, at Albuquerque, New Mexico, from April, 1936, to April, 1937, feloniously embezzle by fraudulently converting to his own use the sum of about \$543.97, property of the Company Fund, Conservancy Beach Fly Camp, Civilian Conservation Corps, which came into his possession by virtue of his office.

Specification 2: In that First Lieutenant Clarence E. Polk, Cavalry Reserve, alias Private Douglas B. Van Dyke,

Headquarters 5th Composite Group, Air Corps, while on active duty and being at the time custodian of the company fund of Conservancy Beach Fly Camp, Civilian Conservation Corps, Albuquerque, New Mexico, did, as custodian of said fund, at Albuquerque, New Mexico, on or about May 20, 1937, feloniously embezzle by fraudulently converting to his own use the sum of \$150.00, property of the Company Fund, Conservancy Beach Fly Camp, Civilian Conservation Corps, which came into his possession by virtue of his office.

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

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

Specification 1: In that First Lieutenant Clarence E. Polk, Cavalry Reserve, then Second Lieutenant, alias Private Douglas B. Van Dyke, Headquarters 5th Composite Group, Air Corps, while on active duty and being at the time custodian of the company fund of Conservancy Beach Fly Camp, Civilian Conservation Corps, Albuquerque, New Mexico, did, as custodian of said fund, at Albuquerque, New Mexico, on or about April 30, 1936, with intent to deceive the auditor of said fund, officially make, sign, and present to First Lieutenant Cornelius B. Cosgrove, Air Reserve, auditor of said fund, the following certificate in the council book of said company to the account of said fund for the month of April, 1936:

"I CERTIFY that the foregoing account for the month of April, 1936, is correct, and that of the amount for which I am responsible One Hundred Sixty Dollars & Ninety-nine cents (\$160.99) is deposited with the Albuquerque National Trust & Savings Bank, to the credit of the Company Fund, Conservancy Beach Fly Camp, and Thirty-two Dollars (\$32.00) in cash, is in my personal possession.

April 30, 1936.

Clarence E. Polk
2nd Lt Cav Res
Commanding."

which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said account was not correct as it showed an expenditure of \$76.00 to the Court Cafe, Albuquerque, New Mexico, on April 10, 1936, of which amount \$50.00 had not been so expended.

Specification 2: * * * officially make, sign, and present * * * the following certificate * * * for the month of May, 1936:

"I CERTIFY that the foregoing account for the month of May, 1936, is correct, * * *"

which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said account was not correct as it showed an expenditure of \$76.00 to the Court Cafe, Albuquerque, New Mexico, on May 2, 1936, of which amount \$50.00 had not been so expended.

Specification 3: * * * officially make, sign, and present * * * the following certificate * * * for the month of June, 1936:

"I CERTIFY that the foregoing account for the month of June, 1936, is correct, and that of the amount for which I am responsible Two Hundred & fifty-three dollars & sixty-two cents (\$253.62) is deposited with the 1st National Bank, Albuquerque, N.M., * * *"

which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said account was not correct as it showed an expenditure of \$18.00 to the Court Cafe, Albuquerque, New Mexico, on June 15, 1936, which had not been made, and in that said amount of \$253.62 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 4: * * * officially make, sign, and present * * * the following certificate * * * for the month of July, 1936:

"I CERTIFY that the foregoing account for the month of July, 1936, is correct, and that of the amount for which I am responsible Thirty-dollars & forty-five cents (\$30.45) is deposited with the 1st National Bank, Albuquerque, * * *"

which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said

account was not correct as it showed expenditures of \$18.00 and \$51.50 to the Court Cafe, Albuquerque, New Mexico, on July 4 and 7, 1936, respectively, which had not been made, and in that said amount of \$30.45 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 5: * * * officially make, sign, and present * * * the following certificate * * * for the month of August, 1936:

"I CERTIFY that the foregoing account for the month of August, 1936, is correct, and that of the amount for which I am responsible One Hundred & Eighty-seven Dollars & Sixty-seven (\$187.67) is deposited with the 1st National Bank, Albuquerque, N.M., * * *

which certificate was false and known by said Lieutenant Clarence E. Polk, cavalry reserve, to be false in that said account was not correct as it showed an expenditure of \$73.00 to the Court Cafe, Albuquerque, New Mexico, on August 22, 1936, which had not been made, and in that said amount of \$187.67 was not deposited in the first National Bank, Albuquerque, New Mexico.

Specification 6: * * * officially make, sign, and present * * * the following certificate * * * for the month of September, 1936:

"I CERTIFY that the foregoing account for the month of September, 1936, is correct, and that of the amount for which I am responsible Two Hundred & One Dollars & Twenty-Four Cents (\$201.24) is deposited with the 1st National Bank, Albuquerque, N.M., * * *

which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said account was not correct as it showed expenditures of \$20.00 and \$35.00 to the Court Cafe, Albuquerque, New Mexico, on September 8 and 12, 1936, respectively, which had not been made, and in that said amount of \$201.24 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 7: * * * officially make and sign the following certificate * * * for the month of October, 1936:

"I CERTIFY that the foregoing account for the month of October, 1936, is correct, and that of the amount for which I am responsible One Hundred & Eighty-six Dollars & Eighty-six Cents (\$186.86) is deposited with the 1st National Bank, Albuquerque, N.Mex., * * ** which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said account was not correct as it showed an expenditure of \$38.60 to the Court Cafe, Albuquerque, New Mexico, on October 31, 1936, of which amount \$18.10 had not been so expended, and in that said amount of \$186.86 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 8: * * * officially make, sign, and present * * * the following certificate * * * for the month of November, 1936:

"I CERTIFY that the foregoing account for the month of November, 1936, is correct, and that of the amount for which I am responsible Three Hundred & Ten Dollars & Fifty Cents (\$310.50) is deposited with the 1st National Bank of Albuquerque, New Mex., * * ** which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said account was not correct as it showed an expenditure of \$39.00 to the Court Cafe, Albuquerque, New Mexico, on November 10, 1936, which had not been made, and in that said amount of \$310.50 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 9: * * * officially make, sign, and present * * * the following certificate * * * for the month of December, 1936:

"I CERTIFY that the foregoing account for the month of December, 1936, is correct, and that of the amount for which I am responsible Four Hundred & four dollars & Sixty one cents (\$404.61) is deposited with the 1st National Bank of Albuquerque, N.M., * * ** which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false, in that

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said account was not correct as it showed an expenditure of \$33.87 to the Court Cafe, Albuquerque, New Mexico, on December 15, 1936, which had not been made, and in that said amount of \$404.61 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 10: * * * officially make, sign, and present * * * the following certificate * * * for the month of January, 1937:

"I CERTIFY that the foregoing account for the month of January, 1937, is correct, and that of the amount for which I am responsible Two Hundred & sixty-one Dollars & seventy-one (\$261.71) is deposited with the 1st National Bank, Albuquerque, N.M., * * *" which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said amount of \$261.71 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 11: * * * officially make and sign the following certificate * * * for the month of February, 1937:

"I CERTIFY that the foregoing account for the month of February, 1937, is correct, and that of the amount for which I am responsible Three Hundred & Forty-Eight Dollars & Eighty One Cents (\$348.81) is deposited with the First National Bank of Albuquerque, * * *" which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said amount of \$348.81 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 12: * * * officially make, sign, and present * * * the following certificate * * * for the month of March, 1937:

"I CERTIFY that the foregoing account for the month of March, 1937, is correct, and that of the amount for which I am responsible Five Hundred & thirty-nine Dollars & Fifty Cents (\$539.50) is deposited with the 1st National Bank, Albuquerque, N.M., * * *" which certificate was false and known by said First Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said amount of \$539.50 was not deposited in the First National Bank, Albuquerque, New Mexico.

Specification 13: * * * officially make and sign the following certificate * * * for the month of April, 1937:

"I CERTIFY that the foregoing account for the month of April, 1937, is correct, and that of the amount for which I am responsible Six Hundred and Five Dollars & Five Cents (\$605.05) is deposited with the 1st National Bank, Albuquerque, N.M., * * *" which certificate was false and known by said Lieutenant Clarence E. Polk, Cavalry Reserve, to be false in that said amount of \$605.05 was not deposited in the First National Bank, Albuquerque, New Mexico.

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

Specification: * * * did, at Albuquerque, New Mexico, on or about May 20, 1937, desert the service of the United States, and did remain absent in desertion until he was apprehended at Luke Field, Territory of Hawaii, on or about July 30, 1937.

CHARGE IV: Violation of the 54th Article of War.

Specification: * * * did, under the name of Douglas B. Van Dyke, at Luke Field, Territory of Hawaii, on June 25, 1937, by willfully concealing the fact that he was then a First Lieutenant, Cavalry Reserve, on active duty with the Civilian Conservation Corps, procure himself to be enlisted in the military service of the United States by Second Lieutenant Downs E. Ingram, Air Corps, and did thereafter at Luke Field, Territory of Hawaii, receive allowances under the enlistment so procured.

He pleaded not guilty to the charges and specifications, and was found not guilty of Specifications 3 and 4, Charge I; guilty of Specification 1, Charge I, except the figures "543.97", substituting therefor the figures "343.97"; guilty of the Specification, Charge III, except the words "was apprehended", substituting therefor the word "surrendered"; and guilty of the charges and remaining specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due,

and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Accused was found guilty of embezzlements of company funds aggregating \$493.97, false official statements made in concealment of certain of the embezzlements, desertion and fraudulent enlistment. Testifying in his own behalf he admitted all material elements of the offenses as found. The material facts may be summarized as follows:

Accused, a Second Lieutenant, and later a First Lieutenant, Cavalry Reserve, was on active duty with the Civilian Conservation Corps from April 27, 1935, to October 26, 1937 (Pros. Ex. 1), and was in command of the Conservancy Beach Fly Camp at Albuquerque, New Mexico, from about April 1, 1936, to about May 20, 1937 (R. 18). From time to time during the period April 10, 1936, to April 30, 1937, he wrongfully withdrew from the company fund of his company, of which fund, by virtue of his command, he was the custodian, various sums of money aggregating \$343.97, and converted the same to his personal use (Pros. Exs. 6,7,8; R. 75,76,79). (Specification 1, Charge I.) To conceal his peculations he made in his council book erroneous entries falsely indicating disbursements covering certain of the embezzled funds (Pros. Ex. 6), and presented, as supporting vouchers to these pretended disbursements, partially false or wholly fictitious receipts (Pros. Exs. 8,23,24). He also presented altered bank statements showing false balances in the company fund account (Pros. Ex. 7). On the last day of each month from April, 1936, to April, 1937, inclusive, he executed the usual certificate that the council book account for that month was correct. These certificates, as required, contained statements of the amount of money on deposit in bank to the credit of the company fund at the time the certificates were made. Each certificate was false in that it verified an account in which accused had made a false entry of pretended disbursement, as indicated above, or in that it incorrectly stated the balance in bank. (Pros. Exs. 6,7,22) With the exception of those for October, 1936, and February and March, 1937, the council book accounts were currently audited and, in reliance on the false entries and balances, found to be correct (Pros. Ex. 6; R. 26-32). The falsity of the thirteen certificates was the basis of the specifications, Charge II.

About May 14, 1937, accused advised his district commander that he had misappropriated about \$109 of his company funds (not apparently

included in the funds found to have been embezzled) in landscaping and improving the facilities of his camp, and asked authority to make restitution. He was told that an audit and investigation would be made. (R. 46,47) On May 18 accused cashed a check for \$150 on the account of his company fund (Pros. Exs. 19,22) and appropriated the money to his own use (R. 77). (Specification 2, Charge I.) On May 20 he absented himself without leave (R. 18). On June 25 he enlisted at Luke Field, T. H., under the name of Douglas Bruce Van Dyke, concealing his status (Pros. Exs. 2,3; R. 78). He received allowances of clothing and rations after enlistment (Pros. Ex. 4; R. 78). On July 31 he made known his identity and status and was placed in confinement (Pros. Ex. 5; R. 79). (Charges III and IV and their specifications.)

Accused testified that of the monies converted to his own use, a great deal was paid upon liquor bills incurred by his wife and for damage to property caused by his wife when drinking heavily (R. 70-72). His wife testified to the same effect (R. 55-62). Evidence of disorders by the wife resulting in property damage and domestic difficulties was introduced (R. 61-64).

Evidence of good character of accused and efficient performance of duty by him both as an enlisted man and Reserve officer, prior to the offenses involved, was introduced by the defense (R. 48,53; Def. Exs. 3,4,5).

4. The findings of guilty are fully supported by the evidence.

5. The charge sheet shows that accused is 26 years of age, and that he served as an enlisted man in Troop A, 7th Cavalry, from April 27, 1931, to April 26, 1934, and that he was discharged from this enlistment as a corporal with character excellent.

6. Accused was arraigned on October 21, 1937, prior to the expiration of his tour of active duty on October 26, 1937. The trial was not completed until November 12, but it is well established that jurisdiction of the court-martial having attached while accused was on active duty and subject to military law, it continued for all purposes of trial, sentence and execution of the sentence. CM 203869, Lienhard; CM 206323, Schneider.

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7. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of the 54th, 58th and 93d Articles of War and is mandatory upon conviction of violation of the 95th Article of War.

Shas. Johnson, Judge Advocate.

Walter M. Krimmell, Judge Advocate.

Nicholas W. Kargell, Judge Advocate.

To The Judge Advocate General.

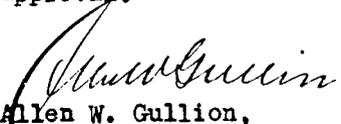
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War Department, J.A.G.O., JAN 5 1938 - To the Secretary of War.

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 Clarence E. Polk, Cavalry Reserve, alias Private Douglas B. Van Dyke, Headquarters 5th Composite Group, Air Corps.

2. I 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, and recommend that the sentence be confirmed and ordered executed. In view of the nature of the offenses and the amounts of money embezzled, I believe that the sentence is not unduly severe. I recommend that the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, be designated as the place of confinement.

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.


Allen W. Gullion,
Major General,

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.

Confinement reduced to one year by the President.

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

(27)

Board of Review
CM 208699

JAN 19 1938

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,
Private HERBERT E. CROWDER	)	December 21, 1937. Dishonorable
(6566375), Company A,	)	discharge and confinement for
29th Engineers.	)	six (6) months. Vancouver
	)	Barracks, Washington.

HOLDING by the BOARD OF REVIEW
CRESSON, KRIMBILL and HOOVER, 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 Herbert E. Crowder, Company A, 29th Engineers, did, at Portland, Oregon, on or about November 14, 1937, feloniously take, steal and carry away one Smith and Wesson, Cal. .32 revolver, value about \$25.00, the property of Frank Wilson.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved only so much of the finding of guilty of the specification as involved larceny, as charged, of the revolver, value about \$12.50, approved the sentence, designated Vancouver Barracks, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. There is undisputed evidence that at about the time and at the place alleged accused wrongfully took and carried away the revolver described in the specification, of approximate value as approved by the reviewing authority, and of ownership as alleged. The only question requiring consideration here is whether there is sufficient evidence of intent by accused permanently to deprive the owner of his property to support the findings of guilty of larceny.

4. The evidence shows that about November 13, 1937, at Portland, Oregon, accused took the revolver from under a pillow of a bed in the home of Mr. and Mrs. Frank Wilson, during their absence, and kept it in his possession until it was found in his unlocked foot locker at a camp about 27 miles from Centralia, Washington, where accused was on duty, on November 16 (R. 6,10,17,26,27). The bed was one habitually used by Mr. and Mrs. Wilson (R. 10). Accused, when confronted with his wrongdoing, admitted taking the revolver and, in response to a question by his company commander, said he did not know why he had taken it (R. 17).

Accused is the nephew of Mrs. Wilson, and was a frequent visitor at the Wilson home where he was received by Mrs. Wilson much as a son (R. 10,29,30). With the knowledge and consent of Wilson and his wife, accused had a key to the house (R. 6,9,11). He had permission to enter the house during the absence of the Wilsons (R. 6), and to "use anything in the house", although he did not have express permission to remove the revolver (R. 8,9). Mrs. Wilson testified, however, that she thought accused felt free to take things away - "It was the same as his own home" (R. 10). There had been friction in the home concerning accused, and Wilson and accused were not very friendly (R. 12,13,30). Accused had seen the revolver and offered to buy it, but Wilson refused to sell it and told accused "never to take it away" (R. 12). When loss of the revolver was discovered, Wilson notified the police (R. 11), and Mrs. Wilson, to protect accused, thereupon went to the latter's company commander to see if accused had the property (R. 6,31). It was then found as indicated above (R. 6).

Accused testified that on the night of November 13, following a conversation with his "girl friend" in which she rejected his attentions, he drank heavily and went in a drunken condition to the Wilson house, where he slept in Mrs. Wilson's bed. He did not remember taking the revolver but found it in his traveling bag upon reaching Centralia. He recognized it and "intended to take it back to Portland and return it"

but was placed in arrest (R. 20-27). He considered Mrs. Wilson his "best friend". He had never taken anything from her house except some car tickets, and in that case he later told her what he had done and she said "it was all right". (R. 23)

Evidence of good reputation of accused for honesty in his home community prior to enlistment (on June 16, 1937, at age 19 years) was introduced by the defense (Exs. A,B,C).

5. The salient facts developed by the evidence are that the taking of the revolver by accused, though without specific authority and legally wrongful, was from a household which was to all intents and purposes his home, and was accomplished under circumstances which indicate that he honestly believed that his acts would be overlooked and that his temporary possession of the property would be approved. The taking was secret in the sense that neither Wilson nor his wife knew of it, but in view of the intimately friendly relations of accused with his aunt, Mrs. Wilson, and his free access to the home, there was not in the taking that element of obvious evil purpose which in the usual secret trespass raises an inference of fraudulent intent permanently to deprive the owner of the property taken. The Board of Review is unable to find in the circumstances of the trespass alone sufficient basis for a reasonable inference of intent to steal.

The only remaining established facts from which it might be argued that such intent might be inferred are the asportation and temporary retention of the revolver by accused. But it has been held that mere asportation and temporary possession of property wrongfully taken or retained are not sufficient to justify such an inference. CM 207466, Philpott; CM 206350, McAdams and Tedder; CM 205920, McCann; CM 205811, Fagan; CM 197795, Hathaway; CM 194359, Sadler; CM 193315, Rosborough.

When confronted with his wrongful behavior and questioned, accused stated that he did not know why he had taken the revolver. This statement, taken in its aspect most unfavorable to accused, was no more than a declination then to commit himself as to his motive. Considered by itself, it falls short of being a confession of guilt or of involving an admission of larcenous intent, and, considered with all the other facts in the case, it does not suffice to support a finding of intent to steal.

In the opinion of the Board of Review, the evidence, as a whole, is legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of wrongful taking and asportation, in violation of the 96th Article of War. For this offense, accused may lawfully be punished as for larceny. 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 as involves findings that accused did, at the place and at about the time alleged, wrongfully take and carry away the property described in the specification, of the ownership alleged, and of the value as approved by the reviewing authority, without the consent of the owner, in violation of the 96th Article of War; and legally sufficient to support the sentence.

Charles S. Besson, Judge Advocate.

Walter M. Krimmel, Judge Advocate.

Richard W. Hoover, Judge Advocate.

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

(31)

President followed Judge Advocate General's recommendation
Board of Review
CM 208870

MAR 2 1938

UNITED STATES)	FIRST CORPS AREA
v.)	Trial by G.C.M., convened at
Lieutenant Colonel J.)	Headquarters First Corps Area,
MERRIAM MOORE (O-3487),)	Army Base, Boston, Massachusetts,
Infantry.)	November 22, December 14-17, 1937.
	Dismissal.

OPINION of the BOARD OF REVIEW
CRESSON, KRIMBILL and HOOVER, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Lieutenant Colonel J. Merriam Moore, Infantry, U.S. Army, did, at Fort Devens, Mass., during the period from about December 1, 1935, to about July 10, 1936, wrongfully, unlawfully, and to the discredit of the military service, make, utter and negotiate through various parties in the usual course of business 23 checks bearing approximate dates and for amounts as follows, to wit: Dec. 9, '35, \$40; Dec. 11, '35, \$50; Dec. 14, '35, \$50; Dec. 19, '35, \$75; Dec. 30, '35, \$60; Jan. 3, '36, \$40; Jan. 7, '36, \$60; Jan. 13, '36, \$60; Jan. 17, '36, \$35; Jan. 24, '36, \$25; Jan. 24, '36, \$18.06; Jan. 29, '36, \$25; Feb. 4, '36, \$50; Feb. 4, '36, \$25; Feb. 5, '36, \$65; Feb. 8, '36, \$45; Feb. 10, '36, \$89; Feb. 10, '36, \$71.20; Feb. 10, '36, \$45; Feb. 11, '36, \$67; Feb. 13, '36, \$85; July 1, '36, \$175; July 10, '36, \$375; all drawn upon the Riggs

National Bank of Washington, D.C., without making provision for the necessary funds or credit in said bank to meet the same, by reason whereof said checks were dishonored by said bank.

Specification 2: * * * wrongfully, unlawfully, and to the discredit of the military service make, utter and negotiate through various parties in the usual course of business 22 checks bearing approximate dates and for amounts as follows, to wit: Jan. 16, '37, \$40.80; Jan. 25, '37, \$100; Jan. 26, '37, \$75; Jan. 30, '37, \$15; Feb. 1, '37, \$25; Feb. 3, '37, \$60; Feb. 9, '37, \$25; Mar. 15, '37, \$78; Mar. 16, '37, \$78.84; Mar. 16, '37, \$65.75; Mar. 19, '37, \$96.20; Mar. 20, '37, \$126; Mar. 20, '37, \$150; Mar. 20, '37, \$13; Mar. 22, '37, \$50; April 1, '37, \$25; April 1, '37, \$127.81; April 7, '37, \$20; April 10, '37, \$53.18; April 15, '37, \$25; April 29, '37, \$106.44; May 3, '37, \$150; all drawn upon the National Bank of Fort Sam Houston, Texas, without making provision for the necessary funds or credit in said bank to meet the same, by reason whereof said checks were dishonored by said bank.

Specification 3: * * * on or about November 25, 1936, with intent to deceive the National Bank of Fort Sam Houston, Texas, state and pretend to said bank that his total indebtedness then was \$350 well knowing that said statement and pretense was false, and by means thereof did fraudulently obtain from said bank a loan of \$690.

Specification 4: * * * on or about November 25, 1936, sign and deliver to the National Bank of Fort Sam Houston, Texas, an agreement in the words and figures following, to wit: "In consideration of the National Bank of Fort Sam Houston, San Antonio, Texas, making me a loan in the amount of \$690, payable in monthly installments of \$46, I certify that I will have my pay check sent to the bank each month for deposit until said loan, or any renewal or extension thereof, is paid in full" - which agreement he, the said Moore, without due cause, dishonorably failed and neglected to perform.

Specification 5: * * * wrongfully, unlawfully, and to the prejudice of good order and military discipline and the discredit of the military service negotiate to the Post Exchange Officer at said Fort Devens, 13 personal checks, drawn by said Moore on various banks, bearing approximate dates and for amounts (including protest fees) as follows, to wit: Feb. 8, '36, \$52.30; Feb. 10, '36, \$67.30; Feb. 15, '36, \$69.30; May 18, '36, \$56.56; May 25, '36, \$54.56; May 27, '36, \$58.12; July 18, '36, \$4.80; Oct. 20, '36, \$59.43; Oct. 23, '36, \$28.56; Nov. 13, '36, \$81.56; Nov. 14, '36, \$64.56; Nov. 16, '36, \$5; Nov. 18, '36, \$60.17; without having made provision for the necessary funds or credit in the banks upon which said checks were drawn to meet the same, by reason whereof said checks were dishonored by said banks.

Specification 6: * * * with intent to deceive Major F. E. Parker, F.D., Disbursing Officer of the First Corps Area, officially certify upon his, the said Moore's, pay vouchers for the months of August, September, October, November, and December, 1935, that Mrs. Mary H. Moore was his dependent lawful wife, which said certificates were known by said Lieut. Colonel Moore to be untrue in that the marriage relation between the said Mary H. Moore and Lieut. Colonel J. Merriam Moore was terminated by a decree of divorce granted to the said Mary H. Moore by the Circuit Court for the County of Wayne, State of Michigan, on November 6, 1933.

Specification 7: * * * with intent to deceive Lieut. Colonel C. B. Lindner, F.D., Disbursing Officer of the First Corps Area, officially certify upon his, the said Moore's, pay vouchers for November 14-30, 1936, December, 1936, January, 1937, February, 1937, and March, 1937, that Mrs. M. Moore (meaning Mary H. Moore) was his dependent lawful wife, which said certificates were known by said Lieut. Colonel Moore to be untrue, in that the marriage relation between

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the said Mary H. Moore and Lieut. Colonel J. Merriam Moore was terminated by a decree of divorce granted to the said Mary H. Moore by the Circuit Court for the County of Wayne, State of Michigan, on November 6, 1933.

Specification 8: * * * on April 23, 1937, with intent to deceive Colonel William E. Hunt, I.G.D., Inspector General of the First Corps Area, who was then and there conducting an official investigation into the personal financial affairs of said Lieut. Colonel Moore, officially state under oath to said Colonel Hunt, in substance, that all of his, the said Moore's outstanding indebtedness on April 23, 1937, amounted in round numbers to \$3855, that he knew the exact dollars and cents and "can put that in exact dollars and cents if you wish", which statement was made by said Moore as true when he did not know it to be true, in that he then had no accurate knowledge of the exact amount of his outstanding indebtedness on April 23, 1937, and the true amount was at least \$1300 more than that stated by him.

Specification 9: * * * on May 1, 1937, with intent to deceive * * * officially state under oath to said Colonel Hunt, in substance, that a certain statement in writing then and there presented by said Moore showing the total amount of his indebtedness on May 1, 1937, to be \$4141.85 included all amounts "due and payable" by him, that it was "the complete list to date", that it was "correct in detail as regards dollars and cents", and that he had no other "outstanding bills" except current expenses for the month of April, 1937, and \$5.50 "club dues due this month" to the Harvard Club; which statement was made by said Moore as true when he did not know it to be true, in that he then had no accurate knowledge of all the amounts due and payable by him on May 1, 1937, and the true amount was at least \$1000 more than stated by him, and the list referred to was not a complete list of all amounts due and payable by him on that date and was not correct in detail as regards dollars and cents.

Specification 10: * * * on May 1, 1937, with intent to deceive * * * officially state under oath to said Colonel Hunt, in substance, that the only loans negotiated by him, the said Moore, since November, 1935, were "Industrial Bankers, Leominster, \$250, and Industrial Credit, Lowell, \$250, Morris Bank, Boston, \$540, and the Clinton Trust Company, \$1850"; which said statement was known by said Moore to be untrue in that since November, 1935, in addition to the loans above specified, he had negotiated loans on dates, from institutions, and for amounts as follows, to wit: November 25, 1936, National Bank of Fort Sam Houston, \$690; December 21, 1936, Army National Bank, Fort Leavenworth, \$375; January 5, 1937, W. H. Hofheimer Company, Norfolk, Va., \$125; February, 1937, Wm. J. Kennedy, New York, N.Y., \$350; March, 1937, Public Finance Service, Incorporated, Philadelphia, Pa., \$400; March 13, 1937, Service Finance Corporation, San Antonio, Texas, \$545; and April 19, 1937, Citizens' Loan Association, Chicago, Ill., \$300.

Specification 11: * * * on July 10, 1937, with intent to deceive * * * officially state under oath to said Colonel Hunt, in substance, that he, the said Moore, had negotiated no loans "since this investigation began" which said statement was made by said Moore with disregard of a knowledge of the facts, in that the investigation referred to had begun on April 7, 1937, and on April 19, 1937, said Moore had negotiated a loan of \$300 from the Citizens' Loan Association of Chicago, Ill.

Specification 12: * * * on May 1, 1937, with intent to deceive * * * officially state under oath to said Colonel Hunt, in substance, that he, the said Moore, then had no "outstanding checks post-dated or otherwise, drawn payable to any of these loan companies" (referring to loan companies with which Lieut. Colonel Moore then had outstanding loans) which

statement was made by the said Moore with disregard of a knowledge of the facts in that post-dated checks drawn by him were then held by W.H. Hofheimer Company, Norfolk, Va., Citizens Loan Association, Chicago, Ill., Public Finance Service, Inc., Philadelphia, Pa., Wm. J. Kennedy, New York, N.Y., and the Service Finance Corporation, San Antonio, Texas.

Specification 13: (Finding of not guilty)

Upon arraignment the defense entered special pleas to Specifications 1, 2 and 5 and moved to strike them out on the ground that they did not state offenses under the Articles of War. These pleas and the motion were not sustained by the court. (R. 10-36) The defense pleaded the statute of limitations to such part of Specification 6 as involved the words "August, September, October". The court sustained the plea. (R. 34) Accused thereupon pleaded not guilty to the Charge and specifications. He was found not guilty of Specification 13; guilty of Specification 1, except the figures "23", substituting therefor the figures "20", and except the words and figures "Feb. 4, '36, \$50; Feb. 5, '36, \$65; Feb. 11, '36, \$67"; guilty of Specification 2, except the figures "22", substituting therefor the figures "21", and except the words and figures "Jan. 16, '37, \$40.80"; guilty of Specification 5, except the figures "13", substituting therefor the figures "12", and except the words and figures "Nov. 18, '36, \$60.17"; and 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 transactions involved in the specifications of which accused was found guilty may be grouped as (a) the wrongful making and negotiating of checks dishonored by the drawee banks (Specifications 1, 2, 5); (b) false pretenses to obtain a bank loan and failure to perform an agreement covering deposits of pay to meet the loan (Specifications 3, 4); (c) false official certificates on pay vouchers as to dependent lawful wife (Specifications 6, 7); (d) false official statements to an inspector as to the amount of his indebtedness (Specifications 8, 9); and (e) false official statements to an inspector

as to his loans and postdated checks (Specifications 10, 11, 12). The facts are not in material dispute, but accused testified in denial of any intention to commit wrongs.

4. With respect to the dishonored checks, the evidence is substantially as follows:

On November 7, 1935, accused, then assigned to duty at Fort Devens, Massachusetts (he reported for duty November 30) (Ex. G), opened a checking account with the Riggs National Bank, Washington, D. C., with an initial deposit of \$450, the proceeds of a loan made to him by the bank. He did not make any further deposit that month, and on November 29 his balance had been reduced to \$4.88. Thereafter he made checks which were received by the bank in regular course of business and dishonored because of insufficient funds to pay them, as follows:

<u>Date of dishonor</u>	<u>Amount of check</u>	<u>Balance when dishonored</u>
Dec. 9, 1935	\$40.00	\$ 4.88
" 11, "	50.00	4.88
" 14, "	50.00	19.88
" 19, "	75.00	64.88
" 30, "	60.00	5.79
Jan. 3, 1936	40.00	4.79
" 7, "	60.00	34.79
" 13, "	60.00	33.79
" 17, "	35.00	32.79
" 24, "	25.00	11.79
" 24, "	18.06	11.79
" 29, "	25.00	22.29
Feb. 4, "	50.00	2.13
" " "	25.00	2.13
" 5, "	65.00	11.13
" 8, "	45.00	16.53
" 10, "	89.00	16.53
" " "	71.20	16.53
" " "	45.00	16.53
" 11, "	67.00	16.53
" 13, "	85.00	12.53
July 1, "	175.00	14.50
" 10, "	375.00	19.50.
Total	<u>\$1,630.26</u>	

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Between December 9 and 30, 1935, deposits aggregating \$410 were made; and checks were cashed aggregating \$409.09. The total of the dishonored checks for this period was \$275. During January, 1936, deposits aggregating \$495 were made; and checks were cashed which, added to a small service charge, aggregated \$443.50. The total of the dishonored checks for January was \$263.06. During February deposits aggregating \$334 were made; and checks were cashed which, added to a small service charge, aggregated \$331.91. The total of the dishonored checks for February was \$542.20. The account was inactive for the months of March, April and May. One deposit of \$80 was made in June, and two checks, aggregating \$74.88, were cashed in that month. On July 1, following dishonor of the check for \$175, a deposit of \$180 was made. A check for \$175 (whether the dishonored check or not does not appear) was cashed on the following day. On July 10, following dishonor of the check for \$375, a deposit of \$520 was made. On the same day a check for \$151.50 was cashed. Through the cashing of a check for \$522.03 on July 16, the account became overdrawn in the amount of \$135.03. The bank did not at any time assent to overdrafts. (Exs. 10,11)(Specification 1) The finding of guilty of this specification does not cover the checks of February 4 for \$50, of February 5 for \$65, and of February 11 for \$67, which checks are apparently covered by the finding of guilty under Specification 5.

From about February 1 to November 18, 1936, while accused was on duty at Fort Devens, he negotiated twelve of his checks with the local Post Exchange Officer, which were dishonored, on account of insufficient funds, by the banks on which they were drawn. In each case the check, after return from the drawee bank, was made good by accused. The checks, with protest fees, were as follows:

<u>Date of notice of dishonor</u>	<u>Amount including protest fees</u>
Feb. 8, 1936	\$52.30
" 10, "	67.30
" 15, "	69.30
May 18, "	56.56
" 25, "	54.56
" 27, "	58.12
July 18, "	4.80
Oct. 20, "	59.43
" 23, "	28.56
Nov. 13, "	81.56
" 14, "	64.56
" 16, "	5.00
Total	\$602.05 (R. 61-91,218; Exs. 43, D).

At the time of the negotiation of the seven checks last listed, accused was in command of the post of Fort Devens or was Post Executive Officer (Ex. G). The checks listed as dishonored on February 8, 10 and 15 appear to have been among those payment of which was refused by the Riggs National Bank. The checks listed as dishonored on May 18, 25 and 27, October 23 and November 13 and 14 were apparently drawn on the Clinton Trust Company, a banking concern of South Lancaster, Massachusetts. On May 13 accused had a balance of \$92.23 in a checking account with this concern. The account had been opened in January, 1936, and thereafter, through 1936, was overdrawn every month, the overdrafts in April reaching \$650.45. In response to questions as to whether accused had made provision for the checks dishonored because of insufficient funds, the president of the bank testified that accused "did make provision for credit. At times we had blank notes which we could have used", that payment of the checks was, however, refused for the protection of the bank until such time as accused "could come in and execute the necessary documents", and that arrangements had been made with accused to "lend him money as and when and in amounts as we saw fit to properly take care of his needs". He also testified that the overdrafts allowed did not impair the bank's faith and confidence in accused. On November 25, 1936, accused was indebted to the bank in the amount of \$2893.60. (Ex. 42) At the time the testimony of the president of the bank was given, the indebtedness had increased to about \$8600 (R. 192,265). (Specification 5)

On November 25, 1936, accused opened a checking account with the National Bank, Fort Sam Houston, Texas, with an initial deposit of \$643.41, the proceeds of a loan from the bank arranged that date (Ex. 14). On January 23, 1937, the account showed a balance of \$64.33 (Ex. 12). Accused made and negotiated checks which were thereafter received by the bank in regular course of business but dishonored because of insufficient funds to pay them, as follows:

<u>Date of dishonor</u>	<u>Amount of check</u>	<u>Balance</u>
Jan. 25, 1937	\$ 100.00	\$ 64.33
" 26, "	75.00	18.58
" 30, "	15.00	3.33
Feb. 1, "	25.00	3.08
" 3, "	60.00	2.83
" 9, "	25.00	2.58

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<u>Date of dishonor</u>	<u>Amount of check</u>	<u>Balance</u>
March 15, 1937	\$ 78.00	\$ 1.20
" 16, "	78.84	.95
" " "	65.75	.95
" 19, "	96.20	.45
" 20, "	126.00	.20
" 20, "	150.00	.20
" 20, "	13.00	.20
" 22, "	50.00	.55 (overdraft)
April 1, "	25.00	1.30 "
" " "	127.81	1.30 "
" 7, "	20.00	10.61
" 10, "	53.18	10.36
" 15, "	25.00	10.11
" 29, "	106.44	3.43
May 3, "	150.00	3.18
Total	<u>\$1,465.22</u>	(Ex. 16).

On January 6 the account was overdrawn \$170.08. Thereafter, during January, deposits aggregating \$487.64 were made. Checks were cashed aggregating \$286.73, service charges of \$1.50 on account of dishonored checks were made, and the account was debited \$46.00 to cover indebtedness to the bank. The total debits for the month, including the overdraft, amounted to \$484.31. The dishonored checks aggregated \$190. No deposits were made during February. The checks dishonored during this month totaled \$110. During March, deposits aggregating \$169 were made. Checks totaling \$77.63 were cashed; debits of \$92 to cover indebtedness to the bank were made; and charges of \$2.50 on account of dishonored checks were entered, - total debits, \$172.10. The dishonored checks aggregated \$657.79. During April, deposits of \$446.14 were made. Checks totaling \$393.66 were cashed; a debit of \$46 to cover indebtedness to the bank was made; and the account was charged \$1.50 for the handling of dishonored checks, - total debits \$441.16. The dishonored checks aggregated \$357.43. During May, a single deposit of \$5 was made. The dishonored check presented this month was for \$150. The cashier of the bank testified that payment of overdrawn checks "was the bank's discretion" (Ex. 12). A vice president testified that the account had been "Most unsatisfactory. Colonel Moore drew numerous checks on this bank where he did not have sufficient funds in the bank to enable the bank to pay them. In addition, his account was overdrawn on a number of occasions. His account necessitated much additional work on the

part of the officials and employees of this bank". (Ex. 15) (Specification 2)

During the period covered by Specifications 1, 2 and 5, accused was heavily indebted to various banks, loan concerns and private parties (Exs. 10,14,17,18,19,21,22,24,26,28,30,31,32,33,35,36,37,39,40, 41,44). His pay plus subsistence allowances and less deductions for life insurance premiums from December, 1935, to March 2, 1937, averaged \$387.75 per month; thereafter, \$400.26. He received rental allowances from November 24, 1936, to January 31, 1937, only. (Exs. 4-9) He was divorced on November 6, 1933 (Ex. 1); and was remarried on December 4, 1933 (Ex. 2). He had four children by the first marriage, the three youngest of whom were dependent minors during the time in question. He also had one child by the second marriage, born in 1936 (Ex. 44, Q. 18). In the course of an investigation by an inspector on April 23, 1937, accused stated that he had contributed about \$150 per month for the support of his children by his divorced wife (Ex. 44, Q. 143).

Accused testified that soon after his divorce his first wife became ill (R. 166) and remained so until her death in October, 1937 (R. 172,213). In the interim he contributed about \$300 per month to the expenses of her illness and to the support of herself and children (R. 176-178,301). He expended about \$180 to \$190 per month for the maintenance of himself and second wife (R. 178,179), who lived apart from him most of the time (R. 170-172). He realized a small but irregular income from the sale of writings (R. 164). He made and issued checks without sufficient funds in bank to pay them because he became confused as to some postdated checks he had given finance companies and thus became confused as to his balances, or made the checks in anticipation of deposits which he was unable to make in time to meet the checks on presentation (R. 182, 193,204,290-294). On one occasion, in the spring of 1936, arrangements were made with his first wife's mother to advance him about \$750, but the loan was not made (R. 194,195). On other occasions accused wrote to his father requesting him to advance funds (R. 294). He believed in each case that the "check would be covered" (R. 292). All the checks were promptly redeemed (R. 250,251,290). He had an understanding with the Clinton Trust Company that the latter concern would use notes which accused had signed in blank and deposited with the concern "against any overdrafts I had in the bank to take care of emergency expenses". Overdrafts were in fact allowed when such notes were in the

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hands of the bank. The notes were constantly on hand "except when I would go over and make them another one" (R. 201). The dishonor of checks by this concern may have been caused by the fact that the checks passed through other banks - "that is a technicality I didn't get" (R. 202). In response to a question as to his loans and accounts, accused testified:

"I would have to make new loans or renew the old ones to meet the new obligations, and I kept some sort of a memorandum of checks in the back of my check book, but finally I was borrowing from one outfit to pay another, and I would take the cards and put them in a drawer of my desk, and the thing got into a hopeless scramble." (R. 182)

Thus the evidence shows that from December 9, 1935, to May 3, 1937, a period approximating seventeen months, accused made and negotiated 53 checks for amounts aggregating about \$3600, which, when presented for payment, were returned unpaid by the drawee banks because of insufficient funds. From the fact of dishonor and the testimony of the bank officials, it plainly appears that accused had not made provision for the necessary funds or credit to pay the checks, as found by the court. Two of the three drawee banks at times allowed accused to overdraw his accounts, sometimes in considerable amounts, and accused contends that in the case of the Clinton Trust Company (Specification 5) he believed that he had made arrangements for credit necessary to cover the checks drawn on that concern. But the overdrafts and arrangement with the Clinton Trust Company, though conceivably arousing in accused a hope that the checks would be paid upon presentation, did not justify such hope, for the checks were in fact dishonored for lack of funds or credit to cover them. In view of the generally depleted state of the accounts, the multiplicity and large amounts of the dishonored checks, - during some months approximating and even exceeding the deposits - and the admitted confusion of accused as to his credits in the banks, the Board of Review cannot escape the conclusion that the making and negotiating of the checks were grossly careless, were the result of indifference or were deliberately designed to gain time and temporary relief from creditors. In either event, the acts of accused were wrongful and unlawful, as alleged.

Intent by accused finally to defraud through the use of the checks was not alleged or proved. Nevertheless, it was proved that the checks were wrongfully and unlawfully made and negotiated, and it must be inferred that the repeated wrongdoing created or tended to create unfavorable impressions upon the persons to whom the checks were given and upon the banks on which the checks were drawn. Under all the circumstances, the court was justified in finding, under Specifications 1, 2 and 5, that the actions of accused were to the discredit of the military service, within the meaning of the 96th Article of War. Similar conduct by an officer has been held to be discreditable and violative of that article. CM 202027, McElroy. Likewise, the repeated negotiation of worthless checks by accused with the Post Exchange must, under all the circumstances, be deemed to have been directly prejudicial to good order and military discipline, as found under Specification 5.

It is the opinion of the Board of Review that the special pleas entered by the defense to the specifications above discussed were properly overruled by the court.

5. As to Specifications 3 and 4, alleging false pretenses by accused to obtain a loan and his failure to perform an agreement to deposit his pay check to meet the loan, the evidence shows that:

On November 23, 1936, accused, then on duty at Fort Devens, signed and forwarded to the National Bank of Fort Sam Houston, San Antonio, Texas, an application for a loan of \$652.04, plus interest (total \$690), as follows:

"MONTHLY INSTALLMENT LOAN

"In consideration of the National Bank of Fort Sam Houston, San Antonio, Texas, making me a loan in the amount of \$652.04, payable in monthly installments of \$46 (incl. interest), I certify that I will have my pay check sent to the bank each month for deposit until said loan, or any renewal or extension thereof, is paid in full, beginning Jan. 1937.

J M Moore

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INCOME:

Monthly Salary (including allowances)- - -	<u>-\$570</u>
Outside Monthly Income - - - - -	<u>-\$ -</u>
Total Monthly Income- - -	<u>-\$570</u>

INDEBTEDNESS:

To banks - - - - -	<u>-\$ -</u>
To Finance Corporations or Associations- - -	<u>-\$ -</u>
Approximate Current Indebtedness (other than above)- - - - -	<u>-\$350</u>
Total Indebtedness- - - - -	<u>-\$ -</u>

Is this money being borrowed for the purpose
of paying any of the indebtedness listed above,
if so state approximate amount- - - - - \$350 above plus
tuition at
son's school.

In order to obtain a loan from the National Bank of
Fort Sam Houston and as part of the contract for the loan,
I certify that the above financial statement is true and
correct. The financial statement hereon will be kept in
the confidential file of this bank.

J M Moore . " (Ex. 15)

The words "beginning Jan. 1937" at the end of the first paragraph,
that is, at the end of the certificate or agreement with respect to
the deposit of pay checks, were added by accused (Ex. 44, Q. 592).
At the same time that he forwarded the application, he signed and
forwarded a series of fifteen of his promissory notes for \$46 each,
payable on the second day of consecutive months beginning with January,
1937. Relying on the statements and agreement embodied in the appli-
cation, the bank made the loan, and credited to him in a checking
account the sum of \$643.41. It was the custom of the bank to accomplish
payment of notes of this character by debiting the account of the maker,
and for this reason the agreement to deposit pay checks was required.
(Ex. 15)

At the time the application was submitted, accused was indebted
to various banks in the amount of \$4577.35 (Exs. 11,21-A,24,30,31,42),
to loan concerns in the amount of \$1602.96, and to others in the amount
of \$1060.23 (Exs. 17,18,20,21,22,27,28,32,35), a total of \$7240.54.
On September 12, 1936, he had submitted to the Service Finance

Corporation, a loan concern, a certified application for a loan which included what purported to be a list of "all" his debts totaling \$385 (R. 238-242; Ex. 35). On April 19, 1937, he submitted to the Citizens Loan Association an application for a loan which listed debts aggregating \$680 only (R. 246; Ex. 40). On both dates accused was indebted greatly in excess of the amounts listed (Exs. 11,17,18, 20,21,21-A,22,24,27,28,32,35). Accused did not at any time maintain sufficient balance in his account with the National Bank of Fort Sam Houston to meet the notes to that concern as they became due. In the meantime his note due on January 2 was charged to his account on January 7; the note due on February 2 on March 5; the note due on March 2 on March 5; and the note due on April 2 on April 3. The note due in May and the remaining notes were paid on July 9 by the Clinton Trust Company. (Exs. 13,14) On April 3 a deposit was made in the account which corresponded to accused's pay check for the preceding month, but at no other time was a deposit made which corresponded in amount to his pay previously drawn (Exs. 6-9,12). From January 1 until the notes were paid on July 9, the deposits in the account totaled \$1107.78 (Ex. 12). Pay checks received by accused during this period totaled about \$2952.48 (Exs. 6-9). On July 10, 1937, in the course of an investigation by an inspector, accused stated that the entry on his application of the sum of \$350 as his approximate current indebtedness "was intended as a statement of my bank loans to different banks" (Ex. 44, QQ. 582,589,590). With respect to deposit of his pay checks he stated to the inspector:

"I had my pay check sent to them for several months. It was to begin with the December check and I made a note on the thing to that effect. I think it was December or the January check that it started and I did have my check sent in until I was so pressed that I could not * * *." (Ex. 44, Q. 592)

Accused testified that at about the time he made the application for the loan from the National Bank of Fort Sam Houston, he made several similar applications, including those to the Service Finance Corporation and the Citizens Loan Association noted above, "under a good deal of stress and in a great hurry", and sent them away "practically without reading them" (R. 241-243,246,249). When the application was made to the National Bank of Fort Sam Houston, he "intentionally refrained from making a statement" of his indebtedness but set forth only certain

"bills * * * that I wanted to meet with the loan" (R. 197). He "put dashes in the places" that he "didn't care to fill in", and believed that the dashes indicated that he was not submitting a complete financial statement and that if the bank was unwilling to make the loan without a complete statement, it might govern itself accordingly (R. 198,236,244,249). At the time he told the inspector that the entry related to "bank loans", he had not recently seen the application and as a result was in error (R. 200). He understood the agreement with respect to his pay checks to mean only that money must be available in the bank each month to meet the note then due (R. 198).

That the National Bank of Fort Sam Houston interpreted the application by accused as a representation or pretense on his part that his entire indebtedness totaled only \$350, as listed on the application, and that in reliance on this representation it made the loan, does not admit of doubt. It is equally clear that accused conceded that he purposely withheld complete information as to his indebtedness, and if the application as made and submitted was in fact false in this respect, its falsity must be deemed to have been intentional. The intent and legal effect of the application as made and submitted by accused is to be determined primarily from the application itself. The only reasonable interpretation of the written application to be gleaned from scrutiny thereof is that the dash marks, under whatever heading they were placed, were designed to and did plainly indicate that under that heading the maker had no material information to impart. The definite statement of approximate current indebtedness other than to banks and loan concerns as included in the application, could mean nothing to the ordinarily prudent person other than that it was what it purported to be - a complete approximation of such current indebtedness. Nor were the circumstances coincident with the making and submission of the application indicative of any meaning other than that to be normally ascribed to its contents. Accused, as an intelligent officer, must have known that the amount of his obligations to others would have controlling effect upon the extension of credit by the bank in question. He must have known that a complete statement of his indebtedness would lessen his chances of securing the loan. He must have known that his statement, made as an officer of the Army, would be taken at its face value, and would not be meticulously searched for evidence of trickery. It would, in the light of all the circumstances of the case, tax

credulity to assume that accused in submitting this application believed that the paper as a whole would be read as meaning anything other than that his total indebtedness did not substantially exceed \$350.

Accused testified that in withholding information as to his debts owing to banks and loan concerns, he used the dash marks to indicate that he did not wish to disclose such debts, and that he intended to and did list only such current debts as were to be taken up by the loan. This testimony was not consistent either with the face of the application or with his statement to the inspector that he intended only to disclose his debts to banks, and is hardly worthy of belief. But, accepting for the moment as true his testimony in this regard, it but leads to the conclusion that, at best, accused sought by this means to avoid a plain statement of the true facts and believed that the dash marks and the entry of the figures \$350 would operate as devices to inject self-serving uncertainty into the application. In such a case the devices could have been but indicative of his purpose to conceal and deceive. The proof of other applications for loans in which full statements of indebtedness were withheld, made by accused shortly before and after that involved in the charges, was competent as evidencing his fraudulent intent and guilty knowledge in the instant case. Par. 112 b, M. C. M. .

In the opinion of the Board of Review, the evidence proves beyond reasonable doubt that the application was false and was known and intended by accused to be false, as found by the court under Specification 3. The offense charged by this specification amounted to obtaining property under false pretenses.

With respect to Specification 4, the evidence shows that in entering into the agreement to deposit his pay checks with the bank accused knew that the purpose thereof was to insure prompt payment of his notes. He failed almost completely to carry out his specific agreement and failed in every instance to pay his notes when due. When he made the agreement he was fully aware of the many financial demands that would be made upon him during its life. There is nothing in the evidence to indicate that any possible excuse for his failure and neglect to deposit his pay checks was not foreseeable when he made the agreement. Under these circumstances, and in the light of the

plain context of the agreement which accused himself amended to fix its effective date, there can be no substantial doubt that with full knowledge of his obligations, accused designedly refrained from complying therewith in order that he might avoid prompt payment of his notes to this bank. In the opinion of the Board of Review, such evasive conduct fell so far below the standards of honesty to be expected of an officer of the Army that the court was amply justified in finding under Specification 4 that the acts of accused as charged were dishonorable and without due cause.

6. With respect to Specifications 6 and 7, alleging false official certificates on pay vouchers as to dependent lawful wife, the evidence shows that accused submitted four pay vouchers for the months of November and December, 1935 (Exs. 3,4). On a voucher for November 1 to 10, he drew subsistence and rental allowances for dependents. On the voucher for November 11 to 30, he did not draw allowances (Ex. 3). On vouchers for December he drew subsistence allowances for dependents (Ex. 4). On each of these four vouchers there were listed as dependents "Mrs. Mary H. Moore", as lawful wife, and two children of accused, residing in Detroit, Michigan (Exs. 3,4) (Specification 6). For the period November 14, 1936, to March 31, 1937, accused submitted five vouchers (Exs. 5-9), on which he drew subsistence allowances. On the first three of these vouchers (Exs. 5-7) he also drew rental allowances from November 24, 1936, to January 31, 1937. On each of the five vouchers there was listed as his dependent lawful wife, "Mrs. M. Moore". The first of the vouchers showed her address as "Boston, Mass."; the second "Harvard, Mass."; the third "Boston, Mass."; the fourth "Fort Devens, Mass."; and the fifth "Boston, Mass.". On two of the vouchers, the first and the fourth, the name and address were written in longhand, apparently in the handwriting of accused (Exs. 5-9) (Specification 7). Accused had, during 1935, 1936 and 1937, three dependent minor children. He also had a wife, "Gladys M. Moore" (Ex. 44, Q. 409), whom he married December 4, 1933 (Ex. 2). "Mrs. Mary H. Moore" or "Mrs. M. Moore" was not his lawful wife at the time the vouchers were submitted but was the former wife from whom he was divorced in November, 1933. This lady and her children by accused listed as dependents resided in Detroit, Michigan. The former wife was not in the vicinity of Boston during the period covered by the vouchers. (R. 174,304; Ex. 44, QQ. 222-245)

Accused testified that prior to his divorce he discussed with his first wife his remarriage to another woman, but that shortly after his remarriage the first wife became ill and, fearing that news of his remarriage would aggravate her illness, he determined to conceal the remarriage. He lived apart from his second wife most of the time thereafter, until the death of the first wife in October, 1937. (R. 161-172) He did not give much attention to his pay vouchers which were made out in his office (R. 203), but after his wife came to Boston in July, 1936 (R. 171) he decided not to make any change in the designation thereon of his lawful wife for the reason that he did not wish the fact of his remarriage to become known (R. 203). The former wife was in fact dependent on him, and he had other dependents on whose account he was legally entitled to allowances, so he concluded there would be nothing wrong in keeping the divorced wife's name on his vouchers (R. 203,204). Accused placed the name of the divorced wife on the voucher for November 14-30, 1936, after he had received a letter from the finance officer to whom the voucher had been previously submitted, requesting accused to enter on it the names and address of his dependents (R. 261-265; Ex. H).

All of the allegations of these specifications were proved and were admitted by accused. Accused explained the falsity of his certificates involved therein by asserting that he wished thereby to conceal his remarriage from his former wife, and that he deemed the inaccuracies of his vouchers immaterial. It is clear that had accused in all cases certified his true dependents, the payment of all allowances received would have been proper. From this standpoint the Government did not suffer injury. The false certificates therefore were not fraudulent in the sense that they were designed to obtain money to which accused was not lawfully entitled. The certificates did, however, amount to deliberate official misrepresentations of material facts, made with intent to deceive. As such, the Board of Review believes them to have been violative of the 96th Article of War, as found by the court.

7. The evidence relating to Specifications 8 and 9, alleging false official statements as to indebtedness, is as follows:

Colonel William E. Hunt, I.G.D., Corps Area Inspector of the First Corps Area, conducted, from April 7 to July 10, 1937, an

official investigation of the conduct of accused, which included interrogation of accused, under oath, concerning his financial affairs. On April 7 accused stated to the inspector that he would at a later date submit, among other things, an itemized statement of his indebtedness. (Ex. 44, QQ. 66,87) The inquiry was resumed on April 23, at which time accused stated that, "in round numbers" his total outstanding obligations amounted to \$3855, and that "I can put that in exact dollars and cents if you wish" (Ex. 44, QQ. 100-105) (Specification 8). He was told to present on May 1 a detailed statement of his indebtedness (Ex. 44, QQ. 105,260). The inquiry having been resumed on May 1, accused presented to the inspector and signed a written statement "made * * * from my retained records" listing debts due totaling \$4141.85 (Ex. 44, QQ. 285,286, Ex. C), and stated that this figure included all amounts due and payable by him, that the statement was "the complete list to date", that it was correct in detail as regards dollars and cents, and that he had no other outstanding bills except current ones at Fort Devens and a Harvard Club bill of \$5.50 (Ex. 44, QQ. 288-296) (Specification 9).

On April 23 and May 1, 1937, accused was indebted to various banks, loan concerns and other persons in amounts aggregating not less than \$7882.26 (R. 288,289; Exs. 11,14,17,18,20,21-A,22,24,27,28,30,31,32,35,37,39, 40,42). The following lists debts owing on these dates, the amounts stated by accused in writing on May 1 to be owing, and the differences:

<u>Creditor</u>	<u>Amt.owing</u>	<u>Statement of accused</u>	<u>Excess of debts over amts.stated</u>
Riggs National Bank	\$ 100.00	\$ 75.00	\$ 25.00
Natl. Bank Ft. Sam Houston	506.00	456.00	50.00
Industrial Credit Corp.	161.00	158.24	2.76
Industrial Bankers	179.07	161.16	17.91
Fed. Services Finance Corp.	118.50	66.00	52.50
Citizens Natl. Bank	50.00	not listed	50.00
Household Loans, Inc.	196.67	168.37	28.30
Omaha Natl. Bank	300.00	not listed	300.00
Dr. Hershey	145.00	" "	145.00
Fred's Grosse Pointe Market	800.00	680.00	120.00
Morris Plan Bank	540.00	287.20	252.80
Army Natl. Bank	350.00	250.00	100.00
Public Service Finance Corp.	372.42	144.59	227.83
Service Finance Corp.	495.00	270.00	225.00

<u>Creditor</u>	<u>Amt.owing</u>	<u>Statement of accused</u>	<u>Excess of debts over amts.stated</u>
Hofheimer Co.	\$ 125.00	\$ 175.00	\$ (50.00 plus)
Wm. J. Kennedy	250.00	250.00	none
Citizens Loan Assn.	300.00	100.29	199.71
Clinton Trust Co.	2893.60	900.00	1993.60
Totals	<u>\$7882.26</u>	<u>\$4141.85</u>	<u>\$3740.41.</u>

On May 1, questioned by the inspector as to the Clinton Trust Company item included in his written statement, accused stated that the total owing to the concern, including interest, was in fact \$1850 (Ex. 44, QQ. 365-375). The inquiry was renewed by the inspector on June 28, at which time accused asked for a delay until July 10 within which to present a complete statement of his financial status (Ex. 44, QQ. 510-516). On July 10, confronted by statements of creditors showing amounts owing in excess of that stated by accused on May 1, accused admitted errors in his previous written statement and explained certain of the discrepancies as due to his faulty bookkeeping and misunderstandings (Ex. 44, QQ. 521-550, Ex. HH). He stated that the Clinton Trust Company had arranged to take over his debts, advancing the necessary funds (Ex. 44, QQ. 517, 558, 559), but that he knew only indefinitely the amount he then owed this concern (Ex. 44, QQ. 560-562).

Accused testified that about May, 1937, through the intervention of his friends, the Clinton Trust Company was induced to take over his various debts, merging his obligations into a single loan (R. 187-190). Working with this bank and the inspector, he attempted to prepare from his records and otherwise accurate lists of his debts. No item of indebtedness or information as to the amount thereof was intentionally withheld from the inspector. (R. 190, 191, 204, 205, 280, 284, 302) At the time he made his statements to the inspector he believed them to be true (R. 287, 288). Asked to explain the discrepancies, he testified:

"Well, my records were in pretty bad shape. I didn't have any -- I had these cards that came from the loan companies, and the loans had been renewed, and every time they were renewed they would send me a card, and I got -- when I started to make up my records I would take these cards out of the drawers, and sometimes I didn't have the latest cards -- I took what I had." (R. 204, 205)

At the time of trial he did not know accurately how much he owed on April 23 or on May 1 (R. 287-289). Up to about November, 1937, he

signed notes to the Clinton Trust Company aggregating \$8600 (R. 192,265).

The official sworn statements of accused on April 23 and May 1 as to the amount of his total indebtedness, shown by the evidence to have been false, were alleged to have been made by accused as true when he did not know them to be true (Specifications 8, 9). The evidence shows that they were made after extended deliberation and under circumstances demanding accuracy. There can be no doubt that accused intended them to be accepted as accurate within very narrow limits. The information was especially within the knowledge of accused, and was not of such complexity as to make material errors probable. But at the trial he asserted confusion and uncertainty in the premises. If he did not in fact know the approximate amount of his indebtedness, it was his manifest duty so to advise the inspector. Instead of so doing, he made the definitive statements. Accused contends that the statements, though false, were honestly made, but, in view of the circumstances recited, the Board of Review is convinced not only that the statements were made as true when accused did not know them to be true, but that they were made with a deliberate purpose of concealment or with culpable indifference to the truth. The court heard accused testify at great length and heard his protestations of candor and honesty with respect to the statements to the inspector, and, thus afforded a favorable opportunity to judge his veracity, rejected the protestations as not worthy of belief. This action by the court is of substantial, if not determinative, value in consideration of the weight of the evidence. Whether accused made the false statements with deceitful design or in conscious carelessness of the truth, the evidence leaves no substantial doubt that he intended to deceive the inspector, as found under Specifications 8 and 9. Each of these specifications involves a false official statement knowingly made, cognizable under the 95th as well as the 96th Article of War, violation of which latter article is here charged; and involves as well, in substance, the offense of false swearing (par. 152 c, M.C.M.).

8. The evidence relating to Specifications 10, 11 and 12, alleging false official statements as to loans and postdated checks, is substantially as follows:

In the course of the investigation by the inspector on May 1, in response to questions as to the progress made by accused in reducing his indebtedness, accused stated that the only loans negotiated by him

since November, 1935, were "Industrial Bankers, Leominster, \$250, and Industrial Credit, Lowell, \$250, Morris Bank, Boston, \$540, and the Clinton Trust Company, \$1850" (Ex. 44, QQ. 297-302) (Specification 10). He also stated that he did not have any outstanding checks postdated or otherwise payable to any loan companies to which he was indebted (Ex. 44, Q. 338) (Specification 12).

On July 10, the inquiry was again resumed. In response to questions by the inspector as to what loans accused had "negotiated since this investigation began", accused answered "None" (Ex. 44, Q. 667) (Specification 11).

Subsequent to November, 1935, and prior to May 1, 1937, on which latter date accused stated to the inspector that the only loans he had secured since November, 1935, were the four he described, accused negotiated loans, other than the four described, as follows:

<u>Date</u>	<u>Creditor</u>	<u>Amount</u>
November 25, 1936	Natl. Bank Fort Sam Houston	\$ 690.00 (Ex. 15)
January 9, 1937	W. H. Hofheimer Co.	200.00 (Ex. 37)
February 10, 1937	Wm. J. Kennedy	350.00 (Ex. 39)
March 13, 1937	Public Finance Service, Inc.	300.00 (Ex. 32)
" 16, "	" " " "	100.00 (Ex. 32)
" 13, "	Service Finance Corp.	545.00 (Ex. 35)
April 19, 1937	Citizens Loan Corp.	300.00 (Ex. 40).

The loans of November 25, 1936, January 9, 1937, and February 10, 1937, were original ones, that is, in so far as appears, accused owed nothing to the concerns making the loans at the times they were made. The loan of March 16, 1937, was an original loan in the sense that it did not absorb any old obligation and resulted in a cash advance in the amount of the loan less interest, but accused was indebted otherwise to this lender. The loans of March 13 and April 19 were made in part to absorb obligations previously existing, but in each case funds in substantial amounts, aggregating about \$693.25, in addition to the amounts already owing, were advanced to and received by accused. (Exs. 32, 35, 37, 39, 40). On the loan of April 19, made after the investigation by the inspector had commenced, accused realized \$197.40 in cash (Ex. 40). On May 1, the date of the statement by accused that he had no outstanding postdated checks payable to the loan companies, there were in the hands of

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loan companies his postdated checks as follows:

<u>Loan company</u>	<u>Date given</u>	<u>No.</u>	<u>Amt. each check</u>
W. H. Hofheimer Co.	Jan. 9, 1937	5	\$ 25.00 (Ex. 37)
Citizens Loan Assn.	April 19, 1937	16	23.50 (Ex. 40)
Public Fin. Service, Inc.	March 13,16, 1937	"several"	34.00 (Ex. 32)
Wm. J. Kennedy	Feb. 10, 1937	5	50.00 (Ex. 39)
Service Finance Corp.	March 13, 1937	11	45.00 (Ex. 35).

Accused testified that when he stated to the inspector on May 1 that the only loans negotiated by him since November, 1935, were the four described, he was speaking of "new" obligations only. He omitted two original loans through forgetfulness, and did not mention the others because they were in part "renewal" transactions. (R. 205,206,222-224) The loan of April 19, 1937, was a renewal transaction of this kind (R. 206,207). When he stated to the inspector that he had no outstanding postdated checks, he meant that he had given none in payment of "bills" (R. 209), and did not think the inspector was inquiring as to the postdated checks given the loan concerns, his indebtedness to which he had already revealed (R. 208).

Specifications 10, 11 and 12, based on the sworn official statements as to loans made by accused after November, 1935, and after the commencement of the investigation, and as to his postdated checks, allege that these statements were made by accused knowing them to be untrue or with disregard of knowledge of the facts. Each therefore alleges what amounts to deliberate falsity. Falsity is clearly established and was admitted by accused except that he contended that he failed to mention some of the loans because they had in part covered renewals of previous indebtednesses, and except that he only intended to say, with respect to the postdated checks, that he had not paid bills with such checks. To say that a borrowing of money did not involve a loan because the new obligation embraced an old indebtedness as well as the money newly borrowed, would be to ignore or distort the plain meaning of the language used. There is no support in the evidence for accused's suggestion that his statement to the inspector regarding his postdated checks was made inadvertently or with a misconception of its meaning. All of the statements by accused were positive and unequivocal, and the only reasonable conclusion to be drawn from the evidence is that they

were intended to conceal the truth by misstatements or by evasions. Again, in either case, the court was amply justified in rejecting as untrue accused's protestations of honesty and in finding that he intended to deceive the inspector, as charged in each of these specifications. These specifications, as Specifications 8 and 9, charge false official statements and false swearing.

9. The accused is 47 years of age. The Army Register shows his service as follows:

"Maj. of Inf. N.A. 7 June 18; accepted 8 June 18; hon. dis. 27 Aug. 19.--2lt. of Inf. 30 Nov. 12; accepted 3 Mar. 13; 1 lt. 1 July 16; capt. 15 May 17; maj. 1 July 20; lt. col. 1 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 to warrant confirmation of the sentence. Dismissal is authorized for conviction of violation of the 96th Article of War.

On leave, Judge Advocate.
Walter M. Grinnell, Judge Advocate.
Richard W. Hooper, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., MAR 17 1938 - 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 Lieutenant Colonel J. Merriam Moore, Infantry.

2. I 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, and recommend that the sentence be confirmed. In view of all the facts in the case, I believe, however, that the ends of justice and discipline will be fully served if the sentence as confirmed be commuted to reduction of one hundred and fifty files on the promotion list and relative rank list.

The evidence shows that the transactions involving dishonored checks and false certifications on pay vouchers were not fraudulent in the sense that financial loss to others resulted therefrom, or that such loss was intended by accused. The check transactions, as well as the transactions involved in the more serious charges, appear to have been the outcome of financial mismanagement and confusion which were in themselves to be condemned but which resulted in great measure from commendable action by the officer in undertaking without legal obligation the care and hospitalization of his former wife who had become mentally and physically ill following accused's second marriage and assumption of consequent added financial obligations. The false certifications appear to have been prompted by the not unworthy motive of protecting the former wife from possible added mental distress. Accused seems to have been temperamentally unable to avoid confusion and to adopt straightforward means of adjustment of his affairs, but the circumstances take from his acts and shortcomings some of the taint of inherent dishonesty which would normally be inferable therefrom.

The military record of accused, which is briefly stated below, is of such excellence, and the circumstances have such extenuating force, as to lead me to believe that a sentence less than dismissal will suffice, and that if given further opportunity the officer will demonstrate his integrity and render further creditable service of distinct value to the Government.

The records of the War Department show the following:

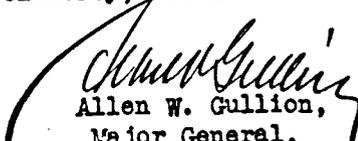
Lieutenant Colonel Moore was born in Detroit, Michigan, August 30,

1890. He graduated from Harvard University in 1911, with the degree of A.B., and later attended Harvard Law School for one year. He reads and translates French, German, Spanish and Italian. He was appointed a second lieutenant of Infantry in the Regular Army on November 30, 1912. He was promoted to first lieutenant July 1, 1916; to captain May 15, 1917; to major July 1, 1920, and to lieutenant colonel August 1, 1935. During the World War, from June 8, 1918, to August 27, 1919, he held the temporary grade of major, Infantry, National Army. He is a graduate of the Army War College, the Air Corps Tactical School, and the Chemical Warfare School, Field Officers' Course, and an honor graduate of the Command and General Staff School.

His efficiency reports prior to 1918 were generally satisfactory, with some adverse ratings as to initiative, cooperation and force. After 1918, 43 efficiency reports were rendered upon him. In 28 of these reports, covering about ten years and four months in all, his general rating was excellent, or the equivalent. In eight of the reports, covering about five years and seven months, his general rating was superior. In seven of the reports, covering about one year and seven months, his general rating was satisfactory, or the equivalent. He was commended for efficient performance of duty - twice in 1922; twice in 1924; in 1925; twice in 1928; in 1929 and in 1936. Correspondence relating to complaints by creditors and official action thereon, initiated in 1929, is appended to his efficiency file. Twenty-one communications relating to complaints by creditors, dated from 1918 to early in 1937, are attached to his 201 file.

3. In recommending that the sentence be confirmed, I also recommend that it be commuted to reduction of one hundred and fifty files on the promotion list and relative rank list. 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 recommendations hereinabove made should they meet with approval.

4. Attention is invited to a letter from the Honorable Joseph P. Kennedy, then Chairman of the United States Maritime Commission, to the Assistant Secretary of War, dated January 8, 1938, inclosing a letter from Mr. R. C. Foster, urging clemency, which is attached to the officer's 201 file.


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

- 3 Incls.
Incl. 1-Record of trial.
Incl. 2-Draft of ltr sig. S.W.
Incl. 3-Form of Executive action.

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

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Board of Review
CM 208895

FEB 7 1938

U N I T E D S T A T E S)	FIRST CAVALRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Clark, Texas, November 19,
Corporal RONALD I. ZERKEL	)	1937. Dishonorable discharge
(6725710), Medical Depart-	)	and confinement for six (6)
ment (Veterinary Service).	)	months. No place of confinement
	)	designated.

HOLDING by the BOARD OF REVIEW
CRESSON, KRIMBILL and HOOVER, 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 94th Article of war.

Specification: In that Corporal Ronald I. Zerkel, Medical Department (Veterinary Service), did, at Fort Clark, Texas, on or about October 18, 1937, feloniously take, steal, and carry away about 391 pounds of oats of the value of about five dollars and fifty-nine cents (\$5.59), the property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved only so much of the finding of guilty of the specification as involved larceny by accused at the place and on the date alleged of 260 pounds of oats of the value of about \$3.71, the property of the United States, furnished and intended for the military

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service thereof; approved the sentence, did not designate 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 the afternoon of October 18, 1937, accused sold and delivered to one Oscar Sniffen, in Brackettville, Texas, two sacks of oats, at a price of \$3.50 (R. 7,8,12). Later, on the same day, about two and a half sacks of oats were seized at Sniffen's home (R. 14,15,19,21). These oats, introduced in evidence (R. 21), were identified as being of the type and kind issued as forage at Fort Clark, Texas, accused's station (R. 22,25), but the witnesses who testified to this similarity were unable to identify the oats as property of the United States (R. 23,26). The same type and kind of oats were sold locally (R. 23,26). Oats of this kind were sold to officers by the Quartermaster at Fort Clark at \$.0143 per pound (R. 26,27). On the same day the Provost Marshal of Fort Clark went to the home of accused in Brackettville and there found loose oats inside accused's car (R. 14,15). Accused was placed in arrest (R. 16) but denied having sold any oats that afternoon and explained the presence of loose oats in his car by saying that he had "taken three quarts of oats sweepings that afternoon to feed his chickens". Later, having been shown the oats taken from Sniffen's house, accused said:

"* * * the oats there were given to him by two men in B Troop that afternoon, that he had asked them for the oats and they had given them to him, and he released the men of any intent in the matter. He said they had given them to him, but that they didn't know what he was going to do with them. And then he said he had disposed of them." (R. 17)

He "only admitted having taken two sacks of oats that afternoon" (R. 18).

Accused did not testify or make an unsworn statement.

Evidence of creditable performance of duty by accused and of his excellent military character prior to the transaction involved in the present charges was introduced (R. 28).

4. It is proved that on the date alleged accused was in possession of and sold two sacks of oats, which were of the type and kind issued

at Fort Clark and of the type and kind sold commercially in that locality. Accused stated that the oats were given to him by two soldiers "in B Troop" (at what place does not appear), and that upon receiving them he took them to the place of sale and disposed of them. There is no direct evidence or admission of a shortage or theft of the oats at Fort Clark, that accused had access to sacked government owned oats, that he took the oats from Fort Clark, or that the oats, if in fact given to accused as he claims, or if obtained otherwise, belonged to the government. The only scintilla of evidence from which it might be inferred that the oats were government property wrongfully taken from Fort Clark was the similarity in type of the oats shown to have been in the possession of accused to oats regularly issued at Fort Clark.

The Manual for Courts-Martial, paragraph 150 i, provides that:

"Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended."

In many cases, evidence of similarity is, because of the special peculiarities, markings, etc., of the property, strongly evidential of government ownership when considered with other corroborative circumstances. Examples may be firearms, blankets, clothing, or other accouterments, found in the possession of accused persons within or in the immediate vicinity of military posts. But in cases such as the instant one in which the property in the hands of accused has no characteristics peculiar to government ownership or characteristics distinguishing it from other property to be had in local markets, the mere fact that it is of the same type and kind as that issued by the government is not, in the opinion of the Board of Review, sufficient basis, standing alone, for a reasonable inference of government ownership or of theft from the government. CM 197408, McCrimon; CM 207591, Nash et al.

