E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 839
CM ETO 1538

VOLS. 3-4

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 4 (ETO)

CM ETO 1100-CM ETO 1538

OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C.

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 4 B.R. (ETO)

including

CM ETO 1100 - CM ETO 1538

(1943-1944)

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CONTENTS OF VOLUME 4 B.R.(ETO)

ETO No.	CM No.	Accused	Date	Page
1400		Johnston	17 Feb 1944	267
1402	257054	Willison	26 Feb 1944	271
1403		Kummerle	24 Feb 1944	275
1404		Stack	16 Mar 1944	279
1405		Oliff	21 Feb 1944	285
1406		Pettapiece	25 Feb 1944	289
1408		Saraceno	17 Mar 1944	293
1409		Mieczkowski	16 Mar 1944	299
1411	262038	Riess	15 Feb 1944	303
1412	257059	Medeiros	29 Feb 1944	307
1413	257058	Longoria	25 Feb 1944	311
1414	264494	Elia	2 Mar 1944	315
1415	262039	Cochran	29 Feb 1944	321
1432	256427	Good	1 Mar 1944	325
1447		Scholbe	6 Mar 1944	331
1453	268994	Fowler	26 Apr 1944	337
1479	258076	Shipley	16 Mar 1944	353
1486		MacDonald, MacCrimmon	24 May 1944	357
1515	262040	Smith	6 Mar 1944	375
1519	258086	Bartel	7 Mar 1944	381
1535		Cooper	8 Mar 1944	385
1538	258071	Rhodes	12 Apr 1944	391

(1)

Branch Office of The Judge Advocate General
with the European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1100

15 JAN 1944

U N I T E D S T A T E S	5TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Camp Ballyedmond, County Down, Northern Ireland, 1 December 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOSEPH (NMI) SIMMONS (15013511), Headquarters Company, 2nd Battalion, 10th Infantry.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Joseph Simmons, Headquarters Company, 2d Battalion, 10th Infantry, did, without proper leave, absent himself from his organization and station at Tidworth Barracks, England, from about 2400 hours, 21 September, 1943; to about 1800 hours, 29 September, 1943.

CHARGE II: Violation of the 69th Article of War.
Specification: In that Private Joseph Simmons, Headquarters Company, 2d Battalion, 10th Infantry, having been duly placed in confinement at Camp Ballyedmond, Northern Ireland, on or about 13 October, 1943, did, at Camp Ballyedmond, Northern Ireland, on or about 22 October, 1943, escape from said confinement before he was set at liberty by proper authority.

(2)

CHARGE III: Violation of the 58th Article of War.
Specification: In that Private Joseph Simmons, Headquarters Company, 2d Battalion, 10th Infantry, did, at Camp Ballyedmond, Northern Ireland on or about 22 October, 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Belfast, Northern Ireland on or about 8 November, 1943.

ADDITIONAL CHARGE I: Violation of the 93d Article of War.
Specification: In that Private Joseph Simmons, Headquarters Company, 2d Battalion, 10th Infantry, did, at Belfast, Northern Ireland, on or about 8 November, 1943, with intent to commit a felony, viz, robbery, commit an assault and battery upon Bernard McKeating by willfully and feloniously grabbing hold of and offering and threatening to strike and stab the said Bernard McKeating in the body with an open dagger-like knife.

ADDITIONAL CHARGE II: Violation of the 96th Article of War.
Specification: In that Private Joseph Simmons, Headquarters Company, 2d Battalion, 10th Infantry, did, at Belfast, Northern Ireland, on or about 8 November 1943, unlawfully carry a concealed weapon, viz, a dagger-like knife.

He pleaded guilty to charges I and II and their respective specifications; to the specification, Charge III, guilty "except the words 'desert' and 'in desertion', substituting therefor, respectively, the words 'absent himself without leave from' and 'without leave'," of the excepted words not guilty, of the substituted words guilty; to charge III, not guilty but guilty of violation of the 61st Article of War; and not guilty to Additional Charges I and II and their specifications. He was found guilty of all the charges and specifications. Evidence of three previous convictions was introduced: one by special court-martial for cutting a tarpaulin with a knife, one by general court-martial for use of threatening language towards a superior officer and for carrying a concealed weapon and one by summary court for absence without leave for five days. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 30 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. At the opening of the trial, accused introduced the officer who investigated the charges against him as his individual counsel. The trial judge advocate immediately announced in open court that that officer would be called as a witness for the prosecution (and he was so called) and asked the accused if he still wished him to act as his individual counsel, whereupon the accused again stated that he did desire him to act as counsel. The Board of Review finds this procedure legal and proper.

4. 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.

5. The charge sheet shows the accused is twenty-two years and three months of age. Confinement in a penitentiary is authorized for the offense of desertion during time of war (AW 42) and also for assault with intent to commit robbery (18 USCA, sec.455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is correct (WD, Circular #291, 10 November 1943, sec.V, par.3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(4)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 15 JAN 1944 TO: Commanding General, 5th Infantry Division, APO 5, U.S. Army.

1. In the case of Private JOSEPH (NMI) SIMMONS (15013511), Headquarters Company, 2nd Battalion, 10th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. As the effect upon the rights of citizenship of conviction by court-martial of desertion from the military services in time of war is fully covered by Federal statutes, it appears both unnecessary and inadvisable to mention or include it again in either the action or the General Court-Martial order.

3. The sentence herein is excessive and unjustifiable for the offenses under the circumstances shown by the record of trial. His case will be re-examined in Washington and, I believe, will result in a very considerable reduction in the sentence. In order to comply with instructions in reference to uniformity of sentences, and so that this theater may not be subject to criticism for returning prisoners to the United States with indefensible sentences which require immediate clemency action by the War Department, I recommend that a substantial part of the sentence be remitted. If this be done, the signed action should be returned to this office for file with the record of trial.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1100. For convenience of reference please place that number in brackets at the end of the order: (ETO 1100).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1103

20 DEC 1943

U N I T E D S T A T E S	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private WOODROW (NMI) BURNS (15046087), Detachment "A", Headquarters Company, Headquarters Command, Services of Supply, ETOUSA.	Trial by G.C.M., convened at London, England, 19 November 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Woodrow Burns, Detachment "A" Headquarters Company, Headquarters Command, Services of Supply, ETOUSA, did, at London, England on or about 24 September 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Birmingham, England on or about 24 October 1943.

CHARGE II: Violation of the 69th Article of War.
(Finding of Not Guilty).
Specification: (Finding of Not Guilty).

CHARGE III: Violation of the 93rd Article of War.
Specification 1. In that Private Woodrow Burns, Detachment "A" Headquarters Company, Headquarters Command, Services of Supply, ETOUSA, did, at London, England, on or about 14 September 1943, feloniously take, steal, and carry away six pounds (£6) in English money, of the value of about twenty-four dollars
* ($24.00), ~~ten dollars ($10.00) in the money of the United States,~~ the property of Private First Class Anthony F. Barbano, Headquarters Detachment, Services of Supply, ETOUSA.
* amended by V.O. of appointing authority, JMC.,T.J.A.

Specification 2. In that Private Woodrow Burns, Detachment A Headquarters Company, Headquarters Command, Services of Supply, ETOUSA, did, at London, England, on or about 17 September 1943, feloniously take, steal, and carry away seven pounds (£7) in English money, of the value of about twenty-eight dollars ($28.00), one dollar ($1.00) in money of the United States, one leather wallet and personal papers of the value of about one dollar ($1.00), the property of Staff Sergeant Kenneth H. Gerber, Headquarters Detachment, Services of Supply, ETOUSA.

Specification 3. In that Private Woodrow Burns, Detachment "A" Headquarters Company, Headquarters Command, Services of Supply, ETOUSA, did, at London, England, on or about 17 September 1943, feloniously take, steal, and carry away five pounds (£5) in English money, of the value of about twenty dollars ($20.00), one wallet and personal papers, of the value of about one dollar ($1.00), the property of Private First Class William R. Crowder, Headquarters Detachment, Services of Supply, ETOUSA.

He pleaded not guilty to all charges and specifications and was found guilty of Charges I and III and of their respective specifications, and not guilty of Charge II and its Specification. Evidence of one previous conviction by summary court for absence without leave for 16 days was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 30 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the approved sentence.

4. The charge sheet shows that the accused is 24 years 11 months of age. Confinement in a penitentiary is authorized for the offense of desertion during time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is correct (WD, Circular #291, 10 November 1943, sec.V,3a).

Judge Advocate

Judge Advocate

Judge Advocate

(8)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 20 DEC 1943 TO: Commanding General, Central Base Section, SOS, ETOUSA, APO 887, U.S. Army.

1. In the case of Private WOODROW (NMI) BURNS (15046087), Detachment "A" Headquarters Company, Headquarters Command, Services of Supply, ETOUSA, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, and the sentence as approved by the reviewing authority, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1103. For convenience of reference please place that number in brackets at the end of the order: (ETO 1103).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1107

24 DEC 1943

U N I T E D S T A T E S	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
First Lieutenant JOHN JOSEPH SHUTTLEWORTH (O-1101213), Company C, 346th Engineer General Service Regiment.	Trial by G.C.M., convened at Watford, Hertfordshire, England 20 November 1943. Sentence: To be dismissed the service.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 96th Article of War.

Specification: 1. In that First Lieutenant John Joseph Shuttleworth, Company "C", Three Hundred and Forty Sixth Engineer General Service Regiment, was, at Kings Langley, Herts, England, on or about 28 September 1943, drunk while driving a vehicle.

Specification: 2. In that First Lieutenant John Joseph Shuttleworth, Company "C", Three Hundred and Forty Sixth Engineer General Service Regiment, did at Watford, Herts, England, on or about 28 September 1943, wrongfully take and use, without lawful permission, a certain automobile, to wit: a Government Vehicle, No. 2083712, the property of the United States, of a value of more than fifty dollars ($50.00).

He pleaded not guilty to and was found guilty of the Charge and of its specifications. Evidence of one previous conviction on 4 May 1943 by General Court-Martial for being drunk and disorderly in uniform in a public place in violation of Article of War 96 was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding Officer, Eastern Base Section, SOS, ETOUSA approved the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½. The Board of Review has treated the record of trial as if forwarded by the reviewing authority under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution was in substance as follows:

It was stipulated that Government vehicle No. 2083712 was property of the United States and of a value of more than 50 dollars (R10).

Prior to 28 September 1943, Captain Louis B. Zurborg, Company C, 346th Engineer General Service Regiment, accused's immediate commanding officer, called the officers of the company together and informed them that no vehicle would be removed from the company motor park after 1800 hours without his permission. Accused was present when this order was given (R6). Use of vehicles after 1800 hours was not prohibited but pursuant to regimental orders a weekly report was forwarded to regimental headquarters concerning vehicles used after that hour (R6,8). Also by virtue of regimental orders, officers were allowed to drive vehicles "on the actual works site" but enlisted personnel assigned by the regiment were to drive them elsewhere (R6-7). On the night of 28 September 1943 accused's company was stationed in Watford at Cassiobury Park. He was the senior officer then present in his company, was duty officer in charge of the camp, and had no duties other than at Cassiobury Camp (R7,9). It was customary for the junior officers to arrange among themselves who should be duty officer on any night and a system of "Rotation by roster" was maintained (R9). An arrangement existed in the various companies of the battalion whereby one officer could substitute as duty officer for another, but Captain Zurborg, who was not in camp on the evening of 28 September, did not know whether accused had arranged for anyone to take his place (R8-9). The company had one jeep, the last three digits of its number being "712" (R7). It was not required that a duty officer obtain Captain Zurborg's permission to use a vehicle after 1800 hours (R9), and on the evening of 28 September accused did not ask the captain's permission to use the company "jeep" outside the area, nor was any such permission granted (R7). Accused had been assigned to the company about 1 May 1943 and as far as Captain Zurborg's knowledge was concerned, the character of the performance of his duties was "very good" (R7-8).

About 10:15 or 10:20 p.m., 28 September 1943 Michael Dunham, 13 Belham Road, Kings Langley, Hertfordshire, England, was cycling through

Kings Langley when he was overtaken by a jeep which was "swerving from side to side". For about 25 yards the driver slowed down, then turned and went to the right of the road into a hedge, reversed on to the pavement and turned the car towards Watford. He then reversed again and turned towards Kemel Hempstead. The back wheel was "knocking" and was dented. Dunham asked the driver, who was the only one in the vehicle, what the matter was and he replied "I am drunk". He staggered and his speech was blurred. The distance from Watford to the scene of the occurrence was five miles. At the trial when asked if he knew accused, Dunham testified that he knew his name. Asked if he recognized him he testified "It is difficult to say, he had his working clothes on, it was dark at the time". At the conclusion of his testimony the president of the court asked accused to stand and asked Dunham if he was the man who had been driving the car. Dunham replied "Yes, I think it is now but at the time his hair was all fair. He had nothing on his hair. His hair was not done" (R10-13).

Police Constable Ernest S. Stone, stationed at Kings Langley, arrived at the scene about 11:30 p.m. and saw a vehicle numbered 2083712, the right rear wheel of which was "buckled". Accused, whom he identified at the trial, was attempting to use the telephone in a kiosk. He smelled strongly of intoxicants, was unsteady, and his manner of speech convinced Stone that he was drunk and "not in any fit state to be in charge of a vehicle on a public road" (R13-14). The road was 24 feet wide where the accident occurred (R20).

About 10:35 p.m. that evening Special Constable Herbert H. Healey, 36 Blackwell Road, Kings Langley, was summoned to the scene and found the car in the middle of the road, "Lieutenant Shuttleworth" in the call-box, smelling very strongly of alcohol and using "some very bad language. *** he was blessing our telephone communications in general, giving them a good old leg up. *** he was giving them that the thing was no good and all the rest of it." It was Healey's opinion that he was "under the influence of drink". He said that he was going to drive back to Watford, got in and started the vehicle but then immediately obeyed Healey's order to get out of the car. Asked at the trial if he knew accused's name Healey replied "Lieut. Shuttleworth". When asked if he saw him in court he testified "I am afraid I cannot recognize the gentleman here this morning anyway. When I last saw the accused he had his hair ruffled and he looked anything other than an American Lieutenant". At the conclusion of the cross-examination of the witness, the president of the court said "Accused please stand. Who is that person?" Healey replied "That is the accused" (R15-16).

After midnight Captain Hiram P. Bamberger, 978th Military Police Company, arrived at the scene and accused admitted to him that he had been driving the vehicle. There was an odor on his breath and "*** it was indisputable that he had been drinking". However, Captain Bamberger could not say that he was drunk. "I would not say that he was entirely

drunk, but too drunk to drive a car". He was wearing what appeared to be a pair of moccasins. He was not placed under arrest at that time (R17-19).

In the opinion of Corporal Charles H. Hurley, 978th Military Police Company, who arrived at the scene between 10:15-10:30 p.m., accused was then under the influence of liquor and although his speech was normal, he was not in condition to drive a vehicle. There was an odor of alcohol about him. The right rear wheel of the car was broken off at the base of the cone and the lugs were stripped. The scene of the accident was between six and eight miles from Watford. (R19-20).

4. For the defense, Second Lieutenant John K. Petty, Company B, 346th Engineer General Service Regiment, testified that a little after 6:00 p.m. 28 September, about four or five officers, including accused, gathered together before dinner. "There was a quart bottle on the table *** I didn't see everybody take a drink, but I figure they took about one, maybe some of them took two, but I don't think they took more than that". After supper Lieutenant Petty "heard the bottle open" but he did not know whether it was entirely consumed during the evening. Between 8:00-9:00 p.m. accused said "*** he had to go but he was duty officer, so I was sitting around and was not going out, so said 'If you want to go, go ahead and I will do it'". Accused's speech was then "alright", and when he left about 10:00 p.m. he did not stagger, was not drunk, and in Lieutenant Petty's opinion was capable of driving a car. Although accused had been drinking with the other officers, Lieutenant Petty did not know how much he had consumed. A Lieutenant Oyler was present that evening but was in the hospital at the time of the trial (R22-24).

The prosecution and defense then stipulated that if Second Lieutenant Jack E. Oyler, Company B, 346th Engineer General Service Regiment, were present in court and sworn as a witness he would testify as follows:

> " . In reference to Lt. Shuttleworth, 1st Lt. Co.'C' 346th Engr Gen Serv Regt, on or about Sept. 28, 1943 at about 2130 hours. He was not drunk to my knowledge." (R24).

The record of trial then recites:

> "The court was reminded that it was not necessary to accept this stipulation and that the ruling was made that the stipulation be not accepted. The President pointed out, in explanation, that several witnesses had testified to the condition of the accused and it was unusual to bring a stipulation of that nature into the court." (R25).

The defense then stated:

> "It is merely corroborative testimony, if there is more than one person there able to testify the accused would like the benefit of their testimony." (R25).

The record recites that the court closed and on re-opening "objected to the stipulation being introduced" (R24-25).

Second Lieutenant Cleveland Romero, Company B, 346th Engineer General Service Regiment, testified that "we all took a drink before supper" and that upon the officers' return to the hut "there was some left in the quart and it was passed around again". It was then about 8:30 or 9:00 p.m. Lieutenant Romero went to bed at 9:30 p.m. and accused was not drunk at that time (R25-26).

Accused, having been advised of his rights elected to remain silent (R26).

4. Errors and irregularities.

(a) On direct examination Captain Bamberger testified that accused admitted to him that he had driven the car. The defense objected and stated that it should be shown that accused had been cautioned as to his rights. The law member sustained the objection and the defense then moved that the court not consider the testimony concerning accused's admission. Captain Bamberger then testified on direct examination that the "statements" were voluntarily given but that he did not advise accused of his rights at that time. The court closed and upon being opened the president announced that the objection was not sustained (R17). The statement by accused that he had been driving the car was an admission only, and as such it was properly received in evidence without any showing of its voluntary nature (CM 227793, Anderson; CM ETO 804, Ogletree et al; MCM., 1928, par.114b, p.117).

(b) On direct examination Lieutenant Romero was asked if he had any idea how many drinks accused might have had that evening. The president of the court stated: "The number of drinks has nothing to do with whether the man was drunk or not" (R26). The president's statement was manifestly an expression of personal opinion. The number of drinks which accused consumed during the evening, his meeting with Dunham having occurred about 20 minutes after his departure, had a material bearing on the issue of drunkenness and the witness should have been allowed to answer the question.

(c) When asked if he recognized accused, Dunham testified: "It is difficult to say, he had his working clothes on, it was dark at the time". At the conclusion of the testimony the president told accused to

stand and then asked Dunham if he was the man who had been driving the car. He replied "Yes, I think it is now ***", and testified as to a difference in the condition of accused's hair (R10,13). When asked if he saw accused in court, Constable Healey testified "I am afraid I cannot recognize the gentleman here this morning anyway ****" (R15). At the conclusion of the cross-examination of Healey, the president of the court said "Accused please stand. Who is that person?" Healey replied "That is the accused" (R16). Both witnesses had testified that they knew accused's name to be Lieutenant Shuttleworth (R10,16). Although it was beyond all question established by the evidence that accused was the man involved in the commission of the offenses alleged, the action of the president in pointedly directing the attention of the two witnesses to accused in the manner disclosed by the record was improper and is a practice not to be condoned. However, the action of the president in ordering accused to present himself for identification did not violate the prohibition of the Fifth Amendment to the Federal Constitution against compelling one to give evidence against himself (MCM., 1928, par.122b, p.130; Holt v. United States, 218 U.S. 245, 54 L.Ed. 1021).

(d) From the record of trial it appears that the witnesses were excused upon the completion of their testimony, but it is not stated therein that they withdrew from the court room.

(e) The refusal of the court to accept the stipulation that if Lieutenant Oyler were present in court and sworn he would testify that at 9:30 p.m. accused was not drunk to his knowledge, was plainly erroneous (R25). A stipulation need not be accepted by the court nor is the court bound by a stipulation even if received (MCM., 1928, par.126b, p.136). However, the issue as to whether accused was drunk while driving the vehicle was one of fact and was, of course, of paramount importance with respect to the question of his guilt or innocence of the offense alleged. When the stipulation was offered in evidence, the president of the court remarked that "*** several witnesses had testified to the condition of accused and it was unusual to bring a stipulation of that nature into court". Five witnesses had then testified adversely to accused with respect to the issue of intoxication, and the evidence of but one witness which was beneficial to accused had been produced by the defense. Stipulations similar in character to the one offered are commonly admitted in trials by courts-martial. Although the accident occurred about 10:20 p.m. and the time involved in the proffered stipulation was 9:30 p.m., evidence as to accused's sobriety at 9:30 p.m. was material to the issue and the stipulation should have been admitted. The court did receive in evidence the testimony of two witnesses for the defense that accused was not drunk about 9:30 p.m. and 10:00 p.m. respectively. However, in view of the clear, convincing and detailed testimony by several witnesses as to the fact of accused's intoxication at the time of the accident and shortly thereafter, and his actual admission to one such witness that he was drunk, the Board of Review is of the opinion that the refusal of the court to admit the stipulation as

to Lieutenant Oyler's testimony did not injuriously affect the substantial rights of accused.

(f) The review of the Staff Judge Advocate of the Eastern Base Section, SOS, ETOUSA refers to other irregularities appearing in the record of trial. Further comment thereon is unnecessary.

The foregoing errors and irregularities when considered in solido did not injuriously affect the substantial rights of accused.

6. The evidence clearly established accused's guilt of the offense alleged in Specification 1 of the Charge (driving a vehicle while drunk). The accident occurred about 10:20 p.m. He admitted to Dunham at the time that he was drunk. He staggered and his speech was blurred. According to Corporal Hurley who arrived at the scene before 10:30 p.m., accused was under the influence of liquor, had an odor of alcohol about him and although his speech was normal, he was not in condition to drive a vehicle. Special Constable Healey was summoned to the scene about 10:35 p.m. and testified that accused smelled very strongly of alcohol, was very profane and "was under the influence of drink". According to Constable Stone who arrived about 11:30 p.m., accused smelled strongly of intoxicants, was unsteady, and his manner of speech indicated that he was drunk and not in a fit state to drive. Captain Bamberger, who did not arrive until after midnight testified that "*** it was indisputable that he had been drinking," and that there was an odor on his breath. The Captain could not say that accused was drunk but did testify that he was "too drunk to drive a car". Two witnesses for the defense testified that accused was not drunk at about 9:30 and 10:00 p.m. The question of drunkenness was one of fact for the sole determination of the court. There is substantial competent evidence to sustain the findings of the court, therefore the Board of Review can not disturb the same (CM 145791 (1921), CM 161833 (1924), CM 192609, Rehearing (1930, Dig.Ops.JAG.,1912-40, sec.408(2), p.259). The evidence is legally sufficient to support the findings of guilty of Specification 1 of the Charge.

7. With reference to Specification 2 of the Charge (wrongfully taking and using a Government vehicle without lawful permission), accused was duty officer on the evening of 28 September. There was no evidence that he accepted the offer of Lieutenant Petty to take his place in that capacity. It is true that the duty officer was not required to secure the permission of Captain Zurborg to use a vehicle after 1800 hours. However, it was established by the evidence that as duty officer that evening, accused had no duties other than in Camp Cassiobury at Watford. Furthermore, by virtue of regimental orders officers were allowed to drive vehicles only "on the actual works site" but enlisted personnel assigned by the regiment were to drive them elsewhere. Accused was driving the vehicle between five and eight miles away from Watford while he was in a drunken condition. The evidence showed that when questioned by Dunham he was the only one in the vehicle. The foregoing evidence was legally sufficient to support the findings of guilty of Specification 2 of the Charge.

8. The charge sheet shows that accused is 29 years of age and enlisted in the regular army 3 October 1938. He served from 3 October 1938 to about December 1938 in the 29th Engineers (Topographic); from December 1938 to August 1939 in the 65th Engineer Company (Topographic); from August 1939 to March 1940 in the 4th Engineer Battalion (Combat); and from March 1940 to June 1942 as first sergeant at Fort Belvoir, Virginia in the ERTC. He was commissioned a second lieutenant in the Army of the United States on 24 June 1942.

9. The court was legally constituted and had jurisdiction of the person and offenses. 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. Dismissal is authorized upon conviction of violation of Article of War 96.

B. Franklin Ritter Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 DEC 1943 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of First Lieutenant JOHN JOSEPH SHUTTLEWORTH (O-1101213), Company C, 346th Engineer General Service Regiment, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1107. For convenience of reference please place that number in brackets at the end of the order: (ETO 1107).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 29, ETO, 27 Dec 1943)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871.

BOARD OF REVIEW

ETO 1109

19 APR 1944

U N I T E D S T A T E S	1ST INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Palma Di Montechiaro, Sicily, 27 September 1943. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. NATOUSA Disciplinary Training Center, Casablanca, French Morocco.
Private ROY (NMI) ARMSTRONG (6664798), Battery "A", 7th Field Artillery Battalion.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentence in part. The record has now been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private Roy Armstrong, Battery A, 7th Field Artillery Battalion, did, at Enna, Sicily, on or about 22 July 1943, while before the enemy, by his misconduct in becoming drunk and disorderly, endanger the safety of his Battery, which it was his duty to defend.

Specification 2: In that Private Roy Armstrong, Battery A, 7th Field Artillery Battalion, did, at Enna, Sicily, on or about 22 July 1943, while before the enemy, by his misconduct in becoming so drunk he was unable to perform his duties as a cannoneer, endanger the safety of his Battery, which it was his duty to defend.

He pleaded not guilty to and was found guilty of the Charge and its specifications. Evidence of four previous convictions by summary courts-martial was introduced: one for two unauthorized absences of four days and five days respectively, one for two days absence without leave, both in violation of the 61st Article of War; one for five and a half hours absence without leave and breaking quarantine, and one for three days absence without leave and breaking quarantine, both in violation of the 61st and 96th Articles of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 20 years. The reviewing authority approved the sentence, ordered its execution, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the NATOUSA Disciplinary Training Center, Casablanca, French Morocco as the place of confinement.

The proceedings were published in General Court-Martial Order No. 83, Headquarters 1st U.S. Infantry Division, APO 1 dated 9 December 1943.

3. Testimony of witnesses for prosecution summarizes as follows:

Corporal Spero Gianakouros, Headquarters Company, 1st Infantry Division, testified that on the afternoon of July 22, 1943, while on a motor patrol with Private Otello Casistrini in the town of Enna, Sicily, he was stopped by a civilian. As a result of an ensuing conversation with the civilian, Gianakouros and Casistrini accompanied the civilian to a house. After some delay the door was opened by a woman who pointed to a soldier in the room who was carrying a rifle and was engaged in opening the drawers of a bureau. The soldier was disarmed by Gianakouros (R5). He was in a dazed condition, talking incoherently, and his breath smelled of liquor. In his right hip pocket was a pair of cheap opera glasses (R6). This soldier was the accused Armstrong (R7). He resisted removal from the house. When placed in a jeep to be taken to the police station a civilian asserted that a watch had been taken from him by accused, which was later found on accused and returned to the owner (R6). At the military police station in Enna, a civilian pointed to him and started speaking in Italian. The two men seemed to recognize each other. There were indications that accused was responsible for breaking a rifle belonging to the civilian. Subsequently, accused was taken back to his "outfit". As Gianakouros was leaving the battery a commotion arose. Someone said, "look out, he's going for a stack of rifles." Armstrong ran up a hill, but a noncommissioned officer took hold of him. He cursed the men forming the police escort and threatened them (R7). In the opinion of Gianakouros accused was so drunk he was incapable of performing his duties and did not know what he was doing (R8).

Private Otello Casistrini, Headquarters Company, 1st Infantry Division, corroborated Gianakouros' testimony with respect to the discovery of accused, the incidents connected therewith and his condition. In his opinion accused was drunk (R10-13).

Private First Class Harris, Headquarters Company, 1st Infantry Division, testified that he was one of the party which returned accused to his organization. He corroborated Gianakouros' testimony with respect to Armstrong's actions and conduct after arriving at the battery location. Harris expressed the opinion that accused was drunk while at the police station and after arrival at the location (R13,14).

Captain Lemuel D. Thomas, Jr., Commander of Battery "A", 7th Field Artillery Battalion, identified accused as a member of his organization on 22 July 1943, and stated that on that day his battery was about 1000 yards south-east of Enna in tactical support of the 16th Infantry. It was in position, layed and ready to fire though no firing was done. The Canadians, located about 10,000 yards to the right of Battery A, had run into opposition and were conducting the nearest firing (R15). Captain Thomas' battery could fire 12,500 yards. It was in the line, on continuous alert and did not know when it would be called on to fire. The action was not out of range of the battery. It was about 10,000 yards distant, but in order to be effective it would have been compelled to fire close to the city of Leonforte within the Canadians' sector (R17). It had not fired within the previous few days and two days later moved forward through Enna and Calsibetta to Villa Rosa some 20 miles without having fired a shot (R17,18). The military police brought accused to Captain Thomas about four o'clock in the afternoon. He was unsteady on his feet and definitely had been drinking. He was cursing and disorderly. He was in no condition to perform his duties as a cannoneer as he might have cut fuses so that the shots would have fallen short. Accused did not have permission to leave the area. The battery needed every man (R16).

First Lieutenant Richard J. Nelson, 7th Field Artillery Battalion, stated that he was present on 22 July at Battery A location when accused was brought before Captain Thomas. His eyes were blood-shot and he was unsteady. He had been drinking and was drunk. He swore in the presence of the battery commander who cautioned him against such conduct (R20). The witness would not have entrusted accused with any duties as he was not in a condition to perform them (R21).

4. The defense presented the following witnesses whose testimony was as follows:

Sergeant Lionel J. La Plante, Battery "A", 7th Field Artillery Battalion, in whose charge accused was placed by the battery commander on his return to his unit on 22 July, stated that at that time accused's condition showed he had been drinking because he was unsteady on his feet; otherwise he appeared normal and gave no trouble (R22-23). He left his unit about noon and was returned at approximately three o'clock in the afternoon. His absence was not reported (R24).

Sergeant Ernest E. Oakes, Battery "A", 7th Field Artillery Battalion, testified he was at the battery location on 22 July when the military police returned accused to the battery. From a distance of 25 feet he observed accused who showed he had been drinking as he was unsteady on his feet; otherwise he appeared to know what he was doing and seemed to

understand what the battery commander said to him when he was placed under arrest (R25).

Accused elected to remain silent.

5. (a) Accused was brought to trial upon two specifications laid under the 75th Article of War which charge that he did, while before the enemy:

Specification 1

"by his misconduct in becoming drunk and disorderly, endanger the safety of his Battery, which it was his duty to defend".

Specification 2

"by his misconduct in becoming so drunk he was unable to perform his duties as a cannoneer, endanger the safety of his Battery, which it was his duty to defend".

It is difficult to ascertain the intention of the accuser in his attempt to divide accused's misconduct into two separate offenses. The evidence shows that there was but one transaction. Proof of his inability to perform his duties as cannoneer of the battery would have been admissible to show that in becoming drunk and disorderly he endangered the safety of his battery. The pleader split one offense into separate episodes. This is opposed to principles of good pleading.

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. Thus a soldier should not be charged with disorderly conduct and for an assault when the disorderly conduct consisted in making the assault, * * *." (MCM, 1928, par. 27, p.17; CM 120542 (1918), Dig.Op.JAG, 1912-1940, sec.428(5), p.294).

There was but one offense charged, viz: misbehavior before the enemy which consisted of becoming drunk and disorderly to the extent that he was unable to perform his duties as cannoneer of the battery.

(b) A diagrammatic visualization of the pertinent provisions of the 75th Article of War will be helpful in considering the offenses with which accused is charged:

AW 75

	)	(1) misbehaves himself			
	)	(2) runs away			
	)	or			
Any officer	) before	(3) shamefully abandons	)	any fort	) which it is
	)	or	)	post	)
or	) the	(4) delivers up	)	camp	) his duty
	)	or	)	guard	)
soldier	) enemy	(5) by any (a) miscon-	) endangers)	or	) to
	)	duct (b) disobe-	) the)	other	)
who	)	dience or (c)	) safety)	command	) defend
	)	neglect	) of)		)

Undoubtedly the specifications in the instant case were based upon form 48, p.244 of the Manual for Courts-Martial, 1928. Comparing them with the relevant component parts of the Article it is manifest that they coincide with the following reconstructed clause of the Article:

> "Any * * * soldier, who, before the enemy, * * * by any misconduct * * * endangers the safety of any * * * command which it is his duty to defend,"

Clearly the accuser had the aforesaid provision of the statute in mind when he prepared the specifications. Does such intention of the draughtsman confine the prosecution to proof of an offense under the said clause of the Article if the specifications contain allegations of fact which constitute offenses under some other clause or provision of the statute? The principle governing such situation is announced thus:

> "We must look to the indictment itself, and if it properly charges an offense under the laws of the United States that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute" (Williams v. United States, 168 U.S. 382, 42 L.Ed., 509,512).

> "* * * the statute on which an indictment is found is determinable, as a matter of law, from the facts charged, and they may bring the offense charged within an existing statute, although the same is not mentioned, and the indictment is brought under another statute." (Vedin v. United States, 257 Fed. 550,551).

As further upholding this principle see: United States v. Nixon, 235 U.S. 231, 59 L.Ed., 207,209; Wechsler v. United States, 158 Fed. 579,583; Farley v. United States, 269 Fed. 721,722.

(24)

As a corollary to the above doctrine it is firmly established that:

> "If the pleader omits an essential element, the case fails because the pleader cannot shorten the law. If he includes all the essential elements and more, again the pleader cannot enlarge the law, and the case will be sustained and the law vindicated by ignoring the unessential allegations" (Meyer v. United States, 258 Fed. 212,215).

(See also Fall v. United States, 209 Fed. 547,551; 31 C.J., sec.306, p.748).

The phrase "which it was his duty to defend" may be rejected as surplusage inasmuch as the remaining allegations state facts sufficient to constitute an offense under the clause of the Article which declares that "any * * * soldier who, before the enemy, misbehaves himself" is guilty of an offense (CM ETO 1249, Marchetti).

The specifications, as consolidated and reconstructed under the authority of the foregoing rules of law, therefore become one specification as follows:

> "Armstrong did, at Enna, Sicily on or about 22 July 1943, while before the enemy, misbehave himself by becoming drunk and disorderly to such degree that he was unable to perform his duties as cannoneer."

6. Considering the case upon its merits the Board of Review is of the opinion that the record is legally sufficient to sustain the findings of guilty (CM ETO 1249, Marchetti; CM ETO 1404, Stack; CM ETO 1659, Lee).

7. With propriety a criticism may be made of the specifications in the instant case. The evidence beyond contradiction proves that accused was guilty of quitting his station for the purpose of plundering and pillaging and did in fact pillage and plunder certain inhabitants of Enna. These facts were made obvious by the preliminary investigation. Accused should have been charged with such offense. It was easy to allege and easy to prove. Much time and effort would have been saved, and the complicated legal problems involved in this case under the present specifications would not have arisen. This situation emphasizes again the importance of exercise of care and a sense of discrimination by a staff judge advocate in the preparatory stage of a case. The Board of Review is constantly required to consider important and critical legal issues in the cases coming before it which would have never arisen had the evidence adduced by the investigation been properly analyzed and the charges drafted consistent with the same. With the greatly increased volume of work now imposed upon the Assistant Judge Advocate General and the Board of Review

the intelligent and efficient co-operation of the staff judge advocates in the preparation of their cases is imperative.

8. The charge sheet shows that accused was 26 years ten months of age. He enlisted 14 December 1937 at Fort Benjamin Harrison, Indiana. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offenses. 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.

10. The offenses of which accused was found guilty are strictly military offenses. Confinement in the NATOUSA Disciplinary Training Center, Casablanca, French Morocco, is authorized (AW 42).

B. Franklin Potter Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

20 JAN 1944

ETO 1134

U N I T E D S T A T E S v. First Lieutenant JOHN T. SCARBOROUGH (O-447774), Chaplain Corps, 5th General Hospital, formerly 392nd Engineers, and Technician Fourth Grade ROBERT J. ROUHIER (35259153), 1st Group Regulating Station.	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Taunton, Somerset, England, 19 November 1943. Sentence: SCARBOROUGH to be dismissed the service, total forfeitures and confinement at hard labor for two years: United States Penitentiary, Lewisburg, Pennsylvania; ROUHIER, dishonorable discharge, total forfeitures and confinement at hard labor for two years: The Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

SCARBOROUGH

CHARGE: Violation of the 93rd Article of War.
Specification: In that 1st Lieutenant John T. Scarborough, Chaplain's Corp, 5th General Hospital did at Bourne Hill Green, Wiltshire, England on or about 26 September 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per OS with T/4 Robert J. Rouhier, an enlisted man in the Army of the United States.

(28)

ROUHIER

CHARGE: Violation of the 93rd Article of War.
Specification: In that T/4 Robert J. Rouhier, 1st Group Regulating Station, TC, Southern Base Section, SOS, ETOUSA, did, at Bourne Hill Green, Wiltshire, England on or about 26 September 1943 commit the crime of sodomy by feloniously and against the order of nature permit 1st Lieutenant John T. Scarborough, Chaplain's Corp, 5th General Hospital, to have carnal connection per os with the said T/4 Robert J. Rouhier, an enlisted man.

Each pleaded guilty to and was found guilty of the respective Charge and Specification against him. No evidence of previous convictions was introduced. Lieutenant Scarborough 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 a period of two years. Technician Fourth Grade Rouhier was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a period of two years. The reviewing authority approved the sentences. He forwarded the record of trial as to Lieutenant Scarborough for action under Article of War 48; he designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement, and forwarded the record of trial as to Technician Fourth Grade Rouhier for action pursuant to the provisions of Article of War 50½. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence of Lieutenant Scarborough, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and withheld the order directing the execution thereof pursuant to Article of War 50½.

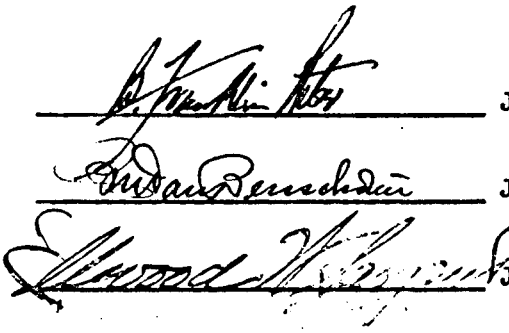
3. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences.

4. The charge sheet shows that the accused Scarborough is 36 years and 11 months of age. He was commissioned 21 April 1942;

The accused, Rouhier, is 23 years of age. He was inducted 3 January 1943, no previous service.

5. The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement of Lieutenant Scarborough and the

designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement of Technician Fourth Grade Rouhier are correct (WD, Circular #291, 10 November 1943, pars. 3a and 3b).



Judge Advocate

Judge Advocate

Judge Advocate

(30)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 20 JAN 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of First Lieutenant JOHN T. SCARBOROUGH (O-447774), Chaplain Corps, 5th General Hospital, formerly 392nd Engineers, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Attention is invited to the newly announced policy of the War Department in cases of this kind, (WD, Cir. #3, 3 January 1944), copy inclosed. This policy is effective immediately and applies to pending cases. This officer has already been examined by a medical board, and his resignation for the good of the service, dated 19 October 1943 is with the record of trial.

3. Please advise this office of the action finally taken. The file number of the record in this office is ETO 1134.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

2 Incls:
Incl.1 Record of trial.
Incl.2 Copy of Cir. #3, W.D.1944.

(So much of sentence of Lieutenant Scarborough as involves total forfeitures and confinement for two years remitted. As thus modified sentence ordered executed. GCMO 4, ETO, 29 Jan 1944)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 20 JAN 1944 TO: Commanding Officer, Southern Base Section, SOS, ETOUSA., APO 519, U.S. Army,(through the Commanding General, ETO).

1. In the case of Technician Fourth Grade ROBERT J. ROUHIER (35259153), 1st Group Regulating Station, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the newly announced policy of the War Department in cases of this kind (WD, Cir. #3, 3 January 1944), copy inclosed. This policy is effective immediately and applies to pending cases. Accused has already been examined by a medical board which recommended his discharge under the provisions of section VIII, AR 615-360, 26 November 1942.

3. This holding is forwarded with that in the case of Lieutenant Scarborough so that action in the two cases may be co-ordinated.

4. Please advise this office of the action finally taken. The file number of the record in this office is ETO 1134.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

2 Incls:
1 - Board of Review, ETO 1134, 20 Jan 44.
2 - Copy of Cir. #3, W.D. 1944.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1146

- 8 JAN 1944

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND.
v.	Trial by G.C.M., convened at The Guild Hall, Hull, Yorkshire, England, 3 December 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.
Private CLIFTON W. LANE (15085960), 1970th Quartermaster Truck Company Aviation.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 86th Article of War.
Specification: 1. In that Private Clifton W. Lane, 1970th Quartermaster Truck Company Avn being on Guard and posted as a sentinel at, an American and British Motor-pool, Hull, Yorkshire, England, on or about 1 November 1943, did leave his post before he was regularly relieved.

CHARGE II: Violation of the 96th Article of War.
Specification: 1. In that Private Clifton W. Lane, 1970th Quartermaster Truck Company Avn did, at Hull, Yorkshire, England, on or about 1 November 1943, wrongfully take and use without proper authority a certain automobile, to wit: a Three Fourth (3/4) ton Command Recon., property of the United States, of a value of more than ($50.00) Fifty Dollars.

He pleaded not guilty to and was found guilty of both charges and of the specifications thereunder. Evidence was introduced of two previous convictions by summary court-martial for absence without leave in violation of Article of War 61, and of one previous conviction by special court-martial for being drunk and disorderly in a public place and for striking a soldier with his fist in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence, reduced the period of confinement to three years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. 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 approved by the reviewing authority.

4. The charge sheet shows that accused is 21 years of age, that he had no prior service, and that he was inducted at Fort Benjamin Harrison, Indiana for the duration of the war plus six months. He has had one year, nine months and fourteen days of service.

B. Franklin Peters Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. -8 JAN 1944 TO: Commanding General, VIII Air Force Service Command, APO 633, U.S. Army.

1. In the case of Private CLIFTON W. LANE (15085960), 1970th Quartermaster Truck Company Aviation, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, and the sentence as approved by the reviewing authority, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1146. For convenience of reference please place that number in brackets at the end of the order: (ETO 1146).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1161

31 JAN 1944

U N I T E D S T A T E S	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JOHN H. WATERS (32337934), Engineer Model Makers Detachment.	Trial by G.C.M., convened at Watford, Hertfordshire, England, 29 November 1943. Sentence: To be hanged by the neck until dead.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private John H. Waters, Engineer Model Makers Detachment, EBS, SOS, ETOUSA, did, at Henley-on-Thames, Oxfordshire, England, on or about 14 July 1943, with malice aforethought willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Doris May Staples, a human being, by shooting her with a pistol.

CHARGE II: Violation of the 86th Article of War.
Specification: In that Private John H. Waters, Engineer Model Makers Detachment, EBS, SOS, ETOUSA, being on guard and posted as a sentinel at headquarters Engineer Model Makers Detachment, Henley-on-Thames, Oxfordshire, England, on or about 14 July 1943, did leave his post before he was regularly relieved.

CHARGE III: Violation of the 96th Article of War.
Specification: In that Private John H. Waters, Engineer Model Makers Detachment, EBS, SOS, ETOUSA, did, at Henley-on-Thames, Oxfordshire, England, on or about 14 July 1943, willfully maim himself in the head by shooting himself with a pistol, thereby unfitting himself for the full performance of military service.

He pleaded not guilty to and was found guilty of all charges and specifications, all members of the court concurring. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court concurring.

The reviewing authority, the Commanding Officer, Eastern Base Section, SOS, ETOUSA approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution was substantially as follows: -

On 14 July 1943 accused's organization was stationed at Phyllis Court, Henley-on-Thames, England where a guard post was maintained at the building (R29). The Royal Air Force maintained the guard which was operated entirely under Royal Air Force regulations. Personnel for the guard was supplied by accused's organization in proportion to the number of men in that organization compared with the number of men in the British unit (R13,34). The post was situated in a room at the interior entrance to the building, which room was adjacent to a workroom. The duty of the guard was to prevent persons from entering the workroom, to examine all passports, to cause visitors to sign the visitors' book, to escort personnel entering and leaving on pass and to maintain order throughout the building. The post was stationary and was primarily confined to the limits of the room at the entrance to the building, although the guard was permitted to go outside to inspect passports of persons driving up in a vehicle (R13). Every guard was issued a pistol and 12 rounds of ammunition (R39). Also pursuant to Royal Air Force regulations, the guards relieved themselves during the daytime hours (R34).

On 14 July 1943 Technician Fourth Grade Joseph F. Hurley, Engineer Model Makers Detachment, was on guard from 3:30 - 4:00 p.m. Accused was to be on guard from 4 - 5:00 p.m. At about 4:05 - 4:10 p.m. accused relieved Hurley on the post who turned over a pistol, pistol holster, belt, and an ammunition pouch containing about 12 cartridges. Accused appeared to be "sane and sober" at the time and there was nothing unusual about his appearance. At the trial Hurley was shown a .38 caliber Smith & Wesson revolver, No. 802663, and testified that it "appears to be the pistol" which he gave accused. The revolver was admitted in evidence (R12-13,29; Pros.Ex. 2). About 4:30 p.m. a search of the post was made by Captain Harrison P.

Reed and First Sergeant Henry E. Cloud, both of the Engineer Model Makers Detachment, and also by Royal Air Force personnel, but the sentry was not on his post (R29-30,36).

On 14 July 1943 Mr. Issy Aaronson operated a tailor shop at 11a, Greys Road, Henley-on-Thames. His three employees who worked in the shop that day were Doris May Staples, Miss Rebecca Woolf, 97 Greys Road and Mrs. Gertrude M. Hurst, 28 Adwell Square, all of Henley-on-Thames (R15,18,20,23). About 12:30 p.m. accused came to the tailor shop, asked for Doris Staples, remarked "She is not here" and departed (R16-17,20-21). He returned about 2:30 p.m. called Mr. Aaronson into the rear yard and asked if he wanted to buy a little rain jacket for one shilling. Mr. Aaronson had seen American soldiers wear the same type of jacket (R17,19). Doris Staples was there at the time and accused said a few words to her and gave her a "small white slip or something" which she pushed under a newspaper (R24). About 4:30 p.m. he a-gain returned to the outside of the shop and tapped on the window. Someone said "He is here again". Miss Staples said "What does he want now? I had better go out and see what he wants". She went out and joined accused by the door (R17,21,24). Miss Woolf testified that Miss Staples said "Go away, Johnny; I have work to do" (R24). Mrs. Hurst testified that apparently accused wanted Miss Staples to go somewhere, and that she heard her say "No; you know I do not come out in these clothes" (R25). Mr. Aaronson shouted to the girl, "Come on; hurry up; get on with your work" (R17), whereupon Miss Staples said to accused "I am going in; after all, he pays me my money" (R25).

Miss Staples re-entered the shop and tried to close the door. Accused, however, had his foot in the door and followed her into the shop. His hand was concealed under his tunic, and as he entered he pulled out a revolver which was on a leather strap around his neck. Miss Staples turned around and walked backwards towards Mrs. Hurst. He pointed the weapon at Miss Staples and fired three shots at the girl who, at the second or third shot, fell down near Mrs. Hurst in a sitting position "with her leg up". Mrs. Hurst, seeing that the girl was alive and believing that she had fainted, said to her "I will get you some water". Miss Staples replied "Oh". Mrs. Hurst left the room. Miss Woolf testified that accused then fired two more shots at the girl who said "Oh". Two shots were heard by Mrs. Hurst while she was outside, filling a bucket with water. Miss Woolf then arose from her work and went around the side of the table, whereupon accused "twisted the revolver round" and said "Not you, Betty". He then put the revolver under his neck, shot himself, and fell down just across from where Miss Woolf was standing. She jumped over his feet, ran outside and shouted for help. When Mrs. Hurst returned with a bucket of water accused was lying on his stomach facing the doorway with the revolver in his hand. She returned to the rear yard and looked for a way to escape over the fence (R17-27).

About 4:30 p.m. Mrs. Ivy Trendall, 7 Friday Street, Henley, a waitress in a cafe adjoining the tailor shop, was returning to the cafe from across the street. She heard Miss Staples tell accused "No; I am not going to-night", and saw her dash into the tailor shop. Accused

followed her immediately, drawing a revolver from beneath his tunic. She then heard three or four shots, and upon looking into the shop saw Miss Staples lying on the floor at the rear door of the shop "*** with her head to the back door and her feet towards the front door", and John Waters was also lying on the floor with his feet towards the door of the tailor's shop (R27-29).

About 4:45 p.m. Inspector Henry Morris, stationed at Henley-on-Thames, was summoned to the tailor shop and found a group of people standing before the entrance, one of whom shouted "Look out; he has got a gun" (R40). Captain Harrison P. Reed and First Sergeant Henry E. Cloud arrived at the scene about 4:45 - 4:50 p.m. (R30,36). When Cloud looked through the door of the tailor shop he saw accused right inside the front door, "half lying and half sitting", propped up on the floor and pointing a gun out of the front door (R36). Captain Reed or Cloud called out "Are you all right, Johnny? Throw your gun out". The gun was not thrown out (R40). A tear gas bomb was then thrown into the front entrance of the tailor shop. Someone shouted "He has just moved". Two shots were then fired from within the tailor shop. One hit the wall on the opposite side of the road and ricochetted back into the roadway; the other entered a window opposite (R30,36-37,40). Someone said that accused had gone out into the area behind the shop, and both Captain Reed and Cloud went through an adjoining fish shop and into the adjoining rear yard. They called accused and asked him to throw out his gun. He replied "O.K., Henry". Captain Reed climbed the fence which was between the two areas, looked in the shop, and saw a girl lying on the floor but did not see accused. He then looked in a brick-inclosed toilet and found accused sitting on the seat, leaning back against the wall. The lower part of his jaw was covered with blood and he was obviously in great pain. After Cloud climbed the fence they took from accused a .38 caliber Smith & Wesson pistol which was hanging from a lanyard around his neck and laid him out on the brick courtyard (R30-31, 37,40-41). Captain Reed noticed an odor of alcohol on his breath (R34). Cloud found two spent cartridges in the pistol but no live ammunition (R31, 37,39). An empty pouch was attached to an R.A.F. web belt which accused was wearing around his waist (R31,38). Both Captain Reed and Cloud identified Pros.Ex.2 as similar in appearance to the revolver which they had taken from accused's possession (R31,37). The pistol was of a type not normally used by the United States Army but was of the type used on the guard post (R39). Inspector Morris, Captain Reed and Cloud entered the tailor shop and found Miss Staples lying on the floor, dead (R37,41). Before accused was removed to the hospital he was given the usual "English police caution" and replied "I don't want to say anything" (R41). During the time he was in the tailor shop accused was scheduled for guard duty (R31) at the post which was one-third of a mile away (R35).

It was stipulated by the prosecution, accused and defense counsel that if Dr. A.E.M. Hartley, "North Lea", Northfield End, Henley-on-Thames, was present he would testify that at 6:30 p.m. 14 July 1943 he conducted a post-mortem on the body of Doris May Staples. He found on external examination five bullet wounds in the following positions:

"(1) At the top of the sternum in midline anteriorly:
(2) 2½ inches below the first and slightly to the left of midline:
(3) 1½ inches below the left armpit in the mid-auxillary line:
(4) In front of the patella of the right knee:
(5) At the back of the right calf 6 inches below the bend of the knee.

All these wounds could have been caused by bullets either entering or leaving the body.

There was no sign of powder staining or singeing.

On internal examination a bullet was found which had entered at punctured wound No. 1 (above), and had penetrated the sternum in a direction slightly upwards and to the left; it had severed the subclavian artery and the apex of the left lung; it had smashed the insertion of the first left rib and had come to rest to the left-hand side of the seventh cervical verterbra. The left pleural cavity was filled with blood.

No other bullet was found, and I concluded that a bullet had entered punctured wound No. 2 and left at wound No. 3 without penetrating the bony thorax.

Similarly I concluded that a bullet had entered the right calf and had left the body in front of the right knee.

In my opinion, death was caused by the bullet which was recovered and which caused bullet wound No. 1.

Death must have been very rapid -- in one to two minutes.

The external examination of the body disclosed that the deceased had her monthly periods at the time of her death". (R41-42).

On 15 July Staff Sergeant Edmund P. Crovo, CID Detachment, APO 647 went to the 2nd General Hospital and received permission from Majors Rogers and Scarff to take a statement from accused. He saw accused who started to give a statement but fell asleep after 20 seconds. Crovo left the room and told a major what had occurred. The officer replied "The man is perfectly all right; wake him up. Do not shake him; just nudge him and wake him up". Crovo left, however, and returned on each of three following days but accused was sleeping. On 19 July he was awake, and in very good spirits (R48-49). After again securing permission (R46), Crovo identified himself to accused and showed him a typewritten summary of his rights under Article of War 24 which accused read and stated that he understood his rights. He then said "Everyone knows; I may as well tell you" (R44-45). He signed the summary of his rights under Article of War 24 and then gave a voluntary statement, which was written down by Crovo, and which was partly in response to Crovo's questioning and partly the result of accused's own

narrative. The statement was read and signed by accused who remarked at the time that his "eyesight was strained or he was tired or something like that" (R44-46,48). The statement was taken in the presence of Captain William Boyden, a military police officer, who was himself a patient in the hospital (R48). At the trial, Crovo identified the statement (R45) which was admitted in evidence (R47; Pros.Ex.3). The defense stated that no legal objection was raised as to the competency of the statement but that its credibility would later be questioned (R47). The statement was as follows:

"STATEMENT OF: John Henry Waters DATE: 19 July 1943 A.S.N. 32337934 ORGANIZATION: Eng.Model Makers Det. APO 887 TAKEN BY Agent Edmund P. Crovo, PLACE: Ward 7, 2nd General Hospital APO 647, it is my duty to inform you of your rights at this time. It is your privilege to remain silent. Anything you say may be used either for or against you in the event that this investigation results in a trial. Do you thoroughly understand your rights?

SIGNATURE: John H. Waters

STATEMENT:

I am a patient at the 2nd General Hospital. I am 36 years old. I met Doris last February. I saw her nearly every day. I used to go to see her at the dress shop where she worked. I used to take her to movies and to pubs.

On last Tuesday I was with Doris and we had an argument. We argued because she was stepping out and it made a god dam fool of me. Henley is a small town and everyone knows the others business. I didn't like her stepping out.

On last Wednesday the 14th of July I went down to see Doris at her work early in the morning. She was not in so I went back to camp. I messed around camp for a while and I was burned up at Doris. I went on guard duty and left my post and rode a bicycle up to where she works. I gave her a picture of herself that she had given me some time before. We talked for a while and then she went in the store. I was standing just inside the store and I pulled the cannon and shot her. I don't know where or how many times. She fell down and then I shot myself. I don't remember what the hell went on afterwards. I would only be guessing if I told you.

She was going with a fellow who is now in Africa. He was a married man and didn't get along with his wife but got along with her. I think she was in love with him. I shot her because I don't like any pushing around. She used me to get something for herself. I used to give her a lot of

little gifts. She used tell me she had to go home early and the boys would see her later in the evening with another guy. That burned me up. I had never thought of shooting her. I had intercourse with her on numerous occasions. One time she told me she was pregnant and I gave her money to straighten it out. I used to think she was having intercourse with other guys and when I thought of it I got burned up. I was afraid she would turn me down in favor of the others. If she went out with others and was a lady about it and told me I wouldn't have minded but I don't like this lying stuff.

I am a married man with one child.

I have read my statement of 3 pages and it is true.

SIGNED: John H. Waters

Subscribed and sworn to before me this 19th day of July, 1943.

Wm. E. Boyden, Capt. C.M.P.

Summary Court.

PMG Form ".

(R47; Pros.Ex.3).

Mr. Aaronson had known accused for about six months. He had come to his shop about every day to see Miss Staples and on occasions had taken her out during the lunch period (R16,18). Asked by defense counsel if he had noticed an odor of alcohol or liquor on accused's breath at any of the times he visited the shop on the day of the shooting, he replied in the affirmative (R19). Miss Woolf had seen accused and the girl together "a few times a week" during the four to six months she had known him. Miss Staples was about 37 years of age (R20,22).

On cross-examination by the defense, Mrs. Hurst testified that a short time prior to the incident she heard Miss Staples tell accused that she had heard that 2000 more "Yanks" were coming to Henley and that she would not want him. Accused replied "We will see". She further testified on cross-examination that Miss Staples had remarked that she felt that she always had accused to wait on her and to be there when she wanted him, and that if she "played him up enough" he would commit suicide over her. On the day of the shooting, the girl had been rather rude to accused and Mrs. Hurst had said to her "you will make Johnny very sore if you keep on like that". The victim replied "Yes, *** it would be awful to go home and find his body on my step, and if it was there I would just say, 'Clear away the mess'". Questioned by defense counsel concerning the victim's reputation in the community, Mrs. Hurst testified "She had a pretty famous name *** She was fond of the opposite sex *** At the time no one had a good word for Doris, but everyone spoke well of Johnny" (R26).

(44)

Captain Reed further testified that the work performed by the members of accused's unit required men with a skilled artistic background in some instances and also men skilled in the use of hand and machine tools. Because of the absence of a T/O it was impossible for any member of the unit to secure a promotion. Those with noncommissioned officers' ratings had secured them prior to departure from the United States. Accused had been overseas for over a year, was a qualified technician and was engaged in technical work. The men complained a great deal because they were on British rations and were "more or less forced" to supplement the ration by purchasing food in the town. Accused purchased many such meals when off duty. About 11 or 12 July he interviewed Captain Reed about a notice from the Office of Dependency Benefits concerning an approved application for a Class F allotment filed by his wife. He was "quite agitated" because he had not seen his wife for about 12 - 13 years, and $22 a month was to be deducted from his pay. He seemed disturbed because he would have less money to spend and stated that he would be forced to cancel insurance for his sister's benefit. The following day he interviewed the captain relative to a notice on the board concerning the possibility of a discharge for soldiers 38 years or more of age who wished to join the merchant marine. He was within two months of that age and "seemed to want to do that". Captain Reed was of the opinion that he "seemed to be giving a lot of thought" to all the foregoing circumstances which were more or less weighing on his mind. He got along very well with the other men, was very well liked, was never obnoxious, or intoxicated while on duty. He was a very good technician. About noon, 14 July accused approached Captain Reed, said he was out of funds and asked if he could "help him out *** until such time as he was paid ***" so that he could purchase several meals in town. The captain loaned him one pound (R32-35).

First Sergeant Cloud was also of the opinion that accused was upset about the allotment, the inability to secure a promotion because of the lack of a table of organization, and the food. In his opinion accused was a good soldier, competent in his work, and had never caused any trouble (R38).

Captain Joy L. Hoffman, 36th Station Hospital, APO 649, chief of the neuro-psychiatric service, had accused under his direct observation from 4-16 September and from 20 October "until Saturday". He was one of a board of three officers who met and examined accused on 27 October 1943; he identified the board's report which was admitted in evidence (R4-5; Pros.Ex.1). The report of the board shows that it found accused to be sane and responsible for his actions at the time of the board's examination, and on 14 July 1943 (R5; Pros.Ex.1). Captain Hoffman further testified that the bullet passed through accused's sub-mental region (the chin), shattered the mandicular symphysis, passed through the floor of the mouth, tongue and hard palate and lodged in the left frontal region of the brain. Subsequently, it migrated through to the left occipital region (the back of the brain). There had been one operation on the frontal part of the

skull immediately after the injury had occurred, but the bullet was not removed. On 23 September another operation was performed on the rear of the skull and the bullet was removed from the left occipital region (R5-7). Accused was suffering from blindness in half of his eye (R6-7) which condition in all probability did not exist prior to the injury and was caused by the bullet lodging in the region of the optic nerve (R9-10). He had experienced one convulsion in the hospital and it might be expected that he would suffer subsequent convulsions as the scar tissue formed in the brain pulled the normal tissue about it. An apparent present inability of accused to recall events occurring "some little time" prior to his injury might be explained by a "retrograde amnesia" a condition caused by the injury itself and manifested during the period of recovery. The presence of this condition would not mean that accused had experienced any lapse of memory before he was injured. In the opinion of Captain Hoffman accused "honestly does not remember" (R8-9). The brain injury also explained his failure "to react with as much agitation, worry and concern as the average man would" because of what he had done (R8). "It is possible that there may be intellectual deterioration as time goes on in that his intelligence suffers; that is, his ability to do computations, his ability to remember things, his ability to use the intelligence with which he was born may be impaired; in other words, if he were graded, for instance, with a 14-years old intelligence, over a course of years he might eventually come to the stage where his intelligence could only be rated as that of a 12-year-old" (R11).

4. For the defense, Mrs. Trendall was recalled as a witness and testified that she had known Miss Staples for 15 months and that her general reputation in Henley, particularly with reference to her relations with men was not very good. She had very frequently heard it discussed by Henley people that the girl "*** spent week-ends with Air Force fellows" (R50). Mr. Aaronson, also recalled as a witness by the defense, testified that he had known the victim for about two and one half years and that as far as he knew she "*** did not have such a great name in the town" (R51). Technician Fifth Grade Robert L. Burge of accused's organization also testified that the girl's reputation in Henley was "not very favorable" (R56-57).

Technician Fifth Grade Thomas P. Mimms, Engineer Model Makers Detachment, had known accused for about a year and had talked with him very frequently. The two men "had a great deal in common" and were close friends. In Mimms' opinion accused was upset because of the uncertainty of his relationship with Miss Staples. He was also disturbed because of having to make the unexpected Class F allotment. He was having financial difficulties, and although he always promptly repaid his debts he was constantly behind. Mimms was also of the opinion that accused was not too happy in his organization and environment, felt that he had ceased to be a part of the United States Army and was being attached to the larger "R.A.F" group. The living conditions, the use of British rations which were inferior in quality and quantity "to our own", and the lack of a T/O were irritating factors to a person of accused's character. All of these

things affected him visibly and he was considerably depressed mentally. This depression was "decidedly more marked at the crisis". His work in the organization was important in nature and he was performing it very well. He behaved normally in the local pubs, was friendly with the people and did not drink excessively "to any marked degree" (R52-54).

Technician Fourth Grade Leonard A. Abrahams, Engineer Model Makers Detachment, testified that accused "went out more often than not with the same girl" whose first name was Doris. He was very much incensed because his wife, from whom he had been separated for so long, had requested an allotment from his pay, and he could do nothing at all about it. In Abrahams' opinion the work accused had been doing did not require the full use of his skill. He shared the dissatisfaction of most of the men in the unit with regard to the quality of the food and the lack of a T/O, but seemed particularly angry with respect to his own personal affairs and complained about them "a good bit" (R55-56).

Accused, after being warned of his rights, testified that he was 38 years of age and in civilian life had been a model maker in terracotta and ornamental plaster. He had been overseas since 3 or 4 October 1942 (R58). He married in 1925, separated from his wife in 1928 because of family troubles but was not divorced (R59,65). He met Miss Staples during the latter part of January 1943 (R59) and began to go with her regularly about the end of February (R62). He had intercourse with her from about the early part of March "to the end" (R62), the last occasion being about 5-7 days prior to 14 July (R63). He saw her about twice daily (R59), and on one occasion had given her five pounds because she told him that she was pregnant (R62). They had quarrels regularly, "but they did not amount to anything. There was no heat in them". Some of the quarrels were caused by lies which she had told but "*** they would patch up eventually. One day she would be mad at me and the next day I would be mad at her, but the majority of times we were all right, going here and going there". "There was no argument you would shoot someone for -- nothing like that" (R60,62). About 4-7 days prior to 14 July, she was "mad" and had mentioned to accused something about going with other American soldiers who might come to Henley. "I knew she was kidding because I knew there were no soldiers coming there" (R63). They had a "little argument" on 13 July which "was forgotten" (R60). Accused had practically all of his meals away from camp when he was not working because "Everything was fried bread and brussel sprouts, and it just wrecked my stomach" (R59). Shortly before 14 July he had received the notice concerning an allotment to his wife from whom he had been separated about 13 years, in the amount of five pounds and ten shillings per month. He already had insurance in the amount of $5000 and had raised it to $10000 but "it had not been taken out yet" (R59-60). After "things seemed to tumble down, like the allotment and a few things", accused felt he did not have very much to live for (R65).

With reference to events on 14 July, accused remembered nothing except borrowing the pound from the captain (R60,62,66). He did not recall going on guard duty (R61-62), being at the tailor shop or seeing Miss Staples (R61) whom he did not at any time intend to kill (R62). He

did not remember going to town (R66), trying to sell a field jacket to Mr. Aaronson (R64) or seeing Miss Woolf (R64,66). He could not explain his statement in Pros.Ex.3 that he had gone to see Miss Staples at work on 14 July, that she was not in, and that he returned to camp (R66). After borrowing the pound he remembered nothing until he was in bed in the hospital with a bandaged head. He did not know how he received the injury. He could not think what had caused his lapse of memory and had never experienced one previously (R63). He learned that Miss Staples was dead when they informed him of this fact at the hospital (R65). He did not know whether he had anything to drink on 14 July (R64-65). The men worked from 8:00 a.m. to 4:00 p.m. and from 4:00 p.m. to 12:00 m. If he went on guard at 4:00 he would have been on the night shift (R65), and would not have had any previous duties during the day (R66-67).

Accused further testified that he did not remember being questioned by Crovo, giving him a signed statement or reading the statement, although the handwriting on the bottom of a page of the document was similar to his own. He could not read even if he wished to do so as "my head is good and sore, and I have had a continuous headache since it happened" (R61-62,66). He was able to read a little at the time of the trial but would become dizzy (R63). He did recall having seen Crovo in the hospital when he had arrived to question another prisoner (R61-62).

5. Recalled as a witness by the court, Corporal Hurley testified that when he was relieved as guard by accused the latter said that he was sorry to be late, whereupon Hurley replied "It is perfectly all right, Waters". He handed the gun to accused who was putting on the belt as Hurley departed. Accused appeared "very normal". He wore a field jacket and was neatly attired. The guard on the post was allowed to walk within the room and "around into the opening of the door", the post being the entrance to the building in which the work was carried on (R69-70).

Also recalled as a witness by the court, Crovo testified that when he took the statement from accused the latter appeared to be perfectly oriented as to the happenings of 14 July and was able to give a clear-cut picture of events leading up to the shooting. He told Crovo that he would "only be guessing" if he told him what occurred after the shots were fired. It took "the best part of an hour" to obtain the statement (R70-71).

6. Murder is legally defined as follows:

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse ***" (MCM., 1928, sec.148a, p.162).

" Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before the commission of the act, or that the intention to kill must have previously existed. It is sufficient if it exist at the time the act is committed. (Clark). Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievious bodily harm to, any person *** (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, **** although such knowledge is accompanied by indifference whether death or grevious bodily harm is caused or not or by a wish that it may not be caused; ***". (Ibid., pp.163-164) (Underscoring supplied).

The evidence, including accused's own testimony shows that accused had been a steady companion of Miss Staples for several months, that they frequently had intercourse and often quarreled. At about 4:30 p.m. on 14 July, when accused appeared for the third time at the shop and tapped on the outside of the window, Miss Staples went to the door and talked with him. The evidence indicates that she either refused to go out with him at that time or later during the evening, and told him to go away as she had "work to do". As she re-entered the shop she attempted to close the door. However, he had his foot in the door, and followed her into the shop with his hand concealed beneath his tunic. He pulled out a revolver, pointed the weapon at Miss Staples and fired three times. After the girl fell to the floor he fired two more shots in her direction. Miss Staples and accused had had an argument the day before the shooting. In his statement to Crovo, he admitted several times that he was "burned up" with her. She "was stepping out and it made a god dam fool of me". She would tell him that she had to go home early but would be seen later in the evening in the company of another man. He thought that she was having intercourse with other men and was afraid that she would turn him down in favor of the others. He also believed she loved another man who was married. "I shot her because I don't like any pushing around". The facts thus disclosed formed a substantial basis for the court's findings that accused was guilty of murder. His actions revealed a cold, deliberate purpose in the absence of adequate provocation either to kill Miss Staples or to inflict upon her grievous bodily harm, "some excessive bodily injury which may naturally result in death" (Winthrop's Military

Law & Precedents, 2nd Ed., Reprint, p.673). The evidence is legally sufficient to support the findings of guilty of Charge I and of its Specification.