To be true, possession by a soldier in a town near a government post of oats of the type issued at the post raises a suspicion that the oats are government property, taken from the post, but mere suspicion and conjecture do not satisfy the established requirements of legal proof. The following, quoted from the holding by the Board of Review in CM 207591, Nash et al., is pertinent in this case:

"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 is not legally sufficient to support the findings or guilty of larceny as approved by the reviewing authority.

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.

Shas Robinson Judge Advocate.
Walter M. Krumhilt, Judge Advocate.
Richard W. Harvey, Judge Advocate.

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Fort Francis E. Warren, Wyoming, on or about December 21, 1937, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private Robert B. Brown, Hq. Co., 4th Infantry Brigade, \$2.50, lawful money of the United States, the property of the said Private Brown.

Accused pleaded not guilty to, and were found guilty of, the Charge and specifications. No evidence of previous convictions was introduced as to accused McCausland. Evidence of one previous conviction by special court-martial for absence without leave was introduced as to accused Blankenship. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence as to each accused but reduced the confinement to five years, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence is legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder. The only question requiring consideration here is whether the evidence is legally sufficient to support the finding of guilty, in whole or in part, of Specification 2 of the Charge, alleging robbery.

4. The evidence material to Specification 2 shows that at about 8:15 p.m., December 21, 1937, Private Robert B. Brown, Headquarters Company, 4th Infantry Brigade, entered the day room of his barracks at Fort Francis E. Warren, Wyoming, where he found the two accused and a Private Kinslow, all three of whom had been drinking beer. Accused were playing pool. (R. 12,18) Brown sat down. Accused McCausland approached him and said, "We don't like you and we are going to beat the hell out of you." Brown asked him to go away, and started to leave the room. Accused Blankenship "caught" Brown at the door and soon thereafter McCausland struck Brown. (R. 12,19) The latter two then exchanged blows and at times Brown fell to the floor (R. 13,19). Brown testified that Blankenship also struck him once (R. 15). Early in the encounter Brown fell against a pool table and spilled a ten cent can of beer belonging to Blankenship. The latter told Brown that he must pay for it and Brown agreed to do so. (R. 12,13) The fight ended, and

soon thereafter accused "made" Brown salute them. They told him that he must apply for transfer from the company and that if he did not do so, or if he reported what had just occurred, they would "beat the hell out" of him. (R. 13,20) Brown tried again to leave the room but accused "made" him "sit down and read the funny papers to them" (R. 13,20). Accused continued to play pool. Another soldier, Private 1st Class Payne, entered the room at about 8:45 p.m. and, noticing beer cans and papers about the floor, asked Blankenship what had occurred. Blankenship said they "were having some fun with Private Brown and that Brown had promised to transfer from the company". Payne at this time observed Brown sitting in a chair apparently looking at or reading some "funny papers". (R. 32,34)

No violence was thereafter used and no further threats were made (R. 17,24). While Brown was reading the paper, or later, accused and Kinslow told him (Brown was day room orderly) that he was not to turn in pool bills against them to exceed twenty-five cents for Blankenship and fifty cents apiece for the others. Accused then asked Brown how much money he had and when Brown replied that he had fifty cents, accused demanded it to pay for the beer spilled, and Brown turned that amount of money over to Blankenship (R. 13,17,21), accused remarking that it "would buy five cans of beer for Blankenship" (R. 13). Some time later accused asked for Brown's billfold and reached towards Brown's pocket, whereupon Brown handed them the billfold. The billfold contained two one-dollar bills. Accused took one of them and returned the billfold with the other dollar bill to Brown. Accused "made" Brown again read the "funny papers", and thereafter "decided" to go to town and told Brown that he was to go with them. Brown agreed. The four then went to a post exchange on the post where beer was purchased for the party. Accused told Brown to pay for the beer and Brown produced his remaining dollar bill. McCausland took the returned change from the counter. (R. 13,21,22) The party then entered a taxicab and went to the "Valencia Bar", where more beer and some sandwiches were purchased. At this place Brown complained of illness, whereupon McCausland gave him ten cents for bus fare to his quarters. (R. 14,22) Brown returned to barracks and went to bed, but later that night helped accused clean the day room (R. 14). Brown did not report the incidents until two days later, after he had been hospitalized for what might have been injuries sustained in the fight (R. 7-9). Brown testified that when

accused asked for his money he thought "from the way they said it *** I'd better give it to them to keep from having more trouble with them" (R. 17). McCausland and Brown had had trouble previously (R. 17,18). Kinslow testified that he thought Brown did "all these things" because he was afraid accused might assault him again (R. 25).

Accused did not testify or make unsworn statements.

5. Thus there is proof that accused, in the course of three related transactions, received from Brown money in the amount of \$2.50. The money, or the greater part of it, was received and retained under circumstances sufficient to show that the taking was by trespass within the law of larceny, and that accused intended to deprive the owner permanently of his property.

It is not, however, proved that the money was taken by violence or intimidation, a necessary element of the offense of robbery. Brown testified that he feared violence at the hands of accused and for this reason acceded to the demands for his money. But it is entirely clear that no force was in fact used or threatened by accused for the purpose of obtaining the money. Force had been previously used and threats had been made but for purposes wholly unconnected with the taking of the money. A considerable period of time elapsed between the fight and the money passing transactions, and the conception of taking Brown's money did not, in so far as appears, occur to accused until after the period of violence had ended and until after ostensibly peaceable, if not friendly, relations had been reestablished and had continued for a considerable period. The taking was so remote from and foreign to the display of force and the circumstances of the passing of the money were such that it cannot be said that the taking was in fact accomplished by violence or that the acts of accused amounted to intentional intimidation with respect to the money. United States v. Birueda, 4 Phil. Rep. 229. Brown, from recent experience, no doubt feared violence, but the character of the acts of accused, rather than Brown's apprehension of what they might do, was determinative of the nature of their offense. As has been said in a similar case (State v. Weinhardt, 161 S.W. (Mo.) 1151, 1153), though the victim of the wrongdoing -

"may have been scared, that fact alone does not convert defendant's acts in taking the money into the crime of robbery, unless he intentionally did or said something"

which placed the victim in fear of immediate personal injury.

Brown testified that from the manner in which accused demanded his money he was afraid to withhold it, but this impression was not, when considered in the light of the other circumstances of the case, sufficient basis for an inference of an implied threat of violence by accused.

The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of Specification 2 as involves a finding of guilty of the included offense of larceny.

6. The maximum sentence to confinement authorized by paragraph 104 c of the Manual for Courts-Martial for the offense involved in Specification 1, assault with intent to do bodily harm, is one year, and for the lesser included offense of larceny involved in Specification 2 is six months. Confinement in a penitentiary is not authorized, neither offense of which accused were properly found guilty being an offense of a civil nature and punishable by penitentiary confinement for more than one year by a statute of the United States of general application within the continental United States or by the law of the District of Columbia. A.W. 42.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder; legally sufficient to support only so much of the finding of guilty of Specification 2 of the Charge as involves a finding that accused did, acting jointly and in pursuance of a common intent, at the place and time alleged, feloniously take, steal and carry away \$2.50, lawful money of the United States, the property of Private Robert B. Brown, Headquarters Company, 4th Infantry Brigade; and legally sufficient to support only so much of the sentence as to each accused 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.
Walter M. Krimmel, Judge Advocate.
Richard H. Gowan, Judge Advocate.

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

(69)

Board of Review
CM 209131

MAR 3 1938

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 SAMUEL L. JACOBS		)	January 28, 1938. Dishonorable
(6898124), Detachment		)	discharge and confinement for
Quartermaster Corps,		)	one (1) year. Disciplinary
Schofield Barracks, T.H.		)	Barracks.

HOLDING by the BOARD OF REVIEW
CRESSON, KRIMBILL and HOOVER, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was found guilty of the larceny of one Eugene Dietzgen Company Drawing Set, of the value of about \$25. The owner of the drawing set testified that it was "issued" to him in 1924 while he "was at the United States Military Academy", and that it was charged against his pay at a price of about \$28 (R. 9). The set was received in evidence (R. 11). A soldier who saw it soon after it was stolen testified that it was then "rusty and dirty" and that he later cleaned it (R. 15).

Other than as to distinctive articles of government issue (par. 1533; Supp. V, Dig. Ops. JAG 1912-30) or other chattels which, because of their character, do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny thereof is the market value. CM 208002, Gilbert; CM 208481, Ragsdale; sec. 585, McClain on Criminal Law; People v. Gilbert, 128 N.W. (Mich.) 756. The drawing set here involved was a commercial article of readily determinable market value. It was not of a distinctive type of government issue. The testimony of the owner that it was "issued" and charged to him at the Military Academy (he graduated therefrom in 1927) can only be interpreted as meaning that it was purchased by him while a cadet from or through the cadet store at that institution.

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Proof of original cost price of the drawing set many years ago did not establish its market value at the time it was stolen. From inspection of the set, the court might have determined that it had some value, but, from its inspection alone the court could not determine its market value at the time of trial. CM 208002, Gilbert; CM 208481, Ragsdale.

The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding as to value as involves a finding of some substantial value not in excess of \$20. The maximum punishment by confinement authorized by paragraph 104 c of the Manual for Courts-Martial for larceny of property of value not more than \$20 is confinement at hard labor for six months.

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 drawing set described, of ownership as alleged, of some substantial value not in excess of \$20; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

_____, Judge Advocate.

Walter M. Krummel, Judge Advocate.

Richard W. Haddock, Judge Advocate.

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

(71)

Board of Review
CM 209295

Mar. 29, 1938

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.)			
)			
Private RICHARD O. DeARMOND		)			Trial by G.C.M., convened at
(6731355), Battery B, 61st		)			Fort MacArthur, California,
Coast Artillery (AA).		)			February 25, 1938. Dishonor-
		)			able discharge and confinement
		)			for two and a half (2½) years.
		)			Penitentiary.

HOLDING by the BOARD OF REVIEW
CRESSON, KRIMBILL and HOOVER, Judge Advocates.

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

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

Specification: In that Private Richard O. DeArmond, Battery B, 61st Coast Artillery (AA), did, at Fort Sheridan, Illinois, on or about May 10, 1937, desert the service of the United States and did remain absent in desertion until he was apprehended at Los Angeles, California, on or about December 13, 1937.

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

Specification: In that Private Richard O. DeArmond, Battery B, 61st Coast Artillery (AA), did, at Fort Sheridan, Illinois, on or about May 8, 1937, feloniously take, steal, and carry away one Motorcycle Harley Davidson, United States Registration Number 6936, Value about Three hundred fifty-nine dollars and five cents (\$359.05), the property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to the charges and specifications and was found guilty of Charge I and its specification, guilty of the Specification, Charge II, except the words "feloniously take, steal, and carry away", substituting therefor respectively the words "knowingly and willfully, and without proper authority, apply to his own use and benefit", and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and a half 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 record of trial is legally sufficient to support the findings of guilty and the sentence as adjudged by the court. The only question requiring consideration is whether confinement in a penitentiary as ordered by the reviewing authority is legally authorized. In the opinion of the Board of Review no offense of which accused was found guilty is recognized as an offense of a civil nature punishable by an enforceable statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, or by the law of the District of Columbia, and, therefore confinement in a penitentiary is not authorized under Article of War 42.

4. The evidence pertinent to Charge II and its specification and to the question stated shows that accused deserted from Fort Sheridan, Illinois, May 10, 1937. Shortly thereafter it was discovered that the government motorcycle described in the Specification, Charge II, was missing from a gun shed over which accused was assigned as a guard and to which he had access (Exs. D,E). On the day of his desertion accused took the motorcycle to a shop in Hammond, Indiana, and left it there for repairs (Ex. F). The motorcycle was later returned to Fort Sheridan in a badly damaged condition, its appearance indicating that it had been run a great distance without oil (Ex. E). In the course of an investigation accused stated that he left Fort Sheridan "with an Army Motorcycle" but, "having motor trouble", placed it in the shop for repairs and replacement of a piston (R. 20).

5. The offense of which accused was found guilty under Charge II and its specification, that is, knowingly and willfully, and without

proper authority, applying to his own use and benefit a motor vehicle, property of the United States, furnished and intended for the military service, in violation of Article of War 94, is substantially the offense denounced, among others, by section 87, Title 18, United States Code (sec. 36, Federal Penal Code), as knowingly applying to one's own use property of the United States furnished or to be used for the military service. But it has been held by the United States Circuit Court of Appeals, Fifth Circuit, that this section is inoperative because of its uncertainty as to the punishment prescribed (Holmes v. United States, 267 Fed. 529, 531); and it has been held by the Board of Review that on account of the unenforceability of said section penitentiary confinement cannot be ordered thereunder for wrongful application to personal use of property of the United States, furnished and intended for the military service, in violation of Article of War 94. Sec. 1611, Dig. Ops. JAG, 1912-30.

Consideration has been given to a recent opinion of the Circuit Court of Appeals, Fifth Circuit, in Price v. United States, 74 Fed. (2d) 120, in which said section 87 was invoked by the court as authorizing punishment for larceny of government property, furnished or to be used for the military service, by confinement for ten years, a period in excess of that authorized by section 100 of the Code for violation of which the defendant was convicted. It is believed that this opinion does not affect the legal propriety of the holding of the Board of Review to which reference is made above. Section 87 provides for punishment "as prescribed in sections 80 and 82 to 86 of this title", but, as pointed out in the Holmes case, supra, sections 80 and 82 to 86 (sec. 35, Federal Penal Code) prescribe different punishments, i.e., section 82, denouncing larceny of government property, and sections 80 and 83 to 85 prescribe maximum confinement of ten years; and section 86, denouncing the unlawful purchase or receiving in pledge of military property, prescribes maximum confinement of two years. The court did not, in the Price case, refer to its previous expressions of uncertainty in the punishment prescribed by section 87, and did not expressly recede from its former view that the section was generally inoperative. At most, it appears that in the Price case the court interpreted section 87 to prescribe for the offense of larceny denounced therein the punishment prescribed for the similar offense of larceny by section 82. Such interpretation, based on similarity of the offenses denounced, would not appear to extend to the instant case for the reason that sections

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80 and 82 to 86 do not denounce any offense equivalent or closely similar to that of knowingly applying government property to one's own use, denounced by section 87.

6. Section 62, Title 6 (sec. 826b), of the Code of the District of Columbia, cited in the review of the record of trial by the staff judge advocate as authority for confinement in a penitentiary for the offense found under Charge II and its specification, reads as follows:

"Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven, for his own profit, use, or purpose, shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment."

But the finding in this case that accused willfully and knowingly, and without authority, applied the motor vehicle to his own use and benefit is consistent with an hypothesis that he was not found guilty of doing all the acts required to complete the offense under this section of the Code of the District of Columbia. In a similar case (CM 149985, Swinkins) the Board of Review stated:

"Section 826b of the Code of the District of Columbia denounces the offense of removing an automobile from a public highway, without the owner's consent, and operating or driving the same or causing it to be operated or driven for one's own use, but accused, under Specification 1, Charge I, was found guilty only of removing an automobile from the custody of another and converting it temporarily to his own use, findings wholly consistent with an hypothesis that he did not operate or drive the automobile, or cause it to be operated or driven."

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

as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and a half years at a place other than a penitentiary.

_____, Judge Advocate.
Walter M. Krimmel, Judge Advocate.
Hubert H. Hoover, Judge Advocate.

assault upon Anne Bradford, a female child of about 15 years of age, by wrongfully putting his hand inside her clothing and indecently feeling her person.

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: In that Captain Morton McD. Jones, 8th Cavalry, did, at or near Fort Bliss, Texas, on or about the 1st day of November, 1937, indecently commit an assault on Joan Odor, a female, about 18 years of age, by wrongfully putting his hand in her pocket and feeling her person.

Following arraignment, upon a motion by the defense, the court inquired into the mental condition of accused (R. 13,17), receiving evidence on this issue (R. 17-255; Pros. Exs. A to A-7, B-1, B-2, C to C-9,D; Def. Exs. 2, 3-A to 3-U, 4-6). The court found, all members concurring, that accused was sane at the time of the commission of his alleged offenses and at the time of trial (R. 256). Accused thereupon pleaded not guilty to the charges and specifications. He was found not guilty of Specifications 1 and 2, Charge III, and guilty of the charges and remaining specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service of the United States and to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence relating to Charge I and its specification alleging an assault with intent to rape Martha Rice Barnum, a female child about fourteen years of age, is substantially as follows:

Martha Rice Barnum, daughter of Major Edmund M. Barnum, 7th Cavalry, testified that she reached her fifteenth birthday February

20, 1938. On the afternoon of October 27, 1937, at Fort Bliss, Texas, accused took witness to her home in his car, accompanied by two of his sons and another boy. En route accused told witness he wanted to see her later, and witness, thinking accused wished to discuss a new riding class, agreed to meet him. At 7 p.m., that evening, with the permission of her parents, witness left her home and went in her car to accused's quarters, arriving five or ten minutes after seven, and alighted and stood near her car. Accused came to her from his quarters and hugged her - he was "breathing very hard". Accused said he wanted to go to look at a polo field at El Valle, whereupon witness suggested they take her car for the trip. The two entered witness' car, witness driving, and went to the field. On the way accused hugged witness several times, although she "kept trying to change the subject". He also leaned towards her repeatedly and kissed her on the right cheek. At the polo field they turned about and returned immediately. En route to the field they traveled at about thirty miles per hour, but returning went somewhat faster because accused "did not touch" witness. Accused warned her several times to look out for children and dogs as they passed through some Mexican villages. When they reached a point about six hundred yards from the post of Fort Bliss, accused asked witness to turn off the road onto a "big plot" from which he might show her "the sights". They stopped and accused pointed out - witness thought erroneously - some certain localities. (R. 277-284) Accused -

"then pulled me over, kissed me, and I objected but he didn't seem to care and I kept pulling myself over toward the left--I was sitting in the driver's seat, and I kept pulling myself over to the left side of the car. Then he asked me--he kept feeling around my underpants, and asked me why couldn't I get them off. Then he attempted to put his male organ into my female organ, but it didn't hurt me in the slightest. * * *

"He was laying on top of me; he asked me if I wouldn't get in the back seat where we could do it better. I kept trying to push him away all the time, I didn't know what he was trying to do, and I pushed him away and then very suddenly he stopped. He was laying his full weight on

top of me and forced me down into the seat, and then--
I kept begging him to stop and he did, very suddenly." (R. 279)

Witness answered in the affirmative a question as to whether accused actually placed any part of his "male organ inside of your female organ"; and likewise answered in the affirmative a question as to whether it remained there "for a few seconds" (R. 280). They were at the scene of this occurrence "between five and ten minutes" (R. 282). It was dark (R. 284). Witness said she wanted to go home and do her home work and accused showed her the route. He asked her not to speak of what had occurred and not to believe any rumors she might hear from the children of the post (R. 279), "and that we would have a swell time together and go out and he asked me to promise I wouldn't tell my parents" (R. 280). Witness asked accused where the riding class would be held on the following day, and said she would see accused there. She took accused to his quarters and then went to her home, arriving at about 7:45 p.m. (R. 279-281) She sat down to do her studies and noticed the clock at that time. Her father asked her what accused had wanted and witness answered that he had wanted to talk about riding classes. (R. 284) A few days later, however, after discussing the matter with two girl friends, she told her father what had occurred (R. 356,357). She did not feel any ill effects from her experience (R. 357). She discussed the episode on the school bus but did not think that the discussion was within the hearing of the bus driver (R. 360). About October 31, witness, while in the office of her high school, had a conversation by telephone with accused and his wife, in the course of which she told Mrs. Jones that accused -

"had not done anything that he should not have, and this was just to console her, and I came back directly and told my father what I had said to her. I told Mrs. Jones that he didn't do anything to be ashamed of, and then came back and told my father that I had said that to her to console her because the two of them were wrought up and Mrs. Jones was crying." (R. 358-359)

Major Edmund M. Barnum, 7th Cavalry, father of Martha Rice Barnum, testified that on the evening of October 27 his daughter left his

quarters between 6:50 and 7 p.m. About October 31, 1937, she came to him and said that she "had something that she ought to tell me, but she did not know whether she could or not". (R. 310) The next morning she told witness, in substance, that she had been criminally assaulted (R. 312). She later recounted to witness her telephone conversation with accused and Mrs. Jones. About October 28 witness observed that his daughter was "very nervous", but he could not state that she was more nervous than usual between the date of the alleged attack and the date she disclosed the attack. He had attributed her condition to a recurrence of sinus trouble. (R. 319) While accused was in arrest in quarters and later while he was in the hospital, he requested interviews with witness, but none was granted (R. 313,317, 318).

A medical officer, who was present at a physical examination of Martha Rice Barnum, in the latter part of November, 1937 (R. 284,354), testified that there was then no visible evidence of "any injury to the sexual organs of the person examined, no scratches, cuts, abrasions, contusions or tears. Nothing to indicate any injury." (R. 354) He could not state whether she had suffered penetration. The "opening in the hymen was larger than is usually found". (R. 355)

Accused testified that in the course of the afternoon preceding the occurrences described by Martha Rice Barnum the girl asked him to get a horse for her use in an approaching horse show. He made some telephone calls in an effort to do so. She drove his car home and asked him to let her know if he succeeded in getting the horse. Later accused attended a gathering where he had cocktails. He returned to quarters, had a cocktail with his wife, and ate supper. Between 7:15 and 7:30 he left his quarters to make a trip to El Valle to inspect the polo field there. Miss Barnum drove up at this point, and, after some conversation about the horse for the show, asked accused if she might accompany him on his trip to El Valle. Accused told her she must get permission from her parents and she replied that she had permission to go wherever she wished. She insisted on driving her own car. En route to El Valle she asked why accused would not let her ride his horse and complained that he had not helped her as he had other children. Accused's hand was on the

back of the seat. He patted her on the left shoulder and assured her that he had done all he could for her. They went to the polo field and returned to his quarters. He asked her to tell her parents where she had been and with whom, and she promised to do so. She inquired about the riding class the next day (Thursday) and asked for a horse for the following Saturday. (R. 294-296) Accused did not testify further as to the occurrences on the trip to and from El Valle, except to say that he did not "harm" Miss Barnum at any time (R. 306). Asked by defense counsel on direct examination, "Did you cover the trip completely down there and back?", accused replied "But not my experience with her concerning that", and then recounted events occurring later in the week (R. 297). He testified that he had reason to believe that Miss Barnum became angry with him and would accuse him falsely. On Saturday she rode a colt but was "dismissed from the ring" because of the colt's poor behavior. A short time later she came to accused and asked for an explanation, whereupon accused told her she had used poor judgment in attempting to ride the colt. She appeared to become angry, and accused repeated that she had been foolish. While with a riding class on Sunday, he cautioned Miss Barnum about crossing a railroad and she became angry, said that he did not like anything she did and that she "did not care". On the following Thursday accused was informed by General Lear that accusations had been made against him and that Miss Barnum was one of the complainants. Accused at once "told" his wife and tried to get in communication with Major Barnum. (R. 296,297) He telephoned Miss Barnum and asked her "what has happened?" She replied that she had told her father "what you told me to tell him" and also told him "something else that we did, which is untrue". Accused asked her if she could not see that she had placed him "in a wrong light by making such a false report" (R. 308) and she said that she would "straighten the matter out" with her father. (R. 298,307,309) She stated that accused had not offended or mistreated her in any way. She then, at the request of accused, talked over the telephone to Mrs. Jones, who later stated to accused that Miss Barnum had informed her that she had disavowed her report of wrongdoing by accused, and, further, that General Lear had pointed his finger at Miss Barnum and another complainant and had stated, "You can't change this statement. This is a serious matter." (R. 298) Accused was subsequently informed by

Mrs. Barnum that General Lear had forbidden Major Barnum to talk to accused (R. 299). Accused considered Miss Barnum a "very strange child" (R. 307), she being somewhat of a "tomboy type" and unduly familiar, at times calling accused "Jonesy", putting her hands on his shoulders and making exacting demands upon him (R. 306,307). On one occasion she appeared at his quarters at night when he and Mrs. Jones were going out, and asked if accused was "going down my way". Her familiarity was not necessarily "suggestive", but was "objectionable in a sense and sensed as such by the other children". (R. 308) Accused testified that after "these children" had talked to him and after he had talked to Colonel Herr, an investigating officer, accused "couldn't believe anything" (R. 304).

Witnesses for the defense testified that they had driven from accused's quarters at Fort Bliss to the polo field at El Valle and back, a total distance of about ten and four-tenths miles at speeds not exceeding thirty miles per hour, and had found that the round trip required about twenty-seven minutes. Continuing the return trip from accused's quarters to Major Barnum's quarters, the total distance was ten and nine-tenths miles and the elapsed time was about twenty-nine and a half minutes. (R. 287,288,327-329) Witnesses for the prosecution testified in rebuttal that they had made a similar trip at about thirty miles per hour (about thirty-five miles per hour for a short distance) and had found the time required for the entire journey to be about twenty-three minutes (R. 315,320,321).

A witness testified that on October 30, 1937, Miss Barnum was eliminated, probably with the first of two groups, in a horse show competition at Fort Bliss (R. 333). Eleanor Aleshire, fifteen years of age (R. 271), testified that Miss Barnum attempted to influence her against accused in her testimony before an officer investigating alleged misconduct by accused towards witness by telling witness "stories she had heard" about him, and that witness thought Miss Barnum "was a little mad because * * * she never happened to ride Captain Jones' horse", but did not seem to be angry when telling the stories about accused (R. 361,362). Miss Barnum testified in rebuttal that she believed she had always been fairly and impartially treated in the riding class, and did not feel that she had been neglected by

accused. She had not felt that it was necessary for her to make any special effort to gain his approbation. (R. 357,358) Colonel John K. Herr, 7th Cavalry, testified that in the course of an investigation by him Miss Barnum testified that she left the post on the evening in question at about 7:15 p.m. and returned about 7:45 p.m. (R. 286). Brigadier General Ben Lear testified that Major Barnum reported to him that accused wished to interview Major Barnum, whereupon witness said it would be improper for Major Barnum to visit accused (R. 326). Witness gave instructions that no witness should see accused without prior permission (R. 325). On the day that report of the occurrence was made to witness, he interviewed Miss Barnum and another child (Anne Bradford) in the quarters of a Major Bradford, and then, to test Miss Barnum's story and to "break down" any possible falsification on her part, told them that the charges were serious and ruinous to the officer concerned and that they "had to tell me the truth. That if they were going to change their stories, now was the time to tell me." He also told Miss Barnum that "she had to remember" the story she was about to tell witness, that "she would have to stick to it, and that it must be true". (R. 326,349)

In argument at the close of the case, following argument by counsel, accused stated:

"The charge made against me by Miss Barnum is absolutely false. I have never done at this time and will never desire to possess Miss Barnum or harm her in any way." (R. 374)

4. The evidence as to Charge II and its specification alleging an aggravated, indecent assault upon Anne Bradford, a female child about fifteen years of age, is substantially as follows:

Anne Bradford, daughter of Major William B. Bradford, 8th Cavalry, testified that she reached her sixteenth birthday December 23, 1937. About October 25, 1937, she was with a riding class "riding along by the Airport" on or in the immediate vicinity of Fort Bliss, Texas, when accused told the remainder of the class to -

"go on, that he wanted to give me a little instruction about riding and we would catch up with them in a little while, and they went on and he started to show me how to sit in my saddle more correctly, and he said I did not seem to be getting it. He asked me to feel down in his pocket and he would show me how to get the position he wanted. So I put

my hand in his pocket and it was twisted and I took it out and he untwisted it for me and he put it back in and he told me to put my hand as far down as I could reach toward the middle of him, and I did and I could feel all around him and he said I didn't seem to be getting it very well. He asked me if I had pants on under my jodhpurs and he asked me to unbutton my jodhpurs and he felt down in the front of me a minute and then he took his hand out and he told me to try and get the position then, and I tried and about that time his son came up and he told his son that he should not have come up at that time, he thought something had happened to one of the kids and he got mad at him and he told him to go on and he would gallop and catch up with them, and we did, and we caught up with them at Bosserman Field, and we started jumping and he said he was very proud of me and while we were out there he kept looking around to see if anyone was coming, and he told me not to tell my parents and he asked me if I would let him do it, and I knew what he meant and I said No, I didn't think so, * * *." (R. 275)

When accused caused witness to place her hand in his pocket, her hand was against his genitals "just a little bit"; and when he placed his hand inside her clothes it was against her flesh "just for a minute". In response to a question as to whether she thought it was normal or abnormal for accused to "place his hands down between your legs and between your body and the saddle", witness testified that she thought the actions were abnormal but she did not think "about it terribly much" because she probably felt that accused was trying to help her as he said. He asked her twice not to tell her parents what had occurred. She had not had a similar experience previously. She did not want to go riding with accused again, but, accompanied by her mother, did so once. (R. 276) Asked to describe her "reaction to that whole thing", she stated that she did not give any thought to it "for a week or so until some of the other girls told me something that had happened to them and then I told them" (R. 277).

Major Bradford testified that he talked to accused, at his request, following the incident described, and that accused said that

his conception of what occurred differed in some respects from what the girl had told him, and asked witness to talk to his daughter again (R. 324).

Colonel John K. Herr, 7th Cavalry, testified that during the course of his investigation of the conduct of accused he received a note purporting to be signed by several girls, including Anne Bradford, in which it was stated, among other things, that the statements previously given by the signers were exaggerated and in part untrue (R. 350,351; Def. Ex. 3-B).

Accused testified that Anne Bradford's mother and father asked accused not to allow the child to become frightened. When she rode she habitually fell back or asked to stop and complained of a pain in her side. He told her he would be glad to help her but that he preferred that she refrain from discussing it with anyone for he did not have time to assist everyone. He also told her that he thought the muscles about her stomach and the "forward part of her body" should be relaxed. (R. 290,293)

"At first I asked her to feel my muscles in my stomach and in my side, to put her hand forward until I reached the position in the seat of the saddle, and talked to her several minutes before I told her that she had not relaxed sufficiently and in my opinion the pains in her side were due to her holding her muscles so rigidly. I started to put--I asked if I might put my hand in her pocket to show her what I meant, and as I recall it, she had on a pair of jodhpurs with a very small handkerchief pocket on the left side. I then asked her if she had on underclothing underneath her jodhpurs and she stated that she had. I told her to unbutton her jodhpurs at the top, the first two buttons; possibly three, as I remember, were opened by Miss Bradford. I put my hand first on her left side and then on her right side, made her relax her stomach muscles, moved my hand forward and told her to move to that position, and I immediately removed my hand and stated to her that I had in no way intended to embarrass

her and asked her if I had, and she said I had not, * * *. I later told her * * * in the presence of her mother, that I was very proud of her and was sure she would do better in the next riding class. She thanked me and, as I remember, nothing further was said. The records of the investigating officer will show that a statement was made by her to this effect, that she had thought nothing of what I had done or said to her until she had her--until Tish Barnum had talked to her." (R. 293,294)

He did not knowingly touch the girl's flesh (R. 305). She visited him while he was confined at the William Beaumont Hospital, and told him that she did not "believe Tish Barnum's story" and had never "mentioned anything about what happened" (R. 302). She also told him an "entirely different story from what Colonel Herr had told" him. He asked Major Bradford to check her story. Asked on cross-examination as to what instructors he had known "who placed their hands inside of a young girl's clothes and between her legs to correct her seat", accused replied:

"I have never known anyone to do it and have never put my hands between any girl's legs to show them how to ride. It would be unnecessary. I have touched many people and have had many people touch me on the stomach and back and have punched me in front or on the side and told me to relax, here and there." (R. 301)

5. The evidence with respect to Charge III and Specification 3 thereunder alleging an indecent assault upon Joan Odor, a female about eighteen years of age, is substantially as follows:

Joan Odor, daughter of Captain Raymond W. Odor, (Infantry) Signal Corps, testified that she reached her eighteenth birthday November 5, 1937. About November 1, 1937, she attended a riding class at a riding ring at Fort Bliss, Texas. The class started away from the ring but she delayed, and the remainder of the class rode ahead. Accused came back to her and the two rode forward together. (R. 264,265,268)

"On the way out there he was going to help me with my riding and he said he could help me a lot if I could

keep my mouth shut, and then he asked me to put my hand in his pocket and see where he was sitting in the saddle, and I did that, and then he put his hand in my pocket and told me to move forward, that I was back too far."

When accused asked witness to place her hand in his pocket, he told her to "put it down and feel where he touched the saddle". When he placed his hand in her pocket "he placed it where it was supposed to touch the saddle and asked me to move forward", and kept his hand in this position for "ten seconds or so". (R. 265) Witness answered in the affirmative a question as to whether accused's hand touched any part of her "person" (R. 268). She thought at the time that what accused did was "a little unusual" but that he was only trying to help her with her riding. She later decided that his actions were improper, and that she would not tell what had occurred but would not let it happen again. She did not attend the class further. (R. 266,267)

Accused testified that Miss Odor did not leave the riding ring with the class, and that upon discovering her absence he returned and asked if she intended to accompany the others. She replied that she would go with him.

"After we left the riding ring area, Miss Odor had spoken to me several times about her back and her seat. She was inclined to ride far backward with a decided sway in her back. I told her that I would be glad to help her, but that I preferred that she not discuss this with everyone, for I did not have time to offer my assistance to each individual, much as I would like to. I told Miss Odor I thought her stomach muscle and the forward part of her body should be more relaxed and told her if she would put her hand on my stomach muscles and well forward, she would feel what I meant when I dropped my stomach and for her to do the same thing. This she did without hesitation. I then rearranged her, without touching her, in the seat of the saddle, and put my hands in her pockets on her stomach muscles, on both sides, and on the forward part

of her body and told her to move forward until she touched my hand. When she did, I removed my hand from her body. Statements made in my presence by Miss Odor before the investigating officer will show that she stated that she had thought nothing of what I had done or had said, but had fully understood and that I had not impressed her as being in any way ungentlemanly or suggestive toward her. Later on in the ride, I would say thirty minutes later, she rode * * * up to me and said, 'I feel sure that I have found out what you meant by going forward. This is the first time I have ever been able to keep my knees in position,' and thanked me." (R. 290,291)

He thought nothing of placing his hand on her, and believed that she did not consider his actions suggestive or ungentlemanly (R. 300).

6. There is thus direct evidence of the commission by accused of the acts specifically charged in the Specification, Charge I, the Specification, Charge II, and Specification 3, Charge III, of which he was found guilty.

7. As to Charge I and its specification, accused denied having harmed the girl involved, Martha Rice Barnum, and testified to circumstances tending to discredit her testimony, but did not further, under oath, deny or explain the acts constituting the alleged assault upon her. He admitted having accompanied her on the trip in the course of which she testified the assault occurred, but with apparent deliberation refrained from denying or explaining the specific acts constituting the assault charged. His single specific denial did not in essence go beyond a denial that rape was accomplished, and, if accepted by the court as true, was not necessarily inconsistent with the evidence that the assault as charged was completed in all its elements. After leaving the witness stand, accused stated in argument that Miss Barnum's "charge" against him was "absolutely false", and denied lascivious desire. This argument was before the court for what it might be worth and for such interpretation as might be given it in the light of the sworn testimony. The language used was possibly broad enough to deny generally any offense against Miss Barnum, but it did not specifically deny or explain the particular inculpatory acts. The testimony of

Miss Barnum as to the details of the assault was circumstantial and positive. The Board of Review finds nothing in her testimony, in the attempted impeachment of her, in the testimony and argument of accused, or in the circumstances as shown by the other evidence to suggest any substantial doubt that at the time and place alleged accused did in fact hold her, put his hand under her clothing, get upon her and attempt to have intercourse with her, as charged. Accused's denials, such as they were, were primarily for consideration by the court, as were the accuracy and veracity of his accuser. The failure of accused when testifying explicitly to deny or explain the acts constituting the assault was the basis of a legitimate inference that could he have truthfully denied or credibly explained them, he would have done so. As stated by the United States Supreme Court in Caminetti v. United States, 242 U. S. 470, 494:

"* * * where the accused * * * voluntarily testifies for himself * * * he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

"The accused of all persons had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. * * *

"The court did not put upon the defendant the burden of explaining every inculpatory fact shown or

claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf."

The Board of Review believes that upon all the evidence and under all the circumstances of the case the court was fully justified in accepting the testimony of Miss Barnum as true in all its material aspects. Accused, according to his own testimony, had been drinking to some extent during the evening of the occurrence, but there is nothing in the evidence to indicate that he was so drunk as to be unable to entertain the specific intent involved in the offense charged.

It was not necessary for the court to conclude or find that penetration was in fact accomplished, for rape was not alleged.

8. Miss Barnum testified that she resisted accused, objected to his actions, and throughout the transaction "kept begging him to stop", but that accused continued his importunities and used sufficient force to accomplish his purpose. But she also testified to acts and omissions prior to and subsequent to the assault - her submission to his embraces before the assault, her casual conversations following it, and her failure immediately to report the occurrence, - which, regardless of what her real attitude may have been, indicate that she so deported herself as to create an appearance of complacency which may have led accused to believe that she would not seriously object to or resist such advances as he might make. Under such circumstances, and in the absence of evidence of marked violence or resulting injury, the Board of Review believes that the proof falls short of establishing beyond reasonable doubt that accused intended to overcome by force any possible resistance on her part. The Manual for Courts-Martial, paragraph 149 1, states in this connection:

"The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual

or constructive, and penetrate the woman's person.
Any less intent will not suffice."

The Board is, therefore, of the opinion that confirmation of the finding of guilty of Charge I and its specification would not be warranted upon the theory that the evidence shows beyond reasonable doubt that accused assaulted Miss Barnum with intent forcibly to rape her, that is, with intent to commit the common-law offense of rape as that offense is denounced by the 92d Article of War (par. 149 1, M.C.M.).

But more than an assault with intent to commit common-law rape is alleged and found. The specification charges that the victim of the assault was a female child about fourteen years of age, and alleges specific acts amounting to an attempt to have intercourse with her. Thus, there are allegations of an offense consisting of acts which, in view of the age of the female, were the equivalent of an assault with intent to commit so-called statutory rape, the offense denounced by section 289 of the Federal Penal Code (U.S.C. 18:458) and section 808 of the Code of the District of Columbia (D.C.C. 6:32), in which neither force nor consent is an essential element. That Miss Barnum, at the time of the assault, was under the age of consent (sixteen years), as fixed by the statutes noted, was clearly proved, and, as observed above, the acts alleged constituting the assault by accused with intent to have intercourse with her were also proved beyond reasonable doubt.

Excluding from consideration such allegations of common-law rape as may be contained therein, the specification alleges, and the evidence establishes, an assault by accused with intent to commit a felony, rape, by having intercourse with a female under the legal age of consent, in violation of the 93d Article of War.

The 93d Article of War denounces, among other things, an "assault with intent to commit any felony". Such an offense is defined by paragraph 149 1 of the Manual for Courts-Martial as -

"An assault with intent to commit any felony is
an assault made with a specific intent to murder, rape,

rob, or to commit manslaughter, sodomy, or other felony. See definition of felony in 149 d (Burglary)." (Under-scoring supplied)

Under paragraph 149 d (Burglary) appears the following:

"The term 'felony' includes, among other offenses so designated at common law, murder, manslaughter, arson, robbery, rape, sodomy, mayhem, and larceny (irrespective of value)."

This language expressly includes in the term "felony" all common-law felonies. Statutory felonies, such as so-called statutory rape, are not specifically mentioned, but the definitions as quoted do not exclude them. The words "other felony" (par. 149 l, M.C.M.) are of such breadth as to require inclusion of all felonies, common-law and statutory, and it is the opinion of the Board of Review that they must be so interpreted. The term "any felony", as appearing in the article of war, was expressly defined in the Manual for Courts-Martial, 1921 Edition, as including statutory as well as common-law felonies (par. 443, XII, M.C.M., 1921). This definition is in conformity with what appears from the language of the statute to have been the intent of the Congress to make punishable assaults with intent to commit any act recognized as a felony by the laws of the United States. The Judge Advocate General has heretofore expressed the view that offenses of a civil nature, when punished by courts-martial, are to be classified as felonies if they were felonies at common law or if, though not common-law felonies, they are felonies by federal statute. JAG 000.51, Sept. 15, 1936. The Board of Review, with the concurrence of The Judge Advocate General, has held legally sufficient a sentence based upon a specification laid under the 93d Article of War alleging assault with intent to commit statutory rape. CM 162435, Huston.

9. (Inasmuch as the Specification, Charge I, alleged, as indicated above, two distinct offenses arising from the same transaction, it was, possibly, subject to an objection of duplicity. Par. 29 b, M.C.M. No objection on this ground was made. Not only did the prosecution introduce evidence as to the age of the girl assaulted but, prior to the introduction of evidence upon the merits, it presented authorities

in support of the proposition that an assault upon a girl under the age of consent with intent to have sexual intercourse with her was an assault with intent to rape, thus making it clear that it was the theory of the prosecution that the averment of the specification of an assault "with intent to commit * * * rape" would be established by proof of an assault with intent to commit so-called statutory rape (R. 262,263). (The federal civil courts have indeed held that proof of an assault with intent to commit so-called statutory rape sufficiently supports a charge of an assault with intent to rape. Walters v. United States, 222 Fed. 892. Under the circumstances, and in the light of the wording of the specification, accused could not have been misled as to the offenses intended to be charged, and the defect in the specification was not, therefore, fatal. Par. 87 b, M.C.M. Considering the fault of duplicity in an essentially similar charge, the Supreme Court of the United States has said:

"It is next objected that the indictment is bad, inasmuch as it contains the double charge of a rape at common law and of the statutory offence under the act of February 9, 1889; and it is quite obvious that both these offences can be made out from the language of the indictment, which is in a single count. The allegation that the offence was by violence and against the will of the woman, with the other allegations in the indictment, describe the offence of rape. The allegation that the defendant had carnal knowledge of a female under sixteen years of age makes out the offence under the statute of 1889. But the view of the court was, that the allegation that the carnal knowledge was against the will of the woman may be rejected as surplusage, and the rest of the indictment be good under the statute referred to. And, as the court instructed the jury in accordance with that view of the subject, and as the jury found the prisoner guilty not of the crime of rape but of the smaller crime of carnal knowledge of a female under sixteen years of age, the action of the court on that subject was probably correct. At all events, the court had jurisdiction of the prisoner, and it had jurisdiction both of the offence of rape and of carnal knowledge of a female under sixteen

years of age. It was its duty to decide whether there was a sufficient indictment to subject the party to trial for either or for both of these offences. As no motion was made to compel the prosecuting attorney to elect on which of the charges he would try the prisoner, we think that there was no error in its rulings on this subject." 135 U. S. 448.

10. As to Charge II and its specification and Specification 3, Charge III, accused admitted without material qualification his acts as described by Anne Bradford (Charge II and its specification) and Joan Odor (Charge III and Specification 3 thereunder), but denied any improper purpose therein and sought to justify his conduct as having innocently occurred in the course of instruction in equitation. The circumstances of time and place, the remarks by accused in each case urging secrecy and the nature of the acts themselves were such that there can be no reasonable doubt of the indecency and unlawfulness of the acts. The statements of accused to the Bradford girl following the assault upon her were, in their suggestive implications, distinctly corroborative of a lustful purpose on his part. Her comparative youth (fifteen years) was a fact in aggravation, as charged. The assertions by accused in both cases at the time of taking the indecent liberties with the persons of the girls, as well as his testimony at the trial, that he only sought to give the girls riding instruction were but indicative of subterfuge, or fraud, to enable him to accomplish his improprieties, and the court was fully justified in so believing and in rejecting as unworthy of belief his declarations of innocence of intentional wrongdoing. Although the girls apparently consented to the acts of accused, it is plain that their consent, if such there was, was obtained by fraud and through their ignorance and did not therefore affect the unlawful nature of those acts. 6 C. J. S. 941; Wharton's Crim. Law (11th ed.), sec. 833.

11. Evidence was received, without objection by the defense, to the effect that the witnesses Martha Rice Barnum, Anne Bradford and Joan Odor made statements prior to the trial which were consistent with other statements by them or with their testimony. As a witness for the court, Brigadier General Lear testified that after his

conversation with Misses Barnum and Bradford, in which he impressed upon them the importance of telling the truth and adhering to their statements, they did not subsequently change their statements (R. 331). Colonel Herr testified as a witness for the court that the girls last named were questioned by him but did not materially change their previous statements (R. 351,353); and that Miss Barnum stated to him that accused kissed her, asked her to remove her "pants" and penetrated her sexually (R. 352,353). Captain Edward B. Schlant, Judge Advocate General's Department, testified as a witness for the court that the three girls named testified before him in the course of an investigation, and that neither subsequently changed her testimony (R. 337,338); and that Miss Barnum testified that on the night of October 27 she left her home at 7 p.m., that she waited for accused in front of his quarters and that he ran out and hugged her, and that he was then "breathing hard" (R. 347,348). Major Bradford, as a witness for the prosecution, and Captain Odor, as a witness for the court, testified, in effect, that in so far as they knew their respective daughters had not changed their stories (R. 324,336). The court announced that General Lear, Colonel Herr, Captain Schlant and Captain Odor, whose testimony included that just noted, were examined by the court for the purpose of testing the credibility of the principal witnesses in the case (R. 363).

The applicable rule of evidence is stated by the Manual for Courts-Martial as follows:

"In general, a witness gains no corroboration merely by repeating his statements a number of times to the same effect. Hence, similar statements made by a witness prior to the trial consistent with his present testimony are in general not admissible to corroborate him. But this is only a general rule, and there are some situations in which such statements, having a real evidential value, are admissible. For example, if a witness is impeached on the ground of bias due to a quarrel with the accused, the fact that before the date of the quarrel he made an assertion similar to his present testimony tends to show that his present testimony is not due to bias. So, also, where he is sought to be impeached on the ground of

collusion or corruption the circumstances of the case may show that such prior statements have such evidential value as to make them admissible." (Par. 124 a)

A comparatively recent and more complete statement of the rule as followed by the federal courts appears in Dowdy v. United States, 46 Fed. (2d) 417, 424:

"In the early days of the common law, the notion prevailed that a witness could always be corroborated, without any limitation, by the circumstance of having made at other times, statements consistent with the testimony delivered in court--a practice based on a loose, instinctive logic, popular enough even to-day, that there is some real corroborative support in such evidence. 2 Wigmore, Ev. par. 1125. But the lack of a logical foundation for a rule of such breadth, and the dangers attending the admissibility of such evidence without limitations, have been perceived and appreciated, and there can be no doubt that in modern times the general rule is that a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony. 40 Cyc. 2787, text and cases cited in notes; 2 Wigmore Ev. pars. 1122-1129; Ellicott v. Pearl, 10 Pet. 412, 439, 9 L. Ed. 475; Vicksburg & Meridian, etc., v. O'Brien, 119 U. S. 99, 7 S. Ct. 118, 30 L. Ed. 299; Inman Bros. v. Dudley (C. C.A. 6th) 146 F. 449, 455; Southern Pacific v. Schuyler (C. C. A. 9th) 135 F. 1015, 1017.

"But there are numerous cases which hold that where a witness has been assailed on the ground that his story is a recent fabrication or that he has some motive for testifying falsely, proof that he gave a similar account of the transaction when the motive did not exist, before the effect of such account could be foreseen, or when motives of interest would have induced a different statement, is admissible. But in order to bring the case within this rule, it must appear that the conversation occurred soon after the transaction, is consistent

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with the statements made on oath, was made before any motive to fabricate could exist, and contains such fact or facts pertinent to the issues involved as reasonably furnish to the jury some test of the witness' integrity and accuracy of recollection; and such evidence should never be admitted until the witness has been in some way impeached; and the jury should be carefully cautioned that the evidence is to be considered only as affecting the credibility of the witness; and it should never be admitted as substantive or independent supporting testimony. 40 Cyc. 2789, text, notes, and cases cited; *Di Carlo v. U. S.* (C. C. A. 2d) 6 F. (2d) 364; *Boykin v. U. S.* (C. C. A. 5th) 11 F. (2d) 484, 486."

See also *Gelbin v. New York, N. H. & H. R. Co.*, 62 Fed. (2d) 500, 502.

There was in the present case a suggestion of bias and possibly collusion on the part of Miss Barnum, but none of the statements similar to her testimony or other declarations as proved was made prior to the suggested motive for fabrication, that is, prior to the occurrence of the alleged causes of bias or of the events suggestive of collusion. Although in his testimony accused suggested exaggeration or misunderstanding of his motives by Misses Bradford and Odor and contradicted them as to facts in some minor respects, no attempt was made to impeach them by showing bias, collusion, corruption or similar circumstances. It would appear, therefore, that the introduction of the evidence noted as to consistencies of statement by the three witnesses was not justified by any exception to the general rule of exclusion, and that its admission was error.

The Board of Review is convinced, however, that this error did not injuriously affect the substantial rights of accused within the meaning of the 37th Article of War. The veracity of Misses Bradford and Odor was not seriously attacked and accused expressly admitted the salient facts to which they testified. Miss Barnum was challenged by some attempts at impeachment, but her testimony was not contradicted in its important elements by the testimony of accused. In view of the

substantially uncontradicted testimony of the three girls, the testimony of accused and the corroborating circumstances properly to be considered, it is inconceivable that the court was materially influenced in its findings by the erroneously proved fact that the girls repeated their accusations to various persons. Their repetitions were, in any circumstances, of little logical weight, for "a witness gains no corroboration merely by repeating his statements". Par. 124 a, M.C.M.

It was not legally improper for the court, in searching for possible inconsistent statements by the prosecution witnesses, to question other witnesses as to what the prosecution witnesses had said, and there is no reason disclosed by the record to assume that in eliciting the erroneous testimony the court intended to do other than to determine whether the prosecution witnesses had been inconsistent. When the fishing net brought to the surface the consistent statements, the court might have removed the error by then expressly excluding the statements from consideration, but its failure to do so does not justify a conclusion that it accorded the repetitions any determinative weight.

Without the erroneous testimony, the evidence is persuasive of guilt beyond reasonable doubt, and, considering the entire record of trial, the Board of Review believes that any hypothesis that this error materially influenced the court in its findings of guilty would be merely conjectural. The 37th Article of War provides that errors in the admission of evidence shall not invalidate the proceedings of courts-martial unless "it shall appear" that such errors have injuriously affected the substantial rights of the accused. There is no such affirmative appearance of injury in this case.

12. Majors Barnum and Bradford were permitted to testify, in effect, without objection by the defense, that upon hearing the statements of their respective daughters concerning the assaults, they believed the stories to be true (R. 318,324). This testimony was mere opinion and its admission was erroneous. It was, however, manifest from the circumstances properly proved that the statements were in fact accepted as true by the parents, and the erroneously admitted opinions were therefore but cumulative in effect. In any event, it is clear, from the entire record, that the expressions of opinion could not have materially influenced the court in reaching

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its own conclusions as to the credibility and accuracy of the two girls in their testimony before the court.

13. The court overruled an objection by the defense to the testimony of Major Barnum that his daughter complained to him that she had been criminally assaulted, basing its ruling upon the proposition that evidence of the fact that the complaint was made was proper although such evidence might not be received as proof of the assertions involved in the complaint (R. 311,312). This action of the court was not in error. It is well established that upon prosecutions for assault with intent to rape, the fact that a complaint was made by the victim of the assault is admissible as bearing upon the complainant's testimony as to lack of consent. CM 198724, Clark; 52 C. J. 1063; Note, 41 L. R. A. (N.S.) 886. The complaint, though delayed some days, appears, under all the circumstances, to have been made within a reasonable time. Such delay as occurred was for consideration as to the probative weight to be given the circumstance that a complaint was in fact made. 52 C. J. 1065.

14. The evidence as to the mental condition of accused is substantially as follows:

There were introduced in evidence a report and two supplemental reports of a board of medical officers convened at William Beaumont General Hospital, Fort Bliss, Texas, to examine accused and report upon his mental condition (Pros. Exs. A,C,D). The board consisted of Lieutenant Colonel T. E. Scott, Medical Corps, chief of the Medical Service of the hospital mentioned, with extended experience in psychiatry from time to time since 1921 (R. 24,25); Lieutenant Colonel Francis E. Weatherby, Medical Corps, in charge of the psychiatric section and assistant chief of the Medical Service of the hospital, a psychiatrist with extended continuous experience in psychiatry since 1914, and a Fellow of the American Psychiatric Association since 1926 (R. 49-51); and First Lieutenant Byron E. Pollock, Medical Corps, ward surgeon of a ward in the hospital, with special but limited experience in psychiatry (R. 74,75). This board had accused under observation from November 4, 1937, to February 14, 1938, and one member of the board at least, Lieutenant Colonel Weatherby, continued his observation to the end of the court's inquiry on the issue of

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sanity, February 23, 1938 (R. 28,75,253). The board examined accused repeatedly and exhausted available medical means of determining his mental condition (R. 29,52,54; Pros. Exs. A,C,D).

The board, on November 22, 1937, reported findings as follows:

"The Board has carefully considered all the evidence in this case, including a detailed history of the officer's family and past life given by his wife and his mother-in-law, together with the statements of officers who have known him, as outlined above, and has observed him continuously during his present hospitalization. At no time during this observation has the officer exhibited any reaction other than that of a normal person in the situation in which he finds himself.

"In spite of the history of insane antecedents in this officer's case, there is nothing in his past conduct during his army service which would classify him as insane, all reports being to the effect that he is a representative of a very high type of officer, and at no time has his official conduct been in question so far as this Board can determine.

"The Board feels that many of his acts which have been presented as evidences of abnormality might be explained on the basis of occasional alcoholic indulgences. They are definitely not evidences of insanity.

"The Board has considered the etiology of manic-depressive psychosis and the possibility of hereditary influence effecting this officer's future mental health. Authorities generally agree that hereditary influence does play some part in the production of mental disease in the offspring. The existence of manic-depressive psychosis in the parents does not, however, always result in mental disease of the children. Quoting Pollock, Malzberg and Fuller (Oxford Medicine, volume VII, pages 437 and 438), who among 745 sibilings of manic-depressive patients found a total of 29 cases of mental disease of whom only 11, or barely 1.5%, were manic-depressive. Kahn, page 435, same article, out of 50 children, offsprings of manic-depressive parents, found only 10 manic-depressive children. Thus, it does not follow that because this officer has a history of

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insanity in his antecedents that he too is insane.

"The Board recognizes the fact that this officer is a decidedly extraverted individual of a hypomanic type of personality. Such persons are cheerful, lively and mobile; they are usually referred to as 'live wires' and as 'the life of the party'. They are in practical affairs, enthusiastic, tireless workers, good organizers and daring adventurers. There is an ever present possibility in all such cases that the condition may proceed further. Marked activity and restlessness, emotional elevation and talkativeness have been described as pre-psychotic states.

"'Pre-psychotic states' exist in individuals who are not insane and may precede the development of an actual psychosis. Insanity of recognizable character may be expected to follow under conditions of stress.

"There is, however, in the case of this officer, no evidence that he has ever passed into an actual attack of the manic or hypomanic type of psychosis. His personal characteristics have admittedly been essentially the same over a long period of years. They have not been such as to cause any interference with his professional work and they have not given rise to any social conflicts as observed by those about him in his daily life outside of his home.

"The Board realizes that in view of the family background of the patient there may be a greater tendency to mental breakdown if stress is long continued. There is, however, no evidence that such has occurred up to the present time. No evidence of an actual psychosis has so far appeared in spite of the fact that this officer has been hospitalized for considerable time under conditions which cannot fail to cause severe nervous tension and mental stress.

"As hyperthymics we designate a group of psychopathic personalities that are bound together by their vivacity and excitability. There is no boundary line between the vivacious psychopath and the normal vivacious person. Such individuals are not insane and are commonly held

legally responsible for their acts.

"This Board therefore considers this officer sane and mentally responsible for his acts.

"Diagnosis: No mental disease found." (Pros. Ex. A)

On December 13, 1937, the board reported supplemental findings as follows:

"1. The Board recognizes the fact of certain biological limitations and peculiarities on the part of Captain Morton McD. Jones which have largely governed his actions. It is established that his mother was insane, and that other members of his family have been mentally abnormal. In the opinion of the Board the individual characteristics of Captain Morton McD. Jones are due to hereditary factors.

"From early life, this individual has been of an unusually active, aggressive nature, enthusiastic and courageous. These qualities have been emphasized to more than the normal or usual degree and have been the cause of his success as well as difficulties. Imprudence was shown by the fact that he ran away from home in boyhood, and impetuous recklessness was demonstrated by his joining the National Guard when several years under age.

"In his subsequent life, continued activity, un-failing enthusiasm, extreme sociability, and a persistently extraverted attitude have made him an outstanding figure in sport, as a horseman, and in his social and official relations with others. At the same time there has been according to his wife, such continued domestic discord as to cause her to question his mental normality. Long continued irritability and occasional outbursts of anger are said to have been manifested by mental cruelty and even physical abuse. He has apparently been unusually attracted to young people. Within the past year, while in the Philippine Islands, he is said to have talked of them in a manner which his wife characterized as silly and his behavior with some of them was under suspicion.

A definitely psychopathic attitude of a sexual character is suggested.

"2. All of this officer's conduct is explained by the condition of Constitutional Psychopathic State, Hyperthymic Personality. Such an individual is not insane and is commonly held responsible for his acts, but is unsuitable for the military service. The members of the Board therefore believe that the information outlined above may be useful in determining the type of disciplinary action to be taken and disposition made in this case." (Pros. Ex. C)

On February 14, 1938, the board reported further supplemental findings as follows:

"The Board has kept this officer under continuous observation from the time of his admission to hospital November 4, 1937, to the present date. He has been seen by one or more members of the Board practically every day since his admission to hospital, and in many instances visited several times a day. All members of the Board have taken into consideration every act of this officer during this period of time and have given consideration to any possibility of conduct which might indicate insanity. A formal and detailed mental examination was carried out February 11, 1938, by all members of the Board and is attached herewith.

"During the entire period of observation of this officer, it has been noted particularly that he has suffered from an anxiety neurosis of psychogenic origin due to the serious predicament in which he finds himself. This has not assumed the proportions of a psychosis. The anxiety state is believed to be a normal result of the mental torture which he has suffered. The fact that he has not become psychotic under such stress is good evidence of a firm grip on reality. At no time in the period of this officer's observation or in the history obtained by this Board of the officer's past life has there ever been evidence of flight of ideas, abnormal

depressions, or emotional elevation of sufficient degree to indicate manic depressive or other psychosis. The history of this case indicates constitutional psychopathic state from early childhood, and continued study by this Board confirms the opinion that this officer's entire conduct is explainable on the grounds of constitutional psychopathic state, hyperthymic personality type.

"The Board therefore adheres to it's original opinion that this officer was sane and responsible for his acts at the time of the alleged offenses and that he is sane and mentally responsible for his acts at the present time." (Pros. Ex. D)

Each member of the board testified at length in explanation and confirmation of the board reports (R. 18-87,217-256). Lieutenant Colonel Scott testified that in observing and examining accused and seeking information as to his conduct and history "the board almost hopefully searched for something which would justify our calling him insane" (R. 29). Lieutenant Colonel Weatherby testified that in his opinion it was "more difficult" for accused to adhere to the right than for most persons "although by no means impossible" (R. 56). This witness testified further that if there was derangement in the case of accused he regarded it as a "derangement of personality and character and would not classify it as a mental derangement" (R. 52). He understood a "constitutional psychopath" to be one who suffers from a peculiarity or defect of character, as a result of which he "comes into personal and social conflicts". A "hyperthymic" type is one characterized by excessive energy, some irritability, unusual talkativeness, brightness and sociability, but who "often fails to control himself" (R. 53). Psychopaths may be of all grades of intelligence (R. 58). The reputed creditable military service of accused was not incompatible with his condition as found because -

"the very qualities which I have described as a constitutional psychopathic state, hyperthymic condition, very often produce superficial brilliance, over-activity, increased capacity for work, mental alertness, all are part of the picture, along with possibly excessive sexual

desire, excessive physical and even mental activity, and a certain lack of complete self-control. Many of these qualities, it can be understood, would give the impression of superiority rather than inferiority." (R. 64)

Colonel Ralph G. DeVoe, Medical Corps, Division Surgeon, First Cavalry Division, a witness for the defense, who stated that although he was not a psychiatrist he had received special training and had had some experience in psychiatry, testified that he had known and generally observed accused from about 1928 to 1930, that he had specially observed and examined him on several occasions while accused was in the general hospital at Fort Bliss, and that he had studied the reports of the board of medical officers above noted, together with additional data (R. 89-91;98,102). He found evidences that accused was suffering from "multiple sclerosis", residuals of minute hemorrhages in the brain and spinal cord, which might have resulted from physical injuries, and might be "a sign of the onset of a distinct nervous disease" (R. 96). Witness believed that accused had a mental disorder or disease, a psychosis of functional character, which was probably of the manic depressive type, to which he was predisposed by heredity, but which might be schizophrenia (dementia praecox) (R. 102, 109,113,114). He might have long periods of normality with recurrent aberrations (R. 113). His insanity impaired his emotional control and rendered him incapable of distinguishing right from wrong (R. 96, 111) and rendered him not responsible for his actions at the time of trial or during the six months immediately preceding the trial (R. 96). Witness considered accused's defect to be in the "emotional and not in the mental sphere" (R. 122). In the period 1928 to 1930, witness observed in accused "a condition of exaltation which we describe as euphoria", an exalted state of "mental uplift" not justified by circumstances, an indication of mental disease and irresponsibility (R. 118). In witness' opinion, a "constitutional psychopath" could not render outstanding service in the army as accused had done (R. 93).

Dr. Chester D. Awe of El Paso, Texas, a specialist in diagnosis and internal medicine, with some training and practice in psychiatry, testified for the defense that he had examined accused, had read the reports of the board of medical officers and had considered additional statements from persons who had known accused (R. 124,128,132,134).

He found some evidence of multiple sclerosis, not in an advanced stage, but which might result in mental impairment in an advanced stage (R. 137,145). Witness did not consider accused mentally responsible for his acts (R. 136), this because of a "major psychosis" which had existed for some time (R. 134), but which was not sufficiently advanced for witness to state definitely whether it was of manic depressive or schizophrenic type (R. 141,153). His impression was that accused "was a manic depressive". He did not believe accused had been insane for as much as ten years (R. 141). Witness did not believe that it was possible for a constitutional psychopath, emotional type, to succeed as an army officer (R. 149). The defects of accused were generally emotional with "some evidence of mental deterioration" (R. 154). About eighty per cent of manic depressive cases have "manic depressive heredity" (R. 155).

Dr. Samuel D. Swope, a physician of El Paso, Texas, with ten years' practice in psychiatry, testified for the defense that he had examined the reports of the board of medical officers and various other statements referred to him and had conversed with accused four or five times over extended periods (R. 156-159,161). In witness' opinion accused belongs to the "class of dementia of a psychopathic personality" with intermittent periods of normalcy. Witness believed that accused "understands the wrong in a criminal act, (but) his inhibitive powers are so low * * * he is unable to restrain a criminal impulse" (R. 160,161). Accused appeared to be "insane" and not mentally responsible for his acts (R. 163,165), his psychopathic state possibly being classifiable as schizophrenic, manic depressive or multiple sclerotic. Witness was inclined to give him the latter classification but believed that he might become a manic depressive in a comparatively short time (R. 164).

Dr. A. B. Stewart, a psychiatrist with extended experience, superintendent of the New Mexico Insane Asylum, Las Vegas, New Mexico (R. 166,185), and a member of the American Psychiatric Association (R. 178), testified for the defense that he had observed accused on two occasions covering a total period of about six hours (R. 178), had examined the reports of the board of medical officers, had talked to persons knowing accused and had received other statements concerning him (R. 166). Witness believed accused to be insane and to

have been insane for "some time", having a "deteriorated personality" (R. 167) and being classifiable as a "psychopathic personality" (R. 173) - "superficially a successful individual, but as his life shows, he is unable to carry through" in all ways the success appearing in some ways (R. 177). He appeared to have a "major psychosis" (R. 177), exhibiting evidences of split personality or schizophrenia (R. 171,179). Witness did not reach a definite diagnosis of schizophrenia (R. 179) or of any other specific type of psychosis (R. 178). He was of the opinion that accused could not distinguish between right and wrong, and that he "would not know enough" to attempt to "cover up" his misdeeds. Should accused have sufficient mental capacity to attempt concealment of wrongdoing he would not be insane (R. 184). The history of accused as to heredity and early environment was indicative of his psychotic tendencies (R. 167-169). Witness did not believe it possible to determine whether accused had multiple sclerosis (R. 170,183), but the history of his physical injuries was suggestive of that condition and it could not be overlooked (R. 167, 170). Witness was informed that accused had been "guilty of abnormal sex conduct * * * demanding and acquiring sexual intercourse with his wife during her menstrual period", this over a considerable length of time during recent years, and believed that this circumstance, as well as reported outbursts in his home and other recent abnormal conduct of accused, was suggestive of progressive "deterioration" (R. 172,173). In witness' opinion, the "deviation from the normal" in accused commenced about ten years ago (R. 180). Had he been a "constitutional psychopath", the defects would have been present at all times and he could not have succeeded in the army (R. 177). The unusual reactions of accused in his home, differing from his normal official conduct, might be explainable by his overindulgence in alcohol (R. 191).

Affidavits by physicians who had read the reports of the board of medical officers and allied statements were received in evidence for the defense as follows:

Dr. Julian W. Ashby, psychiatrist, superintendent and chief of staff of the North Carolina State Hospital for the Insane, Raleigh, North Carolina. A maternal uncle of accused was at one time confined in affiant's institution. Affiant believed that the board had not given sufficient weight in its findings to the hereditary factor in

the history of accused, and was of the opinion that accused was a "manic-depressive type", mentally incapable of distinguishing right from wrong or of adhering to the right. (Def. Ex. 2)

Dr. John W. Myers, neuro-psychiatrist. Affiant stated that his views might be altered by examination of accused and interviews with his family, but was of the opinion, upon reading the matter before him that accused -

"is psychotic and that he suffers a mental disorder, perhaps best classified as Schizophrenia, with episodes of disassociation and psycho-sexual deviation. I am further of the opinion that the accused was not able to adhere to the right during such episodes." (Def. Ex. 4)

Dr. M. O. Blakeslee, medical superintendent of the New Mexico Home and Training School, Los Lunas, New Mexico, a Fellow of the American Psychiatric Association (R. 211).

"I gain the impression on reading the evidence presented that the accused is a person whose mental condition is classified under the head of a constitutional psychopathic inferior state. His antecedent psychotic history certainly colors the case with the uncertain heredity transmission possibilities, the evidence of increasing irritability following continued athletic events, the alternating extraversional attitudes in social contacts, and the irritability evidenced in his home, present evidence of a disassociation which might well be the result of a subconscious urge which would lead to actions otherwise inhibited, and which would negativate, at least temporarily, his ability to appreciate the right from the wrong in his conduct." (Def. Ex. 5)

Dr. Karl A. Menninger of the Menninger Clinic, Topeka, Kansas, a psychiatrist of exceptionally high standing (R. 55,97,177). Affiant stated that his opinion was tentative only, inasmuch as it was drawn wholly from study of the observations of others, an "entirely unsatisfactory method of coming to definite psychiatric conclusions".

He believed, however, in view of the history of the success of accused as an officer of the army, that he was not a "psychopathic personality". Affiant found no evidence that the "state" of accused was "constitutional". The term "hyperthymic personality" was unknown to affiant, but he thought the board of medical officers might have meant "hypomanic". He found evidence in a statement by the wife of accused and others of "excited paranoid periods" and of "repeated minor psychotic episodes with indications of a proximate major psychotic outbreak", and believed that accused "is probably insane and has been for some time".

"Taking the man's life history as a whole, it would be our impression that he was a man of exceedingly unstable personality who managed to maintain his mental integrity and his social adjustment by dint of extraordinary effort, exhibited in the form of intense application to work.
* * * One could say, then, that this man appears to have been slowly losing his battle against an imminent outbreak of a permanent psychotic (insane) state. If he proves to have been guilty of some kind of sexual manipulations of the girls in question, it can safely be concluded that such behavior was in all probability psychotic, in view of this history." (Def. Ex. 6)

Lieutenant Colonel Weatherby testified in rebuttal that in repeated examinations of accused he had not found any evidences of multiple sclerosis. Neither had witness observed in accused any symptoms of schizophrenia, a "psychosis of a shut-in, seclusive type of personality" usually occurring in young unmarried persons, and not developing "an extroverted, aggressive, sociable and open type of personality" as in manic depressive cases. The manic depressive psychosis usually occurs in older, married persons. (R. 217,218) Neither did he find any evidence of delusions (paranoia) (R. 235). Euphoria is an "abnormal sense of well being" not necessarily, but possibly, a symptom of manic depressive insanity (R. 218,241). Witness did not discern a degree of euphoria in accused which might be deemed abnormal, but did observe evidence of "some euphoria" (R. 241). The term "hyperthymic" is one used in a publication by a professor of psychiatry of Yale University (R. 219), and is not the equivalent of "hypomanic", which, used alone, defines a psychosis (R. 220). Witness discussed in detail Dr. Menninger's report (R. 221-236), and stated, in effect, that he found nothing therein

to change his views expressed as a member of the board of medical officers. Referring to Dr. Menninger's statement that accused "appears to have been slowly losing his battle against an imminent outbreak of a permanent psychotic (insane) state", witness testified that in his opinion "so far, he has not quite lost the battle. I think he has had a great deal to contend with in his psychopathic personality." (R. 236) Witness believed it would be difficult, but possible, for a constitutional psychopath to meet the demands of military service over a period of twenty years, but that an insane person could not "meet the demands if he were actually insane at any time" (R. 218,219).

15. It appears from the evidence that the members of the board of medical officers examined with marked competence and thoroughness all phases of the question of the mental responsibility of accused for his actions, giving special heed to the history of hereditary and environmental influences, as well as to the history of his career as an officer of the army, and to such history of his conduct as an individual as could be obtained from members of his family and elsewhere. The board's observation of accused was painstaking and prolonged. The conclusions of expert witnesses for the defense conflict with the conclusions of the board in crucial particulars, but, considering all of the testimony, the Board of Review is of the opinion that the court could not reasonably have reached any other conclusion than that the most convincing and reliable evidence before it was the reports of the medical officers and the testimony of the members thereof, and that it is shown beyond reasonable doubt that accused was sane at the time of the commission of his offenses and at the time of trial. It may be added that the evidence of the wrongful acts as developed at the trial subsequent to the inquiry as to the sanity of accused does not suggest to the lay mind any mental condition not usually suggested by the proof in criminal trials of offenses of the nature of those here involved. Other evidence of these wrongful acts, similar to that developed at the trial subsequent to the inquiry as to sanity, was considered by the expert witnesses.

16. Prior to the trial the defense requested the employment and attendance of seven certain expert witnesses at the trial. The convening authority disapproved the request on the grounds that a

board of medical officers had examined accused, that it was not shown that the employment of psychiatrists at government expense was necessary at that time, and that public funds for such purposes were limited. The defense was advised, however, that it might submit to the court a request for the employment of and the fixing of compensation for an expert psychiatrist. (Def. Ex. 1) No request of this nature was made to the court, but the correspondence embodying the original request and the action thereon was introduced in evidence by the defense to "speak for itself" (R. 87,88). Three of the expert witnesses requested appeared as witnesses for the defense (Drs. Stewart, Awe and Swope). Affidavits of two of the others (Drs. Menninger and Myers) were offered by the defense and received in evidence. A letter from a sixth (Dr. Franklin G. Ebaugh of Denver, Colorado) was offered in evidence and was attached to the record of trial for the information of the reviewing authority, but was not received in evidence (R. 210). There appears to have been no abuse of discretion by the convening authority in declining the employment of experts as requested; and no abuse of discretion by the court in not requesting the employment of experts other than those who appeared as witnesses.

17. The accused is 43 years of age. The Army Register shows his service as follows:

"Sgt. and stab. sgt. Tr. B, 1 Cav., N. C. N. G. 27 June 16; hon. dis. 15 July 18; 2 lt. of Inf., U. S. A. 1 June 18; accepted 16 July 18; vacated 14 Sept. 20.--2 lt. of Cav. 1 July 20; accepted 14 Sept. 20; 1 lt. 1 July 20; capt. 1 Feb. 34."

18. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized for violation of the 93d, 95th and 96th Articles of War. Confinement in a United States Penitentiary is authorized under Article of War 42 for the offenses involved in the Specifications, Charges I and II, recognized as offenses of a civil nature and so punishable by confinement in a penitentiary, that involved in the Specification, Charge I,

by section 276 of the Federal Penal Code (U.S.C. 18:455), and that involved in the Specification, Charge II, by section 814 of the Code of the District of Columbia (D.C.C. 6:37).

Walter M. Krimmel, Judge Advocate.
George A. Fraser, Judge Advocate.
Arthur H. P. P. P., Judge Advocate.

To The Judge Advocate General.