7. With reference to Charge II and Specification (leaving post as sentinel before being regularly relieved in violation of Article of War 86), the evidence shows that the guard system at the building was maintained by the Royal Air Force and operated under R.A.F. regulations. Accused was scheduled for guard duty from 4:00 - 5:00 p.m. on the date alleged, and about 4:05 - 4:10 p.m. he relieved Hurley from whom he received his equipment and assumed his duties. About 4:30 p.m. a search of the post was made and accused was not found. About 4:30 p.m. he appeared at the tailor shop about one-third of a mile away from his post, and was on the tailor shop premises for the balance of the hour during which he was supposed to be performing his duty as a guard.

Although the manner in which accused assumed guard duty was somewhat informal and not in accordance with the usual United States Army practice, nevertheless the evidence shows that it entirely conformed with the British regulations by virtue of which the guard system for that post was admittedly maintained and operated. He violated his duty by leaving his post before he was regularly relieved.

> "The fact that the sentinel was not posted in the regular way is not a defense". (MCM., 1928, par.146, p.160).

> "A sentinel is on post within the meaning of this article not only when he is walking a duly designated sentinel's post, as is ordinarily the case in garrison, but also, for example, when he may be stationed *** on post to maintain internal discipline, or to guard stores ***" (Ibid).

The evidence is legally sufficient to support the findings of guilty of Charge II and of the Specification thereunder.

8. It is alleged that accused did "*** willfully maim himself in the head by shooting himself with a pistol, thereby unfitting himself for the full performance of military service" in violation of Article of War 96 (Charge III and its Specification) (Underscoring supplied). The evidence shows that after shooting the girl accused shot himself. The bullet passed through his chin, the floor of his mouth, tongue and hard palate, and lodged in the left frontal region of the brain. Later it migrated through the left occipital region in the rear of the brain, and was surgically removed. As a result, at the time of trial, accused was suffering from blindness in half of his eye. He had experienced one convulsion and would, in all probability experience others during the healing process. In the opinion of Captain Hoffman it was possible that

accused would suffer intellectual deterioration with the passage of time. "*** his ability to do computations, his ability to remember things, his ability to use the intelligence with which he was born may be impaired ***".

The offense of self-maiming in violation of Article of War 96 should not be confused with that of mayhem in violation of Article of War 93. A person may be guilty of self-mayhem (MCM., 1928, par.149b, p.167).

> "Mayhem is a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary. (Bishop).
>
> Thus it is mayhem to put out a man's eye, to cut off his hand, or his foot or finger, or even to knock out a front tooth, as these are members which he may use in fighting; but it is otherwise if either the ear or nose is cut off or a back tooth knocked off, as these injuries merely disfigure him. (Clark). (MCM., 1928, par.149b, p.167).

> "The word 'maim' is used in the popular sense of mutilating, and not as synonymous with the technical word 'mayhem'. (Words & Phrases, Perm.Ed., Vol.26, p.50).

> "'Maim' is defined as 'To mutilate or seriously wound or disfigure; disable'" (Words & Phrases, Perm.Ed., Vol.26, p.48).

> "MAIM. At common law, to deprive a person of a member or part of the body, the loss of which renders him less capable of fighting; or of defending himself; to commit mayhem ***.
>
> But both in common speech and as the word is now used in statutes and in the criminal law generally, maim signifies to cripple or mutilate in any way, to inflict upon a person any injury which *** renders him *** defective in bodily vigor; to inflict any serious bodily injury." (Black's Law Dictionary, 3rd Ed., p.1142).

A specific intent to maim is not necessary (Wharton's Crim.Law, 12th Ed., Vol.I, sec.768, footnote 8, p.1051; Terrell v. State, 86 Tenn. 523). The word "willful" means:

"done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification." (Black's Law Dictionary, 3rd Ed., p.1849).

The evidence, including the medical testimony shows beyond any doubt that accused willfully maimed himself as alleged and thereby unfitted himself for the full performance of military service. The evidence is legally sufficient to support the findings of guilty of Charge III and of its Specification.

9. Mr. Aaronson noticed an odor of alcohol or liquor on accused's breath when the latter was at his shop on 14 July, and Captain Reed testified that he noticed an odor of alcohol on his breath when he was removed from the toilet. This constituted the only evidence which indicated that accused might have been drinking. Hurley testified that when accused relieved him from guard duty at about 4:05 - 4:10 p.m. he was "sane and sober", that he appeared "very normal" and was neatly attired. The question of intoxication was not raised by the defense, and was not an issue in the case. Further discussion thereon is unnecessary.

10. A board of officers was convened to determine accused's sanity pursuant to the provisions of paragraph 35c, M.C.M., 1928 and AR 420-5. On 27 October 1943 the board found that he was sane and responsible for his actions "now" and on 14 July 1943. The report of the board was admitted in evidence (R5; Pros.Ex.1).

11. The prosecution offered in evidence the report of the board of officers and the pistol and they were admitted as exhibits for the prosecution. The record does not indicate whether the defense consented or objected thereto (R5,12). These irregularities did not injuriously affect the substantial rights of accused. When the prosecution offered the statement of accused in evidence the defense stated in substance that it had no objection as to the "competency" of the statement but that it would later question its "credibility" by showing that when the statement was made, accused "did not know anything about it" (R47). Accused subsequently testified that he did not recall being questioned by Crovo, giving him a signed statement or reading the statement. Crovo testified that after he had warned accused of his rights, the latter made a voluntary statement. He told Crovo that he understood his rights, appeared to be perfectly oriented as to the happenings of 14 July and gave a clear-cut picture of events leading up to the shooting. Captain Hoffman testified that an apparent present inability of accused to recall events occurring "some little time" prior to his injury might be explained by "retrograde amnesia", a condition caused by the injury itself. The questions as to whether the statement was of a voluntary nature and whether accused was conscious of what he was doing when he made the statement, were issues of fact for the sole determination of the court, and in view of all the evidence the Board of Review sees no reason to disturb its findings.

12. Attached to the record of trial is a petition for clemency addressed to the Commanding General, ETOUSA, dated 18 December 1943 signed by about 35 members of accused's organization. Also attached is a letter from Mrs. V. Hunter-Miskett and Miss May Pardoe dated 22 December 1943 and inclosing a petition for clemency signed by approximately 302 citizens of Henley-on-Thames. Attached is a memorandum signed by the Commanding General, ETOUSA wherein it is stated in substance that he has again considered all of the circumstances appearing in the record of trial which are favorable to accused, viewed in the light of the foregoing petitions for clemency, and that no circumstance disclosed in the record of trial or brought to his attention in these petitions "tends to justify the accused's criminal act of murder for which he stands properly convicted. The sentence of death (heretofore confirmed) should be carried out, subject to the requisite action under Article of War 50½".

13. The charge sheet shows that accused is 38 years of age, that he was inducted 16 May 1942 in the Army of the United States for the duration of the war plus six months, and was assigned to the Engineer Model Makers Detachment, 3 October 1942. He had no prior service.

14. The court was legally constituted and had jurisdiction of the person and offenses. 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. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92); the penalty for the offense of a sentinel leaving his post before being regularly relieved in time of war is death or such other punishment as a court-martial may direct (AW 86). The sentence that accused be hanged by the neck until dead is legal (CM ETO 438, Smith; CM ETO 255, Cobb; CM ETO 969, Davis; MCM., 1928, par.103a, p.93).

B. Franklin Riter Judge Advocate

Judge Advocate

Edward Hitzgerald Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 31 JAN 1944 TO: Commanding General, ETOUSA, U. S. Army, APO 887.

1. In the case of Private JOHN H. WATERS (32337934), Engineer Model Makers Detachment, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, which holding is hereby approved.

2. When copies of the published order are forwarded to this office, they should be accompanied by the record of trial, the foregoing holding and this indorsement. The file number of the record in this office is ETO 1161. For convenience of reference please place that number in brackets at the end of the order: (ETO 1161).

3. Should the sentence as imposed by the court be carried into execution it is requested that a full copy of the proceedings be furnished this office in order that its files may be complete.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

1 Incl:
Record of trial.

(Sentence ordered executed. GCMO 5, ETO, 4 Feb 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

27 JAN 1944

ETO 1165

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private First Class JOHN F. VITTITOE (20700151), Company G, 6th Armored Infantry.	Trial by G.C.M., convened at Whittington Barracks, Lichfield, Staffordshire, England, 6 December 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 75th Article of War.
(Nolle Prosequi).
Specification: (Nolle Prosequi).

CHARGE II: Violation of the 59th Article of War.
(Nolle Prosequi).
Specification: (Nolle Prosequi).

CHARGE III: Violation of the 96th Article of War.
(Nolle Prosequi).
Specification: (Nolle Prosequi).

CHARGE IV: Violation of the 58th Article of War.
Specification: In that Private First Class John F. Vittitoe, now attached as a prisoner, Western Base Guardhouse, Whittington Barracks, Lichfield, Staffordshire, England, then of Company G., Sixth Armored Infantry, Makhassy, Tunisia, did at Constantine, Algeria, on or about 8 April 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Newcastle-Under-Lyme, Staffordshire, England, on or about 6 October, 1943.

He pleaded guilty to and was found guilty of Charge IV and its Specification. Evidence of two previous convictions by special courts-martial was introduced; one for absence without leave, disobeying superior officer and attempting to deceive superior officer in violation of Articles of War 61, 64 and 96, and one for absence without leave for ten days, loss of government property and appearing in civilian clothing without proper authority in violation of Articles of War 61, 84 and 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the approved sentence. (CM ETO 656, Taylor; CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet; CM ETO 875, Fazio, et al).

4. The charge sheet shows that the accused is 23 years six months of age. Confinement in a penitentiary is authorized for the offense of desertion during time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (WD, Circular #291, 10 November 1943, sec.v, 3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 JAN 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U. S. Army.

1. In the case of Private First Class JOHN F. VITTITOE (20700151) Company G, 6th Armored Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. The specification in this case, to which accused pleaded guilty, alleges desertion from the Sixth Armored Infantry, Maknassy, Tunisia, a combat unit, on April 8, 1943 terminated by apprehension in England on October 6, 1943. No evidence was introduced and the accused made no statement so the court had just this and nothing more. These facts alone do not warrant a sentence of confinement for life. Sentences of confinement should be reasonable and just before the return of prisoners to the United States.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1165. For convenience of reference please place that number in brackets at the end of the order: (ETO 1165).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

- 6 MAR 1944

ETO 1177

U N I T E D S T A T E S	)	ICELAND BASE COMMAND.
	)	
v.	)	Trial by G.C.M., convened at Camp Curtis, Iceland 16 December 1943. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Beekman New York.
Private CLAUDE M. COMBESS (7080335), Battery "C", 70th Field Artillery Battalion.	)	

OPINION by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentence in part. The record has now been examined by the Board of Review which submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Claude M. Combess, Battery "C", 70th Field Artillery Battalion, did, at Broadway Cafe, Iceland, on or about 8 December 1943, with intent to do her bodily harm, commit an assault upon Anna Benonysdottir, by willfully and feloniously striking the said Anna Benonysdottir in the face with his hand.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

He pleaded not guilty and was found guilty of the Charge and of Specification 1, and not guilty of Specifications 2 and 3. Evidence was introduced of one previous conviction by special court-martial for absence without leave for three days in violation of Article of War 61, disobedience of the order of a non-commissioned officer (apparently in violation of Article of War 65), and breach of arrest in violation of Article of War 69. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year at such place as the reviewing authority may direct. The reviewing authority approved the sentence but suspended the execution of that portion thereof imposing dishonorable discharge until the soldier's release from confinement, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement, and directed that he be confined in the Iceland Base Command Prison Stockade until further orders.

The proceedings were published in General Court-Martial Order No. 159, Headquarters Iceland Base Command, APO 860, c/o Postmaster, New York, New York 20 December 1943.

3. Evidence for the prosecution pertaining to the offense of which accused was found guilty (assault with intent to do bodily harm in violation of AW 93) was substantially as follows:

Private Henry E. Scearce, Battery "C", 70th Field Artillery Battalion, testified that on the date alleged he, accused and two other soldiers secured four quarts of whiskey and went to the Broadway Cafe where the other two soldiers became drunk. Scearce and accused took them back to camp and returned to the cafe. Scearce did not know how much liquor accused had consumed up to that time, but there then remained one full bottle of liquor and another which was partially filled (R6,14). They ordered two soft drinks which the waitress brought to a table. She then took them away without offering any explanation, and told them to "get out" (R6,8-9). Accused threw two or three saucers at her feet but the saucers did not strike her. She "dashed" a bucket of water at Scearce and accused, who "let the water go by". Then the waitress moved toward them with the bucket in her hand. She seized accused's hat, threw it on the floor, and tried to seize Scearce's cap, but he "jumped back". He picked up accused's hat and gave it to him. It appeared to Scearce that the waitress then attempted to strike accused with the bucket whereupon he saw accused slap her once. The two men then left the restaurant (R6-7,10).

Anna Benonysdottir, Broadway Cafe, Iceland, identified accused and testified that two soldiers entered the restaurant, spoke to her "rather annoyingly", and ordered two soft drinks. When she brought the drinks and told them the price "their face just looked like they did not owe anything". Because they "kept standing there" - by the counter, she told them they should leave. As they did not go, her daughter who was 5 years of age told them twice that they should leave, whereupon "he" (accused) threw a glass and then two plates at the daughter, one of which struck her on the arm and then

broke on the floor. The witness became angry and threw a half pail of water at them which went over the floor. She then approached the man with the pail in her hand in order to chase accused from the counter, whereupon he seized the pail and struck her face with it. As it appeared that he intended to take the pail from the restaurant she followed him for the purpose of taking it away from him. When he refused to deliver the pail to her, she knocked his hat from his head. He started to hit her again whereupon she called two Icelanders who were present, one of whom took the pail from accused and ordered him to go. The two soldiers appeared to be afraid and left the cafe. She did not know whether or not accused was drunk (R16-19).

On 9 December accused, after being warned of his rights, swore to a statement which he had previously signed on that day, which statement was admitted in evidence (R29-31; Pros.Ex.A). He stated in substance that he, Scearce, and two other soldiers drank about two quarts of liquor at the Broadway Cafe. When the other two soldiers "got a little to much" he and Scearce took them back to camp and then returned to the restaurant. After they ordered the two soft drinks the waitress apparently thought that accused did not pay for the drinks promptly enough, because she took them back. Accused tossed five or six saucers "playfully" at her feet, and some of them were broken. She went to the kitchen and shortly thereafter threw a pailful of scalding water at him through a window. The water missed him.

> "She then came out of the kitchen with the bucket in her hand and started swinging at me with the bucket. I tried to stop her by grabbing the bucket. She tried to scratch me, and I got mad and slapped her twice with my left hand, openhanded. ****. Two Icelanders **** came over and grabbed ahold of me and she opened the door and told us to get out" (Pros.Ex.A).

4. After his rights were explained to him, accused elected to remain silent. The defense offered no evidence pertaining to Specification 1 of the Charge (R32-33).

5. Accused was found guilty of assaulting the waitress with the intent to do her bodily harm by striking her in the face with his hand as alleged in the Specification. He was not charged with striking her with a pail, as she testified. The question presented for consideration is whether the evidence is legally sufficient to support the findings of accused's guilt of an assault (including a battery) with intent to do bodily harm. The offense is defined:

"This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed.

* * * * * * * * *

Proof.- (a) That the accused assaulted a certain person as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person" (Manual for Courts-Martial 1928, par.149n, p.180). (Underscoring supplied).

"A simple assault and battery is usually accomplished by the primitive means ordinarily resorted to by individuals in inflicting punishment on one another, and the motive of the assailant is not ulterior to the mere punishment of the person assailed. An aggravated assault, or assault and battery, which is ordinarily made a felony by statute, is one where the means or instrument used to accomplish the injury are highly dangerous or where the assailant has some ulterior and malicious motive in committing the assault other than a mere desire to punish the person injured.

* * * * * * * * *

To convict a person of an aggravated assault and battery, the act must have been committed by him with the specific malicious intention which gives character to the act and aggravates the assault. The intent in such cases is a question of fact for the jury, and the malicious intention is to be inferred from the situation of the parties, their acts and declarations, the nature and extent of the violence, and the object to be accomplished" (Criminal Law from American Jurisprudence, Assault and Battery, sec.26, p.142) (Underscoring supplied).

* * * * * * * * *

"Under statutes of this character (punishing assault with intent to inflict great bodily harm) the intent to inflict an injury, of the kind described by the particular statute, is an essential element of the offense, and the absence of such intent cannot be supplied by the mere fact that the injury is inflicted, although an inference of the intent may be

justified from the occasioning of the injury, or the character of the injury, or the implement employed, or the other circumstances attending the assault" (6 C.J.S., Assault and Battery, sec.79b, (2), pp.937-938).

After a wordy altercation about service or payment, the accused tossed saucers in the direction of the waitress. In retaliation she threw water from a pail at him, tossed his hat on the floor and advanced toward him with the pail, whereupon he grasped it and slapped her twice on the face with his open left hand. As he provoked her threats of violence against him and did not withdraw from the conflict, he may not rely upon the plea of self-defense (Criminal Law from American Jurisprudence, Assault and Battery, sec.45,pp.149-150; Wharton's Criminal Law, sec.826, pp.1114-1115 and sec.614, pp.828-831; 6 C.J.S., sec.92b (4), p.947). He did not exhibit an unusual amount of violence towards her, nor did he have an unreasonable advantage over her. He caused her no injury. The evidence shows that accused and the waitress engaged in only a minor squabble. Its maximum thrust establishes only a mild battery upon the person of the woman (See Manual for Courts-Martial 1928, par.149 l, pp.177-179). There were no circumstances attending the battery from which the necessary specific intent may be inferred. The Board of Review is of the opinion that the evidence is legally sufficient to sustain a finding of guilty of only the lesser included offense of simple assault and battery in violation of Article of War 96.

6. The charge sheet shows that accused is 22 years of age and that he enlisted at Fort Benning, Georgia 24 May 1940 to serve three years. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of the Charge and of the Charge as involve findings of guilty of assault and battery in violation of Article of War 96, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of accused's pay per month for a like period.

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

(64) 1st/Ind.

WD, Branch Office TJAG., with ETOUSA. - 6 MAR 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 U.S.C., 1522) and as further amended by the Act of 1 August 1942, (56 Stat. 732, 10 U.S.C., 1522), is the record of trial in the case of Private CLAUDE M. COMBESS (7080335), Battery "C", 70th Field Artillery Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of Specification 1 of the Charge and of the Charge, except so much thereof as involve findings of guilty of assault and battery in violation of Article of War 96, be vacated, that so much of the sentence as exceeds confinement at hard labor for six months and forfeiture of two-thirds of the soldier's pay per month for a like period be vacated, and that all rights, privileges and property of which he has been deprived by virtue of those portions of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

3 Incls:
Incl.1 Record of trial
Incl.2 Form of action
Incl.3 Draft GCMO

(Findings vacated in part in accordance with recommendation of the Assistant Judge Advocate General. So much of sentence as exceeds confinement for six months and involves forfeitures of $41.66 for like period vacated. GCMO 17, ETO, 16 Mar 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1191

14 MAR 1944

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND.
v.	
ELOY V. ACOSTA, JR., (36079), Aircraft Engine Mechanic, Civil Service Technician Detachment, 401st Air Depot, 1st Base Air Depot; a civilian serving with the United States Army in the field and under the jurisdiction thereof.	Trial by G.C.M., convened at Warrington, Lancashire, England, 26 November 1943. Sentence: Confinement at hard labor for 18 months. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Eloy Acosta, Jr. Air. Eng. Mech. a person serving with the Armies of the US in the field, Civil Service Technician Detachment, 1st B.A.D., did, at AAF Station 590, on or about 29 October, 1943, feloniously take, steal and carry away, seven one-pound notes, British Currency, value about $28.25 (twenty eight dollars and twenty five cents), the property of Joe Mayfield

CHARGE II: Violation of the 94th Article of War
(Finding of not guilty)
Specification: (Finding of not guilty)

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * * * * * * * * * did, at AAF Station 590, APO 635, from on or about 1 August 1943 to on or about 30 October 1943 wrongfully and unlawfully obstruct and interfere with the U.S. Army Mail.

He pleaded not guilty, was found guilty of Charges I and III and their respective specifications and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor at such place as the reviewing authority may direct for a period of 18 months. The reviewing authority approved the sentence and designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement but withheld the order directing the execution of the sentence and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. Evidence for the prosecution establishing the status of accused is substantially as follows:

Accused was, on 29 October 1943, an aircraft engine mechanic employed as a civil service technician in the United States Civil Service Detachment with the United States Army in the European Theater of Operations at AAF Station 590 (R62). He worked in the shipping department located at Hangar K at such station (R36,37). He was paid by the United States Government (R6). He had been working for the Government for about four years; first at San Antonio General Depot and then at Duncan Field where he was an aircraft engine mechanic. At the last named place he volunteered to go overseas (R62). The defense conceded the jurisdiction of the court over accused (R7).

4. Prosecution's evidence in support of Charge I and its Specification shows: On 29 October 1943 and previous thereto, he lived in a double room at Bruche Hall, a barracks at AAF Station 590. He had had various room-mates at different times. One Joe Mayfield had been his room-mate for some three months prior to the last mentioned date. Each had his own separate furniture in the room (R63). On the evening of 28 October, Mayfield also a civil service technician in like employment, had retired leaving his trousers on top of his dresser (R9). In one of the pockets thereof was £17, British currency. On the morning of 29 October 1943, £7 were missing (R8). Upon discovering his loss, he asked accused if he had any money to lend. Accused answered "He had only five shillings and could not spare a pound" (R9). Mayfield had received his money from the pay roll. The notes were numbered consecutively. He requested the loan as he desired to check the numbers of pound notes he still retained with the money accused might have produced (R10). Accused however was not in the same pay line as Mayfield. Accordingly his money would bear different serial numbers (R11). Mayfield charged accused with the theft of the £7. The accusation was investigated on 30 October 1943 by Corporal Charles L. Colgrove, 890th Military Police Company, Corporal Trevis of the Post Guard,

Corporal Burke of the 1108th Military Police Company and Lieutenant J. Perez Petinto, 1108th Military Police Company. During the investigation the personal belongings of accused located in his room in Bruche Hall were searched. Accused and Mayfield were present at the search. A Mr. Laudrum (status undisclosed) was also present. Seven £ 1 notes were found on the top shelf of his wall locker among a quantity of papers (R12, 15). Five of the seven notes bore numbers which were consecutive with five of the nine notes which remained in Mayfield's possession. The seven notes were admitted in evidence as Pros.Ex."A" (R14). They were numbered Z16D584418, Z16D584430, Z30D065420, Z30D065421, Z30D065422, Z30D065423, Z30D065424. The notes remaining in Mayfield's possession were numbered Z29D850510, Z30D065425, Z30D065426, Z30D065427, Z30D065428, Z30D065429, Z30D069470, Z30D069471, Z30D069472 (R15) (Underscoring supplied).

When confronted with the fact that the numbers of five of the notes found among his possessions bore numbers which were consecutive with several notes remaining in the possession of Mayfield, accused admitted that he had taken the seven £1 notes and described the manner in which he took them. He entered the room during the previous night while Mayfield was asleep. He saw Mayfield's trousers on top of the dresser and "went through the trousers and removed the seven £1 notes" (R30). Accused also made a written statement, admitted in evidence as Pros.Ex.J1, (R33) in pertinent part as follows:

"Statement of Eloy Acosta.

I, Eloy Acosta, CST #36079, stationed at Bruche Hall and quartered in room #18, in Barracks "B", having had the 24th AW read to me and my rights therein explained do hereby make the following voluntary statement:

On the 30th October 1943 at about 00:45 hours I entered my room in Barracks "B". I saw that my roommate, Joe Mayfield, was in bed and asleep and that his trousers were laying on his bureau. I went to Mayfield's side of the room and took some of the £ (Pound) notes from his trousers. I put the money in my fatigue suit and after getting up this morning, I placed the money on the top shelf in my wall locker, where it was found by the Military Police who were searching for the missing money.

I have read the foregoing and find same to be true."

5. Prosecution's evidence with respect to Charge III and its Specification summarizes as follows:

During the search of accused's quarters conducted for the purpose of discovering the money, Mayfield and accused were in the room and they pointed out their respective bureaux and lockers (R21,30). In addition to the money there was found a considerable amount of mail matter among accused's belongings (R30). It consisted of "V" letter mail written by members of the Civilian Technician Detachment at Bruche Hall which had never reached the censor's office, and numerous post-cards and letters written by people in the United States and addressed to persons at AAF Station 590. Some of the mail was in accused's wall locker, some in his bureau drawers and some in his suit case (R16). This mail was delivered to Lieutenant Petinto who took it to the Military Police office where Colgrove, Burke and a Sergeant Prince sorted and classified it and compiled a record particularly identifying each piece of mail matter (R17). In the evening of 30 October 1943, Colgrove accompanied by Major Nelson, commanding officer of Bruche Hall and Sergeant Thomas J. Horan, 890th Military Police Company returned to accused's room and made further examination of accused's personal property. Acosta was not present during this search. Post-cards and sealed letters were found and seized by Major Nelson, Colgrove and Horan and were also taken to military police headquarters (R22). They were sorted, classified and listed and delivered to Lieutenant Petinto (R16).

By stipulation between the Prosecution and Defense it was agreed that Colgrove was able to identify Pros.Exs. A to Z and Pros.Exs. A1 to G1 as the pieces of mail found by him in accused's room during both the first and second search (R17). The exhibits were accordingly admitted in evidence but withdrawn by consent of the court upon completion of the case (R18). Accompanying the record is a description and classification of these exhibits prepared by Colgrove which was substituted for the exhibits upon withdrawal (R18). Of the envelopes containing letters which originated in the United States, about four or five remained sealed and about four had been opened when seized. The mail exhibits as presented in court were in the same condition as when taken from accused's room (R54). Acosta gave Colgrove no reason for his possession of the mail matter (R19).

A former room-mate of accused, civil service technician, Seccundino Martinez, testified that Pros.Ex.U was a letter he had received from his brother, but did not recall what disposition he had made of it. While rooming with accused, witness and accused wrote many letters and there were usually letters lying around unmailed (R44-45). Normally their mail was delivered to them by sliding it under the door of their room (R46). He had lived in the room with accused about eight months beginning in November 1942 and ending about July 1943. Mail was not censored before it was placed in the mail box (R47-48).

Accused's brother-in-law, Leopold Munez (46420), civil service technician, testified that he had written Pros.Ex.B1 and C1, being letters to his wife and to his father living in Texas. He gave them to accused

to mail. He believed that accused had forgotten to mail them (R50).

R. C. Kimberley, (32737), civil service technician, identified Pros.Ex.B as a letter he wrote his wife on 7 September 1943. He deposited it in the mail box at Bruche Hall on that date. Accused was never given permission to have possession of the letter (R41). The mail box was a closed box with a slit in it (R42).

C. D. Crawford (33805), civil service technician, identified Pros. Ex.F, a "V" mail letter, as written by him on 7 September 1943 which he placed in the "V" mail letter box at the branch post-office on that date. He gave no one permission to mail this letter for him (R39). The mail box was closed but it had a slit in it.

An additional stipulation was entered into between prosecution and defense as follows:

> "It is stipulated by and between Prosecution Counsel and Defense Counsel that various other pieces of mail, both unmailed V-Mail and regular type mail, some addressed from the States to Civil Service Technicians at AAF Station 590 and some pieces of mail addressed by Civil Service Technicians now stationed at AAF Station 590, as evidenced by Prosecution Exhibits "A" to "Z" and "A1" to "G1", were found in the possession of the accused, and if the persons who addressed those pieces of mail or who should have received those pieces of mail were present they would testify in substance as did the witnesses R.C.Kimberly, 32737, Civil Service Technician, AAF 590, L.Muniz, 46420, Civil Service Technician, Civil Service Detachment, AAF 590 and C.D.Crawford, 33805, Civil Service Technician, Civil Service Detachment, AAF 590, and S. Martinez, Civil Service Technician, Civil Service Detachment, AAF 590 in regard to the mail addressed to them or written by them. It is further stipulated that all of the mail in question was of a personal nature" (R51).

6. For the defense, Jesus Gonzalez, a civil service technician, testified he was one of four station mail censors in addition to the Chief Censor. Gonzalez censored the mail originating at Bruche Hall. His office was located next door to the post office (R56). There were two boxes in which the outgoing mail was deposited. The air mail box had a slot through which letters were inserted. In order to remove mail from it one had to walk around the counter. The "V" mail box had a door through which the mail was placed in the box. It was not locked. Some of the

men placed their letters on top of the boxes or the counter instead of in the boxes. Mail orderlies brought the letters from the boxes to the censor's office and returned it. Witness had never heard complaints concerning misdelivery of mail (R57,58).

Although the defense did not raise any question as to accused's sanity, 1st Lieutenant Gerald C. Sylvester, QMC., 401st Air Depot, the investigating officer, admitted that he had recommended that accused be examined by a psychiatric board to determine his sanity and stated that he was hazy and vague when examined by witness.

Accused was sworn as a witness on his own behalf. He stated he had been overseas since September 1942 and had lived in Bruche Hall during all of that time (R62). He and his successive room-mates had separate closets and dressers in their room. They used each other's clothes. He did not keep money in the place where the money in question was found, did not know how the money got there, never saw it and knew nothing about it (R63,66). He did not know why they were searching his room but he was present when the search was made for the money and when it was found (R63, 68). He admitted that the money was found in his room and that "the Lieutenant" was "pretty mad about it" and cursed him and struck him on the face. The officer had a club which he kept in his hand at Police Headquarters and informed accused that he better "tell him something about all this" or else he "would beat me up". Accused was afraid (R64). He was taken to another room and there an enlisted man "took down something; I do not know what it was. Then they told me to sign it. I do not know what I was signing" (R65,68). Accused stated some of the letters were given to him "by some parties" and some belonged to his room-mates. He could not explain his possession of the V-mail letters (R65).

7. Lieutenant Joseph Perez-Petinto, recalled as a witness in rebuttal, related in detail the warning given to accused at the time he made his statement (Pros.Ex.J1) and the circumstances surrounding its procurement. He denied that accused was struck or cursed by anyone (R71-72).

8. Article of War 2 reads in part as follows:

> "The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: * * *.
>
> (d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

Accused's amenability to the United States military courts sitting in the United Kingdom was established beyond doubt or contradiction. He had been an employee of the United States Government at the San Antonio General Depot and as an aircraft engine mechanic at Duncan Field. He volunteered for over-sea service and arrived in the United Kingdom in September 1942 as a member of the United States Civil Service Detachment. At the time of his commission of the alleged offenses he was employed, as a member of said detachment, in the shipping department in Hangar K of the First Base Air Depot, AAF Station 590. He received his compensation from the United States Government. Since his arrival in England he was domiciled in a barracks - Bruche Hall - provided for the personnel of the Civilian Civil Service Detachment.

The court and the Board of Review may take judicial notice of the fact that between 1 August 1943 and 30 October 1943 the United States was engaged in war against the Axis power (Act Dec 8, 1941, Public Law 328-77th Cong. 1st Sess.; Act Dec 11, 1941, Public Law 331-77th Cong. 1st Sess.; Act Dec 11, 1941, Public Law 332-77th Cong. 1st Sess.; 55 Stat. 795-797); that within the United Kingdom the United States maintained military establishments; that AAF Station 590 was one of their establishments; and that military personnel were on duty at said station (MCM, 1928, par.125, pp.134,135). The proof shows that also located at said station was a detachment of civilian employees of which accused was a member, which was engaged in work directly connected with the servicing of the Army Air Force.

It therefore is manifest that jurisdiction over the person of accused may be claimed by military courts under the clause of the 2nd Article of War declaring that:

> "all persone accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States"

are subject to military law regardless of the existence of a state of war or not. Accused, an immediate employee of the Government, was also within the subsequent clause of the article which specifies that:

> "in time of war all * * * persons accompanying or serving with the armies * * * in the field both within and without the territorial jurisdiction of the United States"

shall be subject to the jurisdiction of courts-martial and the Articles of War. Beyond doubt he was "serving with the armies in the field". The Board of Review is of the opinion that the record of trial establishes the court's jurisdiction over the person of accused and his responsibility under the Articles of War (In re Di Bartolo 50 Fed. Supp.929; Ex parte Gerlach, 247 Fed. 616; Ex parte Falls 251 Fed. 415; SPJW 1943/6250, 14 May 1943, Bull.JAG June 1943, Vol.II, No.6, sec.359(9), pp.234,235; SPJGW 1942/5668,

Dec 1, 1942, Bull.JAG Dec 1942; Vol.I; No.7, sec.359(12), p.357; SPJGW 1942/4635, Oct 7, 1942, Bull.JAG Oct 1942, Vol.I, No.5, Const. Art.II, sec.2, cl.2(1a), pp.255,256; JAG 250.401, Jan 21, 1942, Bull.JAG Jan-June 1942, Vol.I, No.1, sec.359(12), p.12).

9. "Larceny is the the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein" (MCM, 1928, par.149g, p.171).

Despite accused's denial that he took the money from Mayfield's trousers and secreted it among papers on the top shelf of his wall locker, it was there discovered by the military police. The numbers of five of the seven notes found in accused's possession bore numbers consecutive with five of the nine notes which remained in Mayfield's possession. There is therefore substantial and convincing evidence that the notes thus recovered were Mayfield's property. They were obtained without Mayfield's consent. Accused was the only person having reasonable access to Mayfield's property. Opportunity to commit the theft therefore was proved. Independent of accused's written signed confession there is substantial evidence to support the court's findings of his guilt (CM ETO 885, Van Horn; CM ETO 952, Mosser).

10. In the locker, bureau drawers and among effects and personal belongings of accused were found a considerable number of both ordinary and V-mail letters and also post-cards. These were written by persons other than the accused, most of whom were residents of Bruche Hall, and were addressed to persons other than accused, residing principally in the United States. There was also found a considerable number of letters, originating in the United States and directed to members of the Civil Service Technical Detachment, other than accused. Many letters had not been opened. Some of those addressed to persons in the United States bore no evidence of having been deposited in the mail. A "post office" was located in Bruche Hall, and in proximity to accused's room.

The evidence discloses the fact that letters "posted" or deposited by the writers thereof in the Bruche Hall "post-office" were not protected against extraction from the posting boxes pending the collection by postal clerks. Both the "V" mail box and the air mail box could be entered by trespassers or other unauthorized persons and the letters removed therefrom. This evidence supports the inference that an opportunity was thus afforded accused to secure possession of "outgoing" letters written and addressed by residents of Bruche Hall. The record is entirely silent as to any opportunity for accused to secure possession of "incoming" letters addressed to residents of the Hall other than himself. Accused's explanation of the curious situation is vague, indistinct and unsatisfactory. He declared some of the letters were given to him by other parties and some belonged to his room-mates, past and present. He did not explain his possession of the "V" mail letters.

Accused is not charged with either the theft of these letters nor the wrongful or unlawful possession of same, but that he did "wrongfully and unlawfully obstruct and interfere with the U.S. Army Mail". Such offense is laid under the 96th Article of War. Therefore, the question presented as to sufficiency of proof of larceny in CM 226734 (1942), Bull. JAG., Dec 1942, Vol.I, No.7, sec.451(37), p.364 does not arise in the instant case.

There is no information in the record of trial as to the nature of the so-called "post-office" at Bruche Hall. It is not shown that it was an official army post office nor is there any evidence of its relationship to the New York City post-office. No authority is shown for its establishment and operation. For the purpose of this holding it will therefore be assumed that the so-called "post-office" was simply a place of deposit of "outgoing" mail and receipt of "incoming" mail arranged by the commander of AAF Station No. 590 for the convenience of the military and civilian personnel on duty at that station and that it was not in its operations subject to the rules of the Army Postal Service or to the Postal Rules and Regulations or to any acts of Congress pertaining to the Postal Service (Federal Criminal Code, sec.194, 18 USCA 317; Federal Criminal Code, sec. 201, 18 USCA 324).

Accused was found in possession of letters written by and addressed to personnel of his station. Authority or permission of the writers and addressees thereof for such possession is negatived by substantial evidence. Accused's explanation of his possession of the letters is unconvincing. Nevertheless, allowing it to stand, its greatest effect was to traverse the prosecution's evidence and thereby create an issue of fact for the exclusive determination by the court. The findings of the court are adverse to accused thereby indicating that it did not accept accused's explanation but believed he came into possession of the letters without authority and as a result of his own deliberate acts of trespass. Such findings must be accepted by the Board of Review as conclusive inasmuch as they are supported by substantial competent evidence (CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer).

There is thus presented the question as to whether accused's possession of the mail matter under the circumstances clearly proved by the evidence constitutes an offense under the 96th Article of War, and if so whether the Specification of Charge III alleges such offense. They will be considered in inverse order.

The charge is that accused did "wrongfully and unlawfully obstruct and interfere with the U.S. Army mail". The word "obstruct" has been defined as "to hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment difficult" (Conley v. United States 59 Fed. (2d) 929,936; 29 W. and P. Perm.80). The word "interfere" has been defined "to enter into, or to take part in, the concerns of others; to intermeddle; interpose; intervene (Webster's New International Dictionary, 2nd Ed; 22 W. and P. Perm.147). There can be no serious contention

offered against the assertion that a most reprehensible offense is committed when a person "obstructs" or "interferes" with United States Army mail, and that such offense is clearly one chargeable under the 96th Article of War as disorder to the prejudice of good order and military discipline (MCM, 1928, par.152, p.187; Winthrop's Military Law & Precedents - Reprint - p.722). Regardless of orders, commands, directives or even specific Congressional denunciation it is difficult to imagine an act more prejudicial to "good order and military discipline". The Board of Review therefore concludes that the Specification alleged facts constituting an offense under the 96th Article of War.

There remains the question as to whether the evidence is sufficient to prove the allegation that accused did "obstruct" and "interfere with" the "U.S.Army mail". Accused's unauthorized possession of the letters under the circumstances revealed by the evidence was certainly an obstruction and interference with the orderly processing of mail matter. Delay was thereby caused in the delivery of both "outgoing" and "incoming" letters to their respective addresses. The dates of the letters as compared with the date they were accidentally found in accused's possession is self-speaking evidence of this fact. There is no difficulty in concluding that accused wrongfully and without authority obstructed and interfered with certain mail matter.

The crucial problem is whether it was "U.S.Army mail" as alleged in the Specification. Certainly it was not official mail. Obviously it did not relate to the operation, management or control of the military forces. The mail consisted of private letters written by ("outgoing") or addressed to ("incoming") individuals who were either civilian employees of the United States engaged in servicing and supplying the military forces, or military personnel, and concerned private matters only.

The phrase "U.S.Army" means, of course, "United States Army". The word "mail" in modern usage is equivalent to "mail matter", and includes all matters which may be transmitted in the mails (United States v. Huggett, 40 Fed. 636,641; 26 W. and P. Perm.44). Did the phrase "U.S.Army mail" mean only official mail or did it include all mail, official and private, forwarded by or intended to be delivered to persons, who were members of or serving with the Army? The word "Army" is one of very general signification, analogous and equivalent to "military service". In its etymology the word "army" denotes men in arms. The term in law is noman generalissimum and has been held even to include the navy (In re Stewart, 30 NY Super. (7 Rob.) 635,636; Webster's New International Dictionary - 2nd Ed). Considering all aspects of the matter it is believed that the phrase "U.S. Army mail" describes mail matter which is despatched by or intended for delivery to persons in the service of the army, whether it be private or official communications or information. The interpretation appears to be consistent with popular usage and understanding. "Army mail" is not generally understood as referring to official communications only. It is an over-all generic term carrying the sense and meaning herein indicated.

The proof in the instant case therefore clearly sustains the allegations of the Specification that the accused obstructed and interfered with mail matter despatched by or intended for persons serving in or with the United States Army at AAF Station No. 590. The Board of Review is of the opinion that the findings of accused's guilt of Charge III and its Specification is supported by the evidence.

11. Accused was present when the seven one pound English bank notes were discovered on the morning of 30 October 1943 on the top shelf of his locker and were seized by the military police (R29,34). He pointed out a box, some papers and other miscellaneous articles between the two wall lockers used by him and Mayfield and suggested that Lieutenant Perez - Petinto, Colgrove and searching party also make search of them (R20). He had previous to the search identified his locker, bureau and his "property" located in the room (R21,23,30). On this occasion the military police discovered numerous letters "that had been written by and to other individuals" (R15,32; Pros.Exs. A to Z and A1 to G1). The letters were taken to the military police station where they were sorted and classified and a tabulation made of them (R17). Later in the day Major Nelson, Commanding Officer of Bruche Hall, Colgrove and Horan returned to accused's room (R21) and at that time discovered some sealed letters and post-cards (R16). Accused was not present on the occasion of the later search (R20,22,23).

The evidence therefore is conclusive that when the seven one pound English bank notes (Pros.Ex.A) and the greater part of the letters (Pros.Exs. A to Z and A1 to G1) were discovered among accused's belongings and seized, that accused was present and gave his consent to the search (Pros.Exs. A to Z and A1 to G1). The vexed question as to whether accused's constitutional rights under the Fourth Amendment to the Federal Constitution and the Act of November 23, 1921 (42 Stat. 223, 18 USCA 53) were violated (CM 196526 (1931), Dig.Op.JAG 1912-1940, sec.395(27), p.220) is therefore eliminated from consideration with respect to the pound notes. When evidence is secured by law enforcement officers without warrant or authority but the search is conducted in the presence of the accused and with his full knowledge and consent he waives his Constitutional rights and incriminating evidence thus secured is admissible a gainst him. The search and seizure under such circumstances is not "unreasonable" within the purview of the Fourth Amendment (Dillon v. United States, 279 Fed. 639; Windsor v. United States, 286 Fed. 51; United States v. Williams 295 Fed. 219; Waxman v. United States, 12 Fed.(2nd) 775; Giacolone v. United States, 13 Fed.(2nd) 110; Schutte v. United States, 21 Fed.(2nd) 830; United States v. Bianco, 96 Fed.(2nd) 97; United States v. Thompson, 113 Fed.(2nd) 643; 56 C.J., secs.65,66, pp.1180,1181).

Although the motive for the search was the discovery of Mayfield's bank notes there is no suggestion that accused attempted to limit the search to such purpose. Rather there is a definite inference that he gave a general consent to the examination of his belongings. In any event, the discovery of a major part of the letters and their seizure was the result of a legal search - a search to which accused gave his consent - of accused's belongings. These letters were found within the territorial limits of the consent and hence were not under the inhibition which arises

when incriminating articles are discovered exterior to the authorized place of search (United States v. McCunn, 40 Fed.(2nd) 295). The important thing is that the search which discovered these letters was a search not in violation of accused's constitutional rights. The fact that in the course of such search articles were discovered which incriminated accused in another offense did not render them inadmissible when used in evidence in proof of such other offense (Gouled v. United States, 255 U.S. 298, 65 L.Ed, 647,653; United States v. Jankowski, 28 Fed.(2nd) 800; Matthews v. Correa, 135 Fed.(2nd) 534,537).

There is no serious question involved in sustaining the admissibility in evidence of the letters which were actually discovered and seized in accused's presence. The difficulty arises out of the fact that the record of trial does not distinguish between the letters seized on the first visit to accused's room (which were thus obtained as a result of accused's consent) and those letters found in accused's room by Major Nelson, Colgrove and Horan upon their return later in the day. This second search was made without Acosta's knowledge or consent and in his absence. The exact number of letters found and seized in the course of this search is not indicated by the evidence. The implication is that they were but few. Colgrove in his testimony is positive that Major Nelson, the commanding officer of Bruche Hall was present on the occasion of this second search and seizure (R22). The fair inference is that it was ordered and directed by Major Nelson. The seizure of these letters, being made by order of the commanding officer of the public quarters occupied by accused situate at military station, was therefore not obnoxious to the Fourth Amendment of the Federal Constitution. The letters were admissible in evidence (JAG 250.413, July 23, 1930, Dig.Op. JAG 1912-1940, sec.395(27), p.220).

12. The charge sheet shows accused to be 27 years and three months of age at time of commission of the offenses charged. He was temporarily appointed to the Civil Service at Duncan Field, Texas, on 2 February 1942. He had service of one year and eight months.

13. The conviction of accused of the crime of petty larceny (Charge I and Specification) authorized confinement at hard labor for one year (MCM, 1928, par.104c, p.99). Penitentiary confinement for this offense is not authorized either by the Federal Criminal Code (sec.287, 18 USCA, 466) or the District of Columbia Code (sec.22-2202 (6:61)).

Obstructing and interfering with the mail belonging to other persons (Charge III and its Specification) of which accused was found guilty is an offense under the 96th Article of War and is not the crimes denounced by the Federal Criminal Code (See par.10, supra). Consequently penitentiary confinement is not authorized for this offense. Although accused is a civilian he is amenable to the Articles of War and was subject to the jurisdiction of the military court which tried him. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorised. The place of confinement should be changed accordingly.

14. The court was legally constituted and had jurisdiction of the person and the offenses. 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.

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

(78) 1st Ind.

WD, Branch Office TJAG., with ETOUSA. 14 MAR 1944 TO: Commanding General, VIII Air Force Service Command, APO 633, U.S. Army.

1. In the case of ELOY V. ACOSTA, JR., (36079), Aircraft Engine Mechanic, Civil Service Technician Detachment, 401st Air Depot, 1st Base Air Depot, a civilian serving with the United States Army in the field and under the jurisdiction thereof, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The conviction of accused of the crime of petty larceny (Charge I and Specification) authorized confinement at hard labor for one year (MCM, 1928, par.104c, p.99). Penitentiary confinement for this offense is not authorized either by the Federal Criminal Code (sec.287, 18 USCA 466) or the District of Columbia Code (sec.22-2202 (6:61)).

Obstructing and interfering with the mail belonging to other persons (Charge III and its Specification) of which accused was found guilty is an offense under the 96th Article of War and is not the crimes denounced by the Federal Criminal Code. Consequently, penitentiary confinement is not authorized for this offense. Although accused is a civilian he is amenable to the Articles of War and was subject to the jurisdiction of the military court which tried him. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized. The place of confinement should be changed accordingly, by supplemental action which should be returned to this office for attachment to the record.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1191. For convenience of reference please place that number in brackets at the end of the order: (ETO 1191)

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1197

-8 FEB 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS
v.	
First Lieutenant EUGENE J. CARR, (O-22905), 398th Engineer General Service Regiment, Corps of Engineers.	Trial by G.C.M. convened at Barnstaple, Devonshire, England, 27 November 1943. Sentence: To be dismissed the service and to forfeit all pay and allowances due or to become due.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 96th Article of War.
Specification I: In that First Lieutenant Eugene J. Carr was at Barnstaple, North Devon, England, drunk and disorderly in uniform in a public place, to wit, Barnstaple-Biddeford road, on or about 2 October 1943.
Specification II: In that First Lieutenant Eugene J. Carr, Company "B", 398th Engineer General Service Regiment, did, at Barnstaple, North Devon, England, on or about 2 October 1943, wrongfully strike Mr. Horsman, Berylmere, Sticklepath, Barnstaple, North Devon, England, with his hand.

Specification III: In that * * * * * *, did, at Barnstaple, North Devon, England, on or about 2 October 1943, wrongfully strike Mrs. Horsman, Berylmere, Sticklepath, Barnstaple, North Devon, England, with his hand.

Specification IV: In that * * * * * *, did, at Barnstaple, North Devon, England, on or about 2 October 1943, forcibly resist arrest by civilian police in the performance of their duties.

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

Specification I: In that * * * * * *, was, at Barnstaple, North Devon, England, on or about 2 October 1943, in a public place, to wit, the Barnstaple-Biddeford road drunk and disorderly while in unifrom (sic).

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of two previous convictions was introduced, one for being drunk in uniform and the other being drunk and disorderly in uniform, both in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding Officer, Southern Base Section, SOS, ETOUSA, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that about 10:30 p.m., 2 October 1943, Mr. and Mrs. Maurice H. Atkins, Belle Vue, Bickington, North Devonshire, England, were walking home on Sticklepath Road in the vicinity of Bickington. They observed the lights of a car (agreed by the prosecution and defense to be a command car) shining down the road, and as they approached the lights went out. An American, later identified as accused, came from behind the car to about the middle of the road, shone a torch in their faces and asked them where they were going (R 48,52-53). When they replied that they were going home he asked whether they were English or American and where Mr. Atkins was working. He would not let them by and "just pushed his hands and made various mumblings" (R48,52). They made several attempts to pass (R52) but he kept waving his hands (R50), putting up his fist (R54) and said they were staying there (R49). He threatened to beat Mr. Atkins to a pulp, said he would take care of Mrs. Atkins later and would push her face through the cement. At his order the man in the car kept a light shining in their faces, and as they tried to move forward or backward, he "made this car go up and down with us". He shouted to the man in the car to " 'Get the guns out, and shoot them'." Mrs. Atkins

became frightened and screamed, whereupon he told her not to scream again, seized her sleeve and pulled her (R49,51-54). The man in the car said " 'You had better let them go, Lieutenant' "(R49). They were in the middle of the road when a jeep containing four persons appeared and stopped. When Mrs. Atkins asked their help but they did nothing, she ran with her husband down the road as accused called to the man in the car not to let them get away, and shouted " 'Get the guns out and shoot them both' "(R49, 52-53).

At the trial both of the Atkins identified accused as the man who had stopped them (R50,54), and both testified that they did not see any weapon in his hands (R49,53). To Mrs. Atkins it seemed as if he had "gone mad" (R49-50). Asked by the Court whether he believed accused was insanely drunk at the time, Mr. Atkins replied "Well, I suppose he was, Yes" (R55). He had not seen the man who remained in the car (R53).

On the night of 2 October 1943 Mr. and Mrs. Walter H. Horsman, Berylmere, Barnstaple and Mr. Sidney John Squire, The Post, Bickington were walking up Sticklepath Hill. As they passed a parked car there were two uniformed figures in the road. One, later identified as accused, came over and said "'Halt, Stand to. Don't move. Don't speak or I'll shoot.'" He had his fist clenched against his waist. Horsman asked "'What's the trouble, is there an invasion?'" Accused replied, "'Quiet, or I will shoot.'" The other uniformed figure "must have slipped off" (R12-13, 43, 63). Accused turned his head and shouted as though he were giving orders. He seemed to be calling somebody from a car, and was "waiving the jeep up" from the top of the hill. Squires, who, "thought he was fairly wild", jumped over a locked gate and went to a house to telephone the police (R63). Horsman said to his wife "'Come on, we have got to go home.'" They had gone about three paces when he was struck on the back of the head, probably by accused's fist, and "went flying" into the post office entrance. He fell down and was more or less knocked out. Mrs. Horsman screamed to accused "'Leave my husband alone'", whereupon he dealt her a severe blow with his fist over her right eye. Horsman heard his wife screaming and struggled to his feet in a dazed condition when accused "made another dive for me, and my wife intervened, and caught it across the eye". She fell, struck her right knee and "broke" her stocking. She shouted repeatedly to Mr. Squires but received no reply. When Mr. Horsman went to pick her up he was struck again and "went flying again". Accused landed on top of him. Mrs. Horsman called to the other soldier, who was across the road and asked him to do something for her husband; he seemed afraid to speak, but finally came over and said "'Lieutenant, leave this woman's husband alone.'" Accused replied "'I am handling this case'", and the soldier left. A cyclist then passed and accused got up and followed him shouting "'Hey, there. I'll shoot, I'll shoot'". The Horsmans then ran down Wray Avenue and escaped (R13-15,18-20, 44-46). After trying without success for about ten minutes to get into the house to telephone and to find something with which to hit accused, Squires returned to the road. The Horsmans had gone and he saw a car approaching. He did not return to the scene but instead departed down

Wrey Avenue(R63-64).

Both Mr. and Mrs. Horsman identified accused as the person who had assaulted them (R14,18,45). Neither of them had noticed any weapon in his possession (R13,43). Mr. Horsman testified that he did not smell any alcohol on accused's breath and that he did not know whether he was drunk. His speech, however, was different than it was when he saw him in town on the following day (R19) when he apologized for his conduct and "had such a different manner"(R20-21).

At the trial Mr. Horsman identified a raincoat which he had worn that evening and which bore as the result of the assault, petrol and mud stains and a one inch tear in the left sleeve. The coat was admitted in evidence (R15-17; Pros. Ex. B).

On 3 October Dr. Hector Acheson, 21 Byport Street, Barnstaple, examined Mrs. Horsman and found that she had an incised wound over the right eye, a bruised lip and an abrasion of one knee. The incised wound required stitching. Mr. Horsman had an abrasion at the back of his head and a bruise on his buttock. The bruises and abrasions were "small, minor" but at the time of trial the woman was still receiving treatment for the upset to her emotional system. Dr. Acheson's notes were admitted in evidence (R9-10; Pros. Ex.A).

About 11:40 p.m., 2 October Constable George Benny, stationed at Sherwell, was on duty on the Barnstaple-Bideford Road, and was proceeding toward Sticklepath when he heard a man's voice shouting "'Stop them I tell you, stop them'". A man and a woman ran toward him, but turned off. Reaching Sticklepath Cross he saw a "military sergeant", Sergeant Emerick, standing by a parked military vehicle and an officer, later identified as accused, standing a little further away in the middle of the road shouting to himself "'Stop them, I tell you, stop them'". No one else was present (R33-34). The sergeant told Benny that he had come to fetch the officer but was unable to do anything with him owing to his condition (R34). Accused seemed to be directing an imaginary battle in which everyone appeared to be his enemy and he was "calling on someone to open up or man the guns and open fire" (R37). Benny asked him what the matter was, whereupon he told Benny to get out of the way or he would "smash my face in". When Benny told him that his conduct was not becoming to a member of the United States forces "he then called me a yellow bastard, and said he was over in this country fighting for such skunks as me". Two persons appeared on bicycles and he shouted "'Stop, you bastards'", and called on an imaginary sergeant named "'Mac'", to "man the guns and mow them down". A car appeared and when Benny tried to get accused to safety, he started to struggle and held up his hands in a fighting attitude (R34-35). The car stopped and Police Sergeant George H. Jewell and Constable George H. Rodd, both stationed at Barnstaple,

alighted. Accused was waving his arms frantically and was acting "more or less like a madman". When Jewell asked him what the matter was he replied "'You mind your own business, you bloody skunk'" and tried to kick Jewell in the testicles(R28-30,34-35). He continually shouted "for someone to 'put the guns on them', to 'shoot their heads off.'". He referredtto the three police officers as "'yellow bastards', 'Bavarians,' 'Free French'"(R41). When accused attempted to kick Jewell, Rodd and Benny "both closed with him", pinned his arms behind his back, and with considerable difficulty got him into the American vehicle. On the way to the vehicle he became violent and kicked Benny on both shins. He was strong and vicious. Sergeant Emerick had remained with the American vehicle about 35 yards away. He was sober, and "appeared to be very frightened as to what was taking place". Emerick drove accused and the three police officers to the police station. Accused was very violent in the car. The three officers were forced to "more or less sit on him" (R29-30,34,37-40). When they arrived at the police station about 11:55 p.m., because of his violence it was necessary to carry him from the vehicle into the station where three officers had to hold him down on a bench. Until about 1:45 a.m. when Captain Arnett of the Military Police arrived at the station, accused was "struggling, kicking, gibbering, and using bad language, and *** had to be held down, otherwise he would have been more violent"(R29,37-39,41). As soon as Captain Arnett spoke to him "it was like a light piercing the fog. He seemed to realize that he was talking to an American Officer, and it seemed to make all the difference. *** The Captain seemed to touch some spot that we could not". He ceased to be violent and aggressive, pulled himself together and behaved quite well(R31,35-36,41).

At the trial Jewell, Benny and Rodd identified accused (R28,35, 40). They did not notice any weapon in his possession, nor was any weapon found on his person when a search for his identity card was made at the station (R31,38,40). Both Jewell and Rodd testified that he was "mad drunk". Jewell also testified that he smelled of intoxicating liquor and was "insanely drunk, absolutely without knowing what he was doing. I don't think he could have seen reason in any shape or form" (R28-31,41).

When Captain Levin H. Arnett, 707th Military Police Battalion arrived at the police station at 1:45 a.m. 3 October accused's uniform was "quite in order", but his shoes were off. He told accused to put them on, that he was taking him back to his organization. He obeyed and was driven to organization headquarters where he was turned over to the executive officer. He did not cause any trouble and did everything he was told to do willingly and without hesitation. He was a little surly, it was evident that he had been drinking and "there was an odor of alcohol". However, he recognized Captain Arnett, his speech was coherent and he "walked perfectly all right to the car"(R60-61). In the opinion of Captain Arnett, accused had been drinking heavily (R61).

It was stipulated by the prosecution and defense that Sergeant Reuben Styrlund and Private First Class Webster Helmond, both of Company A,

707th Military Police Battalion went to the police station at Barnstaple on the night of 2 October and that accused was present and "in orderly condition at that time" (R59).

On 19 October 1943 accused was admitted to the 36th Station Hospital, a neuro-psychiatric hospital, where he was under the daily observation of Captain Bill H. Williams, Medical Corps, who prepared a clinical abstract for a board of officers which met on 29 October to determine accused's sanity under the provisions of paragraph 35c MCM, 1928, and AR 420-5. The clinical abstract and the report were admitted in evidence (R56-58; Pros. Exs. C,D,E,F). The board found accused sane and responsible for his actions on 2 October and at the time of its examination (29 October 1943) (Pros. Ex. F).

4. For the defense, Sergeant John L. Emerick, Company B, 398th Engineer Regiment testified that on the evening of 2 October, he drove accused to the Wrey Arms and was instructed to call for him at 10 p.m. When he returned to Wrey Arms, accused "seemed to be intoxicated". They drove two nurses to a hospital and during the ride accused's manner was orderly and his conversation natural. On the way back to Barnstaple he ordered Emerick to stop the car, got out, started to direct traffic and stopped a car or two. He stopped two persons and Emerick turned on the car lights at his request (R66-67,70-71). The sergeant got him back in the car and drove away. He ordered Emerick to stop the vehicle again, got out, halted a jeep and tried unsuccessfully to halt a truck.

> "All this time he was directing, the way it sounded, artillery and machine-gun fire. He had his lines all set up, and the way he was talking he didn't want anybody to block his lines. That was the whole crux of the matter"(R67).

When he stopped two more persons Emerick drove off, turned around and returned in a few minutes. A woman ran up to the car and said hysterically "'He's killing my husband'.***'Please take him away'". Emerick found accused on top of a man, holding him down and saying that he would "knock his head off". He finally made him understand these people would not go through his lines and accused let them go. He then got out in the middle of the street and "started his battle formation all over again" (R67,69-70). The police arrived and he was taken to the station and then to his organization where "he was shaking his head and beginning to wonder what was going on". Emerick had a regular trip ticket which had been signed by the dispatcher at the motor pool. The company commander had authorized the use of the car. In Emerick's opinion, compared with the other officers under whom he had served, accused was "a very good military man"(R68-69).

Accused testified that before leaving camp he had "possibly three drinks". He remembered having had two drinks at the Wyey Arms and estimated from the time he was there that he had possibly three, maybe four";

in all he had "from six to eight"(R72,75-76). He recalled conversing with two nurses at Wrey Arms and meeting there a fellow officer and his guest. The last thing he remembered was standing in line for a drink at Wrey Arms. He next recalled "someone holding me down, with my arms pinned in a hammerlock, and applying quite a bit of punishment to me". He had the impression that the British "had turned against us, and there was some sort of a battle going on". He then remembered riding in a car with an American officer, being in regimental headquarters, meeting the executive officer and being ordered to go to his quarters (R72-75). When he awoke the following morning (3 October) he had a feeling that something had happened, and ascertained from Sergeant Emerick what had occurred. He went to the police station at Barnstaple, offered to make amends as far as he was able in a material way to the policemen and civilians who had suffered damage and secured the addresses of the civilians involved. He saw Mr. and Mrs. Horsman and assured them that he would pay all expenses when the doctor had completed his treatments(R73-74,77).

Questioned by the court, accused testified that at one time he had "a rather large capacity for liquor" but on two or three occasions during the last six or eight months "as little as four or five drinks has just knocked the sails out of me". He had at first attributed this fact to stomach trouble from which he had fully recovered, and now believed it might be due to a "sort of mental stress" which he had been under for quite some time. On the other hand, on some occasions he had had 12 to 15 drinks and had been perfectly normal (R75-76). He used to do quite a lot of drinking, but had done very little in the year and a half since his marriage. With the exception of two or three occasions he probably did not drink more in a year than the average man did in a month (R77). Upon further questioning by the court, he admitted that he had been court-martialed and convicted twice before for drunkenness while on the Alcan Highway project. The first trial consumed 10 hours, "was very poorly defended, and it was a mess". He felt that he had then been unjustly convicted (R76).

Colonel Theodore Wyman, Jr., Commandant, 19th District, Hestercombe House, Somerset testified that he had been accused's regimental commander since June, 1943. In his opinion, accused's value to the service was "very large" (R22). He said accused had ability to lead troops against an armed enemy and Colonel Wyman would be very glad to have him serve under him in a combat outfit. "However, I would not wish him to serve in any SOS outfit". As far as "soldiering characteristics" were concerned he would rate accused as superior. The fact that accused had been in one or two previous incidents would not alter his opinion (R23).

Major Elmer W. Fuggit, regimental surgeon of the 398th Engineer Regiment had also known accused since June 1943. In his opinion he was extremely intelligent and a "very keen engineer". He was very determined, had a rather explosive disposition, and showed great decisiveness (R24). He would be peculiarly gifted as a combat soldier because of a fighting instinct and the intelligence and ability to make quick decisions. He

was also an excellent leader. His physical condition was excellent, "probably the best of any officers of our outfit", and his mental condition was "perfectly suitable and responsible"(R25). He was emotionally stable. He had never seen accused drunk (R26).

Captain John P. Rasmussen, battalion commander of the 398th Engineer Regiment testified that he had known accused for about eight months and that accused had been his administrative officer when he had commanded Company B and relieved him in command of B Company. Asked his opinion of him as a soldier, Captain Rasmussen testified "he is the best", that he was an outstanding professional soldier (R78,80). He based his opinion on his cooperation, his ability to command men and their respect, his technical military knowledge, and his courage and reliability (R79-80). He admitted the acts of which accused is charged herein did not support such expressed opinion. It was his further opinion that "there is a lot to be salvaged in this young man. I think he learned his lesson" (R80). His opinion of accused was based on his being in "sane and good sense" for when accused was under the influence of liquor "he is not the same Eugene Carr"(R81)though he had never seen accused drunk(R80). The fact that accused had been before a court on two previous occasions for drunkenness would not change the witness' opinion of him(R79).

5. Specification 1, Charge I and the Specification of Charge II both allege identical offenses at the same time and place, namely, drunkenness and disorderly conduct in uniform in violation of Articles of War 96 and 95 respectively.

> "Offenses under AW 95 and AW 96 are not the same, nor established by the same evidence, the former being applicable to officers and cadets; and the conviction of an officer under both articles on the same facts held not illegal as placing him twice in jeopardy for the same offense. (McRae v. Henkes, 273 Fed. 108)" (Footnote, AW 95, MCM, 1928, p.224).

In the McRae case cited above, the specifications alleging violations of Articles of War 95 and 96 were identical. In CM 209952, Berry there were identical specifications alleging violations of Articles of War 95 and 96, and the court denied a motion by the defense that the trial judge advocate be directed to elect between the duplicate charges. The Board of Review held that there was no error in the duplication but that the offenses could be punished only in their most important aspect (See also Dig.Ops.JAG, 1912 1930, par.1452 (4), p.722).

6. The reviews of the Assistant Staff Judge Advocate, Southern Base Section, SOS, ETOUSA and of the Assistant Theater Judge Advocate, ETOUSA

contain discussions of several irregularities appearing in the record of trial. None of these irregularities injuriously affected the substantial rights of accused and further comment thereon is deemed unnecessary.

7. It was clearly established by the evidence that at the time and public place alleged accused, while in a grossly drunken condition, halted and committed an unprovoked assault with his fists upon two British civilians, one of whom was a woman, as the result of which they received medical attention. He halted another British couple, threatened them with bodily harm and would not let them pass. He halted vehicular traffice, and used foul language toward both British police and British civilians. On several occasions he loudly threatened to shoot the people with whom he came in contact. He attempted to kick one policeman in the testicles and when taken in custody by the police, resisted so violently that it required three officers to place him in a vehicle, and to hold him down during the journey to the police station. It was necessary to carry him bodily into the station, where for over an hour three policemen were forced to hold him down on a bench during which time he was "struggling, kicking, gibbering, and using bad language". The evidence is legally sufficient to establish the findings of guilty of Charge I and of the four specifications thereunder alleging violation of Article of War 96.

With reference to Specifications 2, 3 and 4, Charge I (wrongfully striking Mr. and Mrs. Horsman with his fist, and forcibly resisting arrest by the civilian police, in violation of Article of War 96), accused denied all memory of these events and ascribed his loss of memory to his indulgence in intoxicants.

> "It is a well settled general rule of the common law, and also generally followed under the statute, that voluntary drunkenness of an accused at the time a crime was committed is no defense; and that despite his voluntary drunkenness at the time one may, subject to the qualifications hereinafter pointed out, be guilty of any crime, such as assault***. It can make no difference, where no specific intent is necessary, that the intoxication was so extreme that accused was unconscious of what he was doing and had no capacity to distinguish between right and wrong, and, although there may be no actual criminal intent, the law will,

> by construction, supply the same, except in cases where specific intent is requisite." (22 CJS., Sec.66, p.130-131; 16 C.J., Sec. 81, p.104-6) (Underscoring supplied).

Specific intent is not an essential element of the offenses alleged. In view of the foregoing, accused's voluntary drunkenness did not constitute a defense.

8. With reference to Specification 4, Charge I (forcibly resisting arrest by civilian police in performance of their duties in violation of Article of War 96), the British police were authorized to arrest accused for an offense committed against British law (United States of America (Visiting Forces) Act, 1942, (3 & 4 Geo.6 c.51) Sec. 1 (2); Cir. 72, ETOUSA, 9 Sept. 1943, par. III 1 d). Although the evidence does not show that accused was informed by the British police that he was under arrest, such action was unnecessary in view of his violent and drunken misconduct at the time.

9. The question remaining for consideration is whether accused's drunkenness and disorderly conduct was of such an aggravated nature as to amount to conduct unbecoming an officer and gentleman within the meaning of Article of War 95 (Charge II and Specification). In Winthrop's Military Law and Precedents it is stated that the word "unbecoming" as used in Article of War 95 "*** is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety *** but morally unbefitting". (Reprint p.711). The conduct contemplated by Article of War 95:

> "*** must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." (Reprint, pp.711-712).

Winthrop cites as an instance of an offense chargeable under Article of War 61 (present AW 95) "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Reprint p.717). In paragraph 151, MCM., 1928, p.186, the offense of being "grossly drunk and conspicuously disorderly in a public place" is listed as an example of a violation of Article of War 95. It is further stated therein that the article contemplates conduct by an officer which, taking all the circumstances into consideration, shows that he is morally unfit to be an officer and to be considered a gentleman.

The findings indicate that the court believed the evidence sufficient to establish that accused was drunk and disorderly as alleged and in view of all the circumstances of the case the Board of Review will not disturb its findings. Accused's drunkenness was gross and his disorderly conduct was decidedly conspicuous. His conduct as a whole far transgressed military canons of fairness and decency. (CM ETO 25, Kenny). The evidence is legally sufficient to support the findings of guilty of Charge II and its Specification.