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War Department, J.A.G.O., MAY 14 1938 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Morton McD. Jones, 8th Cavalry.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support findings of guilty of an assault by accused upon Martha Rice Barnum, with intent to commit so-called statutory rape, - that is, with intent to have intercourse with a female under the legal age of consent; of an aggravated, indecent assault upon Anne Bradford; and of an indecent assault upon Joan Odor, as charged, and legally sufficient to support the sentence, and that the record of trial warrants confirmation of the sentence. I think the sentence is appropriate to the offenses and recommend that it be confirmed and carried into execution.
3. It was contended by the defense that accused was not, at the time of the commission of his wrongful acts, mentally responsible therefor, and similar representations are contained in correspondence to the War Department which accompanies the record. There is evidence that the mother of accused, now deceased, was insane and was confined for many years in an institution on that account, and that there has been insanity in other members of the family. Prior to the trial, accused was thoroughly examined by a board of medical officers, including skilled psychiatrists of wide experience. This board, after examination and close observation of accused over a period of more than three months and consideration of his history as supplied by members of his family and as obtainable from other sources, reached the conclusion that accused, largely through hereditary influences, has defects of personality and character but is not insane and is and has been mentally responsible for his acts. Experts, including civilian psychiatrists of high standing, testified, made affidavits or wrote letters in behalf of the defense to the effect that they believed accused to be insane and not mentally responsible for his acts. These experts had before them the reports of the board of medical officers and the history of accused as contained therein and certain other cumulative data, but their examination and observation of accused was relatively limited. In addition to the evidence

noted above there were forwarded to this office with the record of trial copies of reports by three medical officers on duty at the Station Hospital, Fort Sam Houston, Texas, the chief of the medical service of that hospital and two experienced psychiatrists, to the effect that they had studied the original report of the board of medical officers, including the history of accused, and concurred in substance with the conclusions of the board. These officers did not, apparently, observe or examine accused.

Considering all the evidence in the case, I am convinced that it was proved beyond reasonable doubt that accused was sane at the time of the commission of his acts and at the time of trial. In view of the thoroughness with which the mental condition of accused has already been examined, I can see no useful purpose in reopening the case at this time for further inquiry upon this issue.

Attention is invited to copies of letters, accompanying the record of trial, dated March 11, 1938, from Lieutenant Colonel T. E. Scott, Medical Corps, and Lieutenant Colonel F. E. Weatherby, Medical Corps, the two senior members of the board of medical officers, stating, subsequent to the trial, that in their opinion accused may, because of his constitutional psychopathic state, develop insanity under confinement. The possibility of insanity developing under confinement is frequently encountered in cases of this kind. I believe that the sentence should not now be disturbed.

4. The records of the War Department show the following:

Captain Jones was born in North Carolina, January 1, 1895. He received instruction in a normal school for two years. He was commissioned a second lieutenant, National Army, June 1, 1918, and served in France during the World War. Appointed to the Regular Army in 1920, he graduated from the Cavalry School, Troop Officers' Course, in 1923. He was promoted to captain, February 1, 1934.

Forty-seven efficiency reports have been rendered upon him. In twelve of these reports, covering about three years and ten months, his general rating was superior. In twenty-four of the reports,

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covering about six years and two months, his general rating was excellent or the equivalent. In eleven of the reports, covering about three years and nine months, his general rating was satisfactory or the equivalent. He has been commended upon numerous occasions, and his efficiency file contains several commendatory remarks concerning his horsemanship, skill in polo, and efficiency in managing horse shows and polo tournaments.

5. It is recommended that a United States Penitentiary be designated as the place of confinement.

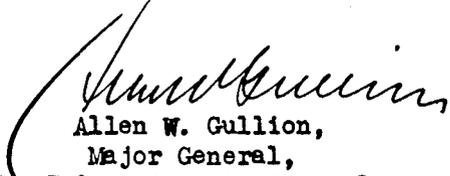
6. Consideration has been given to letters to the Secretary of War, attached to Captain Jones' 201 file, as follows:

a. From Honorable J. W. Bailey, United States Senate, dated March 8, 1938, with inclosure;

b. From Mr. Turner W. Battle, Department of Labor, Washington, D. C., dated March 9, 1938, with inclosure;

c. From Honorable Robert R. Reynolds, United States Senate, dated March 3, 1938;

and to a letter to the Secretary of War, attached hereto, from Honorable Frank Murphy, Governor of the State of Michigan, dated April 6, 1938.


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

4 Incls.

Incl. 1-Record of trial.

Incl. 2-Ltr for sig. of Secy. of War.

Incl. 3-Form of Executive action.

Incl. 4-Ltr to Secy. of War fr Gov. Murphy.

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

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Board of Review
CM 209627

MAY 13 1938

U N I T E D S T A T E S)	SEVENTH CORPS AREA
)	
v.)	Trial by G.C.M., convened at
	)	Fort Snelling, Minnesota,
First Lieutenant HUGH D.	)	April 19, 1938. Dismissal.
HALSTED (O-336455),)	
Medical Corps Reserve.)	

OPINION of the BOARD OF REVIEW
KRIMBILL, FRAZER and HOOVER, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt. Hugh D. Halsted, Med-Res., did, at Fort Snelling, Minnesota, on or about February 23, 1938, with intent to deceive Lt. Colonel William B. Borden, M. C., District Surgeon, Minnesota District, CCC, officially state to the said Lt. Colonel William B. Borden, M. C., that he (1st Lt. Hugh D. Halsted, Med-Res.) was a graduate of Northwestern University, Chicago, Illinois, in the year of 1932, having in his possession a diploma from the said university and that he had completed one year of internship in the Minneapolis General Hospital, or words to that effect, which statement was then known by the said 1st Lt. Hugh D. Halsted, Med-Res., to be untrue, in that he was not a graduate of the said university; was unable to present the said diploma and had not completed one year of internship in the said Minneapolis General Hospital.

Specification 2: In that 1st Lt. Hugh D. Halsted, Med-Res., did, at Fort Snelling, Minnesota, on or about August 1, 1937, with intent to deceive Captain Edgar B. Moomau, VMCR, District Adjutant, Minnesota District, CCC, and 1st Lt. Paul E. Arneson, Inf-Res., Assistant District Adjutant, Minnesota District, CCC, officially state to the said Captain Edgar B. Moomau, VMCR, and 1st Lt. Paul E. Arneson, Inf-Res., that he (1st Lt. Hugh D. Halsted, Med-Res.) had been promoted from 1st Lieutenant, Med-Res., to Captain, Med-Res., and that he had received notification of such promotion through his reserve division, or words to that effect, which statement was then known by the said 1st Lt. Hugh D. Halsted, Med-Res., to be untrue, in that he had never been so promoted nor has he ever been so notified.

He pleaded guilty to, and was found guilty of, the Charge 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 Article of War 48.

3. The evidence, together with the pleas of guilty, shows that about August 1, 1937, accused, while on active duty as First Lieutenant, Medical Corps Reserve, Assistant District Surgeon, Minnesota District, Civilian Conservation Corps, was observed wearing Captain's bars. Upon being questioned, he stated to the District Adjutant, Captain Edgar B. Moomau, Voluntary Marine Corps Reserve, and to the Assistant District Adjutant, First Lieutenant Paul E. Arneson, Infantry Reserve, that he had been promoted to Captain and that he had received notice of his promotion from his reserve division. He had not been so promoted and had not so received notice. (R. 10-16) (Specification 2) About February 23, 1938, while accused was Assistant Surgeon of the district, Lieutenant Colonel William B. Borden, Medical Corps, District Surgeon, interrogated him concerning a report or complaint of his lack of medical credentials received from the American Medical Association. Accused then stated that he graduated from Northwestern University Medical School in 1932 and had a diploma showing such

graduation, and that he had completed one year of internship in the Minneapolis General Hospital. Neither of these statements was true. (R. 7-10) Accused was never a registered student at the medical school. He had served about three months as an interne at the hospital. (R. 7-10)

4. The charge sheet shows that accused was commissioned a First Lieutenant, Medical Corps Reserve, on September 25, 1935, that he was placed on active duty the following day, and that he remained on such duty to the date of trial. Accompanying the record of trial is a copy of paragraph 3, Special Orders 327, Headquarters Seventh Corps Area, December 13, 1937, continuing his tour of active duty from February 1 to July 31, 1938.

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

Walter M. Krimmel Judge Advocate.
George W. Fagan Judge Advocate.
Hubert D. Hoover, 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 209651

MAY 13 1938

U N I T E D S T A T E S)	FOURTH CORPS AREA
)	
v.)	Trial by G.C.M., convened at
	)	Fort Moultrie, South Carolina,
Privates WILLIAM C. PALMER	)	March 22, 1938. As to each:
(6790342) and WILLIS D.	)	Dishonorable discharge and
MORRELL (6367090), both of	)	confinement for three (3) years.
Battery D, 13th Coast	)	Penitentiary.
Artillery.)	

HOLDING by the BOARD OF REVIEW
KRIMBILL, FRAZER and HOOVER, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private William C. Palmer, and Private Willis D. Morrell, both of Battery D, 13th Coast Artillery, acting jointly and in pursuance of a common intent, did, at Fort Moultrie, S. C., on or about February 26, 1938, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection, per mouth, with each other.

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, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentences but reduced the period of confinement in each case to three years, designated the United States Penitentiary, Atlanta, Georgia, 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 at about 2 p.m., February 26, 1938, accused were observed "milling around", apparently drinking, in the vicinity of an "observation station" at Fort Moultrie, South Carolina. At about 4 p.m. they were observed lying on a platform of the observation station, the platform being at the head of a stairway of some kind having six or eight steps. The two were on their left sides, facing each other. (R. 5) The space they occupied was narrow and they were very close together (R. 6). The belt and trousers of one accused, Palmer, were open and "partly lying back on his buttocks". His body was visible only from the "waist down". The other accused, Morrell, was seen to raise his head and shoulders and look about. (R. 5) The witness who observed accused reported what he saw and, a few minutes later, went to the platform with two officers (R. 5-8). Accused were then in the same positions. Palmer's buttocks were exposed. (R. 7,8) Morrell again raised his head "up over the other man's hips", his head not being over five or six inches from Palmer and his hand being on the lower part of Palmer's body (R. 6-8). The witnesses could not see the genitals of accused (R. 6). One of the officers started up the steps and asked accused for their names. They arose, each holding up his trousers. Morrell's, as well as Palmer's, trousers were open. (R. 6-8) Morrell had an erection (R. 8,9). In response to the officer's question, Morrell stated his name was "Johnson" and Palmer gave the name "Billy Smith". They also said they had gone on the platform to urinate. There was no physical evidence that they had done so. The officer ordered them to report to their organization under arrest, whereupon Morrell said to Palmer, "I told you we should not come up and that we would get caught". (R. 7)

For the defense, witnesses testified to the previous good reputation of accused as to character and veracity.

Accused Palmer testified that on the afternoon in question he and Morrell drank heavily, and that witness became quite drunk. The two being in the vicinity of the observation station, Morrell laid down on the platform and witness, after urinating, laid down alongside him to sleep. At this time witness "passed out" and knew nothing further until awakened by "some big man" coming up the steps. He then discovered to his confusion that his trousers were unbuttoned and "didn't know what to say". He did not recognize the "big man" as an officer, so gave a fictitious name. (R. 11-13)

Morrell made an unsworn statement that he and Palmer had been drinking heavily and that Morrell became ill, laid down on the platform and went to sleep. He thought Palmer went to barracks but on being awakened discovered that he was also on the platform. He did not know that the person who awakened him was an officer. (R. 13)

4. To establish the crime of sodomy, as charged, it was necessary to prove actual sexual penetration of the mouth of one of accused. Par. 149 k, M.C.M. It is well established that penetration may be proved by circumstantial evidence, but that strict proof is required. Dig. Ops. JAG 1912-30, sec. 1590; CM 206242, Slone. Mere conjecture or suspicion is not enough. The evidence in this case shows that accused assumed physical positions from which penetration by mouth might be accomplished, and the condition of their clothing, their appearance and actions, and their conduct and statements when interrupted are strongly indicative of an intent on their part to commit the offense charged. But the facts in evidence do not, in the opinion of the Board of Review, constitute sufficient basis for a reasonable inference that the mouth of either accused was actually penetrated. The following has heretofore been quoted by the Board of Review as pertinent in cases of this character:

"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." Hudson v. Commonwealth,
127 S. W. (Virginia Supreme Court of Appeals) 89.

In the opinion of the Board of Review, the evidence is not legally sufficient to support the findings of guilty of sodomy, in violation of the 93d Article of War, but is legally sufficient to support findings of guilty of the lesser included offense of an attempt to commit sodomy, in violation of the 96th Article of War.

Confinement in a penitentiary is not authorized by Article of War 42 upon conviction of an attempt to commit sodomy, that offense not being punishable by confinement for more than one year by any statute of the United States. CM 196922, Killalea; CM 192456, Ciambrone; Dig. Ops. JAG 1912-30, sec. 1613.

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 in each case as involves findings that accused, acting jointly and in pursuance of a common intent, did, at the place and time alleged, attempt to commit the crime of sodomy by attempting feloniously and against the order of nature to have carnal connection, per mouth, with each other, in violation of the 96th Article of War, and legally sufficient to support only so much of the sentence in each case as modified by the reviewing authority as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years at a place other than a penitentiary.

Walter M. Kimball, Judge Advocate.

George A. Frazer, Judge Advocate.

Richard H. Kober, Judge Advocate.

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

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Board of Review
CM 209677

MAY 24 1938

UNITED STATES)
))
 v.)
Second Lieutenant THOMAS R.)
CONNER (O-20133), 8th)
Engineers.)

EIGHTH CORPS AREA

Trial by G.C.M., convened at
Fort Sam Houston, Texas,
March 30, 1938. Dismissal.

OPINION of the BOARD OF REVIEW
KRIMBILL, FRAZER and HOOVER, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Thomas R. Conner, 8th Engineers, did, at or near San Antonio, Texas, on or about December 5, 1937, willfully and unlawfully fly an Army airplane dangerously low over the restricted area of San Antonio and its suburbs.

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

Specification: In that Second Lieutenant Thomas R. Conner, 8th Engineers, did, at or near Randolph Field, Texas, on or about December 5, 1937, knowingly and willfully apply to his own use Army airplane, Type BT-9B, A.C. No. 37-153, Squadron No. 243, of the value of about \$16,207.16, and about 100 gallons of gasoline, of the value of about \$9.70, property of the United States, furnished for the military service thereof.

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

Specification 1: In that Second Lieutenant Thomas R. Conner, 8th Engineers, with intent to deceive Staff Sergeant James C. Rosser, Private First Class Henry L. Latimer and Private First Class William C. Brazier, all of 46th School Squadron, A.C., who were then in the execution of their duty as members of the alert crew of 46th School Squadron, A.C., did, at Randolph Field, Texas, on or about December 5, 1937, wrongfully pretend to said Staff Sergeant Rosser, Private First Class Latimer and Private First Class Brazier that he was Second Lieutenant Mell M. Stephenson, Jr., Air Corps, and that he was authorized to fly Army airplane, Type BT-9B, A.C. No. 37-153, Squadron No. 243, well knowing that said pretenses were false, and by means thereof did deceitfully obtain from said Staff Sergeant Rosser, Private First Class Latimer and Private First Class Brazier, for his own use, said Army airplane, Type BT-9B, A.C. No. 37-153, Squadron No. 243, of the value of about \$16,207.16, property of the United States, furnished for use in the military service thereof.

Specification 2: In that Second Lieutenant Thomas R. Conner, 8th Engineers, did, at Randolph Field, Texas, on or about December 5, 1937, with intent to deceive Staff Sergeant James C. Rosser, 46th School Squadron, A.C., who was then in the execution of his duty as noncommissioned officer in charge of the alert crew of 46th School Squadron, A.C., state to the said Staff Sergeant Rosser that "I have a clearance, it is in my quarters," or words to that effect, which statement was known by the said Lieutenant Conner to be untrue in that he did not have such clearance.

He pleaded not guilty to the charges and specifications, and was found guilty of Charges I and II and their specifications, guilty of Specification 1, Charge III, except the words -

"that he was Second Lieutenant Mell M. Stephenson, Jr., Air

Corps, and", and

"and by means thereof did deceitfully obtain from said Staff Sergeant Rosser, Private First Class Latimer and Private First Class Brazier, for his own use, said Army airplane, Type BT-9B, A.C. No. 37-153, Squadron No. 243, of the value of about \$16,207.16, property of the United States, furnished for use in the military service thereof", and furthermore

"pretenses were", substituting therefor the words "pretense was",

guilty of Specification 2, Charge III, and not guilty of Charge III but guilty of violation of the 96th Article of War. 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 at about 10:45 a.m., Sunday, December 5, 1937, accused drove in an automobile to a hangar at Randolph Field, Texas, and inquired as to what person was to use a certain Army airplane, Type BT-9B, Air Corps Number 37-153, Squadron Number 243, which was standing nearby. He was told that it was for a Lieutenant Stephenson. (R. 15,16,19,32) It had been prepared for a cross-country flight and was fueled with 105 gallons of gasoline (R. 21) of the value of nine and seven-tenths cents per gallon. The airplane, property of the United States, was of the value of about \$16,207.16. (Pros. Ex. I) Accused departed and shortly thereafter borrowed from an officer acquaintance at the field a set of flying equipment (R. 57,58). At about 11 a.m. he returned to the hangar wearing the flying equipment and got into the airplane. Private First Class William E. Brazier, 46th School Squadron, Air Corps, a member of the alert crew at the hangar, approached and asked accused if he had his "clearance" (R. 21-23), an authorization required for cross-country, but not for local, flights (R. 76; Pros. Ex. H). Accused stated that he did not have a clearance and suggested "How about fixing it up for me?" Accused started the motor of the airplane (R. 22), and Brazier reported to Staff Sergeant James C. Rosser, noncommissioned officer in charge

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of the alert crew, 46th School Squadron, in the hangar office. Rosser instructed Private First Class Henry L. Latimer, a member of the Squadron alert crew, to make inquiries. (R. 16,33) Latimer went to the airplane and asked accused about the clearance. Accused said he did not "have time to go by and get" it. Latimer reported to Rosser, in the hangar office, that accused did not have a clearance, and returned to the airplane. Thereupon accused told Latimer that his "clearance was in his quarters" and asked Latimer to go to his quarters and get it for him. (R. 16) In the meantime Rosser telephoned the Post Operations Office, from which he received instructions not to permit the pilot to take off without a clearance (R. 33,49,55). Rosser then went to the airplane and told accused that he must have a clearance. Accused replied, "I have a clearance. It is in my room in the Bachelor Officers Quarters" (R. 33), gave a room number (R. 37,38), and asked Rosser to send someone for it. Rosser returned to his office and telephoned further. While Rosser was talking over the telephone (R. 33,34), accused ordered Brazier to "pull the blocks" (R. 22), saying he was going to "taxi around and get ready to take off" (R. 27). Brazier started towards the office but accused called him back, gave him "another order to pull the blocks and started getting out of the ship", whereupon Brazier removed the blocks and accused took off in the airplane and left the field (R. 22,23,34). Accused had attended the Air Corps Primary Flying School at Randolph Field from September 10, 1936, to September 27, 1937 (Pros. Ex. A), but on August 31, 1937, having been disqualified for further flying training, had been suspended from duty involving flying (Pros. Ex. B), and was not thereafter authorized to pilot an Army airplane (R. 64). He did not have a clearance for a flight on December 5, 1937 (R. 48).

A short time after leaving Randolph Field, accused flew the airplane over a residential area in the suburbs of San Antonio, Texas. For ten or fifteen minutes he flew at a low altitude, diving at least twice to within about fifty feet of the housetops and making some "90 degree banks" at a very low altitude. (R. 80-83,87) An Air Corps officer who observed accused testified that in his opinion, because of low altitude, it would have been impossible "most of the time" for accused to have landed without "crashing into something" had the motor failed (R. 83), and that accused flew "dangerously low" (R. 86). By a regulation issued by the Commanding Officer, Randolph Field,

applying by its terms to "all pilots who fly from Randolph Field", the city of San Antonio and suburbs were a "restricted area" over which flight at any altitude was forbidden (R. 68). Army Regulations (sec. IV, AR 95-15) and Department of Commerce Air Traffic Rules (Pros. Ex. G), issued under authority of the act of May 20, 1926 (U.S.C. 49:173), forbid the operation of aircraft over cities or other populous areas at an altitude lower than might permit gliding to a landing beyond the limits of such areas. The Department of Commerce Rules fix 1000 feet as the minimum altitude for safe flying over congested areas. (Pros. Ex. G)

After leaving the area in San Antonio where he had flown at low altitudes, as described, accused piloted the airplane to the vicinity of Laredo, Texas (Pros. Ex. A), near his station, Fort McIntosh, and landed it there. The distance from San Antonio to Laredo was about 150 miles. He immediately telephoned Randolph Field and reported the whereabouts of the airplane. (R. 62) The airplane was recovered at this place on December 6 in a slightly damaged condition, and with but four or five gallons of gasoline left in the fuel tank (R. 77-79).

For the defense, Lieutenant Colonel Edwin B. Lyons, Air Corps, testified that he had heard of cases in which officers had been punished otherwise than by courts-martial for low flying over restricted areas (R. 100,101). Colonel G. R. Lukesh, Corps of Engineers, testified that accused had served under him, on detached service, since about February 9, 1938, and that he had performed his duties in a very satisfactory - "probably excellent" - manner (R. 104). It was stipulated that, if present, Major Henry Hutchings, Jr., 8th Engineers, would testify that he had observed accused while under witness' command from about November 19 to December 6, 1937, and considered him a "distinctly superior young officer" (Def. Ex. 3). It was likewise stipulated that, if present, Captain Ole G. Hoas, 8th Engineers, would testify that for a short period, while assigned to witness' troop, accused was well liked by the enlisted men, that he was sober and reserved, and that witness rated him superior professionally. Accused exhibited signs of worry for two or three days prior to the airplane episode, and upon his return to Fort McIntosh after having flown the airplane he appeared to witness to be

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"extremely overwrought emotionally" (Def. Ex. 2). A map showing park and other areas without buildings in the vicinity of the scene of the low flying was introduced in evidence (Def. Ex. 1).

Accused made an unsworn statement that on the night preceding December 5, he had been drinking and had been "up most of the night". He saw the airplane and "got the idea that I was going to borrow a plane and go for a ride". He inquired about the plane in order to find whether it was fueled for a cross-country flight, and understood that it was meant for "a Lieutenant Stevens". He obtained flying equipment and returned to the hangar without "any plan * * * It was just a hair brain idea", but intending to get the airplane "by surprise". He told Brazier that he did not have a clearance. As to Latimer -

"I told him I would take full responsibility in the matter. I didn't have a clearance, and I don't remember exactly what I said to him, but I was trying to get him away from the plane, just stalling him, * * *." (R. 107)

Accused did not tell Rosser that he had a clearance and did not try to deceive him but "was just trying to get him away from the plane so I could get out and pull the blocks myself". He ordered Brazier to remove the blocks and started to climb out to do it himself, but Brazier "probably thought I was coming out for some other purpose" and complied with the order, whereupon accused flew the airplane from the field. Accused did not "know anything about the clearances". As to his low flying, he had the plane under control and believed he could have made a safe landing at any time.

"Although I did fly low, yet I was going 160 or 180 miles an hour, and to land you have to slow up to 80 miles an hour, and the speed there makes up for the lack of altitude in maneuverability. I was prepared to glide to an extent to where there would have been no damage to civilians or danger, although I might not have been able to make a safe landing as far as the airplane was concerned." (R. 105-109)

4. There is thus evidence that at the time and place alleged accused stated to Staff Sergeant Rosser, then in the execution of his

office, that he had a clearance in his quarters, as charged by Specification 2, Charge III. There is also evidence that at this time and place accused pretended to Sergeant Rosser and to Private Latimer, both of whom were on duty as members of the alert crew, that he had a clearance for a flight of the airplane described, and that, by necessary inference, he thereby pretended to them, as found under Specification 1, Charge III, that he had authority to fly the airplane. Admittedly, he did not have a clearance or other authority to fly the airplane. In his unsworn statement he denied having told Rosser that he had a clearance and stated that although he did not recall just what he had said to Latimer he had only temporized with him, but the testimony of Rosser and Latimer as to what was said to them is clear, and, in view of the admitted circumstances and course of action of accused, it must be concluded that the representations as to having a clearance were in fact made to these two enlisted men. The evidence shows that accused stated to Private Brazier that he did not have a clearance. He suggested, however, that the soldier "fix it up" and then proceeded as if he had authority to fly the airplane, although he did not have the clearance required for a cross-country flight. The actions and statements of accused under the circumstances plainly implied an assertion on his part of authority to fly the airplane, and it is believed that the finding under Specification 1, Charge III, of false pretenses to Brazier, as well as to Rosser and Latimer, was justified.

Specification 1, Charge III, as modified by the findings, is based on the transaction involved in Specification 2 of that charge in so far as the pretense and statement to Sergeant Rosser are concerned, and, to this extent, the offenses charged in these specifications are, in legal effect, duplications.

The misapplication of the airplane and gasoline, within the inhibition of the 94th Article of War, as alleged in the Specification, Charge II, was established by the admitted action of accused in flying the airplane for his own use and benefit, without authority. The values alleged were proved. The offense was complete when the property was devoted by accused to an unauthorized purpose. Par. 150 i, M.C.M.

The evidence shows, and accused did not deny, that he flew the airplane at a low altitude over a restricted area, as alleged in the Specification, Charge I. He denied in effect that his operation of the airplane over this area was dangerous to civilian life and property. The proof of the extremely low altitude at which he flew and of the maneuvers he accomplished leaves no reasonable doubt that his operation of the airplane was in fact dangerous, as alleged.

5. All members of the court joined in a recommendation that the sentence be commuted to reduction of 500 files on the promotion and relative rank lists, stating:

"Clemency is recommended because of the belief of each member of the court-martial that dismissal from the service is a very severe punishment. Dismissal will, in all likelihood, adversely affect the life and usefulness of this young man as an individual and, moreover, deprive the Army of an officer who, according to the evidence, has been highly rated by three officers."

6. The accused is 25 years of age. The Army Register shows his service as follows:

"Cadet M.A. 1 July 32; 2 lt. C. E. 12 June 36."

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of violation of the 94th and 96th Articles of War.

Walter M. Kinnell, Judge Advocate.
George A. Hayes, Judge Advocate.
Hubert W. Hooley, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., MAY 31 1938 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas R. Conner, 8th Engineers.
2. I 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, and recommend that the sentence be confirmed. In view of all the facts in the case, I believe that the ends of justice and discipline will be fully served if the sentence as confirmed be commuted to reduction on the promotion and relative rank lists as indicated below.
3. As noted in the opinion of the Board of Review, there is attached to the record of trial a unanimous recommendation by the court that the sentence be commuted to reduction of 500 files on the promotion and relative rank lists. Attached hereto, also, are letters from the defense counsel, a major and captain of the Corps of Engineers, from five other officers of the Corps of Engineers, including the three officers who testified in behalf of accused at the trial, and from a civilian employee of the Corps of Engineers, attesting to efficient performance of duties by accused while serving with the Corps of Engineers and to his creditable personal characteristics. The writers of these letters recommend clemency.
4. The efficiency report file of accused shows that the only efficiency reports rendered upon him have been two reports covering the period of his service at the Air Corps Primary Flying School from September 10, 1936, to September 27, 1937. His general ratings in the performance of duties in the ground school were excellent and satisfactory. His final rating in flying was unsatisfactory. Each report contained entries to the effect that accused was attentive to his duties and had the qualifications necessary to become an excellent officer.

Attached to the record of trial is a copy of a report of a board of medical officers which observed accused at the Station Hospital, Fort Sam Houston, Texas, from December 6, 1937, to January 21, 1938.

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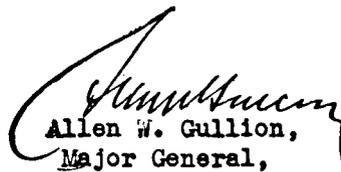
It contains findings of a diagnosis as follows:

"Constitutional psychopathic state, emotional instability. This condition is considered present to such a degree as to unfit the officer for the Military Service; it does not, however, constitute a physical or mental disability such as would indicate the action of a Retiring Board."

The 201 file of accused shows, however, that after consideration of a similar statement incorporated in a report of physical examination of accused, dated January 21, 1938, The Surgeon General, with the approval of the War Department, expressed the opinion that a diagnosis of constitutional psychopathic state did not justify a finding that accused was permanently incapacitated for active military service. As a result of this opinion a finding of incapacity for such service originally embodied in the report of physical examination was changed to a finding that accused was not permanently incapacitated.

5. The offenses of which accused stands convicted were such as to warrant dismissal in the absence of extenuating or mitigating circumstances. But the offenses appear in fact to have been characterized by rashness rather than by any deliberate design of dishonesty or of injury to the Government or to individuals. The views of the board of medical officers do not appear to be inconsistent with a probability that the immaturity and momentary bad judgment displayed by accused were faults of a correctable nature.

In view of the evidence of efficient performance of duties by accused as a member of the Corps of Engineers, the recommendations for clemency, and all the other circumstances in the case, I recommend that the sentence be commuted to reduction of 500 files on the promotion and relative rank lists.


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

- 4 Incls.
Incl. 1-Record of trial.
Incl. 2-Ltr for sig. Sec. War.
Incl. 3-Form of Executive action.
Incl. 4-File containing 8 ltrs
requesting clemency.

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

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Board of Review
CM 209825

JUN 17 1938

U N I T E D S T A T E S)	FIRST CORPS AREA
)	
v.)	Trial by G.C.M., convened at
	)	Headquarters First Corps Area,
Lieutenant Colonel JOHN	)	Army Base, Boston, Massachusetts,
M. STANLEY (O-6244),	)	May 20, 1938. Dismissal.
Medical Corps.)	

OPINION of the BOARD OF REVIEW
FRAZER, HOOVER and BETTS, Judge Advocates.

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

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

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

Specification: In that Lieutenant Colonel John M. Stanley, Medical Corps, was, at Fort Devens, Massachusetts, on or about April 9, 1938, found drunk while on duty as Medical Officer of the Day.

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

Specification 1: In that Lieutenant Colonel John M. Stanley, Medical Corps, having been detailed as Medical Officer of the Day, Fort Devens, Massachusetts, did, at Fort Devens, Massachusetts, on or about April 9, 1938, fail to perform his full duty as Medical Officer of the Day.

Specification 2: In that Lieutenant Colonel John M. Stanley, Medical Corps, having been detailed as Medical Officer of the Day, did, at Fort Devens,

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Massachusetts, on or about April 9, 1938, violate Paragraph 67, Hospital Order No. 1, Station Hospital, Fort Devens, Massachusetts, January 1, 1936, by failing to advise the post hospital as to where he, the said Lieutenant Colonel John M. Stanley, could be located.

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 evidence shows that accused was medical officer of the day at the Station Hospital, Fort Devens, Massachusetts, from 9 a.m., April 9, to 9 a.m., April 10, 1938 (R. 7,49). Paragraph 67, Hospital Order No. 1, January 1, 1936, of that hospital, in prescribing the duties of medical officers of the day, provided, among other things, that:

"During his tour of duty when not within the hospital he shall be within telephone call of the hospital. He will at least make one visit in the afternoon and one in the evening to the hospital. He will keep the nurse on duty and the non-commissioned officer in charge of quarters informed where he may be found at all times. * * *

"During his tour of duty he will be responsible for the care of sick in hospital in the absence of the Ward Surgeon; for the care of emergency cases arising outside the hospital when the Attending Surgeon is not available; * * *." (Ex. 1)

At about 7:45 p.m., April 9, a patient entered the hospital with an injured finger (R. 8). No nurse was on duty at the time (R. 13,54). The noncommissioned officer in charge of quarters who admitted the patient believed that treatment of the injury by a medical officer was necessary (R. 8) and telephoned the quarters of accused, but did not get an answer. He made three similar calls later and telephoned elsewhere, but did not reach accused. (R. 9) The enlisted wardmaster on duty attempted unsuccessfully to reach accused by telephoning his

quarters and elsewhere (R. 15,16). Accused had not advised the non-commissioned officer in charge of quarters where he might be found during the night, and did not at any time during the tour as officer of the day advise him as to his whereabouts while absent from the hospital (R. 9). It was customary for the officer of the day to report his whereabouts by telephone, usually to the soldier at the "front desk", whose duty it was to answer all telephone calls coming into the hospital (R. 10,12), but accused did not so report (R. 12,19, 20,22,23,26). Accused was not seen in the hospital during the night (R. 13,17,21,24). Another medical officer, Captain Roary A. Murchison, Medical Corps, was called and attended the patient (R. 43,51,52).

At about 7:30 p.m., April 9, accused appeared as one of 18 or 20 guests at a dinner party at the quarters of Captain Francis H. A. McKeon, 13th Infantry, at Fort Devens (R. 62). Martini cocktails and rye highballs were served, as were ginger ale and soda water (R. 65,66). Accused was observed "on two occasions with a glass" (R. 56). At about 10 p.m. the guests, including accused, went to a post hop at the officers' club (R. 63,68). At the club accused was observed drinking beer on two or more occasions (R. 38,60,90,99). He remained at the hop until about midnight, or a little later (R. 30, 31,37,70).

Lieutenant Colonel Joseph F. Crosby, Veterinary Corps, testified that he observed accused at the hop, talked to him two or three times, and noticed him during most of the dance intermissions. From "his loud talking and continuous loud laughter without * * * any apparent reason for it, and his general appearance" and "mannerisms", witness reached the conclusion that accused was drunk in the sense that "his condition was such to sensibly impair his faculties" (R. 31,32). He did not stagger when he walked (R. 35). Witness had known accused "rather intimately for some little time" (R. 32). Their relations at all times had been "most friendly". Witness himself partook of liquor at a dinner party he attended prior to the hop (R. 33).

Captain Roary A. Murchison, Medical Corps, testified that he was present at the hop until after midnight and observed accused during the course of the evening, noting that "his eyes were quite bright and lively; his face was somewhat flushed; he was very lively

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from a laughter point of view * * * gayety, you might say" (R. 38,39). Accused was accompanied by a lady, a "stranger at the club", who appeared to be under the influence of alcohol. Accused

"would dance with her occasionally and then go off and park her more or less, in the general slang, in the corner and leave her and go over to the bar, and while she was more or less flopping from side to side, nodding this way and that way, * * * I felt that a man in his normal--in possession of his right mental faculties would have certainly taken that lady, who was a stranger and more or less the butt of the regular army crowd there that night, would have taken her home or got her out of there, out of the position she was in, rather than leave her there throughout the evening." (R. 50)

Witness observed accused closely because he knew that he was officer of the day (R. 41). From witness' observation he reached a conclusion that accused was drunk in the sense that his "faculties were sensibly impaired from the performance of his duty as medical officer of the day" (R. 40). Witness had known and had associated professionally with accused for about three years (R. 36), and had "seen him various times when he had had many drinks, sometimes when he had had an occasional drink, and other times he went without * * * I could tell his reactions pretty well" (R. 43). Accused was not disorderly (R. 42). Witness had himself sipped "one drink" that night but had not consumed more than "one-sixteenth" of it (R. 44). Witness reported to the post surgeon "casually the next morning" the inability of the hospital to locate accused, and the condition of accused at the hop (R. 45). Witness had reported the inability of the hospital to locate accused on a previous occasion when he was officer of the day, and at that time witness had been instructed to report any repetition of such an occurrence (R. 45,46). Witness had occasionally been required to perform duties for accused and may have been slightly irritated thereby at the time, but had no animus towards accused, with whom he had "gotten along very nicely" (R. 46-48).

Nine officers testified that they had observed accused at the hop, to greater or less extent, and had seen nothing in his manner or appearance to cause them to believe that he was drunk (R. 56-94,99).

Of these witnesses, Major Frederick V. Edgerton, 13th Infantry (R. 56), Major H. Allen Winslow, Dental Corps (R. 60), Major Robert P. Bell, 13th Infantry (R. 69), Captain Francis H. A. McKeon (host at the dinner party attended by accused) (R. 64), Captain Ray E. Marshall, 13th Infantry (R. 80), and First Lieutenant Fred C. Barald, Medical Reserve Corps (R. 92,94), testified that their observation was sufficient to enable them to form the opinion that accused was not drunk while at the hop. One other officer who observed accused while at the dinner party before the hop testified that he saw nothing to lead him to question the sobriety of accused (R. 96). Major Winslow testified that although accused while at the hop was not, in witness' opinion, drunk, he "had a flushed face and his eyes were rather sparkly and bright" (R. 59). Major Bell testified that as senior line officer at the hop and chairman of the dance committee it was his "job to see who got drunk, so that we could take care of them". With respect to accused, he believed that he was not drunk but had been drinking to some extent and

"possibly his step was a little livelier than usual in his dancing, but in talking to him he talked rationally, and other than being possibly a little gayer than usual, why, that was the only thing."
(R. 71,72)

Asked whether he thought the mental faculties of accused were complete, this witness testified that he "wouldn't have let him operate on me" and "I think a doctor that has had one drink or two is in a different category than a doctor who is there in a capacity as an officer at a dance" (R. 72). Lieutenant Barald testified that he saw accused drink beer at the hop and that he observed him "laughing loudly" (R. 90,91) but did not associate his laughing with the drinking (R. 92).

Accused did not testify or make an unsworn statement.

4. The 85th Article of War provides that -

"Any officer who is found drunk on duty shall * * *
if the offense be committed in time of peace, * * *
be punished as a court-martial may direct."

Paragraph 145 of the Manual for Courts-Martial defines drunkenness within the meaning of the article of war as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties"; and defines the term "on duty" as including duty of an anticipatory nature, such as "an awaiting by a medical officer of a possible call for his services".

There is evidence that at the time and place alleged in the Specification, Charge I, accused, while on duty as medical officer of the day and as such specially subject to call for his professional services, was intoxicated to such a degree that his mental and physical faculties were sensibly impaired. Captain Murchison, a medical officer of some years medical experience, and Lieutenant Colonel Crosby, close friends of accused, were positive that accused exhibited at the hop tangible evidences of overindulgence in alcohol. Their testimony was supported in varying degrees by three other officer witnesses. Drinking by accused during the evening in question was proved. The senior line officer who observed accused believed that his faculties were so impaired as to disqualify him for surgery, and Captain Murchison and Colonel Crosby were convinced that accused was drunk within the definition of the Manual. Several officers who observed accused to some extent testified that in their opinion he was not drunk and did not display evidence of drunkenness. The weight to be given to the conclusions of the various witnesses was primarily a question within the province of the court which had an opportunity to observe the witnesses and, in the light of all the circumstances, judge the value of their testimony. The Board of Review is convinced that the court did not err in finding, upon all the evidence, that accused was in fact drunk on duty within the meaning of the 85th Article of War. In view of the conclusions of the court and the persuasive character of the evidence of drunkenness, the expressions of negative opinion do not engender any reasonable doubt of guilt as found under this charge and specification.

It was proved without contradiction that accused failed to advise the noncommissioned officer in charge of quarters at the Station Hospital at Fort Devens as to his whereabouts during the night of April 9-10, 1938. Neither did he report his whereabouts to any other military personnel on duty at the hospital that night.

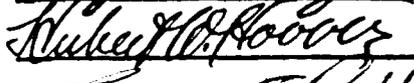
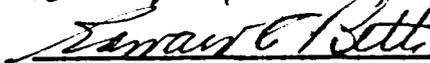
The hospital order described in Specification 2, Charge II, required accused, as medical officer of the day, to keep the noncommissioned officer in charge of quarters advised as to where he might be found at all times during his tour, and his failure to do so, directly or indirectly, was violative of the order, as charged in Specification 2, Charge II.

The evidence also shows beyond reasonable doubt that accused failed to perform his full duty as medical officer of the day on April 9, as charged in Specification 1, Charge II, in that it shows that he was not available when his services were specially called for and that he failed to visit the hospital during the night of April 9-10, as required by hospital orders. His failure to perform his duty as alleged under Specification 1, as well as his failure to advise the hospital of his whereabouts as alleged by Specification 2, Charge II, were properly found to be violative of the 96th Article of War.

5. Accused is 52 years of age. The Army Register shows his service as follows:

"(Non-Federal: 1 lt. Miss. N. G. 25 Feb. 08 to 22 Dec. 12.)--1 lt. Med. Sec. O. R. C. 10 July 17; accepted 13 July 17; active duty 17 July 17; vacated 24 Dec. 17.--1 lt. M. C. 4 Oct. 17; accepted 24 Dec. 17; capt. 24 Nov. 18; accepted 6 Apr. 19; maj. 17 July 29; lt. col. 17 July 37."

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized for violation of the 85th and 96th Articles 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 209862

JUN 23 1938

UNITED STATES)	SEVENTH CORPS AREA
)	
v.)	Trial by G.C.M., convened at
	)	The Cavalry School, Fort Riley,
Private 1st Class JULIAN D.	)	Kansas, May 19, 1938. Dis-
YAPLE (6856375), Machine	)	honorable discharge and con-
Gun Troop, 2d Cavalry.	)	finement for two and a half
	)	(2½) years. Disciplinary
	)	Barracks.

HOLDING by the BOARD OF REVIEW
FRAZER, HOOVER and BETTS, 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 Julian D. Yaple, Machine Gun Troop, 2d Cavalry, did, at Fort Riley, Kansas, on or about April 17, 1938, with intent to do her bodily harm, commit an assault on Freda Schubert, by willfully and feloniously attempting to cut her with a dangerous weapon, to wit, a razor.

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 two and a half 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 of trial for action under Article of War 50½.

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3. The evidence shows that at about 11:30 p.m., April 16, 1938, accused went to a room in the basement of Arnold Hall, Fort Riley, Kansas, occupied by Miss Freda Schubert, a domestic employed by an officer on the post, and knocked on the door (R. 6). A Private Sherrill was in the room with Miss Schubert (R. 6,12). Miss Schubert had frequently kept "dates" with accused and "right at first * * * thought a lot of him". His attitude when she had similar engagements with other persons was "not very nice" (R. 26) and on one such occasion, while he was drunk, he told her he "had a notion to choke her" (R. 10,26). When accused, on the night of April 16, knocked on her door, Miss Schubert refused to admit him, whereupon accused suggested that she was "afraid to let him in". She then allowed him to enter. He asked for iodine for some cuts he said he had suffered in a fight, and then asked for a knife she used for her finger nails and threatened to "tear up" the room until he found it. After the two had "argued" for some time, Miss Schubert told him to leave. Accused complied but returned a few minutes later, threw his cap and blouse on the floor, and told Miss Schubert to keep them. He again departed. About five minutes later Miss Schubert and Sherrill heard some glass break and went to a wash room where they found accused "sitting on one of the sinks cutting his arm" with a piece of broken glass. Miss Schubert tried to get accused to desist. Sherrill tried to get the glass and for this purpose struck accused and knocked him down. Sherrill secured the glass and accused left. (R. 6,12) At about this point Miss Schubert left the scene and reported to a member of the military police that accused had tried to commit suicide (R. 6,16). At about 11:45 p.m., accused went to his foot locker and obtained a sadler's knife and his razor (R. 24). Soon after Miss Schubert's report to the military police, the latter placed accused in custody and took from him the sadler's knife which he then had in his hand. He said that he had been in a fight and that he was going for his shirt or his shirt and blouse. (R. 16,17) Followed by three military policemen, he then went to the vicinity of Miss Schubert's room. She and Sherrill were in the hallway. (R. 17,21) Accused and Miss Schubert entered the room. Miss Schubert, while entering or attempting to leave, was caught in the doorway between the door and frame, accused holding the door closed against her. (R. 7,12,17) She screamed and was heard to say something about a razor (R. 20). The military policemen and Sherrill pushed the door from its hinges and forced their way into the room. Accused tried to take a razor

from under the pillow on Miss Schubert's bed, but, after Miss Schubert had shouted a warning, the military police took it from him and subdued him by striking him twice over the head with a pistol. (R. 7,13,17,18,21,22) When struck the first time, accused cursed and said to the man who delivered the blow that he would "know" him if he ever saw him again (R. 13,18,22). Accused was taken from the room and placed in a military police truck. When the truck started away accused seized the wheel and "tried to turn the truck over an embankment" (R. 22).

Miss Schubert testified that accused, upon his return to her room with the military policemen,

"said he wanted his cap and blouse. So I went in to get them and then I turned around and he had that razor open in his hand. He caught me in the door as I started to go out of the room. He was holding the door and standing over me with that razor open in his left hand. I couldn't get away and I was scared." (R. 6,7)

Witness stated that she was "scared to death" (R. 8). She thought that accused did not say anything while she was caught in the door (R. 10,11). He did not seize her, but with his right hand held the door against her (R. 8,10). He is right handed but took the razor from his pocket (R. 9) and held it in his left hand. Witness did not know how close to her it came. Asked if she believed that accused intended to cut her with the razor, she testified, "It was up in his hand like that" (R. 11). When the door was broken in, accused ran to witness' bed and hid the razor under her pillow (R. 7). Witness had seen accused drunk many times (R. 9) and believed that he was drunk at the time of the occurrences of the night in question (R. 9,11). He had been drinking, appeared to be unsteady in his movements (R. 11), and seemed to be "mean" as he sometimes became when drunk (R. 9).

Sherrill and two of the military policemen testified that accused pulled or attempted to "drag" Miss Schubert into her room at the time she became caught in the door (R. 12,17,21). Sherrill believed "at first" that accused was drunk but after a "little time elapsed I was not so sure by his actions" (R. 14). One of the

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military policemen testified concerning accused that he "noticed whisky on his breath" but did not form an opinion as to whether accused was drunk (R. 18). Accused was physically examined by a medical officer at some time on April 17 and was found to be not drunk at that time (R. 27; Ex. D).

Accused did not testify or make an unsworn statement.

4. The evidence thus shows that at the place and time alleged accused held an open razor of some description in his left hand while "standing over" Freda Schubert. At the same time, with his other hand, he held the woman between a door and its frame by pressing the door against her. The positions of the two were such that accused was apparently able to inflict injury upon the woman by cutting her with the weapon. Whether or not he intended to do her serious corporal hurt, his demonstration of violence, coupled with his apparent ability to inflict injury and the apprehension reasonably aroused in her, amounted to an assault. Par. 149 1, M.C.M. The following from an opinion of the Supreme Court of Massachusetts has been quoted with approval by a United States Circuit Court of Appeals, Price v. United States, 156 Fed. 950, 953:

"It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

The evidence does not show, however, that the assault was committed by accused with specific intent to do bodily harm, as alleged. He did not in fact harm the woman and did not attempt to cut her with the razor by making movements immediately adapted to accomplish such a battery. He was within striking distance, and had he intended to cut her he could no doubt have done so. He did not by words threaten her at the time of the transaction involved. There is

some suggestion of possible jealousy on his part and of his resentment towards the woman, and at one time accused threatened to "choke" her, but these circumstances are not significant in view of what he actually did and refrained from doing. His actions while in the room with the woman, when considered in the light of his previous and subsequent conduct and all the other circumstances in the case, were wholly consistent with an hypothesis that in drawing and holding the weapon in his hand his only purpose was to prepare to conceal it and prevent its seizure by the military policemen. If his actions be construed to indicate an intention on his part to inflict bodily harm, they were still consistent with an hypothesis that he intended only to continue his prior attempt to inflict self-injury. His acts, considered as a whole and interpreted in connection with all the circumstances, negative rather than support an inference of intent to injure Miss Schubert. Intent of an assailant to inflict bodily injury upon another may in some cases be inferred solely from the use and character of the weapon employed (6 C.J.S. 937), but in this case the Board of Review believes that the use of the weapon was such as to preclude such an inference.

Dependent upon the circumstances, the weapon held by accused might have become a dangerous one, as charged. A razor with an exposed blade, such as that held by accused (it was before the court but was not clearly described in the evidence), would no doubt be susceptible of use in such a manner as to be dangerous, but the mere fact that it was susceptible of such use is not enough to justify its characterization as a dangerous weapon. Only if actually used or attempted to be used in such a manner that it would be likely to produce death or great bodily harm, would it become a dangerous weapon within the law of assaults. Par. 149 m, M.C.M.; Price v. United States, 156 Fed. 950, 952. The evidence, as indicated above, does not establish such use or attempted use.

In the opinion of the Board of Review the evidence of record is not legally sufficient to justify a reasonable inference that in the commission of the assault accused intended to do bodily harm to another or that the assault was committed with a dangerous weapon. A simple assault only, for which the maximum punishment authorized by paragraph 104 c of the Manual for Courts-Martial is confinement at hard labor for three months and forfeiture of two-thirds pay per

month for a like period, is established.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involves findings that accused did, at the place and time alleged, commit an assault on Freda Schubert by offering to do her corporal hurt with a razor, in violation of the 96th Article of War; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

George A. Frayer Judge Advocate.
Hubert W. Parviz Judge Advocate.
Ernest E. Hill Judge Advocate.

were not entered. Evidence upon the general issue was introduced, and accused was found guilty of the charge and specification and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for six months. The reviewing authority approved the sentence, designated Fort Francis E. Warren, Wyoming, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence relating to the plea in bar of trial shows that about March 9, 1938, Captain Kenneth N. Decker, 76th Field Artillery, in command of Battery B of that regiment, following investigations of the transaction involved in the specification, directed "company punishment" of accused, apparently under Article of War 104, "for the theft of the slacks in question", such punishment consisting of restriction to quarters and extra fatigue for one week. The punishment was announced to accused at about 10:30 a.m. and he "accepted" it. Shortly after 12 noon of the same day, the company commander, having decided that he had been in error in imposing the punishment as appropriate for the offense involved, preferred charges and caused accused to be placed in confinement. (R. 5-8) Accused was restricted to barracks under the disciplinary punishment during the noon hour of March 9 (R. 8,9).

Upon sustaining the plea in bar of trial, the president of the court announced in open court that "There being no objections the case is dismissed" (R. 9).

When the court reconvened on May 17, 1938, following an announcement by the president of the court that the trial judge advocate "would proceed with the trial", the trial judge advocate stated, "At this time Private Benjamin is absent without leave". The statement of the trial judge advocate was not challenged by the defense counsel or otherwise, and the trial proceeded in the absence of accused. (R. 12,13) Attached to the record of trial is a certificate by the president and trial judge advocate of the court to the effect that accused absented himself without leave on April 8, 1938, and was not present at the trial at any time thereafter. It may be inferred from the statement and certificate concerning the

absence of accused that he was released from confinement following the action of the court sustaining the plea in bar of trial.

4. It is the opinion of the Board of Review, as hereinafter appears, that the court erred in proceeding with the trial in the absence of accused, and that this error was fatal to the validity of the findings and sentence. No opinion, therefore, is expressed by this holding as to whether the plea in bar of trial should finally have been sustained.

5. Paragraph 10 of the Manual for Courts-Martial provides:

"Effect of escape.--The fact that after arraignment and during the trial the accused has escaped does not terminate the jurisdiction of the court, which may proceed with the trial notwithstanding the accused's absence."

This provision reflects a principle long recognized in military law and expressed in Winthrop's Military Law and Precedents as follows:

"Where the accused has escaped. The fact that, pending the trial, the accused has escaped from military custody furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in his case; and the court may and should thus find and sentence precisely as in any other instance. The court, having once duly assumed jurisdiction of the offence and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath." (Reprint, p. 393)

The 1917 and 1921 editions of the Manual for Courts-Martial (par. 36) stated the principle in substantial conformity with the language last above quoted. The Board of Review believes that it is entirely clear that in the case now under consideration the court acquired jurisdiction of the offense and person through arraignment of

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accused, and that jurisdiction was not terminated by the wrongful act of accused in absenting himself without leave.

Assuming that the court had jurisdiction, this fact did not dispense with the necessity for accused's presence at the trial. Paragraph 55 of the Manual for Courts-Martial states:

"The presence of the accused throughout the proceedings in open court is, unless otherwise stated (e.g., 10, Effect of escape, and 83, Revision), essential."

The requirement that accused be present at all stages of his trial, while not going to the jurisdiction of the court (Frank v. Mangum, 237 U. S. 309, 338-343), recognizes a fundamental legal right of the accused, violation of which deprives him of the opportunity to appear in his own behalf and confront the witnesses against him. As appears from paragraph 10 of the Manual for Courts-Martial and the excerpt from Winthrop, above quoted, the right of an accused person to be present at his trial is one which may be waived, as by escape during trial. The Supreme Court of the United States has said:

"But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." Diaz v. United States, 223 U. S. 442, 455.

The Board of Review believes, however, that, under the circumstances of this case, the absence of accused did not operate as a waiver of his right to be present at his trial.

The principle of waiver can apply only where a person intentionally surrenders a right with knowledge that the right exists

and may be exercised. As stated by a United States Circuit Court of Appeals in Panther Rubber Mfg. Co. v. Commissioner of Internal Revenue, 45 Fed. (2d) 314, 316:

"A waiver is the intentional relinquishment of a known right. Waiver implies knowledge and is not applicable to one who has acted without full knowledge of all the facts."

In the usual case of escape by an accused during his trial, the principle of waiver applies for the reason that, with manifest knowledge of his jeopardy and of his right to be present at his trial, the accused so conducts himself as to evidence an intentional and voluntary abandonment of that right. But in the case now under consideration, the record of trial fails, directly or by reasonable inference, to show that accused knew in fact that his trial was to continue. On the contrary, the record of trial shows that the president of the court, following the original action on the plea in bar of trial, announced on April 7, 1938, in the presence of accused, that the case was dismissed. In view of this announcement, accused no doubt assumed, as he was justified in doing, that his trial would not continue. Thereafter, he was released from confinement and, on April 8, absented himself without leave. Being charged with knowledge of the law, he must be presumed to have known, despite the announcement, of the contingency that his trial might continue should the reviewing authority require reconsideration of the court's action on the plea in bar of trial. This did not, however, in view of the uncertainty inherent in the procedure prescribed for action on pleas in bar, charge him with presumptive knowledge that the trial would in fact continue. As observed, he could not and did not actually know that it would continue. The action taken by the court and the local military authorities plainly distinguishes the instant case from the usual one in which adjournment for further evidence or similar interruption of the trial leaves no uncertainty as to future trial and compels an inference of knowledge that the trial will be resumed. Without actual or presumptive knowledge that the trial would continue, there could be no basis for an inference of knowledge on the part of accused in this case of his right to attend the trial or of intentional abandonment thereof, and no waiver could occur.

The action of the court in proceeding with the trial in the absence of accused and without waiver of his right to be present was error which, in view of its nature, must be deemed to have injuriously

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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 and sentence.

Richard H. Hoover, Judge Advocate.
Walter S. Campbell, Judge Advocate.
Allen T. Paruley, Judge Advocate.

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

(155)

Board of Review
CM 209952

AUG 6 - 1938

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 HERBERT L. BERRY	)	May 16 and 17, 1938.
(O-11076), (F.A.) Quarter-	)	Dismissal.
master Corps.)	

OPINION of the BOARD OF REVIEW
McNEIL, BURDETT and HOOVER, Judge Advocates.

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

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

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

Specification 1: In that Captain Herbert L. Berry, Quartermaster Corps (FA), being at the time Sales Officer, Fort Jay, New York, did, at Fort Jay, New York, on or about October 15, 1937, feloniously embezzle by fraudulently converting to his own use the sum of \$728.57, property of the United States which came into his possession by virtue of his office.

Specification 2: In that Captain Herbert L. Berry, Quartermaster Corps (FA), being at the time Sales Officer, Fort Jay, New York, did, at Fort Jay, New York, on or about January 10, 1938, feloniously embezzle by fraudulently converting to his own use the sum of \$141.54, property of the United States which came into his possession by virtue of his office.

Specification 3: In that Captain Herbert L. Berry, Quartermaster Corps (FA), being at the time Sales Officer, Fort Jay, New York, did, at Fort Jay, New York, on or about February 3, 1938, feloniously embezzle by fraudulently converting to his own use the sum of \$2,090.57, property of the United States which came into his possession by virtue of his office.

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

Specification 1: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about December 4, 1937, in his duly appointed capacity as Sales Officer, and in violation of paragraphs 5 and 6, Army Regulations 35-160, cash his personal check in the sum of \$100.00, from funds of the United States in his possession.

Specification 2: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about December 10, 1937, in his duly appointed capacity as Sales Officer, and in violation of paragraphs 5 and 6, Army Regulations 35-160, cash his personal check in the sum of \$115.27, from funds of the United States in his possession.

Specification 3: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about January 4, 1938, in his duly appointed capacity as Sales Officer, and in violation of paragraphs 5 and 6, Army Regulations 35-160, cash his personal check in the sum of \$96.00, from funds of the United States in his possession.

Specification 4: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about December 13, 1937, wrongfully

make and utter to the Post Exchange Officer, Fort Jay, New York, a certain check in words and figures as follows:

"The Security Bank and Trust Company
of Lawton

Lawton, Okla., December 13, 1937.

Pay to the
Order of - - Post Exchange Officer - - - - - \$800.00
EIGHT HUNDRED AND no/100 - - - - - dollars
(SIGNED) HERBERT L. BERRY",

he the said Captain Herbert L. Berry, then well knowing that he did not have and not intending that he should have sufficient funds in the Security Bank and Trust Company, Lawton, Okla., for the payment of said check.

Specification 5: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about November 18, 1937, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange Officer, Fort Jay, New York, a certain check in words and figures as follows, to wit:

"The Security Bank and Trust Company
of Lawton

No. 126

Lawton, Okla., Nov. 18, 1937.

Pay to the
Order of - - Post Exchange Officer - - - - - \$800.00
EIGHT HUNDRED AND no/100 - - - - - dollars
(SIGNED) HERBERT L. BERRY",

and by means thereof did fraudulently obtain from the Post Exchange Officer the sum of \$800.00, he the said Captain Herbert L. Berry, then well knowing that he did not have and not intending that he should have sufficient funds in the Security Bank and Trust Company, Lawton, Okla., for the payment of said check.

Specification 6: In that Captain Herbert L. Berry, Quartermaster Corps (FA), being at the time Sales Officer, Fort Jay, New York, did, at Fort Jay, New York, on or about

February 2, 1938, wrongfully and wilfully fail to deposit with the Finance Officer, funds of the Sales Commissary in excess of \$200.00, as required by paragraph 12, Army Regulations 35-6660.

Specification 7: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about February 3, 1938, wrongfully and wilfully fail to deposit with the Finance Officer, funds of the Sales Commissary in excess of \$200.00, as required by paragraph 12, Army Regulations 35-6660.

Specification 8: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about February 5, 1938, in his testimony before a board of officers convened pursuant to paragraph 1, Special Orders No. 28, Headquarters Fort Jay, New York, dated February 4, 1938, make under oath a statement in substance as follows: That on or about February 3, 1938, he had borrowed \$1,000.00, in cash from Mr. Elliot Henry, which statement he then knew to be untrue.

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

Specification 1: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about November 18, 1937, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange Officer, Fort Jay, New York, a certain check in words and figures as follows, to wit:

"The Security Bank and Trust Company	No. 126
of Lawton	
	Lawton, Okla., Nov. 18, 1937.
Pay to the	
Order of - - Post Exchange Officer - - - - -	\$800.00
EIGHT HUNDRED AND no/100 - - - - -	dollars
(SIGNED) HERBERT L. BERRY",	

and by means thereof did fraudulently obtain from the Post Exchange Officer the sum of \$800.00, he the said Captain Herbert L. Berry, then well knowing that he did not have

and not intending that he should have sufficient funds in the Security Bank and Trust Company, Lawton, Okla., for the payment of said check.

Specification 2: In that Captain Herbert L. Berry, Quartermaster Corps (FA), being on duty as Sales Officer, Fort Jay, New York, did, at Governors Island, New York, on or about February 4, 1938, with intent to deceive his commanding officer, Lieutenant Colonel W. R. White, Quartermaster Corps, Post Quartermaster, Fort Jay, New York, and thereby conceal the embezzlement of funds of the United States in the sum of \$2,090.57, from the Sales Commissary at Fort Jay, New York, falsely state and demonstrate to the said Lieutenant Colonel White, that the said Commissary had been burglarized on or about February 3, 1938, which said statement and demonstration, he the said Captain Berry well knew to be false.

Specification 3: In that Captain Herbert L. Berry, Quartermaster Corps (FA), did, at Fort Jay, New York, on or about February 5, 1938, in his testimony before a board of officers convened pursuant to paragraph 1, Special Orders No. 28, Headquarters Fort Jay, New York, dated February 4, 1938, make under oath a statement in substance as follows: That on or about February 3, 1938, he had borrowed \$1,000.00, in cash from Mr. Elliot Henry, which statement he then knew to be untrue.

Following arraignment, the court granted a motion by the prosecution to amend Specification 1, Charge I, by substituting the word "Salvage" for the word "Sales" appearing therein (R. 15). The defense, by way of a plea in bar of trial, suggested that Specification 5, Charge II, and Specification 1, Charge III, as well as Specification 8, Charge II, and Specification 3, Charge III, involved duplications of charges, and asked the court to direct the trial judge advocate to inform the defense "upon which of these charges he will go to trial". The plea was denied (R. 16). Accused then pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the

record of trial for action under the 48th Article of War.

3. The transactions involved in Specifications 1 and 3, Charge I, Specifications 4 to 8, inclusive, Charge II, and Specifications 1, 2 and 3, Charge III, are closely related. The evidence with respect thereto is substantially as follows:

Accused, a Field Artillery officer detailed in the Quartermaster Corps, was on duty as Salvage Officer and Commissary Sales Officer at Fort Jay, New York, from about April 21, 1937, to February 5, 1938 (R. 150,151). About October 18, 1937, and prior thereto (R. 35), accused received as the proceeds of salvage sales of Government property held on September 17 sums totaling \$728.57 (R. 34-40; Pros. Exs. 1,2,3). On October 21 a completed Form No. 325 for deposit with the Finance Officer of the proceeds of salvage sales was placed on accused's desk, and an enlisted assistant invited his attention to it (R. 36). Subsequently, on two occasions, enlisted assistants of accused called his attention to the form and to the fact that the funds relating thereto had not been transmitted to the Finance Officer (R. 36,135). Deposit of the funds was made by accused at Fort Jay on November 18 (R. 27,40). On November 18 accused presented to the Post Exchange Officer at Fort Jay his personal check for \$800, drawn on the Security Bank & Trust Company of Lawton, Oklahoma, and asked to have it cashed, remarking that "This is a good check". The check was cashed, with the Exchange Officer's approval, from Post Exchange funds (R. 51; Pros. Ex. 4). Payment thereof was refused by the drawee bank because of insufficient funds. Accused had deposited \$343.14 on November 2, 1937, but his balance had been reduced to \$140.03 on November 18. No further deposits were made in the account until November 30 (Pros. Ex. 9). Accused was promptly advised of the rejection of the check (R. 60). The cashier of the exchange spoke further to accused about the matter, and on December 13 accused presented to her a second check, drawn on the same bank for the same amount, and asked her to "hold the check possibly one day until the funds he was presenting to the bank" had reached it (R. 60,61). About two days later the check was deposited for collection with a local bank. Payment was refused by the drawee bank on December 18 because of insufficient funds. On December 13 accused's balance in the bank was \$159.58. On December 18 his balance had been reduced to \$8.66. No deposit to the credit of the account was made during December (Pros. Ex. 9). The Post Exchange Officer spoke to accused on two or three occasions about the checks, and about January 31 told him that

unless the \$800 was paid by February 20 he would make an official report (R. 54). Accused paid \$800 in cash to the cashier of the Post Exchange on February 3, 1938 (R. 61,62). (Specification 1, Charge I; Specifications 4 and 5, Charge II; Specification 1, Charge III.)

Prior to the closing of the Sales Commissary at Fort Jay, at about 4:05 p.m., February 3 (R. 118), there was turned over to accused as Sales Officer and placed in his office safe in the commissary \$2090.57 in cash (R. 87,102,103). The safe was then locked (R. 87). No one other than accused had the combination thereto (R. 156-175). The cash thus left in the safe was an accumulation of cash receipts in the sales commissary between January 31 and February 3 (R. 82-101; Pros. Exs. 19-23). The noncommissioned officer who handled the funds prior to delivery to accused testified that he was uncertain as to the dates prior to February 3 on which the money was turned over to accused (R. 94), but did not think that he retained in his own possession from day to day any considerable amounts of cash (R. 88,94). AR 35-6660 requires sales officers to deposit their funds with a finance officer "whenever the cash on hand exceeds \$200.00". On February 3, after leaving the sales commissary, accused was observed at about 4:15 p.m. sitting in his automobile near the commissary building (R. 119,121). Between 4:25 and 5 o'clock p.m. he entered the Post Exchange at Fort Jay and delivered \$800 in cash, as indicated above (R. 62-64). On the morning of February 4 the \$2090.57 placed in the safe in the sales commissary on February 3, was missing (R. 103). At about 7:45 a.m., February 4, accused unlocked and entered the commissary. The safe doors were slightly ajar, and he called the attention of an enlisted man to the fact that the safe was open, looked at some envelopes which he took from inside the safe, and remarked, "I kept the money in these envelopes" (R. 124,125). A few moments later accused stopped in front of a door to the building and "kept looking at the door" (R. 125). The hasp on the inside of this door had apparently been "pried away from the door. It was bent in almost a half circle." An enlisted man attempted, without success, to pull the door open, whereupon accused, by applying both hands, succeeded in opening it (R. 126). Accused reported to the Post Quartermaster, Lieutenant Colonel W. R. White, Quartermaster Corps, that "his safe had been robbed the night before and \$2090.00 had been taken". The Quartermaster went to the office of accused, and accused showed him the safe and stated that the handle had been "turned as it would be if the safe were open" but that the outside doors thereof had been closed (R. 151). The doors to the commissary building had been locked on the evening of February 3 (R. 109,115-118,123,147,149). Except for the door with the broken hasp, all of the doors appeared still to be locked on the morning

of February 4 (R. 123). On the morning of February 4 all of the windows in the building were closed except two small ones which were open a few inches but stuck with paint (R. 130,154). All of the windows except the two small ones were barred (R. 153). The safe had not been injured except that there was some physical evidence that two small inner drawers which had contained the money had been forcibly opened (R. 152). Accused and a noncommissioned officer on duty in the commissary had keys to the building (R. 141). A master duplicate key was also kept in the office of the Quartermaster Property Officer (R. 160). On February 4 or shortly thereafter (R. 169), accused stated under oath (R. 171) to a board of officers appointed by paragraph 1, S.O. 28, Headquarters Fort Jay, N. Y., February 4, 1938, to investigate the loss of the funds, that he had borrowed about \$1000 from a friend, a Mr. Henry, a branch manager of the Western Union Telegraph Company, and that from this loan had paid the \$800 to the Post Exchange on February 3 (R. 172, 174). Mr. Elliott Henry, a manager and clerk of a Western Union Telegraph Company office in New York, testified that "right after Captain Berry's trouble" (R. 179), after a member of the board of officers had communicated with witness, accused telephoned witness and asked him to say yes "if anyone came in or called" or asked any questions (R. 181, 182). Witness testified that he had never at any time lent any money to accused (R. 178,182). Full reimbursement to cover the shortage of \$2090.57 was made by accused about February 16, 1938 (R. 196; Def. Ex. I). During the summer of 1936, monies totaling about \$190 were taken - apparently stolen - from the safe in the sales commissary while the commissary was in charge of a Captain Pelton (R. 146-148,177). (Specification 3, Charge I; Specifications 6,7,8, Charge II; Specifications 2 and 3, Charge III.)

For the defense it was stipulated that, if the wife of accused were called as a witness, she would testify that "she sold a piece of property belonging to her for approximately \$2100", and that the Government did not suffer any loss from the acts of accused (R. 196). Earl Speight Bridgers testified by deposition that accused had advanced him money during the past five years approximating \$2000, and had guaranteed witness' purchase of one or more trucks; that about November 1 witness wrote to accused that he would at an early date repay some of the money borrowed; and that about November 18 accused advanced witness \$800 in cash at New York (Def. Ex. A). Copies of correspondence between accused and a finance company in San Antonio, Texas,

indicating that accused applied for a loan from that concern on December 4, 1937, and that a loan of \$1000 was offered by the loan company on January 5, 1938, were introduced (Def. Exs. F,G,H). A sales officer who succeeded accused testified that the records of the sales commissary showed that on several occasions preceding February, 1938, cash in excess of \$200 had been kept in the commissary overnight, and that the officer who audited the accounts had not noted any discrepancies or irregularities (R. 197-199). The steward of the Post Exchange testified that he saw accused deliver \$800 to the Post Exchange cashier and that this might have occurred "around 4:25 o'clock or 4:30 o'clock" (R. 193).

Accused did not testify or make an unsworn statement.

The evidence thus shows that about the date alleged in Specification 1, Charge I, accused, as Salvage Officer, received monies of the United States totaling \$728.57, and that he did not deposit an equivalent amount with a finance officer until about one month later and until his attention had been repeatedly called to his delay. Under Army Regulations (par. 3 c, AR 30-2110) he was required to deposit funds of this character daily. His deposit was made on the day on which he cashed a worthless check for an amount substantially equal to the deposit. In view of the plain duty of accused promptly to render an accounting, his failure to account, the circumstances precluding the possibility that the delay was caused by mere carelessness or remissness, and the fact that the deposit was made only after he had cashed a worthless personal check and thus obtained funds sufficient for reimbursement, the Board of Review entertains no doubt that the Government monies mentioned were in fact fraudulently converted by accused to his own use, and thus embezzled, as charged. The mere failure to deposit the funds as required by Army Regulations amounted to the offense of embezzlement as defined by section 91 of the Criminal Code of the United States. U.S.C. 18:177. The defense introduced testimony purporting to account for the disbursement by accused on November 18 of the proceeds of his worthless check other than by its use to cover the defalcation, but under all the circumstances of the case this testimony is not convincing.

The making and uttering on November 18 and December 13 of the checks for \$800, set forth in Specifications 4 and 5, Charge II, and Specification 1, Charge III, were established. The circumstances leave no reasonable doubt that in negotiating these checks accused was aware of

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their worthlessness and had no reasonable expectation of having sufficient funds in the bank to meet them. The negotiation of the check of December 13, without sufficient funds in the bank to meet it, and without reasonable expectation that funds would be available to meet it, although it did not involve direct loss to the exchange, was discreditable and violative of Article of War 96. CM 208870, Moore. The transaction involved in the cashing of the check of November 18 carries clear implications of intent to defraud, as charged by Specification 5, Charge II, and Specification 1, Charge III. The offenses alleged by the latter specifications as violative of Articles of War 96 and 95 are duplications, and accused may properly be punished for the acts involved only in their most important aspect. Par. 80 a, M.C.M. So much of the plea in bar of trial as was based on the duplication was properly overruled. Par. 27, M.C.M.

With respect to Specifications 6 and 7, Charge II, alleging failure by accused to make deposits of commissary funds in excess of \$200, on February 2 and 3, 1938, respectively, the evidence shows that cash monies aggregating over \$2000 were in the actual possession of accused on February 3 prior to the end of the business day, and that he wrongfully failed to deposit them with a finance officer as required by paragraph 12, AR 35-6660. It must be inferred from the circumstances that his failure was wilful. The elements of the offense of February 3, charged by Specification 7, were thus established. Upon the evidence, however, it is quite possible that cash in excess of \$200 was not actually delivered to and in the possession of accused prior to February 3. Such being the case, the evidence is not legally sufficient to support the finding of guilty of Specification 6, alleging failure to make deposit on February 2.

As to Specification 3, Charge I, alleging embezzlement of \$2090.57, the evidence shows, without contradiction, that on February 3 accused, as Sales Officer, was in possession of the monies described, property of the United States, proceeds of cash collections by the Sales Commissary, and shows that he failed to produce the monies on February 4. All of the circumstances of the case, including accused's pressing need for funds, his production of \$800 in cash on the post during the evening of February 3, and his false account of the source of the \$800, point unmistakably to his fraudulent conversion of the Government funds. Accused contended that the funds had been stolen, but there was not in the circumstances proved any substantial support of his contention. There were no physical evidences of forcible entry of the building.

Such breaking thereof as occurred was of a nature to suggest that it was accomplished from the inside and not from the exterior. The safe, to which only accused had the combination, and which had been locked on the evening of February 3, was found unlocked on the morning of February 4. The finding of guilty of embezzlement appears to have been amply justified. The falsity of accused's statement and demonstration to the Quartermaster that the commissary had been burglarized, and the resulting deceitful concealment of his embezzlement, as charged in Specification 2, Charge III, are plainly inferable from the circumstances above outlined.

The giving of testimony by accused, under oath, before the board of officers described in Specification 8, Charge II, and Specification 3, Charge III, to the effect that he had borrowed \$1000 from Elliott Henry, was proved substantially as charged. The falsity of this testimony was clearly established. The offense involved, false swearing, was properly charged as violating Articles of War 96 and 95. The duplication in pleading, made a basis of the plea in bar of trial, was not objectionable, and need be considered only from the standpoint of punishment.

The restitution of the funds embezzled is for such consideration in extenuation as the circumstances may be found to warrant.

4. With respect to Specification 2, Charge I, and Specifications 1, 2 and 3, Charge II, the evidence is substantially as follows:

On December 4 and 10, 1937, and on January 4 and 10, 1938, accused cashed from funds of the United States, in his possession as proceeds of commissary sales, a series of four checks drawn by him on his personal account with the Security Bank & Trust Company of Lawton, Oklahoma, for \$100, \$115.27, \$96 and \$141.54, respectively (R. 67-69, 79,80; Pros. Exs. 6-8,10). The amounts of these checks were materially in excess of the commissary bills owed by accused for the months of October, November and December, 1937 (R. 79). All of the checks were paid in regular course (R. 71,72) except the check of January 10 for \$141.54. This check was delivered to the Finance Officer about January 18 (R. 69; Pros. Ex. 10). It was deposited by the Finance Officer to the credit of the United States, and, on January 22 payment thereof was refused by the drawee bank because of insufficient funds (R. 69,72; Pros. Ex. 9). At the end of the day of January 10 the balance in accused's account with the bank on which the check was drawn was \$69.18.