10. Attached to the record of trial are three recommendations for clemency, one by Lieutenant Colonel J.S. Tudor, Quartermaster Corps, a member of the court, another by the assistant defense counsel who conducted the defense in the absence of the defense counsel, and the third by the trial judge advocate. Also attached is a recommendation by the reviewing authority that accused be eliminated from the service but that such separation be without "dishonorable discharge".

11. The charge sheet shows that accused is 27 years of age. He was a cadet at the United States Military Academy from 1 July 1936 to 11 June 1940, on which date he was commissioned a second lieutenant, United States Army. On 10 October 1941 he was promoted to first lieutenant, Army of the United States, and on 11 June 1943 he was promoted to first lieutenant, United States Army.

12. The court was legally constituted and had jurisdiction of the person and offenses. 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. Dismissal is mandatory upon conviction of violation of Article of War 95, and both dismissal and total forfeitures are authorized upon conviction of Article of War 96.

B. Franklin Peters Judge Advocate

Judge Advocate

Judge Advocate

(90)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. -8 FEB 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of First Lieutenant EUGENE J. CARR (O-22905), 398th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In addition to dismissal from the service, the sentence imposed by the court includes forfeiture of all pay and allowances due or to become due. The sentence is entirely legal in view of the conviction of a violation of Article of War 96, in addition to the conviction of a violation of Article of War 95. An examination of cases of conviction by court-martial of officers in the United States wherein the President has acted as the confirming authority, discloses that that part of a sentence which imposes total forfeitures has almost uniformly been remitted. Such a remission would afford the officer involved the means with which to pay his obligations which are outstanding at the termination of his service, as well as the cost of transportation to his home. If such a policy has virtue in the United States, there is even stronger reason for it here in a foreign land distant from home.

3. Lieutenant Carr, according to those who have served with him, is an able, energetic, experienced professional soldier. If he would leave liquor alone, he appears capable of useful service in coming operations, but because of his record in this respect during the recent past he must be considered a doubtful risk.

4. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1197. For convenience of reference please place that number in brackets at the end of the order: (ETO 1197).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Portion of sentence adjudging total forfeitures remitted. Execution of sentence as thus modified suspended. GCMO 8, ETO, 14 Feb 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1201.

29 MAR 1944

U N I T E D S T A T E S	)	29TH INFANTRY DIVISION.
	)	
v.	)	Trial by G.C.M., convened at APO 29 U.S. Army, 23 December 1943.
	)	
Private (formerly Corporal) LIONEL (NMI) PHEIL (33052124) Company "L", 115th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE : Violation of the 93rd Article of War.
Specification: In that Corporal Lionel Pheil, Company "L", 115th Infantry, did, at Bodmin, England, on or about 1 December 1943, feloniously take, steal, and carry away a pocketbook and £37, British currency, value about $150.00, the property of Corporal George W. Ward.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Competent, substantial evidence presented by the prosecution established the following indisputable facts:

(92)

At about 1800 hours on 1 December 1943, Sergeant Schwatka, Private first class Crockett, Corporal George W. Ward and accused, all of Company "L", 115th Infantry, were in barracks and were in one anothers immediate presence. Ward inquired of Schwatka if he were going on his furlough during December, to which Schwatka replied in the negative explaining that he had lost most of his money in a poker game and in addition had incurred gambling debts. At that time Ward had in his shirt pocket a wallet containing £38 or £40 in English currency (R6,8). Schwatka then left the barrack room and simultaneously Private first class John J. Jarrett, Company "L", 115th Infantry, entered. At this instant, the lights were extinguished in the barracks, due to a temporary failure of the electrical service in camp (R5,18). At Crockett's request, Jarrett commenced sewing stripes on the sleeves of Crockett's blouse, and Crockett held a flashlight so that Jarrett could see to do the work. Accused's bed was across the aisle from Ward's bed -- about five feet from it. Accused at this time stood between the two beds (R5, 6). Ward removed his shirt, ascertaining at the same time that the wallet was in the pocket and that the pocket was buttoned (R6,7). He then wrapped the shirt in a raincoat and placed it on his bed. Borrowing a flashlight from Jarrett (who owned two flashlights), Ward left the room and went to the latrine. The accused, Crockett and Jarrett remained in the room upon Ward's departure. Ward returned in about five minutes(R7, 18). He dressed in a clean shirt and then reached for his wallet, which he had placed in the pocket of his shirt on his bed. The wallet and the money contained therein were missing. Darkness yet prevailing, Ward asked for a flashlight and searched his bed for the wallet, but did not find it. Jarrett, Crockett and accused were still present. Ward then said: "There are three persons that are not going to leave this room until I find the money" (R6,7,10). Jarrett and Crockett offered themselves for search but Ward did not search them. Accused, although present, remained silent. Ward asked: "Where the hell is Pheil?", but receiving no answer (R6,7,8,10), inquired for accused of other men who came into the barracks. Ward did not see accused until the lights were turned on a short time later. Accused then offered Ward the opportunity to search him, but Ward did not do so (R6,8). The electric lights remained extinguished for about fifteen minutes (R7).

The company commander, Captain Arthur D. Lawson, was absent from camp on 2 December 1943, so Ward had complained of his loss to Lieutenant MacDonnell. Captain Lawson returned on the evening of 2 December 1943, and Ward immediately reported the theft to him. On Friday morning, 3 December 1943, Ward, pursuant to Captain Lawson's instructions, reported to the company orderly room and there gave Captain Lawson a statement of the episode involving the loss of the money. Captain Lawson had the company assembled, informed the men that a sum of money had been stolen, explained the seriousness of the offense and made request for its return. He further stated "that if the person would see me I'd see if we couldn't make it easy for the one responsible" (R14).

4. After waiting until the afternoon of 4 December 1943, and the money not having been recovered, Captain Lawson told a Colonel Sheppe of the incident and then approached Lieutenant Harrison H. Holland, Military Police Platoon, 29th Infantry Division, and informed him of the particulars of the theft. Lieutenant Holland instructed Captain Lawson to bring the men whom he suspected down to the "police station" (R15,28).

Sergeant Robert Snell and Constable William Frederick Timmins, were members of the Cornwall Constabulary stationed at Bodmin. Timmins was at the United States Army military installation at A.P.O.29, on 4 December 1943 on other business (R11,17,19,20), where Captain Lawson and Lieutenant Holland informed him of the theft. Captain Lawson in talking with Timmins solicited the help of the civilian police. Timmins informed Captain Lawson that the matter "would have to go through the normal and usual channels"; that he (Timmins) "would have to make a report of it to the superintendent" (R19); that he would "get in touch with Sergeant Snell" and if Captain Lawson "would bring the 3 men to the police station, who were in the room with Corporal Ward", Timmins "would see what could be done" (R19,20,29).

Captain Lawson, thereupon on the evening of 4 December 1943 ordered Jarrett and Crockett to meet him at the constabulary police station and took Ward and accused with him in a jeep to the station (R15). At the station Captain Lawson and the four soldiers were met by Lieutenant Holland. Accused, Jarrett and Crockett were taken into Sergeant Snell's office (R11-12,28) and were questioned by him. Suspicion fell upon accused, who was duly cautioned. He denied any knowledge of the theft of the money. Captain Lawson and Lieutenant Holland were present while Snell was questioning accused and they also questioned him. Snell, believing that accused was not telling all he knew because of the presence of the two officers, asked the latter to leave the room. They complied with the request (R12,15,28). Snell, alone with the accused, cautioned him again and then informed him that he was to be questioned. Accused replied: "OK Sarge, carry on." Snell then stated to accused that "he was standing near Corporal Ward's bed when he (Ward) left the hut and he was not there when Ward returned and that he was strongly under suspicion." (R12). Accused then stood up and said, "Well, Sarge, I had it, I have about £52, 10s in notes on me now. I will admit to Captain Lawson that I took the money and I will hand the money to him." Captain Lawson then returned to the office and accused gave him £52. 10s in notes and said Ward's money was among the bills or notes (R12, 14,15,28). At the request of Lieutenant Holland, accused was then supplied with a sheet of paper and by his own hand wrote the following statement (R12,28), which without objection was admitted in evidence as "Pros.Ex.1":

"Dec. 4 1943

I, Lionel Pheil, 33052124 Cpl. Co L. 115th Inf. being under no pressure or coercion state a follows on the night of Dec. 1 1943 were in the barracks with Cpl Ward, Pvt. Jarrett, Pvt. Crockett when the lights went out. Cpl Ward left the room leaving his wallet containing an amount of money unknown to me, lying on the bed. I in the darkness

took the wallet. Later I took the money from the wallet and threw the wallet in the street in Bodmin. On Dec 4 1943 I returned the money to Captain Lawson

(s) Lionel Pheil
2140 hrs.
4 Dec 1943
Cpl Phiel before me did write the above statement

(s) Arthur D. Lawson
Capt. Inf

(s) Harrison H. Holland
1st Lt. CMP

(s) R. Snell, Sergt."

5. Ward received as pay on 30 November 1943 £13. 14s and odd pence. His pay was contained in an envelope and consisted of thirteen one pound notes and metal change (R8). The men in the company were paid according to grade, and within the same grade they were paid alphabetically. One Landon and Ward held the grade of T/5. Landon was therefore paid immediately prior to Ward (R17). After Captain Lawson obtained the £52. 10s from accused, he secured from Landon the serial numbers of the pound notes paid to him. According to Captain Lawson, Ward having been paid after Landon the numbers of the notes received by Ward should have been in consecutive order. Among the bank notes delivered by accused to Captain Lawson there were seven or eight whose serial numbers coincided with the numbers of notes with which Ward was paid (R14-15). Ward asserted that although he had gambled in a crap game prior to the theft he had not reduced the money in his possession at any time below seven or eight pounds (R8-9,10). When he entered the game he had no money other than what he had been paid (R10). About £38 to £40, including the notes paid to him, were contained in the wallet which was stolen (R6,8).

6. With respect to accused's confession, in addition to his remarks to the assembled company, Captain Lawson told accused "that I'd try and get him off by 'busting' him and transferring him out of this company"(R14). At the police station before the confession, he at first denied the theft. Captain Lawson then told him: "I would try and get him off as easy as I could with a reduction in grade and a transfer, but could not promise him that he would not be court-martialed." (R15), and "I did not know what higher headquarters would do about it but would recommend a special court-martial * * * also * * * that he had been an excellent soldier"(R16). Captain Lawson stated that accused informed him "that before he would go before a general court-martial, he would admit the offense and pay the money back and take the blame." (R16). Lieutenant Holland in relating the incidents of the meeting at the police station whereat Captain Lawson, Sergeant Snell, Lieutenant Holland and accused were present, declared that "Captain Lawson asked him (accused) to tell us if he took the money and where we could find it and that

he (Captain Lawson) would see that it would not go too hard with Phail if he confessed he took the money, that he (Phail) would be 'busted' and transferred"(R28). When the accused signed the statement he asked Lieutenant Holland if he would be tried for the offense and the latter told him that he could not promise him anything. He also told accused that he would keep the statement in his file and have a copy made for the civilian police and that it would not be used unless accused later said that they had threatened him and that the only reason he gave the money back was to keep them from questioning him (R28-29). Accused testified that Captain Lawson told him that "if I was guilty to admit the theft and to return the money, that I would be 'busted' and transferred out of the company, and that there would be no court-martial," (R22,24) and further that Lieutenant Holland told him that if he did not sign a statement that he had taken the money, "I would stand court-martial and that charges would be preferred, and * * * I could draw my own conclusions about what would happen. Then I wrote this statement and signed it"(R22). Accused declared that inasmuch as all circumstantial evidence pointed to him, and Captain Lawson, Lieutenant Holland and Sergeant Snell told him they believed he was guilty he "knew there would be a court-martial if I did not do anything. I never heard of anyone beating a court-martial and I thought it would be better if I parted with the L 37 so that I would not have to stand a court-martial and I wanted to keep a clean record"(R22,24). Lieutenant Holland asked him to sign the statement and told him that it would be put in a secret file and held in confidence (R25-27).

7. In addition to his testimony concerning the statement (Pros.Ex. 1) set forth above, accused testified that he was in the barracks on the evening of 1 December 1943 and was engaged in a conversation with a group of soldiers.

> "* * * The fellows in the barracks were talking and I joined in the conversation and about that time Sergeant Schwatka entered the room and left and then the lights went out and Jarrett entered. Crockett was in the room when I entered. After the lights went out, Ward was around his bed searching for his blouse which he had mislaid. After a while he (Ward) decided he had to urinate and borrowed a flashlight from Jarrett and left the room. I stayed still for a short while and then felt my way around to my own bed and got my flashlight and continued to dress and about that time Ward returned and again made a search around his bed and Jarrett asked him what he was looking for but Ward did not say. At about this time the other fellows entered the room, coming from supper and Ward stated that his wallet had been stolen. I stayed around till about 8:30 before I left. At one time, Crockett,

Jarrett and I offered to let Ward search us to see if we had the money, but he did not search us. That is about all."(R21).

Upon being asked how it was he had the £52 which he delivered to Captain Lawson at the Constabulary police station he replied:

"I got paid £12, 10s; had £3 owed to me; won about £15 on the night of the 3rd and 4th; won about £8 on Friday night and had about £14 on me" (R22).

He further explained that he won the money described by shooting crap and playing cards (R22).

On cross-examination, he stated that he didn't "think" he heard Ward call his name when Ward returned from the latrine; that when the lights went out he stood for about thirty seconds and then started to feel his way around to his bed to obtain his flash-light which he turned on and continued dressing; that he stood "on the other side of the room, across the aisle (from Ward's bed) by the bed next to mine"; and that it was five or six feet from Ward's bed and he heard no one around it. He admitted he overheard a conversation between Ward and Schwatka wherein Ward spoke of the amount of money he had, but denied that Ward showed him (accused) his money. He further asserted that a soldier named Stankus, who carried a flash-light walked through the barracks during this time (R23,24). When asked by a member of the court how he accounted "for the fact that some of the money that Ward was paid off with was in the roll of notes" which he turned over to Captain Lawson, he replied: "I might have won it when gambling". However, he stated that Ward had not been in a game with him at any time (R25), and that he could think of no one who knew that he had won money playing cards and shooting crap (R23,24).

8. Determination of the legal sufficiency of the record to sustain the findings of guilty primarily requires the consideration of four evidentiary questions:

(a) - Pros. Ex.1 is the signed confession of accused wherein he admitted the larceny of Ward's wallet and money. Although there was an affirmative indication by the defense that it had no objection to its admission (R12) it formed a vital part of the prosecution's case. The question of its admissibility therefore remains open for consideration by the Board of Review (CM ETO 527, Astrella).

With respect to the admissibility of confessions the following quotation from the Manual for Courts-Martial is cogent:

"Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party

confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved. Thus, a benefit, punishment, or injury of trivial importance to the accused need not be accepted as having induced a confession, especially where the confession involves a serious offense; casual remarks or indefinite expressions need not be regarded as having inspired hope or fear; and an intelligent, experienced, strongminded soldier might not be influenced by words and circumstances which might influence an ignorant, dull-minded recruit.(MCM,1928, par.114a, p.116).

The effect of promises of immunity upon a confession of an accused is stated thus:

"Inducements by way of promises of benefit made by persons in authority in respect of the prosecution of the accused for the crime with which he is charged, which have reference to the person's escape from punishment for such crime or his partial escape therefrom, or promises to mitigate punishment are sufficient to render confessions made in consequence thereof involuntary and inadmissible. A promise of immunity is held to be of such force as to render a confession made in reliance thereon involuntary. If a confession is induced by a promise of leniency or clemency, although not necessarily of an entire escape from punishment, it is not admissible in evidence against the confesser. A promise to free the accused in return for his confession is in the same category, and has the same effect upon a confession obtained thereby, as a promise of immunity"(20 Am. Jur., Evidence, sec. 511, p.440).

> "It is generally held that if a confession is induced by a promise of leniency or clemency, although not necessarily of an entire escape from punishment, it is not admissible in evidence against the confesser. Thus, a confession is not admissible if made in response to a promise to 'make it lighter' on the accused for confessing; to recommend a life sentence to the jury rather than capital punishment; to relieve the defendant from a prosecution in the state court; or to release the defendant from jail on bond" (2 Wharton's Criminal Evidence - 11th Ed. sec.619, pp.1039-1040).

In the administration of military justice the fact that a confession is made by the accused to his superior officer may be the decisive element in determining whether or not it was a voluntary confession.

> "The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior" (MCM, 1928, par.114a, p.116).

> "In military cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. Statements, by way of confession, made by an inferior under charges to a commanding officer, judge advocate, or other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior, should not in general be admitted. Thus in a case where a confession was made to his captain by a soldier upon being told by the former that 'matters would be easier for him,' or 'as easy as possible,' if he confessed, such confession was held not to have been voluntary and therefore improperly admitted" (Winthrop's Military Law and Precedents - Reprint - p.329).

"The admissibility of such a confession is to be determined in the light of the precedents and interpretations of military law alone, for the problems and the purposes of military justice have no exact counterpart in other legal systems. One of the major purposes of military justice is the promotion of military discipline. Any act or practice, therefore, such as the procuring of a confession by trick, promise, or false statement, which would tend to destroy the confidence of the soldier in his superior officer, would be detrimental to the basic purpose which military justice is designed to serve" (CM 230377 (1943), Bull.JAG, Mar 1943, Vol.II, No.3, sec.395(10), p.96).

Captain Lawson testified that he stated to accused that if he would admit the theft of Ward's money that he (Captain Lawson) would "try and get him off by 'busting him' and transferring him out of the company". He further testified that on another occasion he informed accused: "that I would try and get him off as easy as I could with a reduction in grade and a transfer, but could not promise him that he would not be court-martialed". This pertinent fact is established by the prosecution's and defense's evidence. Accused was under the immediate command of Captain Lawson and he was the superior officer to whom accused would naturally look for penalties or favors. Such promise was clearly one of at least partial immunity within the rule pertaining to admissibility of confessions, and there can be no question but what such promise would prevent the admissibility of accused's written confession had it been made directly and exclusively to Captain Lawson (CM 183917 (1928), Dig.Op.JAG 1912-1940, sec.395(10), p.206; CM 230377, supra; CM 206090, Koehler and Skillin).

Although accused and all persons concerned in this episode were members of the United States Army and no British civilians were involved either as parties or witnesses, Constable Timmins and Sergeant Snell of the Cornwall Constabulary were solicited to investigate the case. Such practice does not appear to have been authorized by higher authority. It is apparent that the English constables understood clearly the unusual nature of the solicitation of Captain Lawson and Lieutenant Holland that they participated in the matter. Timmins was specific in his statement that the case must "go through the normal and usual channels" with resultant "report of it to the superintendent". Upon this premise the accused was brought before Snell in the latter's office in the Constabulary police station and questioned further by Captain Lawson, Lieutenant Holland and Sergeant Snell. In such process Captain Lawson again made the promise of immunity if accused would admit the theft. Accused remained obdurate and denied his guilt.

Snell, believing the presence of Captain Lawson and Lieutenant Holland was repressing accused's freedom of speech, requested the two army officers to retire. In the subsequent conversation, involving accused and Snell only, the former admitted the theft and offered to deliver the £52 to Captain Lawson. It was upon the return of the two military officers to Snell's office that accused wrote and signed his confession (Pros.Ex.1).

The question naturally arises as to whether or not Snell, by the method he pursued in obtaining accused's confession, succeeded in isolating it from the effect of the poison arising from Captain Lawson's promises of partial immunity, the last of which was made immediately prior to the interview of accused by Snell alone. Stated otherwise the question is whether accused made the statement solely as a result of Snell's presentation to accused of the inculpating circumstances against him or whether the influence of the company commander's promises of leniency remained as the principal operative influence. Snell's interview with accused was completed within a very brief period of time. Accused actually wrote the confession in Captain Lawson's presence.

That "the taint of the inducing promise" of Captain Lawson remained (CM 206090, Koehler and Skillin) notwithstanding Snell's intervention is made obvious by two striking circumstances which stand uncontradicted:

(1) According to Snell, accused said to him upon admitting the theft - "I will admit to Captain Lawson that I took the money and I will hand the money to him"(R12) (underscoring supplied). This declaration is clearly indicative of the fact that in accused's mind it was Captain Lawson who was the responsible party in securing his admission of guilt and who would influence his future status.

(2) Captain Lawson testified that on being re-called to Snell's office, after Snell had interviewed accused, the latter "told me that he had taken the money and gave me £52. I told Pheil that I would try to get him off as easy as I could with a reduction in grade and a transfer, but could not promise him that he would not be court-martialed" (R15). Accused thereafter wrote and signed Pros.Ex.1. Captain Lawson's statement is corroborative of the fact that he had not only made to accused prior promises of partial immunity, but also that the influence of such promises was extended to the exact moment of accused's production of the written confession. There is an implication that Snell, being aware of the promises of immunity made to accused by Captain Lawson and its effect upon accused attempted to eliminate its influence by excluding the military officers from the crucial interview. If such assumption is correct, Snell's attempt was certainly thwarted by Captain Lawson repeating his promise of at least partial immunity at the time immediately prior to accused writing his confession.

The Board of Review therefore concludes that the written confession (Pros.Ex.1) should have been excluded from evidence as a confession obtained under promises of favor and partial immunity.

(b) According to Lieutenant Holland when he and Captain Lawson returned to Snell's office "there was a stack of notes on the table, 52 £ notes and a 10s note. Pheil said that he had taken the money from Ward's shirt that was on the bed and I told him that I would have to make a report" (R28). Captain Lawson testified "* * * Sergeant Snell called me into the room and then Pheil told me that he had taken the money and gave me £52" (R15), and "when he gave me the money I asked him how much of it belonged to Ward and he (Pheil) said he did not know" (R15). Snell testified that accused said to him: "Well, Sarge, I had it. I have about £52.10s in notes on me now, I will admit to Captain Lawson that I took the money and I will hand the money to him (R12). Snell testified further that when Captain Lawson came in the office accused gave him £52.10s in notes and said, "Ward's money was among the bills and notes" (R12)(Underscoring supplied).

Accused made these statements to the three witnesses prior to the time he wrote his formal confession. The underscored portions thereof are highly inculpatory, and are manifestly confessions (CM ETO 292, Mickles).

Inasmuch as the written confession (Pros.Ex.1) was in legal effect nothing more than a physical confirmation of accused's preceding oral confessions, upon objection from the defense the oral confessions should have been excluded on the ground that they were not the best evidence. However, the defense by its failure to object to the oral confessions on this ground waived the same (MCM, 1928, par.116a, p.120; CM ETO 739, Maxwell). This waiver, however, did not eliminate any other valid objections to the confessions.

Upon giving proper and logical consideration to the time and place of these oral confessions and the circumstances under which they were made, it is manifest that they are tainted with the same promises of favor and immunity as operated against the admissibility of the written confession. The exclusion of the written confession of the same criminal conduct as is included in the oral confessions without excluding the oral confessions themselves would be inconsistant and anomalous. The Board of Review therefore concludes that accused's oral confessions of guilt should have been wholly excluded from evidence.

(c) Evidence that accused was found in possession of recently stolen property is not only admissible but may also raise a presumption that he stole the property (MCM, 1928, par.112a, p.110; CM ETO 885, Van Horn), and possession of part of stolen property infers theft of all of the property (CM ETO 952, Mosser; CM ETO 157982, Acosta; CM 192031, Allen). In the instant case accused produced certain pound notes from his person and said that Ward's money was among them, simultaneously with and as part of his oral confessions which were obtained illegally by means of promises

of partial immunity (see (b) supra). Were any parts of the inadmissible oral confessions rendered admissible as a result of accused's actions with respect to the pound notes?

The rule with respect to admissibility of evidence of inculpatory facts is stated as follows:

> "The rule is settled that, notwithstanding the inadmissibility of the confession, all facts discovered in consequence of the information given by the accused, and which go to prove the existence of the crime of which he is suspected, are admissible as testimony. * * *. It is obvious that a search made as a consequence of information given by the accused must result in the discovery of the inculpatory facts, as otherwise no testimony, either as to the confession, or as to the search instituted in consequence of it, is admissible. In connection with the discovery of the alleged inculpatory facts, there should be proof, beyond a reasonable doubt, of the identity of the property, the body, or other fact. This is the rule with regard to larceny, and in other crimes, identification should be complete before admission of the inculpatory facts. But when the search reveals the inculpatory facts, and there is conclusive identification of such facts, this necessarily brings with it the reception in evidence of the accused's statements in giving the information"(2 Whartons Criminal Evidence, 11th Ed. sec.600 pp.995.997.998).
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> "Independent Facts and Evidence.- discovered through a confession inadmissible because impelled by hope or fear, are not therefore to be rejected. To illustrate: if one under excluding influences confesses a larceny, and thereon conducts an unsuccessful search for the stolen goods, the search equally with the confession will be withheld from the jury;but should the goods be found, they may be exhibited to the jury and identified as those stolen. * * *. But the better common law doctrine in authority and probably in reason is, that when the confession is thus confirmed, simply so much of it as led to the finding, and, should the prisoner have been present at the search

and finding, his declarations and conduct during this period, or his declarations when he surrenders back an article stolen, may be shown to the jury in connection with the thing itself. The finding makes the truth of so much of the confession sufficiently evident". (2 Bishop's New Criminal Procedure - 2nd Ed. sec.1242, pp.1061, 1062).

"Although a confession may be inadmissible as a whole because it was not voluntarily made, nevertheless the fact that it furnished information which led to the discovery of other evidence of pertinent facts will not be a reason for excluding such other evidence; and when such pertinent facts have thus been proved, so much of the accused's statement as relates strictly to those facts becomes admissible. For example, where an accused held for larceny said 'I stole the articles and I tore up a board in the floor of my room and I hid them there,' the fact that the confession was improperly induced by promises or threats would not exclude evidence that the articles were discovered in the place indicated by him, and after the introduction of such evidence, it would be proper to prove that the accused made the statement, 'I tore up a board in the floor of my room, and hid them there.'" (MCM. 1928, par.114a, pp.114,115).

It will be noted that the Manual for Courts-Martial has adopted the rule denominated by Bishop as the "better common law doctrine." Therefore notwithstanding the condemnation of accused's oral confessions as inadmissible on the ground heretofore stated, those parts of these confessions which relate strictly to pertinent facts discovered as a result of information furnished by the confession will be admissible. The pertinent facts however must be proved by evidence <u>other than</u> that contained in the illegal confession. In the instant case there is some, although inconclusive evidence independent of the confession that 7 or 8 of the pound notes delivered by accused to Captain Lawson were part of the stolen property owned by Ward. The condition of the rule permitting those parts of the illegal confessions relating strictly to the identity of the pound notes to be admitted in evidence was therefore met (20 Am. Jur. Evidence, sec.402, p.363, footnote 5). Consequently Captain Lawson's testimony that accused gave him £52 and Snell's evidence that accused said: "I have about £52 10s in notes on me now" and that accused gave Captain Lawson £52 10s saying "Ward's money was among the bills and notes" were properly admissible in

evidence, and will be so considered by the Board of Review.

(d) Accused, when he delivered the £52 10s in English currency undoubtedly was prompted by the same motive and acted under the same influence as produced the inadmissible oral confessions. The giving of the confessions and the delivery of the currency appear to be but one transaction. The 7 or 8 pound notes contained in the set of 52 pound notes handed by accused to Captain Lawson and which were asserted to be the same notes received by Ward as part of his army pay, were not produced as evidence. Had they been offered there can be no question as to their admissibility as they were delivered by accused from his person. Incriminating articles - "real" evidence - taken from the body of the suspect even by force or compulsion are admissible in evidence (State v. Griffin 124 S.E. (S.C.) 1227, 35 ALR 1227 and authorities therein cited; 20 Am. Jur. Evidence, sec.401, p.361). Inasmuch as the notes themselves were admissible evidence, testimony as to their delivery by accused to Captain Lawson and the evidence, although superficial and sketchy, of the method adopted in establishing the identity of a number of them as being the notes paid to Ward was clearly admissible (20 Am.Jur.Evidence, sec.885, pp.744,745; 36 C.J., sec.442, p.880, sec.445, p.882; Underhill's Criminal Evidence - 4th Ed. - sec.510, p.1032).

9. There was substantial evidence produced at the trial showing that a larceny of Ward's money and wallet at the time and place alleged had been committed by some person (MCM, 1928, par.149g, p.171). Accused at the time denied that he was the thief and offered an explanation of his actions at the actual time and place of the disappearance of Ward's property. Normally the legal sufficiency of the findings would turn upon the simple issue of fact as to whether it was accused or some other person who was the thief - whether the prosecution's or defense's evidence should be believed. This was essentially a question for determination by the court. In the instant case, however, the issue is seriously complicated by the admission in evidence of oral and written confessions of the accused which the Board of Review has hereinbefore determined were erroneously admitted because they were secured by promises of favor or partial immunity. The question must therefore be considered as to whether the admission of these illegal confessions in evidence "injuriously affected the substantial rights" of the accused within the purview of the 37th Article of War.

The rule governing such situation has been succinctly stated:

> " It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion

that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C.M.127490 (1919)." (Underscoring supplied).

" The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C.M.130415 (1919)." (Dig.Op.JAG, 1912-30, sec.1284, p.634) (Underscoring supplied).

The foregoing principles were elaborated in the dissenting opinion of Colonel Archibald King in CM 211829, Parnell. Colonel King's opinion was approved by The Judge Advocate General and formed the basis of the subsequent action of the Secretary of War.

The fate of the accused in the instant case is not to be determined by the simple expedient of separating the legal evidence from the illegal evidence and then evaluating the legal evidence as to its sufficiency to sustain the findings. Such process would be an over simplification and would wholly ignore the actualities of the trial. The court had before it both legal and illegal evidence. It is an impossibility for the Board of Review to measure the influence of the illegal evidence upon the court and should it attempt to do so it would be usurping the functions of the court (CM ETO 132, Kelly and Hyde). A reviewer in considering the record of trial to determine whether the "legal evidence of itself substantially compelled a conviction" cannot ignore the impact upon the mind of the court of the illegal evidence. For this reason the Board of Review in CM 127490 (supra) particularly qualified its pronouncement by the statement "nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony has been excluded enough legal evidence remains to support a conviction". (Underscoring supplied). An accused has not received a fair and impartial trial if his conviction is based upon a body of evidence part of which is legal and which standing alone possesses only sufficient weight to tip the scales in favor of its sufficiency but does not contain the robust quality of moral certainty and determinativeness, and part of which is illegal composed of confessions which are some of the "strongest forms of proof known to law". The Board of Review/ undoubtedly

had this situation in mind when it adopted the qualification last quoted in its holding CM 127490 (supra).

The legal evidence against accused, Pheil, is incriminating, but it does not exclude "any fair and rational hypothesis except guilt" (MCM, 1928, par.78a, p.63). There is evidence which would have justified the court in concluding that accused came into possession of the inculpating pound notes as a result of gambling and that Ward had parted with them in an earlier game in which accused did not participate. Further, the evidence identifying these notes as Ward's property rests upon several inferences:(1) that Lieutenant Miller, the disbursing officer of the company, (R16) in paying the company secured pound notes of numerical continuity; (2) that Lieutenant Lewis in preparing the company pay had the notes arranged in numerical continuity; (3) that in preparing Landon's and Ward's pay envelopes Lieutenant Miller maintained numerical continuity of the notes so that Ward's notes were placed in his envelope immediately following the preparation of Landon's envelope.. Lieutenants Lewis and Miller were not witnesses. This crucial element of prosecution's case largely depends upon the following colloquy between the trial judge advocate and of Captain Lawson:

"Q.- Did you check the serial numbers of the notes with the notes that Ward was paid off with?
A.- I did. I got the numbers off the notes that the fellow in front of Ward in the pay-roll was paid with and checked the numbers. Naturally, Ward being paid after Corporal Landon, the numbers would run in consecutive order.
Q.- How many of the notes coincided?
A.- About 8 or 9."
(R14) (Underscoring supplied).

It is manifest that the vital fact - that "the numbers would run in consecutive order" - was a conclusion of the witness based on the inferences above set forth; it was not a conclusion which rested upon facts proved at the trial. In connection with this evidence the court had for consideration the evidence pertaining to accused's opportunity to commit the offense; admissible parts of the illegal confessions (Par.8b, supra) and the fact that he delivered certain pound notes to Captain Lawson saying that "Ward's money was among the bills and notes". In the opinion of the Board of Review this evidence is not "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty". Reason and conscience dictates that it contains an inherent uncertainty which prevents it from attaining the weight and dignity of "compelling" evidence; it does not possess the quality of realism demanded to sustain the finding of guilty.

It was in support of this proof that the illegal confessions were introduced. Had the confessions been legally obtained they would have

removed all reaspnable doubt and the prosecution's case would have become invulnarable. The strength and power of the confessions would have produced a moral certainty of guilt which the minds of "conscientious and reasonable men" would accept without mental equivocation or reservation. It is the repercussion of this illegal evidence, possessing inherent strength and power, upon the other, but nevertheless equivocal evidence of the prosecution that would influence the court in its weighing and consideration of the other evidence. It was this influence that substantially prejudiced the rights of the accused.

10. For the foregoing reasons; the Board of Review is of the opinion that the admission in evidence of accused's confessions - both oral and written - substantially prejudiced the rights of the accused and consequently the record is legally insufficient to support the findings and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

(108)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 MAR 1944 TO: Commanding General, 29th Infantry Division, APO 29, U.S. Army.

1. In the case of Corporal LIONEL (NMI) PHEIL (33052124), Company "L", 115th Infantry, attention is invited to the foregoing holding by the Board of Review, that the record of trial is legally insufficient to support the findings of guilty and the sentence. I concur in said holding.

2. Under Article of War 50½ accused may be again brought to trial for the offense charged. Upon rehearing the oral and written confessions, which were illegally secured through promises of partial immunity made by Captain Lawson should not be offered in evidence. This officer's treatment of the accused in securing his confessions indicates his lamentable lack of knowledge of certain well-known, but fundamental principles in the securing of statements from a suspected person. His promises of partial immunity to the accused destroyed the legal effectiveness of the confessions. Actually accused received the maximum permissible sentence.