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No further deposit was made during January (Pros. Ex. 9). On January 31 a new check, which was paid in due course, was given by accused to the Finance Officer in lieu of the dishonored check (R. 72).

Thus the evidence shows, as alleged by Specifications 1, 2 and 3, Charge II, that accused cashed personal checks from funds of the United States in his possession on December 4 and 10, 1937, and on January 4, 1938. These checks were paid in due course. It was alleged by the specifications that the cashing of the checks was in violation of paragraphs 5 and 6, Army Regulations 35-160. Paragraph 5 of the regulation contains the wording of Revised Statutes 3651 (U.S.C. 31:543) prohibiting the "exchange of funds *** by any disbursing officer or agent of the Government", and paragraph 6 prohibits the "exchange" of Government funds by "any disbursing officer or agents of the War Department for *** personal checks". The word "agent", as used in the statute referred to, has been interpreted by The Judge Advocate General to include only disbursing or agent officers. JAG 230.7462, June 27, 1929. Accused was not a disbursing or agent officer and it appears, therefore, that the cashing of the checks did not involve violations of the Army Regulation cited. The findings of guilty of these specifications should be disapproved.

The transaction involving the worthless check of January 10, for \$141.54, was charged as embezzlement under Specification 2, Charge I. The circumstances under which this check was cashed show that at the time it was drawn, at the time it was turned over to the Finance Officer, and at the time it was presented for payment, accused did not have sufficient funds in bank to pay it. In view of the depletion of the account, it must be inferred that accused knew when he cashed the check that his bank balance was not sufficient to cover it, and did not intend to have sufficient funds in the bank to meet it when presented for payment in usual course. The application to his own use of the proceeds of the check, public monies intrusted to him, amounted to fraudulent conversion and embezzlement, as charged. Par. 149 h, M.C.M.; 29 Atty. Gen. 563. His mere act of cashing the worthless check from public funds in his safe-keeping was embezzlement as that offense is defined by section 89 of the Criminal Code, which reads as follows:

"Every officer *** who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any

portion of the public moneys intrusted to him for safe-keeping, shall be guilty of embezzlement ***."

The statute appears to apply to all officers of the United States to whom public monies are intrusted for safe-keeping, as well as to other persons specially charged by statute with the safe-keeping of public funds. Sec. 92, Criminal Code of the United States (U.S.C. 18:178); 13 Atty. Gen. 588.

5. Six officers, on the active list, or retired, testified for the defense that the reputation of accused for honesty, trustworthiness and military efficiency prior to the offenses here involved, was excellent (R. 189,191; Def. Exs. B-E).

6. During the trial defense counsel objected to the introduction in evidence of the checks of accused involved in Specifications 1, 2, 3, 4 and 5, Charge II, and Specification 1, Charge III (Pros. Exs. 4-8), upon the ground that they had been obtained through an unreasonable and unlawful search and seizure of the effects of accused. The objection was overruled (R. 43-48). In a brief by civilian counsel, attached to the record of trial, it is contended, as at the trial, that the checks were illegally seized and therefore illegally received in evidence.

The evidence relating to these checks shows that in the course of an investigation by the board of officers of the shortage of funds in the possession of accused, the checks were taken by members of the board from a locker trunk found in the office and custody of accused (R. 42,43). The trunk was a "government locker" and was "on the Commissary Officer's property account" (R. 57). By order of the commanding officer the trunk was opened in the presence of accused with a duplicate key obtained from the Post Quartermaster. Accused did not prohibit the opening of the trunk, but did not expressly consent thereto (R. 42,43).

Inasmuch as the trunk containing the checks was in apparent use by accused in the discharge of his official duties and was found in a public office, and in view of the circumstances then known indicative of fraudulent conversion by accused of public monies, it is believed that the search and seizure were not unreasonable or illegal. The Judge Advocate General has held that a search, by order of a competent commander, of public quarters occupied by an enlisted man on a military

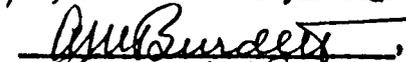
reservation, the order having been issued in the exercise of a sound discretion, was not "unreasonable" within the meaning of the search and seizure clause of the Fourth Amendment to the Constitution. JAG 250.413, July 23, 1930. See also CM 201878, Bashein. There does not appear to have been any abuse of discretion in the instant case.

7. Assignments of error other than as noted above and arguments of civilian defense counsel presented by his brief and orally, have been considered by the Board of Review.

8. The accused is 45 years of age. The Army Register shows his service as follows:

"Corp., Btry. A, 1 F.A., N.Y.N.G. 19 June 16 to 4 Nov. 16; pvt., corp., sgt. and sup. sgt., N.Y.N.G. and Btry. A, 104 F.A. 30 June 17 to 31 May 18; 2 lt. of F.A., U.S.A. 1 June 18; accepted 1 June 18; 1 lt. of F.A., U.S.A. 21 Sept. 18; accepted 26 Sept. 18; vacated 17 Sept. 20.- 2 lt. of F.A. 1 July 20; accepted 17 Sept. 20; 1 lt. 1 July 20; capt. 1 Nov. 32; Q.M.C. 27 June 36."

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings of guilty of Specifications 1, 2, 3 and 6, Charge II, but is legally sufficient to support the remaining findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of the 93d and 96th Articles of War, and is mandatory upon conviction of violation of the 95th 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.

(169)

Aug. 5, 1938

Board of Review
CM 209988

Sentence suspended by President

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,
Major JOSEPH P. CROMWELL	)	May 12, 13 and 14, 1938.
(O-6934), Adjutant	)	Dismissal.
General's Department.)	

OPINION of the BOARD OF REVIEW
McNEIL, BURDETT and HOOVER, Judge Advocates.

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

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

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

Specification 1: In that Major Joseph P. Cromwell, Adjutant General's Department, did, without proper leave, absent himself from his office and duties as Assistant Adjutant General at Headquarters Second Corps Area, Governors Island, New York, from about 9:00 a.m., August 10 to about 11:00 a.m., August 11, 1937.

Specification 2: In that Major Joseph P. Cromwell, Adjutant General's Department, did, without proper leave, absent himself from his office and duties as Assistant Adjutant General at Headquarters Second Corps Area, Governors Island, New York, from about 9:00 a.m., to about 4:30 p.m., September 14, 1937.

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

Specification 1: In that Major Joseph P. Cromwell, Adjutant General's Department, having been specifically asked whether or not he could properly perform the important duties of Adjutant General, First Army, at the First Army CPX 1937, and having been designated as Adjutant General of said First Army upon assurances, given by him, the said Major Cromwell, that he could be relied upon properly to perform said duties; and thereafter, having received a lawful order from Major General Frank R. McCoy, the said Major General McCoy being in the execution of his office, to proceed at the proper time from Governors Island, New York, to Fort Devens, Mass., and report to the Commanding General, First Army, on August 23, 1937, for temporary duty in connection with the First Army CPX, 1937, did, en route between said places, on said date, fail to obey the same.

Specification 2: In that Major Joseph P. Cromwell, Adjutant General's Department, having been assigned to duty as Adjutant General, First Army, at First Army CPX, 1937, Fort Devens, Mass., after he the said Major Cromwell, had given assurances that he could be relied upon properly to perform the duties of that important office, did, between Governors Island, New York, and Fort Devens, Mass., on or about August 23, 1937, wilfully incapacitate himself for said important military duty through voluntary overindulgence in intoxicating liquor.

Specification 3: In that Major Joseph P. Cromwell, Adjutant General's Department, having received a lawful order from Major General Frank R. McCoy, the said Major General McCoy being in the execution of his office, in words and figures as follows:

"HEADQUARTERS SECOND CORPS AREA
Office of the Corps Area Commander
Governors Island, New York.

September 15, 1937.

SUBJECT: Office Hours.
TO: Major Joseph P. Cromwell, A.G.D.
Governors Island, N.Y.

In view of the irregularity of your past duty attendance you will be present in your office at least between the following hours:

Weekdays, 9:00 a.m. to 12:00 noon
1:00 p.m. to 4:30 p.m., except that on days detailed to stay after 4:30 p.m., you will remain until at least 5:00 p.m.

Saturdays, 9:00 a.m. to 12:00 noon, except that on days detailed to stay after 12:00 p.m. you will remain until at least 1:00 p.m.

Holidays as per announced schedule.

One afternoon per week will be available for exercise.

By command of Major General McCOY:

G. A. MOORE (signed)
G. A. MOORE,
Major, A.G.D.,
Acting Adjutant General."

did, repeatedly, at Headquarters Second Corps Area, Governors Island, New York, between the dates of September 15 and October 7, both dates inclusive, 1937, wilfully fail to obey the same.

CHARGE III: (Nolle prosequi.)

Specification: (Nolle prosequi.)

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

Specification 1: In that Major Joseph P. Cromwell, Adjutant General's Department, was, at Governors

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Island, New York, on or about October 12, 1937, found drunk while on duty as Assistant Adjutant General at Headquarters Second Corps Area.

Specification 2: In that Major Joseph P. Cromwell, Adjutant General's Department, was, at Governors Island, New York, on or about December 14, 1937, found drunk while on duty as Assistant to the Officer in Charge of Reserve Affairs at Headquarters Second Corps Area.

Specification 3: In that Major Joseph P. Cromwell, Adjutant General's Department, was, at Governors Island, New York, on or about December 28, 1937, found drunk while on duty as Assistant to the Officer in Charge of Reserve Affairs at Headquarters Second Corps Area.

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

Specification: In that Major Joseph P. Cromwell, Adjutant General's Department, on duty in the Office of the Officer in Charge of Civilian Component Affairs, Headquarters Second Corps Area, Governors Island, New York, did, without proper leave, absent himself from his duty at Headquarters Second Corps Area, from about 9:15 a.m., April 13, 1938, to about 8:12 a.m., April 14, 1938.

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

3. The evidence relating to Specification 1, Charge I, alleging absence without leave on August 10-11, 1937, shows that during the day of August 10, 1937, accused was absent without authority from his

office and from his duties as Assistant Corps Area Adjutant, Headquarters Second Corps Area, Governors Island, New York, and that he did not return to his office and duties until about 11 a.m., August 11 (R. 19). August 10 fell on a Tuesday, the day assigned to accused for his regular half-day weekly exercise (R. 22). At about 9:25 a.m. he telephoned to a warrant officer clerk on duty in the office of the Corps Area Adjutant that he would be in the office in about thirty minutes (R. 177). The immediate commanding officer of accused, Colonel Raymond S. Bamberger, Adjutant General's Department, Corps Area Adjutant, did not enter the unauthorized absence on the morning report for the reason that he did not know whether accused had been absent from the post (R. 25). On August 12, however, Colonel Bamberger addressed an official letter to accused stating that an explanation of the unauthorized absence was desired. On August 16 accused returned the letter by indorsement as follows:

- "1. No explanation is offered. I telephoned the office and thought possibly that that was sufficient.
- "2. If I am to be treated as a civil service employee, I can conform of course." (Pros. Ex. 1)

Accused testified that he telephoned to Colonel Bamberger but that the clerk "took the call". Accused asked whether anything of importance had come into the office. The clerk's reply was satisfactory and accused asked him to tell Colonel Bamberger that accused had called. His "business in town took longer" than he expected, and, that being one of his recreation days, on which days he habitually left his office at noon, he did not call again. (R. 212) Accused did not, when testifying, recall where he was on August 10 and 11, but thought he was in New York City on the morning of August 10 and the night preceding. He telephoned from "the barber shop". (R. 225) The letter from Colonel Bamberger was not returned to accused for explanation further than that given by his indorsement of August 16. Accused noted that he was not carried as absent without leave on the morning report, but also noted that copies of the letter and indorsement referred to were attached to an efficiency report upon him. (R. 212) He had no time off for exercise during the week other than on August 10 (R. 213).

The evidence leaves no doubt that accused was absent without leave from his office and duties between the hours and dates alleged in Specification 1, Charge I. In his explanatory communication submitted soon after his absence, he protested, in effect, the fairness of the official action treating him as absent without authority, and invited attention to his telephone call. It is not suggested by the evidence that the telephone call involved any grant of authority for the absence, but the fact that it was made may properly be considered, in connection with all the circumstances, in possible extenuation of the offense. Violation of the 61st Article of War was established.

4. The evidence relating to Specifications 1 and 2, Charge II, alleging failure to obey an order to proceed to Fort Devens, Massachusetts, and report for a specific duty on August 23, 1937 (Specification 1), and wilful incapacitation for duty about that date through voluntary overindulgence in intoxicants (Specification 2), is substantially as follows:

Early in August, 1937, Colonel Ulysses S. Grant, 3d, General Staff Corps, Chief of Staff of the Second Corps Area and of the First Army, told accused that he had tentatively selected him as Adjutant General of the First Army during an approaching Command Post Exercise (CPX), but, in view of certain difficulties accused "had gotten into", wanted to be certain he could depend on accused to handle the duties of that assignment. Accused stated that Colonel Grant could depend on him to perform the duties in a thoroughly satisfactory manner. (Pros. Ex. 4) Following this conversation, accused was, on August 11, assigned as Adjutant General of the First Army, and, with other officers, was, by command of Major General Frank R. McCoy, Commanding General of the Second Corps Area, ordered to proceed to Fort Devens, Massachusetts, to report there on August 23, 1937, for temporary duty in connection with the CPX (Pros. Exs. 4,5). Accused departed from Governors Island, New York, on August 22 (R. 63; Pros. Ex. 8). He reported at Fort Devens, Massachusetts, at 9:49 a.m., August 24 (Pros. Exs. 9,10). A morning report (First Army) entry reciting that accused joined on August 24 was changed following a conversation between accused and an Acting Adjutant General of the First Army CPX (an officer not under the direction of accused) to recite that accused

joined August 23 (Pros. Exs. 11,12; Def. Ex. A). He appeared at his office at Army Headquarters at about 11 a.m. and stayed there for about half an hour, during which time he gave to his clerk, Warrant Officer Arthur B. Wood, some instructions as to the office work (R. 193). Colonel Grant went to accused's quarters following luncheon and asked accused the reasons for his delay. Accused referred to bad weather of the day before and stated that, having been delayed, he had attempted to telephone. He suggested that inasmuch as there had been nothing special to do on the previous day he had not failed in his performance of duties. Accused said that he would go to his office at once but Colonel Grant told him that he was not in a proper condition to do so, but should "get himself into shape" by 4 p.m. for a staff conference called for that hour. (Pros. Ex. 4)

On August 24 the duties of accused included supervision of the unpacking of files and other equipment, "arrangement of his office", allocation or subdivision of duties among the personnel of his office, and issuance of any instructions the headquarters might desire (Pros. Ex. 4).

Warrant Officer Wood testified that when he first saw accused at 11 a.m. on August 24, accused appeared to be sober, and "did perform his duties" (R. 193). Witness, however, believed accused had been drinking, for he had an odor of liquor on his breath, his eyes were bloodshot, he was "physically nervous" and he exhibited tremors in his hands (R. 195). Accused was observed by another witness lying in his bunk in quarters, with his clothes on, shortly after noon (Pros. Ex. 6). Colonel Grant testified that when he went to accused's quarters after luncheon, accused was sitting on his bunk and appeared to be "suffering distinctly" from a "hang-over" - he "looked as though he had had a day or night of dissipation, and the evidences of that was that his eyes were bloodshot, his complexion was distinctly off color and he showed every sign of great nervous tension; a certain amount of trembling and having to concentrate tensely when he spoke and made his replies". In witness' opinion accused was not, due to his condition, fit to undertake the performance of his duties. (Pros. Ex. 4) Captain Lawrence Ladue, Cavalry, Aide-de-camp to the Commanding General,

First Army CPX, testified that at Colonel Grant's request he accompanied that officer to the quarters of accused at about 1 p.m., August 24. He saw accused sitting on his bed putting on his shoes. Accused arose to acknowledge Colonel Grant's presence and "apparently made a certain effort to answer questions put to him". He seemed to have a "severe hang-over" and to be "suffering from the effects of drinking". (R. 43,44) Colonel Jay W. Grissinger, Medical Corps, Corps Area Surgeon and Chief Surgeon, First Army, testified that he saw accused several times in quarters during the late afternoon of August 24 or the morning of August 25, and at one time talked to him for a few moments. Although accused impressed witness as being "clear of mind", he was extremely nervous, having a tremor over his whole body, his face was flushed and his eyes were "injected". Witness believed that the condition of accused was the result of "overindulgence in alcoholic liquors". Witness told the Commanding General of accused's condition. (Pros. Ex. 7) Colonel Thomas C. Cook, General Staff Corps, Assistant Chief of Staff, G-1, First Army CPX, testified that he observed accused at about 4 p.m., August 24, in the course of a staff conference and, from his appearance and actions, reached the conclusion that he was drunk in the sense that his mental and physical faculties appeared sensibly to be impaired through the use of intoxicants (R. 47-49,52,61), and that he was not fit for the full performance of his duties (R. 49). Witness spoke casually to accused but did not have a conversation with him (R. 47). Accused appeared to be overzealous in attempting to introduce his assistant to the Commanding General (R. 48,54). Witness saw accused at about 11 a.m., August 25, and observed that he was then "in a very agitated, nervous and shaky condition" (R. 48). Witness said to him: "For heavens' sake, you cannot take another drink. Cromwell, you just cannot do it", and accused replied: "I know that; that is the reason I am this way, if I could only have another drink." Witness then told him: "Don't you take a drink as long as you are in this town." (R. 53)

Colonel Grant testified that the performance of duty by accused after August 24 was "distinctly excellent or superior" (Pros. Ex. 4). Colonel Cook testified that he had many official contacts with accused during the CPX, and that beginning about August 26 accused performed his duties in a very efficient manner - "we could not have

had a better person" (R. 56).

For the defense, Mr. B. B. Fowler testified that through a mutual friend he arranged to accompany accused, in the latter's automobile, from New York City to Boston, Massachusetts, on August 23. Accused telephoned witness in New York that his car was being repaired and that he would pick witness up as soon as he could get the car. They left New York about noon of August 23. It was raining. The traffic was heavy and they had some trouble with the car which necessitated stops for repairs. They drove slowly and arrived in Boston at about 10 or 11 p.m. (R. 178-180) Witness did not see accused take a drink, and "saw no evidence of his being anything other than sober" (R. 181). Accused used telephones two or three times en route, and said something about attempting to communicate with Fort Devens (R. 180). Colonel William H. Jones, Jr., Infantry, testified that he was on duty at Fort Devens on August 23 as "G-1, Umpire, First Army Base Exercises". Accused telephoned him about 10:30 p.m., August 23, and said that he was in Boston, that he had had trouble with his car en route and would be late in reporting. He asked whether it would be "all right for him to come out on the morning of the 24th". Witness had no authority to extend accused's time for reporting, and told accused so, but also told him that since it was raining "if I were in his position that I would report in the morning". (R. 184,185). Witness did not gain the impression that accused was at this time in any degree intoxicated (R. 186,187). Witness saw accused between 2:00 and 2:30 p.m., on August 24, and talked to him for about forty-five minutes but did not observe any mental or physical impairment in him and believed him to be normal (R. 186). He also saw accused two or three times on August 25, and at these times observed no evidences of abnormality (R. 187). During the CPX, witness umpired "reports and various other matters that Major Cromwell submitted", and believed that his work was of superior quality (R. 187,188). Considering the nature of such of the duties of accused on August 24 as were known to witness and the personnel available to assist in performing them, witness believed that only about five or ten minutes of accused's time was required therefor (R. 188,189). Captain John W. Haubernestal, Engineer Reserve, testified that while on active duty as Assistant Army Engineer, First Army CPX, he observed accused at the staff conference on August 24,

and saw nothing abnormal about him. Witness' employment in civil life required him to pass upon the sobriety of many men employed by a railroad company. In the light of his experience, he deemed accused fit for his duties. Witness also saw accused at dinner and after dinner on August 24, and saw him and transacted official business with him on August 25. In witness' opinion accused was not drunk or unfit for his duties at any time at which witness saw him. (R. 199-203)

Accused testified that he did not recall that Colonel Grant specifically asked him whether he could properly perform the duties of Adjutant General in the CPX, but accused did tell Colonel Grant that he would do as well as possible (R. 216,217). Accused's automobile was damaged in a collision in New York City on August 22 and he could not obtain repairs until the following day. He "probably had two or three" drinks that evening, but did not become drunk. Before lunch on August 23, he had one or two drinks of Scotch whisky, as he recalled.(R.229) He had no recollection as to whether he drank en route to Boston and had he been asked whether he

"took a drink on that occasion from force of habit I would have answered: 'Yes.' It was news to me that I did not. I remember talking to Mr. Fowler about this and he said it was terrible weather and for that reason we did not have any liquor." (R. 214)

In Boston, being tired, he had two or three drinks but did not become drunk (R. 215,231). En route he tried two or three times to reach the Adjutant at Fort Devens by telephone (R. 232) but did not succeed, and, after arrival in Boston, being "worried about the matter", called Colonel Jones. He asked Colonel Jones:

"what was doing there and I believe he stated, as I remember it, 'Nothing but organization duties.' He told me that on account of the weather and because there was nothing important doing there that I should stay over in Boston and come on over to camp the next morning. I did what he stated. I knew he did not have

authority to grant me permission to stay in Boston. However, I had accepted telephone reports in my position many, many times and I thought apparently Devens did." (R. 215)

Accused knew he was not missing any important duties. Had he thought that there was any reason for continuing on to Fort Devens the night of August 23, he could and would have done so. (R. 216) It occurred to him that he might telephone Colonel Grant but he decided that it was not "worthy of bothering him with" (R. 233). He later told Captain Prouty, Adjutant at Fort Devens, of his conversation with Colonel Jones and asked him to consider this conversation as a report as of August 23. Captain Prouty agreed (R. 234). The Adjutant General, First Army, had nothing to do with the records of presence or absence of personnel connected with the CPX (R. 215). The duties of accused on August 24 were very light, but he went to his office and discussed with Warrant Officer Wood the arrangements that had been made. Mr. Wood "was thoroughly prepared to do that job and I normally give him very few instructions". Accused "could have attended to everything that needed attending to". He was "a little shaky" on August 24 because he had had very little sleep the night before, and his clothes were disheveled because he had worn them on the trip to Boston. (R. 218) Having had but little sleep on the night of August 24 as well, because of a poor bed, he was a "little shaky" on August 25 (R. 219). Asked as to how many drinks would be required to give him a "hang-over", accused testified:

"if a hang-over means that you are nervous, have a headache, are a little foggy, and not quite as keen as you are normally - that is what it means to me - I might say that I have had a hang-over from two or three bottles of beer, beer particularly incidently." (R. 231,232)

It is clear from the evidence that after having been specially asked as to whether he could be depended upon to perform the duties of Adjutant General of the First Army CPX, and after having given assurances in the affirmative, accused failed to obey such part of the order given him by the Corps Area Commander as required him to report for such duty at Fort Devens on August 23, 1937, as charged in

Specification 1, Charge II. He reported on the following day, having in the meantime, on August 23, communicated by telephone with an officer, Colonel Jones, at Fort Devens. It is not contended that Colonel Jones had authority to excuse accused's failure to report in person at Fort Devens or that he pretended to grant such authority. The fact that accused did communicate with Fort Devens tends to demonstrate that he was fully aware of his duty to reach Fort Devens on the day specified in the order. His communication by telephone, together with such assurances as were given him by Colonel Jones in the course thereof are for consideration as possible elements in extenuation. Violation of Article of War 96 was established.

With respect to the allegations of Specification 2, Charge II, that on or about August 23 accused wilfully incapacitated himself for his duties in connection with the Army CPX, through excessive indulgence in intoxicating liquor, the testimony shows that he was under the influence of liquor on August 24 in sufficient degree, in the opinion of the First Army Chief of Staff, to require his temporary absence from his duties. On this and on the following day he exhibited drunkenness which responsible officers deemed to be of a degree sufficient to impair his capacity for the full performance of duty. He denied excessive drinking and testified that he was at all times fully able to perform such duties as were given him, and witnesses testified in his behalf that they believed he was not drunk on August 23, 24 or 25. On all the evidence, there can remain no reasonable doubt that about August 23 accused did, as charged, wilfully incapacitate himself for his duties to an appreciable degree, through the voluntary use of intoxicants, and that this incapacity extended at least through August 24, a part of the period of the CPX.

Accused, in testifying (R. 217), and military defense counsel, by a brief filed with the record of trial, have suggested that Specification 2, Charge II, was defective in that it could not be determined therefrom whether it was intended to allege that the incapacity of accused extended over the entire period of the CPX. It was proved that the incapacity did not extend beyond August 25. In the opinion of the Board of Review, the specification sufficiently apprised accused that he was charged with wilfully incapacitating

himself for the specific duty alleged, a military offense violative of the 96th Article of War regardless of the duration of the incapacity. It does not appear that any possible defect of the specification in alleging the duration of the incapacity misled the defense or otherwise injuriously affected the substantial rights of accused. The error in pleading, if such existed, was not therefore fatal. Par. 87 b, M.C.M.

5. The evidence relating to Specification 2, Charge I, alleging absence without leave on September 14, 1937, shows that on that date, a Tuesday, between 9 a.m. and 4:30 p.m., accused was absent without authority from his office and duties as Assistant Adjutant General, Headquarters Second Corps Area, Governors Island, New York (R. 27,28). At about 12:18 p.m. he telephoned his office and asked for Major George A. Moore, 14th Cavalry (R. 35,36), Acting Adjutant General (R. 27). Upon being advised by Major Floyd Marshall, Infantry, an Acting Assistant Adjutant General, that Major Moore was at lunch, accused asked Major Marshall to tell Major Moore that accused would return from New York City to Governors Island on the 1:30 p.m. boat, and would then take care of any work which might have reached his desk. Major Marshall agreed to deliver the message (R. 35,36; Pros. Ex. 3), and did so (R. 36). Accused did not return to Governors Island (R. 28,34) until after 9 p.m., at which time a message directing him to report to Military Police Headquarters was delivered to him (R. 33,34). At about 9:30 p.m. (R. 39), in the presence of Major Moore and Colonel Thomas C. Cook, Assistant Chief of Staff, G-1, Second Corps Area (R. 40), in the course of a discussion with Colonel Cook concerning his absence, accused "said that he had just got back, that he had sufficient reasons for not getting back that he did not wish to disclose" (R. 41). On September 15, an official letter signed by Major Moore, by command of Major General McCoy, Corps Area Commander, was addressed to accused directing him to explain his absence without leave from 9 a.m. to 9:30 p.m. of September 14. Accused returned the letter by indorsement stating:

"1. I reported by telephone; no other explanation is offered.

"2. It is requested that I be placed on regular leave of absence for that day. I have sufficient leave due me to cover." (R. 30; Pros. Ex. 2)

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Major Moore testified that accused was not, to witness' knowledge, placed on a leave status (R. 31).

Accused testified that after telephoning Major Marshall he "did not hurry back", but intended to go to his office and attend to any accumulated work. In telephoning he followed a "procedure" he had used previously and "nothing has happened". His explanatory indorsement not having been returned to him, he assumed that his explanation was satisfactory, but noted that the letter and indorsement were attached to his efficiency report. He also noted that he was not carried as absent without leave on the morning report. (R. 213,214)

Absence without leave on September 14, between the hours alleged in Specification 2, Charge I, in violation of the 61st Article of War, was proved. Again it was shown that accused telephoned his office during his absence, but, again, no authority for the absence was gained as a result of the telephone conversation. He asked to be placed on leave of absence, but this was not done and the request did not affect the legal propriety of his absence. Such extenuating effect as the telephone conversation may have had was limited by accused's failure to report for duty at or about the hour stated to Major Marshall.

6. The evidence as to Specification 3, Charge II, alleging wilful failure by accused to obey an order as to hours of attendance at his office, shows that about 10 a.m., September 15, 1937 (R. 69), following approval thereof by the Corps Area Chief of Staff (R. 74; Pros. Ex. 13), there was addressed and delivered to accused a letter dated September 15, signed by Major G. A. Moore, by command of Major General Frank R. McCoy, the body of which was as follows:

"In view of the irregularity of your past duty attendance you will be present in your office at least between the following hours:

Weekdays, 9:00 a.m. to 12:00 noon

1:00 p.m. to 4:30 p.m., except that on days detailed to stay after 4:30 p.m., you will remain until at least 5:00 p.m.

Saturdays, 9:00 a.m. to 12:00 noon, except

that on days detailed to stay after 12:00 p.m. you will remain until at least 1:00 p.m.

Holidays as per announced schedule.

One afternoon per week will be available for exercise." (Pros. Ex. 13)

It was returned by accused at about 11 a.m. by indorsement containing the remark "Noted" (Pros. Ex. 13). Accused left his office at noon and returned from lunch this date at about 1:40 p.m. (R. 69,73). On September 16 he reported at his office at 9:15 a.m., left at noon, and returned at 1:10 p.m. (R. 73; Pros. Exs. 14,15). On September 29 accused arrived at his office at 9:30 a.m. On October 5 he arrived at 9:15 a.m. (R. 73; Pros. Exs. 15,16). On October 6 accused telephoned to Major Moore at 8:58 a.m. and said he would "make the 9:30 boat". Major Moore told him "things were looking serious again" and that he should be "sure to be here". Accused replied that he "wanted to be in shape and would make the 9:30 boat". He did not, however, reach his office until 10:40 a.m. He left at 12:22 p.m. and returned at 2:45 p.m. (R. 74,88; Pros. Exs. 16,17) On October 7 accused left his office at noon and returned at 1:15 p.m. (R. 74; Pros. Ex. 16). During the period in question accused was in charge of the miscellaneous division of the office of the Corps Area Adjutant and at about this time was Executive Officer and Water and Motor Transportation Officer. It was proper for him to dispatch automobiles although not in his office at the time (R. 76,80). Major Moore testified that had accused been prevented by outside duties from being in his office, witness would have expected accused to notify him, but that no such notice was received (R. 80-82). Major Moore testified that he occupied quarters at Governors Island immediately above those occupied by accused, and that "for a period" their relations were very friendly (R. 83), and "So far as I am concerned, they are still friendly, but * * * after a certain period the normal social relations ceased" (R. 86).

Accused testified that "there was no wilful intention on my part to disobey an order, definitely not" (R. 219). He had, after duty hours, spent considerable time in attending to the dispatch of official cars, and this may have caused tardiness but "I don't want the court to get the impression that that was entirely to blame for

my derelictions. I do not think they were. I have no recollection of that. I have no recollection of the matters; I frankly don't know. * * * I am in no way offering this as a definite explanation of my derelictions because I have no distinct recollection of the incidents". (R. 220,221) He "did not like the order very much", however, on account of his outside duties (R. 219). Prior to receiving the order he had habitually taken more than an hour for lunch (R. 221). He usually arrived at his office at about 9 a.m. and left about 5 or 6 p.m. and "worked many, many nights" (R. 221,222). He did not "watch particularly the hours of his arrival and departure (R. 221) but attempted to obey the order "very strictly" by carrying out the spirit thereof (R. 237,238). He did not recall that he reported the reasons for his tardiness (R. 237), and did not think that his violations of the order were of material importance (R. 238,239).

The evidence establishes the order to accused as set forth in Specification 3, Charge II, and the failure by accused, on eight occasions over a period of twenty-three days, strictly to obey it. Certain of the lapses in attendance were brief and others were of more material duration. Accused contended in his testimony that he attempted to obey the "spirit" of the order, but admitted that he did not "watch particularly" the hours of his attendance. Accused testified to duties outside his office but he did not assert and the evidence does not indicate that such duties caused his tardiness on any particular occasion. Upon all the evidence it is believed the court was justified in its finding that the failure to obey was wilful in the sense that it was contumacious or animated by gross indifference, and was not the result of mere heedlessness, remissness or forgetfulness. The failure to obey was violative of the 96th Article of War, whether or not it was "wilful". The offense was not charged as wilful disobedience such as is violative of the 64th Article of War. Military defense counsel, by his brief, contends that the specification here involved was defective in that it did not state the specific dates of alleged violation of the order. It charged that accused "repeatedly * * * between the dates of September 15th and October 7th, both dates inclusive, 1937," failed to obey the order, and thus apprised accused, within what must be deemed to have been reasonably close limits, of the dates of his alleged failures. No objection was made during the

trial to the sufficiency of the specification, and no objection was made to the introduction of evidence in support thereof upon the grounds of uncertainty of the allegations. It is clear from the record that accused was not misled in his defense by the failure to allege specific dates of violation of the order, and that his substantial rights were not otherwise injuriously affected thereby. Par. 87 b, M.C.M.

7. The evidence relating to Specification 1, Charge IV, alleging that accused was found drunk on duty on October 12, 1937, shows that accused appeared in his office on that date at about 9:15 a.m. (R. 89). He sat down at his desk and looked at some papers, but in a few minutes leaned back in his chair and closed his eyes, apparently in sleep. Sometime later a clerk shook him and patted him on the back of the neck in an attempt to arouse him. Accused thereupon leaned forward, placed his arms and head on the desk and continued, apparently, to sleep. (R. 103) His sleep seemed to be "uncontrollable, irresistible action" (R. 108). His telephone rang, and another officer in the room tried to arouse him by shaking him but without success (R. 101). Accused remained in apparent sleep until about 10:15 a.m. (R. 100). At about this time Major Moore, Acting Adjutant General, Second Corps Area, who had been away from the office, entered. After a short interval, having concluded that accused was drunk and unfit for duty, he told accused that he was unfit for duty and ordered him to report to the station hospital at Fort Jay for examination. Accused remonstrated, asserted that he was fit for duty, and started to work on some papers on his desk. A few minutes later Major Moore repeated his order. Accused remarked in effect that Major Moore's action was a "low-down trick" but finally at about 11:40 a.m. arose and left. (R. 91,92) Major Moore testified that accused's "hair was disheveled; his speech was thick; he had difficulty in enunciation; his eyes were partially glazed" (R. 90). Major E. F. Olsen, Adjutant General's Department, an Assistant Adjutant General who was in the office at the time, testified that accused's "face was flushed and he looked somewhat bloated. His eyes were half-closed. That was not his normal appearance". (R. 101) Major Floyd Marshall, Infantry, an Acting Assistant Adjutant General who was also present, testified that accused's face was flushed, that his "expression" was not normal, and that he walked unsteadily (R. 104). Majors Olsen and Marshall also

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were of the opinion that accused was drunk (R. 101,103). Major Marshall did not recall that accused's voice was "thick" or unnatural (R. 105). Accused was examined at the station hospital at about noon by three medical officers and was found to be drunk - suffering from acute alcoholism (R. 110,119). A blood analysis showed alcohol in his blood in the amount of 3.5 milligrams per cubic centimeter; and a urine analysis showed alcohol in the amount of 2 milligrams per cubic centimeter (Pros. Ex. 20). Two of the medical officers who examined accused testified that the alcoholic content of his blood as found was very high and indicative of "exaggerated" or "rather advanced" alcoholism (R. 117,121). One of them, Lieutenant Colonel Edgar F. Haines, Medical Corps, testified with respect to the blood analysis:

"3.5 milligrams represent an excessive amount. Anything up to 1.5 might be considered as normal. As far as aiding in the diagnosis of intoxication, anything from 1.5 and beyond indicates some degree of intoxication. 3.5 in the blood indicates a rather advanced intoxication. When you reach 4.0 a person is incapable of any action. He is on his bed or lying down in the street." (R. 122)

Accused was hospitalized from October 12 to October 16, with a final diagnosis of "(1) Alcoholism, acute, moderate. (2) Alcoholism, chronic, moderate." (Pros. Exs. 18-20)

Lieutenant Colonel John H. Sturgeon, Medical Corps, testified for the defense that in sobriety examinations analyses of blood and urine to determine alcoholic content are "very important, but they are not absolutely diagnostic". In most cases a man would be drunk who had as much as 4 milligrams of alcohol per cubic centimeter of his blood, but there might be exceptions. (R. 206) Treatment for chronic alcoholism would include alcohol if the patient should have delirium tremens. The clinical record of the treatment of accused did not show the use of alcohol. (R. 209,210)

Accused testified that he had consumed "very little" liquor on the night of October 11, and continued:

"I had had something to drink, yes, there was no question about that and I was out very late. * * * I drove my car down from midtown, New York, on the morning of the

12th. I was perfectly aware of what was going on. I signed a few papers which were in my desk or rather on my desk. Nothing happened for a few minutes. I closed my eyes. I was sitting up, but I was not asleep. I was perfectly aware of what was going on. I could have handled my desk all right. I had less alcohol then the findings of the board indicated on a previous occasion when they found me sober. I am quite sure when the sleepiness wore off, I could have handled everything all right. I do not say I was as bright-eyed as I am right now. However, I was certainly capable of handling my work at that time." (R. 222)

He might have told one of the medical officers who examined him that he "returned with a hang-over", but did not believe that he so stated (R. 236).

The evidence of drunkenness on this occasion is positive and clear. Accused was at his desk during office hours and made an apparent effort to perform his duties. He contended that he could have performed his duties and thus, inferentially, denied drunkenness, but such denial is without weight in the light of the uncontradicted proof of his condition, and the conclusions of the medical officers. The finding of the court under Specification 1, Charge IV, that accused was drunk on duty, in violation of the 85th Article of War, was fully justified.

8. The evidence as to Specifications 2 and 3, Charge IV, alleging that accused was drunk on duty on December 14 and 28, 1937, is substantially as follows:

On December 14, 1937, a Tuesday, accused was on duty as an assistant to Colonel George H. Baird, Cavalry, Officer in Charge of Civilian Component Affairs, Headquarters Second Corps Area. His office hours were from about 9 a.m. to 12 noon, and from 1 p.m. to 4:30 p.m. He was not present at his desk during the forenoon. (R. 125) At about 2:30 p.m. he entered a doorway of his office and remarked to Major George H. Hadd, Infantry, another assistant: "I have not done anything wrong. I met a friend in town and had a couple of beers." He then came to Major Hadd's desk, sat down and said: "Incidentally

this man is a friend of yours." Major Hadd testified that accused's face was "very flushed" and his eyes were bloodshot. (R. 135) Accused went to his desk and handled some routine papers (R. 129,132,135). While there his eyes were, on one or two occasions, closed (R. 136). Colonel Baird entered the room and noted that accused's face was flushed, that he was exceedingly nervous, and that his eyes were bloodshot (R. 125,128,129). Colonel Baird and Major Hadd testified that in their opinion accused was suffering from a "hang-over" and was drunk within the definition of drunkenness appearing on page 160 of the Manual for Courts-Martial, in that his faculties appeared to be sensibly impaired (R. 125,126,135,136). Colonel Baird qualified his testimony in this regard by stating that he did not think the mental faculties of accused were sensibly impaired (R. 128), although he questioned his ability to perform "the duties of a staff officer of his grade and branch in active service" (R. 126). Colonel Baird permitted accused to remain at his desk until 4:30 p.m. - "there was no occasion for my ordering him to his home at that time. * * * There was very little for him to do. What there was, he did." (R. 129) Major Hadd testified that he did not believe accused was entirely competent to handle important duties (R. 137,138,141). Both Colonel Baird and Major Hadd testified that they did not conclude that accused was "drunk" until the definition contained in the Manual for Courts-Martial was brought to their attention (R. 131,138). Colonel Baird testified that he reported to the Corps Area Chief of Staff that accused "had a hang-over" (R. 130) but did not believe he reported that accused was drunk on duty (R. 130,131). On December 15 Colonel Baird advised accused that he was in the office "on probation", that under the circumstances it was "very wrong for him to indulge in any drinking", and that he should stop it entirely. Accused replied, "You are perfectly right." (R. 127)

By previous arrangement with the other officers in the office handling Civilian Component Affairs, accused was assigned as the sole officer on duty for the day of December 28, 1937, between the hours of 9 a.m. and 4:30 p.m., with lunch time out (R. 142,143,149). Accused was not present in the forenoon, however, and Major Hadd, at Colonel Baird's direction, assumed the duty (R. 149). Accused entered the office at 1:30 p.m. Major Hadd testified that at this time "his face

was very flushed; he had an overcoat on with the collar turned up, his hat was over his eyes, and his eyes were a little bit bloodshot. He appeared to be much the worse for wear." Accused addressed Major Hadd, asked if General McCoy or Colonel Grant was in, and stated that he "felt like raising hell". After a few minutes Major Hadd told accused he should go home, but accused sat at his desk and looked at some papers. (R. 150,154) Colonel Emer Yeager, Field Artillery, entered the office and accused said: "How in the hell did you get away from the CCC?" No response was made. (R. 151) Colonel Yeager . had been on duty at Headquarters Second Corps Area as "CCC Executive" since May 17, 1937 (R. 158). Some ten or fifteen minutes after accused sat down at his desk, Major Hadd noticed that his eyes were closed, and he again suggested that accused go home. Accused answered: "I think I will. I am not feeling so well" (R. 151); possibly said that he would be at his home if needed, and then left the office (R. 153a). Accused was in the office "not more than one hour". Major Hadd testified that in his opinion accused, while in the office, was suffering from a "very bad hangover" (R. 150), was drunk within the definition of drunkenness appearing on page 160 of the Manual for Courts-Martial, and could not properly have performed his normal duties (R. 152).

Accused testified that he "was very definitely not drunk on December 14th or on December 28th" (R. 223), and did not learn that anyone considered him drunk until the charges were preferred (R. 222). He did not recall where he was on the night preceding December 14, but may have been in New York City with out-of-town friends, and probably drank some liquor. While he did not on December 14 "feel as perk as I do now", he did not drink enough to make him drunk or unfit for duty (R. 239), and he "worked", had a discussion with the chief clerk, and "could have handled anything that came up". He was in his office two hours and "did concentrate on the work". (R. 223) On December 28 he spoke "jokingly" to Major Hadd and Colonel Yeager, and understood that Major Hadd "jokingly" suggested that he go home, but did not order him to do so. When the suggestion was repeated, accused said he would go home if Major Hadd was to remain in the office, and that accused would be at his home if wanted. He did not believe that on this day he "handled a single paper". The duties during the

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holiday period were very light. (R. 223,224,240,241)

There is convincing evidence that on the dates alleged in Specifications 2 and 3, Charge IV, accused was found drunk while on the duty described in these specifications. The drunkenness proved was less in degree than that of October 12, but, in the opinion of the Board of Review, the evidence shows that it was of sufficient degree sensibly to impair the rational and full exercise of the mental and physical faculties of accused. In each case, he actually entered upon his prescribed duties while drunk within the meaning of the 85th Article of War. The fact that he may have completed little, if any, of the routine work assigned to him is not material, for in each case it is clear that he was "on duty" and was not "off duty". Par. 145, M.C.M.

9. The evidence relating to the Additional Charge and its Specification alleging absence without leave on April 13-14, 1938, shows that while on duty as an Assistant to the Officer in Charge of Civilian Component Affairs, Headquarters Second Corps Area, accused absented himself without leave from his desk and duties from about 9:15 a.m., April 13, 1938, to about 8:12 a.m., April 14 (R. 157,159,161). He was carried on the morning report as so absent (Pros. Ex. 21). At about 12:55 p.m., April 13, accused telephoned Major Hadd and, among other things, stated that if there was nothing important on hand he would not be in the office that day, that he was "busy doing some money business or monkey business" (R. 161). Major Hadd told accused there was nothing important in the office for him at that time, and at the close of the conversation, in response to some remark by accused which Major Hadd did not understand, said "O.K." Accused's speech "seemed incoherent" to Major Hadd. Major Hadd ranked accused by one file on the promotion and relative rank lists. Major Hadd did not give accused permission to be absent (R. 162), did not intend to do so (R. 163), and did not consider that what he said gave accused tacit authority to remain away from his office (R. 165). In a conversation with Major Hadd about April 15 accused appeared to be "surprised" that he had been marked absent without leave (R. 164). Colonel Baird testified that he had granted accused permission to be absent whenever he had asked for it, but that he did not give him "general permission to be absent at any time". Accused frequently said that he did not have much to do. (R. 159)

Accused testified that Colonel Baird had been "very generous in giving me permission to work on my case", and on April 12 accused heard of the whereabouts of a witness, Mr. Fowler. During his absence on April 13 and 14 he "was running down this witness", and as he recalled was, at night, at the New Yorker Hotel in New York City. (R. 224,242) He telephoned Major Hadd and told him he would come to his office at once if there was anything important for him to do, and understood Major Hadd to approve his absence by saying "O.K." Accused was certain that he did not tell Major Hadd that he would not come to his office. He told him that he was attending to "some monkey business", thus referring to his efforts to locate Mr. Fowler. There was a "complete misunderstanding" between accused and Major Hadd. (R. 224)

The absence alleged was not denied, and the evidence shows that permission to be absent was not given to accused. He testified that he believed his conversation with Major Hadd carried tacit authority for his absence following the conversation, and believed that Colonel Baird, his immediate commanding officer, would not take exception to any part of his absence. Whatever may have been his belief in these respects, it is clear that accused did not have express or implied authority to be absent. The fact that he telephoned his office during the day, together with the substance of the telephone conversation, is for such consideration in extenuation as may be warranted by the entire record.

10. The defense introduced in evidence the efficiency report file of accused covering the period of his commissioned service to June 19, 1936 (R. 243; Def. Ex. E). Six of the reports, covering about two years and nine months, carried general ratings of superior; thirty of the reports, covering about twelve years, carried general ratings of excellent or the equivalent; and three of the reports, covering about two years, carried general ratings of satisfactory or the equivalent. Many of the reports contained commendatory remarks. There were no general ratings of unsatisfactory or the equivalent. The file shows that accused was cited in orders of the Fifth Division, June 27, 1919, for distinguished conduct in action, as follows:

"Though severely wounded on the morning of October 14th, 1918, in the Argonne-Meuse Offensive, continued

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in command of his company until the objective was reached and positions consolidated. He was evacuated then only when ordered to the rear by his Battalion Commander. This officer showed exceptional courage under the heaviest fire to which the regiment was ever subjected,"

and that on account of this citation the wearing of a silver star was authorized. On November 6, 1922, he was awarded the Distinguished Service Cross, with citation as follows:

"For extraordinary heroism in action near Cunel, France, October 14, 1918. When the assault battalion of his regiment had been held up by terrific hostile artillery and machine gun fire, upon learning of the loss of all the company commanders, Lieutenant Cromwell voluntarily left the supporting battalion went forward through an almost overwhelming enemy fire to the advance position of the assault battalion, where, although wounded in the arm, he assisted the battalion commander in leading the men from a very disadvantageous position to the capture of a nearby hill held by the enemy, and later in the hostile counter attack assisted in the defense of the position."

He was also awarded a Purple Heart on account of a wound received in action October 14, 1918. Three commendatory letters for efficient performance of duties following the World War are attached to the file. He graduated from the Command and General Staff School in 1936, with an academic rating of satisfactory, not recommended for further training in high command or general staff duty.

In rebuttal the prosecution introduced in evidence three efficiency reports upon accused covering the period July 18, 1936, to October 19, 1937, in which his general ratings were unsatisfactory (R. 244; Pros. Ex. 22). Attached to these reports are correspondence and copies of letters and reports relating to accused's overindulgence in alcoholic liquor and absences without leave during the period involved, part, but not all, of which relate to occurrences involved in the charges.

11. Nine of the twelve members of the court signed a recommendation for clemency, attached to the record of trial, which contains the following:

"In view of his distinguished record in the face of the enemy during the World War and his fine record of performance of duty in peace time since that War until his present tour of duty at Headquarters, Second Corps Area, as evidenced by his efficiency reports which are part of the record in this case, it is recommended that the sentence in his case be commuted so as to retain this officer in the service."

Another member of the court signed a similar recommendation, attached to the record of trial, with the added recommendation that the sentence "be commuted by the reviewing authority to a severe sentence which will not involve complete separation from the service at this time".

In approving the sentence, the reviewing authority stated in his action:

"Ten out of the twelve members of the court have recommended clemency based primarily on the accused's war service. The only favorable action that could be taken on this recommendation would necessitate the retention of the accused in the Army. It appears very conclusively from the record of trial that the accused's service has been given every possible consideration and in each instance leniency extended to him has been followed by additional misconduct. Under these circumstances, it is apparent from the record of trial that favorable action upon the recommendation by the members of the court to clemency would be detrimental to the interests of the service."

12. Briefs have been presented to The Judge Advocate General by civilian counsel and, as noted above, by military defense counsel. In addition to discussing the merits of the findings and sentence, and in addition to matters hereinbefore discussed, counsel suggest irregularities and errors in the proceedings in

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several particulars. All assignments of irregularity and error have been carefully examined and found to be without legal merit. Discussion of certain of them appears to be appropriate.

Civilian counsel suggests that Major General Frank R. McCoy, the authority which appointed the court, was in legal effect the accuser or prosecutor within the meaning of Article of War 8. This contention is based upon the circumstances appearing from the record and accompanying papers, that prior to the time the charges were preferred General McCoy expressed concurrence in and commented upon certain adverse entries in efficiency reports upon accused involving references to derelictions later made the subject of certain of the charges (Pros. Ex. 22, pp. 69,82,100); that General McCoy denied in person an appeal by accused from an entry on a sick report and a decision that his hospitalization beginning October 12, 1937, was not in line of duty and was due to causes within the purview of the act of May 17, 1926 (Pros. Ex. 22, pp. 89,90); that accused was a member of General McCoy's staff at the time of the commission of his offenses; that other members of General McCoy's staff participated in investigation and advice relating to the charges, signed the charges and testified at the trial as witnesses for the prosecution; and that charges were added upon advice of the Corps Area Judge Advocate or Corps Area Adjutant General, which were not recommended by the Corps Area Inspector. Counsel also refers, by letter dated July 18, 1938, supplemental to his brief, to what purport to be copies of correspondence, attached to his letter, indicating that on July 12, 1938, General McCoy incorporated in correspondence relating to a recent efficiency report upon accused comments to the effect that he believed the service of accused during a part of the period covered by the charges was unsatisfactory because of his commission and conviction of certain offenses involved in the charges. It is to be noted also that the orders, violations of which are alleged in Specifications 1 and 3, Charge II, were issued in the name of General McCoy.

Paragraph 5 a of the Manual for Courts-Martial contains the following:

"Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined

by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved. * * * Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. Thus a division commander may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases."

There is not in the record of trial and accompanying papers any reasonable basis for a suggestion or suspicion that General McCoy at any time entertained any personal feeling or interest which might have led him to accuse or prosecute Major Cromwell. Whatever personal action was taken by him upon the efficiency reports and upon the appeal from the decision involved in the sick report entry was manifestly taken in an official capacity and in the strict line of his duty. The personal action taken prior to trial shows that General McCoy, at the time of his action, was of the opinion that the entries on the efficiency reports and sick report were based upon facts and were fairly made, but is not indicative of any intention on his part at any time to originate or adopt charges covering the transactions involved or to undertake trial or proof of charges. The circumstance that accused was a member of General McCoy's staff, while making the latter's official action in the premises appropriate, was not of a nature to suggest personal animosity or personal interest in trial and punishment. The actions of General McCoy's staff do not appear to have extended beyond the sphere of their proper official duties, and are not in any manner indicative of personal feeling or interest on the part of General McCoy. The orders involved in the charges may have been issued without General McCoy's personal knowledge, but even if issued at his specific direction this circumstance, standing alone or considered in the light of the other circumstances of the case, does not show animus. In the opinion of the Board of Review, the facts and circumstances do not justify an inference that the appointing authority was in legal contemplation the accuser or the prosecutor with respect to any of

the charges or specifications.

The series of offenses involved in the original charges extended from August 10 to December 28, 1937, and charges were not preferred until March 30, 1938. Counsel suggest that the considerable lapse of time indicates a designed accumulation of charges with improper motives, an accumulation which would be violative of the prohibition of paragraph 26 of the Manual for Courts-Martial. The record of trial, on the other hand, is entirely consistent with the theory that the delay was the result of forbearance and careful investigation by the responsible officers, and that no improper motives impelled the delay or the accumulation of charges. Although no deliberate "saving up" of charges appears, the offenses exhibit a "continued course of conduct", and, on this account, it would have been permissible designedly to allow them to accumulate within reasonable limits in the interests of discipline. Par. 26, M.C.M.

Counsel contend that a member of The Judge Advocate General's Department should have been appointed law member of the court. The requirement of Article of War 8 for detail of officers of The Judge Advocate General's Department as law members of general courts-martial is subject to the exception that another qualified officer is to be appointed when an officer of The Judge Advocate General's Department is not available. The appointment of an officer other than a member of The Judge Advocate General's Department as a law member imports a decision by the appointing authority that an officer of this category is not available for the duty. Such a decision reached in the exercise of a sound discretion must, in the interests of efficient administration of justice and exercise of command, be held to be conclusive upon the question of availability. The discretion lodged in the appointing authority in this respect does not differ in principle from that formerly lodged in the appointing authority with respect to the number of officers, within prescribed maximum and minimum limits, which might be appointed as members. In that connection it was held that the decision of the appointing authority, in the exercise of his discretion, was conclusive. Martin v. Mott, 25 U. S. (12 Wharton) 19, 35. See also par. 7, M.C.M., 1917.

Counsel take exception to a ruling by the law member sustaining an objection to evidence offered by the defense (R. 204,205) relating

to the results of a physical examination of accused on July 2, 1937, conducted for the purpose of determining his sobriety. In offering the evidence, defense counsel stated that it would show more alcohol in accused's blood than was found in the examination of October 12 (as indicated by accused in his testimony, R. 222), and that it would be thus shown that the tests of October 12 showing alcoholic content of the blood and urine were of little value. The defense was permitted to introduce expert testimony as to the relative conclusiveness and diagnostic value of tests of the blood to determine alcoholic content in cases of suspected drunkenness. Whether or not the excluded evidence as to the examination of July 2 was legally relevant and material to the issue of drunkenness on October 12, its probative weight was obviously slight. It is clear that its exclusion, in view of the other evidence on the issue of drunkenness on October 12, could not have injuriously affected the substantial rights of accused within the meaning of Article of War 37.

13. The accused is 42 years of age. The Army Register shows his service as follows:

"Pvt. 1 cl. Co. L 1 Inf. Va. N.G. 20 June 16 to 16 Jan. 17; 2 lt. Inf. Sec. O. R. C. 3 May 17; accepted 7 May 17; active duty 12 May 17; vacated 8 Nov. 17; capt. of Inf. U. S. A. 3 Oct. 18; accepted 13 Oct. 18; hon. dis. 24 Mar. 20.--2 lt. of Inf. 25 Oct. 17; accepted 8 Nov. 17; 1 lt. 25 Oct. 17; capt. 1 July 20; A. G. D. 8 July 25; trfd. to A. G. D. 3 Mar. 27; maj. 1 Aug. 35."

14. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence, and warrants confirmation thereof. Dismissal is authorized upon conviction of violations of the 61st, 85th and 96th Articles of War.

[Signature], Judge Advocate.
[Signature], Judge Advocate.
[Signature], Judge Advocate.

To The Judge Advocate General.

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1st Ind.

War Department, J.A.G.O., AUG 10 1938 - 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 Major Joseph P. Cromwell, Adjutant General's Department.
2. I 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 and to warrant confirmation thereof.
3. As noted in the opinion of the Board of Review, there are attached to the record of trial recommendations by ten of the twelve members of the court that the sentence be commuted to punishment which will not involve separation from the military service. The reviewing authority in his action expressed disagreement with these recommendations. The records of the War Department, to which reference is also made in the opinion of the Board, show that, except for a comparatively short time preceding and including the period covered by the charges, the military record of accused has been excellent. For meritorious service during the World War he was awarded the Distinguished Service Cross and was cited in Fifth Division orders. He was awarded the Purple Heart for a wound received in action. His efficiency file contains numerous commendatory remarks for creditable service following the World War. His entire record indicates that he has been of distinct value to the service, and that the offenses involved in this case are wholly the result of overindulgence in intoxicants. This fault is a correctable one, and if corrected accused should render further valuable service to the Government.
4. I recommend that the sentence be confirmed but, in view of all the facts and circumstances connected with the offenses, the excellent previous record of accused, and the recommendations for clemency, recommend that the execution thereof be suspended during the pleasure of the President.
5. 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 confirm the sentence but suspend the execution thereof should such action meet with approval.

6. Consideration has been given to briefs by civilian and military counsel, to a letter to the Chief of Staff from Honorable Clifton A. Woodrum, House of Representatives, dated July 15, 1938, and to two letters to the Secretary of War from Mr. Ralph T. O'Neil, Topeka, Kansas, dated July 13 and 16, 1938, with inclosures, all of which are inclosed herewith. Attention is invited to communications, attached to the 201 file of accused, from the office of Honorable James Roosevelt, Secretary to the President, to the Assistant Secretary of War, dated June 24, 1938, from Honorable Bennett Champ Clark, United States Senate, to The Adjutant General, dated June 28, 1938, and from Honorable Robert F. Wagner, United States Senate, to the Chief of Staff, dated August 1, 1938.


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

7 Incls.

- Incl.1-Record of trial.
- Incl.2-Draft of ltr for sig.
 Secy. of War.
- Incl.3-Form of Executive action.
- Incl.4-Briefs fr mil. & civ. counsel.
- Incl.5-Ltr fr Mr. Woodrum to C. of S.
 & copy of reply thereto.
- Incl.6-Ltr fr Mr. O'Neil to Secy. of
 War w/incls, 7-13-38.
- Incl.7-Ltr fr Mr. O'Neil to Secy. of
 War w/incl., 7-16-38.

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

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Board of Review
CM 210015

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 JOSEPH J. RUDDY, JR.	)	June 2 and 3, 1938.
(O-225653), Infantry Reserve.	)	Dismissal and confinement for
	)	two (2) years.

OPINION of the BOARD OF REVIEW
HOOVER, CAMPBELL and PARMLEY, Judge Advocates.

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

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

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

Specification 1: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty, being at the time in command of Company 205, Civilian Conservation Corps, did, at Fort Ann, New York, on or about May 20, 1937, feloniously embezzle by fraudulently converting to his own use the sum of \$613.22, property of the Company Fund of said company, which came into his possession by virtue of his office.

Specification 2: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty, being at the time in command of Company 1241, Civilian Conservation Corps, did, at Boonville, New York, on or about October 13, 1937, feloniously embezzle by fraudulently converting

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to his own use the sum of \$718.59, property of the Company Fund of said company 1241, which came into his possession by virtue of his office.

Specification 3: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty, being at the time in command of Company 1241, Civilian Conservation Corps, did, at Boonville, New York, between October 1, 1937, and February 15, 1938, feloniously embezzle by fraudulently converting to his own use the sum of \$2,525.78, property of the Company Fund of said company, which came into his possession by virtue of his office.

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

Specification 1: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty, in command of Company 1208, Civilian Conservation Corps, did, at Speculator, New York, on or about February 6, 1937, in violation of section 35 of the Criminal Code of the United States, knowingly and willfully make a false certificate in the accounts of the fund of said company in words and figures as follows, to wit,--

*Deposit	2/6/37	<u>156.73</u>
		412.23
Cash	2/12/37	<u>.29</u>
		\$412.52

No outstanding checks.

Certified correct. (Signed) Jos J Ruddy Jr.
Capt 26thInf-Res
Commanding",--

which said certificate he, the said Captain Ruddy, well knew to be false and fraudulent.

Specification 2: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty in command of Company 1208, Civilian Conservation Corps, did, at Speculator, New York, on or about May 11, 1937, in violation of section 35 of the Criminal Code of the

United States, knowingly and willfully make a false certificate in the accounts of the fund of said company in words and figures as follows, to wit,--

*Transfer of Company Fund, Co. 1208 CCC

I CERTIFY that to the best of my knowledge and belief the foregoing statement is a complete and accurate statement of all amounts due to the fund, of all outstanding debts and obligations payable from the fund, and of all outstanding checks (not reported from the fund, and of all outstanding checks (not reported paid by bank) pertaining to the fund, as listed below.

(Signed) JOSEPH J. RUDDY, Jr.,

(Typed) JOSEPH J. RUDDY, Jr.,

Captain, Inf.-Res.,

May 11, 1937",

which said certificate he, the said Captain Ruddy, well knew to be false and fraudulent.

Specification 3: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty in command of Company 205, Civilian Conservation Corps, did, at Fort Ann, New York, on or about June 5, 1937, in violation of section 35 of the Criminal Code of the United States, knowingly and willfully make a false certificate in the accounts of the fund of said company in words and figures as follows, to wit,--

"I CERTIFY that the foregoing account for the month of May, 1937, is correct, and that of the amount for which I am responsible Three Hundred Thirty and 87/100 (\$330.87) is deposited with The Peoples National Bank, Hudson Falls, to the credit of the Company Fund, Co. 205, CCC, and Two Hundred Eighty nine and 07/100 (\$289.07), in cash, is in my personal possession.

(Signed) JOS J RUDDY Jr

Capt Inf Res.

Commanding.

June 5, 1937",--

which said certificate he, the said Captain Ruddy, well knew to be false and fraudulent.

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Specification 4: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty, in command of Company 205, Civilian Conservation Corps, did, at Fort Ann, New York, on or about July 16, 1937, in violation of section 35 of the Criminal Code of the United States, knowingly and willfully make a false certificate in the accounts of said company in words and figures as follows, to wit,--

"Balance in Bank	184.12	
Cash on hand	<u>328.67</u>	Deposited 7/16/37
	512.79	

No outstanding checks
Certified true and correct.

(Signed) JOS J RUDDY Jr
Capt. 26th Inf-Res
Commanding",--

which said certificate he, the said Captain Ruddy, well knew to be false and fraudulent.

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

Specification 1: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty, in command of Company 1241, Civilian Conservation Corps, did, at Boonville, New York, on or about January 13, 1938, with intent to deceive Captain Werner C. Strecker, Engineer Reserve, and thereby conceal a shortage in the fund of said company, officially state to the said Captain Strecker that the Company Fund records of Company 1241, Civilian Conservation Corps, were in the custody of Captain Allen G. Spitz, Infantry Reserve, which statement was false and known by the said Captain Ruddy to be false.

Specification 2: In that Captain Joseph J. Ruddy, Jr., Infantry Reserve, while on active duty, did, at Fort Ann, New York, on or about October 5, 1937, with intent to deceive First Lieutenant Henry Peck,

Infantry Reserve, and thereby conceal a shortage in the company fund of Company 205, Civilian Conservation Corps, falsely represent to the said Lieutenant Peck that he the said Captain Ruddy had deposited the sum of \$717.32 in the First National Bank in Boonville, New York, to the credit of said Company 1241, which representation he the said Captain Ruddy well knew to be false.

Upon arraignment the defense made a motion, in the nature of a plea in abatement, that the specifications, Charge II, and Charge II, be stricken out upon the ground that the specifications failed to allege the particulars in which the certificates set forth therein were false (R. 13-20). The motion was denied (R. 20). Accused thereupon pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence, designated the United States Northeastern Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that accused, a Captain, Infantry Reserve, was ordered to active duty with the Civilian Conservation Corps on May 6, 1935 (Def. Ex. A). He continued on such active duty (R. 27; Def. Ex. A) until May 5, 1938 (A.G. 201, Ruddy, Joseph J. Jr., S.O., 2d C.A., as follows: Par. 5, S.O. 101, May 3, 1935; par. 1, S.O. 224, Oct. 21, 1935; par. 18, S.O. 82, Apr. 7, 1936; par. 14, S.O. 250, Oct. 19, 1936; par. 16, S.O. 86, Apr. 14, 1937; par. 6, S.O. 251, Oct. 28, 1937). He assumed command of Company 1208, CCC, Speculator, New York, September 1, 1936 (Pros. Ex. 1). On May 5, 1937, he was ordered transferred to Company 205, Fort Ann, New York (Pros. Ex. 7). He departed from Company 1208 and assumed command of Company 205 on May 11 (Pros. Exs. 8,10). On September 16 he was ordered transferred to Company 1241, Boonville, New York (Pros. Ex. 16). He departed from Company 205 and assumed command of Company 1241 on September 24

(Pros. Exs. 16,19). He remained in command of Company 1241 until January 31, 1938 (R. 151; Pros. Ex. 25).

4. With respect to Specification 1, Charge II, alleging the making of a false certificate about February 6, 1937, the evidence shows that about February 4, 1937, accused certified in his council book, among other things, that he then had in his possession cash in the sum of \$157.02 belonging to the company fund of Company 1208 (R. 49; Pros. Ex. 3). On February 12 he exhibited to a subdistrict inspector, engaged in auditing the company accounts, a bank statement from the Hamilton County National Bank, Wells, New York, showing a balance of \$255.50 on February 4, to which accused had added, in his own handwriting (R. 53), a certificate as follows:

"Deposit 2/6/37	<u>156.73</u>
	\$412.23
Cash 2/12/37	<u>.29</u>
	\$412.52

No outstanding checks
Certified Correct.

(Signed) Jos J Ruddy Jr.
JOSEPH J. RUDDY, JR.
CAPT. 26th INF.RES.
Commanding."

(Pros. Ex. 5)

The amounts thus certified as deposited and in cash aggregated the amount of cash which he had certified in his council book to be in his possession on February 4. The bank statement, including the certificate by accused, was accepted by the inspector as correct (R. 53). Accused had not in fact deposited in the bank the sum of \$156.73 on or about February 6. The actual balance in the bank to the credit of the fund on February 12 was \$255.50, as on February 4. (Pros. Ex. 27)

The making of the certificate at the place and about the date alleged was thus proved. The certificate was false, as charged, in that the bank deposit recited therein had not in fact been made. From the circumstances it must be inferred that accused knew of the falsity of the certificate in this respect and that he made it with the fraudulent design of concealing his true accountability. Violation

of the 96th Article of War is established.

5. As to Specifications 2 and 3, Charge II, alleging the making of false certificates about May 11 and June 5, 1937, and Specification 1, Charge I, alleging embezzlement of \$613.22, about May 20, the evidence is substantially as follows:

On May 11, 1937, in effecting the transfer to his successor, Second Lieutenant George C. Symonds, Infantry Reserve, of the funds of Company 1208, accused made and delivered to him a certificate (R. 88-90) as follows:

"TRANSFER OF COMPANY FUND CO. 1208 CCC.

I certify that to the best of my knowledge and belief the foregoing statement is a complete and accurate statement of all all amounts due the fund, of all outstanding debts and abligations payable from the fund, and of all outstanding) checks (not reported paid by bank) pertaining to the fund, as listed below.

Check #620 - \$26.37." (Pros. Ex. 9A)

The statement referred to in the certificate purported to list the assets and liabilities of the company. It listed deposits in bank totaling \$400.08. Lieutenant Symonds asked accused whether there was any cash on hand. Accused replied in the negative and said that all of the funds were in the bank (R. 88). He also, on May 11, made a certificate to this effect in his council book (Pros. Ex. 4). On April 30 accused had made the company collections (R. 87) totaling \$613.22 (Pros. Ex. 6), and in the course of an inspection of the fund on May 11 presented to the inspector the collection sheet on which the collections had been made as "a voucher to the company fund" (R. 54). The total receipts from the collection sheet for the months of February and March, and the total disbursements from such receipts, had been entered in the council book for March and April (Pros. Ex. 4), as was customary (R. 78). No reference to the collections made on April 30 was contained in the statement to which the certificate above quoted pertained. Lieutenant Symonds testified that he "supposed" he saw the collection sheet "while it was in the company", but believed that in checking over the receipts and vouchers pertaining to the fund preparatory to the transfer of May 11 he did not see the collection sheet (R. 94). He did not

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have the "slightest" reason to suspect any irregularity in the fund (R. 95).

On May 12, 1937, the company fund of Company 1208 was transferred by Lieutenant Symonds to First Lieutenant William A. Kerr, Field Artillery Reserve (R. 96,97; Pros. Ex. 9). About May 21, after Lieutenant Kerr had "spoken on the phone" to him about it (R. 97,99,105), accused delivered to Lieutenant Kerr by mail the collection sheet in question, together with a check dated May 20, in favor of the commanding officer, Company 1208, for \$613.22 (the amount collected on the collection sheet)(R. 98,105), drawn by accused as "Custodian", on the Peoples National Bank of Hudson Falls, New York (Pros. Ex. 12). The check was paid on May 26 by the drawee bank from funds on deposit to the credit of Company 205 (Pros. Ex. 26), the funds of which had been transferred to accused on May 12 (Pros. Ex. 11). The expenditure represented by the check was not entered in the council book of Company 205 (Pros. Ex. 14). Upon receipt of the check for \$613.22 from accused, Lieutenant Kerr entered the same in the council book of Company 1208, and also entered expenditures therefrom in the amount of \$587.15 (R. 98; Pros. Ex. 4). On June 5 accused made in the council book of Company 205 a certificate as follows:

"I CERTIFY that the foregoing account for the month of May, 1937, is correct, and that of the amount for which I am responsible Three Hundred Thirty and 87/100 (\$330.87) is deposited with the Peoples National Bank, Hudson Falls to the credit of the Company Fund, Co. '205', CCC, and Two Hundred Eighty nine and 07/100 (\$289.07) in cash, is in my personal possession.

Jos. J. Ruddy Jr.

Capt Inf. Res.

June 5, 1937.

Commanding." (Pros. Ex. 14)

The council book account referred to in the certificate, as noted, did not contain any entry in reference to the check for \$613.22 drawn on the company fund bank account (Pros. Ex. 14).

Mrs. Miriam Clark Ruddy, wife of accused, testified for the defense that accused was unemployed for nine months prior to going on active

duty and that when he went on active duty he had debts totaling about \$2000. At this time he traded in an old car upon the purchase of a new one. A child was born to witness in February, 1936, and she was confined fourteen days. Immediately after confinement she became ill and was under the care of a doctor and nurse for sixteen to nineteen weeks. Accused visited witness during the time he was with Company 1208, and witness then observed that he seemed to be "under some sort of a strain". He refused to tell her the cause of his anxiety, but about "February 16" told witness he "needed" about \$1400. Witness secured the money for him from her aunt. (R. 168-170)

Accused made an unsworn written statement that during the early part of his tour of active duty he found himself heavily in debt due to obligations existing prior to his entrance upon active duty, to the birth of a child to his wife early in 1936, to illness of his wife following the birth, to purchase of an automobile to be used largely in the performance of his duties, and to expenses incident to an automobile accident occurring in December, 1936, or January, 1937. As a result of his burdens and anxiety he "did commit some irregularities with respect to camp funds", but at no time intended to "appropriate, or embezzle" company funds to his own use. (Def. Ex. A)

The evidence thus shows that at the place and times alleged accused made the certificate with respect to the company fund of Company 1208, set forth in Specification 2, and the certificate with respect to the May account of Company 205, set forth in Specification 3, Charge II. The certificate set forth in Specification 2 was false in that it asserted that the financial statement to which it referred contained a complete and accurate account of all "amounts due" the company fund, whereas the statement did not contain any reference to the proceeds of the collection sheet. Whether or not the entire proceeds of the collection sheet were "due" in the sense that they were assets of the company fund, it fairly appears that the difference between the amount collected and disbursed therefrom, some \$26.07, was an asset of the fund which could not properly, under any circumstances, have been omitted from the financial statement. That accused considered as an asset of the fund at least the difference between the amounts collected and the lesser amounts to be disbursed may be inferred from his acts in entering similar collections and disbursements in his

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council book, thus charging himself as custodian of the fund with the differences. The amount involved, as well as the circumstances of the transfer and reimbursement, were such as to preclude any conclusion other than that accused made the certificate with full knowledge of its falsity in the particular indicated and with the fraudulent purpose of securing acceptance of his imperfect accounting and furthering concealment of the proceeds of the collection sheet. The certificate set forth in Specification 3 was false in that the account to which it pertained did not contain any entry showing disbursement of the funds represented by the check for \$613.22, drawn on the bank account of Company 205. The circumstances do not admit of doubt that accused knew of the omission and consequent falsity and that, as charged, he made the false and fraudulent statement knowingly and wilfully. Violation of the 96th Article of War is established in each case.

The conversion by accused, about May 20, of the monies in the amount of \$613.22, in his possession as custodian of the fund of Company 205, for the purpose of paying to a successor in command of Company 1208 the amount represented by the collection sheet, was manifestly fraudulent and amounted to embezzlement, in violation of the 93d Article of War, as charged in Specification 1, Charge I.

6. With respect to Specification 4, Charge II, alleging the making of a false certificate on July 16, 1937, the evidence shows that during the course of an audit of the funds of Company 205 by a sub-district inspector, on August 16, 1937 (R. 68), accused presented to the inspector, as evidence of the deposit of monies in the amount of \$328.67, which on July 13 he had certified to be in his personal possession (Pros. Ex. 14), a bank statement of the Peoples National Bank of Hudson Falls, New York, covering deposits in and withdrawals from the company fund during July, 1937 (Pros. Ex. 15), and bearing a statement, in the handwriting of accused (R. 68), as follows:

"Balance in Bank	184.12	
Cash on hand	<u>328.67</u>	Deposited 7/16/37
	\$512.79	

No outstanding checks.

Certified true and correct.