3. The offense charged involved only personnel of the military establishment of the United States. It was committed within the limits of a United States camp or station. No British civilians were concerned either as parties or witnesses. Under such circumstances the reasons for the participation by members of the English constabulary in the investigation are not apparent. No provision of the United States of America (Visiting Forces) Act, 1942 (3 & 4 Geo. 6 c.51) requires the interposition of the British authorities under such circumstances.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1201. For convenience of reference please place that number in brackets at the end of the order: (ETO 1201).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871.

BOARD OF REVIEW

14 FEB 1944

ETO 1202

U N I T E D S T A T E S	)	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS
v.	)	
Privates JAMES (NMI) RAMSEY (34619781), and BENNIE L. EDWARDS (34618625), of Company B, 260th Quartermaster Service Battalion.	)	Trial by G.C.M., convened at Kettering, Northamptonshire, England, 14 December 1943. Sentence: Each to dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING of the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates.

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

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

RAMSEY

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private James (NMI) Ramsey, Company B, 260th Quartermaster Service Battalion, and Private Bennie L. Edwards, Company B, 260th Quartermaster Service Battalion, acting jointly, and in pursuance of a common intent, did at or near, Little Harrowden, Northamptonshire, England, on or about 0030, 4 December 1943, forcibly and feloniously, against her will, have carnal knowledge of Miss Lily Rebecca Garrod.

EDWARDS.

CHARGE: Violation of the 92nd Article of War.
Specification:. In that Private Bennie L. Edwards, Company B, 260th Quartermaster Service Battalion, and Private James (NMI) Ramsey, Company B, 260th Quartermaster Service Battalion, acting jointly, and in pursuance of a common intent, did at or near, Little Harrowden, Northamptonshire, England, on or about 0030 4 December 1943, forcibly and feloniously, against her will, have carnal knowledge of Miss Lily Rebecca Garrod.

Each pleaded not guilty to and each was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions of the accused, Edwards, by summary court each for absences without leave for two days in violation of Article of War 61. No evidence of previous convictions of accused, Ramsey, was introduced. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, by separate signed actions, approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement but withheld the order directing execution of the sentence and forwarded the record of trial for action under Article of War 50½.

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

Miss Lily Rebecca Garrod, age 17, a machinist in a tailoring factory, living at Little Harrowden, near Wellingborough, Northamptonshire, left her home at 7:40 p.m., 3 December 1943, with Mrs. Mary (sic) Middleton, to dance at Wickstead Park Pavilion. The dance having been postponed, the two women took a bus into Kettering to see if there was a dance there (R6-7). On the way to Kettering, they met two white American soldiers with whom they were not acquainted and went with them to the New Inn for a drink, Miss Garrod having "part of a small beer" (R7,14-15). At about 9 p.m., they left this inn and went to a "public house" where Miss Garrod again had "part of a small beer". They spent about two hours with these soldiers and then, at 10:45 p.m., no bus being available, Miss Garrod and Mrs. Middleton started homeward, walking along the main road toward Little Harrowden (R7). At about midnight, having reached a point approximately one and one-half miles from their homes and near to the Finedon Station turn, they saw approaching them two colored American soldiers, one being tall, the other short. The latter wore a "peak cap". The soldiers stopped, asked what was wrong, then "made a grab" at them. They were unable to pass the soldiers (R8,18-19,21), but both girls ran. Miss Garrod tripped in the brush after running a few yards. Mrs. Middleton

escaped from the two soldiers but for about 15 minutes she remained in the vicinity a few yards away (R14,19). Miss Garrod struggled vigorously, shouted and kept saying, "Let me go," and "Please, don't" (R9,19). The smaller soldier (who wore the peak cap) kept hitting her in the face. The taller one at first stood by and did not hit her nor interfere with his companion. Then both soldiers seized her, the smaller one hitting her, grasping her about the throat and threatening to kill her (R9-10). He seemed like a madman (R13) and struck her in the eyes and neck about four times while the tall one held her down. She struggled about five minutes when the taller soldier, aided by the smaller one who held her down, pulled off her knickers and, against her will, had sexual intercourse with her for about three minutes (R10-11). One soldier had laid his coat on the ground so that Miss Garrod would not soil her coat (R13). Miss Garrod, in the meantime, kept pleading with them and attempted to kick them. Then the smaller soldier had intercourse with her for about the same length of time (R11). The taller soldier walked away after the smaller "had gotten on top of me" (R14). After saying that he would help her find "her things", the smaller one asked her if she wanted "it" again and, being informed that she did not, he threatened to hit her. Thereupon, thinking it useless to struggle, she had intercourse with the smaller one again (R11). She did not consent to any one of these three acts of intercourse and struggled to the best of her ability until the third act of intercourse when she felt it was useless. The taller soldier returned and told the short one that they ought to be going. Miss Garrod then started walking toward Little Harrowden and met "Mr. Masters" who had been summoned by Mrs. Middleton and whom she told what had occurred. Her stockings were ripped, her clothing was torn and "full of blood" which had come from her "private parts", and she had lost her earrings and her brooch. Her menstrual period had been fully completed on 29 November. Although the night had been a clear one, neither Miss Garrod nor Mrs. Middleton could identify the accused (R11-13,18-19).

Mrs. Middleton, having stayed in the vicinity of the scene of action for about fifteen minutes, departed for help and secured the aid of Mr. Arthur Masters. The two then walked back and found Miss Garrod with "her eye.... all swelled so you couldn't see her eye, and her face... scratched and her hair .... rumpled and the stockings all laddered. She was very upset." She was crying and said she wanted to go home (R20). This was about 1 a.m., 4 December. Asked which way her assailants had gone, she replied that they had gone toward Kettering and also, "I don't think I could recognize them," and, "I don't know what my father and mother will say; they've had what they wanted." (R22-23). Mr. Masters' brother 'phoned the police and then "we took her to Wellingborough Police Station". (R23).

After receiving a telephone call at 12:50 a.m. 4 December from Mr. Masters concerning the alleged rape of Miss Garrod, Andrew M. Sykes, police sergeant, Wellingborough, immediately notified the military police, Sergeant Willey of Finedon, and an Inspector Sherman. He then patrolled the road with Sherman in a patrol car and met Miss Garrod, Mrs. Middleton and Mr. Masters. Miss Garrod was distressed, had a black eye, and her upper lip was badly swollen. "She complained that she had been raped by two colored soldiers" (R23-24). Mr. Masters agreed to convey Miss Garrod to Wellingborough for immediate examination by a doctor. Sergeant Sykes and Sherman continued to patrol the road towards Kettering, and found the two accused at 1.25 a.m. 4 December, on the Pytchley Road Railway Bridge, just coming into Kettering borough, 3½ miles from Little Harrowden and about 2 miles from the scene of the crime (R23-24, 27-28). Having been told why they were wanted, the accused denied any connection with the crime (R24). No other soldiers had been passed on the road and, as they answered the description given by Miss Garrod, Sergeant Sykes took them to the Wellingborough police station (R27). It was then 2 a.m. of 4 December.

Upon arrival at the station the accused were separated and when the military police arrived Sergeant Clarence F. Schreiber, 985th Military Police Company and Sergeant Sykes questioned accused Edwards. Sergeant Schreiber cautioned Edwards, telling him that he was not obligated to say anything "unless you wish to", but that whatever he said might be given in evidence should there be a trial. This examination was oral. Accused Edwards said, "I was there," and, "We both did it." He denied hitting the girl but did say that he raped her, doing it one time (R24,25). (Before this testimony was given, the record of trial shows that the trial judge advocate cautioned the court in accordance with the principles laid down in MCM, 1928, par. 114c, at p. 117, saying "that these statements made by one accused may not be considered as evidence against the co-accused." (R25))

Ramsey, similarly warned, first denied any connection with the affair "until the time of the examination by the U.S. Military Doctor". Within the space of an hour after examining Edwards, accused Ramsey admitted participation saying, "Yes, we were both in it". He denied hitting the girl, but "did say he was the first." Each accused admitted that he had "ravished" the girl, stating that this was done near Kettering Road, near Little Harrowden (R26-27). These admissions were voluntary. Shortly thereafter, the clothes of accused Ramsey were examined. There was a small spot of blood "on the inside of his pants, or on the bottom of his vest" (R27). It was described as "a smear of blood rather than if it were soaking into anything". (R28). What appeared to be seminal fluid was also present "on the inside of his (Ramsey's) long pants". Edwards' trousers also contained blood but not as much as Ramsey's. (R32). While it was noticeable that both accused had had something to drink, they both walked normally, their speech was coherent, and they were rational at all times. (R28).

At 2 a.m. 4 December, Dr. Alexander C.R. Walton, 19 Castle Street, Wellingborough, a doctor of medicine and a member of the Royal College of Physicians of London, at the request of the police, examined Miss Garrod. (R15). He testified that she was about 5 feet 6 inches tall and weighed 8½ stones (119 pounds). When he examined her she was in a "shocked" condition, pale and trembling, pulse rapid, hair disheveled. Her dress was torn down from the neck four or five inches. Her knickers were torn in front, her stockings badly torn, and her right shoe was unlaced. Her knickers were soaked with blood between the legs, especially at the back of her knickers, and her roll-on belt was bloodstained at the back. Her face was badly bruised, the left side being swollen, and her left eye was closed completely; her nose was swollen and bruised with blood trickling down the nostrils. The upper lip was badly bruised and swollen. Several scratches were on her right forearm and wrist, and a superficial laceration a half-inch long on the ring finger of her right hand just below the nail, and two small blood blisters on the pad of her finger, "as if clenched between teeth possibly". Below her left elbow was a bruise, superficially lacerated and about two inches in diameter. Examining her sex-organs, he found the hair of the pubic region matted with blood, the labia majora swollen, and the vulva area "rather sore looking". A good deal of fresh blood was exuding from the vulva from two recent tears in the hymen which was well formed. An examination of the vaginal fluid was made by Dr. Walton and he "found seminal fluid from a human individual, from one which would be found after intercourse from the male". It was his professional opinion that Miss Garrod "was tight and virginal" prior to the incident and that she had been raped and assaulted with violence, which assault and rape had definitely taken place within a few hours before his examination. Miss Garrod was a strong, well-built girl and from the position of the blood on her knickers and body-belt, he presumed she had been lying on her back. (R.16-17).

4. Captain Meyer Supornick, 985th Military Police Company, stationed at Wellingborough, saw the two accused in the Wellingborough police station between 1 and 2 a.m. on 4 December. Both had full possession of their faculties. After warning them of their rights under AW 24, Captain Supornick questioned them in the presence of Detective Sergeant Meacock of the Wellingborough Police, and Sergeant Schreiber (R28-29). He again warned the accused that they could remain silent, that anything they said might be used against them in the event of trial, and that any statements made by them would be voluntary. After asking them if they had any questions, statements of accused were reduced to writing, signed and sworn to by accused Ramsey (Pros.Ex.2) and by accused Edwards (Pros.Ex.3). These were admitted in evidence without objection (R30).

Accused Ramsey, in his written statement, said that he and Edwards were walking along the road to Kettering some time after 11 p.m., when they met two girls walking in the opposite direction. Edwards grabbed one of the girls but the other ran away. He took her to the side of the road while she shouted, and yelled "Let me go". When Ramsey went up to them Edwards "was down on her and she was struggling". He pulled Edwards off the girl and had intercourse with her while she still struggled. The girl hit him but "if I hit her I do not remember". Ramsey got up and Edwards got on her and had intercourse with her, while the girl struggled and cried. Ramsey walked up the road, returned again to find Edwards "still on the girl". He pulled him up and said "Let's go". Edwards said, "All right, I am coming now." The girl lost her shoe, and both accused helped her look for it. They then left the girl and started walking to Kettering until they were picked up by the police. Ramsey said he did not have any blood on his clothes when he left Kettering on 3 December 1943; that he was wearing a garrison cap and that Edwards was wearing a peaked service cap (Pros.Ex.2).

Accused Edwards, in his written statement, stated that on 3 December he and accused Ramsey were walking to Kettering and when within about two miles of there they met two girls. Ramsey said, "Let's take them". Both "went for them".

> "We missed the elder girl and then we both took the young one. We put her on the grass by the side of the road. She was shouting and struggling. Ramsey slapped her. Ramsey had intercourse with the girl. I stood nearby. As soon as he had finished I had intercourse with the girl. She was still fighting and I hit her in the face. She slapped my face.
>
> When I had finished I got up and the girl had lost her shoes and she asked me to find them. I found them. The girl then said, 'Will you do it again'. She laid down and I then had intercourse again with her.
>
> I had no blood on my clothing when I left Kettering on Friday 3 December 1943.
>
> After I had had intercourse the second time with the girl Ramsey and I started off to Kettering and we were stopped by the Police in a car near the Railway Bridge at Kettering.
>
> I was wearing a peaked cap. Ramsey was wearing a garrison cap." (Pros.Ex.3).

5. The accused, having been advised of their rights elected to remain silent. The defense submitted no evidence.

6. a. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not. * * * * Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par.148b, p.165).

The above elements are essential to sustain a case under this charge. That carnal knowledge of Miss Garrod was obtained is evident not only from the testimony of Miss Garrod but from that of Dr. Walton who examined her within a relatively short time after the commission of the offense. The hymen was torn and male seminal fluid was found in the vaginal tract. That the act was accomplished by force is conclusively shown by the undisputed evidence of the physical condition of Miss Garrod found by the examining physician, by the testimony of Miss Garrod and by the admissions of the accused (CM ETO 90, Edmonds; CM ETO 832, Waite; CM ETO 611, Porter). There was also blood exuding from the vagina caused by abrasions of the hymen and Miss Garrod testified that her menstrual period had ended about six days before the alleged act took place.

That there was no consent to the first two acts of intercourse, and that resistance to the extent that Miss Garrod was able to resist was amply proved by her testimony, that of her friend, Mrs. Middleton, and by the signed statements of both accused. Although weighing only 119 pounds, Miss Garrod did not offer "mere verbal protestations and a pretense of resistance" (See MCM, 1928, par. 148b, p.165) but actively resisted by hitting the accused, by kicking at them, and by active force in attempting to prevent the accused from gaining access. Only when she realized that further resistance was of no avail did she cease, and this occurred after both accused had raped her and one of the accused was about to repeat the act of intercourse. Both the elements of force used by the accused and lack of consent in the legal sense were proved by uncontradicted evidence.

b. The accused were not identified by Miss Garrod or Mrs. Middleton, the only persons other than the accused at the scene of the offense, but their identity was definitely proved by circumstantial evidence concerning the comparative size of the accused, the "peaked cap" of one of them, the mud on accused Ramsey's coat which had been placed on the ground to avoid soiling Miss Garrod's clothes, the blood on the trousers of both accused and the evidence of seminal fluid in the same location on accused Ramsey's trousers. These evidentiary

facts, coupled with the prompt apprehension of both accused in the near vicinity and the discovery by the police of no other soldiers in the search instituted immediately after the crime had been committed, substantiate all that the accused admitted in their statements. It is elementary that identity may be proved by circumstantial as well as by direct evidence (See particularly CM ETO 969, Davis, at pp.22-23). Apart from the statements of the accused, the proof is ample that the accused committed the rape charged.

c. Important as confessions always are, the confessions in the case at hand have the common fault of containing statements which, if permitted, are damaging to the other joint-accused. The statements of each accused, both oral and written, were made after the common design had been accomplished and not made in the furtherance of any escape (See MCM, 1928, par.114c, p.117). Hence, the statement of one under such circumstances is not admissible to prove the guilt of the other (MCM, 1928, par.76, p.61). But this fact does not invalidate the statement with reference to the one making it (MCM, 1928, par.114c, unnumbered par. 3, p.117). Thus, both statements, being voluntarily made and after proper warning, were legally admissible to prove the guilt of the accused making it. The trial judge advocate in this case was cognizant of the rule and, when evidence of statements made by one of the accused was initially presented, he warned the court "that these statements made by one accused may not be considered as evidence against the co-accused"(25). Having been thus warned, the rights of the accused were properly protected and no prejudicial error exists. (CM ETO 72, Stump et al; CM ETO 804, Ogletree; CM ETO 895, Fred A. Davis et al; CM ETO 1052, Geddies et al).

That the corpus delicti had been sufficiently proved to warrant the admission of the confessions contained in the statements of the two accused, is clear from the summary of the evidence above (CM 202213, Mallon).

7. The charge sheet shows that accused Ramsey is 20 years of age and that he was inducted 28 January 1943; that accused Edwards is 23 years of age and that he was inducted 23 January 1943, each at Camp Shelby, Mississippi for the duration of the war plus six months. Neither accused had prior service.

8. The court was legally constituted and had jurisdiction of the persons and of the offenses. 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 sentences as to each accused. The penalty for rape under Article of War 92 is death or imprisonment for life, as a court martial may direct. A sentence to dishonorable discharge, total forfeitures and confinement at hard labor for life, for violation of Article of War 92, is authorized. (CM ETO 709, Lakas).

9. Confinement in a penitentiary is authorized for the offense of rape (AW 42; MCM, 1928, par.90a, p.80; 35 Stat. 1143, 18 U.S.C. 457; 35 Stat. 1152, 18 U.S.C. 567), and the designation of the United States Penitentiary, Lewisburg, Pennsylvania, as a place of confinement for both accused, is authorized (WD Cir.291, Sec.V 3a and b, 10 November 1943).

(CONCURRING AND DISSENTING) Judge Advocate

Judge Advocate

Judge Advocate

CONCURRING AND DISSENTING HOLDING

14 FEB 1944

RITER, Judge Advocate

I concur in the conclusions of the majority of the Board of Review that no errors injuriously affecting the rights of the accused were committed at the trial and that the record is legally sufficient to support the findings of guilty. However, I do not agree that the sentences upon conviction of an offense under the 92nd Article of War may include dishonorable discharge and total forfeitures. My reasons are set forth in extenso in my concurring and dissenting holding in CM ETO 709, Lakas. I have no cause to change my opinion therein expressed.

Judge Advocate

(118)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 14 FEB 1944 To: Commanding Officer, Eastern Base Section, SOS, ETOUSA, APO 517.

1. In the case of Private JAMES (NMI) RAMSEY (34619781) and Private BENNIE L. EDWARDS (34618625), both of Company B, 260th Quartermaster Service Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and sentence as to each, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. I deem it advisable to speak of two matters of importance in this case:

a. One member of the court trying the accused, while not believing in the death penalty in the case of rape, without notice to other members of the court or to the trial judge advocate, kept his place on the court, voted upon the guilt of the accused, and disclosed his belief concerning this matter for the first time when the court was closed to vote upon the sentence. This occurred despite the fact that when the prosecution asked "If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member, it is requested that he state such facts," another member of the court promptly stated that for religious and moral reasons he was opposed to the death sentence in such cases and was excused and withdrew from the court. Prior to this, the trial judge advocate had read Article of War 92 to the court and had stated that he would ask for the maximum punishment in this case (R3). This action by the unknown member was highly unethical and is to be vigorously condemned. Appropriate procedure to avoid a repetition of such a pernicious practice is suggested in Paragraph 1d, Circular No.1 (Military Justice), Branch Office of The Judge Advocate General with the European Theater of Operations, 1 January 1944.

b. Where accused are charged jointly, as in this case, it is not necessary to frame two charges naming one accused as having jointly acted with the other and, in the second charge sheet, reversing the order of their names and charging in the same manner. While not erroneous, the simpler practice is preferred. (See MCM, 1928, p.237, Appendix 4,f.) There is also an undue duplication of the investigating officer's reports of witnesses examined by him in the form of carbon copies of the same material, one for each accused. Since these reports were similar in every respect, the original would have sufficed.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1202. For convenience of reference please place that number in brackets at the end of the order (ETO 1202). Since this was a joint trial only one published order should be issued. (See Military Justice Circular No.5, Branch OTJAG, 4 October 1943, par.13 for proper practice on joint trials).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

13 MAR 1944

ETO 1226

U N I T E D S T A T E S	)	VIII BOMBER COMMAND.
	)	
v.	)	Trial by G.C.M., convened at AAF
	)	Station 139, APO 634 10 November
Private JOHNNIE (NMI) MUIR	)	1943. Sentence: Dishonorable
(20504412), 569th Bombard-	)	discharge (suspended), total for-
ment Squadron (H), 390th	)	feitures and confinement at hard
Bombardment Group (H).	)	labor for two years. The 2912th
	)	Disciplinary Training Center, APO
	)	508, U.S. Army.

OPINION by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentence in part. The record has now been examined by the Board of Review which submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private JOHNNIE (NMI) MUIR, 569th Bombardment Squadron (H), 390th Bombardment Group (H), did, at AAF Station 153, APO 634, on or about 27 September 1943, misbehave himself before the enemy, by refusing to accompany and fly with his crew, which had been ordered by Major ROBERT M. TUTTLE, Commanding Officer, 569th Bombardment Squadron, 390th Bombardment Group (H), of which said crew formed a part, to fly in a bomber and execute a combat operational mission over territory occupied by the enemy in Europe.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, ordered its execution but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the 2912th Disciplinary Training Center, APO 508, United States Army, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 107, Headquarters VIII Bomber Command, APO 634, 28 December 1943.

3. The evidence for the prosecution summarizes as follows:

Major Robert M. Tuttle, commander of 569th Bombardment Squadron, 390th Bombardment Group (Heavy) testified:

Accused was on and prior to 27 September 1943 assistant engineer and waist gunner of a heavy bomber crew. Prior to the events involved in the instant charge he was on a mission to Regensburg Germany. When completed the crew flew to Africa instead of returning to their home base. En route the 'plane was "ditched" in the Mediterranean. When it sank the members of the crew lost all of their equipment. They spent some 20 hours in a dinghy and were picked up and taken to Africa. After elapse of a month they returned to their base without flying equipment. They had been on about ten raids prior to the one involved herein. There had been three raids since their return, two of which were completed (R11,12). Accused had been on five raids prior to 27 September 1943, one being on 26 September 1943 (R6,12). He and the crew of his 'plane knew they were alerted for a mission for the following day, 27 September 1943, when they landed on the night of 26 September 1943 (R6,7).

Usually a 'plane crew is put on the alert on the evening preceding a mission. At that time the squadron commanders report to group operations and acting jointly specify the ships which are to participate in the mission on the following day and designate the crews, making any crew substitution necessary. The orderly room is informed as to the crews selected for the mission, the time to awaken them, the time they will eat breakfast and the time of briefing. When there is no alert for a mission a white flag is displayed; when "on the standby", a red flag is flown and when on an alert and a mission has been called, a green flag appears over the orderly room (R7). The men do not know they are going on a mission till given orders in the early morning. Late alterations and substitutions are often made (R14). It is occasionally necessary to make substitutions in the crews (R10) and substitutes are available (R11).

Gloves and shoes operate on the same electric circuit and if one fails the other will not function (R12). The equipment in the squadron on

27 September was bad. There was a shortage of the new type oxygen masks and heated equipment could not be obtained (R10). "It was more or less a proposition of begging and borrowing from other men" (R9). Efforts were made without success to get proper equipment (R13).

This squadron was ordered to furnish six 'planes and ultimately furnished five because accused's 'plane, Lieutenant Raymond A. Becker, pilot, failed to join the mission (R9).

Twenty-one 'planes were ordered from accused's Group and 20 were dispatched with two spares - a total of 22 ships (R16). This flight was to be at about 25,000 feet. Oxygen masks are usually worn at 10,000 feet altitude. There is danger from an improperly fitting mask and without heated gloves one cannot fire the guns because of the cold (R17).

Accused's crew was awakened at 2:30 a.m. Briefing was at 3:30 a.m. The "take-off" time was set at 6:30 a.m. It was not until roll call at briefing about 4:30 a.m. that the squadron commander knew accused and Sergeant Shermeyer were missing. He then went to the bomber and talked with Sergeant Hahn, the engineer and top turret gunner of the crew. Hahn stated that accused and Shermeyer were "getting up" and would be present (R10). At 7:00 a.m. accused and Shermeyer appeared at the office of the squadron commander. Accused was questioned as to his reason for absenting himself from the mission. He stated he did not have the proper clothing. Chiefly there were missing heated gloves and mask (R8,18). He complained that his gloves had failed to function on the previous day (R8). The squadron commander took "action against" accused and Shermeyer by reducing each of them from staff sergeant to private (R12).

First Lieutenant Raymond A. Becker, 569th Bombardment Squadron, first pilot of accused's crew, testified that on 26 September the crew flew on its mission at approximately 26,000 feet elevation (R19). The temperature registered more than 40 degrees below zero centigrade (R21). This altitude was held for two and one half hours. There were complaints about the equipment in general. Most of it had been borrowed. The plane did not engage in a mission on 27 September because two members of the crew were missing (R19). A jeep was sent for them. The "tower" was requested to check on them. Then a truck was sent for them but too much time had elapsed to permit the bomber to join its Group which had departed. He had obtained heated gloves for accused and had them at the 'plane (R21) but had not informed accused they were there or that he could use them (R23). Accused was a crew member in the United States. He was most reliable and had done his work exceptionally well on the Regensburg raid (R21).

Staff Sergeant Roy N. Ball, 569th Bombardment Squadron, was a waist gunner in the same crew and 'plane as accused. He testified that a maximum of heated equipment is necessary for the waist gunner. If fighter opposition is met it is necessary to have one's hands properly heated to man the gun (R27). He first learned that his crew was going on a mission on 27 September when he was called at 2:30 a.m. on that day. Accused slept in the

same barracks, was awake and stated at that time to Ball "that he was not going to fly till he got some heated gloves". On the previous day accused had said to witness "that his boots or gloves would not work" (R26-27). Ball knew nothing about an extra pair of gloves being on the 'plane. When accused said he would not fly, his statement was not taken seriously as it was expected he would be on hand (R29).

Joseph A. Demmerle, corporal, 569th Bombardment Squadron, stated that he was in charge of quarters the morning of 27 September 1943. He awakened the combat crews about 2:30 a.m., turned on the lights and informed them as to the time of briefing and also the breakfast hour (R30). About 7:00 a.m. he was sent down to the barracks to notify Sergeant Shermeyer and accused to report to Major Tuttle's office (R31).

Staff Sergeant Herman K. Black, 569th Bombardment Squadron, testified he was a member of the ground crew on the morning of 27th September. At approximately 3 or 4 o'clock, while in barracks, he heard accused say to Sergeant Ball in effect that he did not want to fly until he had sufficient flying equipment and that the day before it had been "too cold to stand it" (R33).

Technical Sergeant John W. Parker, 569th Bombardment Squadron was chief of the ground crew which serviced Lieutenant Becker's 'plane. He declared that on the morning of 27 September when the 'plane was ready to go, Sergeant Shermeyer and accused were missing. At about 6:00 a.m. Parker was sent in a truck to obtain their presence (R34). Accused was in his barracks standing by his bed. When Parker said to him, "Come on, let's go" he answered that he was not going to fly. He told accused that "Lieutenant Becker and Major Tuttle are both out there waiting for you". At that time the other 'planes were gone. Parker further testified that he knew Lieutenant Becker's crew had been having trouble in securing flying equipment. Accused had stated to witness on the previous day that if there had been any opposition on the raid of 26 September his hands were so cold that he would not have been able to shoot the guns (R35). On the morning accused did not appear, other men volunteered to replace him but there were no volunteers for the position of ball turret gunner (R36).

First Lieutenant Robert W. Stuart of the same unit as accused testified that on 27 September the condition of the heated equipment of the men in general was rather poor. Supplies were depleted and difficult to obtain. He had loaned accused used equipment. The suit and shoes were in working order but the gloves were not (R37). As far as he knew the gloves had not since been checked (R38).

It was stipulated that if Technical Sergeant Clinton E. Hahn, 569th Bombardment Group, were present in court (R46)he would testify in substance that he was a member of the bombardment crew of which accused was a member on 26-27 September 1943; that upon return from a mission on 26 September the crew knew it had been alerted for a mission on the morning of 27 September. About 2:30 a.m. on 27 September Charge of Quarters awakened the

crew. All men went to breakfast except accused. At briefing, accused and Staff Sergeant Shermeyer were missing. Major Tuttle asked for them. Witness told him the men would be in the 'plane ready to fly and sent Sergeant Ball to secure the missing men. They did not appear and the pilot upon being informed of their absence called the "tower". The 'plane did not "take off". When witness went on mission of 26 September he borrowed clothing and equipment from other crews. All crew members complained about the clothing on the 26 September mission. Accused was waist gunner on this mission and he needed more clothing than any other crew member - especially heated equipment. He had borrowed the heated equipment he used. Since the Regensburg raid the crew has been borrowing clothing. When a green flag is flying the crew knows it is scheduled for a mission and it goes to barracks for sleep. In the morning it is awakened by Charge of Quarters who informs it as to time of breakfast and briefing. At briefing the crew receives its orders and is notified as to time of departure and target.

A stipulation was entered into between the prosecution and the accused in substance: (1) that the 569th Bombardment Squadron (H) is a unit of the 390th Bombardment Group (H); the 390th Bombardment Group is a part of the 13th Wing of the 3rd Bombardment Division and on 27 September 1943 these units were part of the Eighth Air Force, based in the United Kingdom and engaged in heavy bombardment operations against enemies of the United States. (2) That they were ordered by proper authority to perform on 27 September 1943 a tactical combat bombing mission against installations at Emden, Germany. (3) That the 390th Bombardment Group (H) was ordered to supply 21 aircraft and crews for this mission of which the 569th Bombardment Squadron (H) was ordered to supply six. (4) Aircraft of the 390th Bombardment Group (H) including five aircraft from the 569th Bombardment Squadron (H) executed the mission. (5) That Emden, Germany is and was on 27 September 1943, in territory occupied by enemies of the United States (R40).

4. The defense produced two witnesses (Technical Sergeant Merle Houck and Staff Sergeant Enrique Perez) who slept in the same barracks with accused. Each testified that on the morning of 27 September when called by the Charge of Quarters each heard the accused say he was not going to fly because he did not have proper equipment (R41-42). The defense also produced several witnesses (Second Lieutenant William F. Burke, Second Lieutenant David Von Schlegell, First Sergeant Frank L. Gerchman, all of the 569th Bombardment Squadron (Heavy)), who testified that accused performed his combat duties well and would again make a good member of a combat crew (R43-47).

Private Earl R. Shermeyer (formerly staff sergeant) stated in detail the events of the morning of 27 September 1943 as they affected him and accused, being substantially the same story as told by prior witnesses (R47-51). He was confused by the messengers sent to the barracks. One said, "stay there", and the other said, "come up". He did not know which to believe. He remained in the barracks (R52).

(126)

Captain William F. Pennybacker, operations officer with the 569th Squadron, assistant group operations officer and in the past, equipment officer, stated that the squadron had been unable to secure replacement equipment. The squadron had three crews "ditched" and for the 30 men about six suits of heated clothes had been obtained. They were all size 40 for large men. In his knowledge there were none for Lieutenant Becker's crew. The official record shows that 24 ships were escheduled to "take off" on the 27th and that 23 "took off". Lieutenant Becker's ship did not "take off" (R54). Three ships listed as "spares took off" (R55).

Accused, as a witness, declared that when he awakened from sleep on the morning of the 27th September, most members of his crew were arising. They said the crew was on the alert to go. Accused did not leave his bed but made the statement that

> "I would fly if I knew I had flying clothes that would work but as I had not I would not".

He returned tha day before from a mission around 7:30 or 8:00 p.m. and by the time the 'plane was parked it was dark. On that mission his heated clothes did not work. It was approximately "40 below" on that mission. No fighter opposition was seen. With the temperature 40° below zero the operation of guns with use of ordinary gloves is impossible (R57). Accused has been on five combat missions. On the missions since his return from Africa, his experiences had been very unpleasant. He had some electrically heated equipment which would not work and a gas mask which would not fit. Lieutenant Becker had sent over to the Air Force Supply and obtained some equipment for the crew. It had all been picked over and anything of any use taken before he could equip himself. After accused had been awakened by Charge of Quarters, Sergeant Ball came into the barracks. Accused told him he would fly if given flying equipment (R58). The next person who arrived was a sergeant from Major Tuttle's office who informed him that Major Tuttle was coming to the barracks. Accused dressed and waited for him. Then Sergeant Parker came in and stated that Lieutenant Becker and Major Tuttle were out at the ship and that a truck was available to accused for transportation. Charge of Quarters then appeared and instructed witness and Shermeyer to go to Major Tuttle's office which they did. Three days later accused was "broken" to a private (R59). Accused desired to continue combat flying and had never suggested to anyone that he wanted to go off flying status (R60). He did not go out to the 'plane to see if the equipment was there for he had been out three other times and there was no equipment. He did not know for sure whether or not there was equipment for that morning, but there was no equipment in the 'plane when he left it tne previous evening nor had any been delivered to him prior to nine o'clock the night previous (R63).

5. On being recalled by the court, Major Tuttle stated the usual procedure applicable to non-commissioned personnel of combat crews was for them to report at briefing their inability to depart on a mission. There was no order to that effect nor were there any other methods of giving notice (R68).

6. Winthrop comments on the history of the 42nd Article of War of the Code of 1874, a partial predecessor to the present 75th Article of War:

> "The originals of this and the next Article may be traced in Arts. 9 and 13 of Sec. III of Charles I, Arts.22, 23 and 24 of James II, and in various provisions of the Code of Gustavus Adolphus, especially in the Arts. numbered 55,56,62,64,73,79,89,92,93 and 94. The offence of pillaging is denounced in the still earlier Art. 7 of Richard II.
>
> The present Article is Art. 52 of the Code of 1806 expressed in improved English. The existing form is more general than that of 1775, which provided for the punishment of the offences described only when committed 'in time of an engagement;' and, as respects the offence of 'leaving post, &c., to plunder and pillage,' is also more general than the form of 1776, which made this act punishable only 'after victory,'" (Winthrop's Military Law and Precedents - Reprint p.622).

Articles 41 and 42 of the Code of 1874 provided:

> "Art.41.- Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as a court-martial may direct.
>
> Art.42.- Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct".

In the 1916 code, a single article designated Article of War 75 was substituted for Articles 41 and 42 of the Code of 1874. (See statement of Brigadier General Enoch H. Crowder, The Judge Advocate

General before the sub-committee of the Committee on Military Affairs of United States Senate 9 February 1916, Senate Calendar 122, Report No 130, 64th Cong., 1st Sess. at p.78). In the 1916 revision the article appeared in the following form:

> "Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard or other command, which it is his duty to defend or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct."

The 1920 amendments to the Code of 1916 produced the 75th Article of War in its present form:

> "Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison or quarters, shall suffer death or such other punishment as a court-martial may direct." (Underscoring supplied).

The 1920 amendment transposed the phrase "before the enemy" to the position following the pronoun "who" in order to remove all doubt as to its qualifying affect upon the remainder of the article. There was also interpolated the clause "or by any misconduct, disobedience, or neglect endangers the safety of" following the verb phrase "abandons or delivers up".

The idea may be advanced arguendo that the 75th Article of War is inapplicable to the Army Air Corps. Such argument is based on the history of the Article which definitely indicates that it is premised on the classical pattern of land warfare which does not include the aerial combat - a strictly modern development. As a corollary to this proposition it may be contended that at the time of the enactment of the 75th Article of War in 1916 and also at the time it was reenacted in its

amended form in 1920 Congress did not contemplate the conditions and situations arising as a result of modern aerial warfare and that it envisioned warfare on land fought only by land forces when it gave its legislative approval to the Article.

Certain well established rules of statutory construction are applicable in the consideration of the problem thus presented:

(a) - The intention of Congress must primarily be discovered from the language of the statute itself.

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislature which passed it" (United States v. Standard Brewery, 251 US. 210, 64 L.Ed.229,234).

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute." (United States v. Goldenberg 168 US.95, 42 L.Ed. 394,398).

(b) - The history of the statute may be considered in construing and interpreting it (United States v. Raynor, 302 US.540,82 L.Ed.413; United States v. Morrow 266 US.531,69 L.Ed.425)

(c) - In particular it will be noted that the 75th Article of War is part of the Act of June 4, 1920 (41 Stat.759,803) which designates the Air Corps (formerly Air Service) as part of the Regular Military

establishment. The two legislative directions - one denouncing certain acts as a military offense and the other creating the Army of the United States - are contained in one legislative enactment:

> "And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning."(Brown v. Duchesne, 19 Howard 183, 15 L.Ed. 595,599) (See also Helvering v. New York Trust Company 292 U.S. 455,464, 78 L.Ed.1361, 1366).

The Air Service is a component of the Regular Army of the United States - not a separate organization nor department of Government (Act of 3 June 1916, 39 Stat 166; Act of 4 June 1920, 41 Stat 759; 10 USC 4; Military Laws of the United States, 1939, Sec.6, p.26). By the Act of 2 July 1926 (44 Stat 780; Military Laws of the United States, 1939, Sec.30, p.37) the "Air Service" was designated as the "Air Corps".

The 75th Article of War is general in its application to the military personnel. It applies to "any officer or soldier".

> "All officers * * * and soldiers belonging to the Regular Army of the United States * * * and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service"

are subject to the Articles of War (AW 2).

There is no distinction on the face of the Article between the separate arms and services - all are part of the Army. Notwithstanding the fact that they must adopt different methods and means in the performance of their respective functions they remain part and parcel of the American military organization.

The Board of Review therefore believes that the rules of statutory construction hereinbefore set forth when applied in connection with the history of the 75th Article of War require the conclusion that the Article governs the conduct of the personnel of the Army Air Corps.

7. Of primary importance is the question: Was accused, at the time he refused to fly on combat mission over enemy occupied territory in Europe, "before the enemy" within the purview of the 75th Article of War? If this question is answered in the negative the prosecution's case must fail in its entirety as the acts of omission and commission which are denounced as military offenses by the article must be committed "before the enemy" (CM 125263 (1919) Wachsman, CM 131873 (1919), CM 129614 (1919), Dig.Op. JAG 1912-1940, sec.433 (1) p.303; CM France, QAJAG, 201-598, 12 December 1918 Robstock).

> "It is not necessary, however, that the enemy should be in sight. If he is confronting the army or in its neighbourhood, though separated from it by a considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the enemy, or resorted to in view of his movements, the misbehaviour committed will be 'before the enemy' in the sense of the Article" (Winthrop's Military Law and Precedents, 1920 Reprint, pp.623-624).

> "The words 'before the enemy' imply contact with the enemy. It is not a question of distance, but rather of tactical relation. Actual contact with the enemy is not necessary. It is sufficient if the organization with which accused was serving at the time was so situated, either in the front lines or in reserve, as to indicate its involvement in an impending combat" (Tillotson, Articles of War Annotated, p.165; CM 128019 (1919), Dig.Op.JAG 1912-1940, sec.433 (2), p.304).

> "Actual engagement with the enemy at the time of the commission of the offense is not an essential prerequisite to conviction under A.W.75, so long as there was a real 'contact with the enemy' as the term is reasonably used"(CM 126528 (1919), Dig. Op.JAG 1912-1940, sec.433 (2), p.304).

The foregoing dissertations with respect to the meaning of the phrase "before the enemy" as used in the 75th Article of War can have only general application to the problem arising in the instant case.

Manifestly they were written prior to the advent of modern aerial warfare. Literally they encompass combat activities on land and it is only by implication and inference they become pertinent to present consideration.

The evidence without contradiction shows that at AAF Station 153, accused's bomber crew was alerted on the evening of 26 September for combat flight over enemy territory early next morning; that the members thereof, including accused, knew upon retirement for sleep that evening that they were on such status; that about 2:30 a.m. 27 September the crew was called for breakfast and briefing; and that accused although awakened and informed that he was ordered to breakfast and briefing refused to obey the order for the reason that he was not properly equipped with heated gloves. It is also clearly proved that as part of the process of briefing accused was ordered by proper authority to join the tactical bombing mission on 27 September against installations at Emden, Germany, which is in an enemy country and that he refused to obey the order. The map shows that Emden is approximately 250 miles on a direct flying route from the nearest shore line of the United Kingdom. The location of AAF Station 153 within the United Kingdom is not disclosed by the record of trial. There is no evidence that there was any enemy action by air or otherwise directed at accused's station or any other installation or location within the United Kingdom on 26-27 September 1943.

In attempting to analyze the status, under the 75th Article of War, of personnel of the United States Air Force now stationed in the United Kingdom, who are engaged in combat missions over Germany and the enemy occupied countries of Europe, two extreme situations appear. The first is presented by the picture of a bomber which has flown to the confines of enemy territory and is the object of attack by enemy aircraft and enemy anti-aircraft from the ground. There are none who will deny that in such situation a bomber crew is "before the enemy". At the opposite pole is a bomber crew which may or may not have been engaged in combat with the enemy but which at the relevant time is in barracks at an air-field. It has not been alerted nor placed under orders to perform a mission and the crews are not required to remain at their station. Such situation also assumes that enemy aircraft are not in immediate proximity. There appears to be no difficulty in reaching the conclusion that under such situation a bomber crew is not "before the enemy". Within these two extremes, delicate and complicated problems arise in defining the phrase "before the enemy" - problems produced by the great variety of conditions and circumstances under which aerial warfare is presently being conducted by the United States Army Air Force based on the British Isles. Under such circumstances it appears to be highly inadvisable to formalize for general application in such operations a definition of the phrase "before the enemy". While past experiences and practices may suggest a fairly substantial basis upon which to construct a formula, there is no assurance that revolutionary changes may not occur which would render a fixed and positive declaration difficult to apply or embarrassing to explain. An open-minded analysis of the problem compels the conclusion that any attempt

to state an overall definition of the phrase when applied to the air forces would serve to obscure rather than illuminate the subject.

Notwithstanding the difficulties and circumstances which argue against the announcing of a dogmatic formula or definition it is most desirable to discover a safe and reasonable standard of measuring an accused's status under the article. The Manual for Courts-Martial, 1928 declares:

> "Whether a person is 'before the enemy' is not a question of definite distance, but one of tactical relation" (par.141a, p.156).

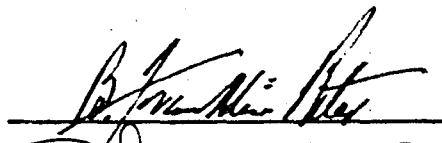
Such statement possesses the merit of being specific and positive in its declaration of a legal principle without being inflexible in its application. It is therefore a particularly practical and helpful guide in the instant case.

At the time accused refused to obey the positive order to accompany his crew on its bombing mission the crew and its bomber waited at its base station ready to "take off". Other bombers of the squadron had departed on the mission. Accused's and Shermeyer's deriliction prevented the crew from joining in the assault upon enemy territory. A realistic and rational analysis of these facts compels the conclusion that at the time of accused's malfeasance he and his crew were in the course of preparation and had not entered the tactical situation where they were "in the face or presence of the enemy". Accused's disobedience must not be confused with his tactical status when he disobeyed. His refusal to obey was something separate and apart from his tactical position. His disobedience was partially responsible for the inability of his crew to participate in the mission, but this consequence did not advance accused from a preparatory status to that of actual combat with the enemy.

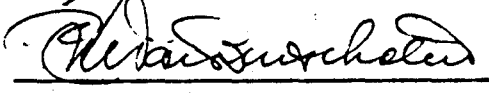
It is unnecessary for the decision in this case to consider when and under what conditions or circumstances the crew would be no longer in a preparatory status but would have passed to that of being tactically "before the enemy". Neither is it necessary to consider the result if the station of accused's squadron or his squadron had been under actual attack by the enemy. Such situation did not obtain in the case. It suffices for present purposes to conclude that a bomber crew, based on an air-field in the United Kingdom, although alerted and under orders to perform a designated mission is not "before the enemy" when it has not departed from its base, and is not the immediate object of attack by the enemy.

From the foregoing it follows that accused was not before the enemy when he disobeyed the order "to fly * * * and execute a combat mission". Therefore the prosecution failed to establish a fundamental premise of its case.

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



Judge Advocate



Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 13 MAR 1944 To: Commanding General, ETOUSA, APO 887, U.S.Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by Act of 20 August 1937 (50 Stat.724; 10 U.S.C. 1522) and as further amended by Act of 1 August 1942 (56 Stat.732; 10 U.S.C. 1522), is the record of trial in the case of Private JOHNNIE (NMI) MUIR(20504412) 569th Bombardment Squadron (H), 390th Bombardment Group (H).

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which accused may have been deprived by reason of such findings and sentence, so vacated, be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with the required copies of GCMO.

OUT 13 MAR 1944 BJAGO-ETO

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

3 Incls:
Incl.1. Record of Trial
Incl.2. Form of Action
Incl.3. Draft of GCMO

(Findings and sentence vacated. GCMO 18, ETO, 17 Mar 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1232

31 JAN 1944

U N I T E D S T A T E S)	VIII BOMBER COMMAND
v.)	
Second Lieutenant JOHN H. BAXTER (O-731137); 533rd Bombardment Squadron, 381st Bombardment Group (H).)	Trial by G.C.M., convened at AAF Station 103, APO 634, on 30 November 1943. Sentence: To be dismissed the service.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 64th Article of War.
Specification: In that 2nd Lieutenant John H. Baxter, 533rd Bombardment Squadron, 381st Bombardment Group (H), having received a lawful command from 1st Lieutenant Karl (NMI) Franek, his superior officer, 533rd Bombardment Squadron, 381st Bombardment Group (H), to report to his Squadron Commander for flying duty and to fly with his squadron on a scheduled combat operational mission, did, at AAF Station 167, APO 634, on or about 8 October 1943, wilfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, VIII

Bomber Command, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved so much of the findings of guilty of the Specification of the Charge as involved willful disobedience of an order to report to accused's Squadron Commander for flying duty as not being supported by the evidence, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

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

On 8 October 1943 First Lieutenant Karl Franek, 533rd Bombardment Squadron, 381st Bombardment Group, Station 167, was operations officer of the 533rd (Bombardment) Squadron. His duty consisted of exercising direct control over the flying personnel with respect to training, assignments, crew-making, flying schedules and status reports (R6). On that day an operational combat mission was scheduled for Anklam, Germany (R7). Lieutenant Franek brought the crews to the "briefing" where Major Hendrick (apparently the Squadron Commander) stated that "as we were short of a bombadier Baxter would have to fly and to get him" (R8). About 9 a.m. 8 October Lieutenant Franek ordered accused

> "* * * to fly on a mission in accordance with orders given to me by the Squadron Commander.
> * * * * *
> I told him he would have to fly on that mission and he refused.
> * * * * *
> I told Lieutenant Baxter that he would have to fly and that was all there was to it and also at the time he told me he would not, and I said it would probably lead to a court-martial and he should go and speak to Major Hendrick at the time, which he did." (R6-7).

The order given was for an operational combat mission, and no preliminary order was given prior to the order that he should fly on the mission (R7). Lieutenant Franek did not know the destination and so did not disclose it to accused, who although not previously scheduled to go on the mission, was to substitute as bombadier for another man who was ill (R8-9). However, the crew was the one to which accused was regularly assigned. His crew left on the mission without him (R7-8).

On 4 October after a mission to Frankfurt, he told Lieutenant Franek that he was through with flying and wanted to quit because of a mental incapability to co-ordinate himself. He said that he had gone to pieces on two other missions, did not think he could do his job and did not want to be a hazard to the crew (R8-9). After 4 October the crew had gone on a mission without him because Major Hendrick had thought that if he "was off a couple of missions it might help him" (R10).

It was stipulated that accused was in the military service and that Lieutenant Franek was authorized to give him orders (R6).

First Lieutenant Frank S. Guiner, 42nd Military Police Company, AAF Station 167, appointed to investigate the charges, interviewed accused who, after being warned of his rights, stated orally that he had refused to fly because he thought he was a detriment to his crew (R10).

4. For the defense, accused testified that he "graduated 10 October 1942 in Arizona and I was second highest in the class ***". He had requested combat duty but against his wishes was retained as an instructor. After six or seven months on duty as an instructor in the United States he was finally assigned to a B 17 crew. He had been "quite nervous" while attending Bombardier School, and after graduation was taken up in a ship which the pilot "wrung**out" in a fruitless effort to help him get rid of his nervousness and air sickness. "In the States it was O.K. but over here it is a different story with someone else depending on you". He had participated in one combat mission to Frankfurt which aborted and in an air sea rescue to Norway. After the Frankfurt raid on 4 October, he told Lieutenant Franek that he did not want to fly any more because he "froze" on his guns under attack and was a detriment to his crew. The navigator had to take over his guns. Rather than continue to fly and endanger the lives of the crew he said that he preferred to be grounded, whereupon the lieutenant replied that "he would see about it". On the morning of 8 October the crew was "briefed" on a raid to Germany. Lieutenant Franek told witness that the bombardier scheduled to go was ill and Major Hendrick had asked "for me to be put on". Lieutenant Franek said "'Go get your stuff ready and report to the line to fly' and I told him I was not going to do it as I had told him 4 days previously." The order was to fly with the crew on an operational mission. He did not fly. Between 4-8 October he was not told whether he was still on a flying status. During that period he had not seen the flight surgeon with respect to his condition, but he was examined by tne squadron flight surgeon after 8 October. Upon being questioned by a member of the court, accused further testified in substance that on 4 October he went on the Frankfurt raid, that the fact that the crew "aborted" had not been due to a mechanical failure of the plane but that the abortion had some relation to his having been a member of the crew (R11-13).

Admitted in evidence as an exhibit for the defense was a copy of AR 40-110, 3 December 1942, entitled Standards of Physical Examination for Flying (R11, Def. Ex. A). Also admitted as a defense exhibit was the report

of a Flying Evaluation Board of four officers dated 28 October 1943, and which contained in part the following entries:

* * * *

"(8)Flying status and limitations
Fully qualified (physically) for all types of flying as Bombardier.

* * * *

(13)Mental attitude toward flying Poor
(14)Observation of flying proficiency
Bombardier adequate record.
(15)Flight Surgeon's Report:
(a) General physical condition
Physically qual for flying Class 1.

* * * *

(d) Neuro-psychic Unsatisfactory.

* * * *

(16)Classification: Unlimited-Limited
Unlimited"

The commanding officer, AAF Station 167, concurred in the report of the board (R13; Def. Ex. B). (Underscoring supplied).

It was stipulated by the prosecution and defense that accused was among the officers listed in paragraph 3, SO 122, Hq; AAF Station 167, APO 634, 27 October 1943 which provided that

> "U.P. para 2 AR 35-1480, the following officers, organizations indicated, are suspended from further participation in regular and frequent aerial flights". (R13).

5. The undisputed evidence, including accused's own testimony, shows that at the time and place alleged, accused was ordered by Lieutenant Karl Franek, his superior officer, to fly with his squadron on a scheduled combat operational mission. He willfully refused to comply with the order although told that his conduct in refusing to go would probably result in a court-martial.

The defense contended that

> "**** under the 64th (Article of War) he cannot be charged if he had previously given notice he was not going to perform an act and subsequently to give the order for the sole purpose of increasing the penalty does not make that proper"(R11).

This contention by the defense is without merit. Accused testified that on 4 October he told Lieutenant Franek that because he

"froze" to his guns under attack, he "didn't want to fly any more" as he felt he would endanger the lives of the crew, and that he would, therefore, "rather be grounded". Lieutenant Franek replied that "he would see about it". There was no evidence from which it could reasonably be inferred that on 4 October he had refused unqualifiedly to fly again. Rather, the evidence indicates a request that he be grounded. Also, there was not the slightest evidence that the order to fly on 8 October was given for the sole purpose of increasing any "penalty". The record of trial does not show that any offense had been committed prior to 8 October for which it could be inferred that he would be penalized. After 4 October it was thought that it might benefit accused if "he was off a couple of missions" and for this reason he did not accompany his crew on a mission which occurred between 4-8 October. He was not originally scheduled to go on the mission of 8 October and was ordered to do so solely because of the illness of the bombardier who had been previously assigned. Accused was then on flying status, was qualified to fly and was subject to the order given. The evidence is legally sufficient to support the findings of guilty of the Charge and Specification as confirmed by the confirming authority.

6. The charge sheet shows that accused is 25 years of age. He served in the regular army from 22 November 1938 to 18 February 1942, on which date he was a member of the 135th Infantry Regiment; served as an aviation cadet from 19 February 1942 to 9 October 1942, and on 10 October 1942 was commissioned a second lieutenant Air Corps.

7. The court was legally constituted and had jurisdiction of the person and offense. 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 as confirmed by the confirming authority and the sentence. Dismissal is authorized upon conviction of a violation of Article of War 64.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(142)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 31 JAN 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Second Lieutenant JOHN H. BAXTER (O-731137), 533rd Bombardment Squadron, 381st Bombardment Group (H), attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as confirmed and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1232. For convenience of reference please place that number in brackets at the end of the order: (ETO 1232).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 7, ETO, 5 Feb 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1249

7 MAR 1944

U N I T E D S T A T E S	1ST INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Dorchester, Dorsetshire, England 24, 26 November, 23 December 1943.
Private JOHN (NMI) MARCHETTI (32505685), Company "K", 18th Infantry.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE: Violation of the 75th Article of War.
Specification: In that, Private John Marchetti, Company K, 18th Infantry, being present with his company while it was engaged with the enemy, did at or near Villa Rosa, Sicily, on or about 19 July 1943, shamefully abandon the said company, and seek safety in the rear, and did fail to rejoin it until on or about 17 September 1943, after the engagement was concluded.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General of the 1st Infantry Division, found the record of trial legally insufficient to support a finding of guilty of that portion of the Specification as finds that the accused failed to rejoin his company until "on or about 17 September 1943" and returned the record of trial to the court for reconsideration of its action if it so desired. The court

reconvened and found the accused, of the Specification, guilty; except the words and figures "on or about 17 September 1943"; of the excepted words and figures, not guilty; of the Charge, guilty. It adhered to its former sentence. The reviewing authority thereupon approved the sentence, and forwarded the record to the Commanding General, European Theater of Operations. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge from the service, total forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 30 years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. The prosecution's evidence is as follows:

First Lieutenant William E. Russell, 18th Infantry, testified that on or about 19 July 1943 he was a platoon leader of Company K, 18th Infantry. Accused was on duty as an ammunition bearer of one of the machine gun squads of that company. In the latter part of the morning of that date, the company was attacking Villa Rosa, Sicily. It was ordered to move out across a road through a defilade and across a ravine or dry stream bed. During the movement down the road it was subjected to enemy shelling (R5). Accused was with the platoon when it crossed the road (R6-7). It was then held up by forward elements. When the contingent was again ready to move, Lieutenant Russell was informed by the squad-leader that accused could not be found (R6). As the squad moved forward shelling continued about an hour (R24). Shells and mortar fire landed close about it (R25). A soldier, Private Whalen, was knocked unconscious and was prone on the ground (R22). The squad to which accused belonged advanced in extended order on the slope of the gully, and another squad was on the right slope (R24). It was possible to see the entire area in the rear where Lieutenant Russell could see Whalen. Accused could not be found (R22). Private Sheahan of the other squad was reported missing as the platoon advanced through the gully or draw (R23). Accused, Whalen and Sheahan were the only men in the machine gun section not accounted for that day (R24).

Corporal Erwin A. Hallett, Company K, 18th Infantry, stated that he was leader of the machine gun squad of which accused was a member. On 19 July accused was an ammunition carrier. On that date the squad moved to attack toward Villa Rosa. As it advanced across a road it moved into shell fire. Accused was present with the squad as it crossed the road and as the first shell landed. A gunner was injured at that time. The shelling consisted of artillery fire - 88s and other guns. Upon reaching a partially defiladed area, Hallet took a check of the men and accused was missing. Members of the squad called to accused, but there was no response. He had been under fire previously and acted normally that day (R8). The next time witness saw accused was in the guardhouse after the company came

back from the front (R8).

Corporal Dale Stofferson, assistant section leader of the 3rd Battalion Medical Section, testified that on 19 July "about an hour or two after dinner" (R9,10,20) he led a squad of litter bearers into a gully to pick up wounded soldiers (R9). This gully had few trees and was embanked on both sides. He found accused in this gully about 200 yards from a road, posed in a more or less crouching position (R10,11). It required about 15 minutes to reach accused from the road because of the shelling, passing from "tree to tree" (R11). When Stofferson asked accused if he were wounded, he answered he was not but that it was "too hot" or words to that effect. He did not appear wounded (R10). There were two men in the gully - accused and a soldier not known to witness. The other man was in about the same position as accused (R19,20). There was some shelling at the time. Accused was next seen by Stofferson that night in the company of the other soldier at the aid station where they remained until next morning (R19). A jeep from his company was pointed out to accused and he was told to get on it and return to his company (R11). Witness did not know whether accused was examined at the aid station, but it was customary to do so even during the confusion of battle (R20).

Private Francis Sheahan, also an ammunition carrier of Company K, on 19 July in a squad other then that of accused testified that there was some "pretty heavy shelling" as the company made this attack. He was "knocked out" while in a small gully. When he regained consciousness, possibly an hour later - about three p.m.- he noticed accused lying face downward some five or ten yards away and crept down to him, shook him and asked what had happened. Accused replied he had been knocked unconscious (R13) that his head was pretty bad and he was dizzy (R17). The two soldiers "staggered" up the hill and a jeep brought them to the "medics" who gave them some pills and took care of them for the night. The next morning a jeep brought them to a new area from which Sheahan returned to his company (R13-14) located across the road some 20 or 30 yards away. Accused did not accompany him to the company. The next time Sheahan saw accused was in the "last area" in Sicily (R15).

4. At the close of the case by the prosecution, defense moved for a finding of not guilty in that it was not proved that accused had abandoned his company. The motion was denied and not later renewed. A prima facie case had been made out at that time against accused and denial by the court of the motion was proper. Not having renewed the motion at the close of the taking of testimony, its further consideration was waived by the defense (CM ETO 564, Neville).

The accused elected to remain silent and the defense rested without presenting evidence.

5. The court recalled Lieutenant Russell (R20) and Corporal Stofferson (R18) for further examination. Their testimony was but a reiteration of that given previously. At the conclusion of this examination the defense moved for a continuance (R26) in order to secure evidence that accused

"returned to military control well in advance of the time stated in the specification". The motion was taken under advisement by the court which at 1655 hours, 24 November 1943, adjourned to convene at 0900 hours on 26 November 1943.

At the adjourned hour and date the court reconvened. The defense again submitted argument in support of its motion for a continuance (R27, 28) asserting that additional evidence would show that at least a month prior to 17 September 1943 accused was in control of the 175th Engineers and was delivered to the 15th Evacuation Hospital for hospitalization. The motion was denied (R28).

Thereupon without objection of defense the prosecution called Lieutenant Astor Morris, Company K, 18th Infantry, as a witness. Lieutenant Morris was executive officer of the company on 19 July 1943, and upon the company commander being injured he assumed command (R28). He stated that on 19-20 July the company was not in a bivouac area, nor was it out of tactical combat formation, and that Company K on the afternoon of 19 July made an attack on Villa Rosa, but was "pulled back during the night and made a sweep around the draw and were in Villa Rosa the next morning" (R29) which place the enemy had evacuated during the night (R28).

6. The granting or denying of a motion for continuance is within the sound judicial discretion of the court and its action in denying a motion for continuance will not be disturbed upon appellate review in the absence of a showing of abuse of that discretion (CM ETO 895, Fred A. Davis et al, par.7(a), p.17). A continuance of the trial in the instant case was desired by the defense in order to allow it to present evidence that accused was returned to military control at least a month prior to 17 September, the date alleged in the specification when accused returned to his organization and that he was hospitalized at the time. Defense counsel asserted that it would be necessary to communicate with military authorities in Sicily to secure this information. It was further suggested by the defense that under the Charge and Specification alleging an offense under the 75th Article of War the court might find accused guilty of absence without official leave under the 61st Article of War and for this reason such additional evidence was relevant and its absence prejudicial to substantial rights of accused. Without subscribing to the principle of law advanced by defense counsel and specifically reserving the question for future decision, the Board of Review is of the opinion that the court did not abuse its discretion in denying the motion for continuance for the reason that in neither the offense alleged (shamefully abandoning his company) nor in consideration of a charge of absence without leave was the proposed evidence material. Proof that accused abandoned his company while it was before the enemy will sustain a conviction under the 75th Article of War regardless of the length of time he was absent from his duty. Where the misbehavior is based upon proof that accused left his duty station and went to the rear, the offense is committed immediately upon and coincidently with his departure from his station.

" This offense may consist in:- * * * Such acts by <u>any officer or soldier</u>, as - * * * going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire * * *. Nor will it constitute a defence, or scarcely an extenuation, that the accused did finally perform the service required of him or otherwise duly conduct himself before the enemy, if, after having originally misbehaved, he was compelled to such service or conduct by peremptory orders or by the use or display of force.

Running away. This is merely a form of misbehaviour before the enemy, and the words 'runs away' might well be omitted from the Article as surplusage" (Winthrop's Military Law & Precedents - Reprint - pp. 622,623,624).

Limitations of punishment for absence without official leave under the 61st Article of War as to offenses committed after 1 December 1942 were suspended by Executive Order 9267, 9 November 1942. Consequently the length of time accused was absent from his command was an immaterial matter in considering his guilt of such offense. The denial of the motion was free from error.

7. Captain Wilson V. Ledley, Field Artillery was appointed a member of the court. He was absent on the first day of trial, 24 November 1943, upon verbal order of commanding general. While not revealed by the record of trial it appears from "Post Trial Remarks of Defense Counsel" dated 15 December 1943 supported by a written statement of Captain Ledley which accompany the record, that upon reconvening of the court, Captain Ledley presented himself. He was excused from participating in the trial by the President and he left the court room. It is alleged by Defense Counsel that substantial rights of accused were thereby prejudicially affected. Neither the President nor the court have general authority to excuse members (CM 121765 (1918), CM 121768 (1918), CM 122789 (1918), Dig.Ops.JAG., 1912-1940, par.395(46), p.231), but

"Where a member of a general court-martial has been absent during the taking of evidence in the progress of trial of a case, it is proper for the court to exclude such member from further participation in the trial because of such absence (250.4, 11 Jun 1918, Dig.Ops.JAG., par.395(46), p.230).

The action of the President in excusing Captain Ledley under the circumstances of the case was not only free from error, but also avoided the intrusion into the trial proceedings of an awkward and serious legal question. (Cf: Winthrop's Military Law & Precedents - Reprint - pp.175-176).

8. The 75th Article of War provides in pertinent part:

> "Misbehavior Before the Eenemy.- Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, * * *."

The following interpretative comments of the foregoing article in addition to those hereinbefore quoted are pertinent:

> "a. MISBEHAVIOR BEFORE THE ENEMY * * * Misbehavior is not confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article. * * *.
>
> Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy." (Manual for Courts-Martial 1928, par.141a, p.156).

> "An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offence as if he had deliberately proved recreant. * * *.
>
> The act or acts, in the doing, not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender. * * *.
>
> Defence. Beside negativing the facts charged, the accused may show in defence that in what he did he was acting under the orders or authority of a competent superior, or was properly exercising the discretion which his rank, command, or duty, or the peculiar circumstances of the case, entitled him to use. He may also show that he was suffering under a genuine and extreme illness or other disability at the time of the

alleged misbehaviour" (Winthrop's Military Law & Precedents - Reprint - pp.623,624).

(a) The gravamen of the offense against accused is contained within the following allegations:

> "Marchetti * * * being present with his company while it was engaged with the enemy * * * did * * * shamefully abandon the said company, and seek safety in the rear".

While this specification is modeled upon form 46 (Manual for Courts-Martial, 1928, p.244) it is to be noted that it follows that part of the 75th Article of War which pertains to the abandonment of "any fort, post, camp, guard or command". There is therefore presented a situation which requires particularized consideration of the statute to determine its application in the instant case. A diagrammatic visualization of the part of the Article relevant to the present problem will be helpful:

Any officer, or soldier who	before the enemy	(1) misbehaves himself or (2) runs away or (3) shamefully abandons or (4) delivers up or (5) by any (a) misconduct (b) disobedience or (c) neglect	endangers the safety of	any fort, post, camp, guard or other command	which it is his duty to defend	

The evidence in this case establishes the indisputable fact that accused, when his squad was advancing toward the enemy in the direction of Villa Rosa, Sicily, deliberately and without authority ran away from it. The evidence is therefore such as would consistently and appropriately support this averment:

> "Marchetti * * * being present with his company while it was engaged with the enemy ran away from his company and did not return, etc."

There was an apparent endeavor on the part of the draughtsman to lay his allegations in such form as to bring the same under the following denouncement of the statute:

> "Any * * * soldier who, before the enemy * * * shamefully abandons * * * any * * * command which it is his duty to defend" (Underscoring supplied).

The pleading, however, fails to include the highly relevant allegation "which it is his duty to defend". It is therefore manifest that if the legal sufficiency of the record depends upon this provision of the Article only, a serious question would be presented as to whether the specification states facts constituting an offense under this particular clause of the Article. Fortunately, however, the allegations of the Specification are sufficiently broad to avoid this dilemma. It is alleged that Marchetti "did shamefully abandon the said company, and seek safety in the rear". Synonyms of "abandon" are: leave, quit, renounce, resign, surrender, relinquish, vacate, remit, discard, forswear (Webster's New International Dictionary - 2nd Ed.). Judicially "abandon" has been defined as totally withdrawing oneself from an object; laying aside all care for it; leaving it altogether to itself (Pidge v. Pidge, 44 Mass.(3 Metc.) 257,265. Cf: 1 W. & P. Perm.4). The Specification's allegations are beyond doubt equivalent to the allegation "did run away from his company". Interpreted in such manner the Specification clearly alleged facts constituting an offense under the clause of the Article which denounces as an offense the act of a soldier who "before the enemy runs away".

(b) In order to constitute an offense under the 75th Article of War the various acts of dereliction of duty by an accused must be committed "before the enemy". Winthrop comments as follows upon its meaning:

> "'Before the enemy.' This term is defined by Samuel as- 'in the face or presence of the enemy.' It is not necessary, however, that the enemy should be in sight. If he is confronting the army or in its neighborhood, though separated from it by a considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the enemy, or resorted to in view of his movements, the misbehaviour committed will be 'before the enemy' in the sense of the Article." (Winthrop's Military Law & Precedents - Reprint - pp.623-624).
>
> "Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation". (Manual for Courts-Martial 1928, par.141a, p.156).

The Specification fails to allege in the words of the statute that accused was "before the enemy" when he ran away from his company. However, it does allege that he was "present with his company while it was engaged with the enemy". The phrase "engaged with the enemy" is properly construed as an allegation of place as well as time. It is identical in meaning with "before the enemy" (CM, France, 24 May 1919, OAJAG 201-4170,

Samuel Stone; CM France, 28 January 1919, OAJAG 201-1200, Francis Slagle). The Specification, therefore, alleges the crucial fact that accused was "before the enemy" when he "ran away".

(c) The evidence in the instant case without contradiction shows that the company to which accused, an ammunition bearer, belonged was moving to the attack on Villa Rosa, Sicily, on the morning of 19 July 1943. Accused's company was ordered to "move out across a road", and it then entered a gully or ravine. It advanced in extended order and was under direct fire of the enemy. Its progress was then "held up by forward elements". It was at this time and place that accused chose to leave his squad. He was discovered in the rear of the advance some time later and thereafter went to a first-aid station where he remained over-night. The next morning he did not report to his company. He was absent therefrom for an undetermined but considerable period of time. The duration of his absence is immaterial in considering his guilt of the present charge.

Accused therefore was "before the enemy" at the time he departed from his squad which was actively engaged in combat. Such fact was obviously known to the accused inasmuch as he was present when the enemy shelled the road across which the detachment was to pass. He informed Stofferson it was "too hot". Assuming that accused was truthful when he stated to Sheahan that he was knocked unconscious through shell explosions the evidence shows that he must have suffered such disability after he left the line of advance and while he was in the rear, and not while he was with his squad.