(Signed) Jos J Ruddy Jr
 Capt Inf Res." (Pros. Ex. 15)

A deposit of \$328.67 had not been made in the bank on July 16, 1937, or at any other time prior to the audit (Pros. Ex. 26).

The evidence establishes the making of the certificate at the place and about the time alleged, as well as the falsity of the certificate in so far as the deposit of \$328.67 was concerned. The circumstances clearly evidence knowledge by accused of this falsity, and wilful use of the certificate to avoid accounting for the monies previously certified to be in his personal possession, and thus to accomplish a fraudulent end.

7. With respect to Specification 2, Charge I, alleging embezzlement of \$718.59, and Specification 2, Charge III, alleging a fraudulent representation that a bank deposit of \$717.12 had been made, the evidence is substantially as follows:

Following his transfer from Company 205, Fort Ann, New York, on September 24, 1937 (Pros. Ex. 16) and his assumption of command of Company 1241 at Boonville, New York, on that date (Pros. Ex. 19), accused did not turn over the funds of Company 205 until October 5. On the latter date, in making the transfer of funds at Fort Ann, he told First Lieutenant Henry Peck, Infantry Reserve, then in command of Company 205, that he had retained the funds because he wanted to straighten out a collection sheet and wanted to avoid transfer to an officer who had temporarily succeeded him. (R. 112,113) He wrote a number of checks in payment of bills "that had been accumulating" (R. 113). In effecting transfer of the funds he told Lieutenant Peck that "he did not want to carry a large amount of cash around with him and so he deposited it in the Boonville bank" (R. 115). He then made a check on a "Boonville bank" for \$717.32 and delivered it to Lieutenant Peck as cash belonging to Company 205 (R. 115,116). A blank check of a Hudson Falls bank was used, accused crossing out the bank name on the form and substituting the name of the "Boonville bank" (R. 115). He gave Lieutenant Peck a statement of the account of Company 205 with the Peoples National Bank of Hudson Falls which bore, in the handwriting of accused, the statement "Deposit 10/5/37 717.32" (R. 118; Pros. Ex. 28). The check was

deposited at Hudson Falls (R. 119), but on October 8 payment thereof was refused by the First National Bank of Boonville, Boonville, New York (Pros. Exs. 21,29). Accused was notified and said he would "straighten the matter out" (R. 119). On October 13 the check, with protest fees of \$1.27, was paid by the bank last mentioned from funds to the credit of Company 1241. No deposit of \$717.32 was made by accused with this bank between September 23 and October 5, 1937. (Pros. Ex. 29) The funds of Company 1241 were turned over to accused on October 1, 1937 (Pros. Ex. 20). The withdrawal by the check was not noted as an expenditure in the council book of Company 1241 (Pros. Ex. 22).

The evidence shows that at the place and time alleged accused made, in substance, the representation concerning a deposit of funds, alleged by Specification 2, Charge III, and that the representation was false in that the deposit described had not in fact been made. That the representation was knowingly made with intent to deceive and conceal a shortage, as alleged, was clearly inferable from the circumstances. The fraud involved was such as rendered the conduct of accused unbecoming an officer and a gentleman within the meaning of the 95th Article of War.

The conversion by accused of the funds in the amount of \$718.59 (check and protest fee) belonging to Company 1241, for the purpose of meeting his obligations to Company 205, followed the pattern of the previous conversion of the funds of Company 205 to cover his obligations to Company 1208. The embezzlement charged by Specification 2, Charge I, in violation of the 93d Article of War, is fully established.

8. With respect to the remaining specifications - Specification 1, Charge III, alleging a false official statement as to the custody of the records of Company 1241, and Specification 3, Charge I, alleging embezzlement of \$2525.78 - the evidence is substantially as follows:

In January, 1938, Captain Werner Strecker, Engineer Reserve, Subdistrict Inspector of a subdistrict embracing Company 1241, attempted to audit the accounts of that company at the camp where the company was located, but accused told him that he did not have the "company fund book" and that it was in the possession of Captain Allen G. Spitz, Infantry Reserve, a previous inspector (R. 140). The books pertaining to the funds of Company 1241 were never in the possession of Captain

Spitz, and he never audited the funds of that company. Captain Spitz testified that he attempted an audit but accused did not produce the "books" although he promised to do so. (R. 73) In the course of an investigation, after having been apprised of the contents of the 24th Article of War (R. 160), accused admitted that he had falsely told Captain Strecker that the "books" were in the possession of Captain Spitz (Pros. Ex. 25).

About February 16, after further temporizing, accused turned over to Captain Strecker the accounts of Company 1241 for audit (R. 140,141). Captain Strecker refused to audit them because of what appeared to be numerous discrepancies (R. 141), and accused said the "fund was all right" (R. 144). Captain Strecker told accused he "did not believe him", and spoke of reporting the matter to the district inspector. Accused then asked to see Captain Strecker in private and told him he had been pressed with personal debts and "had to have some money" so had taken money (in amounts not stated) from the company fund. He asked Captain Strecker to "give him a break" and not report the incident. (R. 145) Captain Strecker later audited the account for the period October, 1937, to January, 1938, and found that accused was "short" \$2525.78 (R. 145,147; Pros. Exs. 23-23D). The monthly accounts in the council book were not closed during the period covered by the audit (R. 146,147). Checks aggregating \$1621.50 were outstanding (R. 146; Pros. Ex. 30). In paying his company on November 2, accused was "short of cash" and borrowed \$100 from another company officer to complete the payments (R. 152). He made collections on company collection sheets for October, November and December, 1937, and January, 1938. Payments from the October and November collections were not made to the camp exchange until about November 24 and December 27, respectively. Payments from the December and January collections were not made until February 16, at which time accused gave to the exchange officer his personal check or checks for about \$1061.66, to cover. (R. 152-155; Pros. Ex. 23D) On February 16 accused deposited in bank, to the credit of Company 1241, about \$1487.44, transmitted to him by telegraph. These reimbursements totaled \$2549.10. (R. 154,163; Pros. Ex. 23D) In the course of the investigation mentioned, accused stated that he had made "unauthorized use * * * of the Company Fund" for his own benefit, but had made full restitution (Pros. Ex. 25). In his unsworn statement, in addition to ascribing his misuse of the funds to his

financial embarrassments, accused stated: "All funds have been restored and all accounts are in proper shape once more" (Def. Ex. A). A witness for the prosecution testified that during November and the early part of December, 1937, he was present at numerous "parties" at which accused spent money freely and consumed considerable liquor (R. 172-177).

Thus the evidence, including the statements of accused, fully establishes the false official statement as alleged in Specification 1, Charge III, and the embezzlement of \$2525.78, as alleged in Specification 3, Charge I. Violations of the 95th and 93d Articles of War, respectively, are proved. Inasmuch as the embezzlement of \$718.59, found under Specification 2, Charge I, was committed during the period involved in Specification 3, and was of funds belonging to Company 1241, it is probable that the total of \$2525.78, found under Specification 3 to have been embezzled, included the \$718.59 found under Specification 2 to have been embezzled. If so, the two specifications involved duplications to this extent.

9. In his unsworn statement accused asked for leniency on account of the circumstances of his offenses, his restitution of the monies embezzled and the hardships to his wife and child which might result from his severe punishment (Def. Ex. A).

10. The specifications, Charge II, allege the making of the false certificates set forth therein as violations of section 35 of the Criminal Code of the United States. That section includes the following clause:

"* * * Whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than \$10,000.00 or imprisoned not more than ten years, or both" (U.S.C. 18:80),

which appears to be of sufficient breadth to include the transactions involving the false certificates here in question, alleged and proved to have been made and presented in the course of inspections or transfers of quasi-public funds, that is, in "matter(s) within the jurisdiction" of the War Department. Inasmuch as the property involved was only of a quasi-public nature (sec. 620, Supp. VII, Dig. Ops. JAG 1912-30), it does not appear that pecuniary or property loss to the United States could have resulted from the false certificates. In interpreting the provisions of section 35 of the Criminal Code as they stood prior to enactment of the clause above quoted (the clause was added by the act of June 18, 1934), the federal courts have expressed the opinion that this section applied only to those cases in which pecuniary or property loss to the United States might occur. United States v. Cohn, 270 U. S. 339; Capone v. United States, 51 Fed. (2d) 609; United States ex rel Starr v. Mulligan, 59 Fed. (2d) 200; United States v. Mercur Corporation, 83 Fed. (2d) 178. The clause quoted, however, does not by its terms or by inference from the remaining language of the section appear to be limited to matters involving pecuniary or property loss to the United States, and it would seem that the opinions noted are not controlling with respect thereto. Whether or not the making of the false certificates involved violations of section 35 of the Criminal Code, the acts charged and proved were plainly violative of the 96th Article of War.

11. The defense contended, in presenting its motion to strike out Charge II and the four specifications thereunder, that these specifications did not with sufficient particularity allege wherein the certificates set forth were false. The specifications charged, in effect, that the certificates were false in all respects. It was the theory of the prosecution, however, as declared in an opening statement by the trial judge advocate (R. 22), that the certificates were false only in certain material respects which the trial judge advocate orally defined with particularity. The evidence thereafter presented bearing upon the falsity of the certificates was limited to the particulars of falsity so declared and defined. Under the circumstances, it would have been proper, in the interest of clarity, to amend the specifications to specify the particulars of the alleged falsity. The record of trial, however, does not in any manner indicate that the pleading of general

falsity or the failure of the court to take corrective action to meet the objection by the defense in fact misled accused in his defense or that his substantial rights were otherwise injuriously affected thereby. A.W. 37. The falsity proved was plainly included in that charged.

12. It was not directly proved at the trial that accused was on active duty at the time the charges were preferred on May 2, 1938, and authenticated by the oath of the accuser on May 3. As noted above, however, copies of special orders of Headquarters Second Corps Area, showing that accused's tours of active duty extended at least to May 5, 1938, are of record in the War Department. Jurisdictional facts may properly be ascertained aliunde the record of trial. Givens v. Zerbst, 255 U. S. 11, 20; Ver Mehren v. Sirmeyer, 36 Fed. (2d) 876, 880. Jurisdiction in courts-martial having attached by the preferring of charges prior to the relief of accused from active duty, such jurisdiction continued thereafter for all purposes of trial, sentence and execution of the sentence. Winthrop's Mil. Law and Precedents (Reprint), pp. 90, 91; CM 203869, Lienhard; CM 206323, Schneider; CM 208545, Polk.

13. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and warrants confirmation of the sentence. Dismissal is authorized upon conviction of violations of the 93d and 96th Articles of War, and is mandatory upon conviction of violation of the 95th Article of War. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of embezzlement involved in the specifications, Charge I, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year by section 851b (sec. 76, title 6) of the Code of the District of Columbia.

Richard W. Hoover, Judge Advocate.
George B. Traub, Judge Advocate.
Loren T. Parkey, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., AUG 18 1938 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Joseph J. Ruddy, Jr., Infantry Reserve.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed, but that the period of confinement be reduced to one year.

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

4. Consideration has been given to the attached letter from Honorable William T. Byrne, House of Representatives, to the Administrative Assistant to the Secretary of War, dated June 8, 1938, with inclosure, and to a letter from the wife of accused to the President, dated August 1, 1938, a copy of which is attached, requesting clemency.

5. Inclosed herewith are the draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action confirming the sentence, reducing the period of confinement as recommended, and directing that the sentence as modified be carried into execution.


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

5 Incls.

- Incl. 1-Record of trial.
- Incl. 2-Draft of ltr for sig.S.W.
- Incl. 3-Form of Executive action.
- Incl. 4-Ltr fr Mr. Byrne 6-8-38.
- Incl. 5-Copy ltr fr Mrs. Ruddy 8-1-38.

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

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Board of Review
CM 210207

OCT 14 1938

U N I T E D S T A T E S)	PHILIPPINE DEPARTMENT
)	
v.	)	Trial by G.C.M. convened at Fort
	)	Mills, P. I., June 17, 1938.
Sergeant WILLIAM E. KENNER-	)	Dishonorable discharge and con-
SON (6047929), Battery G,	)	finement for one (1) year and
59th Coast Artillery.	)	eight (8) months. Penitentiary.

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Sergeant William E. Kennerson, Battery "G", 59th CA, did, at Fort Hughes, P. I., on or about January 29, 1938, commit the crime of sodomy by feloniously and against the order of nature, having carnal connection with Private Joseph T. White, Battery "G", 59th CA.

Specification 2: In that Sergeant William E. Kennerson, Battery "G", 59th CA, did, at Fort Hughes, P. I., on or about October 20, 1937, with intent to commit a felony, viz, sodomy, commit an assault upon Private Victor L. Weber, Battery "G", 59th CA, by willfully and feloniously taking hold of Private Weber's penis when he was asleep.

Specification 3: In that Sergeant William E. Kennerson, Battery "G", 59th CA, did, at Fort Hughes, P. I., on or about October 20, 1937, with intent to commit a felony, viz, sodomy, commit an assault upon Private Albert Grand, Battery "G", 59th CA, by willfully and feloniously getting into bed with the said Private Grand.

Specification 4: In that Sergeant William E. Kennerson, Battery "G", 59th CA, did, at Fort Hughes, P. I., on or about November 20, 1937, with intent to commit a felony, viz, sodomy, commit an assault upon Private Albert Grand, Battery "G", 59th CA, by willfully and feloniously kissing the said Private Grand.

FIRST ADDITIONAL CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Sergeant William E. Kennerson, Battery "G", 59th C.A., did, at Fort Hughes, P.I., on or about November 5, 1937, with intent to commit a felony, viz, sodomy, commit an assault upon Private Albert Grand, Battery "G", 59th C.A., by willfully and feloniously pushing against Private Grand and asking him to play with his penis.

Specification 2: In that Sergeant William E. Kennerson, Battery "G", 59th C.A., did, at Fort Hughes, P.I., on or about November 15, 1937, with intent to commit a felony, viz, sodomy, make homosexual advances toward Private Charles E. Schuchart, Battery "G", 59th C.A.

SECOND ADDITIONAL CHARGES: Violation of the 54th Article of War.

Specification: In that Sergeant William E. Kennerson, Battery "G", 59th Coast Artillery, did, at Fort Mills, P.I., on or about August 31, 1937, by willfully concealing the fact that on or about December 7, 1916, he was discharged from the United States Navy on account of the sentence of a court-martial with a bad conduct discharge, procure himself to be enlisted in the military service of the United States by Lieutenant Colonel Gouverneur H. Boyer, Medical Corps, Recruiting Officer, and did thereafter, at Fort Hughes, P. I., receive pay and allowances under the enlistment so procured.

He pleaded not guilty to all charges and specifications. He was found not guilty of Specifications 2, 3 and 4 of the original Charge, and of the First Additional Charge and its specifications, but guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for two years. The reviewing authority approved the sentence but remitted four months of the period of confinement adjudged, 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. Accused was charged with but acquitted of five specifications, alleging assault with intent to commit sodomy or similar offenses, in three instances with Private Grand and in one each with Private Weber and Private Schuchart. The evidence as to each specification was that of the assaulted party only. Vigorous cross-examination of each prosecuting witness developed vagueness, inconsistency, and contradictions, which, no doubt, led to the findings of not guilty of those specifications.

4. With respect to Specification 1, original Charge, alleging sodomy, of which accused was found guilty, Private Joseph T. White, Battery G, 59th Coast Artillery, testified that on Saturday morning, January 29, 1938, from midnight to 3 a.m., he was on duty as observer at Station F-2, 371 feet above sea level, Fort Hughes, P. I., and that during that period the accused "practiced homosexuality and degeneracy" by going down on his knees and "He put his mouth upon my penis, sir, and sucked it" (R. 27-28). No further details relating to the alleged offense were adduced by the trial judge advocate, and the court conducted no examination of the witness. Upon cross-examination by the defense, Private White testified that there were two men sleeping next door to the place where the alleged offense was committed, but that there were no eye-witnesses, and that he requested Private Bennington to report the matter to his organization commander (R. 28). Following the testimony that there were two men in the adjoining room at the time of the commission of the offense alleged, the record on page 28 reads as follows:

"Q. Why did you not call for help?

Prosecution: Objection! I believe it irrelevant whether he called for help or not. Did the accused do anything or did he not? That is the question before the court.

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Law Member: Objection sustained." (Underscoring supplied.)

Thereafter, the cross-examination of Private White was extremely meager.

The question put by defense counsel is open to objection on a ground not stated by the trial judge advocate, namely, that it assumed a fact not proved, the fact that witness did not call for help. However, such was not the ground on which the trial judge advocate made his objection, or, presumably, that on which the law member excluded the question. For the Board to sustain the ruling of the law member on that ground would be highly technical and would ignore the effect of the ruling, as inferred from the wording of the objection, in preventing further cross-examination, as hereafter pointed out.

It appears from the evidence that Private White was the pathic and accomplice in the commission of the alleged offense, as well as the sole witness against the accused, and therefore the most extensive and searching cross-examination would have been proper. The offense of sodomy is a heinous offense; but is, from its very nature, so easily charged and the negative so difficult to prove that the accusation should be established by clear and indisputable evidence (M.C.M., 1921, p. 439; 2 McClain on Crim. Law, sec. 1155).

Regarding the crime of sodomy, section 546, Underhill's Criminal Evidence, reads in part:

"If the crime is consummated, both parties consenting thereto, each is an accomplice of the other and neither can be convicted upon the uncorroborated testimony of the other."

The rule is not inflexible, however, and where the evidence is clear and compelling a conviction may be sustained upon the testimony of the pathic alone. Numerous rulings of the federal courts support the rule set forth in Corpus Juris, reading as follows:

"The mere fact that one was an accomplice of, or particeps criminis with, the defendant on trial does not render him incompetent as a witness in behalf of the prosecution; * * *"
16 C.J. 1410 and footnotes.

While the testimony of an accomplice is competent and admissible, his credibility is a very material factor in the trial, especially in such

a heinous offense as sodomy, and consequently such a witness should be subjected to the most searching and thorough cross-examination. In digesting the law on this point, section 1420, volume 16, Corpus Juris, citing both federal and state cases, reads as follows:

"The fact that a person is an accomplice in the commission of a crime goes to his credibility as a witness; and it is well settled as a general rule that an accomplice is not, as a matter of law, entitled to the full credit given to other witnesses, the rule in this respect being the same whether the accomplice is introduced by the prosecution or by the defense. Furthermore where the accomplice is introduced as a witness for the defense, his relationship to defendant and his interest in the result are to be considered as bearing on his credibility. While the testimony of an accomplice is to be treated like that of other witnesses, and considered for all purposes, and may be believed, such testimony is not regarded with favor, but should be received with caution, should be closely scrutinized and viewed with distrust, and even under the common-law rule that it is not essential that the testimony of accomplices be corroborated, the jury should be instructed as to the danger of convicting upon the evidence of accomplices alone."

The testimony of an accomplice is of doubtful integrity and should be received with great caution (M.C.M., 1928, par. 124 a). In Holmgren v. United States (217 U.S. 509, 523, 524), it was stated by the Supreme Court:

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them."

See also Sykes v. United States (204 Fed. 909, 913). In Winthrop's Military Law and Precedents, pages 336 and 357, with regard to the testimony of accomplices, the following appears:

"But the mere fact that a person was an accomplice of the accused does not so identify him with the latter as to render him incompetent to testify for or against him. Nor

is his competency affected by the fact that he has himself been charged - separately - with the same offence. The objection is not to his competency but to his credibility - as will be noticed under another head.

* * *

"While the testimony of an accomplice, if believed, may be sufficient, though unsupported, to warrant a conviction, it is agreed by the authorities that, as a general rule, such testimony cannot safely be accepted as adequate for such purpose unless corroborated by reliable evidence."

In the instant case the accused was sworn as a witness at his own request and denied categorically and emphatically the allegations contained in the sodomy specification of which he was found guilty, and stated that Private White left him and some other soldiers "about fifteen to twelve" on the night in question (R. 51). He was aware of no motive which might have caused Private White to accuse him of sodomy, but testified, when asked what kind of soldier Private White was, that -

"I would not say that he was a very good soldier. In fact, about a year ago, Sergeant Fleming was acting first sergeant and he asked me to take Private White and I said I did not want him." (R. 52.)

The accused further testified that Private White was in his platoon two days and that "he was hard to handle and you always had to keep after him" (R. 52).

The defense introduced a number of enlisted men of various grades from private to sergeant who testified that they had known the accused over a period of years, had been alone with him but had never known him to show any sex-perversion tendencies.

Sergeant Louis J. Kahrer, Battery G, 59th Coast Artillery, testified that he had known accused since October, 1937, and lived in the room with him for approximately a month; that he never made any homosexual advances towards him (witness) and he "found him to be a straightforward man" (R. 39).

Sergeant Fred Schmuellen, Battery G, 59th Coast Artillery, testified that he had known the accused since September, 1932, and that

he lived with accused at Fort Hughes, both in Battery G and in Battery B, and had been alone with him but had never known of his making homosexual advances to him or to anyone else; that he is not a particular friend of accused, "just in the same battery" (R. 40).

Sergeant Alex B. Prettol, Battery G, 59th Coast Artillery, testified that during October and November, 1937, he was a corporal; that he has known accused since November, 1936, and had been alone with him on occasions but that accused never made any improper advances toward him (R. 41).

Private 1st Class Jessie D. Cruse, Battery G, 59th Coast Artillery, testified that he was in the same battery with accused and had been alone with him but that accused never made any homosexual advances toward him; that he had seen accused partly dressed in quarters but never saw him "abusing himself"; that he had worked in the oil wells of Texas and had there seen "queers" but that accused was not that type of man (R. 42, 43).

Corporal Simeone Salvatore, Battery G, 59th Coast Artillery, testified that he had been on duty with accused about three months and had been alone with him on a number of occasions but had never known accused to make improper advances to men, and considered him "a good man to soldier with" (R. 44).

Private 1st Class Dallas C. Howell, Battery G, 59th Coast Artillery, testified that he had known the accused for fifteen months, and had been alone with him "lots of times"; that accused never made any homosexual advances to him, and on the night of the sodomy alleged in Specification 1, original Charge, he was with accused "between six o'clock and 12 o'clock", leaving him about 12:05 a.m.; that accused upon leaving said he was sleepy and "I've got to go to bed, got an inspection tomorrow"; that he considers the character of the accused as good; and that he (witness) is a boxer and would strike a man who offered to commit sodomy with him but that he never saw accused approach anyone "in a lovemaking way" (R. 45, 46, 47).

Private 1st Class James McD. Martin, Battery G, 59th Coast Artillery, testified that he knew the accused and had been on duty with him; that he was six feet two inches tall and would strike any man making homosexual advances towards him, and that the accused never made any such advances; that he has "a very good opinion" of accused but is not a particular friend of his (R. 48, 49).

Private Richard H. Howell, Battery G, 59th Coast Artillery, testified that he had been alone with accused "several times", but had never known him to make homosexual advances toward anyone and "my opinion of his character is good" (R. 50).

The charge sheet shows the accused as 43 years of age, having first enlisted in March, 1920, and at present serving his seventh enlistment in the Army and holding the grade of sergeant.

5. The only evidence of guilt of the sodomy alleged in Specification 1, original Charge, is the testimony of Private White, the accomplice and pathic. It follows, therefore, that every test as to its credibility should have been applied. He should have been thoroughly examined and cross-examined, and his testimony scrutinized closely and received with caution. In an opinion of the Board of Review (CM 186545, Phillips) where, in a sodomy case, the only competent witness against the accused was the pathic, it was held:

"Although the competent evidence in this case might warrant a court-martial in finding the accused guilty of the charges, it is not of such compelling character that it can be said with reasonable certainty that it would have resulted in conviction had the incompetent statement of the child, * * *, been excluded."

The Board held the record not legally sufficient to sustain the findings.

In the instant case it appears that although Private White was the sole witness against the accused with respect to the sodomy specification of which he was found guilty, his examination by the prosecution was extremely meager, the court failed to examine him at all, and the defense counsel, when attempting to cross-examine him with respect to his actions and the surrounding circumstances, was not permitted to do so by a ruling of the law member sustaining an objection by the prosecution on the ground that such testimony was irrelevant as the cross-examination should be confined to what the accused did or did not do (R. 28). It is true that the specific question ruled out was improper in form and limited in subject matter, but the language of the objection furnished a basis for the conclusion by both defense counsel and the court that the ruling excluded a wide scope of cross-examination that in fact was proper. The defense had the right and duty to test the credibility of this witness. In view

of the nature of the offense charged and of the discrediting on cross-examination of all witnesses accusing him of assault with intent to commit sodomy, alleged in specifications on which he was acquitted, considered together with the fact of the many witnesses testifying to the good character of accused, and the further fact that Private White, an accomplice, was the only witness for the prosecution on the specification under consideration, it became highly important that he be closely and thoroughly cross-examined on all the statements made by either party at the time of commission of the alleged offense and with respect to the surrounding circumstances. This was not done by either the defense or the court, probably due to the ruling in question, as all other witnesses testifying with respect to other specifications were thoroughly cross-examined.

It may be suggested that the cross-question which the law member erroneously excluded was intended to bring out only that White was a willing participant in the sodomy, and that whether he was such was immaterial, since sodomy, unlike rape, is committed even if the other party consents. The Board does not admit the validity of that argument. If White was a willing participant, he was guilty of a crime involving moral turpitude of the worst sort. The question, therefore, was proper as cross-examination to credit, and as such the defense had the right to put it. But the question excluded had another and even more important purpose. If White did not call for help, one permissible inference is that he was a willing participant; but another and even more plausible inference is that he did not call for help because no sodomy was then committed and no necessity existed for calling, that his whole story is a fabrication. The defense was entitled to bring out the facts from which to draw this inference.

In view of the wording of the objection and the failure of the defense counsel or the court thereafter to conduct the searching cross-examination so successfully employed with respect to other prosecution witnesses, the conclusion is inescapable that the defense counsel and the court considered, and with reason, that they were precluded by the ruling of the law member from examining White regarding his own acts, omissions and statements. The ruling of the law member appears to be the only reasonable explanation of the brief cross-examination of White. That such matters were relevant to the issue and of vital materiality, and cross-examination with respect thereto important as a means of impeaching the witness or of at least casting doubt on his veracity, is unquestionable. The ruling excluded the introduction of evidence pertaining both to the general issue, i.e., whether or not the acts alleged in fact occurred, and to the question of the credibility of the witness testifying. Moreover, an examination of the testimony of Private White given at an investigation of

the charges February 18, 1938, and again on March 25, 1938, and during the trial, considered together with the testimony of other witnesses at the said investigations and at the trial, indicates that a thorough and searching cross-examination of Private White might have wholly discredited him. At the trial there was testimony that the group of soldiers with whom Private White and the accused were present on the night in question broke up about 11:45 p.m., at which hour White left for his place of duty (R. 51), yet White testified at the March 25th investigation that he was asleep and awakened at midnight by the observer whom he was to relieve on guard. White also stated at an investigation that accused called him on the telephone, informing him of his intention to visit him and actually arrived ten minutes later, yet White made no effort to have two other soldiers in the adjacent guard room observe the accused, whom he testifies he accommodated in order to get evidence against him. White further stated that accused had been trying to commit sodomy with him for a year, and that while he was "looking through his instrument" accused unbuttoned his (White's) trousers and "knelt down and took the witness' penis in his mouth and sucked on it until emission occurred", after which he asked accused to meet him the next day at a given place, as there he would have witnesses to the act; but there were two witnesses available on the night of the alleged offense whom Private White did not call, nor did he fulfill the appointment for the next day before witnesses as arranged. At both investigations, Private White stated that he reported the affair to his battery commander voluntarily the following morning, but at the trial he testified that he did not first do so but reported it to Private Bennington, who reported it to the accused's organization commander (R. 28). The date and manner of such report are not shown, but accused was not confined until February 3, 1938, five days after the date of the alleged sodomy, from which fact it may be inferred that the report to the commanding officer was made on that date, and then by Private Bennington and not Private White. The battery commander, although called as a witness, was not questioned with respect to any matter except receipt of pay and allowances by accused during his current enlistment (R. 31).

Under the circumstances, a conclusion that the ruling of the law member, restricting the defense counsel in his scope of cross-examination of Private White to matters pertaining solely to the actions and statements of accused, did not injuriously affect the substantial rights of the accused within the meaning of the 37th Article of War would not be justified. It is the opinion of the Board of Review that the ruling of the law member constituted a fatal error injuriously affecting a substantial right of accused and that, therefore, the evidence is not legally

sufficient to support the findings of guilty of the original Charge and Specification 1 thereunder.

6. The only other charge and specification of which accused was convicted are the second additional charge and specification thereunder, alleging fraudulent enlistment by concealment of a prior bad conduct discharge from the Navy. To prove accused's naval service the prosecutor introduced a certificate signed by Admiral Nimitz, Acting Chief of the Bureau of Navigation, Navy Department, as follows:

"I hereby certify that the annexed are photographic copies showing the enlistments and discharges of William Edward Kennerson, Ex-Fireman second class, U.S. Navy, as shown by the records on file in the Bureau of Navigation."

Under the foregoing, is a further certificate signed by Admiral Leahy, Acting Secretary of the Navy, bearing the seal of the Navy Department. Attached to the above certificates are photostatic copies of papers showing two enlistments of William E. Kennerson in the Navy on March 7, 1916, and December 15, 1917, respectively; fingerprints of William E. Kennerson, taken before medical officers of the Navy on dates not stated; and three papers in the nature of final entries in a service record, one showing the discharge at Norfolk, Virginia, December 7, 1916, "on account of sentence of S.C.M. with bad conduct discharge" of a man whose name is not disclosed by the paper itself, a second similar paper showing the desertion of an unnamed man from the Receiving Ship at Philadelphia, May 1, 1918, and the third showing the discharge of an unnamed man from the Naval Prison, Portsmouth, New Hampshire, August 16, 1919, "on account of served full sentence". That these three papers relate to William Edward Kennerson is shown, not by the photostatic copies furnished, but solely by the certificate of the Acting Chief of the Bureau of Navigation. As the specification alleges only concealment of a bad conduct discharge from the Navy December 7, 1916, the trial judge advocate properly refrained from offering in evidence the proof of accused's second enlistment in the Navy December 5, 1917, and the other papers tending to show (if they relate to him) his desertion and dishonorable discharge from that enlistment. With reference to the certificate and the papers covered by it and offered in evidence, the record states (p. 33), "There being no objections, the paper was then received in evidence".

CM 156186, Potter, digested in Dig. Ops. JAG 1912-30, paragraph 1299, was a like case. Though not stated in the digest paragraph, the name of the person concerned appeared only in the certificate of the Acting Chief of the Bureau of Navigation and not in the paper certified. In the Potter case, when the certificate and accompanying papers were offered in evidence, the defense counsel said, "No objections".

The Board of Review, with the approval of The Judge Advocate General, said:

"* * * The photostatic copy of a paper attached to the aforementioned certificate of the Acting Chief of the Bureau of Navigation to the effect that on September 8, 1922, someone was discharged by reason of the sentence of a general court-martial and orders of the Secretary of Navy, does not bear the name of the accused and it is impossible to determine therefrom whether or not the entry applies to the accused, and even if so, whether the original entry from which the copy in question was made is a document of original entry such as would itself have been competent evidence.

"True, the certificate recites that the papers in question relate to the accused, but the certificate is not evidence; the papers must speak for themselves. * * *."

The position of the Board of Review in the Potter case is logical but highly technical. (The present Board feels strongly that our system of military justice, while carefully protecting the rights of accused persons, must not become so technical as to be unworkable by law members, trial judge advocates, and defense counsel who are primarily soldiers and not lawyers.) Such seems to have been the view of the authors of the 1928 edition of the Manual for Courts-Martial, published since the Potter case was decided. In many respects that edition simplifies and liberalizes the pre-existing procedure. The last sentence of paragraph 116 is as follows:

"A failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection."

It may be objected that the objection to the admissibility of the paper now in question goes not to its genuineness, but to its relevancy, that it is properly proved that that paper is a true copy of an

original paper on file in the Navy Department, but it is not properly shown that that original paper relates to Kennerson. If there be given to the word "genuineness" a narrowly technical signification, equivalent to "authenticity", the argument is sound; but ought not the word to have a broader meaning? Ought it not to be construed so as to mean genuine as respects this accused, i.e., authentic and applicable to him? And even if, as a matter of lexicography, "genuineness" cannot receive so broad a meaning, the Board thinks that it ought to regard the present as a case within the spirit if not the letter of the passage quoted from the 1928 Manual, as a case not covered by any express directive in the Manual, but to which by analogy the Board should apply the same rule.

In the Manual for Courts-Martial, edition of 1928, paragraph 117 a, it is said:

"An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, where an official duty exists to know and to make one or more records of certain facts and events, each such record, including a permanent record compiled from mere notes or memoranda, is competent (i.e., prima facie) evidence of such facts and events, * * *." (Underscoring supplied.)

The present is a certificate by a high officer of the Government. The subparagraph from which quotation has just been made concludes:

"* * * A failure to object to a document on the ground that the information therein is compiled from other original sources may be regarded as a waiver of the objection."

The statement by the Acting Chief of the Bureau of Navigation that the paper certified relates to William Edward Kennerson is information compiled from another original source, presumably the cover or first page of Kennerson's naval service record, of which the last page only has been certified and transmitted. The present case therefore falls squarely within the scope of the sentence last quoted.

For the reasons above set forth, the Board concludes that the Potter case should not be followed in the present and future like cases, and that accused's bad conduct discharge from the Navy was sufficiently

proved. No injustice will be done by so holding. If there existed the least doubt that the entry in question applied to Kennerson, he or his counsel would have objected to its admission. On the contrary, in the closing sentences of his argument (p. 54), counsel inferentially admitted that accused committed the offense of fraudulent enlistment now in question. It is to be noted that neither the Potter opinion nor the present holding covers a case where objection is made to the admission of the document in question.

7. The Board observes another irregularity with respect to the proof of the specifications alleging fraudulent enlistment. On pages 33-34, appear the following stipulations:

"Prosecution: If it please the court, the prosecution and the defense agree to the stipulations that:

"If one A. Y. Laperal, Superintendent of the Identification Section, Secret Service Division, Manila Police Department, were present in court he would testify as follows: "That the fingerprints on Exhibit 'A'-GCM, Exhibit 'B'-GCM and Exhibit 'E'-GCM were made by one and the same man, and that Mr. Laperal would say that he is Superintendent of the Identification Section, Secret Service Division, Manila, Police Department, Manila, P.I."

"If Major Desmond O'Keefe, J.A.G.D., were present in court he would testify as follows: "That as trial judge advocate in the case of the United States versus Private Denver D. Albrecht, Company A, 31st Infantry, tried by a general court-martial at the Headquarters Philippine Department on October 30, 1937, Mr. A. Y. Laperal, Superintendent Identification Section, Secret Service Division, Manila Police Department, was called as an expert witness for the prosecution and examined quite thoroughly concerning his qualifications. Upon this examination, Mr. Laperal testified under oath in substance that he had studied and made comparisons of handwriting and fingerprints for approximately twenty years. He further testified that he had been qualified and testified as such an expert before many courts in Manila and surrounding provinces. Mr. Laperal was accepted by the court as an expert witness".

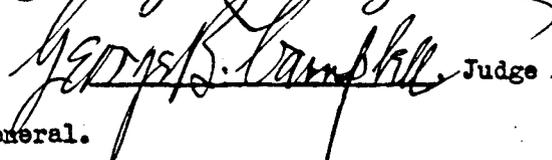
"These stipulations were received in evidence by the court, there being no objections."

The first stipulation is unobjectionable so far as it goes, but the second is improper. The proper way to prove the qualifications of an expert witness is by testimony of the witness himself or some other person, or by a stipulation, as to his training and experience in his art or profession, not by testimony or a stipulation as to what he had testified at some prior trial of another person, which is secondary evidence only of his qualifications. However, the first stipulation shows the witness to be Superintendent of the Identification Section, Manila Police Department; and it may be inferred that a person holding such a position is qualified as a fingerprint expert. The Board, therefore, concludes that the proof of identity was sufficient.

8. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of the original Charge and Specification 1 thereunder, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary.


Arlethald King, Judge Advocate.


George H. Hayes, Judge Advocate.


George B. Campbell, Judge Advocate.

To The Judge Advocate General.

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

(235)

Board of Review
CM 210256

APR 21 1939

UNITED STATES)

SIXTH CORPS AREA

v.)

Trial by G.C.M., convened at
Selfridge Field, Michigan,

Private GORDON W. DELPH)
(6552821), Air Corps,)
Unassigned, attached to)
Base Headquarters and)
5th Air Base Squadron,)
Air Corps.)

for twenty-seven (27) days
and forfeiture of \$12 pay.
Selfridge Field, Mount Clemens,
Michigan.

OPINION of the BOARD OF REVIEW
KING, FRAZIER and CAMPBELL, Judge Advocates.

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

2. The accused was tried on a single charge and specification, as follows:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Gordon W. Delph, Air Corps, Unassigned, attached to Base Hq & 5th Air Base Squadron, Air Corps, did, at Hamilton Field, California, on or about May 12, 1938, desert the service of the United States and did remain absent in desertion until he surrendered himself at Selfridge Field, Michigan, on or about May 21, 1938.

Accused pleaded not guilty to and was found guilty of the charge and specification thereunder. Evidence was introduced of two previous convictions. He was sentenced to be dishonorably discharged the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the findings of guilty of the Charge and Specification thereunder as involved a finding of guilty of absence without leave at the place and on the date alleged, terminated by surrender at the place and on the date alleged, in violation of the 61st Article of War; and only so much of sentence as provided for confinement at hard labor for twenty-seven days and forfeiture of \$18 of the soldier's pay. The reviewing authority ordered the sentence as thus modified to be executed and designated Selfridge Field, Mount Clemens, Michigan, as the place of confinement (CGMO 174, Headquarters Sixth Corps Area, August 13, 1938).

3. No question arises as to the sufficiency of the record of trial to support the findings of guilty as modified by the reviewing authority. The total pay forfeited by the sentence of the court amounted to about \$79; that forfeited pursuant to the action of the reviewing authority, \$18. Therefore no reason exists for doubting the legality of the forfeitures imposed.

4. The only serious question presented by the case is the legality of the action of the reviewing authority in approving "so much of the sentence as provides for confinement at hard labor for 27 days", in view of the fact that the sentence imposed by the court included no confinement whatever.

5. The Board first considers whether the above action of the reviewing authority may be justified under the table of equivalents in paragraph 104 g, Manual for Courts-Martial, as follows:

"Subject to all applicable limitations, substitution for the punishments specified are authorized, at the discretion of the court, at the following rates, unless dishonorable discharge is imposed:

Forfeiture	Confinement at hard labor	Detention	Hard Labor without confinement	Restriction to limits
1 day's pay ...	1 day	1/2 day's pay	1/2 days	3 days

6. Does the above passage authorize the reviewing authority, not the court, to substitute confinement at hard labor for forfeiture of pay? As far back as 1897, C 3487, it was held by The Judge Advocate General:

"The Commanding Officer at Willet's Point, N. Y., submits the question whether an officer who has the authority to review the sentence imposed by a summary court may mitigate the same by substituting for a forfeiture of pay confinement at hard labor for a less number of days than a summary court may substitute for the same forfeiture, and he is of opinion that he may do this because the President by Executive Order of March 20th, 1895, authorized the substitution of confinements of varying duration for forfeiture of pay and thus established the equality of these species of punishment. The regulations presented by the President in order to enable courts-martial to determine the measure and kind of punishment to be imposed were not intended to, and do not, effect the firmly established principle that the reviewing authority, in the exercise of his power of mitigation, can not change the kind of punishment. If this could be done, he might thus award a punishment which had been actually rejected by the court. The power of substitution as exercised by the court under the provisions of the Executive Order has no relation to the power of the reviewing Officer."

Apart from the precedent, the theory that the reviewing authority may make substitutions pursuant to the passage quoted in paragraph 5 of this opinion from paragraph 104 c, Manual for Courts-Martial, would seem to be untenable in view of the phrase "at the discretion of the court". (The Board believes that the language of an executive order, and this part of the Manual is such, is subject to substantially the same canons of construction as a statute.) One of these canons is that a statute must be construed so as to give every word in it some effect. Among the many expressions of this rule by the Supreme Court of the United States are the following:

"* * * it is the duty of^f the court, when it can, to give effect to every word in every enactment, if it can be done, without violating the obvious intention of the legislature. * * *." (United States v. Gooding, 12 Wheat. 460, 477, per Story, J.)

"* * * Now, it is the duty of courts of justice so to construe all statutes as to give full effect to all the words, in their ordinary sense, if this can be properly done; * * *." (Bend v. Hoyt, 13 Pet. 263, 272, per Story, J.)

"* * * Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. * * *." (Early v. Doe, 16 How. 610, 617.)

"* * * if possible, effect shall be given to every clause and part of a statute. * * *." (Ginsberg & Sons v. Popkin, 285 U.S. 204, 208.)

It follows from the foregoing and many other cases to the same effect which might be cited that the words, "at the discretion of the court", may not be ignored or rejected, but that meaning and effect must be given to them.

7. What meaning shall be given to the words, "at the discretion of the court"? More specifically, who is meant by "the court"? Again the Board turns to the canons of construction of statutes, one of the most elementary and well settled of which is set out in the following quotations from the Supreme Court of the United States:

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. * * *

"Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. * * *." (Caminetti v. United States, 242 U.S. 470, 485.)

"* * * And unless Congress has definitely indicated an intention that the words should be construed otherwise, we must apply them according to their usual acceptation." (Avery v. Commissioner, 292 U.S. 210, 214.)

"The words of the statute are plain and should be accorded their usual significance in the absence of some dom-

inant reason to the contrary. * * *." (Old Colony Company v. Commissioner, 301 U.S. 379, 383.)

Let the canon of construction laid down in the foregoing and many other cases be applied to the present case. Though it has sometimes been said, in a general and inaccurate sense, that the reviewing authority is a member of the court; "the court", when used with reference to the administration of military justice, means, in its ordinary and natural signification, the court-martial before which accused is arraigned and which hears the witnesses, and does not include the reviewing authority. No reason is seen why there should be attributed to the President the intention of giving the word "court" any other than its usual meaning.

8. There are, furthermore, strong indications that "the court", as used in the passage quoted from paragraph 104 c, Manual for Courts-Martial, ante, paragraph 5, this opinion, meant the court-martial itself and not the reviewing authority. The passage authorizes certain substitutions "at the discretion of the court". When writing it, the author undoubtedly had in mind Article of War 45, which directs:

"Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial the punishment shall not exceed such limit or limits as the President may from time to time prescribe; * * *." (Underscoring supplied.)

9. The word, "court", in paragraph 104 c, Manual for Courts-Martial, clearly means the same as "court-martial" in Article of War 45. The latter term just as clearly means one of the courts established by other articles of the same statute, namely, general, special, and summary courts-martial set up by Articles of War 3, 5-10, and 12-14. Specifically, Articles of War 5, 6 and 7 provide:

"ART. 5. General Courts-Martial. - General courts-martial may consist of any number of officers not less than five.

"ART. 6. Special Courts-Martial. - Special courts-martial may consist of any number of officers not less than three.

"ART. 7. Summary Courts-Martial. - A summary court-martial shall consist of one officer."

It will be noted that none of the above articles makes the reviewing authority a member of the court. His functions are prescribed by Articles of War 46, 47, 50, 50½, 51 and 52, articles which in many places carefully separate and distinguish between the functions of the court and the reviewing authority. For example, in Article of War 46, it is said:

** * * No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

10. The Board therefore concludes that the President, in promulgating paragraph 104 c, Manual for Courts-Martial, made no attempt to empower the reviewing authority to substitute confinement for a forfeiture; but, on the contrary, gave such power to the court alone. Whether the President could lawfully have conferred such power upon the reviewing authority is a doubtful question which it is unnecessary to consider.

11. The next question is whether, even if paragraph 104 c, Manual for Courts-Martial, does not confer power upon the reviewing authority to make such a substitution, is the power conferred by the Articles of War? Articles 46, 47 and 50, so far as material, are as follows:

"ART. 46. Action by Convening Authority. - * * *
No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

"ART. 47. Powers Incident to Power to Approve. -
The power to approve the sentence of a court-martial shall be held to include:

*(b) The power to approve or disapprove the whole or any part of the sentence. * * *.

"ART. 50. Mitigation or Remission of Sentences. -
The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence."

12. Can the action here taken be sustained under Article of War 47 b as an approval or a part of the sentence? To put the same question in another form, is the sentence which the reviewing authority approved a part of that which the court imposed? The answer must be in the negative as to the twenty-seven days' confinement at hard labor, since the sentence imposed by the court included no confinement whatever. One form of punishment cannot be a "part" of another of a wholly different sort.

13. The Board next turns to the first sentence of Article of War 50, which it repeats:

"The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence."

As remission is not involved, it is obvious that the question before the Board turns upon the definition of the verb, "mitigate". Did the action of the Commanding General, Sixth Corps Area, "mitigate" the sentence imposed by the court?

In Bouvier's Law Dictionary, "mitigation" is thus defined:

"Reduction; diminution; lessening of the amount of a penalty or punishment."

14. Bouvier's definition was judicially approved in People v. Leong Fook (206 Calif. 64, 273 Pac. 779). The definition in the Manual for Courts-Martial, though fuller, is substantially the same. It is there said (par. 87 b, pp. 76, 77):

"The power to order the execution of the sentence includes the power to mitigate or remit the whole or any part of the sentence (A. W. 50); but in any case the punishment imposed by the sentence as mitigated or remitted must be included in the sentence as imposed by the court and should be one that the court might have imposed in the case. * * *

"To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same. A sentence can not be commuted except by the

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President or by a commanding general empowered by the President under A. W. 50.

"A sentence imposing dishonorable discharge only can not be mitigated.* * *."

15. We are fortunate in having a definition of "mitigate", as applied to courts-martial, by George Washington, our first Commander-in-Chief, in the handwriting of Alexander Hamilton, then a colonel and General Washington's aide, as follows:

"Had the constitution of the Court been intirely regular, I do not conceive I could with propriety, alter the capital punishment into a corporal one. The right of Mitigating only extend, in my opinion, to lessening the degree of punishment, in the same species prescribed; and does not imply any authority to change the nature or quality of it altogether."

(Washington to Gates, February 14, 1778; Sparks' Writings of Washington, volume 5, page 236; Writings of Washington, Bicentennial Edition, volume 10, page 457.)

16. The Board next considers opinions of The Judge Advocate General on the meaning of "mitigation".

a. In R 47, 123, Engleright, the court sentenced accused "to be confined in the United States Military Prison for the period of one year". The reviewing authority undertook to mitigate this sentence to forfeiture of half monthly pay for four months. The Judge Advocate General held such action unlawful, as constituting commutation and not mitigation.

b. In R 48, 268, Hall, the court sentenced accused to forfeit his pay, to be dishonorably discharged, and "to be confined in such military prison as the reviewing authority may direct, for two years". The sentence did not contain the words "at hard labor". The reviewing authority undertook to mitigate the sentence to "confinement at hard labor at the station of his company for nine months, with forfeiture of ten dollars a month for the same period". The Judge Advocate General held such action not to constitute "mitigation", and to be beyond the power of the reviewing authority, saying:

"Mitigation is reduction in the quantity, or quality of the punishment, without changing its species.

"Commutation is an exercise of the pardoning power, in cases when the punishment is such as not to admit of reduction in degree.

"In the present cases the term of confinement was reduced in time but the nature of the confinement was materially changed and increased in severity. I do not believe this to be within the scope of the reviewing officer's powers.

"No doubt it is often an omission when the court fails to provide in its sentence that the confinement shall be at hard labor, but this can only be remedied by returning the proceedings to the court for reconsideration.

"In this case a sentence of two years confinement without hard labor was changed to one of nine months with hard labor. If such a change were considered a mitigation, where could we draw the line? How many months with hard labor are equivalent to two years without? For we would have to know this line, in order not to pass it. The impossibility of determining it, shows, in my opinion, that this change of sentence was not a legal exercise of the power of mitigation."

c. R 48, 666, O'Donnell and Sweeney, was even more like the present case. The facts and his opinion are thus stated by The Judge Advocate General:

"The enclosed proceedings of General Court Martial in the cases of Privates Patrick O'Donnell Co I, and Edward Sweeney, Co. K, 16th Infantry are respectfully submitted to the Secretary of War.

"The prisoners were each sentenced by the Court 'To be dishonorably discharged the service of the United States with the loss of all pay and allowances now due or to become due; which sentences were "mitigated" by the Department Commander to confinement at hard labor at the post where their companies may be serving for one year forfeiting ten dollars per month of their pay for the same period' (G.C.M.O. 51. December 15, 1884, Dept. of Texas). This action, it is submitted, is not a mitigation, but, so far as confinement at hard labor is concerned is a substitution of an entirely different punishment from that awarded by the Court."

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d. To the same effect is P 32, 401, in which The Judge Advocate General said:

** * * to change the sentence of dishonorable discharge, adjudged against the soldier, to confinement at hard labor, is not a mitigation but a commutation or change of the character of punishment which the reviewing authority cannot legally make. (Decision of Sec. of War of Feb. 15, 1885, published in Decision Circulars, No. 2, Hdqrs. of the Army, A. G. O., March 23, 1885.)"

e. In 1888 The Judge Advocate General rendered an elaborate opinion (R 57, 89), showing extended historical research, on the question whether a reviewing authority has power to commute a sentence of dishonorable discharge. At that time the 112th Article of War empowered the reviewing authority to "pardon or mitigate any punishment adjudged" by the court. The Judge Advocate General showed that the word "pardon" was not used in the usual sense of that word, meaning the power of pardon as exercised by a king, governor, or president; but was a survival from the legislation of the Continental Congress concerning the Continental Army, and meant simply "remit". The question therefore was, what power, if any, had a reviewing authority over a sentence of dishonorable discharge by virtue of the grant to him of the power to "mitigate" sentences. In other words, could a sentence of dishonorable discharge be "mitigated"? It will be observed that this is the identical question now again presented fifty years later. The Judge Advocate General concluded (pp. 93, 94):

"The words 'pardon' and 'mitigation' in the 112th Article of War should, I think, be construed with reference to the condition of the English system existing at the time when we copied it. There was then no general power of commutation; 'pardon' did not include it; when conferred it was expressly conferred by statute and clearly defined. Therefore, I am of opinion that commutation is not authorized by the 112th Article of War.

"By 'commutation' I understand the substitution for the punishment adjudged of a lesser punishment of a different kind. It is now established beyond question, that the President may, by virtue of his pardoning power, commute sentences, because this is held to be simply a con-

ditional pardon; but this is peculiar to the pardoning power; it cannot be extended to the officer's power to 'remit'.

"Moreover, assuming that I am correct in my interpretation of the word 'pardon', as used in the 112th Article of War, viz: that it means remission, then I think it follows that by pointing out the way in which a punishment may be reduced, that is to say by 'mitigation', the Article excludes other methods of reduction. And if the power to commute has been withheld, it would seem clearly to have been for the reason that - as stated by the Law Officers of the Crown in 1727 - 'it is giving a new and different judgment which the law doth not admit of'.

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"Reverting to the particular question submitted to me, I would say in the first place that I am of opinion that no species of confinement can be substituted for dishonorable discharge, as that would clearly be commutation. (See circular No. 2, 1885, Headquarters of the Army.) The question whether forfeiture of pay can be substituted for it depends upon the question whether it is to be regarded as mitigation or commutation. There seems heretofore to have been an inclination to treat it as mitigation, perhaps for the reason that by dishonorable discharge the soldier loses all opportunity of earning pay; but, strictly speaking, this is incorrect. The sentence of dishonorable discharge alone does not include forfeiture of pay; forfeiture of pay forms no part of the sentence; and therefore, to substitute forfeiture of pay for dishonorable discharge would also be commutation, for which there is a lack of legislative authorization. In strictness of law there is no way in which, by virtue of the 112th Article of War, a sentence of dishonorable discharge can be reduced: it can not be commuted, for there is no law for it, and it can not be mitigated, for it is not susceptible of mitigation."

f. In C 5887, in 1899, The Judge Advocate General held:

"This soldier having been sentenced to dishonorable discharge, and forfeiture of all pay and allowances it was beyond the power of the reviewing authority to commute the

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sentence, as attempted in this case, to confinement at hard labor for six months and forfeiture of \$10 per month for six months, for the reason that that would be imposing a punishment of a different nature."

g. In Dig. Ops JAG 1912-30, section 1395 (3), it is said:

"The sentence was 'to be confined at hard labor at such place as the reviewing authority may direct, for the period of his natural life, and to forfeit all pay and allowances due or to become due.' The reviewing authority 'mitigated' the punishment to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 15 years. Mitigation of punishment is a reduction in quantity or quality without changing its species. Dishonorable discharge is a severe punishment of a separate and distinct species from all others. By including the dishonorable discharge in the sentence as approved, the reviewing authority did not 'mitigate', but exceeded his power by adding to the punishment as imposed by the court-martial. Such action was unauthorized and illegal. C. M. 120711 (1918)."

17. All the American textbooks on military law are to the same effect. The following quotations are made:

a. Major General Alexander Macomb, Practice of Courts-Martial, (1840), section 163:

"Mitigation, as the word implies, is to lessen or reduce in amount, or severity. Thus a soldier sentenced to receive fifty lashes, may have his punishment mitigated to twenty-five - and an officer sentenced to a year's suspension, may be suspended for only six months, or less, according to the circumstances attending his case. * * *"

b. Lieutenant John O'Brien, American Military Laws (1846), page 280:

"Although it is lawful for the authority which orders the court to suspend, mitigate, or remit the sentence of a court martial, he is not authorized to commute the punishment, that is, to alter its nature. This rule also applies to officers confirming the sentence of inferior courts martial. To mitigate is to lessen or reduce in amount or severity. * * *"

After using the same examples as General Macomb in the passage already quoted, O'Brien continued (p. 281):

"* * * remission is not followed by any punishment; and in cases of mitigation the punishment is authorized, as far as it goes, by the sentence of a court martial. A mitigation is in fact a partial pardon. But power to commute is in fact power to carry into effect an arbitrary punishment, which has not previously received the sanction of any judicial tribunal; and such power cannot be exercised, even by the highest authority in the land, except in cases provided for by the Legislature, or in some cases indirectly by means of a conditional pardon, which is only valid when the prisoner actually conforms to the conditions."

c. Captain William C. DeHart, Observations on Military Law (1862), page 213:

"The duty of every officer having authority to review the proceedings of courts-martial, is limited; and he has power only to suspend the execution of the sentence, 'pardon or mitigate any punishment ordered by such court. He cannot alter, or commute the punishment, even with the consent of the party sentenced.

"The law has clearly given the power to the officer who orders a court-martial, except in cases of capital punishment, or the cashiering or dismissing a commissioned officer, to pardon, or to mitigate any punishment ordered by such court-martial. To pardon is to absolve from punishment: to mitigate the punishment is to make it less in degree, but of the same species. Beyond this the reviewing officer cannot go. Any attempt to change the punishment in kind would be illegal, and such an exercise of authority would be the assumption of exclusive judicial, as well as to a certain degree, of legislative power. To commute punishment, is to substitute for the one ordered, another of a different kind, - to change the species by the mere will of the individual, without any reference to judicial sanction."

Following the above passage, the learned author develops the views above quoted at some length.

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d. Brevet Lieutenant Colonel S. V. Benet, Treatise on Military Law (5th ed. 1866), pages 179, 180:

"To mitigate a punishment, is to make it less in degree, preserving the same species. To commute, is to substitute a punishment of a different species. There are only two kinds of punishments recognized and authorized by our military laws, which admit of no degrees of severity: - they are, death and cashiering, or dismissal; but when such a sentence is adjudged by a court-martial, its pardon or mitigation is placed, exclusively, in the hands of the President. All other sentences can be pardoned or mitigated by the officer ordering the court, but admitting as they do of different degrees of severity there arises no difficulty in regard to their mitigation, as this power can be exercised by lessening the quantity without changing the species."

e. Lieutenant Rollin A. Ives, Treatise on Military Law (4th ed., 1886), page 196:

"In addition to the power of pardon, the power to mitigate is conferred on the reviewing officer. Mitigation, generally speaking, is making a punishment less in degree, preserving the same species."

f. Colonel Edgar S. Dudley, Military Law (2d ed. 1908), paragraph 450:

"Mitigation is the reduction by the reviewing authority of the punishment adjudged by the court, by reducing it in quantity or quality, or both, without changing its species. Imprisonment, fine, forfeiture of pay, and suspension, are punishments capable of mitigation. * * *."

g. Major General George B. Davis, Treatise on Military Law (3d ed. 1915), page 209:

"The reviewing authority, in approving the punishment adjudged by the court and ordering its enforcement, is authorized, if he deems it too severe, to graduate it to the proper measure by reducing it in quantity or quality without changing its species: this is mitigation. Imprisonment, fine, forfeiture of pay, and suspension are punishments

capable of mitigation. As an instance of a mitigation both in quantity and quality, it has been held that a sentence of imprisonment for three years in a penitentiary was mitigable to an imprisonment for two years in a military prison."

h. Colonel William Winthrop, Military Law and Precedents (1st ed. 1886), pages 725, 726; reprint, 1920, pages 473, 474:

"MITIGATION. This, which, as already observed, is distinct from and not included in the pardoning power, differs from commutation in that it consists, not in changing the nature or quality of the punishment or in substituting a different punishment for it, but simply in reducing it in quantity. Thus an imprisonment or suspension adjudged for a certain term is mitigated by reducing it to one for a less term; a fine or forfeiture of a certain amount, by reducing it to one of a less amount; a loss of a certain number of files, by reducing it to one of a less number. But dishonorable discharge, or forfeiture of pay, cannot, by mitigation, be substituted for confinement, or vice versa.

"The punishment as mitigated must be eiusdem generis with original; that is to say must be a part of the very punishment imposed by the court."

18. The problem has also engaged the attention of the Attorney General. Commander Ramsey, U. S. Navy, was sentenced by court-martial to be suspended from rank and command for five years. The court imposed no forfeiture of pay. The President indorsed on the record.

"Upon a full review of all the facts and circumstances in this case, I regard the sentence as too severe. Let it be commuted to a suspension of six months from this day, without pay."

The commutation was not made at Commander Ramsey's request or accepted by him. Upon the expiration of the period of suspension, he applied for his pay, and the question whether he was entitled to it was referred to the Attorney General. That officer concluded (4 Ops. Atty. Gen. 444, 446), that the President's action was not an exercise of his power of pardon, but was taken under that clause in the 42d Article for the Government of the Navy authorizing him "to mitigate the punishment decreed by a court-martial". He then went on to say (p. 446, et seq.):

*** Did his power to mitigate the sentence include the power to commute or substitute another and different punishment for so much of the sentence as he remitted?

"It is very much to be regretted that the question has not been definitively settled under the law and constitution. At the War Department it has always been considered that the Executive has not the power, by way of mitigation, to substitute a different punishment for that inflicted by sentence of a court-martial - the general rule being that the mitigated sentence must be a part of the punishment decreed. In 1820, Mr. Wirt gave an opinion recognising this rule, but made a substitution of a different punishment for the sentence of death an exception; and he places it on the ground that capital punishment can only be mitigated by a change of punishment. In the navy the practical construction has not been uniform. I have procured and carefully examined the most approved authorities on the subject of military law and courts-martial; and the law seems to be established as laid down by Kennedy, (pages 236-7:) 'The sovereign may either cause the sentence to be put into execution, mitigate, or remit it, but he cannot substitute a different punishment for the one awarded by the court; nor can he in any respect add to that punishment. He may mitigate it; that is, a sentence of twelve months may be reduced to six months; but the mitigated punishment must be ejusdem generis with that inflicted by the sentence quod omne majus continet minus.'"

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"The act of Congress has made a suspension of pay a punishment to be inflicted, or not, in a single class of cases, at the discretion of the court.

"The Executive may dismiss from the service without trial, and he may suspend from duty by arrest; but he has no power while an officer retains his commission, and is not sentenced by a court-martial to that effect, to take from him the pay which the law gives him.

"When an officer is brought to trial, and is sentenced to be punished, the Executive may mitigate the severity of that punishment; but there is a guide - the discretion is a legal discretion, and the mitigation must not be according to a capricious will, but must have the sanction of the judgment of the court. It must inflict a part of the punishment awarded

by the judgment, with the exception of those cases in which there is no degree, as where the whole punishment must be inflicted, or no part or it can be. Such is the case with a sentence of death. I am constrained to the opinion, therefore, that Commander Ramsey is entitled to pay during the period mentioned in the Fourth Auditor's letter, notwithstanding the terms in which the President commuted his sentence."

19. The general rule is well established by the foregoing and many other authorities that "mitigate", as used with reference to action upon a court-martial sentence, means to reduce the sentence in degree, quantity or duration, without changing its character. To that rule there is an exception as well established as the rule itself, namely, that the President may substitute some less severe punishment for a sentence of dismissal of an officer or death. This exception is mentioned in some of the quotations made in the preceding paragraph as well as in many of the other opinions and treatises quoted or cited.

20. The fullest and best statement of the reasons for this exception appears in 1 Ops. Atty. Gen. 327. Private William Bangsman, U.S.M.C., had been sentenced to death by a naval general court-martial. The Secretary of the Navy inquired of the Attorney General whether the President might change the sentence to "service and restraint" for one year, then to be drummed from the Marine Corps as a disgrace to it. The opinion thus answers that question (pp. 328-330):

"By the 42d article of the rules and regulations for the government of the navy of the United States, (to which the marine corps is subjected by vol. 3, Laws United States, p. 96,) it is provided that 'the President of the United States shall possess full power to pardon any offence committed against these articles, after conviction, or to mitigate the punishment decreed by a court martial, ' (same vol., p. 358). The power of pardoning the offence does not, in my opinion, include the power of changing the punishment; but the power to mitigate the punishment decreed by a court-martial cannot, I think, be fairly understood in any other sense than as meaning a power to substitute a milder punishment in the place of that decreed by the court-martial; in which sense, it would justify the sentence which the President purposes to substitute in the case under consideration. The only doubt which occurs to me as possible, in

regard to this construction, is, whether the power of mitigating a punishment includes the power of changing its species; whether it means anything more than lessening the quantity, preserving nevertheless the species of the punishment. But there is nothing in the force of the terms in which the power is given that ties us down to so narrow a construction. Had the phraseology been - 'the President shall have power to remit in part, or in whole, the punishment decreed by the sentence of a court-martial,' he would have been restricted to the single mode of mitigation which the objection supposes - that of lessening the quantity; but a power of mitigation, in general terms, leaves the manner of performing this act of mercy to himself; and if it can be performed in no other way than by changing its species, the President has, in my opinion, the power of adopting this form of mitigation. Such is precisely the case under consideration. A sentence of death cannot be mitigated in any other way than by changing the punishment. To deny him the power of changing the punishment in this instance, is to deny him the power of mitigating the severest of all punishments; while you leave open to him the comparatively insignificant power of mitigating the milder class of punishments; or, in other words, to refuse mercy in the case in which, of all others, it is most loudly demanded. To say that the President may pardon a capital offence altogether, and thereby annul the sentence of death, is no answer to this argument. Congress foresaw that there were cases in which the exercise of the power of entire pardon might be proper; they, therefore, in the first branch of the article under consideration, give to the President the power of entire pardon. But they foresaw, also, that there would be cases in which it would be improper to pardon the offence entirely; in which there ought to be some punishment; but in which, nevertheless, it might be proper to inflict a milder punishment than that decreed by the court-martial: and hence, in another and distinct member of the article, they give him, in general terms, the separate and distinct power of mitigation. To deny him the exercise of this power in relation to a sentence of death, and to throw him, in such a case, on his own power of entire pardon, as the only act of mercy which he can exercise, would be to compel him, contrary to his reason and judgment, to extend the greatest mercy to those who had deserved it least; for while it is true that sentences of death are those which

appeal most strongly to mercy, because they deal in blood, it is no less true that they are precisely those which are least worthy of an entire pardon, because they are pronounced only in cases of enormity. In other words, they are those in which the power of mitigation applies with peculiar propriety. I think, therefore, from the generality of the terms in which the 42d article of the rules and regulations for the government of the navy or the United States gives to the President the power to mitigate the punishment (any punishment) decreed by a court-martial, as well as from the obvious reason of the power, that the President has the right to mitigate a sentence of death; and that every argument for the exercise of the power in inferior cases, applies a fortiori to such a sentence. And since a sentence of death can be mitigated only by changing it, my opinion is, that the President has the power, in the case of William Bausman, to substitute the milder punishment which he contemplates."

21. Some of the language used in the above quotation must be considered limited or overruled by the subsequent opinion in Commander Ramsey's case (4 Ops. Atty. Gen. 444), already discussed (pars. 18, 19), but the principle laid down in the opinion just quoted that the President may change a sentence of death to one involving other forms of punishment has been followed in many subsequent cases, among which may be cited, G.C.M.O. 54, War Department, August 10, 1921, Wylie; G.C.M.O. 62, War Department, August 23, 1921, Jackson; G.C.M.O. 4, War Department, April 2, 1928, Bennett; and G.C.M.O. 6, War Department, July 2, 1936, Hayes.

22. In Aderhold v. Menefee (67 Fed., 2d, 347), an enlisted man in the Navy was sentenced to death by a naval general court-martial for murder committed on a naval vessel at sea. The Secretary of the Navy changed the sentence to imprisonment for life. The Circuit Court of Appeals for the Fifth Circuit upheld the sentence as thus modified, citing and following the opinion of the Attorney General in 1 Ops. Atty. Gen. 327.

23. In 2 Ops. Atty. Gen. 286, 289; 4 Ops. Atty. Gen. 432, and much more recently in 31 Ops. Atty. Gen. 419, 426, the Attorney General has upheld the right of the President to substitute loss of pay, suspension without pay, or similar punishment, for a sentence of dismissal imposed by a court-martial.

24. Mullan v. United States (212 U.S. 516) was a case in which a commander in the Navy had been tried by a general court-martial and sentenced to dismissal. The President changed the sentence to reduction to the foot of the list of commanders and suspension from rank and duty on half sea pay for five years, during which time Mullan should remain at

the foot of said list. After three years, the President remitted the unexecuted part of the sentence. Mullan then sued for the difference between waiting orders pay and what he had received during his suspension. The Supreme Court quoted Article 54 of the Articles for the Government of the Navy, as follows:

"Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm."

The Supreme Court then continued (p. 521):

"The Court of Claims was of opinion that this section did not apply to the action of the President of the United States. If it be conceded for this purpose that it is applicable to the President (sec. 1624, arts. 38 and 53 of the Rev. Stats.), we are of the opinion that the President's action did, in fact, mitigate the previous sentence of the court-martial as approved by the Secretary of the Navy. It may be conceded that there is a technical difference between the commutation of a sentence and the mitigation thereof. The first is a change of a punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment. Bouvier's Law Dictionary, vol. 1, 374; Ib. vol. 2, 428.

"When the President otherwise confirmed the sentence of the Navy Department from absolute discharge from the Navy to reduction in rank and duty for the period of five years on one-half sea pay, he did what in terms he undertook to do, and by the lessening of the severe penalty of dismissal from the Navy, approved by the department, reduced and diminished, and therefore mitigated, the sentence which he was authorized to approve and confirm against the appellant, or mitigate in his favor."

25. The cases last cited have been followed by the President many times in acting upon sentences of dismissal imposed by Army courts-martial, within the past year in the cases of Lieutenant Colonel J. Merriam

Moore, Infantry, and Second Lieutenant Thomas R. Conner, 8th Engineers. They were sentenced by the court to dismissal, but the President commuted their sentences to loss of files (G.C.M.O. 3, War Dept., Apr. 13, 1938; G.C.M.O. 8, War Dept., June 6, 1938).

26. It may be admitted that there is a certain lack of logic and consistency in the opinions which have been cited, notably in the opinion of the Supreme Court in Commander Mullan's case, in that they define "mitigation" as a reduction in the amount of a punishment without a change in its species, and then support as mitigation the change of a sentence of death to one of confinement, or of a sentence of dismissal to loss of files or forfeiture of pay. If there is any logical way to reconcile those antinomies, it would seem to be on the theory that, as death is the severest possible punishment, summum supplicium, any other punishment whatever is a mitigation of it. As to dismissal, it may likewise be argued that to an officer a dishonorable expulsion from his position, his profession, and the Army is so severe a punishment that any sentence permitting him to retain his commission is a mitigation of that imposed. However, as Justice Holmes has said (The Common Law, p. 1):

" * * * The life of the law has not been logic: it has been experience. * * *."

Applying that pragmatic test, there can be no doubt that, for the reasons ably set out by the Attorney General (1 Ops. Atty. Gen. 328-330, ante, par. 20, this opinion), it has worked well for the President to have the right to change sentences of death or dismissal into milder forms of punishment.

27. Whether they are consistent with all other precedents or not, it is clearly the duty of the Board of Review to follow precedents so numerous and of such long standing as those which have been quoted and cited which hold that a reviewing authority may not change a sentence of dishonorable discharge to some other punishment. (See particularly precedents cited in pars. 16 c, d, e, f, 17 h, and 18, this opinion.)

28. Moreover, at the time when the opinions cited and quoted were written, the 112th Article of War of 1874 (Rev. Stats. sec. 1342) and its predecessors in earlier codes empowered the officer authorized to order a general court-martial to "pardon or mitigate any punishment adjudged by it". That language is not found in our present Articles of War. It is true that Article of War 49 of the present Articles of War,

defining the President's powers incident to his power to confirm, is identical with Article of War 47, defining powers incident to the power to approve; but Article of War 50 $\frac{1}{2}$, added June 4, 1920, enlarges the President's powers and uses the words "commutation" and "commute" with respect to him alone, which words were not in the previous codes. The third paragraph of Article 50 $\frac{1}{2}$, after requiring the action of the Board of Review and The Judge Advocate General in cases involving death, dismissal and dishonorable discharge not suspended, or penitentiary confinement, continues:

"* * * In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part." (Underscoring supplied.)

29. The fifth paragraph of the same article covers a case like the present, in which the sentence is not so severe as to fall within the class mentioned in the third paragraph, but in which examination in the Office of The Judge Advocate General has shown that the record is legally insufficient to support the findings and sentence. That paragraph requires such a case to be examined by the Board of Review, as it is now examining the present case, and further provides that the Board shall submit its opinion in writing to The Judge Advocate General who shall transmit the Board's opinion with his own recommendation directly to the Secretary of War for the action of the President. The article then continues:

"* * * In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; * * *." (Underscoring supplied.)

30. The act of August 20, 1937 (50 Stat. 724; Cir. 79, War Dept., Dec. 29, 1938), amended the above paragraphs by providing that the functions therein prescribed to be performed by the President may be performed by the Secretary of War.

31. It is therefore clear that the President or Secretary of War, when acting under the third or fifth paragraph of Article of War 50 $\frac{1}{2}$, may now commute a sentence. No such authority is granted anywhere in the articles to a reviewing authority other than the President, except in Article 50. That article, as already quoted, ante, paragraph 11, begins:

"The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence."

After a paragraph which it is unnecessary to quote, Article 50 continues:

"When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed." (Under-scoring supplied.)

32. The greater part of this opinion has been an effort to define "mitigate" as used in the first paragraph of Article of War 50, above quoted. Is it not clear that it means something other than "commute", when, later on in the same article, "mitigate" and "commute" are both used, and used in such a way as clearly to mark the distinction between them? Also, when, in the first paragraph of Article of War 50, the power is conferred on every reviewing authority to "mitigate" sentences, and no power is given him to commute them; when, in the third paragraph of that article, power is conferred upon certain reviewing authorities only, when empowered to do so by the President, to "commute"; and when in the third and fifth paragraphs of Article of War 50 $\frac{1}{2}$, power is conferred upon the President to "commute"; is not the inference clear and inescapable that Congress did not intend every reviewing authority to have the power to commute? Yet the action

taken by the reviewing authority in the present case in imposing a sentence to confinement was commutation, i.e., a change in the species of punishment.

33. If it be sought to support the legality of the action here taken on the ground that it was not commutation but mitigation, a ground inconsistent with the approved definitions of those words, we are met with the statement in the Manual for Courts-Martial (par. 87 b, p. 77):

"A sentence imposing dishonorable discharge only can not be mitigated."

Article of War 38 says:

"The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, * * *."

The Manual for Courts-Martial is published pursuant to the above statutory authority. It is true that action by the reviewing authority is not a "mode of proof", and it may be debatable whether it is a matter of "procedure * * * in cases before courts-martial". Nevertheless, the passage quoted is found in a book to which is prefixed an "Executive Order" signed by the President and Commander-in-Chief, in which he says (M.C.M., p. IX):

"* * * I prescribe the following Manual for Courts-Martial and direct that it be published for the government of all concerned. * * *." (Underscoring supplied.)

Irrespective of Article of War 38, the President, as Commander-in-Chief, may give such orders to the Army as he sees fit relating to the actions of reviewing authorities as well as to any other activities of the Army. Such orders must be obeyed unless they are unlawful. To justify disobeying an order, its illegality must be clearly shown (Dig. Ops. JAG 1912-30, Supp. VII, sec. 1518; Winthrop on Military Law, pp. 887-890, reprint pp. 575, 576). It is unnecessary for the Board to say whether hypothetically there may be a case in which it would be its duty to disregard and refuse to follow a principle laid down in the Manual for Courts-Martial. It is sufficient for it to say that the present is not such a case, and that it follows the clear and positive statement of the Manual that a sentence to dishonorable discharge may not be mitigated.

34. If the dishonorable discharge imposed by the court still stood, it would be legal for the President or Secretary of War by authority of the fifth paragraph of Article of War 50 $\frac{1}{2}$ (quoted in par. 29 of this opinion), to commute it to a brief period of confinement as the reviewing authority undertook to do. But the reviewing authority by his action disapproved so much of the sentence as involved dishonorable discharge, thereby wiping it out, and there is no dishonorable discharge left for the President or Secretary of War to commute. All that either of those officers may now do is to act upon the sentence as approved by the reviewing authority.

35. After mature consideration, and for the reasons stated herein, the Board of Review is of opinion that the record of trial is legally sufficient to support the findings as modified by the reviewing authority and so much of the sentence as adjudges forfeiture of \$12 of this soldier's pay, but legally insufficient to support so much of the sentence as adjudges confinement at hard labor for twenty-seven (27) days. The fact that accused has already served the confinement adjudged does not make the question of its legality a moot one, because upon its legality depends the length of time which accused may be required to serve in order to complete his enlistment. If his confinement was legal, accused must under the 107th Article of War serve twenty-seven days additional in order to complete his enlistment; if it was illegal, he need not do so.

Archieald King, Judge Advocate.

George H. Payer, Judge Advocate.

George D. Campbell, 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 210257

Apr. 21, 1939

UNITED STATES)

SIXTH CORPS AREA

v.)

Trial by G.C.M., convened at
Selfridge Field, Michigan,
July 28, 1938. Confinement
for twenty-seven (27) days
and forfeiture of \$13 pay.
Selfridge Field, Mount
Clemens, Michigan.

Private KEITH W. WHITE)
(6656585), Base Head-)
quarters & 5th Air Base)
Squadron, Air Corps.)

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. The accused was tried on a single charge and specification, as follows:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Keith W. White, Base Hq & 5th Air Base Squadron, Air Corps, did, at Hamilton Field, California, on or about May 12, 1938, desert the service of the United States and did remain absent in desertion until he surrendered himself at Selfridge Field, Michigan, on or about May 21, 1938.

Accused pleaded not guilty to and was found guilty of the charge and specification thereunder. He was sentenced to be dishonorably discharged the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the findings of guilty of the Charge and Specification thereunder as involved a finding of guilty of absence without leave at the place and

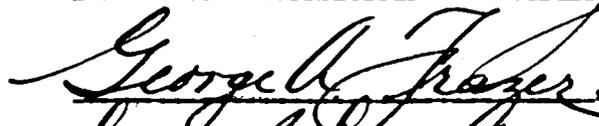
on the date alleged, terminated by surrender at the place and on the date alleged, in violation of the 61st Article of War; and only so much of/sentence as provided for confinement at hard labor for twenty-seven days and forfeiture of \$13 of the soldier's pay. The reviewing authority ordered the sentence as thus modified to be executed and designated Selfridge Field, Mount Clemens, Michigan, as the place of confinement (G.C.M.O. 175, Headquarters Sixth Corps Area, August 13, 1938).

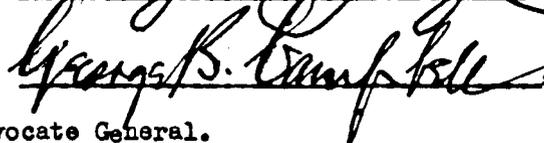
3. No question arises as to the sufficiency of the record of trial to support the findings of guilty as modified by the reviewing authority. The total pay forfeited by the sentence of the court amounted to about \$79; that forfeited pursuant to the action of the reviewing authority, \$13. Therefore no reason exists for doubting the legality of the forfeitures imposed.

4. The only serious question presented by the case is the legality of the action of the reviewing authority in approving "so much of the sentence as provides for confinement at hard labor for 27 days", in view of the fact that the sentence imposed by the court included no confinement whatever. For the reasons stated in some detail in its opinion in the similar case of Private Gordon W. Delph, Air Corps, unassigned, CM 210256, the Board concludes that the reviewing authority's action in this respect was illegal.

5. The Board of Review is of opinion that the record of trial is legally sufficient to support the findings as modified by the reviewing authority, and so much of the sentence as adjudges forfeiture of \$13 of this soldier's pay, but legally insufficient to support so much of the sentence as adjudges confinement at hard labor for twenty-seven (27) days. The fact that accused has already served the confinement adjudged does not make the question of its legality a moot one, because upon its legality depends the length of time which accused may be required to serve in order to complete his enlistment. If his confinement was legal, accused must under the 107th Article of War serve twenty-seven days additional in order to complete his enlistment; if it was illegal, he need not do so.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

To The Judge Advocate General.

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

(263)

Board of Review
CM 210370

SEP 16 1938

UNITED STATES)
))
 v.)
Private GRANVIL HENFROE)
(6793300), 77th Pursuit)
Squadron, GHQ Air Force.)

FOURTH CORPS AREA

Trial by G.C.M., convened at
Barksdale Field, Louisiana,
July 27, 1938. Dishonorable
discharge and confinement for
three (3) years. Disciplinary
Barracks.

HOLDING by the BOARD OF REVIEW
HOOVER, CAMPBELL and PARMLEY, 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 offenses of which accused stands convicted are (a) wrongfully fondling, against her will, a woman not his wife, in violation of Article of War 96, and (b) assault with intent to do bodily harm, in violation of Article of War 93. The first of these offenses amounted to an assault and battery (par. 149 1, M.C.M.), for which the maximum punishment by confinement authorized by paragraph 104 c of the Manual for Courts-Martial is six months. Aggravation of the assault through indecency or similar factor was not alleged or found. The maximum punishment by confinement authorized by paragraph 104 c of the Manual for Courts-Martial for the other offense, assault with intent to do bodily harm, is confinement at hard labor for one year. It was alleged and found that this assault was accomplished by striking the victim on the head with an "iron paper perforator", but it was not alleged or found that the instrument used was a dangerous one. There was evidence that the perforator was used in such a manner as to render it likely to produce death or great bodily harm, but the instrument was not per se a dangerous one, and the description and use thereof alleged and found did not, in the opinion of the Board of Review, ex vi termini import dangerous character. Punishment as for the greater offense of assault with intent to do bodily harm with a dangerous weapon, instrument or other thing, is not, therefore, authorized.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and a half years.

Richard G. Hayes, Judge Advocate.
George B. Smith, Judge Advocate.
Robert T. Paruley, Judge Advocate.

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

Board of Review
CM 210404

Sep. 19, 1938

UNITED STATES)
))
 v.)
Private JOHN C. CAMERON)
(6682313), Medical De-)
partment.)

FIRST DIVISION
Trial by G.C.M., convened at
Fort Niagara, New York, June
27, 1938. Dishonorable dis-
charge and confinement for
three and a half (3½) years.
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW

KING, HOOVER and CAMPBELL, Judge Advocates.

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

_____, Judge Advocate.

Robert W. Hoover, Judge Advocate.

George B. Campbell, Judge Advocate.

Secretary of War agreed with General Gullion :

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

Board of Review
CM 210404

SEP 24 1938

U N I T E D	S T A T E S	)	FIRST DIVISION
)	
	v.	)	Trial by G.C.M., convened at
		)	Fort Niagara, New York, June
Private JOHN C. CAMERON		)	27, 1938. Dishonorable
(6682313), Medical		)	discharge and confinement for
Department.		)	three and a half (3½) years.
		)	Disciplinary Barracks.

DISSENTING OPINION by KING, Judge Advocate.

1. I observe in the record of trial the following errors and irregularities:

a. Page 8. Lieutenant Goldstein began the testimony for the prosecution with an inadmissible hearsay statement concerning information given him by the assistant steward as to the fact that the CCC Exchange had been robbed. However, this fact was later brought out by the first-hand testimony of Private Lupke (p. 17).

b. Page 10. Lieutenant Goldstein testified that when he learned that the Exchange had been broken into he "immediately suspected Private Cameron". Testimony as to suspicion of accused is most improper.

c. Page 12. Lieutenant Goldstein testified as to a conversation between himself and Corporal Swift. As accused was not present, this was inadmissible.

d. Page 12. Lieutenant Goldstein testified that a civilian supposed to be a bartender told him "Cameron gave me some money to hold and I took it". This was inadmissible hearsay. However, accused later admitted giving money to the bartender to hold for him (p. 115).

e. Page 13. Lieutenant Goldstein testified with respect to accused's talk in the automobile while on the way back from Niagara Falls

to Fort Niagara: "His general conversation would convince me that we were after the right man". This was not testimony as to a fact observed by the witness, but was a wholly inadmissible conclusion by him, in substance, a statement that he believed accused guilty.

f. Pages 13,14. The defense asked Lieutenant Goldstein on cross-examination why he suspected Cameron of breaking into the Exchange. The witness' answer was in part as follows:

"Because I knew the man bore the reputation of getting into trouble. They had trouble with him at Fort Ontario with money being taken. They had trouble with him when he was in Headquarters Company before he was transferred to Fort Ontario."

This was wholly inadmissible testimony as to supposed misconduct by accused other than that for which he was then on trial. It later turned out that the witness had in mind another man of the same surname (pp. 110,111).

g. Page 15. Captain Evans, the trial judge advocate, administered the oath to himself. Such a ceremony is not a valid administration of an oath. If it was necessary for Captain Evans to take the stand, he should have been sworn by the president of the court. However, his testimony related only to the fact that two five-dollar bills, which he produced, were the identical bills which he saw Lieutenant Goldstein hand to Major Carswell and which the latter officer sealed and placed in the safe at post headquarters.

h. Page 32. Private 1st Class Daley, a member of the same detachment as accused, testified in answer to questions by the prosecution that a week or so before accused was confined accused was acting a little queer. The witness' testimony continued:

- "Q. Have you any idea what was causing him to act queer?
A. He may have been after a Section 8, sir.
Q. On what do you base your opinion?
A. Well, he wanted to get out of the army, sir.
Q. Do you think he was acting that way intentionally

or because his mind was slipping? Knowing him as well as you did, you have some opinion.

A. My opinion is that he was acting that way intentionally."

This testimony was wholly irrelevant to the case before the court. It amounted to the blackening of accused's reputation by the supposition that he was shamming mental abnormality in order to get out of the Army under a board pursuant to section VIII, AR 615-360.

i. Page 34 and elsewhere. Witnesses pointed out on the map the places where they saw accused, but the places mentioned cannot be identified by myself or any other person not present in court, as the record does not show to what place the witnesses pointed. Key letters on the map should have been used, or some other method employed of showing where the witnesses pointed.

j. Page 46. Private Smallback, a member of the guard, testified to overhearing a conversation of persons whom he could not see. He heard "some voices which I believe were civilians". He testified that he would recognize Cameron's voice because he had known him for two years, but did not say that he heard Cameron's voice taking part in the conversation. As there is no proof that Cameron was present, the conversation between the two civilians was inadmissible. However, their testimony related to receipt of money from Cameron, and Cameron himself later testified (p. 115) that he gave \$10 to the bartender to keep for him.

k. Pages 80,81. Private Kaplewicz, a witness for the prosecution, under examination by the trial judge advocate, answered "I don't know" and "I don't remember" to a number of questions. Thereupon the trial judge advocate had the accused identify his signature on the statement made by him on the investigation of the case and introduced that statement in evidence. This amounted substantially to impeaching his own witness. He might, after laying a proper foundation, have had the witness refresh his recollection from his own prior statement (M.C.M., par. 119 b), but that is not what he did. However, the witness later went on and testified to substantially the same matter as that contained in his statement thus introduced.

l. Page 85. After the same witness had answered "I don't remember" to a certain question, the record continues:

"Q. I am going to tell you what Lieutenant Reidy wrote down, and you tell me if it is true. You told us that Cameron said 'Hang onto this money until I get out of here'. Do you remember that?

A. Yes, sir.

Q. Is that what Cameron actually did say?

A. Yes, sir."

The foregoing constituted inadmissible leading of the witness.

m. Page 88. Members of the court in one form or another asked the same witness why he thought Cameron gave his money to the civilian, and "Have you any suspicion why he gave it to the civilian". Mere suppositions and suspicions have no proper place in the testimony of witnesses.

n. Page 111. The defense introduced two telegrams in evidence, one to accused's mother from counsel and the other her answer. Such unsworn and unidentified papers were admissible in evidence only by stipulation. Either a formal stipulation should have been made, or the testimony of accused's mother should have been taken in person or by deposition.

o. Page 124. At the close of accused's testimony, the record shows the following:

"Questions by the court.

"Q. Cameron, I want to show you that I think you have made a little mistake. You said that you paid the taxi driver a five dollar bill and got back three dollars---a one dollar bill and two more---you spent some money here before you left for Youngstown, and you bought some more at Youngstown---according to that you could not have had five dollars to get changed.

A. I was given some more by one of the men to help pay--

Q. You can think pretty fast, can't you?

Defense: May it please the court, the defense resents that statement.

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Court: I withdraw that statement, but according to the testimony that first came out, it does not look as if the accused had five dollars."

The statements by the member of the court "You can think pretty fast, can't you?" and "it does not look as if the accused had five dollars" were most improper.

2. One of the foregoing irregularities, n, was in favor of the accused; and others, c, g, i, k and m, were of little importance. a, d and j were later cured by other testimony. There remain the following:

b and f. Testimony by Lieutenant Goldstein that he suspected accused to be the person who committed the offenses in question. f, though not b, was brought out in answer to questions by defense counsel. However, defense counsel of courts-martial are seldom learned in the law; and I have always understood that the principle of the civil courts, that a client must suffer without recourse such harm as befalls him in consequence of the unskillfulness, omissions or errors of his counsel, can have only a limited application to trials by courts-martial. Dig. Ops. JAG, 1912-30, par. 1539. I feel that it is the duty of the Board of Review and The Judge Advocate General to see that an accused has a fair trial; and that that duty is not fully discharged by saying that, although he did not have a fair trial, the reason therefor was the unskillfulness and errors of his counsel. It is true that it was later shown (pp. 110,111) that Lieutenant Goldstein's suspicions were in part based upon confusion in his mind of accused and another man of the same surname who had been in trouble. However, the damaging testimony was introduced at the very beginning of the trial and the explanation with respect to the confusion between two Camerons appeared hours later, almost at the close of the trial. Meanwhile, the damaging impression was left on the minds of the court, and I am not prepared to say that the error was altogether cured by the belated explanation as to the confusion between two Camerons.

e. Lieutenant Goldstein's statement that "His (accused's) general conversation would convince me that we were after the right man". I consider this remark highly prejudicial.

h. Private Daley's statement amounting to a charge that accused had previously shammed mental abnormality in order to get out of the Army under section VIII, AR 615-360. Such a statement cannot have failed to be prejudicial before a court composed of line officers dealing daily with enlisted men and necessarily hostile to one of them who would attempt such a fraud.

l. Leading a witness in order to get him to testify that accused said "Hang on to this money until I get out of here". This testimony was very damaging to accused.

o. Improper remarks by a member of the court.

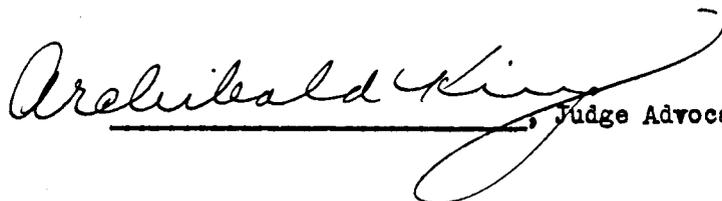
3. I am inclined to believe that several of the irregularities listed in the preceding paragraph, taken singly, would constitute prejudicial error; but I find it unnecessary to reach a definite decision as to each, because I am convinced that taken together their cumulative effect was such that it is impossible to say that accused had a fair trial. In CM 194200, Sanderson, and CM 200989, Osman, it was held that the convictions should be set aside because of numerous errors, no one of which alone was held to be fatal.

4. The present is a case in which errors of the character which I have mentioned are particularly harmful. It cannot be said that the evidence in the present case was compelling. On the contrary, it consists of nothing more than that accused was in the immediate vicinity of the building feloniously entered, at the time that it was entered, that he was then drunk and presumably in the grip of a drunken man's desire for more intoxicants, that earlier that day he had been without funds, and that immediately after the time of the felonious entry he was possessed of bills of the same denominations as those taken from the Exchange and about the same amount. Perhaps, without the errors which I have mentioned, a valid conviction could have been obtained upon the admissible evidence in the case; yet I repeat that that evidence is far from compelling and does not exclude the possibility of some other person having been the thief. The case is one as to which reasonable men might differ, some voting guilty and some not guilty on the admissible evidence. I would not quarrel with those who voted guilty or say that their action was without legal foundation, but I do say that in such a case the minds of men may well be swayed from doubt which would result

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in a vote of not guilty to a vote of guilty by just such inadmissible matter as was introduced on several occasions at the present trial.

5. I therefore conclude that the record of trial is legally insufficient to support the findings of guilty of Charge I and both specifications thereunder. I concur with the Board of Review in considering the record sufficient to support the findings of guilty of Charge II and the specification thereunder. The errors to which I have alluded did not touch that specification, involving disobedience of an order; and the commission of that offense was admitted by accused in his testimony (p. 116). The sentence imposed is not in excess of that permissible upon conviction of that specification alone, and I therefore concur with the other members of the Board in the view that the record is legally sufficient to support the sentence. However, I am of opinion that it is unduly severe when viewed as punishment for that offense alone, under the circumstances disclosed. If accused was not guilty of the housebreaking and larceny alleged under Charge I, some indignation on his part at finding himself in confinement charged with those offenses was pardonable. If he was guilty of those offenses, his intoxication at the time may well have been such that when he sobered up the next day he had no recollection of them. There is nothing unusual in a man committing offenses while drunk and being unable the next day to remember that he has done so. On this hypothesis also, some indignation is pardonable. The indignation took the form of a refusal to work as a prisoner, a refusal unjustified as a matter of law, but not as grave an offense as disobedience of orders under other circumstances. I am of opinion that the period of confinement may properly be reduced to one year and six months.


Archibald King, Judge Advocate.

Board of Review
CM 210404

1st Ind.

War Department, J.A.G.O., OCT 7 1938 - To the Secretary of War.

1. The record of trial and accompanying papers in the case of Private John C. Cameron (6682313), Medical Department, together with the holding thereon of the Board of Review, signed by two of its three members, and the dissenting opinion of one member, are transmitted herewith pursuant to Article of War 50 $\frac{1}{2}$, as amended by the act of August 20, 1937 (50 Stat. 724), for your action.

2. Accused was convicted of the following offenses:

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

Specification 1: Breaking into the Civilian Conservation Corps Camp Exchange at Fort Niagara, New York, May 22, 1938, with intent to commit larceny.

Specification 2: Larceny of \$25 from the above exchange, same date.

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

Specification: Disobedience of the order of a commissioned officer to go to work with the prisoners, Fort Niagara, New York, May 23, 1938.

The court sentenced accused to dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. The reviewing authority approved the sentence, but remitted one and one-half years of the period of confinement.

3. The holding of the Board of Review is that the record of trial is legally sufficient to support the findings and sentence. The opinion of the dissenting member of the Board is that several errors in the admission of evidence and otherwise prejudice the substantial rights of the accused, in so far as concerns the findings of guilty of Charge I and the two specifications thereunder, alleging that accused broke into the Camp Exchange at Fort Niagara, New York, and stole \$25 from it; and that the record is legally insufficient to support the findings of guilty of that charge and those specifications. The dissenting member concurs

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with the majority that the record is legally sufficient to support the findings of guilty of Charge II and the Specifications thereunder, alleging disobedience of the order of a commissioned officer, and the sentence.

4. The evidence showed that the Civilian Conservation Corps Camp Exchange at Fort Niagara, New York, was broken open between 8:05 and 10 p.m., May 22, 1938, and \$25.62 taken from it; that accused and several friends were during that time drinking beer in a recreation room in the same building, and accused was somewhat drunk; that accused left the party for about twenty minutes; that accused had borrowed a dollar earlier that day, that after the hour of the larceny accused had in his possession money about the same in amount and denomination as that taken; that someone, who may have been accused, tried to escape through the window of the toilet when a guard came to arrest him at a cafe in Niagara Falls later that evening; and that accused, when anticipating arrest, gave \$10 to the bartender at that cafe to keep for him. On the other hand, accused, when leaving his friends at the recreation room, said that he was going to the hospital. He departed in the direction of the hospital, was seen by two witnesses approaching the hospital, and by his friends returning from that direction. Also, accused testified that his mother had sent him \$10, and she corroborated him.

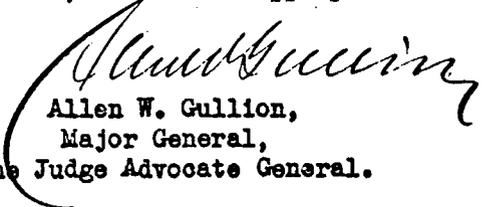
5. The court made numerous errors in the admission of evidence and otherwise, which are enumerated and discussed in the opinion of the dissenting member of the Board of Review. That officer concludes that those errors injuriously affected the substantial rights of accused, in so far as concerns the findings of guilty of Charge I and the specifications thereunder, alleging breaking into the camp exchange and larceny of \$25.62 from it. With those conclusions I agree. For the sake of brevity, I refrain from repeating those errors and refer you to the list of them in the opinion of the dissenting member. The evidence, viewed in the light most favorable to the prosecution, was wholly circumstantial. It amounts to no more than that accused was in the vicinity of the scene of the crime about the time when it was committed, had the opportunity to commit it, had a possible motive to do so in the desire for money with which to buy more beer, borrowed money before the crime was committed, and was in funds afterward. Accused was not definitely identified as the thief, and has consistently maintained his innocence.)

6. In such a case, I should not be justified in advising you to set aside a conviction if accused had had a fair trial without material errors; but such a case is peculiarly one in which justice to the accused demands

that nothing unfair to him be received in evidence. Suspicion, testimony as to other supposed offenses by accused, and other inadmissible matters were received in evidence, which may have influenced the court to find him guilty.

7. For the reasons above indicated, I recommend that you disapprove the findings of guilty of Charge I and Specifications 1 and 2 thereunder. The errors committed by the court do not affect the finding of guilty of Charge II and the specification thereunder, alleging disobedience of the order of an officer to go to work as a prisoner, which offense was admitted by accused. The sentence imposed is legal and within the maximum permissible for that offense alone; but is, in my opinion, unnecessarily severe in view of the mitigating circumstances mentioned by the dissenting member of the Board of Review in the closing sentences of his opinion. I therefore further recommend that the period of confinement be reduced to one (1) year and six (6) months.

8. I inclose alternative forms of action. If you approve the recommendations which I have submitted in the preceding paragraph, I ask that you sign draft A; if, on the other hand, you approve the holding of the Board of Review, draft B is appropriate for your signature.


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

- 4 Incls -
Incl 1 - Record of trial.
Incl 2 - Dissenting opinion
by Lt. Col. King.
Incl 3 - Form of Sec. War's
action (Draft A).
Incl 4 - Alternate form of
Sec. War's action
(Draft B).

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

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Board of Review
CM 210612

JAN 20 1939

U N I T E D S T A T E S)

FIRST CAVALRY DIVISION

v.)

Private BEN H. MADDOX,
Jr. (6255789), Troop B,
8th Engineers.)

) Trial by G.C.M., convened at Fort
) McIntosh, Texas, September 14 and
) 15, 1938. Dishonorable discharge,
) suspended, total forfeitures, and
) confinement for one (1) year.
) Fort McIntosh, Texas.

OPINION of the BOARD OF REVIEW,
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. The accused was tried on a single charge and specification, as follows:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ben H. Maddox, Troop B, 8th Engineers, did, at Fort McIntosh, Texas, on or about October 15, 1936, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort McIntosh, Texas, on or about July 17, 1938.

He pleaded not guilty to and was found guilty of the charge and specification thereunder, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The execution of the dishonorable discharge was suspended until the expiration of the period of confinement. The reviewing authority approved the sentence and ordered it executed (GCMO No. 207, Headquarters First Cavalry Division, October 10, 1938).

3. The competent legal evidence of record establishes, beyond a reasonable doubt, the initial unauthorized absence of the accused and the termination of that absence, at the place and on the dates, alleged. The accused with full knowledge of his rights in the premises elected to remain silent. The evidence adduced at the trial being clear and conclusive no summary or analysis thereof is deemed necessary.

4. The contention is advanced, however, that three errors were committed, affecting the legality of the record of trial, which may be briefly summarized as follows:

- a. [The oath to the charges was modified by striking out the references to both personal knowledge and to investigation of the charges by the accuser although leaving in the statement that the charges "are true in fact, to the best of his knowledge and belief".]
- b. The presence on the court throughout the trial of the investigating officer, Second Lieutenant Andrew O. Lerche, 8th Engineers.
- c. Because of the presence on the court of the investigating officer, the court was reconvened on its own motion, after having reached a finding and sentence and adjournment. At this session of the court the investigating officer was challenged and withdrew from the court following which the findings and sentence previously announced were revoked and new findings and sentence reached, which were in every respect the same as those revoked.

5. With respect to the failure of the accuser to swear to the complete affidavit as indicated in paragraph 4 a, supra, it is the opinion of the Board that while an error and not in strict compliance with the provisions of the 70th Article of War, it does not constitute a fatal error where such defect is expressly or by implication waived. This view, that the requirement of the oath to the charges, contained in the 70th Article of War, is directory rather than mandatory, and that failure to fully comply therewith is not jurisdictional error, is supported by paragraph 31, Manual for Courts-Martial, 1928, where provision is made for its omission entirely when the accused is believed innocent

but trial is deemed advisable and no objection is made to trial on unsworn charges; and also by numerous opinions of this office. In an opinion of The Judge Advocate General published to the field in 1938, where the words "are true in fact to the best of his knowledge and belief" were omitted from the affidavit, it was held -

"That the requirement of A. W. 70 that charges be supported by the oath of the accuser, being procedural, and for the benefit of the accused, does not affect the jurisdiction of the court and may be waived by the accused either explicitly or by failure to object to the irregularity. C. M. 197674 (1932)." (Sec. 1267, Supp. VII, Dig. Ops. JAG 1912-30.) (Underscoring supplied.)

Of like tenor is the holding reported in section 1267 (3) (Dig. Ops. JAG 1912-30), reading -

"In the absence of objection by the defense, the fact that the charges were sworn to before an officer not competent to administer an oath does not invalidate the trial. C. M. 146230; C. M. 146536; C. M. 144896; C. M. 148709; C. M. 146349 (1921)."

In the case under consideration there was no objection interposed to trial on the charges as drawn and sworn to. Accordingly, it is the opinion of the Board that in the instant case the omission in the affidavit, above set forth, does not invalidate the trial and is curable under the provisions of the 37th Article of War.

6. Regarding the presence of the investigating officer on the court throughout the trial and his participation in the voting on the findings and sentence, the Board of Review has held that where the circumstances of the case clearly indicate that no substantial right of the accused has been adversely affected by the presence on the court of the investigating officer, the error may be properly considered as harmless and not a reversible one. In the instant case the facts are simple and are free from all doubt, ambiguity, or confusion. The accused having left his organization without authority remained absent for approximately two years at the end of which period he voluntarily surrendered himself at his home station, Fort McIntosh, Texas. These facts were established by competent, clear, conclusive and undisputed evidence. There is no statutory prohibition against an investigating officer sitting as a member of the court and consequently his presence cannot be considered ipso facto reversible error or as injuriously affecting a substantial right

of the accused. Each case must be considered on its own merits and in the light of its own peculiar circumstances. It is easily conceivable that the presence of the investigating officer on the court may be particularly desired by the accused as being to the best interests of his defense, as where the recommendation of the investigating officer was to dismiss the charges or to refer them to an inferior court for trial. The facts in the case under consideration are so simple and indisputable that it is not conceivable how the presence on the court of the investigating officer can be construed as adversely influencing other members of the court in their voting or as being prejudicial to the interests of the accused. This view is clearly reflected in the sentence adjudged by the court which, notwithstanding the long unexplained and unauthorized absence of the accused, involved confinement for only two-thirds of the maximum period authorized by the Executive Order and equal to a period of but slightly over half that of his unauthorized absence from the service, good time not considered. Moreover, it appears to the Board that the possibility of any undue influence in the person of or by the presence of Second Lieutenant Lerche being exercised upon the court composed of one lieutenant colonel, president and law member, two first lieutenants and three second lieutenants, all senior to Second Lieutenant Lerche, is too remote for serious consideration.

Neither the accused nor his counsel objected to the presence of Lieutenant Lerche on the court, but to the contrary affirmatively accepted the court as constituted (R. 3). To hold that the presence of the investigating officer on the court constituted fatal error, under these circumstances, invalidating the findings and sentence, and consequently to return the accused to his organization for duty without imposing upon him any punishment whatsoever for his desertion extending over a period of approximately two years would, in the Board's opinion, not only be unjustified by the facts but would be a travesty on justice and extremely detrimental to discipline.

While the earlier rulings of this office on the point in question prior to the issuance of the 1928 Manual for Courts-Martial were predicated, in part at least, on the fact that under the 1921 Manual for Courts-Martial the report of investigation was served on the accused, personally or through counsel, which constituted notice of the name and identity of the investigating officer, nevertheless subsequent to the publication of the 1928 Manual, which merely makes such service of papers optional but makes them available to defense counsel, this office has held repeatedly that the presence of the investigating officer on the court is

not jurisdictional error invalidating the proceedings but procedural error only and hence curable under the provisions of the 37th Article of War, where after an examination of the entire proceedings the reviewing or confirming authority is of the opinion that the substantial rights of the accused have not been adversely affected (see Braman, CM 203802 (1935) and seven cases therein cited, all decided subsequent to the publication of the 1928 Manual). The same principle is followed in two published opinions of this office (sec. 1284, Dig. Ops. JAG 1912-30), wherein the rule is enunciated that the improper admission of incompetent testimony does not necessarily prejudice the rights of the accused where there exists other compelling evidence supporting the findings and sentence. The Board adheres to the rule stated above and followed in the Braman case, viz, that the error committed did not adversely affect any substantial right of the accused and is curable under the provisions of the 37th Article of War.

7. The conclusion of the Board that Lieutenant Lerche's presence on the court throughout the trial on September 14 did not constitute reversible error and that the findings and sentence then announced were legal, makes it unnecessary for the Board to pass upon the effect of the proceedings of September 15, further than to say that they certainly did not destroy the validity of the findings and sentence announced on the 14th.

8. In view of the foregoing, the Board of Review is of the opinion that the record is legally sufficient to support the findings and sentence.

Arnold Judge Advocate.

George H. Frayer Judge Advocate.

George B. Campbell Judge Advocate.

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

(283)

Board of Review
CM 210619

NOV 1 1938

UNITED STATES)

THIRD DIVISION

v.)

Private WILLIS E. JEWELL)
(6574654), Company A, 7th)
Infantry.)

Trial by G.C.M. convened at Van-
couver Barracks, Washington,
October 4, 1938. Dishonorable
discharge and confinement for
three (3) months. Vancouver
Barracks, Washington.

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private WILLIS E. JEWELL, Company A, 7th Infantry, did, at Vancouver, Washington, on or about August 15, 1938, feloniously take, steal, and carry away Two (2) automobile tires and One (1) battery, value about \$5.65, the property of Mr. CARL MORTENSON, Route 2, Clakamas, Oregon.

He pleaded guilty to and was found guilty of the charge and specification. The court sentenced him to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six (6) months. The reviewing authority approved the sentence, reduced the period of confinement to three (3) months, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. Article of War 50 $\frac{1}{2}$, so far as material to the present case, provides as follows:

"Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial

involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. * * *."

It will be observed that accused pleaded guilty to the only charge and specification against him; and the case, so far as the pleadings are concerned, would therefore seem to fall within the exception at the close of the above quotation, and to be one which need not have been forwarded to this office for the action of the Board of Review under Article of War 50 $\frac{1}{2}$. The reason for forwarding the record is thus stated by the Division Judge Advocate in a note at the end of the review written by his assistant.

"The testimony of the accused as to drunkenness in my view may be regarded as inconsistent with his plea of guilty and in this view, instead of approving sentence and ordering Execution of DD without first referring the case to Bd of Review, I recmd the case be forwarded under 50 $\frac{1}{2}$ A.W. and the order be withheld until Bd of Rev has passed upon the record."

4. The first question presented is whether, in view of the language of Article of War 50 $\frac{1}{2}$ already quoted (ante, par. 3), the Board of Review has any jurisdiction to act upon the case at all. In CM 197853, Smith, and CM 200856, Virden, the reviewing authority forwarded under Article of War 50 $\frac{1}{2}$ records in which the only findings of guilty were made with respect to charges and specifications as to which accused had pleaded guilty. Without any written opinion the Board of Review took jurisdiction, held the record to be sufficient to support the sentences, and The Judge Advocate General approved its action. In CM 202913, Richards, a similar case arose. Though, in deference to the precedent set by the Virden case, above cited, he signed the holding that the record was

sufficient, one member of the Board expressed doubt of the Board's statutory duty or authority to act. Colonel Hugh C. Smith, then Assistant to The Judge Advocate General, wrote a memorandum to The Judge Advocate General, in which he said:

"3. A.W. 50 $\frac{1}{2}$, in so far as material here, prohibits any authority from ordering the execution of a sentence of a GCM involving 'dishonorable discharge not suspended * * *, unless and until the Board of Review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; * * *'. Then follows an exception which states that the 'reviewing or confirming authority may upon his approval' of a sentence of the character referred to above 'order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty'. * * *."

"4. As I read the provisions of A.W. 50 $\frac{1}{2}$ referred to above, the exception is permissive only and not intended to be mandatory. Therefore it is within the discretion of the reviewing authority whether in such a case as this he will order the execution of the sentence or will forward it under A.W. 50 $\frac{1}{2}$. Of course I am aware that the term 'may' has at times been construed as meaning 'must', but I see no reason why the word 'may' as used in the provisions of A.W. 50 $\frac{1}{2}$, quoted above, should be given other than its literal meaning. Accordingly it is my opinion that the case is one properly for review by the B/R under A.W. 50 $\frac{1}{2}$."

The Judge Advocate General approved the holding of the Board without any further expression of opinion.

5. There is high authority for Colonel Smith's view that the word "may" in a statute, though in some instances to be construed as "must", in others is to have its natural meaning implying permission but not compulsion. In Minor v. Mechanics' Bank (1 Peters 46), Justice Story, speaking for the Supreme Court of the United States and referring to an act of Congress chartering a bank in the District of Columbia, said (p. 63):

"The second section provides, 'that the capital stock of said corporation, may consist of \$500,000, divided into shares of \$10 each, and shall be paid in the following manner, "that is to say: one dollar on each share, at the time of subscribing, one dollar on each share, at sixty days, and one dollar on each share, ninety days after the time of subscribing; the remainder to be called for, as the president and directors may deem proper; provided they do not call for any payment in less than thirty days, nor for more than one dollar on each share, at any one time.' The argument of the defendants is, that 'may', in this section, means 'must;' and reliance is placed upon a well-known rule in the construction of public statutes, where the word 'may,' is often construed as imperative. Without question, such a construction is proper, in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now, we cannot say, that there is any leading object in this charter, which will be defeated by construing the word 'may' in its common sense, as importing a power to extend the capital stock to \$500,000, and not an obligation, that it shall be that sum and none other. * * *."

6. In United States v. Thoman (156 U.S. 358), the Supreme Court had before it an act of the legislature of Louisiana with respect to the fiscal affairs of the city of New Orleans. Justice White, afterwards Chief Justice, speaking for the court, said (pp. 358, 359):

"* * * The act of 1877, after dedicating the revenues of each year to the expenses of that year, took any surplus out of the imperative rule thus established by the proviso that 'any surplus of said revenues may be applied to the indebtedness of former years.' In other words, having fixed inflexibly the rule by which the revenues of the year were to be first used to pay the debts of the year, it made an exception by allowing the surplus of any year to be applied to the debts 'of former years.' The rule was imperative; the exception permissive or facultative. * * *"

"It is familiar doctrine that where a statute confers a power to be exercised for the benefit of the public or of a private person, the word 'may' is often treated as imposing a duty rather than conferring a discretion. Mason v. Fearson, 9 How. 248; Washington v. Pratt, 8 Wheat. 681; Supervisors v. United States, 4 Wall. 435. This rule of construction is, however, by no means invariable. Its application depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty. Minor v. Mechanics' Bank, 1 Pet. 46; Binney v. Chesapeake & Ohio Canal Co., 8 Pet. 201; Thompson v. Carroll's Lessee, 22 How. 422."

To the same effect are Thompson v. Carroll's Lessee (22 How. 422, 434); Farmers' Bank v. Federal Reserve Bank (262 U.S. 649, 662), and many other cases.

7. Upon consideration of the purpose of Article of War 50 $\frac{1}{2}$, it is obvious that Congress can have had no reason peremptorily to require a reviewing authority to order the execution of a sentence based solely upon a plea of guilty and to deny him the privilege, if he so desires, of obtaining the action of the Board of Review and The Judge Advocate General on the case. The Board, therefore, holds that it may properly take jurisdiction of and act upon the case.

8. The evidence for the prosecution showed that Carl Mortenson owned an automobile which was in the possession of John D. Barber; that Barber and his wife on the evening of August 14, 1938, went to a show in Portland, Oregon, and left the car parked on the street in that city; and that when they came out the car was gone. Two deputy sheriffs of Clark County, Washington, on the following evening found this car on the Fruit Valley road in that county with the tires and battery missing. Evan E. Rees, operator of a service station at 39th and Main Streets, Vancouver, Washington, testified that accused and two other soldiers on August 14 (probably the witness' error for 15th), pawned two tires to him; and Meyer Finklestein, proprietor of a store known as Kelly's in the same city, testified that he purchased a battery of accused on the evening of August 15th. A Washington state highway patrolman testified to arresting accused and two others shortly after midnight the night of August 15th at the border patrol station, meaning presumably the border between Washington and Oregon.

9. The foregoing constitutes all the evidence in the case, except three confessions by accused: -

a. A confession made the next morning to the Chief of Police of Vancouver, Washington, and two deputy sheriffs, as follows: (record, p. 10):

"On August 15th, 1938, about 2:30 P.M. when I was riding with Vernon Goad in Harold Hodges' automobile, Goad told me he stole a Chevrolet coupe in Portland and drove it to Vancouver, Washington, parking it around 17th and Franklin, Vancouver. He drove Hodges' car to where the stolen Chevrolet was parked, 17th and Franklin. Goad got in the Chevrolet and I drove Hodges' car. We drove down to Fruit Valley in Vancouver, and we pulled along side the highway by two large trees. We both understood that the Chevrolet was being taken to Fruit Valley where we were going to strip it. After parking the car along side the road in Fruit Valley I and Goad removed two of the tires on the left side of the car. We took these to Portland and also the spare tire on the back of the Chevrolet and sold them to a used tire shop on Union Avenue, receiving \$2.75 for them. The spare tire was worn out and we did not get anything for it. After selling the tires in Portland, Goad and I came back to Vancouver Barracks where we picked up Hodges. We three, I, Hodges and Goad went to where the stolen Chevrolet was left in Fruit Valley and we took the other two tires and also the battery. We all had a part in taking the tires off. The battery was sold to Kelly's second-hand store at 8th and Washington, Vancouver, Washington. We received 50¢ for it. I sold the tires in Portland and the battery at Kelly's, that is the first tires that were taken off. The tires on the right side of the car were sold by Goad to a service station at 39th and Main Vancouver, Washington. I knew that the Chevrolet was stolen and I also knew I was committing a theft in taking the tires and battery from the stolen Chevrolet."

b: A letter written by him to the District Attorney (Ex. "C"):

"Wednesday Aug. 24/38.

"District Attorney
"DeWitt Jones, Clark County

"Dear Sir:

"I am being held here in the County Jail as an accomplice to 'stripping' an automobile. The other two boys were taken to Tacoma Monday to stand trial in Federal Court. I was only involved in the 'stripping' of one car & would like to know if you could give me probation if I would leave this State. I realize that I have gotten myself into some serious trouble & my one thought in mind is to try & rehabilitate myself. I know I did wrong, but if you can give me some kind of consideration I am sure I'll straighten myself up & carry myself in a straight path from hereon. I have been incarcerated here 10 days & believe me I have learned my lesson.

Any consideration which you may be able to give me will be appreciated to the fullest extent.

"Respectfully yours

"Willis E. Jewell."

c. Accused's testimony at the trial in which he said that on the evening in question (record, p. 16):

"Goad had a car and asked me to go for a ride with him and I did. We drove around and down a side road a ways and Goad told me about a car he had. He was going to take the tires off and sell them. I had been drinking a bit and I helped him."

The rest of accused's testimony was to the effect that he drank five quarts of elderberry wine that evening, became very drunk and remembers little of what happened.

10. It is presumed that the reviewing authority sent the record forward under Article of War 50½ for the reason stated by the Division Judge Advocate in the note quoted, ante, paragraph 3, namely, the supposed inconsistency between accused's plea of guilty and his testimony as to his own drunkenness. The detailed narrative of the events of the previous afternoon and evening contained in accused's confession made the following morning (quoted ante, par. 9) seems to contradict his claim of an intoxication so extreme that he did not know what he was doing; but, be that as it may, the Board finds it unnecessary to reach a definite decision on the point raised by the Division Judge Advocate, because, for another reason hereafter set forth, it finds the record legally insufficient to support the findings and sentence.

11. That reason will now be stated. It appears from accused's confessions (quoted ante, par. 9), which are uncontradicted, that Private Goad stole the automobile in question in Portland, Oregon, and that accused had nothing to do with that stealing. By Barber's deposition (Ex. B), it is shown that this occurred on the evening of August 14th. Goad drove the automobile to Vancouver, Clark County, Washington, ten miles away, and parked it on a street in that city. Accused did not even know of the existence of the automobile or Goad's larceny of it until the next day about 2:30 p.m., when Goad told him of it. Thereafter, Goad drove the car to Fruit Valley, apparently near Vancouver, and accused assisted in stripping the tires and battery from the car and selling them, as told in detail in his confessions (quoted ante, par. 9). In the opinion of the Board, the larceny of the automobile by Goad had been completed before accused came into the case at all; the possession of it by Mortenson and Barber had been terminated, though wrongfully, by Goad; and there was no trespass against Mortenson or Barber by this accused, or taking of anything from the possession of either by him. The evidence makes out a prima facie case against accused of being an accessory after the fact to the larceny of the automobile and receiving stolen goods; but no case of larceny, because he committed no trespass.

12. In Digest Opinions, JAG 1912-30, paragraph 1480, it is said:

"Receiving stolen goods, knowing them to be stolen, is not an offense included in the crime of larceny, but is a separate and distinct crime."

In the two cases there digested, CM 120948, Garcia, and CM 120949, Espinosa, the accused were charged with larceny from the person, but the court by exceptions and substitutions found them guilty of conspiring to commit larceny, being accessories before the fact to the larceny, and receiving stolen money. The Board of Review, with the approval of The Judge Advocate General, held that none of the offenses of which the court found accused guilty was included within that charged, and set aside the findings and sentence.

13. In CM 208194, Casteen, the Board of Review had before it a case in which another soldier, Johnson, upon trying the door of a tailor shop while he was walking post as a sentinel, found it unlocked. Johnson entered, removed clothing from the shop, and hid it nearby. When relieved from post, he awakened Casteen, told him what he had done, and the two carried the clothing to their barrack and put it first into Johnson's and later part of it into Casteen's locker. Casteen was convicted of a specification alleging receipt of stolen goods, obviously modeled on that

in Manual for Courts-Martial, Appendix 4, form 160, in violation of the 96th Article of War. The Board of Review and The Judge Advocate General sustained the conviction. If that conviction of receiving stolen goods was proper; and if the Garcia and Espinosa cases, holding that larceny and receipt of stolen goods are separate and distinct offenses, are right; then the present conviction is wrong, because there is no difference in principle between the Casteen case and that now before the board.

14. The position of the Board of Review is sustained by many court decisions, of which the oldest, as well as one of the most apposite, is Rex v. McMakin and Smith, reported in a footnote to Rex v. King, Russell and Ryan, 332. The two defendants were jointly tried at Lancaster assizes in 1808 for larceny of a horse, cart, flour and apples. One Heaton left his horse and cart, loaded with flour and apples, unattended in the street. McMakin led the horse away and got another person to drive it to his house in the same town, where Smith, who was at work in the cellar, after causing the light to be put out, assisted in removing the contents of the cart. The court directed the acquittal of Smith on the ground that the asportation was complete before he became involved in the case.

15. In Rex v. King, Russell and Ryan, 332, Hill and Smith, in the absence of the defendant, King, broke open a warehouse and took from it thirteen firkins of butter and ten cheeses, and put them in the street thirty yards away. They then fetched the defendant, who assisted in carrying the stolen articles to a cart. The case was considered by all the judges of England who -

** * * were of opinion, that as the property was removed from the owner's premises before the prisoner was present, he could not be considered as a principal; and that the conviction as such was wrong."

The King case is the leading case on the point and is cited and followed in many others.

16. In Steed v. State (4 Tex. Cr. 568, 67 S.W. 328), the defendant was convicted of larceny of a steer. Three men were on a hunting trip. Steed and Thomas were out hunting while Reese was left behind in the camp which they had set up. When Steed and Thomas returned, they found that

Reese had shot and cut up a steer near the camp. They helped him load the carcass upon a wagon. They testified that Reese told them that the steer was his. In fact it belonged to another. The court set aside the conviction of larceny and held that Steed and Thomas could be guilty of receiving stolen goods at most. Grace v. State (83 Tex. Cr. 442, 203 S.W. 896), is a closely similar case on the facts and the law.

17. In Pass v. State (34 Ariz. 9, 267 Pac. 206), the facts were substantially the same as in the case now before the Board. Defendant was convicted of larceny of a Ford automobile. The evidence showed that one Aguilar, driving the Ford in question on the street in Phoenix, invited accused to ride with him. After the defendant was in the car, Aguilar confided to accused that he (Aguilar) had stolen it, and asked accused to help him strip it. Aguilar drove the car to the country and concealed it in some weeds and brush where the two removed the rims and tires. Aguilar sold the tires and gave the defendant part of the proceeds. The opinion concludes:

"Aguilar, on the stand, admitted the stealing of the car from the corner of Second and Adams streets, in the city of Phoenix, and that after stripping the same he sold the tires for \$8. He denied absolutely that the defendant herein had anything to do with the stealing of the car or the sale of the tires, but in response to the question, 'Did you pay any of this money to Leo Pass?' stated that he paid him \$2.50 because he owed him the money. The above statement of the defendant and the extract from the testimony of Aguilar are the only portions of the evidence which in any way, shape, or fashion connect defendant with the larceny. Either separately or together, they show, at most, that he was an accessory after the fact or a receiver of stolen goods, as the larceny must have been fully completed at the time he first knew of it, while he was informed against and convicted as a principal in the crime of larceny. While the evidence would have sustained a conviction of being an accessory after the fact to the larceny of the automobile described in the information, or of receiving stolen goods, it is entirely insufficient on which to base a verdict of guilty of the offense set up. A defendant may not be charged with one crime and then convicted thereof on proof of an entirely different offense.

"The judgment is reversed and the case remanded to the superior court of Maricopa county for a new trial."

18. In 36 Corpus Juris 798, it is said:

"One who after a larceny has been completed merely aids in the further removal of the stolen goods is not a principal in the theft but only an accessory after the fact; * * *."

Other authorities to the same effect are Rex v. Kelly (Russell and Ryan 421); Able v. Commonwealth (5 Bush (Ky.) 698); Norton v. People (8 Cowen (N.Y.) 137); Mitchell v. State (44 Tex. Cr. 228, 70 S.W. 208).

19. The Board has not overlooked certain cases, such as Good v. State (21 Okl. Cr. 328, 207 Pac. 565), and others cited in the note to the Good case in 29 A.L.R. 1029, holding guilty of larceny a person, who, after the original taking by another, assisted in carrying the stolen articles further away, on the theory that the asportation was incomplete at the time that he entered the picture. Some of these cases are distinguishable on the facts from the present case, but the Board considers such of them as are not so distinguishable unsound in principle and inconsistent with the better line of cases already cited. At most a person involved in such a case is concerned in the asportation, the carrying away, only; but both the common law indictment for larceny and our forms of specifications for that offense (M.C.M. Appendix 4, forms 94 and 110) allege, not the alternative, that the defendant did take, steal, or carry away certain articles, but the conjunctive, that he did take, steal, and carry them away. Of these the taking, involving a trespass, is an absolutely indispensable element of the crime (M.C.M. par. 149 g). In a common law indictment for larceny, the Latin "cepit", meaning "took", was a word of art, without which the indictment named no offense (1 Hawkins' Pleas of the Crown, 8th Ed. 142; 36 Corpus Juris 812). Hawkins, at the page cited, in discussing larceny, says:

"It is to be observed, that all felony includes trespass; and that every indictment of larceny must have the words felonice cepit, as well as asportavit; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away."

20. Neither has the Board of Review overlooked section 332 of the United States Criminal Code, act of March 4, 1909 (35 Stat. 1152; 18 U.S.C. 550), as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

This accused did not aid, abet, counsel, command, induce, or procure the commission of the larceny by Goad; on the contrary, the crime had been committed by Goad before accused ever saw or heard of the automobile in question. Though some judges have uttered dicta that this section wipes out the distinction between principals and accessories (Madigan v. United States, 23 Fed. (2d) 180), when the cases are examined it is found that they deal solely with accessories before the fact; whereas this accused, if an accessory, was one after the fact. Indeed, the very language of section 332, quoted above, is substantially the same as that of the definition of an accessory before the fact. Compare it with the following from Bouvier's Law Dictionary:

"An accessory before the fact is one who, being absent at the time of the crime committed, yet procures, counsels, or commands another to commit it; 1 Hale, Pl. Cr. 615."

On the other hand, observe Bouvier's definition of an accessory after the fact:

"* * * one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; 4 Bla. Com. 37."

21. The next section of the same act, Criminal Code, section 333, act of March 4, 1909 (35 Stat. 1152; 18 U.S.C. 551), is as follows:

"Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years."

If section 332 of the Criminal Code enacted March 4, 1909, supra, made all accessories, both before and after the fact, principals, what was

the reason or necessity for Congress in the next section providing for the punishment of accessories after the fact? Also, if section 332 made accessories after the fact principals, we have two inconsistent provisions as to the punishment: Section 332, that they shall be punished as principals; and section 333, that they shall receive punishment half as severe as that of principals.

22. In Rizzo v. United States (275 Fed. 51), the defendant was indicted for aiding and abetting in the interstate transportation of women for an immoral purpose. The report states (p. 52):

"* * * Rizzo was convicted upon evidence that after the arrival of the women in Pennsylvania he received them in his house where later they engaged in prostitution, and upon an instruction by the Court that, if he thereby enabled the other defendants to accomplish the unlawful purpose for which they had transported the women, he became a participant in the crime by aiding and abetting its perpetration and was equally guilty, although, as it was conceded by the Government, there was no evidence that he had participated in or had any knowledge of the transportation of the women from New York to Pennsylvania. Thereupon Rizzo sued out this writ, raising the question whether one can unlawfully aid and abet the commission of an offense defined by the White Slave Traffic Act when he had no knowledge of the offense."

The court said:

"Section 332 of the Penal Code * * * deals with accessories at or before the fact; section 333 * * * with accessories after the fact. Rizzo was indicted under section 332. As the offense was complete before Rizzo knew of it and before he did the act charged to have been in aid of it, it follows that he could not be legally convicted of knowingly aiding and abetting its perpetration. As we are dealing with a question of law, not with a matter of morals, we are constrained to reverse the judgment below."

The foregoing case is directly in point, both as to the inapplicability of section 332 of the Criminal Code and as to the main proposition that an accused cannot be convicted as a principal if the offense was completed before he came upon the scene.

23. The Board has also considered section 2601, Remington's Revised Statutes of Washington, as follows:

"LARCENY. Every person who, with intent to deprive or defraud the owner thereof -

"(1) Shall take, lead or drive away the property of another; or

"(2) Shall obtain from the owner or another the possession of or title to any property, real or personal, by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune-telling; or

"(3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian or officer of any person, estate, association or corporation or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; or

"(4) Having received any property by reason of a mistake, shall with knowledge of such mistake secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; and

"(5) Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this act -

"Steals such property and shall be guilty of larceny."

It will be observed that the fifth subsection includes the present offense, and that this accused might therefore have been convicted in a Washington court of larceny. Does that fact make the present conviction valid?

24. The specification in this case alleges that accused did "take, steal, and carry away" certain articles, following the Manual for Courts-Martial, Appendix 4, form 94, in violation of the 93rd Article of War, which article includes, without definition thereof, the word "larceny". The Manual for Courts-Martial, paragraph 149 g, takes over two pages to tell the reader what is and what is not larceny, and what does and what does not constitute taking, stealing, and carrying away. For reasons already stated in some detail, the Board thinks that this accused did not commit larceny at common law or as defined in the Manual. It is obvious that the Washington code changes and broadens the definition of that term so as to include many acts which are not larceny at common law or under the 93rd Article of War. If the word "larceny" in Article of War 93, and the words "take, steal, and carry away", in a specification, are to have one meaning in one state and a different meaning in another, following the provisions of the codes of the several states, it was futile for the authors of the Manual for Courts-Martial to take so much space and trouble to define those words. They would have done better merely to refer the reader to the code of the state in which the offense occurred. They made no such reference, from which the inference is justified that they considered those words to have the same meaning wherever the Army might be.

25. It will also be observed that subsection (3) of section 2601 of the Washington Code (quoted ante, par. 23) broadens the term "larceny", so as to include what is known elsewhere as embezzlement. The Manual for Courts-Martial, paragraph 149 h, devotes two pages to telling the reader what constitutes embezzlement. If the conviction now under consideration be held valid because of subsection 5, then the authors of the Manual also wasted their time in writing paragraph 149 h, as by virtue of subsection (3) any case of embezzlement arising in the Army in Washington State might upon the same theory be prosecuted under a specification alleging that accused did "take, steal, and carry away" the property embezzled.

26. If it were true that the words "larceny" and "take, steal, and carry away", as used in military law, vary in meaning according to the state where the offense was committed, the unity so necessary for a prompt and certain administration of military law would be destroyed.

27. It has been held many times that a conviction otherwise proper will not be set aside because the charge mentions the wrong Article of War. Can the present conviction be held valid under the 96th Article of War, if not the 93rd?

Paragraph 152 c, discussing the 96th Article of War, of the Manual, says:

"Among the crimes referred to in this article may be those offenses created by statute and given names therein which names are also found in other Articles of War given to offenses which have essentially different elements. For example, in the war risk insurance act (sec. 25, as amended by the act of October 6, 1917 (40 Stat., 402)), a false statement is declared to be perjury under certain circumstances although not made under oath. This perjury, however, is not the perjury denounced by A. W. 93. Therefore, the perjury defined by the war risk insurance act is chargeable under A. W. 96."

It is to be noted that perjury under the 96th Article of War is not to be alleged according to the usual form of specification for perjury (M.C.M., App. 4, form 96), but according to a form which follows the language of the act of October 6, 1917 (App. 4, form 165). So also the legislature of Washington has created by subsection (5) of section 2601 a crime and called it larceny; but the crime which it thus created, though bearing the same name, is not larceny at common law or as defined in the Manual, nor is it pleaded in the same way. In State v. Roy (62 Wash. 582, 114 Pac. 439); State v. Martin (94 Wash. 313, 162 Pac. 356); and State v. Benton (150 Wash. 479, 273 Pac. 731), all prosecutions under subsection (5), the information did not allege that accused took, stole, and carried away certain property, but followed the language of subsection (5). Very likely a valid specification could have been drawn in the present case in language following that subsection, and charged as a violation of the 96th Article of War, and a conviction obtained under it; but that is quite different from saying that because of that subsection a valid conviction can be obtained under a "took, stole, and carried away" specification by proof that the accused received stolen goods.

28. To the contention that the present conviction can be sustained as a violation of the 96th Article of War, if not the 95rd, the short and conclusive answer is that the difficulty with the case is not that the specification is laid under the wrong Article of War. On the contrary, the language of the specification is appropriate to the 93rd Article of War and follows a model (form 94) given in Appendix 4, Manual for Courts-Martial, under the heading "A.W. 93". The difficulty with the present case is a variance between the specification and the proof,

and such a variance cannot be cured by supposing the charge to have mentioned another Article of War. The Board is of opinion that section 2601 (5) of the Revised Statutes of Washington does not require or justify a decision in the present case different from that which would otherwise be proper.

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

Archibald King Judge Advocate.
George H. Trayer Judge Advocate.
George P. Campbell Judge Advocate.

(300)

1st Ind.

War Department, J.A.G.O., DEC 6 1938 - To the Secretary of War.

1. I do not concur in the foregoing holding by the Board of Review that the record of trial in the case of Private Willis E. Jewell, Company A, 7th Infantry, is legally insufficient to support the findings of guilty and the sentence.

2. Accused pleaded guilty to the charge and specification alleging larceny by him, at Vancouver, Washington, on or about August 15, 1938, of two automobile tires and one battery, value about \$5.65, the property of Carl Mortenson, in violation of Article of War 93.

Evidence, including admissions and testimony by accused, was introduced indicating that about 2:30 p.m., August 15, 1938, accused and a Private Goad, both stationed at Vancouver Barracks, Washington, went together to the vicinity of 17th and Franklin Streets, Vancouver, Washington, where a Chevrolet automobile belonging to Mortenson but sold conditionally to one Barker, was parked. The car was driven away by Goad with the understanding that he and accused would "strip" it. Arriving in "Fruit Valley in Vancouver", the two removed three tires, including the spare tire, took them to Portland, Oregon, and there sold two of them. Later in the day accused, Goad and a third soldier returned to the car and removed the remaining two tires and the battery which they sold in Portland and Vancouver. Upon arrest accused stated to a police officer that en route to 17th and Franklin Streets, Vancouver, Goad told him that he had stolen the car in Portland and had driven it to Vancouver and parked it at the place noted. The car had in fact been wrongfully taken from a street in Portland where Barker had parked it, sometime before 11 p.m., August 14. Accused testified that he was drunk at the time the tires and battery were taken and did not remember all that occurred.

3. Inasmuch as the sentence adjudged was based solely upon findings of guilty of a charge and specification to which accused had pleaded guilty, the reviewing authority was empowered, under Article of War 50 $\frac{1}{2}$, to order execution of the sentence without preliminary action by the Board of Review and The Judge Advocate General. In approving the sentence, however, the reviewing authority withheld his order of execution, apparently upon the advice of his staff judge advocate that such part of the testimony by accused as asserted drunkenness might not be consistent with the pleas of guilty.

4. The holding by the Board of Review that the record of trial is legally insufficient to support the findings and sentence is premised

upon a conclusion that the testimony of accused is inconsistent with the pleas of guilty in that it asserts that larceny of the car had been completed prior to participation by accused in the taking from the car of the tires and battery and that, therefore, there was, in legal contemplation, no trespass by accused with respect to the tires and battery, a necessary element of the offense of larceny. The Board is of the opinion that accused may have been guilty of being an accessory after the fact or of having received stolen goods, but that neither of these offenses, nor any other offense proved, was included in that charged.

5. I do not find any inconsistency between the pleas of guilty and the testimony of accused or the other competent evidence.

6. Although accused asserted drunkenness and consequent lack of complete memory, his recitals of what occurred are of such circumstantial nature that his avowals of drunkenness do not raise any substantial doubt in my mind of his mental capacity to commit the offense, or amount to a contention on his part that he was so drunk that he could not entertain the specific intent involved in larceny.

7. Assuming that the automobile had been stolen and parked in Vancouver on the evening of August 14 by Goad, without participation by accused, this circumstance did not purge the subsequent acts of accused of trespass with respect to the tires and battery taken on August 15.

If it be concluded that an original larceny of the car by Goad had been completed prior to participation by accused in the removal of the car from its parking place in Vancouver and in the removal of the tires and battery, there is authority, as cited by the Board of Review, for the theory that accused was not, in legal contemplation, a party to that original larceny. On the other hand, if the acts of Goad in taking the car on August 14 and again taking and dismantling it on August 15 are viewed as a single transaction, involving a single larceny, the participation by accused in the asportation and disposition of the property made him a party to that crime, for it is generally held that:

"One who joins with a thief and assists in asportation and disposition of stolen property, knowing at the time he does so that the other acting with him is in the act of carrying away the property of another, is equally guilty of

the larceny." Good v. State, 207 Pac. (Okla.) 565, 566.

See also State v. Behrens, 279 Pac. (Wn.) 607; section 332, Crim. Code of the United States (18 U.S.C. 550); Annotation, 29 A.L.R. 1031.

If in fact, as seems probable and as the Board appears to assume, the original larceny of the car was complete before accused became a party to the transaction, it is my view that the subsequent taking of the car and the taking of the tires and battery by accused and Goad plainly involved a new and distinct trespass and larceny apart from that theretofore committed by Goad. Goad, in leaving the car on a public street of Vancouver without retention of any physical control or dominion over it, relinquished or abandoned his possession thereof. In wrongfully taking the car from its parking place in Portland on August 14, he could have acquired no greater interest or right of possession than that of a thief, and it is elementary that a thief has no legal right or title to the thing stolen beyond his naked possession thereof. When he relinquishes actual possession, he relinquishes all he has, for constructive possession can only result from legal title or right of possession. Aldrich Mining Co. v. Pearce, 52 So. (Ala.) 911; Taylor v. Keen, 72 S.E. (Ga.) 934; 50 C.F. 782; Clark and Marshall, Law of Crimes, 383, 384. It follows that when Goad left the car in Vancouver, constructive possession returned to the legal owner, and the taking by accused and Goad on the following day was a new and distinct trespass against such constructive possession and a new and distinct larceny. Trimble v. State, 26 S.W. (Tex.) 727; Taylor v. State, 138 S.W. (Tex.) 615.

The pleas and findings of guilty of larceny by accused of the tires and battery, are, in my opinion, fully supported by the record of trial. And this is so whether the original taking by Goad be regarded as part of a plan to strip the car which was joined in by accused the next day by further transporting the car and taking and selling the tires and battery, or whether it is true that Goad took the car originally for transportation from Portland to Vancouver, in order to get back to his post at Vancouver Barracks, and there abandoned it, so that the taking and carrying away on the next day by Goad and accused was a new larceny.

8. Under Article of War 50 $\frac{1}{2}$, as amended by the act of August 20, 1937 (50 Stat. 724), you have authority to confirm the action of the

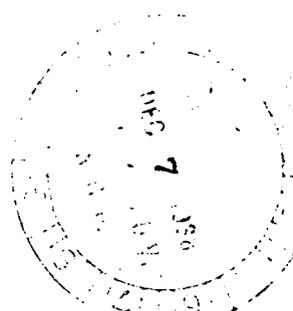
reviewing authority in approving the sentence, or to disapprove the sentence.

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

4 Received A. G. O. DEC 7 1938

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

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



AG 201 Jewell, Willis E.
(11-1-3C) Enl..

2d Ind.

DEC 8 1938
BY
[Signature]

War Dept., A.G.O., December 8, 1938. To The Judge Advocate General.

3 Incls.
N/C

Secretary of War supported J. A. G.

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

(305)

Board of Review
CM 210678

JAN 19 1939

UNITED STATES

SIXTH CORPS AREA

v.

Captain HARRY A. SHARP
(O-223523), Infantry-
Reserve.

Trial by G.C.M., convened at
Fort Sheridan, Illinois, July
14, 29, August 16, 17, 18 and
19, 1938. Dismissal and total
forfeitures.

OPINION of the BOARD OF REVIEW
KING, FRAZIER and CAMPBELL, Judge Advocates.

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

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

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

Specification 1: In that Captain Harry A. Sharp, Inf-Res., being at the time Commanding Officer of 2695th Company, CCC, Camp Freesoil, F-27 (Mich), Freesoil, Michigan, did, at Freesoil, Michigan, during the period from about July 20, 1937, to December 17, 1937, feloniously embezzle by fraudulently converting to his own use money of the value of about \$15.00, the property of the United States, entrusted to him by various enrollee members of said 2695th Company, CCC, for payment to the United States in settlement of fines assessed by the said Sharp against said various enrollee members of said 2695th Company, CCC.

Specification 2: In that Captain Harry A. Sharp, Inf-Res., being at the time Commanding Officer of 2695th Company, CCC, Camp Freesoil, F-27 (Mich), Freesoil, Michigan,

did, at Freesoil, Michigan, during the period from about July 20, 1937 to December 17, 1937, feloniously embezzle by fraudulently converting to his own use money of the value of about \$150.00, the property of the Direct Advertising Company, Baton Rouge, Louisiana, entrusted to him by various enrollee members of said 2695th Company, CCC, for payment to said Direct Advertising Company.

Specification 3: In that Captain Harry A. Sharp, Inf-Res., being at the time Commanding Officer of 2695th Company, CCC, Camp Freesoil, F-27 (Mich), Freesoil, Michigan, did, at Freesoil, Michigan, during the period from about July 20, 1937 to December 17, 1937, feloniously embezzle by fraudulently converting to his own use money of the value of about \$15.00, the property of the Camp Exchange of said 2695th Company, CCC, entrusted to him by the said Camp Exchange while acting as its agent in the collection of payments from various enrollees for the Camp Annual, a publication.

Specification 4: In that Captain Harry A. Sharp, Inf-Res., being at the time Commanding Officer of 2695th Company, CCC, Camp Freesoil, F-27 (Mich), Freesoil, Michigan, did, at Freesoil, Michigan, during the period from about July 20, 1937, to December 17, 1937, feloniously embezzle by fraudulently converting to his own use money of the value of about \$200.00, the property of the Camp Exchange of said 2695th Company, CCC, entrusted to him by the said Camp Exchange while acting as its agent in the collection of payments from various individuals for retail sales of gasoline.

Specification 5: (Finding of not guilty).

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

Specification: In that Captain Harry A. Sharp, Inf-Res., did, at Freesoil, Michigan, on or about March 26, 1938, with intent to defraud wrongfully and unlawfully make and offer to Ross Dairy Co., a certain check, in words and figures as follows, to wit:

TUSCOLA, ILLINOIS. Mar. 26, 1938 No. 1765

THE FIRST NATIONAL BANK	<u>70-578</u>	
PAY TO THE	7	
ORDER OF	Cash	<u>\$15.00</u>
<u>Fifteen and no/100</u>		<u>DOLLARS</u>

/s/ Harry A. Sharp

and by means thereof, did fraudulently obtain from said Ross Dairy Company \$15.00, he the said Captain Harry A. Sharp, Inf-Res., then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank for the payment of said check.

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

Specification 1: In that Captain Harry A. Sharp, Inf-Res., being at the time Commanding Officer of 2695th Company, CCC, Camp Freesoil, F-27 (Mich), Freesoil, Michigan, did, at Freesoil, Michigan, for the months of September and November 1937, with intent to deceive his superior officers, officially report on required monthly fund audit statements, that said statements were correct and that all assets and liabilities were included therein, which report was known by the said Captain Harry A. Sharp, Inf-Res., to be untrue in that all of the outstanding liabilities were not included.

Specification 2: In that Captain Harry A. Sharp, Inf-Res., being at the time Commanding Officer of 2695th Company, CCC, Camp Freesoil, F-27 (Mich), Freesoil, Michigan, did, at Freesoil, Michigan, on or about December 17, 1937, with intent to deceive his superior officers and Captain Gerald H. Reynolds, Inf-Res., his successor in command, officially report on his turn-over certificate that it was a complete and accurate statement of all amounts due the fund and of all outstanding debts and obligations payable from the fund, which report was known by the said Captain Harry A. Sharp, Inf-Res., to be untrue in that all of the outstanding debts and obligations payable from the fund were not included.

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

Specification: In that Captain Harry A. Sharp, Inf-Res. did at Camp Custer, Michigan, on or about June 20, 1938, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Chicago, Illinois, on or about June 27, 1938.

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

Specification 1: (Finding of not guilty).

(308)

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

He pleaded not guilty to all charges and specifications and was found not guilty of Specification 5, Charge I, and of Additional Charge II and the four specifications thereunder. He was found guilty of Specification 1, Charge I, of Specification 2, substituting \$100 for \$150, of Specification 3, substituting \$10 for \$15, of Specification 4, substituting \$30 for \$200, and of Charge I; of Charge II and the specification thereunder; of Specification 1, Charge III, excepting the month of October, of Specification 2 and Charge III; and of Additional Charge I, guilty of absence without leave from June 20 to June 27, 1938, in violation of the 61st Article of War. 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 only so much of the finding of guilty of Specification 1, Charge III, as finds that the accused, being at the time Commanding Officer of 2695th Company, CCC, Camp Freesoil F-27 (Mich.), Freesoil, Michigan, did, at Freesoil, Michigan, for the month of November, 1937, with intent to deceive his superior officers, officially report on required monthly fund audit statement that said statement was correct and that all assets and liabilities were included therein, which report was known by him to be untrue, in that all of the outstanding liabilities were not included; approved the sentence but remitted the confinement imposed, and forwarded the record of trial for action under the 48th Article of War.

3. The court met July 14, 1938, at which time the accused upon being arraigned announced that he had no special pleas to interpose and then pleaded to the general issue, not guilty to all charges and specifications (R. 10). The case was then continued until July 29, 1938, at which time the court reconvened and the accused announced his desire to interpose a special plea to the jurisdiction of the court with reference to the additional charges (R. 11). The special pleas of accused to the jurisdiction were overruled and a continuance taken (R. 16) until August 16, 1938, when it proceeded with the trial of accused (R. 18).

The prosecution stated at the opening of this session of the court that it was desired to change Specification 1, Charge III, so as to allege that the monthly fund audit statements therein mentioned per-

tained to the months of October and November, 1937, and not to September and November, 1937, as originally alleged. The defense objected to the proposed change and the court failed to make a ruling. The accused withdrew the objection (R. 22, 23).

4. The evidence in support of the specifications and the charges of which the accused was found guilty will be separately summarized with respect to each specification.

With reference to Specification 1, Charge I, alleging the embezzlement of \$15, property of the United States, consisting of fines assessed by accused against enrollees and entrusted by them to him during the period from July 20, 1937, to December 17, 1937, or thereabouts, the evidence is as follows:

Captain Harry A. Sharp, Infantry-Reserve, the accused, while on a tour of active duty extending from July 1, 1937, to June 30, 1938, was Commanding Officer of the 2695th Company, CCC, Camp Freesoil, F-27 (Mich.), Freesoil, Michigan, from July 20, 1937, to December 17, 1937 (Pros. Ex. 1, par. 1, R. 29, 30, 221). The accused signed all the pay rolls for the months of July, August, September, October, and November, 1937, while in command of 2695th Company, CCC (Pros. Ex. 1, par. 2, R. 30). The pay rolls fail to show any entries of fines imposed against any member of the company (Pros. Ex. 1, par. 2, R. 36, 37). The accused in his capacity as commanding officer was the custodian of the Company Fund of 2695th Company and as such signed the Council book of this company for the months of August, September, October, and November, 1937 (Pros. Ex. 1, par. 13). First Lieutenant Charles F. Ryan, Infantry-Reserve, was on duty as "Junior Officer of Camp Freesoil, 2695 Company" from September 11 to December 17, 1937, inclusive, during which time the accused was his commanding officer. During the last stated period the accused made collections from some of the enrollees of fines for minor infractions of camp rules, imposed upon them by him. These deductions were made at the time he paid the enrollees, there being no hearing demanded. The various collections totaled ten or twelve dollars. These collections were made from a consolidated collection record used at regular times of company payment and entered as fines. Lieutenant Ryan called the name of the payee and when he stepped up to the pay table, the deduction was made by the accused from the collection sheet when he paid the enrollee. The enrollee received the money due less the deduction which accused retained in his possession and so far as Lieutenant Ryan is aware these moneys were never placed in any official fund (Pros. Ex. 1, R. 38, 39).

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Enrollee Walter L. Everett was a member of 2695th Company, CCC, during the period between July 20, and December 17, 1937, when it was commanded by the accused. Everett was fined and paid small sums on two occasions for minor infractions (Pros. Ex. 4, R. 46).

From the testimony of the accused, it appears that while in command of the company he collected from the enrollees in fines or assessments an amount not exceeding \$15 (Pros. Ex. 4, R. 285, 286, 287), and he used the money as it became available and that as there was none left, he knew that he had used it all; that the money was kept to the best of his recollection in the safe in envelopes, with the amounts marked so that they could be identified (R. 286, 287). The accused also testified that a part of a payment made to the Olson Lumber Company consisted of fines assessed against enrollees over a period of four or five months which had not been entered on the pay roll, and of which he had no records (Pros. Ex. 5, Ex. B, R. 49-50).

Specification 2, Charge I, alleges the embezzlement of \$150, property of the Direct Advertising Company, entrusted by enrollees to accused from July 20, 1937, to December 17, 1937, or thereabouts, for payment to the Direct Advertising Company, of which amount he was found guilty of the embezzlement of \$100. Specification 3 alleges the embezzlement of \$15, property of the Camp Exchange, entrusted to accused by the Camp Exchange while he was acting as its agent in the collection of payments from enrollees for the Camp Annual, a publication, from July 20, 1937, to December 17, 1937, or thereabouts, of which amount he was found guilty of the embezzlement of \$10. The evidence with respect to these specifications may be summarized as follows:

First Lieutenant W. H. Stover, Infantry-Reserve, the commanding officer of the 2695th Company, Civilian Conservation Corps, just prior to accused, entered into an agreement on June 11, 1937, with the Direct Advertising Company, Baton Rouge, Louisiana, to collect for them \$2.40 per copy from the enrollees on seventy-four orders for a publication called the 1937 District Annual. This amount was to be collected through the Camp Exchange, either in a lump sum or at the rate of eighty cents per month, effective the first pay day subsequent to June 11, 1937. The Company Fund was to receive ten percent on all of the money collected, the balance to be paid by the Camp Exchange to the Direct Advertising Company (R. 261, 262). When Lieutenant Stover was relieved by accused on July 20, 1937, he turned over to him \$43 that had been collected from the enrollees for the District Annual (Pros. Ex. 1, par. 3, R. 30, 224, 261). The accused on or about July 20, 1937, upon assuming command of the company, received \$43, which had been collected by his predecessor for the sale of the official CCC Annuals to enrollees (Pros. Ex. 1, R. 30). It is shown by Lieutenant Stover that accused took over the property and funds, including contracts with the Direct Advertising Company (Pros. Ex. 6 (Ex. A), R. 51, 52). None of the money so received was deposited in any bank to the credit of the Camp Exchange,

or transmitted to the Direct Advertising Company (Pros. Ex. 1, par. 4). First Lieutenant Charles F. Ryan, Infantry-Reserve, who was on duty with the company between September 11, and December 17, 1937, was Recorder of both the Company Fund Council and the Camp Exchange Council and collected from certain members of the company a total sum of \$1.60 for the Annual and turned the money over to the accused. This amount was not entered on either the Camp Exchange or Company Fund records prior to December 18, 1937, when Captain Gerald H. Reynolds, Infantry-Reserve, relieved accused. There were some Annuals, approximately six or eight, remaining on hand, undistributed, when Lieutenant Ryan was later relieved (R. 52-59). The accused testified that he collected approximately \$33 on July 30 from enrollees for the District Annual (R. 262) with which funds he purchased building material for the camp, and also used all of the collections on this Annual that he made August 31 for building materials which he used in the construction work at Camp Freesoil (R. 263). Also the accused testified before Lieutenant Colonel B. A. Brackenbury, during an investigation, to the receipt of \$120 from enrollees (R. 67, 68). The Annuals came some time in September, how many came he did not know, but turned them over to the company doctor to distribute. Fifteen of them remained on hand in the company office, and at least ten were there when accused was relieved on December 17 (R. 264).

Specification 2 alleges the money embezzled to have been the property of the Direct Advertising Company and to have been entrusted to accused by various enrollees for payment to that company. Specification 3 alleges the money embezzled to have been the property of the Camp Exchange, entrusted to accused by the Exchange while accused was acting as agent at the Exchange in the collection of payments from various enrollees for the Camp Annual, a publication. The best evidence of the arrangement for the collection of payments for the Annual and the allowances for commission for so doing is the contract between the Direct Advertising Company and accused's predecessor in command, Lieutenant Stover. The contract is Exhibit A to Lieutenant Stover's deposition, Prosecution's Exhibit 6. That contract provides:

"The Commanding Officer of Company 2695, Camp Freesoil, Camp Custer CCC District, Sixth Corps Area, hereby acknowledges receipt of 74 orders for the 1937 District Annual at \$2.40 per copy, from the men in this CCC Company. Such money will be collected in a lump sum on the signing of this agreement or at the rate of eighty cents per month per annual beginning with the pay immediately following the signing of this agreement, except

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as is qualified in Par. 2, this communication. Collections will be made through the Camp Exchange. Such monies collected will be forwarded to the Direct Advertising Company, Baton Rouge, Louisiana; however, ten percent (10%) will be deducted from all payments and credited to the Company Fund."

It appears from the foregoing that the Camp Exchange was the agency through which 90 percent of the amount collected was to be transmitted to the Direct Advertising Company and 10 percent to the Company Fund. It would have been more logical to charge accused either with a single specification charging embezzlement of all the money collected for the Annuals, and alleging such money to have been the property of the Camp Exchange; or with two specifications, one alleging embezzlement of 90 percent of the money collected, the property of the Direct Advertising Company, and the other alleging embezzlement of 10% of the amount collected, the property of the Company Fund. However, it has been held that a variance as to the ownership of the property embezzled may be passed under the 37th Article of War, provided accused is fairly informed of the offense with which he is charged and it is clear that the offense charged and that proved are identical (CM 195513, Croze; CM 210327, Freeman).

Specification 4, Charge I, alleges the embezzlement of \$200, property of the Camp Exchange, entrusted to accused while acting as its agent in the collection of proceeds of sales of gasoline during the period from about July 20, 1937, to December 17, 1937. Accused was found guilty of the embezzlement of \$30 of the above amount.

The accused was custodian of the Camp Exchange Fund of the Camp Exchange of the 2695th Company, CCC at Camp Freesoil, and signed the Council book of that company for the months of August, September, October and November, 1937 (Pros. Ex. 1, par. 13, R. 30). There was a gasoline tank in use at Camp Freesoil, the capacity of which was approximately 550 gallons. There are no records available to show how much gasoline was on hand when accused assumed command on July 20, 1937, or when he was relieved on December 17, 1937 (Pros. Ex. 1, par. 5 b, c). The Sinclair Refining Company delivered to the Camp Exchange, on August 5, 1937, 200 gallons; September 2, 200 gallons; September 9, 1937, 230 gallons; September 21, 200 gallons; October 2, 193 gallons; and December 8, 200 gallons; a total of 1223 gallons (Pros. Ex. 1, par. 14, Pros. Ex. 8, R. 101). The only deposit to the credit of the Camp Exchange from July 20, 1937, to December 17, 1937, for the sale of any gasoline to individuals was the deposit of \$29.40, on September 1, 1937 (Pros. Ex. No. 1, par. 5 d, R. 30). First Lieutenant Charles F. Ryan, Infantry-Reserve, was,

as stated above, on duty at Camp Freesoil from September 11, 1937, to December 17, 1937, and the accused was commanding officer during that time. There was only one gasoline tank in use at the camp which was operated by the Supply Sergeant, an enrollee named William Head (R. 185). Head dispensed the gasoline purchased from the Camp Exchange to a number of the administrative and technical personnel of the camp who were authorized to buy it (R. 71, 72, 73, 256). Lieutenant Ryan always paid his gasoline bill to the accused in person at the end of each month, when notified of the amount due. He was then presented with the gasoline sales slips. All of the other Camp Exchange sales except gasoline were for cash (R. 83). The amount of money paid to accused by Lieutenant Ryan for gasoline from September 11, 1937, to December 17, 1937, was approximately ten to twelve dollars (R. 73). Lieutenant Ryan during this same period collected or had turned over to him anywhere from fifteen to twenty dollars for mess and gasoline bills by others and turned these amounts over to accused (R. 74, 76). The record fails to show the amount for mess and the amount for gasoline. There were approximately six or seven owners of private automobiles who were purchasing gasoline for use in their private cars from the Camp Exchange during this period (R. 74). Prior to December 17, 1937, accused was Camp Exchange Officer (R. 82). While Lieutenant Ryan's only connection with the Exchange was that of recorder, the Government gasoline and Post Exchange gasoline were stored in the same tank, the storekeeper in charge of the records kept two separate accounts in two separate books (R. 82, 83 and 84). The Council book of the Camp Exchange shows that \$29.40 was taken in, in the month of September 1937, for the sale of gasoline; it appears also in the Council book as an expenditure (R. 84, 85). An official investigation was made on May 12, 1938, by Lieutenant Colonel Benjamin A. Brackenbury. Accused testified before Colonel Brackenbury subsequent to a warning of his rights under the 24th Article of War (R. 66, 98, 104, 106, 113). Accused was asked about the disposition of the money collected for the gasoline sales at the camp while in command of the 2695th Company. Accused stated substantially that he sold the gasoline through the Camp Exchange to authorized individuals for use in their private cars; that he had personally made collections of approximately \$200 (R. 108, 286), and that he did not turn over this amount to any proper Government authority (R. 107). The accused declined to state what he had done with this money (R. 108). Accused stated that he did deposit to the credit of the Camp Exchange \$29.40, in the Camp Exchange Council book for the month of September, and that he had not made any other deposits for any so collected (R. 106+108). Amos Washington, Educational Adviser at Camp Freesoil, bought about five or ten dollars worth of gasoline from the Army gasoline tank between July 20 and

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December 17, 1937, he always paid the accused, the price per gallon varied from month to month (Def. Ex. 8, R. 216). Altogether Lieutenant Ryan collected \$31 and some cents for gasoline sold during the time accused was commanding officer of the company. These amounts were entered in the Council or Camp Exchange Council book (R. 80). He does not know of his own knowledge whether it was paid to Sinclair Oil Company while he was Camp Exchange Officer (R. 81).

The evidence with reference to Charge II and the specification thereunder, alleging that accused passed a fraudulent check for \$15 on the Ross Dairy Company, may be summarized as follows:

Mr. Edward M. Owen, President of the First National Bank, Tuscola, Illinois, testified by deposition that the accused maintained a checking account at that bank from March 1, 1938, to April 30, 1938, and from June 1, 1938, to June 14, 1938; that this account was closed on June 14, 1938, due to departure of accused from the city. The policy of the bank in force since February, 1938, was to return checks when received unless sufficient funds were on deposit with the bank to cover the checks when presented for payment. Mr. Owen identified a check (Ex. A, dated Mar. 26, 1938, for \$15, payable to cash, attached to his deposition) as one presented to the bank on March 30, 1938, bearing on its face the signature of accused. This check was protested for nonpayment on the same date and returned. The balance of accused on that date was \$4.40; accused deposited \$264.80 to his account on March 31, 1938 (Pros. Ex. 2, R. 30). Accused admitted that he uttered the check dated March 26, 1938, payable to cash for \$15, to the Ross Dairy Company, and received that amount in cash from the Dairy Company (Pros. Ex. 1, par. 7, R. 30, 244, 245), and that as far as he knows the Dairy Company has never been repaid the \$15 (R. 284, 285).

Specification 1, Charge III, alleges that accused, with intent to deceive his superior officers, made false official reports in his monthly fund statements for September and November, 1937. He was found guilty with respect to the November statement only. Specification 2 alleges that accused, with intent to deceive his superior officers and Captain Reynolds, his successor in command, made a false official report on his turn-over certificate. He was found guilty of this specification. The evidence with respect to these two specifications may be summarized as follows:

Captain Niles Bryant, Jr., Infantry-Reserve, the Civilian Conservation Corps Inspector, 2nd Inspection Area, Camp Custer, CCC District, made frequent periodic inspections of Camp Freesoil (R. 145, 146, 147). Captain Bryant made an audit on or about December

17, 1937 (R. 152, 153, 157). A document was identified by this officer to be a statement of the Company Fund of the 2695th Company, Civilian Conservation Corps, as of November 30th, and which was presented to him by accused at the time of the regular monthly audit (Pros. Ex. 22, R. 151). This statement also bore the signature of accused (R. 153). At time of presenting it, the accused officially reported that it contained all the existing obligations of the company (Pros. Ex. 22, R. 154). It was accepted by Captain Bryant as a true statement of the Company Fund as of November 30th, and forwarded to the Finance Officer (R. 152). It was later discovered, some time after January 1, 1938, that large outstanding obligations were not included (R. 155, 157). An official report was made to the District Commander (R. 156). These outstanding obligations consisted in part of an indebtedness of \$398.78 for fruits and vegetables obtained from the Miklas Economy Market, Manistee, Michigan, and furnished to the company of which accused was commanding officer. The accused had been advised of this outstanding indebtedness. Accused, on December 16, 1937, informed the owner of the market that the new company commander would take care of this unpaid account (Pros. Ex. 25, R. 168). The statement of the fund submitted to Captain Bryant by accused failed to include an unpaid balance due the Olson Lumber Company, Manistee, Michigan, for \$172.15. The Olson account shows payments to have been made on October 14 and December 2, 1937 (Pros. Ex. 27, R. 169). This lumber company began to do business with the 2695th Company in September, 1937; they sold \$193.65 worth of lumber to the 2695th Company at Camp Freesoil in the month of October, 1937. Payments were received from accused in October amounting to \$50. The unpaid balance on November 30, 1937, was \$172.15. A small cash payment was also made on December 2, 1937, leaving a balance due at the close of business December 16, 1937, of \$152.16, and to the best of the recollection of William A. Olson, manager of the Olson Lumber Company, the statements were mailed to accused in the regular course of business. Mr. Olson met accused some time in December and he promised to send remittance from his new camp in Illinois for bills owed to the lumber company (Pros. Ex. 27, R. 169, 239).

The 2695th Company, CCC, Camp Freesoil, began to deal with Josephine Miklas, the proprietor of Miklas Economy Market, dealer in groceries and meat, Manistee, Michigan, in February, 1937, and continued to do so until December 1, 1937. The company was indebted to the Market at the close of business as of December 16, 1937, in the amount of \$398.78 (R. 238); this amount was for supplies furnished during the month of November, 1937. A bill for the amount due was submitted by mail on December 3, 1937. The accused came to see Mrs.

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Miklas at the store on or about December 16, 1937, told her that he was leaving Camp Freesoil and in reply to her query as to who would take care of the November account, she was informed that the next company commander would (Pros. Ex. 25, R. 167).

An account due Farmers Exchange, Ludington, Michigan, presented December 1st for \$92.65 showed no payments made during November and December, 1937 (Pros. Ex. 28, R. 169). It appears from the certificate of accused on the "Statement of Company Fund", "I certify that the above statement is correct, and that all assets and liabilities are included therein" (Pros. Ex. 22, R. 151). Captain Bryant stated: "I had no knowledge of any obligations that did not appear on this report of November, 1937." (R.157.)

Accused was relieved from command on December 17, 1937, by Captain Gerald H. Reynolds, Infantry-Reserve (R. 59, 91, 161). No collection sheets or records of amounts collected from enrollees, or to be collected from them were turned over by accused to Captain Reynolds on December 17, 1937, nor were any CCC Annuals turned over to him at the time (R. 60, 61). Accused submitted a financial statement of the Company Fund to Captain Reynolds on that date purporting to show the total amount of outstanding obligations of the company (Pros. Ex. 23). Captain Reynolds took the statement to be true, received it and signed for the money in the fund (R. 59, 63, 161). Captain Reynolds submitted a statement to The Inspector General (Ex.24) on May 17, 1938, listing the indebtedness of the company which was not reported to him when he assumed command on December 17, 1937 (R. 162). This indebtedness amounted to \$1131.29 (Pros. Ex. 24 (Ex. A 13), R. 163). It consisted of items of various kinds which were not included in Statement of Company Fund (Ex. 23, R. 153). These items of indebtedness not listed by accused in his certification of the Company Fund to Captain Reynolds included amounts due the Economy Market, \$398.78; Olson Lumber Company, \$152.16; Farmers Exchange Store, \$92.65. The certificate executed by accused reads as follows:

"I certify that to the best of my knowledge and belief, the foregoing is a complete and accurate statement of all amounts due the fund, of all outstanding debts and obligations payable from the fund, and of all outstanding checks (Nor reported paid by the bank) pertaining to the fund, and of all the securities which are the property of the organization." (Ex. 23, R. 153).

The transfer of the Company Fund to Captain Reynolds by the accused was done under the supervision of Captain Bryant, the Civilian Conservation Corps Inspector. Neither Captain Bryant nor Captain Reynolds knew that the statement made by accused did not contain

all of the outstanding obligations of the Company Fund on date of transfer, December 17, 1937 (R. 153-160, 161).

Lieutenant Colonel Brackenbury made an official investigation of the condition of the Company Fund of the 2695th Company, CCC, Camp Freesoil, between May 11 and May 19, 1938. He found that the account between that company and the Direct Advertising Company had not been settled. He called the accused as a witness; he was sworn and advised of his rights under the 24th Article of War (R. 65, 66). The accused stated to Colonel Brackenbury that when he took over the company from Captain Stover there was turned over to him \$43 collected from enrollees by Captain Stover for the CCC Annuals. Accused did not deposit it, nor pay it to the Direct Advertising Company. He estimated that on one occasion he had approximately \$120 and on another approximately \$100 that he had collected. He did not deposit any of it in a bank, he did not credit it to any Government fund, and he did not pay it to the Direct Advertising Company, but he did spend the money for construction purposes, materials, etc., at Camp Freesoil (R. 67, 68).

Additional Charge I and the specification thereunder, alleging desertion at Camp Custer, Michigan, June 21, 1938, terminated by surrender at Chicago, Illinois, June 27, 1938. By exceptions and substitutions, accused was found guilty of absence without leave only for that period. The evidence with respect to the above charge and specification may be summarized as follows:

It appears from an extract copy of the Morning Report of Headquarters Company, Camp Custer, CCC District, Camp Custer, Michigan, that accused went absent without leave on June 21, 1938 (Pros. Ex. 3, R. 31), having departed from a hotel in Battle Creek, Michigan, where he was a guest sometime during the night of June 20-21, 1938 (Pros. Ex. 1, par. 12, R. 30). This absence without leave was terminated on June 27, 1938, when he surrendered to Captain Louis Earlix, AG-Res., Assistant Adjutant General, CCC Headquarters, Sixth Corps Area, Chicago, Illinois (R. 35, 36, 252, 253).

5. The explanation given by accused with respect to the allegations against him was apparently unconvincing to the court and is so to the Board of Review. Even if the facts were as claimed by him, they would not justify his devoting to the repair and construction of buildings and sidewalks at Camp Freesoil the sums collected from the men of his company for other purposes, nor would they make such conversion any the less embezzlement. Neither does the fact, if it be such, that these funds were expended for materials and devoted to a

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purpose praiseworthy in itself, namely, the physical improvement and betterment of the camp for the use of the Civilian Conservation Corps alter the legal situation. Such conversion was nevertheless to accused's own use, even though he did not benefit from it pecuniarily. A man who converts funds entrusted to him for another purpose, notwithstanding how worthy it may be, would nevertheless be guilty of an embezzlement (CM 201485, Darr).

6. The Board feels that it is its duty to consider the question of the court's jurisdiction, not only as to the additional charges, as to which the question was expressly raised by accused's special plea (R. 11; ante, this review, par. 3), but also as to the original charges. Accused is a reserve officer of the Army who was at the time when it is alleged that the several offenses were committed on active duty with the Civilian Conservation Corps. The Board of Review and The Judge Advocate General have held in several cases that such an officer, on such duty, is liable to trial by court-martial for offenses committed at such times (Dig. Ops. JAG 1912-30, Supp. VII, par. 1336 (1); CM 202366, Fox; CM 202601, Sperti; CM 202770, Cooley; CM 203303, Little; CM 203869, Lienhard).

By paragraph 48, S.O. 150, Headquarters Sixth Corps Area, June 29, 1937, accused was placed on active duty with the Civilian Conservation Corps for a period of six months, beginning July 1, 1937. The order recites that this was done "with his consent". By letter of October 8, 1937, accused stated that his tour was to expire December 31, 1937, and requested that it be extended six months. By paragraph 11, S.O. 267, Headquarters Sixth Corps Area, November 15, 1937, this extension was made. By paragraph 36, S.O. 131, Headquarters Sixth Corps Area, June 30, 1938, accused was continued on active duty with the Civilian Conservation Corps until July 15, 1938. By paragraph 2, 2d Indorsement, Headquarters Sixth Corps Area to The Adjutant General, November 10, 1938, it was stated that accused did not request this last extension or consent to it.

The original charge sheet is dated June 25, 1938, and the oath thereon is dated the same day. That charge sheet also shows that accused was placed in arrest June 29, 1938, and that it was served upon accused July 9, 1938. All but one of the specifications therein allege that the offenses charged occurred in the last half of 1937, i.e., in the first six months of accused's active duty with the Civilian Conservation Corps. One specification, the specification to Charge II, alleges an offense to have occurred March 26, 1938, during the second six months of accused's active duty with the Civilian Conservation Corps.

The additional charge sheet is dated July 11, 1938, and the oath thereon was executed the same day. It was served on accused July 13, 1938. Accused was convicted of but a single offense charged thereon, absence without leave from June 20, 1938, to June 27, 1938, as alleged in the specification to Charge I.

The trial began and accused was arraigned July 14, but no evidence was then heard. The trial continued July 29, August 16, 17, 18, and was concluded August 19, 1938. The reviewing authority acted on the case October 25, 1938.

The first question is whether the court had jurisdiction to try accused on the original charges and whether the Board of Review, The Judge Advocate General, and the President have authority to pass upon the findings with respect thereto and the sentence. As has been said, all of the offenses alleged in the original charge sheet but one occurred in the first six months of accused's service with the Civilian Conservation Corps, but the charges were not preferred until nearly the end of the second six months. However, as the second six months was an extension of the first at the accused's request, and as there was no break between the two periods, the Board has no hesitation in holding that jurisdiction to try accused was not lost by that extension. The Board is also of opinion that jurisdiction to try accused on the original charges was not lost by the fact that the trial was not completed until after the expiration of all his tours of active duty, and that jurisdiction still vests in the Board of Review, The Judge Advocate General, and the President to take all necessary action upon the record of trial. It has been held many times that if jurisdiction once lawfully attaches it is not divested by the subsequent termination of accused's military service; because, if such were not the law, offenses committed on or near the last day of a soldier's enlistment or an officer's service might go unpunished because of lack of time to assemble a court, try the case, and obtain action upon the sentence. In re Walker, 3 Am. Jurist 221; In re Bird, 2 Sawyer 33, Fed. Case No. 1428; Barrett v. Hopkins, 7 Fed. 312; Dig. Ops. JAG 1912, pp. 511, 512, pars. VIII D 1, 2, and 3; Winthrop on Military Law, 119, reprint page 90.

In several cases it has been so held as to reserve officers whose terms of active service had expired before completion of their trials or final action thereon by the reviewing or confirming authority. Dig. Ops. JAG 1912-30, Supp. VII, par. 1336 (2); CM 202601, Sperti; CM 202770, Cooley; CM 203393, Little; CM 203869, Lienhard; CM 208545, Polk; CM 210015, Ruddy.

What is necessary for the attachment of jurisdiction? In Winthrop on Military Law, at the page cited, the learned author says -

"It has further been held, and is now settled law, in regard to military offenders in general, that if the military jurisdiction has once duly attached to them previous to the date of the termination of their legal period of service, they may be brought to trial by court-martial after that date, their

discharge being meanwhile withheld. This principle has mostly been applied to cases where the offence was committed just prior to the end of the term. In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him,--as by an arrest or the service of charges,--the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused."

It is to be noted that the author mentioned as requisite for the retention of jurisdiction "arrest or service of charges" before expiration of military service, not both. Also, in the Walker case, above cited, the court said:

"In this case the petitioner was arrested or put in confinement, and charges were preferred against him to the Secretary of the Navy, before expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court-martial to proceed to trial and sentence, notwithstanding the time of service had expired before the court-martial had been convened."

In the present case accused was placed in arrest and the original charges were prepared and sworn to, though not served on him, before the expiration of his second six months' tour on June 30, 1938. The present case, so far as concerns the original charges, would therefore seem exactly parallel with that of Walker, and within the language used by Colonel Winthrop.

In view of what has been said, the Board of Review concludes that the court had jurisdiction with respect to the original charges, and that The Judge Advocate General and the President have jurisdiction to pass upon the findings on those charges and the sentence.

The case is somewhat different with respect to the additional charges. They were preferred July 11 and served on accused July 13, 1938, during the fifteen days' additional active duty, July 1 to 15, 1938, to which accused did not consent. The issuance by the Commanding

General, Sixth Corps Area, without accused's consent of the order extending accused's tour fifteen days was presumably based upon the view that such action was authorized by Section 37a of the National Defense Act, 10 USC 369, as follows:

"To the extent provided for from time to time by appropriations for this specific purpose, the President may order reserve officers to active duty at any time and for any period; but except in time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty for more than fifteen days in any calendar year without his own consent."

In issuing the above order it seems to have been supposed that the sentence quoted allowed an officer to be placed on active duty for fifteen days without his consent even though he had with his consent already served fifteen days or more in that calendar year. The Board does not so interpret it, and believes that the section was intended by Congress to mean and does mean that a reserve officer's active service in any one year may not exceed fifteen days, save in time of national emergency or with his own consent. This view of the Board is supported by JAG 241.3, December 12, 1934. The case is stronger for such view than when that opinion was written, since the Act of March 9, 1933 (48 Stat. 1), passed almost simultaneously with the Act of March 31, 1933 (48 Stat. 22), establishing the Civilian Conservation Corps, declared a national emergency to exist; but an emergency cannot be said to last for five years, and the Civilian Conservation Corps now operates under the Act of June 28, 1937 (50 Stat. 319), which, though it does not expressly repeal the earlier act, completely covers the same ground and takes its place, and provides for the continuance of the Corps for four years from July 1, 1937. The Board therefore concludes that paragraph 36, S.O. 131, Headquarters Sixth Corps Area, June 30, 1938, was beyond the power of the Commanding General, Sixth Corps Area, and a nullity, and that accused reverted to a civilian status July 1, 1938.

Does it follow from the foregoing conclusion that the plea to the jurisdiction of the court to try the additional charges (R. 11) ought to have been sustained? Accused was found guilty of but one charge and one specification in the additional charges, with respect to absence without leave, and the question is material as to those findings only. It is true that the additional charges were preferred on July 11, 1938, after accused had, in the opinion of the Board, reverted to a

civilian status, but the offense involved, absence without leave, occurred and accused was placed in arrest while he was on active duty and before his military status terminated. Did the arrest constitute an attachment of military jurisdiction which might not then be divested by a subsequent change in status? As has already been pointed out, Colonel Winthrop in his authoritative treatise on Military Law mentions as requisite for retention of military jurisdiction "arrest or service of charges" (Vol. I, p. 119, reprint p. 90), before the expiration of military service, not both. This view seems consonant with reason. Accused returned from absence without leave on June 27, 1938, but three days before the end of his tour of active duty. He returned to military control at a place other than his station. He might have returned on the last day of his tour. To place a man in arrest requires but a moment, but to prefer charges is a task requiring time. The person so doing, if he has no knowledge of the facts, must swear that he has investigated them; and an investigation, if more than perfunctory, takes time. In the present case, upon accused's return three days before the expiration of his tour, it was known or suspected that he had committed certain offenses. One charge sheet was executed while he was absent without leave, and upon his return he was placed in arrest before his tour expired, and an investigation was made which disclosed the necessity for additional charges, which were preferred sixteen days after accused's return, and after the expiration of his tour. The Board thinks no more ought to be required than was done. If a contrary conclusion were to be reached, it would follow that even if the strongest reason to suppose a reserve officer or soldier to have committed a serious offense were to become known on the last day of his service, he would escape trial and punishment by court-martial unless the facts were sufficiently clear to permit the immediate drawing of charges. Criminal offenses are seldom committed in public, and investigation is nearly always necessary and is required by law before charges can be accurately drawn. The Board does not believe that the military authorities are helpless in such a case.

A helpful analogy is furnished by section 1326 (1), Dig. Ops. JAG, 1912-30, as follows:

"Accused, a general prisoner, was tried for an offense committed while a soldier and prior to his dishonorable discharge. His discharge did not terminate his amenability to trial while in confinement under his sentence for offenses committed prior to his discharge. C.M. 156977 (1923)."

The general prisoner involved in the above case had ceased to be a soldier, his military status had terminated. So, also, the military status of the present accused had terminated, he had ceased to be an officer on active duty. The man involved in the case digested was in confinement because of past misdeeds while he had been a soldier. The present accused was not in confinement, but under a milder form of restraint known as arrest, because of the belief that he had committed offenses while in a military status and the necessity of holding him so that the matter might be investigated. It was held in the case digested that charges might be preferred against the former soldier while in confinement for offenses committed while a soldier; and, by like reasoning, it would seem proper to hold that charges may be preferred against an officer formerly on active duty and now in arrest for offenses committed while on active duty.

The Board therefore holds that military jurisdiction over accused was retained by his arrest on June 29, 1938, for the trial of both the original and additional charges; and that that jurisdiction has not since been lost.

The Board further notes that the additional charges were served on accused July 13 and he was arraigned July 14, without any objection by him. After the arraignment and pleas, the court adjourned until July 29. The 70th Article of War provides:

"The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

As the article uses the phrase, "without objection", and not "except with his consent", or the like, it seems too clear for discussion that a trial within five days is legal in the absence of express objection by accused. Furthermore, the article mentions a total failure to serve charges, not as invalidating a conviction, but merely as a ground for continuance. Dig. Ops. JAG 1912-30, section 1367 (2), is to the same effect. It is also to be noted that the Manual for Courts-Martial says (par. 62):

"The fact that the service of the charges was within five days of the arraignment (see A.W. 70) does not prevent the arraignment even though the accused objects on that ground to the proceeding, but such a fact is available as a ground of valid objection to any further proceedings in the case at that time."

In CM 169250, Foley, and CM 201563, Davis, the above rule was applied and convictions held good when the arraignment took place over the vigorous objection of accused within five days after service of charges, but in those cases after arraignment a continuance was had and no evidence was received until after the five days had elapsed. In the present case also nothing occurred except the arraignment until after five days had elapsed. The Board therefore concludes that the fact that accused was arraigned the day after the additional charges were served on him does not invalidate the findings on those charges or the sentence.

7. In the opinion of the Board of Review, the evidence, including the testimony of accused, clearly establishes the receipt by accused in a fiduciary capacity of moneys in the amount of \$15, property of the United States; \$100, property of the Direct Advertising Company; \$10, property of the Camp Exchange; and \$30, property of the Camp Exchange, as charged, respectively, in Specifications 1, 2, 3 and 4, and that he did not properly account for said sums when demand thereto was made. The circumstances under which the moneys were received, the failure of accused to properly account therefor, his concealment of the shortage and his statement that he intended to make good the loss and knew that the failure to enter the amounts on the Company Fund account sheet tended to conceal the shortage, and was a false representation of the actual situation, left no reasonable alternative to the court other than to conclude that, as charged, the moneys were fraudulently converted to his own use. Embezzlement in violation of the 93d Article of War is established beyond reasonable doubt. The evidence establishes beyond reasonable doubt that accused obtained by means of a fraudulent check the sum of \$15, in violation of the 95th Article of War; and that by means of false official statements did deceive his superior officers and Captain Reynolds, his successor in command, as alleged under the 96th Article of War.

Evidence in support of the unauthorized absence of the accused for a period of seven days from his place of duty, Camp Custer, Michigan, terminated by surrender at Chicago, Illinois, is also, in the opinion of the Board of Review, sufficient to support the finding of guilty of absence without leave for the period of time alleged in violation of the 61st Article of War.

8. The charge sheet, dated June 25, 1938, shows that accused served as an enlisted man in the Regular Army in Btry D 47 CA 6-4-18 to 3-29-19; 23 Rct. Co. GSI 4-21-19 to 4-20-20; Hq Co 2d Inf 7-12-20 to 7-24-23; Hq Co 2d Inf 7-25-23 to 8-28-26; Band 6th Inf 8-29-26 to 2-4-28; Inf Unasgd 7-7-30 to 8-26-32; DEML (OR) 8-30-32 to 8-29-35; DEML (OR) 8-30-35 to 6-28-37. Service in Organized Reserves: On active duty with the CCC as 1st Lt. Inf-Res., 7/1/37 to 9/22/37 and as Capt., Inf-Res., 9/23/37 to date.

9. 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 and 96th Articles of War and mandatory upon conviction of violation of the 95th Article of War.

Archibald King, Judge Advocate.

George F. Jones, Judge Advocate.

George B. Campbell, Judge Advocate.

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1st Ind.

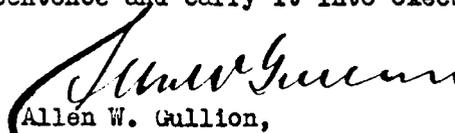
War Department, J.A.G.O., Jan. 25, 1939 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Harry A. Sharp, Infantry-Reserve.

2. I am unable to agree with the Board of Review with respect to Charge II and the specification thereunder, alleging that accused at Freesoil, Michigan, on March 26, 1938, with intent to defraud, made and offered to Ross Dairy Company a check signed by himself payable to "cash", drawn on the First National Bank of Tuscola, Illinois, for \$15, and by means thereof fraudulently obtained \$15 from that company, well knowing that he did not have and not intending that he should have sufficient funds in that bank for payment of the check. The evidence showed that accused on the date of that check, March 26, 1938, had on deposit in the bank on which it was drawn only \$4.40. The check reached the bank March 30th and payment of it was then refused and the check returned to the payee. On March 31st, \$264.80 was deposited to accused's credit, presumably his pay check. The check was uttered on a Saturday, five days before pay day, at a place 435 miles from the bank on which it was drawn, and a large deposit was actually made to accused's credit on pay day. In view of the fact that the check was issued so soon before pay day at a point so far away from the bank on which it was drawn, and that a large deposit was actually made on pay day, I am not convinced beyond a reasonable doubt that accused fraudulently intended not to have sufficient funds in the bank to pay the check when presented, and, accordingly, I recommend that the President disapprove the findings of guilty of Charge II and the specification thereunder.

3. Except as stated in the preceding paragraph, I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed.

4. Inclosed herewith are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to disapprove Charge II and the specification thereunder, to confirm the sentence and carry it into execution.


Allen W. Gullion,
Major General,

The Judge Advocate General.

3 Incls -

Incl 1 - Record of trial.

Incl 2 - Draft of letter for sig. Sec. War.

Incl 3 - Form of Executive action.

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

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Board of Review
CM 210685

NOV 5 1938

UNITED STATES)

NINTH CORPS AREA

v.)

Trial by G.C.M., convened at
Presidio of San Francisco,
California, October 20, 1938.
Dishonorable discharge without
confinement.

Private Ashley S. LeGette)
(R-1322861), Detachment)
Quartermaster Corps,)
Presidio of San Francisco.)

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. Accused was found guilty of failure to repair at the fixed time to the properly appointed place for duty with the Quartermaster Corps, at the Presidio of San Francisco, California, on October 10, 1938, in violation of the 61st Article of War; and of drunkenness in quarters, at the Presidio of San Francisco, California, on October 10, 1938, in violation of the 96th Article of War. The evidence shows that accused was brought by 1st Sergeant Crawley of the Quartermaster Detachment to the office of Colonel Byrom between 2:30 and 3:30 p.m., October 10, 1938. Major Munteanu, who was present, testified that accused was drunk, he was tongue tied, his knees buckled and he could not stand at attention (R. 8, 9). Acting 1st Sergeant Crawley of the Quartermaster Detachment testified that the working hours in the Detachment were from 8 a.m., to 4 p.m., inclusive, on October 10, 1938, and that he had received instructions to put accused on duty in the Quartermaster warehouse "D" (R. 10). Accused was not present that morning and did not show up in the Post until 2 p.m., Monday, October 10, 1938, at which time he was drunk (R. 9, 10). He should have reported in the Orderly Room before 8 a.m. (R. 11). The accused had been informed on the Saturday before

that he would probably be on duty Monday in the warehouse (R. 11). The defense introduced no witnesses. Accused made an unsworn statement (R. 14).

3. The evidence supports the findings of guilty of the charges and specifications; but the legality of the sentence adjudged by the court and approved by the reviewing authority depends upon whether there is legal evidence of five or more previous convictions of accused, as without such proof the sentence is legally excessive. Without objection by accused, there was introduced in evidence a certified extract copy of the accused's service record, referred to the court by the reviewing authority, showing five previous convictions, three of which were by summary courts-martial and two by special courts-martial. The evidence as to one of the special court-martial convictions failed to show the date of the commission of the offense of which the accused was convicted and read as follows:

"Special Court-Martial under 63rd and 96th Articles of War May 12, 1938. Specifications, Drunk in Uniform, and Insubordinate to Lt. Gibson, 30th Infantry Reserve. Sentence announced and adjudged May 12, 1938. Sentenced to be confined at hard labor for six months and forfeit \$11.00 of his pay per month for a like period. Approved May 12, 1938."

The above entry, in which the date of the offense was not stated, was subject to objection by the accused on the ground that it did not appear affirmatively that the offense was committed within the current enlistment and within one year next preceding the date of the commission of any of the offenses of which the accused then stood convicted before the court.

4. A number of cases arose in 1922 and 1923 involving dishonorable discharge because of five previous convictions by special or summary courts, in which the evidence failed to show the date of commission of one or more of the previous offenses. In consequence, the sentences were held legally excessive, as the record did not show affirmatively that the offenses involved in the five previous convictions were committed within one year next preceding the commission of the offense then under consideration (CM 151075, Hester; CM 154917, Khrhart; CM 154506, Miles; CM 155518, Chartier; CM 155741, Silk; CM 155797, Boyce; CM 157115, Buster).

5. Paragraph 79 c, Manual for Courts-Martial, 1928, provides, inter alia, in connection with the introduction of evidence of previous convictions, that they must relate to offenses committed during the one year next preceding the commission of any offense charged and that -

** * * In the absence of objection an offense may be regarded as having been committed during the required periods unless the contrary appears."

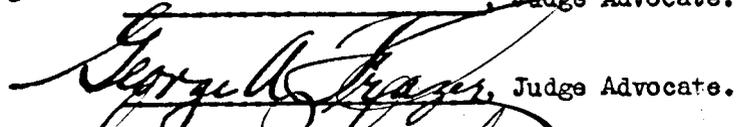
and that -

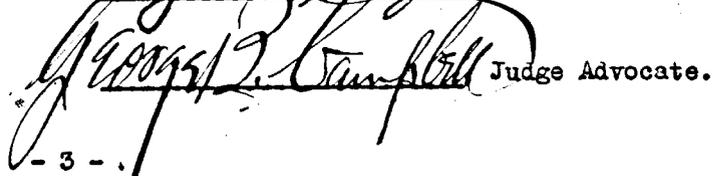
"Any objection not asserted may be regarded as waived." ibid.

6. The cases cited in paragraph 4 all arose prior to the publication of the 1928 edition of the Manual for Courts-Martial, now in force, and when the 1921 edition governed. The paragraphs of that edition relating to previous convictions (pars. 306, 307) contain no such provisions as to waiver. It would, therefore, appear that in view of this new matter in the 1928 edition of the Manual for Courts-Martial, which is not found in the edition of 1921, the old cases decided in 1922 and 1923 are obsolete and should no longer be followed if no objection was made by the defense to the admissibility of the previous convictions and if nothing appears to show that the previous offenses were not committed within one year preceding the date of the present offenses. The present case falls directly within the language concerning waiver quoted in the preceding paragraph from the 1928 edition of the Manual for Courts-Martial.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence. Nevertheless, the Board should not be understood as approving or condoning the omission of the date of commission of previous offenses. It is desirable that that date be definitely shown in all cases.


Judge Advocate.


Judge Advocate.


Judge Advocate.

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

Board of Review
CM 210693

DEC 1 6 1938

U N I T E D S T A T E S)

NINTH CORPS AREA

v.)

Private FRANK E. ALEXAN-)
DER (6553619), Detach-)
ment Quartermaster Corps,)
Presidio of San Francisco,)
California.)

Trial by G.C.M. convened at
Presidio of San Francisco,
California, October 14, 1938.
Confinement for six (6) months
and forfeiture of \$13 per month
for a like period. Presidio
of San Francisco, California.

OPINION of the Board of Review
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. Accused was convicted of a single charge and specification, as follows:

CHARGE: Violation of the 94th Article of War.

Specification 2: In that Private Frank E. Alexander, Detachment Quartermaster Corps, did, at Presidio of San Francisco, California, on or about September 15, 1938, knowingly and without proper authority, apply to his own use and benefit two pair of Breeches, Elastique, of the value of about \$10.56, property of the United States, furnished and intended for the military service thereof.

He was sentenced to confinement for six months and forfeiture of \$13 per month for a like period. The reviewing authority approved the sentence and ordered it executed.

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

Accused was employed in the salvage warehouse at the Presidio of San Francisco and had supervision of and access to clothing turned in for salvage (R. 13, 14, 45, 46). On the date of the alleged misapplication of clothing the accused left a package in the post exchange grill at the street car station, Presidio of San Francisco, for "a street car man". The proprietor of the grill asked accused "if it was all right - that if there was any Army clothing in it I didn't want him to leave it, and he assured me it was all right" (R. 35). A few minutes later the proprietor observed through a slit in the wrapping that the package apparently contained Army clothing, and he notified the military police. The package was left in the grill and accused returned about five hours later and started to take it. The waitress asked him for his name and company, which he refused to give. She then told him that Lester (the military policeman) had told her not to give him the package, and accused said he had better go, and did so (R. 34-37). Upon being questioned, accused gave a military policeman a false name and address (R. 40-42). Upon examination, the package was found to contain two pair of uniform breeches (R. 37-39), one marked "HQ 0558" and the other "BAUMAN HQ CO P 342". The figures "0558" were shown to be the last four digits of the Army serial number of Private Southard, Headquarters Company, 30th Infantry, who was in desertion and who had left two pair of similar trousers among his effects at the time of deserting, November 1937 (Ex. 7, 8). However, the prosecution failed to prove that Southard's clothing had been turned in to salvage. The prosecution attempted to prove that the other pair, marked "BAUMAN HQ CO P 342" belonged to Private Bauman of Headquarters Company, 30th Infantry; but Bauman testified that he could not identify the breeches or explain how his name happened to be on them, that he had not lost or disposed of a pair of breeches, and that he still had the original two pair drawn when he came into the service (R. 52, 53). The breeches were of light weight elastique, and apparently of the type owned and issued by the Government. No record is kept of such articles in salvage, and it is impossible to tell if any are missing (R. 45-47). The prosecution was unable to show that there was a shortage of breeches at the salvage warehouse.

4. A confession by the accused was offered in evidence. This confession, in writing under oath, was made before the Provost Marshal, First Lieutenant John G. Coughlin, who, after duly warning the accused, testified that he told him further -

"that it was not necessary for him to say a thing, as it would be thoroughly investigated later; that if he didn't say anything, I would confine him, but that if he did say something, and I thought it cleared it up in my mind, I would not confine him." (Underscoring supplied.)

The confession was thereupon excluded by the court (R. 43). It was subsequently accepted in evidence, over objection of the defense, upon identification by the investigating officer, Major William L. Tydings, who testified that during the investigation he had duly warned the accused and handed him the written sworn statement previously made to Lieutenant Coughlin; that the accused read the statement over and stated "he still wished to stand on the statement which he made to Lieut. Coughlin, and he had nothing to add to it" (R. 55). The court overruled the objection of the defense and the statement which the accused made to Lieutenant Coughlin was thereupon received in evidence, marked Exhibit 9, and read to the court by the witness, Major Tydings (R. 58). In the confession (Ex. 9), accused admitted exchanging two pair of breeches issued to him for two pair in salvage which were better than his. He took the two pair so obtained to the grill at the car station and left them, meaning to take them that evening to his aunt living in Oakland, who would have had them cleaned for him. Accused further said in his confession:

"* * * I realize that I was doing wrong when I exchanged breeches, Technically speaking, I am responsible for so many pair of breeches and as long as I keep that total there is no violation in my opinion. I do have the correct number of breeches in the salvage ware-house right now."

"* * * I would prefer not to make any mention of any street car conductor in this testimony on the grounds that I do not desire to cast suspicions on others."

"Everything that I have said has been said full knowledge that it might be used against me and has been offered volentarily on my part."

5. For the defense it was proved that breeches turned in to salvage which are serviceable are set aside for renovation. Others are cut up into rags (R. 60, 61).

6. Two questions are presented, first, whether the corpus delicti was sufficiently proved to justify introduction of the confession; and, second, whether the confession was voluntary.

7. The Board considers first the question whether the record contains sufficient proof of the corpus delicti. This question was discussed at length in the review in CM 202213, Mallon (Dig. Ops. JAG 1912-30, par. 1292 a), to which review attention is invited. It was there pointed out that in Professor Wigmore's authoritative treatise on Evidence (sec. 2070) and in the opinion of the Circuit Court of Appeals for the 2d Circuit in Daeche v. United States (250 Fed. 566, 571), grave doubt was expressed whether there exists any necessity or reason for the rule requiring proof of the corpus delicti aliunde a confession. In that opinion the Board admitted and admits now the existence of the rule, fortified by authority; but it felt then and feels now that the rule ought not to be extended any further than the precedents require. The supposed object of the rule is to prevent conviction of an innocent man on his own false confession, but the soldier who has made or will make a false confession of an offense of which he is innocent is a rara avis, so rare as to be almost if not quite extinct.

8. What then is the rule with respect to proof of the corpus delicti as a prerequisite to the admission of a confession? It was thus stated eighty years ago in the charge to the jury in the trial court in United States v. Williams (1 Clifford 5, Fed. Case No. 16707):

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

9. Justice Clifford of the Supreme Court of the United States, sitting in the Circuit Court, held the above charge proper and said further:

"Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required, says Nelson, C. J., in *People v. Badgley*, 16 Wend. 59, by any of the cases; and in many of them slight corroborating facts were held sufficient."

"* * * All that can be required is, that there should be corroborative evidence tending to prove the facts embraced in the confession; and where such evidence is introduced, it belongs to the jury, under the instructions of the court, to determine upon its sufficiency."

10. In *Daeche v. United States*, *supra*, the Circuit Court of Appeals for the 2d Circuit said (pp. 571, 572):

"* * * any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof."

"* * * The rule can in any event be no more than that a confession wholly uncorroborated will not serve; any quantitative measure of corroboration we mean to repudiate."

11. In its opinion in the *Mallon* case, CM 202213 (Dig. Ops. JAG 1912-30, Supp. VII, par. 1292 a (2)), the Board thus stated the rule:

"The general rule * * * is that the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of evidence or at all, but that some evidence corroborative of the confession must be produced and such evidence must touch the corpus delicti."

12. If the rule as stated by the above authorities be applied to the present case, the conviction must be sustained, as there is in the record some corroboration of accused's confession, at least with respect to the breeches bearing Southard's serial number.

13. However, the facts of cases are often more helpful than abstract statements of law; and the Board, therefore, proceeds to examine the facts in several decided cases, as follows:

a. United States v. Williams (1 Clifford 5, Fed. case No. 16707, U. S. Circuit Court for Maine, 1858):

An indictment for murder on the high seas. The brig "Albion Cooper" sailed for Cuba from Portland, Maine, having seven persons on board. Nothing was heard of her until nearly two months later when another vessel picked up on the Bahama banks a small boat identified as having belonged to the "Albion Cooper", in which were three members of her crew, together with provisions, water, compass, the "Cooper's" register, clothing proved to have belonged to the mates, and a watch proved to have belonged to the master. Two of the survivors, Cox and Williams, the defendants in the present case, stated that the "Cooper" had been struck by a squall, that all the other members of the ship's company had been washed overboard, and that the vessel had been so much damaged that the three survivors had abandoned her. Lahey, the third survivor, being separately examined by the American consul at Havana, to which place the rescuing vessel had carried the survivors, made contrary statements implicating Cox and Williams in the death of the master of the "Cooper". They were reexamined and confessed the murder of the captain and other members of the ship's company. They were indicted for the murder of the captain but Lahey died before the trial. Both accused were convicted and upon motions in arrest of judgment and for a new trial, it was contended that there was not, independent of the confessions, such proof of the corpus delicti as would warrant a conviction. Justice Clifford of the Supreme Court of the United States, sitting as Circuit Justice, held that where the body cannot be found the fact of death in a homicide case may be proved by other cogent and unequivocal circumstances. If this were not so, it would be impossible ever to convict of a murder at sea in which the deceased had been thrown overboard. The court held that the circumstances above related with reference to the voyage and the articles found in the boat with the accused were sufficient corroboration of their confession.

b. Daeché v. United States (250 Fed. 566, Circuit Court of Appeals, 2d Circuit, 1918).

Indictment for a conspiracy to attack and set upon certain vessels by attaching bombs to their sterns. After stating the general rule in a passage already quoted in this opinion, ante paragraph 10, the court continued (p. 572):

"There was ample corroboration in this latter sense of the existence of an agreement to attack ships outside of Daeché's confession. He was in correspondence, personal and by letter, with Fay and Scholz at about the time in question. He was certainly trying to learn of the place where or the means whereby he could get high explosives, suitable to their plans. Taken alone they would not establish the conspiracy, but they give great probative strength to the confession, and indeed leave not the least doubt of his guilt."

c. Cohen v. United States (288 Fed. 835, Circuit Court of Appeals, 2d Circuit, 1923).

Indictment for having in possession a Liberty Bond of \$1,000 with intent to pass it, knowing it to have been altered. One Krasnoff testified that one Stein came to him with a Liberty Bond for \$1,000 and offered it in payment of a debt for \$140 and wanted change. Krasnoff did not at once agree to this; but, with Stein's permission, took the bond to a bank to see if it was genuine. Observing the alteration, one of the officers of the bank took Krasnoff to the United States Attorney, who took possession of the bond. Because Stein did not credit Krasnoff's statement that the bond had been taken from him, Krasnoff gave Stein a slip of paper bearing the name and address of the bank to which he had gone and of the district attorney who had taken the bond from him. Defendant was afterwards arrested, confessed that he had given the bond to Stein to dispose of for him, and the slip of paper given by Krasnoff to Stein was found on him.

Held, the possession of the slip of paper was sufficient corroboration of defendant's confession. The Daeché case was quoted.

d. Litkofsky v. United States (9 Fed. (2d) 877, Circuit Court of Appeals, 2d Circuit, 1925).

Indictment for possession of plates for making counterfeit money. Accused confessed and stated that to escape detection they had thrown the plates into the river. The plates could not be found.

Held, there was sufficient corroboration by evidence that defendants had shown samples of bills printed from the plates in question, by evidence of assembly of the several defendants, and by their negotiations with respect to passing counterfeit money.

e. Pearlman v. United States (10 Fed. (2d) 460, Circuit Court of Appeals, 9th Circuit, 1926).

Indictment for interstate transportation of a stolen automobile. Leong, a Chinaman in San Francisco, bought an automobile of accused, paying him part cash and in part another automobile. When Leong undertook to have the automobile which he had purchased of accused registered, it was discovered that the engine numbers were such as could not possibly have been assigned to a car of that make and year, and upon closer inspection it was seen that they had been altered. The automobile which accused had received in trade from Leong was found abandoned on the street in San Francisco and he was arrested in San Jose, California. The court said (p. 462):

"But is the evidence sufficient to establish the corpus delicti, aside from the admissions of the defendant? He claimed to have purchased the car in New York in front of Brown's Auction House, paying \$1,000 for it, but admitted that, a few days after he left New York, he knew the car was a stolen car, and when asked about the Cadillac car which was abandoned at Fourth and Townsend streets, San Francisco, he said: 'Well, you have me, and that's all there is to it.'

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

The court sustained the conviction.

f. Forlini v. United States (12 Fed. (2d) 631, Circuit Court of Appeals, 2d Circuit, 1926).

Indictment for possession of counterfeit bonds of the Kingdom of Italy. Defendant admitted ownership and that the bonds were counterfeit. A witness undertook to qualify as an expert and testify that the bonds were counterfeit, but his testimony was rejected for lack of expert qualification.

Held, the physical appearance of the bonds themselves and evidence of inquiries by the defendant in the effort to dispose of them are sufficient corroboration of defendant's confession.

g. Jordan v. United States (60 Fed. (2d) 4, Circuit Court of Appeals, 4th Circuit, 1932).

Indictment under 18 U.S.C. 231 for perjury in swearing to an affidavit to a bill in equity before a notary. Defendant testified before a master that he had made the affidavit. The objection was made that no other witness had sworn that accused ever took the oath before the notary, and that the notary himself swore that the defendant did not appear before him, but that he (the notary) affixed his seal at the request of his employer without seeing defendant.

Held, the jurat was in evidence, was on its face duly executed, and was sufficient corroboration. The jury was permitted to disbelieve the notary's testimony. The rule does not require evidence of the corpus delicti so full and complete as to establish by itself commission of the crime.

h. CM 202712, Sastre. A military policeman stopped an automobile on the Fort Bliss reservation and found five bales of hay in it. The driver said that the hay had been given to him, but did not answer a question as to who had given it to him. He offered to do anything for the military policeman if the latter would forget it and said that he did not want to do five years for five bales of hay. He would not go to the police station until the policeman drew his gun. Automobile tracks were found matching the tires of accused's car, showing that a car had backed up to the hay shed of Troop B, Seventh Cavalry, and loose dry hay was found on the ground at that place, although it had been raining three and one-half hours. No shortage could be proved in the hay in that shed, although that would be difficult as to such a small quantity. Accused was convicted of larceny of the hay under the 94th Article of War and the sentence was approved by the reviewing authority. The corpus delicti was held sufficiently proved and the record passed as sufficient by the staff judge advocate, the Board of Review, and The Judge Advocate General. It will be noted that in the Sastre case, there was no express confession, and that in the absence of one, the corpus delicti must be proved, like any other element of the offense, beyond a reasonable doubt. The evidence, as summarized above, was held to satisfy that test, a much more severe one than is required in such a case as the present, where there is a confession, and all that is necessary is some evidence corroborating it.

i. CM 202213, Mallon (Dig. Ops. JAG 1912-30, Supp. VII, par. 1292 a (2)). A riding crop was found in accused's locker, which he con-

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fessed that he had stolen. The post exchange steward recognized that the crop was, or at least once had been, the property of the post exchange by the marks on an adhesive band attached to it. No shortage was shown in the post exchange stock, but the only two salesmen who could have sold the crop testified that they had not sold it to accused, though they had seen him at the exchange. Accused was convicted and the corpus delicti was held sufficiently proved.

1. CM 202928, Cooley (Dig. Ops. JAG 1912-30, par. 1292
a (3).

Accused was charged with and confessed to the larceny of oats from the Government, in violation of A. W. 94. There was no testimony as to a shortage of oats from any Government stock, nor were the oats identified. It was established that two sacks of oats were found concealed near the stable where accused was on duty, that accused had access to Government oats, and that a civilian in whose house personal effects of accused and also oats were found was seen to enter the reservation riding one horse and leading another, and that he turned and started to leave when approached. Held, that the corpus delicti was sufficiently proved to justify admission of the confession.

14. At any rate so far as concerns the breeches marked with Private Southard's serial number, the corroborating circumstances in the present case are at least as strong as in many of the cases abstracted, and much stronger than in the Pearlman case, ante, paragraph 13 e. The breeches were originally of Government issue and were articles that might be in salvage, they were marked with the number of a deserter whose breeches would normally be turned in to salvage, accused had access to articles in salvage, he first told the manager of the grill that he was leaving the package for a street car conductor and later that he was taking the breeches to his aunt to be cleaned, he lied to the manager as to the contents of the package, he at first refused to give his name and later gave a false name. All this the Board thinks sufficient to satisfy the rule. The Board expresses no opinion as to what its view might be if the breeches marked "Bauman" were alone involved.

15. The Board has not overlooked CM 207591, Nash et al., or CM 208895, Zerkel, but it does not think them controlling. In the former case, there was no confession, and proof of the corpus delicti beyond

a reasonable doubt was necessary. Neither was there a full confession in the latter case, though accused made certain admissions. Also, the article there stolen was oats, which could not be definitely identified as ever having been Government property, nor was it shown that accused had access to Government oats.

16. The Board now passes to the second point in the case, whether accused's confession was voluntary. On this point, the assistant corps area judge advocate said in his review:

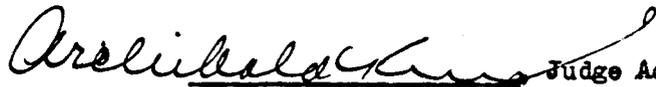
"The second question is whether the confession offered in this case was voluntary. The purported confession was made to Lieutenant Coughlin on the day of accused's arrest. Lieutenant Coughlin testified that he told accused if accused remained silent he would be confined, but that if he satisfactorily explained his actions he would be released. This explanation of his rights left the accused in no doubt but that he should make some statement or face the alternative of confinement in the guardhouse. At this point his statement does not appear to have been made under circumstances showing he acted voluntarily and freely, as required by military law, before the confession may be introduced in evidence. Later, during a formal investigation of the charges, the accused was again informed of his rights to remain silent or to make a statement. He was informed that if he did make a statement such statement might be used against him. The accused, at that time, stated that he wished to stand on the statement he had made to Lieutenant Coughlin and that he had nothing to add to it. This appears to be a reaffirmation of the former statement, after due and proper information as to his rights. I believe the admission of the statement of the accused was proper."

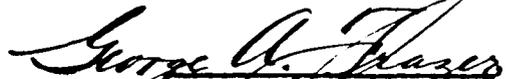
17. Except that it declines to commit itself as to what its view might be if the confession to Lieutenant Coughlin were the only one made by accused, the Board concurs in the above and adopts it as a statement of its views. Here again the Board finds a rule of evidence excluding involuntary confessions, on the theory that, if involuntary, the confession is likely to be false, i.e., the statement of an innocent man falsely accusing himself. The rule is of undoubted utility in preventing the use of confessions obtained by torture or so-called third degree methods, but of these there is no suggestion in the present case.

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As applied in other cases, the rule is of doubtful utility, as the Board considers the likelihood of an innocent soldier falsely accusing himself, except as a result of torture or other very strong pressure, so remote as to be negligible. The rule is, of course, too well established for the Board to overthrow, and it makes no attempt to do so; but the Board is unwilling to extend the rule in doubtful cases further than the precedents require.

18. The Board of Review is, therefore, of opinion that the record is legally sufficient to support the findings and sentence.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

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

Board of Review
CM 210757

NOV 19 1938

UNITED STATES	)	PHILIPPINE DEPARTMENT
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Mills, P. I., August 25,
Private First Class FER-	)	1938. Dishonorable discharge
NANDO BARGAS (6738658),	)	and confinement for one (1)
Battery G, 91st Coast	)	year. Fort Mills, P. I.
Artillery (PS).)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class Fernando Bargas Battery G, 91st CA (PS), Fort Mills, P. I., then a married man, did, under the name of Fernando Vargas at Malitbog, Leyte, P. I., on or about April 17, 1937 bigamously and unlawfully marry one Susana Sumaya without his former marriage to Maria Rada being legally dissolved, this in violation of Article 349, Revised Code of the Philippine Islands.

Accused 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

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labor for three years. The reviewing authority approved the sentence, reduced the period of confinement to one year, designated Fort Mills, P. I., as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

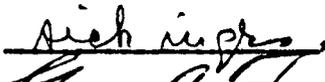
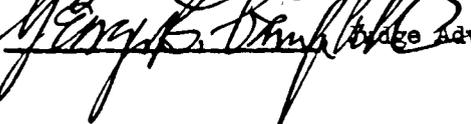
3. By the specification, there is described an offense which is alleged and is shown by the evidence to have been committed on April 17, 1937. The charge sheet shows that accused was discharged from the service on March 24, 1938, at the expiration of his term of enlistment and reenlisted the next day, March 25, 1938. Informal communication by the Office of The Judge Advocate General with the Office of The Adjutant General confirms the fact that the records of the War Department show the accused was honorably discharged on March 24, 1938. The charge was preferred on July 14, 1938, and the case was tried on August 25, 1938.

The Manual for Courts-Martial, 1928, paragraph 10, states:

"The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service."

It has been held by the Board of Review and The Judge Advocate General, and it is well settled that a court-martial is without jurisdiction to try an enlisted man for an offense, other than one denounced by the 94th Article of War, committed in a prior enlistment at the expiration of which he was discharged (CM 171874, Fennimore; CM 192335, Clark; CM 199072, Hewitt; CM 198340, Conyers; CM 199117, Africa). In the opinion of the Board of Review, the court that tried the accused was without jurisdiction to try him for the offense alleged.

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

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

To The Judge Advocate General.

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

(345)

Board of Review
CM 210762

DEC 21 1938

UNITED STATES)

PHILIPPINE DIVISION

v.)

Trial by G.C.M., convened at
Fort William McKinley, P.I.,
September 9 and 14, 1938.

Private First Class)
Gavino Valeroso (6738808),)
Company L, 57th Infantry)
(PS))

Dishonorable discharge and
confinement for five (5) years.
Fort William McKinley, P.I.

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private 1st Class Gavino Valeroso, Company L, 57th Infantry (PS), did, at Fort William McKinley, P.I., on or about August 19, 1938, wrongfully and unlawfully commit lewd and indecent acts upon the person of Nancy Murphy, a female about six years old, by taking the said Nancy Murphy upon his lap, pulling open her pants so that he could see into them, and exposing to her his own penis, to the discredit of the military service.

Specification 2: In that Private 1st Class Gavino Valeroso, Company L, 57th Infantry (PS), did, at Fort William McKinley, P.I., on or about August 19, 1938, wrongfully, unlawfully, lewdly and indecently request Nancy Murphy, a female about six years old, to kiss him and to put her hand on his penis, to the discredit of the military service.

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He pleaded not guilty to, and was found guilty of, the charge and specifications. 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, designated Fort William McKinley, P.I., as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Nancy Murphy, the six year old daughter of Captain H.A. Murphy, testified that about 5 p.m., on the date and at the place alleged she was playing alone in the vicinity of a small bridge near her father's quarters when the accused (whom she identified) arrived on a bicycle which he, after dismounting, parked against the bridge wall. Upon his invitation she proceeded down below the bridge with the accused where he committed the acts alleged in the specifications, there being a brief interval of time elapsing between commission of acts alleged in each specification, after which he departed on the bicycle while she returned to her home (R. 8-25).

The accused was sworn and testified that he was walking post, which embraced the area in question, on the date alleged and that he saw Nancy Murphy sitting on the rail of the stone bridge whereupon, thinking she might fall and injure herself, he "told her not to sit there" (R.50). The accused denied the allegations and further testified that he did not have a bicycle while performing the guard duty in question (R. 56, 59). There was other evidence of record indicating that the accused did not have a bicycle while on guard duty the date in question.

4. In the opinion of the Board of Review, there is substantial evidence of record in support of the findings of guilty of the charge and specifications thereunder although proof of identity is not compelling.

5. With respect to the sentence adjudged by the court involving confinement at hard labor for five years, the fact is noted that the Executive Order, prescribing a table of maximum punishments, as set forth in paragraph 104 c, section A, Manual for Courts-Martial, 1928, does not contain a punishment for either of the offenses of which the accused was convicted. The paragraph of the Manual for Courts-Martial referred to provides further that -

"* * * Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service."

The question, therefore, as to the maximum legal sentence of confinement imposable upon conviction of the offenses alleged in the instant case, is presented for consideration. The rule with respect to punishment imposable upon conviction by courts-martial of an offense for which no punishment is

prescribed in the Executive Order and which does not fall within the provisions of section 289 of the Federal Penal Code, is that the punishment prescribed, for a similar offense, by any Federal statute of general application or by the Code of the District of Columbia, becomes applicable, in the order named.

6. There is no Federal statute of general application making criminal such acts as are here involved. In CM 162435, Huston, and CM 199369, Davis, it was held that upon conviction of taking sexual liberties with a minor female, the maximum legal period of confinement imposable is two years, as set forth in section 37, title 6 (previously section 814) of the Code of the District of Columbia. The cited section reads as follows:

"37. Cruelty to children. - Any person who shall torture, cruelly beat, abuse, or otherwise willfully maltreat any child under the age of eighteen years; or any person, having the custody and possession of a child under the age of fourteen years, who shall expose, or aid and abet in exposing, such child in any highway, street, field, house, outhouse, or other place, with intent to abandon it; or any person, having in his custody or control a child under the age of fourteen years, who shall in any way dispose of it with a view to its being employed as an acrobat, or a gymnast, or a contortionist, or a circus rider, or a ropewalker, or in any exhibition of like dangerous character, or as a beggar, or mendicant, or pauper, or street singer, or street musician; or any person who shall take, receive, hire, employ, use, exhibit, or have in custody any child of the age last named for any of the purposes last enumerated, shall be deemed guilty of a misdemeanor, and, when convicted thereof, shall be subject to punishment by a fine of not more than two hundred and fifty dollars, or by imprisonment for a term not exceeding two years, or both. (Feb. 13, 1885, 23 Stat. 303, c. 58, sec. 3; Mar. 3, 1901, 31 Stat. 1322, c. 854, sec. 814.)"

It is the view of the Board that the statute quoted does not embrace the offense of taking sexual liberties with female children or of committing upon them acts of a lascivious and indecent nature. It obviously contemplates physical harm to a child, abandoning one, or exploiting one for gain. The offense here involved is of a quite different nature. The Board, therefore, concludes that the Huston and Davis cases ought not to be followed. The Davis case arose in the Canal Zone. It might be noted, therefore, that subsequent to the holding in the Davis case Congress passed the act of

February 21, 1933, applicable in the Canal Zone only, making it an offense to commit lewd and lascivious acts with children, and prescribed as a punishment therefor imprisonment in the penitentiary for not more than ten years (47 Stat. 868; Canal Zone Code 5:416). Consequently, should a case similar to the Davis case again arise in the Canal Zone the punishment imposable would have to be measured by the act now in force.

7. There is in a few holdings of the Board of Review authority for the view that if there exists no Federal statute either of general application or pertaining to the District of Columbia punishing such acts as are alleged in a specification, and if section 289 of the Penal Code is inapplicable, the statute of the state, territory, or possession where the offense occurred making criminal a like act fixes the maximum penalty. CM 162435, Huston; CM 187278, Wright. A state statute, and even more clearly a statute of the Philippine legislature, can ex proprio vigore have no controlling effect over the punishment to be imposed by a court-martial, which is an organ of the Federal Government. Of course, a statute of a state, territory, or possession may be given effect in courts-martial by Federal statute or order, as by section 289 of the Penal Code; but such attribution to a statute of validity in the courts of another jurisdiction must be clear and unambiguous, and ought not to be allowed otherwise. MCM, paragraph 104c, after referring to the table of maximum punishments established by Executive Order, says:

* * * Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service."

The word "statute" in the above sentence clearly refers to a statute applicable to courts-martial ex proprio vigore or made applicable to such courts by some other statute (such as section 289) or competent order. The sentence quoted does not confer any validity in courts-martial upon a statute not otherwise applicable in such courts. The Board of Review therefore concludes that as a strict matter of law no statute of the Philippine Islands, whatever its provisions, may limit the punishment which a court-martial may impose in the present case.

Nevertheless, it would constitute a most unjust discrimination if a soldier, tried by court-martial for an offense not of a military character, were to receive a sentence heavier than might lawfully be imposed for the same offense by the civil courts of the state, territory or possession where the offense occurred. The Board therefore considers it desirable for a reviewing authority dealing with such a case, and for the Board itself, to examine any local statute denouncing the same or a like offense, not to find therein a legal limit of punishment, but to avoid such an unjust discrimination. In other words, a state statute is not controlling, but persuasive only, as to the limit of punishment.

In articles 335 and 336, Revised Penal Code of the Philippine Islands, 1932, it is provided that anyone who shall commit an act of lasciviousness upon a person under twelve years of age shall be punished by prison correccional. The limits of punishment prescribed by Article 27 under prison correccional are from six months and one day to six years confinement.

By article 76 it is provided:

"Legal period of duration of divisible penalties. The legal period of duration of divisible penalties shall be considered as divided into three parts, forming three periods, the minimum, the medium, and the maximum in the manner shown in the following table:

Penalties	:Time included in the penalty :in its entirety:	:Time included :in its mini- :mum period	:Time included :in its medium :period	:Time includ- :ed in its :maximum period
Prision correc- cional	:From 6 months :and 1 day to :6 years.	:From 6 months :and 1 day to :2 years and 4 :months.	:From 2 years, :4 months and :1 day to 4 :years and 2 :months.	:From 4 years, :2 months and :1 day to 6 :years.

By article 64 it is provided:

"1. When there are neither aggravating nor mitigating circumstances, they shall impose the penalty prescribed by law in its medium period.

"2. When only a mitigating circumstance is present in the commission of the act, they shall impose the penalty in its minimum period.

"3. When only an aggravating circumstance is present in the commission of the act, they shall impose the penalty in its maximum period.

* * * * *

"6. Whatever may be the number and nature of the aggravating circumstances, the courts shall not impose a greater penalty than that prescribed by law, in its maximum period."

Mitigating circumstances are defined in article 13. None are present in this case. In article 14 are listed 21 aggravating circumstances, among which are the following:

"1. That advantage be taken by the offender of his public position.

* * * * *

"3. That the act be committed with insult or in disregard of the respect due the offended party on account of his rank, age, or sex, or that it be committed in the dwelling of the offended party, if the latter has not given provocation.

"4. That the act be committed with abuse of confidence or obvious ungratefulness.

"5. That the crime be committed in the palace of the Chief Executive, or in his presence, or where public authorities are engaged in the discharge of their duties, or in a place dedicated to religious worship."

The Board thinks that some, if not all, of the above aggravating circumstances were present. The offense here involved can only be committed on a person under 12, and therefore the fact that the person concerned was under 12 cannot be considered an aggravating circumstance; but here the age of the child was so far below 12 that her very tender years may be so considered. United States v. Riguera, 41 Phil. 506, 518. The fact also that the accused, at the time of commission of the offense, was performing guard duty may be considered as being an aggravating circumstance under paragraphs 1 and 4.

The Board thinks that aggravating circumstances existed and that the sentence is not in excess of that which might legally be imposed in a court of the Philippine Islands.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record is legally sufficient to support the findings of guilty and the sentence. The Board has nevertheless written this review so as to set forth the fact that it has declined to follow the cases cited, and its reason for not doing so.

Arlethald King, Judge Advocate.

George H. Frayer, Judge Advocate.

George B. Campbell, Judge Advocate.

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

(351)

Board of Review
CM 210763

DEC 22 1938

UNITED STATES)

PHILIPPINE DIVISION

v.)

Trial by G.C.M. convened at Fort
William McKinley, P. I., September
2, 1938, Dishonorable discharge
(suspended) and confinement for one
(1) year. Fort McDowell, California.

Private First Class MARK)
H. BELLETIER (6115366),)
Detachment Quartermaster)
Corps (American), Fort)
William McKinley, P.I.)

OPINION of the BOARD OF REVIEW
KING, FRAZIER and CAMPBELL, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private First Class Mark H. Pelletier, Detachment, Quartermaster Corps (American), Fort William McKinley, P. I., did, at Barrio Guadalupe, Makati, Rizal, P. I., on or about September 7, 1937, wrongfully and knowingly sell to Elias Reynoso, one (1) bed, hospital, of the value of about \$7.35, property of the United States, furnished and intended for the Military Service thereof.

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Specification 3: In that Private First Class Mark H. Pelletier, Detachment, Quartermaster Corps (American), Fort William McKinley, P. I., did, at Barrio Guadalupe, Makati, Rizal, P. I., on or about September 7, 1937, wrongfully and knowingly sell to Mrs. Rosario D. Landon, one (1) bed, hospital, of the value of about \$7.35, property of the United States, furnished and intended for the Military Service thereof.

He pleaded not guilty to the charges and specifications and was found guilty of the Additional Charge and Specifications 2 and 3 thereunder, not guilty of the remaining specifications and of Charge I, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the findings of guilty of Specifications 2 and 3 of the Additional Charge and of the Additional Charge as a violation of the 96th Article of War and approved the sentence, designating the Overseas Discharge and Replacement Depot, Fort McDowell, California, as the place of confinement, and suspended the execution of the dishonorable discharge until the soldier's release from confinement. The case is published in General Court-Martial Orders No. 2, Headquarters Philippine Division, September 28, 1938.

3. There is competent legal evidence of record establishing the sale by the accused, on or about the dates alleged, of one hospital bed, of the stated value, to Elias Reynoso, and one hospital bed, of the stated value, to Mrs. Rosario D. Landon, both sales being consummated at Barrio Guadalupe, Makati, Rizal, P. I. Four hospital beds were found in the homes of Reynoso and Landon when searched by police officers under authority of a search warrant.

Captain H. W. Allen (PS), Quartermaster Corps, property officer at Fort William McKinley, P. I., testified that when beds are condemned they are sold to the general public (R. 62); that some have been sold in Manila; that there was no shortage of beds on August 25, 1937 (R. 60), or on February 23, 1938 (R. 61); and that the accused did not have access to property of this nature (R. 60) and had not been on duty at the salvage warehouse (R. 63). Also that the hospital beds such as those alleged stolen are not carried in stock (R. 62).

Major James W. Callahan, Jr. (PS), 45th Infantry, who was relieved as property officer on July 19, 1937, testified that there was no shortage of beds (R. 77, 78); that the property had been turned over four times in nineteen months; and that between July 19, 1937, and October 25, 1937, he made one survey but that it did not relate to hospital beds (R. 78, 79).

Second Lieutenant Eli E. Daman, Medical Administrative Corps, Regimental Supply Officer, 12th Medical Regiment, Fort William McKinley, P. I., testified that the hospital has beds of the sort alleged stolen which he carries on the hospital stock records as property intended for use in the Government service and having a value of \$7.35 each, but that no shortage of such beds existed in February 1938, when he took over from his predecessor, at which time he made a physical check of the property. Also that upon checking back the hospital records he finds four such beds were dropped in March 1937, but that the voucher upon which the beds were dropped from the stock record account cannot be found and so the manner of disposition is not known (R. 61-66).

Should the hospital beds disposed of in March 1937 have been turned in to the salvage warehouse and subsequently sold to the public, as was the practice with condemned property, they would, of course, have entirely lost their characteristics as Government property furnished and intended for the military service.

It appears from the foregoing summary of the evidence that the beds found were not identified as Government property, though similar in appearance thereto, and that no loss of hospital beds by the Government was established by the evidence adduced at the trial.

4. The measure of proof necessary to establish the corpus delicti is well stated in Wharton's Criminal Law, section 352, pages 443 and 444, as follows:

"While it is essential to a conviction that the corpus delicti shall have been proved, it is not essential that this be done by full and direct and positive evidence. Like any other fact the subject of judicial investigation, the corpus delicti may be proved by evidence which is probable and presumptive, - that is, circumstantial, - as well as by direct evidence, if satisfactory to the understanding and conscience of the jury beyond a reasonable doubt; but such evidence, where relied upon, must be strong and cogent, and leave no room for a reasonable doubt." (Underscoring supplied.)

The proof of the corpus delicti, in the instant case, is not only purely presumptive but is not strong and cogent. On the contrary, it is extremely doubtful. There was no confession received in evidence. Moreover, the accused denied his guilt by both his pleas to the general issue and in his unsworn testimony (R. 90-92).

5. Without considering any other question that might be involved, the Board of Review is of the opinion that, due to lack of proof of the

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corpus delicti, the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

6. The holding in this case is to be distinguished from the holding in the Alexander case, CM 210693, and certain other cases there cited, where there was received in evidence a confession, thereby greatly reducing the degree of proof of the corpus delicti necessary in order to sustain a conviction. In the present case there was no confession. Simply and concisely stated, the rule with respect to the necessary proof of the corpus delicti is that where a confession has been properly received in evidence such proof may consist of any substantial evidence, while in cases in which no confession has been received the proof of corpus delicti must be established beyond a reasonable doubt.

Archieald Judge Advocate.

George C. Fagan Judge Advocate.

George B. Tompkins Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 210942

FEB 13 1939

UNITED STATES)
)
 v.)
)
 Private PAUL D. FUNDER-)
 BURKE (6717462), Base)
 Headquarters and Second)
 Air Base Squadron, GHQ)
 Air Force.)

SECOND CORPS AREA

Trial by G.C.M., convened at
Mitchel Field, Long Island,
New York, October 24, 1938.
Dishonorable discharge and
confinement for five (5)
years. Penitentiary.

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Paul D. Funderburke, Base Headquarters and 2nd Air Base Squadron, GHQ Air Force, being at the time Steward of the Enlisted Men's Service Club, did, at Mitchel Field, Long Island, New York, from about November 2, 1936 to about July 8, 1938, feloniously embezzle by fraudulently converting to his own use the sum of one thousand three hundred sixty dollars and fifty-five cents (\$1360.55), United States currency, the property of the Enlisted Men's Service Club which came into his possession by virtue of his employment.

He pleaded not guilty to and was found guilty of the charge and specification. The court sentenced him to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the Northeastern Penitentiary at Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

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

a. Lieutenant Colonel Nathaniel A. Jones, Chaplain (p. 9). In addition to my duties as chaplain I have been custodian of the Enlisted Men's Service Club and its fund since 1936, except for certain periods when I was temporarily absent from duty as follows: October 14 to November 4, 1936; August 29 to September 17, 1937; November 1 to December 6 or 7, 1937; March 23 to June 8, 1938. Accused helped me in the administration of this fund. He was clerk, bookkeeper and steward of the club. He made entries in the Council book and made up the vouchers. He was also cashier on duty every other night. Several other men served as cashier the alternate nights, Richard Bonhurst, James Harding and Jack Streiter. Accused also had the operating fund at all times. It ran from \$30 to \$200. There are two safes and a steel locker in the club. To one of the safes I alone carried the combination. To the other safe both the accused and I had the combination, and he and I each had a key to the steel locker but the other cashier did not. The operating fund was used to make change and cash checks. When there were not sufficient undeposited funds on hand, the operating fund was increased by money that came from the organizations. No other individual but Funderburke and me had access to the entire operating fund. The cashier would have access to \$15 or \$25 that would be taken in and put in the cash register. As this operating fund was built up it was deposited in the Guaranty Bank and Trust Company. Funderburke and I made the deposits. (A trunk full of the records of the Enlisted Men's Club Fund was marked Exhibit A for identification.) I have recently examined these records personally. I have found discrepancies falling under two heads, money paid by organizations which was missing and certain amounts missing from the daily or petty cash. Some amounts were missing during my incumbency as custodian and some during my absence. During my recent examination I found part of the records of the fund to be missing. Then I found the missing part of the record, certain sub-vouchers, in a file in the office used by accused. On January 24, 1938, there was missing \$34.20 or \$34.30, the cashier's report

on that night, when we had a dance. This amount was not entered, not taken up in the books. Other discrepancies were February 1st, \$10.50; February 6th, \$10; February 13th, \$10; February 20th, \$10. There is another one which makes the total amount \$50.50. There is a discrepancy on June 5, 1938. Private Richard Bonhurst was on duty that night and signed the cashier's report for \$24.75. This report was not bound in with the cashier's reports, but was found by me between some papers that had been filed. There was another report for \$9.75, a difference of \$15. The lower amount in each case was entered in the journal and the larger amount omitted. Accused made the entries. The bank deposits show that there was not more being deposited than was coming in. The fund was checked, audited, and inspected at the end of each month. It always balanced, except a discrepancy of \$10 in March. I got the money that was picked up on the books. I put it in the safe in the operating funds. I never put it in my pocket. These funds that were received from units were apparently not picked up on the books. They do not show. I found a number of special vouchers that had been concealed. I have them here. They have not been tampered with.

Cross-Examination. I was designated by headquarters on September 6, 1935, to act as custodian of the Enlisted Men's Club Fund. The order does not specify particularly the nature of my duties but is a general order that I be custodian of the fund. (Constitution and By-Laws of the Enlisted Men's Club introduced in evidence as defense Exhibit 1. Certain parts thereof were read providing, among other things, for a Board of Directors of five members to be elected for one year by the units which they respectively represent. The members will in turn elect from among themselves a chairman, a secretary and a treasurer. The board will meet weekly and, subject to the approval of the commanding officer, shall have charge of all activities of the club. The chairman and the board of directors will audit property and accounts monthly.) During the period from 1935 to 1938, no such audit was made by the chairman and the board of directors that I know of. I think the chairman was an enlisted man by the name of Kahn. I do not know whether he is still here on duty. (Further provisions of the Constitution and By-Laws were read to the effect that the recreation officer shall be custodian of the club funds and shall make all collections and all payments. The treasurer shall assist the recreation officer as the latter may direct.) There was a man by the name of Pundt appointed treasurer by the council after I became custodian. Accused was never treasurer. The Constitution and By-Laws, especially with reference to this provision, were not followed. (Another provision of the Constitution was read to the effect that the custodian of the club shall be appointed by the recreation officer from among the members of the club. His duties shall include a complete physical inventory of all club property at least once each

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thirty days.) I audited the fund monthly with the council. This is the Council book. I certified at the end of each month -

*** that the foregoing account is correct and that of the amount for which I am responsible. \$_____ is deposited with the _____ bank to the credit of the Enlisted Men's Club Fund, and _____ in cash is in my personal possession."

The certificate also says that the council finds the account correct, that the certificate of the responsible officer was examined and the cash balance in his possession, check book, stubs and deposit book were exhibited to the council and verified. That took place. All the vouchers were examined carefully as were the entries in the Council book and the totals and the books were balanced. A physical inventory was made of club property. Funderburke was detailed by special orders of headquarters or the Second Air Base Squadron in the spring of 1936. At that time he and the janitor were the only men employed there on special duty. I had no civilian employees, except some waitresses in the restaurant, which was open only at night. Outside of accused the only ones handling money were the other men who were cashiers, Streiter, Bonhurst and Harding. There were waiters and two cooks. Accused and another man would alternate as cashier. Accused and I were the only ones who had the combination to the safe. I did not reveal it to anyone else. Accused had the key to the steel locker and I had one. I did not give my key to anyone else. The duties of the cashier were to receive the coupons exchanged for merchandise and cash paid for merchandise. At the close of business it was his duty to count the cash and coupons and sign the report. The cash and the coupons were put in the safe. If accused was not there, it was put in the steel locker. Charles Norton is one of my cashiers at present. It seems to me that R. J. Jones was cashier for a week or so. Norton was not cashier when accused was there.

(The witness here referred to a memorandum of his.)

I now refer to an item, First Bombardment Squadron, \$80.25, 12/31/36. This was not received. So far as I know it was not deposited in the bank account.

(The prosecution here stipulated that "all these items that are set forth herein on this sheet of paper were deposited in the bank to the credit of the Enlisted Men's Club Fund".)

I had no other person to assist me as clerk, bookkeeper or steward except accused. Accused received this item of \$80.25. I never received it. It does not show in the voucher and it does not show in the deposits or in any entry in the Council book. It was in cash. It was not deposited in the bank to the credit of the Enlisted Men's Club Fund. I have the figures here.

(Stipulation repeated that the amounts set forth on the sheet of paper as payments to the Enlisted Men's Club Fund landed in the bank.)

While under my observation I found nothing wrong as to Funderburke's character. I never saw him convert any money of the club to his own use. During the time covered by this specification there was no opportunity for any person other than Funderburke to have access to the club money except the cashiers.

(Stipulation repeated that \$1,260.75, the amount that accused is charged with embezzling, found its way into the bank.)

On or about January 1, 1937, there was an item for \$80.25 which should have been and was not deposited. Accused signed for it on the collection sheet of the First Bombardment Squadron. It was paid in cash.

(The record shows the following:

"Defense Counsel. It has been conceded that it was deposited.

"Answer: The witness did not so concede." (p. 49)).

On January 27, 1938, accused failed to enter \$34.30. He took that money. I know it because I have the cashier's slip on which it is listed but it is not accounted for. It was handled by accused but not taken up on the voucher. It was \$34.30 that he could use. On that date there is shown as received \$94.90 in coupons and \$34.30 in cash. \$34.30 was not entered. It was on a memorandum as received. It was taken out of the operating fund. It was money that he could use. I counted the money. This \$34.30 was turned over to me personally the morning after the dance. It was money that accused could use, he must have misappropriated it. This item of \$50.50 I do not know whether I received it, presumably I did. The cashier's report shows that that amount was

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received. On the 5th of June is an item of \$15. Here is the cashier's report for \$9.75 but between two pages or some papers that had been filed I found a report signed by Richard Bonhurst and which showed the restaurant received \$24.75 on the night of June 5, 1938. The substituted report shows \$9.75, a difference of \$15, between the genuine original voucher and the substituted voucher. I was not custodian then, Major Welch was. All these papers that I have described were in the possession of the officer in charge of the club. This paper was found between some pages of another file that it did not belong in. I didn't find it until after accused ceased to be clerk in the club.

b. Major Homer B. Chandler, Air Corps (p. 57). I worked as a state accountant in 1915, 1916 and 1917. I have been Post Exchange officer off and on for about fifteen years and have audited many of the accounts.

(Defense counsel conceded that the witness "is qualified to tell us about figures", that the records are bulky and voluminous, and that "this \$1370 or \$1360.55 on this statement is a correct representation of a study of the records of the various units in the military service, subject, of course, to any errors that may appear and that the fact can be arrived at by a study of the records in general".)

I audited the Enlisted Men's Club Fund commencing about November, 1936, and including June, 1938, comparing the Enlisted Men's Club Fund records with the organization records.

(Defense agrees to the accuracy of these records.)

I made a cross check of one fund against the other. I found a total discrepancy in the neighborhood of \$2,000, but I cannot tell exactly. Examination of the vouchers of the organizations showed certain payments to the Enlisted Men's Club Fund which had not been picked up in that fund. My audit also showed a discrepancy in the amount in the fund book and the total of the cashier's daily receipts. Here is an item, "\$80.25, First Squadron, P. Funderburke". That represented a payment by the First Squadron to the Enlisted Men's Club, but it was not picked up on the records of the club fund. It was signed for by "P. Funderburke". These are the items that I found that had been paid to the Enlisted Men's Club Fund by the various units which were not picked up on the records of the club.

(Defense stipulates to the correctness of the memorandum. The memorandum in the record is as follows:

*12/31/36	\$ 80.25	1st Sq.	3/11/38	\$.25	Q.M.C.
4/30/37	70.00	1st Sq.	3/31/38	88.50	Q.M.C.
1/7/ 37	2.75	Hq. Sq.	4/30/38	89.75	Q.M.C.
8/31/37	91.00	Hq. Sq.	9/10/37	32.00	2nd A.B. Sq.
11/30/37	101.75	Hq. Sq.	2/ 7/38	11.75	2nd A.B. Sq.
12/31/37	92.25	Hq. Sq.	2/10/38	32.25	2nd A.B. Sq.
2/ 1/38	83.75	Hq. Sq.	3/10/38	8.25	2nd A.B. Sq.
5/ 2/38	67.25	Hq. Sq.	6/ 9/38	33.25	2nd A.B. Sq.
6/ 2/37	16.00	Q.M.C.	7/ 8/38	14.75	2nd A.B. Sq.
6/ 2/37	49.50	Q.M.C.	5/31/28*	101.00	99th Sq.
3/ 1/38	98.50	Q.M.C.	6/30/38	96.00	99th Sq.*

* Presumably a clerical error for 38.)

I found cashier's report discrepancies for three months. The reports had been destroyed prior to that time. In January the cashier's report showed \$298.85 and the amount picked up was \$264.55, which left a difference of \$34.30. For February, 1938, the cashier's reports showed \$297.15. The amount picked up was \$246.65, making a difference of \$50.50. In June, 1938, the cashier's reports showed \$233.36. The amount picked up was \$218.36, making a discrepancy of \$15. The total of the discrepancies for these three months was \$99.90.

Cross-Examination. My testimony is predicated only on books and records.

c. Major James W. Hammond, Air Corps (p. 62). I am custodian of Base Headquarters and Second Air Base Squadron Fund. I have a record of the fund with me. The Second Air Base Squadron made a payment to the Enlisted Men's Club September 10, 1937, of \$32. The payment was made by me as custodian. On February 7, 1938, a payment was made by me as custodian of the Second Air Base Squadron Fund to the Enlisted Men's Club Fund of \$11.75; on February 10, 1938, of \$32.25; on March 10, 1938, of \$8.25; on June 9, 1938, of \$33.25; and on July 8, 1938, of \$14.75. Some of these payments were made in cash and some by check. My records show that Paul Funderburke signed for them. I do not recall who actually received them. Here is a check for \$14.75 and the stamp on the back of it is Enlisted Men's Club.

d. Captain Joseph C. Denniston, Air Corps (p. 69). I am Commanding Officer, Headquarters and Headquarters Squadron, Ninth Bom-

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bardment Group, GHQ Air Force, and custodian of the fund of that organization. I have a record of the fund with me. Upon consulting the collection sheets I find that my organization made a payment to the Enlisted Men's Club of \$91, August 31, 1937, and that Paul Funderburke, secretary, signed for it.

(Stipulation made that "these amounts were paid by this organization" to the Enlisted Men's Club.)

Payments were also made by me as custodian to the Enlisted Men's Club as follows: November 30, 1937, \$101.75; December 31, 1937, \$92.25; February 1, 1938, \$83.75; May 2, 1938, \$67.25. These items were paid in cash except one, May 2, 1938, by check. Some I paid myself and some I did not. I cannot say which. I cannot say who received the items personally. It was either one of two people. Colonel Jones' name does not appear on the vouchers, the collection sheets. If the money were paid to him it would appear. I am a member of the Council. There was no audit made for almost a year and a half. The last audit was in 1935, or the first of 1936. I did not see the Council book until this summer. In the latter part I audited the books but not that part pertaining to Funderburke.

e. Second Lieutenant Brooke E. Allen, Air Corps (p. 75). I am custodian of the First Bombardment Squadron funds. Turning to the record for December, 1936, there is a payment of \$80.25 made to the Enlisted Men's Club from the First Bombardment Squadron. On April 30, 1937, we made a payment of \$70 to the Enlisted Men's Club. In both cases Paul Funderburke signed for the payments. I did not make the payments personally. The payments were in cash.

Cross-Examination. I do not know whether they were paid to Funderburke or Colonel Jones. I am getting the information merely from records.

Examination by the court. At that time I was not custodian of the fund. Major Duncan was. A junior officer assisted him. I do not know who delivered the money. They do not have an enlisted man do that in the First Squadron. They always have an officer make payments.

(Stipulation that a payment was made by Headquarters Squadron of \$2.75 on January 7, 1937; that this is a bona fide entry and that had the witness been propounded the same questions with reference to that entry, the same answers would have been given.)

f. First Lieutenant Richard T. King, 99th Bombardment Squadron, Air Corps (p. 77). I am squadron adjutant and custodian of the fund. I have the squadron fund records with me. Looking at them, the collection sheet for May shows a payment on May 3, 1938, of \$101 to the Enlisted Men's Club. It was signed for by Paul Funderburke, secretary. At the end of June there was a payment made by the 99th Squadron to the Enlisted Men's Club of \$96, signed by Paul Funderburke. I did not make these payments personally. I do not know whether they were made in cash or by check.

Cross-Examination. I have no knowledge to whom these items were paid, to Funderburke or Colonel Jones. The payments were made by Lieutenant Summerfelt at the end of May and Lieutenant Baylor at the end of June.

g. Captain Richard F. Stone, Quartermaster Corps. I am in command of the Quartermaster Detachment and am custodian of its fund. I have certain parts of the fund records with me. I can see from the records that the Quartermaster Detachment paid a total of \$65.50, June 2, 1937.

(Stipulation that the remainder of the items listed under Quartermaster Detachment payments to the Enlisted Men's Club are correct, namely, March 1, 1938, \$98.50; March 11, 1938, 25¢; March 31, 1938, \$88.50; April 30, 1938, \$89.75.)

These items on June 2, 1937, were receipted for by Paul Funderburke.

Cross-Examination. The items were paid by cash, they were not paid by me personally. I am unable to state to whom the payments were made.

h. Major Clarence H. Welch, Air Corps (p. 82). From March 23 to June 6, 1938, I was Base Executive, Base S-1, Personnel Base Adjutant, part of the time, and performed all the duties normally assigned to Colonel Jones except Base Chaplain. I was custodian of the Enlisted Men's Club during this period. Certain payments indicated on the records of the club were received by me shown by a signed voucher. Funderburke was steward of the club, made the routine daily collections and the collections that come in at the end of the month at pay day. Verbal instructions were given to these people that I, as custodian of this fund, should receive the payments, that the payments should be made to me. Instructions were given that if I were not at the club,

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they were to come to Headquarters. The only payments that were made to me I signed for.

(After examination of the records of the club the witness continued.)

The records fail to show a payment of \$88.50 from the Quartermaster Corps at the end of March. On April 30, the records show no receipt of \$89.75. If I had received these sums they would be on these vouchers, they are not on them. There are no records indicating a payment of \$67.25, May 2, 1938, from Headquarters Squadron. I did not receive such a payment. The records fail to show a payment of \$101, May 31, 1938, from the 99th Squadron. I am certain that I did not receive the money. I made a penciled notation of the organization and the amount of moneys paid to me and kept that in my possession until the proper voucher could be prepared. Had I received that payment, it would be in penciled notes and later checked back against the voucher. I did not receive it. When money was paid I would hold back what was needed to pay our personnel and what accused might need for change. The rest was prepared for deposit. I did not deposit personally. Sergeant Farrell deposited it for me at the same time that he made deposits for the other fund for which I was responsible. In maintaining this fund I had only such help as Funderburke gave me. He made all entries. I made no entries other than checking the records. At eleven o'clock in the morning on July 23rd, the date accused was put in the guardhouse, I had a conversation with him that lasted one and one-half hours. I told accused that the records of the club failed to show the whereabouts of certain receipts of payments made by the squadron, that I as Base Executive was making an informal check, that it appeared that funds were missing, that there would be further investigation that might result in charges against him, that he need not say anything that might tend to incriminate him, and that anything he might say could be used against him, that he did not have to answer questions unless he wanted to. I told him I could not understand the discrepancies. He said: "I don't see why you are worrying. You did not get the money." I said: "Where is the money?" He said: "I cannot tell you where it is." I asked him whether he had used any money for horse racing, and he said: "Occasionally I bet \$2.00, but never more than that." I asked him whether he had sent money home. He said that he had not. A day or so after the departure of Chaplain Jones, accused told me that he did not have a key to the cash register, that it had not been left

by Chaplain Jones. The funds were augmented from day to day and at the end of the month, but the money left on hand was for the payment of personnel and change. I personally attended to seeing that the funds were deposited. I permitted accused to have some of these funds in his possession.

Cross-Examination. I do not know of my own personal knowledge whether accused embezzled any of the funds.

i. Captain James S. Neary, Ordnance Department (p. 91). Between November 1, 1937, and December of the same year I was custodian of the Enlisted Men's Club Fund. Accused helped me. He was secretary of the club, made entries in the fund book, prepared the vouchers for my signature, received the funds and deposited the same in the bank. The funds of the club were kept in the bank except a small operating fund to which the secretary had access.

(The following questions were answered after the witness had examined the records of the club.)

I do not find that Headquarters Squadron paid \$101.75 to the club at the end of November, 1937. I did not receive such a payment. Accused went to the bank with the deposits during my custodianship.

Cross-Examination. I do not know of my own personal knowledge that accused embezzled any funds belonging to the club.

j. Private First Class Richard Bonhurst, Base Headquarters and Second Air Base Squadron (p. 94). I am police and prison clerk and on my own time I work in the Enlisted Men's Club as cashier. I have been doing so five months. While so working cash comes into my hands averaging \$20, from \$5 to \$50, to pay the personnel and other expenses. The money comes from men who purchase articles there. I have to account for it at the close of each day on the cashier's report. I do not have access to the operating fund.

k. Private First Class James Harding, Base Headquarters and Second Air Base Squadron (p. 97). I work in the Air Corps supply office and on my own time have recently worked at the Enlisted Men's Club as cashier. As such I had possession of the money in the cash register. We started off with \$15 and it usually ran up to \$90 or \$100 at the end of the day at the beginning of the month. We had to

account for it every day. At night there was a balance made. At the end of the day we brought it into the Chaplain's office and put it into a trunk that was locked.

l. Private Charles Norton, 18th Reconnaissance Squadron (p. 99). I work in the kitchen of the general mess and also in the Enlisted Men's Club as cashier and spare man. As cashier funds came into my possession varying from \$20 to \$70. At the end of each day we made a report and the accounts had to balance. I did not have access to the operating fund.

m. Lieutenant Colonel Nathaniel A. Jones, recalled (p. 102). After being requested to examine the records, the witness testified: A payment of \$98.50 from the Quartermaster Detachment on March 1, 1938, was not picked up. A payment of \$83.75 from Headquarters Squadron on February 1, 1938, was not picked up.

(The defense stipulated that funds listed in the memorandum were not picked up on the vouchers but called attention to the fact that the prosecution had previously stipulated that they landed in the bank.)

n. Major Homer B. Chandler, Air Corps, recalled (p. 104). In my audit I checked the bank deposits made by the Enlisted Men's Club Fund to see whether there was any excess. There was no excess indicated. None of the shortage appeared as bank deposits.

4. The defense offered no evidence but twice (pp. 42, 107) moved for an acquittal on the ground that, in view of the stipulation that the sums alleged to have been embezzled were deposited in the bank, the prosecution's evidence did not make out a prima facie case of embezzlement, but, if anything, of larceny. The court denied the motions. Since the trial, counsel for accused has argued orally before the Board and filed a brief embodying the same contentions.

5. One preliminary question should first be settled. The fact that the Constitution and By-Laws of the Enlisted Men's Club were not followed is immaterial. That fact gave accused no authority to make way with the club's funds.

6. The most important question is whether the record supports a finding of guilty of wrongful conversion of the funds of the Enlisted Men's Club, leaving to later paragraphs of this holding the question whether the offense was embezzlement or larceny. There would be less occasion for discussion of this point if the stipulation had not been made that the sums which accused is charged with embezzling were deposited in the bank to the credit of the Enlisted Men's Club (pp. 36, 37, 40, 41). That stipulation is contradicted by the two principal witnesses for the prosecution (Jones, pp. 19, 36, 39, 49; Chandler, p. 104). Nevertheless, the Board may not disregard the stipulation as improvidently made, but must accept the facts stipulated as though they were proved to demonstration. To do otherwise would be unfair to the defense; as, but for the stipulation, the defense might perhaps have offered evidence tending to prove such deposit. Indeed on his call at this office, the defense counsel said that he would have done so. If the stipulation be so accepted, is there in the record prima facie evidence of guilt? The theory of the prosecution was that, although the payments made to the club were in fact deposited in the bank, the accused took from the operating fund an equivalent amount which was omitted from the books (pp. 39, 43; pp. 106, 107; pp. 109, 110). There is, it is true, no direct evidence of accused having taken any money from the operating fund; but embezzlement is rarely committed in the presence of witnesses. The usual method of proof of embezzlement is the method followed by the prosecution in this case, namely, by audit of books of account. Evidence from account books is alone sufficient to support a conviction (Dig. Ops. JAG 1912-30, sec. 1563 (4)). The audit in this case, plus the testimony of Chaplain Jones and other witnesses, make out a prima facie proof of certain shortages, that certain sums were received but were not entered on the books. As it was accused's duty to make such entries; as he had access to the moneys of the club; as Chaplain Jones, the only other person having such access during most of the time, denied taking the money and there exists no evidence indicative of his guilt; as the other cashiers had access to petty cash only and were required to balance their cash at the close of each day's business; a prima facie case is made out against accused. The shortage was proved, others are excluded as possible embezzlers; and, even if he did deposit receipts as stipulated, accused had access to the operating fund, and opportunity to take money from it. The operating fund does not appear ever to have been counted or audited separately. The Board is forbidden to weigh the evidence, and can require no more than a prima facie showing of guilt, i.e., some evidence on which reason-

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able men might conclude that accused was guilty. The Board believes that the record contains such evidence.

7. In Dig. Ops. JAG 1912-30, section 1563 (2) and (3), it was held:

"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. C. M. 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. * * *. C. M. 123492 (1918)."

To the same effect is section 1528 (2) and (3), same digest. In the present case not even an explanation of the shortage is offered on behalf of accused.

8. The prosecution's witnesses in many instances testified that receipts for payments on the organization collection sheets to the Enlisted Men's Club Fund were signed "P. Funderburke". The prosecution also relied on other receipts signed by the several cashiers. In no case were these papers formally introduced in evidence, though they seem to have been present in court; nor was the handwriting proved to be that of accused or the cashiers. In failing to offer the papers in evidence, the prosecution relied upon the Manual for Courts-Martial, paragraph 116 a, subparagraph beginning on page 119, line 9. Notwithstanding that paragraph, the Board believes that, since the collection sheets and receipts were the very foundation of its case, it would have been better for the prosecution formally to introduce them in evidence. However, in view of the subparagraph cited from the Manual and the circumstance that the collection sheets and receipts were undoubtedly available to the defense and the court for examination, if desired; the Board thinks that it would be too technical to throw

out this evidence and thereby invalidate the conviction, solely because the collection sheets and receipts were not formally introduced in evidence.

9. A further question is raised by the failure of the prosecution to prove the handwriting of the signatures on the collection sheets and receipts purporting to be those of accused and the cashiers. However, the Manual for Courts-Martial, paragraph 116 b, last sentence, reads as follows:

"A failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection."

Not only was there no objection by the defense to the failure of the prosecution to prove the handwriting on the collection sheets and receipts, but the defense counsel made two concessions or stipulations. On page 58, he stipulated:

"* * * I will concede that this \$1370.00 or \$1360.55, on this statement, is a correct representation or a study of the records of the various units in the military service, subject, of course, to any errors that may appear."

"* * * And that the fact can be arrived at by a study of the records in general?"

On page 60, he stipulated to the correctness of a list of -

"* * * the items that you found that had been paid to the Enlisted Men's Club and the various units that paid them and which were not picked up on the records of the Enlisted Men's Club?"

Though the above stipulations are somewhat indefinite, they appear to be a concession that the list on page 60 of the record represents items in fact paid to the club or some representative of it and not picked up on its accounts.

Furthermore, if, as stipulated, the amounts in question were in fact deposited in the bank to the credit of the Enlisted Men's Club, it makes no difference who received them in the first place and signed

receipts for them. The theory of the prosecution is that accused took the money from the operating fund, to which he and Chaplain Jones alone had access. A shortage exists, Chaplain Jones and accused alone had access to the moneys of the club, and Chaplain Jones denies taking any money of the club and no evidence indicates that he did. The inference is therefore justifiable that accused did so.

Also, one item of \$34.30 does not depend on a signature at all. Chaplain Jones testified positively that he received and counted it, but that it was not taken up on the books (p. 53). He elsewhere testified that accused kept and made entries in the books (p. 11), and that he (Chaplain Jones) put all money so received into the operating fund (p. 19), which accused had in his possession at all times (p. 13).

10. The Board next considers the argument made by defense counsel at the trial (pp. 42, 107), and in oral argument and brief before the Board, that, in view of the stipulation that all the items to which the witnesses for the prosecution testified were deposited in the bank to the credit of the Enlisted Men's Club, and of the contention of the prosecution that accused took the moneys in question from the operating fund, the offense committed by accused, if any, was larceny and not embezzlement. It has been held many times that if a salesman in a store takes cash from the till, his offense is larceny and not embezzlement, on the theory that the till is the proprietor's place to keep his money, and that money therein is in his possession and not in that of the salesman. The contention of the defense counsel appears to be that the position of this accused was similar to that of the salesman. The Board thinks it more like that of an agent operating a store for an absent proprietor, or the manager of a filling station owned by an oil company. If such a person made way with the money of his principal, his offense would be embezzlement and not larceny. So also, a bank teller to whom the cashier delivers a fixed amount for which he is required to account, and who makes way with some of it, is guilty of embezzlement and not larceny (Flower v. United States, 116 Fed. 241). In the instant case, trespass, an essential element of larceny was not present. To the contrary, the evidence shows that the accused had access to and lawful possession of the funds of the club, including the operating fund (R. 11-14). The Board therefore thinks that even by a strict application of the tests used in the civil courts, the present offense was embezzlement. Furthermore, recent decisions of the Board of Review and The Judge Advocate General have tended to draw the line between embezzlement and larceny so as to include debatable territory within

the field of embezzlement (Dig. Ops. JAG 1912-30, Supp. VII, secs. 1528, 1533 (3). See also CM 155621; Moore v. United States (160 U.S. 268); Grin v. Shine (187 U.S. 181); Henry v. United States (50 D.C. App. 366)). The Board concludes that the offense committed was embezzlement and not larceny.

11. The Board of Review holds the record of trial legally sufficient to support the findings and sentence.

Archieald King, Judge Advocate.

George A. Fayer, Judge Advocate.

George B. Crumbly, Judge Advocate.

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

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Board of Review
CM 210952

JAN 26 1939

U N I T E D S T A T E S)

EIGHTH CORPS AREA

v.)

) Trial by G.C.M., convened at
) Fort Bliss, Texas, November
) 16, 1938. Dismissal and con-
) finement for one (1) year.

) First Lieutenant LEO M.
) CONNOLLY (O-282536), In-
) fantry-Reserve.)

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

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

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

Specification 1: In that First Lieutenant Leo M. Connolly, Infantry Reserve, while on active duty and being at the time custodian of the company fund of Company 2881, Civilian Conservation Corps, did, as custodian of said fund, at or near Globe and Williams, Arizona, from July, 1936, to August, 1938, feloniously embezzle by fraudulently converting to his own use the sum of about \$863.79, property of the Company Fund, Company 2881, Civilian Conservation Corps, which came into his possession by virtue of his office.

Specification 2: In that First Lieutenant Leo M. Connolly, Infantry Reserve, while on active duty and being at the

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time custodian of the company fund of Company 2881, Civilian Conservation Corps, did, at Globe, Arizona, on or about May 18, 1938, with intent to defraud, falsely make in its entirety a certain receipt in the following words and figures, to wit:

"\$306.51 - cash.

"Receipt of the above cash payment this date is acknowledged, and statement made that same pays in full the Fund Account up to and including April 30, 1938.

"L. V. STRUKAN CO.

"Globe, Arizona

"By Eva Strukan"

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

Specification 3: In that First Lieutenant Leo M. Connolly, Infantry Reserve, while on active duty and being at the time custodian of the company fund of Company 2881, Civilian Conservation Corps, did, at Globe, Arizona, on or about May 18, 1938, with intent to defraud, falsely make an entry, to wit:

"Paid 5/18/38

"Eva Strukan"

on an invoice from Louis V. Strukan to CCC Camp F-29-A, for the month of April, 1938, in the amount of \$306.51, which said invoice was a writing of a private nature, which might operate to the prejudice of another.

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

Specification 1: In that First Lieutenant Leo M. Connolly, Infantry Reserve, while on active duty and being at the time custodian of the company fund of Company 2881, Civilian Conservation Corps, did, as custodian of said fund, at Williams, Arizona, on or about June 1, 1938, with intent to deceive the auditor of said fund, officially make, sign, and present to Captain G. D. Hastings, Infantry Reserve, auditor of said fund, the following certificate in the council book of said company to the account of said fund for the month of May, 1938:

"I CERTIFY that the foregoing account for the month of May, 1938, is correct, and that of the amount for which I am responsible Ninety Seven and 86/100 Dollars (\$97.86) is deposited with the Valley Nat'l Bank, Globe, Ariz, to the credit of the Company Fund, Co "2881", CCC, and Three Hundred Three and 60/100 Dollars (\$303.60) in cash, is in my personal possession.

"L. M. Connolly
"1st Lt Inf Res
"Commanding."

"June 1, 1938

which certificate was false and known by said First Lieutenant Leo M. Connolly, Infantry Reserve, to be false in that said account was not correct as it showed an expenditure of \$306.51 to L. V. Strukan Company, Globe, Arizona, on May 18, 1938, which had not been made.

Specification 2: In that First Lieutenant Leo M. Connolly, Infantry Reserve, while on active duty and being at the time custodian of the company fund of Company 2881, Civilian Conservation Corps, did, as custodian of said fund, at Globe, Arizona, on or about May 18, 1938, with intent to deceive the auditor of said fund, officially make, sign, and present to Captain G. D. Hastings, Infantry Reserve, auditor of said fund the following certificate:

"COMPANY FUND, Company 2881, CCC, Camp F-29-A, Globe
Arizona, May 18, 1938.

"I certify that I have this date paid to L. V. Strukan Company, of Globe, Arizona, the sum of \$306.51, in cash, same being payment in full for the Fund Account up to and including April 30, 1938.

"L M Connolly
"L. M. Connolly
"1st Lt. Inf-Res
"Commanding."

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which certificate was false and known by said First Lieutenant Leo M. Connolly, Infantry Reserve, to be false in that said payment of \$306.51 to L. V. Strukan Company, Globe, Arizona, had not been made.

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

Specification 1: In that First Lieutenant Leo M. Connolly, Infantry Reserve, while on active duty, did, at or near Williams, Arizona, on or about August 8, 1938, attempt to commit suicide by willfully shooting himself in the chest with a pistol.

Specification 2: In that First Lieutenant Leo M. Connolly, Infantry Reserve, while on active duty, did, at or near Williams, Arizona, on or about August 8, 1938, willfully shoot himself in the chest with a pistol, thereby unfitting himself for the full performance of duty from on or about August 8, 1938, to on or about September 12, 1938.

He pleaded not guilty to Charges I and II and all specifications thereunder, and guilty to Charge III and specifications thereunder, and was found guilty of all charges and specifications. He was sentenced to be dismissed the service, to forfeiture of all pay and allowances due or to become due, and to confinement at hard labor for one year. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. With respect to Specification 1, Charge I, evidence was introduced showing that the accused, a First Lieutenant, Infantry-Reserve, performed active duty with the Civilian Conservation Corps in Arizona, continuously from July 1, 1936, to date of trial, November 16, 1938, and that he was on the latter date serving a tour of active duty terminating on December 31, 1938 (R. 8, 9; Ex. 1-A, 1-B, 1-C, 1-E, 1-F). The accused was in command of Company 2881 from July 1, 1936, to June 30, 1938, when the company was disbanded as an active organization. He was the official custodian of the Company Fund from July 1, 1936, to August 8, 1938 (R. 10, 11, 12, 52), at which time the fund was taken over by Captain George D. Hastings, Infantry-Reserve (R. 18). Captain Hastings and Captain Thomas Tway, both Reserve officers on active duty with the Civilian Conservation Corps, were detailed, on or about August

8, 1938, to make an audit of the Company Fund of Company 2881. An audit was made by them covering the period October, 1937, to June, 1938, inclusive, and a shortage of approximately \$863.79, the amount set forth in the specification under discussion, was disclosed (R. 17, 18; Ex. 9).

4. The allegations contained in Specifications 2 and 3, Charge I, and in Specifications 1 and 2, Charge II, comprise acts so inter-related as to make it advisable to give them consideration as though they consisted of one continuing transaction. Briefly, the evidence adduced at the trial relating to the above-described specifications, may be summarized as follows:

During the month of April, 1938, Company 2881, Civilian Conservation Corps, commanded by the accused and located near Globe, Arizona, purchased from Louis V. Strukan, a grocer at Globe, provisions for the company mess totaling \$306.51 (Ex. 4). There being insufficient funds in the Company Fund to meet this obligation, the accused, on May 18, 1938, entered in longhand at the bottom of the last sheet of the bill the following:

"Paid 5/18/38
"Eva Strukan" (Ex. 4.)

Eva Strukan was the daughter of Louis Strukan, the creditor, and his bookkeeper (Exs. 10 and 11). On the same date the accused prepared on a single sheet of paper a typed certificate showing the account to have been paid by him in cash on that date, beneath which certificate he prepared a receipt acknowledging payment in cash of the account in full. The certificate was executed by the accused and to the receipt he signed the name of Eva Strukan, as follows:

"L. V. Strukan Co.
"Globe, Arizona

"By Eva Strukan" (Ex. 3.)

The amount of the Strukan account was entered by the accused in the May account of the Council book of Company 2881 as an expenditure from the Fund on May 18 (Ex. 2). The receipted bill and prepared receipt above described were filed with the account as Company Voucher No. 19 in support of the expenditure entry in the Council book. On June 1, 1938, the accused executed the customary certifi-

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icate certifying to the correctness of the entire May account as shown by the entries in the Company Council book. The Company Fund account, showing payment of the Strukan bill for May, 1938, was audited and approved by the Company Council on June 1 and again on June 14 by Captain Hastings (R. 15; Ex. 5). The account of Strukan was in fact not paid (Ex. 10). The accused had no authority whatsoever to sign the name of Eva Strukan to the invoice or to the certificate showing payment in cash (Ex. 11).

5. The accused having pleaded guilty to Charge III and the two specifications thereunder, alleging attempted suicide on August 8, 1938, by shooting himself in the chest with a pistol and unfitting himself for duty from August 8 to September 12, 1938, as a result of the injury thereby incurred, no witnesses were called to testify to the nature of the injury sustained, its cause and the resultant effect. That attempted suicide constitutes a military offense there is no doubt (CM 202601, Sperti).

6. The prosecution introduced in evidence, without objection by the defense, letters addressed to Captain Hastings and to Mr. Strukan written by the accused immediately prior to his attempted suicide, in which he admitted the financial shortage in the fund of Company 2881 and the forgery by him of the signature of Eva Strukan and stated that he sought suicide as the only means of escape from his financial difficulties and dishonorable conduct (Exs. 14, 15). The deposition of Captain Milton W. Kingcaid, Infantry-Reserve, Headquarters Arizona District, Civilian Conservation Corps, was received in evidence, from which it appears that the deponent, as president of the board of officers appointed to investigate the alleged shortage of Company Funds, interviewed the accused in the hospital on August 14, 1938, while recovering from his self-inflicted injury, and the accused, after having been fully apprised of his rights in the premises, voluntarily dictated and signed a full and complete confession to the embezzlement of Company Funds and attempted suicide, although the formal charges had not at that time been officially preferred (Exs. 12, 6).

7. The defense offered in evidence letters written by the accused to the Camp Educational Adviser, the Works Progress Administration instructor, the landlady of the accused, the Camp Chaplain, and the members of the company commanded by the accused in which he expressed regret that honor required him to take his life to compensate for the wrongs he had committed against the United States Government, and bidding them goodbye. Also, there was received in evidence a

voluntarily written consent of the accused to withholding from his pay funds sufficient to reimburse the Government for an indebtedness due it because of his financial speculations or inefficient administration of funds belonging to the Government or any of its instrumentalities (Exs. B, C, D, E, F). The defense put in evidence the deposition of First Lieutenant Harry N. Renshaw, Air Corps, Randolph Field, Texas, showing an acquaintance with the accused since 1925, at which time they were fraternity brothers in college. Deponent stated that accused was liked and admired by the other students, played on the football team, worked during the evenings and vacation periods to earn funds necessary to permit completion of his college course, and bore an excellent reputation (Ex. A). The accused presented to the court as character witnesses Lieutenant Colonel Otto Wagner, 7th Cavalry, Major John H. Hildring, Infantry, Major Carl B. Byrd, 8th Cavalry, and Captain Roy J. Laux, Infantry-Reserve, on active duty with Headquarters Eighth Corps Area, all of whom testified that they had known the accused over a period of several years, except Colonel Wagner, who had known him only since his confinement in September, 1938. Colonel Wagner testified that the attitude of the accused with respect to his obligations to the Government and his desire to make full restitution of shortages found in his accounts was an admirable one and that "my impression is that he is an excellent man" (R. 29, 30). The other three character witnesses above named testified that they had served with the accused and considered his services as superior or excellent and that he bore an excellent reputation in the Civilian Conservation Corps camps where he had been on active duty (R. 23-29).

8. The accused, at his own request, was sworn as a witness, having been first advised of his constitutional rights, and testified at great length showing the adverse financial circumstances under which he was compelled to pursue his education at the University of Arizona from which university he graduated in 1930; that he was engaged in the advertising business following his graduation. He was married in 1932 and became the father of a little girl in 1934. He became unemployed in 1934 and was called to active duty as a Reserve officer in the Civilian Conservation Corps at Stafford, Arizona, in January, 1935. Upon entering the service on his first tour of active duty, he was financially obligated in the sum of approximately \$1800. Because of the pressure of his creditors and his inability to meet their demands, despite earnest efforts to do so,

he took funds of which he was the official custodian and paid his creditors, replacing the funds later when paid, but that the shortages thus caused increased with greater rapidity than he could replace them, and, consequently, when the company was disbanded in June, 1938, there existed a shortage in the Company Fund, due to the financial speculations in which he had been engaged for sometime, equal to the amount alleged embezzled. His financial condition had led to discord in his family relations, and so, believing his situation hopeless and overwhelmed with shame and fear, he attempted to end his life in the manner alleged. Under cross-examination by the prosecution, the accused admitted all of the allegations contained in the charges and specifications, expressed deep regret at his actions and testified that it was his desire to make full restitution to the Government; also that full restitution should be completed from his November pay check under an authorization to withhold his pay signed by him October 28, 1938, and that he now has had a position offered to him and believes, if given the opportunity, he could mend his family relations and rehabilitate himself (R. 33-56).

9. Eight of the nine members of the general court-martial who tried the accused joined in a recommendation to clemency, which is attached to the record following defense Exhibit "F". The clemency recommended is that the period of the confinement adjudged be remitted. The grounds for the recommendation are set forth as follows:

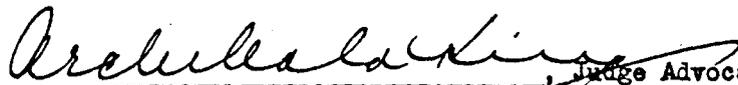
- "(1) It appears that, except for the offenses of which this officer was found guilty, his reputation in every respect was excellent.
- "(2) He has a wife and small child who are blameless of any connection with the offenses of which the officer was found guilty, but who will suffer greatly if confinement is approved.
- "(3) In view of the large debt this officer assumed in order to get an education and the depression which occurred upon his graduation from college, the circumstances over which he had no control were greatly to his disadvantage.
- "(4) While intent to embezzle and forge were clearly established, it is not believed that this officer is really of the criminal type. It is further believed that he has learned his lesson and will probably make a valuable citizen."

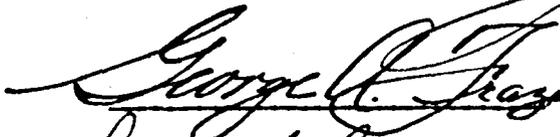
The assistant staff judge advocate who wrote the review of the record for the Commanding General, Eighth Corps Area, recommended clemency to the extent of a remission of that portion of the sentence involving confinement. In this connection the Corps Area staff judge advocate in his brief supplemental review said:

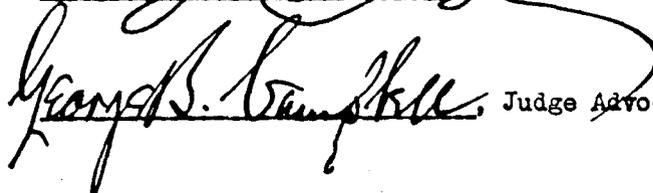
"I do not concur in the recommendation of Captain Johnson that that part of the sentence relating to confinement imposed be remitted at this time. The President in his discretion can reduce the confinement or remit it in its entirety. Whether he does or not such confinement as is confirmed by him will undoubtedly be served in this Corps Area and at a later date the question of clemency can further be considered."

The letter from Senator Carl Hayden of Arizona to The Adjutant General, dated October 12, 1938, and copies of two letters inclosed therewith from neighbors of the accused officer, urging that clemency be extended, have been received and are attached to the record. The accused has been in confinement at Fort Bliss, Texas, since September 17, 1938 (R. 29). It also appears from the record that practically a complete financial restitution has been made by the accused from his pay to the Government (R. 50).

10. The court was legally constituted and the competent evidence of record in support of the findings and sentence is clear and conclusive. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and warrants confirmation of the sentence. Dismissal is authorized upon conviction of violations of the 93d and 96th Articles of War, and is mandatory upon conviction of violation of the 95th Article of War.


 Archibald King, Judge Advocate


 George C. Feasey, Judge Advocate


 George B. Campbell, Judge Advocate.

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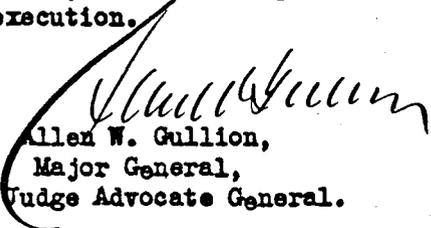
1st Ind.

War Department, J.A.G.O., FEB 2 1938 - 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 Leo M. Connolly, Infantry-Reserve.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence. I recommend that the sentence be confirmed; but, in view of the recommendation to clemency by eight out of the nine members of the court including the President and the law member, the repentant attitude of the accused, and almost complete restitution by him of the amounts embezzled, I further recommend that the period of confinement be remitted.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence but remitting the period of confinement, and directing that the sentence as modified be carried into execution.


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

4 Incls -

- Incl 1 - Record of trial.
- Incl 2 - Draft of let. for
sig. Sec. of War.
- Incl 3 - Form of Executive action.
- Incl 4 - Let. from Senator Hayden,
with incls.

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

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Board of Review
CM 210985

JAN 17 1939

U N I T E D S T A T E S)

SEVENTH CORPS AREA

v.)

Private EVERETT W. BONNER)
(6862673), Private BERNARD)
W. JUDD (6862748), and)
Private JOSEPH L. RILEY)
(6861341), all Troop A,)
Ninth Engineer Squadron.)

Trial by G.C.M., convened at
Fort Riley, Kansas, November 23,
1938. As to each: Dishonorable
discharge and confinement for
one (1) year. Disciplinary
Barracks.

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. The accused were jointly tried upon the following charge and specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Everett W. Bonner, Troop A, Ninth Engineer Squadron, Private Bernard W. Judd, Troop A, Ninth Engineer Squadron, and Private Joseph L. Riley, Troop A, Ninth Engineer Squadron, acting jointly, and in pursuance of a common intent, did, at Fort Riley, Kansas, on or about October 22, 1938, feloniously take, steal and carry away one suit of clothes, value about Twenty-eight dollars, the property of Private Thomas W. Head, Troop A, Ninth Engineer Squadron.

Each accused pleaded not guilty to and was found guilty of the charge and specification. Evidence was introduced of the conviction of Bonner by summary court for absence without leave from March 21 to 28, 1938, the approved sentence for which offense was forfeiture of \$10. No evidence of previous convictions was introduced against Judd or Riley. Each was

sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence as to each, 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 50½.

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

a. Herman Gruno (p. 6). I am owner of the Wardrobe Cleaners in Junction City. On October 10, 1938, Private T. W. Head, Troop A, 9th Engineer Squadron, gave me an order for a new suit of clothes made to measure, the fair cash value of which was \$25. On October 22d I left it in the barrack of that troop on Private Head's bunk. I know it was his bunk because I looked at the tag. This was between 11:00 and 12:00 in the morning. The trousers were over the cross bar of a hanger and the coat over the top of that and then a paper bag was over the top of the suit. There was also a vest. The suit was brown, small plaid. The man's name and the number were on the inside coat pocket and on the watch pocket of the trousers. The suit handed me is the suit concerning which I have been testifying (suit received as Exhibit A). There was a sales ticket on the outside of the suit which I made out in my own writing. I personally delivered the suit. I saw it next when it was returned from Manhattan, on the front porch of the 9th Engineers in the hands of Corporal Wenzlick. Head's name was in the pockets. Cross-examination. I did not see Head the afternoon that I left the suit. There were some men in the squad room but I cannot remember who they were.

b. Private Thomas W. Head, Troop A, 9th Engineer Squadron (p. 10). I know the three accused. They are Privates Judd, Riley and Bonner. I contracted for a suit of clothes with Mr. Gruno of the Wardrobe Cleaners, a brown suit with small checks. About noon, October 22d, I saw a package on my bunk like a suit would be cleaned and sent back in. I didn't open it but left it there. When I came back that evening it was not there. It was about three days afterwards when I next saw it in a store in Manhattan, Kansas, owned by Charles Hofmann. This is the suit (Exhibit A). When I saw the package on my bunk I didn't open it because I was late for formation. Cross-examination. We fell out for this formation at fifteen minutes to one and I returned to the barrack about 5:30 that evening.

c. Corporal George F. Wenzlick, Troop A, 9th Engineer Squadron (p. 13). It was reported that on October 22 a suit had been stolen from the bed of Private Head. I saw it at the Utility Outlet Clothing Company, Manhattan, Kansas, on October 24th, a brown check, three piece suit, identified by the mark "T. W. Head, 48411" and the date of the sale. This is the suit (Exhibit A).

d. Private Howard D. Palmquist, Troop A, 9th Engineer Squadron (p. 15). On October 22d I made a trip to Manhattan, Kansas, about 4:30 in the afternoon. Private Bonner suggested the trip. Bonner, Riley, Judd and myself were present. They said they were going to sell some boot breeches. They used a Chevrolet with yellow wheels, a two-door sedan. Judd, Bonner and I went on the trip. We went to the Utility Clothing Store, Private Bonner carried the suit into the store and we asked the man who seemed to be the proprietor if he wanted to buy a suit (Mr. Charles Hofmann was brought into the room). That is the man they dealt with. Bonner asked him how much he would give for this suit and he said he would give \$5. Bonner asked for \$6 and he said he couldn't give him \$6 and Bonner said all right he would take \$5 and he gave Bonner \$5 and we left the store. Judd, Bonner, this man and I were present. Bonner did all the talking and the money was given to him. This suit (Exhibit A) is the suit. With the money Bonner received he bought some gas and gave Judd some money. I couldn't see how much. Then we came back to the post. Cross-examination. We got back around 6:00 o'clock. I don't know where Riley was. Examination by the court. Judd made no remarks in regard to the sale. I didn't know that he had a suit in the car until we got to Manhattan. I didn't know whose suit it was. Judd drove the car.

e. Charles E. Hofmann (p. 20). I handle second-hand clothing. My place of business is 108 South 3d Street, Manhattan, Kansas. I know those three men as being in the store. Some time between five and six some young man came in. There were some other men with him. They showed me the suit they wanted to sell. I said I didn't care how good it was I wouldn't give over five dollars for it. They wanted six. I said "nothing doing", so they turned and talked to each other and decided to take the five dollars. I gave them the money and that was the end. Just one talked to me, the man in the middle (other witnesses testified that Bonner was in the middle). I believe that this suit (Exhibit A) is the suit that I bought. Afterwards my boy found the name "Head" inside. Of course, they all were dressed in civilian clothes that evening and I couldn't recognize them at all when I came over on Monday. (Corporal Wenzlick was brought into the room). That is the man I turned the suit over to.

f. Private Pierce A. Kensler, Troop A, 9th Engineer Squadron (p. 24). I had an automobile parked behind the post exchange on October 22nd. It belonged to Harold Wells of the artillery. Private Judd asked if he could use it and I told him he could not. When I came back from work it was not where I parked it. I went back of the barracks and it was there. Private Judd admitted using it. He told me he went to Ogden and came back. The charge of quarters was out there and he got a suitcase out of the back of the car. The car was a yellow '31 Chevrolet with wire wheels.

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g. Sergeant Lyle R. Driskell, Troop A, Ninth Engineer Squadron (p. 28). About 6:00 o'clock, the evening of October 22nd, Private Head reported to me that a new suit that had been delivered to him had disappeared. I checked all lockers and did not find the suit. About 1:00 o'clock that afternoon I took the sick book to the hospital. Private Riley went along with me to see the dentist and returned with me. Private Bonner was assistant charge of quarters that afternoon. I turned the keys over to him while I took the sick book to the hospital. I saw Judd in the hallway that afternoon in civilian clothes. Bonner's best friend was Riley. I went with Sergeant Lekas and Corporal Schoenberger and we took a suitcase out of a car, carried it into the orderly room and it had some old khaki breeches in it.

h. Corporal Ambrose B. Schoenberger, Troop A, 9th Engineer Squadron (p. 31). On the afternoon of October 22nd I had a conversation with Bonner about a loan of twenty-five cents that he told me he was getting to get some gasoline to go to Manhattan with. I searched the Chevrolet two-door car that evening at 6:15. I believe it had wire wheels. I found a suitcase and several pieces of o.d. clothing. Examination by the court. The charge of quarters was looking for a missing suit. We didn't search any other car because there wasn't any other there.

i. Private Virgil E. Kuhn, Troop A, 9th Engineer Squadron (p. 33). I am in charge of the Engineer farm. As I went down to feed my pigs on October 22nd I gave Bonner and Riley a ride as far as the filling station. I understood they were going to Manhattan. They wanted to ride down to get a can full of gas. They had a two gallon oil can with them. I saw them get the gas at the filling station and then went on to the farm. This was between three and four.

j. Technical Sergeant Tom Lekas, Troop A, 9th Engineer Squadron (p. 34). On October 22nd Private Head's suit was missing. We inspected the first platoon quarters and did not find the suit. Corporal Schoenberger told me he was suspicious of Privates Riley, Bonner and Judd, that they came out with a suitcase and they had a car. I went up stairs and told Privates Bonner and Kensler to stay in barracks until the first sergeant gets there. Following instructions from the first sergeant, myself, Sergeant Driskell and Corporal Schoenberger located the suitcase and three pairs of breeches in the car. Then we went up stairs and informed Bonner and Kensler that they were through as far as I was concerned. Riley and Bonner were pretty good friends. They generally hang together.

k. Captain Edwin P. Lock, Junior, Troop A, 9th Engineer Squadron (p. 36). On Monday morning I held an investigation of the loss of a suit of clothes and had Bonner, Riley, Judd, and Palmquist in the office for

investigation. The accused were informed that anything they said would be used against them and that they were under no obligation to make a statement. They all three made statements piece-meal as a result of questions and answers, which statements I had typed and they signed. Bonner stated that he sold the suit belonging to Private Head in Manhattan, that he divided or was to divide the proceeds three ways, that he had given Judd \$1.50 and that he was not stating who the third party was. Private Judd said he went to Manhattan with Bonner and witnessed the sale of the suit and received \$1.50 for taking Bonner there. He did not admit any part in the sale of the suit. Private Riley admitted that on October 22nd he was in the barrack, that he picked up a barrack bag of clothing and a package which he found leaning against the wall, that it might have contained the suit, and that he carried them out of the barrack and put them in a car. He said that he didn't know it was Private Head's suit. He said he found it leaning against the east wall of the barrack in a package on the east side. Private Head is quartered in the east squad room.

1. First Sergeant Floyd T. Syrole, Troop A, 9th Engineer Squadron (p. 39).. On October 22nd Private Judd was absent without authority from formation at 12:45. Private Riley was on sick report. Private Bonner was assistant charge of quarters. About 6:20 that night Sergeant Lekas called me at my quarters and said some clothing had been stolen and was in a suitcase in a car in the rear of the barrack. I told him to get the suitcase and I would come over. When I arrived at the barrack the suitcase was open and there were some khaki clothing and o.d. woollens in it. I was present at an official investigation by Captain Lock on Monday, October 24th. Captain Lock told the accused that anything they said would be used against them and I told them the same. They were not going to make any statement but when I questioned them they broke down and confessed. Private Bonner admitted he sold the suit and the money was to be split three ways. He said he gave Private Judd \$1.50 and didn't tell who the other third was to go to. At that time he didn't say who the suit belonged to but afterwards he said it belonged to Head. Judd admitted that he hauled them to Manhattan, that he knew the clothes were stolen and that he received \$1.50 in pay. Riley admitted he carried a package and a barrack bag from the east side of the squad room on the east side of the barrack down and put them in a car.

4. The first question presented is whether the confessions or admissions of the three accused were properly received and may be considered. It was shown by the testimony of Captain Lock, corroborated to some extent by that of First Sergeant Syrole, that the former investigated the transaction which is the subject of the present specification, and that after they had been duly warned the three accused made statements piece-meal.

"As a result of questions and answers they made certain statements which later I had typed up and they signed" (p. 37). The typed and signed statements were not introduced in evidence, but Captain Lock and Sergeant Syrcle undertook to testify to what each of the accused admitted. If by the use of the word "later" in the passage quoted, Captain Lock meant that on one occasion each accused made an oral statement and on another a written one, either was admissible or both (Lowe v. State, 125 Ga. 55, 53 S.E. 1038). If, on the other hand, there was but a single transaction and the oral statements were reduced to writing on the same occasion when uttered, the Board thinks that what each accused said should have been proved by his written and signed statement and not by oral testimony, unless loss or destruction of the writing had first been proved. The reports contain many cases in which confessions or other statements were made to committing magistrates or others orally and reduced to writing, and in which it was held that such confessions or statements should be proved by the writing, if available, and not by oral testimony. As far back as 1722, Kyre, J., in Rex v. Reason (16 Howell's State Trials, 35), said:

"That which is set down in writing, if it be an examination taken in writing of a prisoner before a justice of the peace, you cannot give evidence of that examination "viva voce", unless the examination be lost."

In State v. Branham (13 S.C. 389), the court said (p. 396):

"Upon a preliminary examination the accused parties have the right to be present and cross-examine witnesses, but they are not required to make any statement themselves. Gen. Stat. 197. It is not the duty of a trial justice to examine accused parties or to take their statements in writing, unless they are sworn as witnesses on behalf of the state by their own consent, and if he does so it is not an official act; but he is not prohibited from doing so, and a respectable authority recommends that the ancient course of taking such statements should still be pursued. Be that as it may, when confessions are taken by a trial justice, in writing, signed by the parties, such evidence is the best evidence upon the subject, and if such confessions are relied upon against them, the defendants are entitled to have them produced in the very terms in which

they were made. From the infirmity of memory there is always more or less uncertainty about parol testimony, especially in reference to declarations - mere spoken words. Even in civil cases the rule is that parol testimony is not admissible to explain, vary or add to written instruments, which must speak for themselves. In criminal proceedings there is even more reason that only the best and most reliable evidence should be allowed. There may have been in the written confessions some qualifications or explanations, and, we think, when demanded by the defendants, they should have been offered. It was error to receive parol testimony of confessions made in writing where there was no obstacle in the way of the written confessions being offered.

"The judgment is set aside and a new trial ordered."

In State v. Steeves (29 Ore. 85, 43 Pac. 947), the court said:

"Oral statements, intended to be reduced to writing, when committed to paper and signed by the person making them, are supplanted, and must of necessity be excluded, by the writing."

To the same effect are State v. Eaton (3 Harrington (Del.) 554); State v. Harman (3 Harrington (Del.) 567); State v. Busse (127 Iowa 318, 100 N.W. 356); State v. Usher (126 Iowa 287, 102 N.W. 101), and other cases.

"The general rule of evidence with respect to oral testimony concerning the contents of a written paper appears in the Manual for Courts-Martial, paragraph 116. In a number of cases the Board of Review and The Judge Advocate General have set aside convictions because of violations of that rule (Dig. Ops. JAG 1912-1930, secs. 1295, 1299 (3), 1302, 1444 (6), 1470 (3), 1581 (2)). However, the opinions cited were written before publication of the 1928 edition of the Manual for Courts-Martial, now in force, which in paragraph 116 a says:

"An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: It does not appear that the original has been lost, destroyed, or is otherwise unavailable; * * *."

No such provision as that just quoted is found in the court-martial manuals preceding that of 1928 (M.C.M., 1917, par. 237; M.C.M. 1921, pars. 236 a, 237). No objection was made to the oral testimony of Captain Lock or First Sergeant Syrcle as to the statements of the several accused. The sentence quoted amounts in substance to a direction that the parol evidence rule is not to be enforced unless the party against whom the evidence is offered insists on its enforcement. That being so, the Board concludes that the admission of the oral testimony of Captain Lock and First Sergeant Syrcle with respect to the confession and the admissions which were reduced to writing did not constitute fatal error, and that their testimony may be considered for what it is worth. Such was the holding of the Board, without discussion, in CM 210686, McCrae. Nevertheless, the Board does not approve or condone such use of secondary evidence, and thinks that the written paper ought to be produced whenever it is available. //

5. The defense offered no evidence.

6. The Board next considers the case as to each of the accused separately, and first as to Bonner. Even without regard to his confession the evidence against Bonner is ample to prove his guilt, and in addition his confession fully admitted it.

7. The evidence against Judd may be thus summarized: He obtained the automobile in which the trip was made, notwithstanding that Private Kensler, in charge of the automobile, told him that he could not use it (Kensler, pp. 24-28). He drove the car on the trip afterward. Though he admitted to Kensler that he (Judd) had used the car, he lied as to the place to which he had been, saying that he had gone to Ogden. Judd drove the car on the trip to Manhattan and went into Hofmann's store with Bonner, Palmquist and the stolen clothing. Though Bonner did all the talking to Hofmann about the sale, Judd was present and presumably in hearing. When Hofmann declined to give more than \$5 for the suit all three of the soldiers present (including Judd) conferred as to whether that sum should be accepted. After the sale Bonner gave Judd a part of the money received. Judd admitted receipt of \$1.50 but denied any part in the sale. It was apparently the contention in his behalf that the payment to him was compensation for the transportation furnished, rather than a share in the proceeds of the sale of stolen goods. First Sergeant Syrcle testified, however, that Judd admitted that he knew the clothes were stolen (p. 41). The Board concludes that the foregoing testimony is sufficient to support the findings of guilty as to Judd.

8. The Board next considers the evidence against Riley, which may be thus summarized: Riley was present when Bonner first suggested the trip to Manhattan. It was then stated that the object was to sell some breeches. Riley went with Bonner to the filling station to get some gasoline. Private Kuhn, who took them to the filling station, said "I understood they were going to Manhattan" (p. 34). Riley put his name on the sick book, went with Sergeant Driskell, the charge of quarters, to the hospital to see the dentist, and returned to the barrack with him. Riley admitted that he picked up a barrack bag of clothing and a package which he found leaning against the wall in the east squad room, carried them out of the barrack and put them in a car. He said that he did not know that the package contained Head's suit. According to the testimony of Private Palmquist, who went along on the trip, Riley did not accompany the others to Manhattan (p. 16). On the other hand, Hofmann, the merchant who purchased the suit, testified (p. 21), "I know those three men" (presumably meaning the three accused) "as being in the store". Later (pp. 23, 24), he said that they were in civilian clothes when in his store and for that reason he could not identify them when he was brought to the post a day or two later, but "I recognize them as they owned up that they were in the store, they owned up that they sold me the goods". Bonner and Riley were very good friends.

9. The most serious question in the case is whether the finding of guilty as to Riley should be passed. It is entirely possible that a

soldier on a Saturday afternoon when off duty might accompany another to a filling station to buy gasoline, merely to pass away the time, and not because he was an accomplice in the unlawful designs of his friend. It is contended by the prosecution (pp. 5, 44) that Riley went on sick report so as to avoid going out with the troop that afternoon and to be free to carry out his part of the larceny, but there is no evidence whatever to support this hypothesis. It should have been easy to prove by the records of the hospital or the testimony of officers serving there whether Riley really needed treatment. In the absence of evidence on that point, it must be assumed that Riley needed treatment, as there is no basis for an inference adverse to him. The theory that Riley's trip to the hospital was part of a scheme of the conspirators and that its object was to get the charge of quarters out of the barrack so that they could carry out the suit of clothes is untenable; first, because, as has been said, there is no evidence that Riley did not need treatment; and, second, because, according to the prosecution's own theory, the suit was carried out by Riley himself, and it is impossible that he could have done so when he and Sergeant Driskell were at the hospital. It is also entirely possible that a soldier might carry a couple of packages downstairs for a friend in ignorance of their contents and without suspecting that he was being used as an innocent cat's-paw to carry out a larceny. It is also possible that the package which Riley carried downstairs contained the issue breeches which were taken to Manhattan and not Head's civilian suit. Support is lent to this view by the statement that the package "was leaning against the wall" (p. 38), which could not be said of a suit on a hanger.

10. If Riley did not go to Manhattan, the evidence against him is fragmentary and to the Board wholly unconvincing. Did he go to Manhattan? Palmquist, a soldier in the same troop, who went on the trip, testified unqualifiedly that Riley did not go (pp. 16, 17, 19). The only evidence to the contrary is the testimony of Hofmann, the purchaser of the suit (p. 21). However, he admitted that he had been unable to identify the three accused as the men who were in his store when brought to the post for that purpose a day or two after the sale to him (p. 24), and his testimony that the three accused were present in his store was according to his own statement based on the fact that "they owned up that they were in the store" (p. 24). The Board thinks it probable that Hofmann confused Riley and Palmquist. No doubt Bonner, Judd and Palmquist admitted to Hofmann that they were in his store; but the Board doubts that Riley made such an admission as to himself to Hofmann, since he made none to Captain Lock, and in a letter to The Judge Advocate General since his trial denies that he was present at the sale.

11. The members of the Board do not feel that if they had sat on the court trying these accused they could have voted guilty with respect to Riley; but, on the other hand, it is their duty to remember that they have no right to weigh the evidence and must pass a conviction otherwise proper if there is in the record substantial evidence on which a court might reasonably find the accused guilty, whatever may be their personal views. As there are in the record the testimony of Hofmann that all three accused were present in the store, unconvincing as it may be to the Board as against Riley, and the other evidence concerning Riley already summarized, the Board cannot deny that the quantum of evidence in the record reaches the minimum required to permit the conviction of Riley.

12. On another ground, however, the Board concludes that the conviction of Riley ought to be set aside. In his confession as related both by Captain Lock (p. 37) and by First Sergeant Syrcle (p. 41), Bonner stated that the proceeds of the sale were to be divided three ways, that he (Bonner) gave \$1.50 to Judd, but that he preferred not to say to whom the other share was to go. The Manual for Courts-Martial says (par. 114 c):

* * * The acts and statements of a conspirator, however, done or made after the common design is accomplished or abandoned, are not admissible against the others, except acts and statements in furtherance of an escape. * * *

"The fact that a confession or admission of one conspirator is inadmissible against the others does not prevent the use of such confession or admission against the one who made it, but any such confession or admission can not be considered as evidence against the others. The effect of an unsworn statement made by one of several joint offenders at the trial is likewise to be confined to the one who made it."

In Dig. Ops. JAG 1912-30, paragraph 1294, it is said:

"Two accused, Privates W and Y, were tried jointly for larceny. No conspiracy was shown. A confession by W was properly admitted as against him, but this confession was inadmissible as against Y. C.M. 153877 (1922)."

Pursuant to the above principle, the statements made by Bonner above summarized were admissible against him alone and ought not to have been considered against the other two. This is obviously necessary and just, because, if Bonner's statement is to be considered against Judd and Riley, it amounts to the use of his statement as testimony against them although he was not under oath or subject to cross-examination by

them. The court was not cautioned, as it ought to have been, that the confession or admissions of each accused were to be considered against him alone. Neither can it be assumed that the court knew of the provisions in the manual and digest just quoted and applied them, because the prosecution in its closing argument without objection or interruption contended (p. 44):

** * * (5) Proceeds were to be divided three ways, (6) Judd received his share, (7) Bonner had his share. Whether or not Riley was actually paid his share was not determined. * * * It is possible that Bonner did not have time to pay Riley his share. It seems reasonable to conclude that Riley, who was a fairly intelligent soldier, would not take a package of another soldier, carry it down to a car without any idea of what he was doing. We must presume he stole it. Proof presented indicates beyond a reasonable doubt that all three defendants planned to steal the suit, sell it and share the proceeds. * * *."

In the argument thus quoted the prosecution, in violation of the principle that the confession or admission of one accused may not be used against the other, and in disregard of the passages quoted from the manual and the digest, based its argument tending to prove Riley's guilt on statements made in Bonner's confession. The receipt of Bonner's confession without any caution to the court that it must be considered against him alone and the argument by the prosecution tending to show Riley's guilt based on Bonner's confession were in the opinion of the Board infringements of the substantial rights of Riley such as to require setting aside his conviction, without regard to the question whether, if such errors had not been committed, the evidence against Riley would have been sufficient to support his conviction. The digests include many holdings of the Board of Review and opinions of The Judge Advocate General to the effect that improper argument may under certain circumstances require setting aside a conviction (Dig. Ops. JAG 1912-30, pars. 1363, 1417).

13. The question may be asked, if the introduction of Bonner's confession without a caution that it must be considered against him alone and the improper argument were infringements of Riley's rights and required that his conviction be set aside, why is not the same true with respect to Judd? The errors mentioned were also technical infringements of Judd's rights, but in the opinion of the Board such errors did not sub-

stantially injure him. The admissible evidence is far stronger against Judd than against Riley. It is shown that Judd obtained the automobile in which the trip to Manhattan was made against the will of the person in whose charge it was, drove it to Manhattan, was present when the sale was made, conferred with Bonner before Hofmann's offer of \$5 was accepted, received \$1.50 of the proceeds, and afterward lied as to where he had been. Sergeant Syrcle testified that Judd "admitted he knew the clothes were stolen" (p. 41). The Board considers the above evidence compelling, and feels certain that the same findings would necessarily have been reached as to Judd even if the errors mentioned had not been made.

14. The Board recognizes and follows the principle that, so far as its statutory duty is concerned, a conviction must stand or fall on the record of trial, and would reach the same conclusion as to Riley if the letters which it is about to mention had not been received; but it feels the more certain that that conclusion is right and just since receipt by it or two letters addressed to Captain L. H. Rockafellow, on duty at Headquarters Seventh Corps Area, and forwarded by that officer on behalf of the Commanding General to this office. One of these letters is signed by Judd and the other by Riley. As they both bear a rubber stamp "Inspected, Headquarters Military Police, Fort Riley, Kansas", it is clear that they were not smuggled out of the guardhouse. In his letter Private Judd says in part:

"* * * I wish to clear one of the fellows convicted with me who had nothing to do with this case. He is pvt Riley and I wish you would clear him as a result of the following statement.

(Statement)

"I (pvt Judd) took the suit out of the barracks myself and it was not in the thing that pvt Riley took out. The thing that Riley took out was some boot breeches and a pair of my riding boots so I asked Riley if he would go up and get them Then Riley Bonner and myself walked out to the car where I had previously put suit.

Bernard W Judd."

In his letter Riley says that he did not have possession of the suit and calls attention to the fact that it was not proved that he did. He also contends that he went on sick call, not to see the dentist as Sergeant Driskell testified, but: -

*** with an affliction which was serious enough to warrant my being confined to quarters for a period of 2 weeks immediately after being confined to the Guard-house; checking with sick call records will prove this. *** I went up to have my throat treated. I had trench mouth."

Riley admits carrying a suitcase and a barrack bag out of the barrack and says that they were the things Judd asked him to go up and get. Riley admits that he was to receive \$1.50 but says that it was to be in payment of an honest debt incurred earlier in the month. Both the above letters go into considerable detail and have every internal indication of veracity.

15. 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 Bonner and Judd, except the finding that they acted jointly and in pursuance of a common intent with accused Riley, and legally sufficient to support the sentences as to accused Bonner and Judd; but not legally sufficient to support the findings of guilty and the sentence as to accused Riley.

Archibald
_____, Judge Advocate.

George A. Hayes
_____, Judge Advocate.

George B. Campbell
_____, Judge Advocate.