The evidence establishes beyond a reasonable doubt that accused was guilty of "going to the rear or leaving the command when engaged with the enemy" and this constituted an offense under the 75th Article of War (Winthrop's Military Law & Precedents - Reprint - p.623; CM NATO 397, Barbieri and Bilcavitch; CM NATO 431, Pagano and Poplar; CM NATO 192, Cavaleri; CM, France, 26 May 1919, OAJAG 201-4498, Dominick; CM, France, 28 January 1919, OAJAG 201-1200, Slagle).

9. The charge sheet shows that accused is 22 years of age and was inducted at Fort Jay, New York 17 September 1942 to serve for the duration and six months. He had no prior service.

10. The court was legally constituted and had jurisdiction of the person and offense. 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. The sentence imposed is authorized (AW 75). Violations of the 75th Article of War constitute military offenses; hence confinement in the Eastern Branch Disciplinary Barracks is proper.

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

(152)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 7 MAR 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Private JOHN (NMI) MARCHETTI (32505685), Company "K", 18th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (par.2a, sec.VI, Cir. #210, 14 September 1943 as amended by par.2, sec.II, Cir. #331, 21 December 1943). This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1249. For convenience of reference please place that number in brackets at the end of the order: (ETO 1249).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 16, ETO, 13 Mar 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1259

28 JAN 1944

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private THOMAS L. RUSNIACZYK (35007687), Company A, 37th Replacement Battalion, 10th Replacement Depot.	Trial by G.C.M., convened at Pheasey Farm, Great Barr, Birmingham, England 14 December 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Thomas L. Rusniaczyk Company A., 37th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, then of Provisional Military Police Company "A", 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Whittington Barracks, Lichfield, Staffordshire, England, on or about 5 July 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Blackpool, Lancashire, England, on or about 24 November 1943.

He pleaded not guilty to the Specification and not guilty to the Charge, "but guilty of the lesser offence of Violation of 61st Article of War".

He was found guilty of the Charge and Specification. Evidence of three previous convictions, each for absence without leave for 52, 28 and 10 days respectively in violation of Article of War 61, was introduced,-two were by Special Courts and one by Summary Court. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for twenty years. The reviewing authority approved only so much of the findings as involves a finding of guilty of desertion from 7 July 1943 to 24 November 1943, approved the sentence, reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused pleaded not guilty to the Specification (R5). His plea to the Charge was not guilty but guilty of a violation of Article of War 61. The President explained to accused "the meaning of his plea of guilty to the specification and charge of violation of the 61st Article of War" (R5-6). The Board of Review, having regard for its duty to safeguard the rights of the accused, will treat the plea as one of not guilty to the Charge.

4. Accused was absent without leave from Lichfield commencing 7 July 1943 (R11) and was apprehended in civilian clothes, bearing a British identity card, by a Military Police sergeant in conjunction with a British detective at Blackpool on 24 November 1943 (R7, Pros. Exs. A,B). He admitted that he was an American soldier (R8).

Absence without leave having been established, the only question presented by the record is whether it contains sufficient evidence of accused's specific intent not to return to the military service of the United States. In the opinion of the Board of Review such specific intent is clearly established by the evidence (CM ETO 656, Taylor; CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet; CM ETO 875, Fazio; CM ETO 913, Pierno; CM ETO 952, Mosser; CM ETO 960, Fazio et al).

6. The court was legally constituted and had jurisdiction of the accused and of the offense. No errors injuriously affecting his substantial rights were committed during the trial. For the reason stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority.

7. The charge sheet shows that accused is 24 years 11 months of age. Confinement in a penitentiary is authorized for the offense of desertion during time of war (AW 42). The designation of the Federal Reformatory,

Chillicothe, Ohio, as the place of confinement is authorized (WD, Circular #291, 10 November 1943, sec.V, 3a).

Judge Advocate

Judge Advocate

Judge Advocate

(156)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 28 JAN 1944 To: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U S Army.

1. In the case of Private THOMAS L. RUSNIACZYK (35007687), Company A, 37th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1259. For convenience of reference please place that number in brackets at the end of the order: (ETO 1259).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1262

24 FEB 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private First Class JOHN S. MOULTON (35404951), Detachment A, 152nd Quartermaster Bakery Company.	Trial by G.C.M., convened at Plymstock, Devonshire, England, 4 December 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private 1st Class John S. Moulton, Detachment A 152 Quartermaster Bakery Company did, at Dunstan Woods, Plymstock, Devon, England, on or about 3 November 1943, with intent to commit a felony, viz, rape, commit an assault upon Jeanette Morris, age 12 years, of Burro-Waye, Church Road, Plymstock, Devon, England, by wilfully and feloniously assaulting the said Jeanette Morris by picking her up and throwing her to the ground and striking her in the face with his fist.

CHARGE II: Violation of the 61st Article of War.
Specification: In that Private 1st Class John S. Moulton, Detachment A, 152 Quartermaster Bakery Company did, without proper leave, absent himself from his place of duty at The Firs, Plymstock, Devon, from about 1430 hours 3 November 1943 to about 1600 hours 3 November 1943.

He pleaded not guilty to and was found guilty of both charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a period of 15 years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, designated the United States Penitentiary, "Lewisbury", Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The only question requiring consideration arises from the follow- circumstances:

After practically all of the evidence had been submitted to the court, a trip was made to the premises. The members of the court, the personnel of the prosecution, the accused and his counsel and assistant counsel, the reporter and three witnesses visited the terrain upon which the various incidents brought out upon the trial of the case were alleged to have happened. At various points along their route, the president and members of the court, the trial judge advocate and the defense counsel interrogated the three witnesses. This examination was quite detailed and searching and not of the sort which is anticipated in such a procedure. This Board, in no uncertain language, has recently condemned this practice, and has said:

> " The practice of 'viewing the premises' by a military court is authorized procedure (AW 31). However, the practice of receiving testimony and examining witnesses at a 'view of the premises' is almost universally condemned and usually is reversible error (Underhill's Criminal Evidence, p.833, sec.410, note 49; 16 C.J., p.827, sec.2092, note 9; 23 C.J.S., p.334, sec.986, note 52). A 'view of the premises' properly conducted and not coupled with the examination of witnesses may in many instances be extremely helpful and informatory to the court. When in addition, the court either permits or directs an examination of a witness at the scene of the event it is indulging in a highly dangerous practice, which is not approved or commended." (CM ETO 611, Porter, par.6, p.6).

The fact that there are no material differences in the testimony offered in court and at the premises saves this case, as it did the Porter case, from being reversible error. Eliminating entirely the narrative elicited at the scene of the various events, there still remains in the record substantial and competent evidence to sustain the findings of the court. The

substantial rights of the accused were not affected by this error of procedure (CM ETO 611, Porter).

4. The charge sheet shows that accused is 33 years of age and that he was inducted 27 May 1942 at Columbus, Ohio for the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and of the offenses. 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 (CM ETO 78, Watts; CM ETO 489, Rhinehart and Fallucco; CM ETO 492, Lewis; CM ETO 595, Sipes; CM ETO 996, Burkhart).

6. Confinement in a penitentiary is authorized for the offense of assault with intent to rape (AW 42; Manual for Courts-Martial 1928, par.90a, pp.80-81; 35 Stat. 1143; 18 U.S.C., sec.455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (WD, Cir. #291, sec.V 3a and b, 10 November 1943).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(160)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 FEB 1944 TO: Commanding Officer, Southern Base Section, SOS, ETOUSA, APO 519.

1. In the case of Private First Class JOHN S. MOULTON (35404951), Detachment A, 152nd Quartermaster Bakery Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. Attention is invited to the location of the United States Penitentiary at Lewisburg, Pennsylvania, erroneously named as Lewisbury in the action of the reviewing authority. This should be correctly stated in the published general court-martial order.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1262. For convenience of reference please place that number in brackets at the end of the order: (ETO 1262).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1266

10 FEB 1944

U N I T E D S T A T E S	2ND ARMORED DIVISION
v.	Trial by G.C.M. convened at APO 252, on 5 January 1944.
Captain JACK D. SHIPMAN (0-372674) 14th Armored Field Artillery Battalion.	Sentence: To be dismissed the service.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain JACK D. SHIPMAN, 14th Armored Field Artillery Battalion, did, at or near Bournemouth, England, on or about 15 December 1943, conduct himself in a manner unbecoming an officer and a gentleman, by making indecent advances toward one Leslie Alfred Ernest Williams, a youth of the age of about fifteen years, and by fondling the penis of the said Leslie Alfred Ernest Williams.

Specification 2: In that Captain JACK D. SHIPMAN, 14th Armored Field Artillery Battalion, did, at or near Bournemouth, England, on or about 16 December 1943, conduct himself in a manner unbecoming an officer and a gentleman, by inducing one Leslie Alfred Ernest Williams, a youth of the age of about fifteen years, to perform upon him an act of masturbation, and

by performing upon the said Leslie Alfred Ernest Williams a similar act of masturbation.

He pleaded guilty to and was found guilty of the Charge and both specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 2nd Armored Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 50½. The record has been treated as though forwarded under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved so much of the findings of guilty of Specification 1 of the Charge as involved a finding of guilty of fondling the penis of Leslie Alfred Ernest Williams as not supported by the evidence, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The effects of the plea of guilty were explained to accused by the court and accused announced his desire to let his plea of guilty to all specifications and the Charge stand. The trial judge advocate then announced that though on a plea of guilty, no evidence is required to prove the case, the prosecution would "show sufficient evidence to give the court a picture of the case for use in its deliberations" (R3-4).

Two witnesses only were introduced by the prosecution:

(1) Leslie Alfred Ernest Williams, a sheet metal worker of Bournemouth, England, identified accused as the man he met about 15 December 1943 on Old Christchurch Road in Bournemouth and later saw sitting in front of him and his "pal" in the News Theater. Accused talked to them, offered them cigarettes, went to a restaurant with them and then all three went to another picture house. Halfway through the picture, accused asked him to come into the lavatory with him and there asked him to handle his penis for him and "we done it later" (R5-6). The next day the same thing happened "about dinner time". "He played with me and I played with him" ---- with "our penises" (R6).

(2) First Lieutenant William L. Bradford, Corps of Military Police, Headquarters Southern Base Section, APO 519, investigated a report made by Leslie Alfred Ernest Williams of Bournemouth, England, of acts of misconduct allegedly committed by Captain Shipman, an officer of the United States Army, being an act of mutual masturbation between accused and Leslie Williams. Witness identified a paper marked exhibit "A" for identification purposes only, as the statement made by Leslie Williams to the civilian police. On questioning accused at his (Lieutenant Bradford) office and after due explanation of his rights first given, accused "did admit that the acts alleged in Williams' statement did occur" (R7). Accused had first read the

statement in the reports received by Lieutenant Bradford including that marked Exhibit "A" which was admitted in evidence with consent of defense counsel (R8). Exhibit "A" is a signed detailed account by Leslie Alfred Ernest Williams of his relations with accused on the 15 and 16 December 1943.

4. "There is no requirement of law that evidence must be taken upon a plea of guilty; rather such evidence is intended to assist the court in fixing the punishment, and the reviewing authority in his consideration of the case. The finding of guilty may be supported solely on the plea of guilty". (Winthrop's Military Law and Precedents. Reprint, pp.278-279; CM 212, 197, Rocker;C M ETO 612, Suckow; 24 CJS, sec. 1563, p. 23; Weir v. United States, 92 Fed (2nd) 634, 114 ALR 481, 484).

The effect in law of the plea of guilty is that of a confession of the offense charged. The record shows that accused was represented by counsel, that the effect of his plea of guilty was fully explained to him by the court and that accused understood the effect of his plea of guilty (22 CJS sec 424,p.655; Rice v. United States, 30 Fed. Rep. (2nd) 681; Kachnic v. United States, 53 Fed. Rep.(2nd) 312).

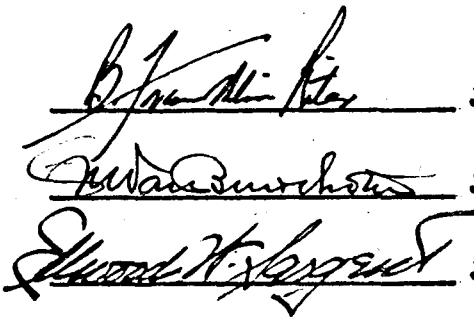
"The more recent practice of both our civil and military courts clearly inclines towards requiring some evidence to be produced in explanation of the circumstances of the commission of the offense that the court, the reviewing and the clemency authorities may each intelligently function" (CM ETO 839, Nelson).

The evidence submitted herein in no way denied or contradicted the plea of guilty. The Board of Review therefore holds that under the circumstances shown herein, the findings of guilty of the Charge and of both specifications are fully supported.

5. The charge sheet shows that accused is 29 years of age. He was appointed a Second Lieutenant, Field Artillery Reserve, 15 November 1938; active duty 25 July to 5 August 1939 and 14 February to 22 July 1940. Entered on active duty 1 November 1940. First Lieutenant, Field Artillery Reserve, 1 November 1941; Captain, 1 June 1942.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the 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. A sentence of dismissal is mandatory upon the conviction of an officer of conduct unbecoming an officer and a gentleman in violation of Article of War 95.



Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 10 FEB 1944 To: Commanding General, ETOUSA, APO 887, U S Army.

1. In the case of Captain JACK D. SHIPMAN (O-372674) 14th Armored Field Artillery Battalion, 2nd Armored Division, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record of trial in this office is ETO 1266. For convenience of reference please place that number in brackets at the end of the order: (ETO 1266).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 9, ETO, 15 Feb 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

15 FEB 1944

ETO 1267

U N I T E D S T A T E S)	2ND INFANTRY DIVISION
)	
v.)	
)	
Second Lieutenant HARVARD C. BAILES (O-1292278) 9th Infantry.)	Trial by G.C.M., convened at Armagh, Northern Ireland, 17 December 1943. Sentence: Dismissal.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates.

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 85th Article of War.
Specification: In that 2nd Lieutenant Harvard C. Bailes, Ninth Infantry, was, at or near Ballyscullion, Northern Ireland, on or about 3 December 1943, found drunk while on duty as the First Battalion, Ninth Infantry, Communications Officer.

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty).
Specification: (Finding of not guilty).

He pleaded not guilty and was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The

reviewing authority, the Commanding General, 2nd Infantry Division, approved the sentence and forwarded the record for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, remitted that portion thereof adjudging total forfeiture of all pay and allowances due or to become due and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosection shows in substance that accused was communications officer of the 1st Battalion, 9th Infantry (R6,12). About 3:30 p.m. 3 December 1943, he reported to Lieutenant Colonel John B. Brainerd, Jr., 9th Infantry, at the latter's office at Ballyscullion House, Northern Ireland, which was then being used as a headquarters, and started to explain the communications set up of the division. Colonel Brainerd testified that his explanations and speech were incoherent, his breath smelled of alcohol and he was not steady but "had some stagger in his walk". He was unable to "explain what the situation was", and thought he had a diagram in his possession which he was unable to produce as it had already been delivered by another person. Colonel Brainerd asked him why his hand was bandaged and he attempted to explain. There was some talk about an accident in which he had been involved. After about ten minutes, because of accused's condition, Colonel Brainerd ordered him to get into his jeep and return immediately to Armagh Barracks. Instead, accused continued with his explanations, whereupon Colonel Brainerd repeated the order and left the room in disgust to put an end to the "incoherent conversation". In his opinion accused was under the influence of intoxicating liquor (R6-9).

When accused entered the office, Captain Frank E. Ball, 9th Infantry, executive officer of the 1st Battalion immediately noticed the tone of his voice and the manner in which he saluted. He did not talk normally, was unable to "describe what he was talking about" and his breath smelled of alcohol. One of his hands was bandaged which fact possibly accounted for the improper salute which he rendered. In Captain Ball's opinion he was drunk. He believed that Colonel Brainerd would speak to accused about his condition and as he did not desire to hear the conversation he left after hearing a few words (R12, 14-15, 18). About 20 minutes later he saw accused in the kitchen where his actions were "sloppy". He leaned over a table, demanded a cup of coffee and talked in a louder tone than was usual. About six enlisted men were present. In Captain Ball's opinion he was still drunk. Captain Ball also smelled alcohol on the breath of Sergeant Watson, who was in the hallway (R13,16-17).

From a window Colonel Brainerd observed that the driver of accused's vehicle was vomiting and sent a staff sergeant down to see if he had been drinking and to investigate his condition. When Colonel Brainerd went downstairs he heard accused talking in a loud tone of voice in the kitchen and ordered a staff sergeant to tell him to report

in the dining room where he placed him under arrest. He also talked with Sergeant Watson and noticed that he had been drinking but that "he was in better shape than anyone else". Because of the driver's condition, Colonel Brainerd substituted as driver Private First Class William T. Anderson, Headquarters Company, 1st Battalion, 9th Infantry, and informed accused that Anderson would take him back to Armagh Barracks where he was to report to his room, and that the regimental commander would be informed of this action. Anderson was ordered not to stop the vehicle under any circumstances (R9-11,20).

At the time he was at Ballyscullion House accused was on duty as communications officer of the 1st Battalion, 9th Infantry, and in the opinion of Colonel Brainerd and Captain Ball his condition was such that he was not capable of performing his duties (R8,13).

During the return to Armagh Barracks accused rode in the front seat with Anderson, and Private Hallman, the former driver, and Sergeant Watson rode in the rear. Anderson saw accused enter the vehicle and testified that "he could walk pretty good", that "he had been drinking", but that he could not say whether he was drunk (R20,24). During the ride back accused "took a drink more than once" from a bottle which he had in his possession and then threw the bottle away. Anderson refused accused's offer of a drink and did not see anyone else take a drink (R21). Accused told Anderson who was in the same company that "if I related anything that happened during the trip it would be tough for me in his section" (R22,25). When Anderson refused his request to stop in Stuartsville because he had been ordered by Colonel Brainerd "to keep right on going", accused grabbed the emergency brake and "made a pass for the steering wheel". It was dark and as he was driving slowly Anderson was able to stop the vehicle quickly. When it ran against the curb, Hallman and Watson were thrown against the front seat. The only other stop made was when they became lost and all of them left the vehicle to make inquiries. Anderson further testified that during the ride accused spoke in his normally loud tone of voice. After taking him to Armagh Barracks, Anderson returned to Ballyscullion House (R22-26).

4. For the defense, Sergeant Thurman T. Watson, Headquarters Company, 1st Battalion, 9th Infantry, testified that Hallman started to drive accused and Watson from Armagh Barracks to Ballyscullion where they were to deliver some diagrams of the telephone circuits. When they stopped to obtain gas at Cookstown accused entered another vehicle with a Lieutenant Mills and drove to meet a forward detail of the company. He later returned and entered his own car. Watson assumed that accused left the diagrams by mistake in Lieutenant Mill's vehicle and they were delivered to Ballyscullion House by someone else before the arrival of accused's party (R28,38,40-41). At Cookstown a "four-fifths" bottle of liquor was purchased (R33) and Watson saw accused take one drink at the cafe where they had lunch (R31). They later had an accident near Cookstown. Accused went back to town and returned with a "jeep", another driver, and a 2-1/2 ton truck (R41-42). Watson saw

accused take another drink from the bottle and carry a third drink of whiskey in a cup into another room at Cheever's Cafe in Cookstown after the accident (R31-32,34,36). He saw him take a fourth drink during their return trip to Armagh Barracks (R31). Watson had two drinks from the bottle at Cheever's Cafe and two drinks by the side of the road after the accident. During the ride to Armagh Barracks he took a fifth drink from the bottle which was between the two front seats. The liquor belonged to accused and the drinks were taken by Watson without his knowledge or permission (R32,35-36,37,39). Hallman, the driver, did not drive after the accident and did not take any drinks before it occurred. Watson saw him take about five drinks after the accident (R41-42).

During the return trip to Armagh Barracks, accused sat in the front seat. In Watson's opinion his actions and speech were normal, and there was no indication that he had been drinking. He did not hear accused offer a drink to the driver Anderson, or threaten him, nor did he see him seize the emergency brake or steering wheel. Watson was not thrown against the front seat at any time and he did not recall that the vehicle struck a curb. They stopped but once just outside Stuartstown to look at a sign post (R29-30,34-35,39).

Accused made an unsworn statement in substance as follows:

On the date alleged he prepared a diagram which he was to take to Colonel Brainerd and started for Ballyscullion. He "ran out of gas" near Dungannon and while the vehicle was being refueled he transferred to Lieutenant Mills' "jeep" in order to deliver a sack of mail. He left the diagram by mistake in this car when he later returned to his own vehicle. He had a drink when they ate at Cookstown. Later, when they were going down a hill a boy started to cross the road. Hallman put on the brakes and as the road was "slick" the vehicle hit one tree and stopped against another. They secured another vehicle and driver at a camp and drove to Ballyscullion House (R43). He reported to Colonel Brainerd and saluted "the best I could" with his bandaged hand. The diagram had been delivered by Lieutenant Mills. Accused conferred about the communications system with Colonel Brainerd who said that he did not want to have anything to do with it and that he "wanted to dump the whole thing in the Division's lap". Accused informed him that since Major BeLieu told him "we were in charge of it", he felt that it was his duty "to work it up". He explained certain features to Colonel Brainerd who said "O.K., you've done a good job. You better run along before dark". Accused went to the kitchen, asked for a cup of coffee and talked with Captain Ball. After he was told by a corporal that Colonel Brainerd wanted to see him, he talked with him for a few minutes. "Never before in the whole conversation did he mention drinking. It's my opinion that the Colonel was not impressed or even thought that I had been drinking until he had seen the driver vomitting". During the return trip to Armagh, they stopped but once when they lost their way and asked for directions. He did not threaten the driver nor seize the emergency brake or steering wheel. When he reached Armagh Barracks he was informed

"that the colonel" had called and that he would be under arrest in quarters(R44).

5. The evidence is legally sufficient to sustain the findings of guilty of being drunk on duty in violation of Article of War 85 (Charge I and Specification). Accused was communications officer of the 1st Battalion, 9th Infantry, and was directed to report to Colonel Brainerd and to explain the communications system of the division. He prepared a diagram which he was to deliver to Colonel Brainerd. He was told by a Major BeLieu that "we were in charge of it". The fact that he was on a duty status when the offense was committed was not disputed.

> "The term 'duty' as used in this article means of course military duty. But, it is important to note, every duty which an officer or soldier is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty." (MCM., 1928, par.145, p.159).

The evidence showed that accused had a bottle of liquor and took at least three drinks before reaching Ballyscullion House. When he reported to Colonel Brainerd his speech was incoherent, his breath smelled of alcohol and he staggered to a certain extent. He was unable to explain the communications system and when Colonel Brainerd ordered him to return to Armagh Barracks he continued with his explanations. Colonel Brainerd repeated his order and left the room in "disgust" in order to end the incoherent conversation. Accused was later observed in the kitchen where his actions were "sloppy". He leaned over a table, spoke in a loud tone of voice and demanded a cup of coffee. Both Colonel Brainerd and Captain Ball testified that in their opinion he was drunk.

> "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article"(AW 85) (MCM., 1928, par.145, p.160).

The issue of drunkenness was one of fact for the sole determination of the court, and in view of the evidence the Board of Review will not disturb its findings (CM ETO 1065, Stratton).

6. The charge sheet shows that accused is 24 years of age and that he entered on extended active duty 3 September 1942.

7. The court was legally constituted and had jurisdiction of the person and offenses. 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. A sentence of dismissal is mandatory upon the conviction of an officer of being drunk on duty in time of war in violation of Article of War 85 (AW 85; CM 255639 (1942), Bul. JAG, Oct.1942, Vol. I, No. 5, par. 443, p.275).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 15 FEB 1944 To: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Second Lieutenant HARVARD C. BAILES(O-1292278), 9th Infantry, 2nd Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number in this office is ETO 1267. For convenience of reference please place that number in brackets at the end of the order: (ETO 1267).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as previously mitigated ordered executed. GCMO 10, ETO, 22 Feb 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1284

6 APR 1944

U N I T E D S T A T E S v. Private ARTHUR A. DAVIS (34069350), Private WILLIAM H. PINDER (33199801), T/5 MILTON F. TRAVERS (33062188), Private JOHN W. MILLER (33171061), Private RUFUS (NMI) SCOTT (33062138), Private PLUMER W. HUDSPETH (38338787), all of 1929th Quartermaster Company Truck (Avn), 1512th Q.M.Trk. Bn.Avn.(Sp), 1511th Q.M.Trk. Reg.Avn.(Sp), and Private OZARK (NMI) CAMERON (34062165), 1944th Q.M. Trk.Co.Avn., 1512th Q.M.Trk.Bn.Avn.(Sp), 1511th Q.M.Trk.Reg.Avn.(Sp).	VIII AIR FORCE SERVICE COMMAND. Trial by G.C.M., convened at AAF Station 473 on 9-11 December 1943. NOT GUILTY: John W. Miller. SENTENCES: Dishonorable discharge, total forfeitures and confinement at hard labor, Davis three years, Pinder one year, Travers two years, Scott four years, Hudspeth three years, Cameron two years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 89th Article of War.
Specification: In that Pvt. Arthur A. Davis, Pvt. William H. Pinder, T/5 Milton F. Travers, Pvt. John W. Miller, Pvt. Rufus Scott and Pvt. Plumer W. Hudspeth, all of the 1929th QM Trk. Co. (Avn), 1511th QM Trk. Reg. Avn (Sp), and Pvt. Ozark Cameron, 1944th QM Trk. Co. (Avn), 1511th QM Trk. Regt. Avn (Sp), being in garrison at AAF Station 473, VIII Air Force Service Command, did, in conjunction with

certain other soldiers whose names are unknown, at Three Tuns Public House, Hotwell Road, Bristol, Gloucestershire, England, and in the immediate vicinity thereof, on or about 6 November, 1943, commit a riot and depredation in that they did wrongfully, unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of the said town of Bristol, and having so assembled, did unlawfully riot, and commit a depredation upon the premises of the said Three Tuns Public House by throwing and breaking glasses, beer mugs, bottles and damaging other privately owned property on the premises of the said Three Tuns Public House.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that * * * * * * * * * * * * * *, acting jointly and in pursuance of a common intent did, in conjunction with certain other soldiers whose names are unknown, at Three Tuns Public House, Hotwell Road, Bristol, Gloucestershire, England, and in the immediate vicinity thereof, on or about 6 November, 1943, with intent to do them bodily harm, commit an assault upon 1st Sgt. Harwell E. Cooper and S/Sgt. Christian S. Holst, both of Hq. Company, 3rd Battalion, 502nd Parachute Infantry, Pfc. Clifford Edwards, of Det. 'B' Co. 'B', 769th M.P. Battalion, T/5 George Cross of the 1965th Q.M.Trk. Co. (Avn), 1511th QM Trk. Reg. Avn (Sp), Mrs. Ellen Callon, Mrs. Lavinia Morris, Mrs. Annie Rose Armstrong, all of Bristol, Gloucestershire, England, by menacing and striking the said 1st Sgt. Harwell E. Cooper, S/Sgt. Christian S. Holst, Pfc. Clifford Edwards, T/5 George Cross, Mrs. Ellen Callon, Mrs. Lavinia Morris, and Mrs. Annie Rose Armstrong on the head and other parts of the body with dangerous things, to wit: beer mugs, glasses, bottles and knives.

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * * * * * * * * * * * * *, acting jointly and in pursuance of a common intent, did, in conjunction with certain other soldiers whose names are unknown, at the Three Tuns Public House, Hotwell Road, Bristol, Gloucestershire, England, and in the immediate vicinity thereof, on or about 6 November, 1943, wrongfully and unlawfully resist by force and violence, lawful arrest by Pfc. Clifford Edwards,

of Det. 'B', Co. 'B', 769th M.P. Battalion and T/5 George Cross, of 1965th QM Co. Trk. (Avn), Military Police in the execution of their duty.

Each accused pleaded not guilty to the charges and specifications. Accused John W. Miller was acquitted of all charges and specifications. Accused Davis and Scott were found guilty of all charges and specifications. Accused Travers and Cameron were found not guilty of Charge II and its Specification but guilty of Charges I and III and their respective specifications. Accused Hudspeth was found not guilty of Charge III and its Specification but guilty of Charges I and II and their respective specifications. Accused Pinder was found not guilty of Charges I and II and their respective specifications but guilty of Charge III and its Specification. Evidence was introduced of one previous conviction of accused Cameron by summary court for failure to obey an officer, in violation of AW 96. No evidence of previous convictions was introduced as to accused Davis, Pinder, Travers, Scott and Hudspeth. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, as follows: Davis, three years; Pinder, one year; Travers, two years; Scott, four years; Hudspeth, three years; Cameron, two years. The reviewing authority approved each of the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement for each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence shows that at 5 minutes of 10 o'clock on the evening of 6 November 1943, Mrs. Annie Rose Armstrong the proprietress of the Three Tuns Public Ho. , Hotwell Road, Bristol, Gloucestershire, England, extinguished the light over the till in the bar room, indicating according to custom the closing of the bar. Mrs. Jennie Holmes, her daughter, who was the barmaid, called "time" as a further means of informing the crowd of Saturday night guests - mostly civilians - that no more drinks would be served. Immediately thereafter four colored American soldiers came into the bar. One approached the counter and asked for drinks. The barmaid announced that she was very sorry, but she could not serve them, as it was "gone time." To their ensuing inquiry why she had served two white American paratrooper sergeants - characterized by the colored soldier as "white bastards" - sitting there at a table with two girls, she replied that they had been served before she called "time". Thereupon one of the colored soldiers picked up a pint cup and threw it across the bar in the direction of the unsuspecting paratroopers (R12,51) who, accompanied by their girls and piloted by the proprietress' son, fled to the bagatelle room adjoining and in the rear of the bar, but not before one of the colored soldiers had seized a white sergeant by the throat (R36) and had been violently repulsed by an effectively wielded beer mug. Panic-stricken customers endeavoring to leave hurriedly were blocked in their outward passage by the colored soldiers, one of whom went to the door and called in other colored soldiers from the outside. The utmost confusion prevailed. All colored soldiers present participated (R51). Glasses,

cups, mugs, bottles, a cuspidor and a knife hurtled through the air. Five dozen glasses and a table were smashed. The door to the bagatelle room was kicked from its hinges by two of the colored soldiers when they found it had been locked behind the white sergeants and their girls, who managed to escape by climbing out through a window of the bagatelle room some fifteen or twenty feet above the ground. A number of persons in the bar, including those named in the Specification, Charge II, were struck, cut or bruised in the melee, none very gravely (R7-33,35-39,42,44-55,57-67).

The disorder lasted for about half an hour. Shortly after it commenced, Ronald P.J. Armstrong, the proprietress' son, escaped to summon military police. Because of the violent opposition of the colored soldiers - "the police were using their truncheons and the soldiers in the bar were retaliating" - the American military police and members of the civilian constabulary who came to their assistance, were unable to evict the crowd until further reinforcements arrived. Once the bar was finally cleared the disorder continued on the moonlit thoroughfare outside, where the military police undertook to arrest those colored soldiers whom they believed to be the leaders of the mob because of their excited running about from group to group apparently accelerating the agitation. While these were resolutely resisting arrest by such means as struggling, scuffling, seizing a club and displaying a knife - all more particularly narrated in the later summary of the evidence applicable to each accused - someone heaved a brick through a window into the bar room of the Three Tuns, shattering the pane. All but one of the accused (Hudspeth) were arrested that night outside the "pub" and transported to military police headquarters (R9-15,18,19,39,40,52-54,68-142).

4. The evidence connecting each accused with the offenses may be summarized as follows:

(a) DAVIS (convicted of all charges) was identified as present in the bar room during the disturbance by (1) Mrs. Jennie Holmes, the barmaid; (2) Mrs. Lavinia Morris, a customer hurt in the melee, who testified he was one of the three soldiers who attacked the white soldier (R26); (3) Ronald P.J. Armstrong, the proprietress' son; (4) First Sergeant Harold E. Cooper, one of the white paratroopers who escaped through the bagatelle room; and who also identified Davis as one who attacked him (R59); and by (5) Police Sergeant Ernest Beard of the Bristol Constabulary. Ten military policemen recognized Davis outside the "pub" immediately after the rioters had been evicted (R82,107,132,139). There he said he wanted to go back in and "tear the place up" (R82). He was arrested for inciting the riot (R130). He resisted arrest, jumped on the back of a military policeman in the act of arresting another colored soldier who succeeded, as a result of Davis' attack, in making his escape (R104,128-129). Davis shoved and cursed the military policemen who arrested him, planted his feet against the ambulance in an effort to push himself free of his captors, and was only subdued through the united efforts of several, who lifted him bodily - still struggling - into the vehicle (R102,110,115,140).

(b) SCOTT (convicted of all charges) had been in the Three Tuns "pub" on previous occasions (R19) and he was identified as one of the four colored soldiers who started the disturbance on the night of 6 November 1943 in the "pub" (R10,36,41,50,94), and continued it outside (R82,132) where he attempted to cut one of the military police with a knife. It was taken away from him after he had cut one of them on the thumb. He had been evicted from the "pub" and was trying to get in again when he was seen with the knife which he threatened to use. It was only after a "terrible tussle" that the military police succeeded in putting him in the ambulance and taking him to police headquarters (R89-90,96,104-106,110-112,115,120-122,133-136,138-140).

(c) HUDSPETH (convicted of riot and assault) was identified by Mrs. Holmes as the "one with a gold tooth", whom she had refused to serve just before the "skirmish" started because time had been called (R9). She testified that when first refused he sought to induce her to serve him by offering to buy drinks "all round the bar." He offered to pay two pounds for a small residue of whiskey in a bottle behind the bar (R8,11), and voiced the complaint that she had served the white American soldiers and not them (referring to the paratroopers as "bastards") (R11). He then started the melee by flinging the first cup (R8) and went over and grabbed one of the white soldiers when the fight started (R12). Mrs. Armstrong testified that she was standing in the doorway to the bar when her daughter refused to serve a colored soldier on the occasion in question. She knew he had a gold tooth but could not recognize him among the accused. She could identify none of them. They all looked alike to her (R26-28,33). Mrs. Morris testified that she had been standing near the bar when Mrs. Holmes refused to serve the four colored soldiers just after "time was called" on the night of 6 November. A week later during the investigation she identified Hudspeth as the spokesman of the four. She remembered his "gold denture" (R35-36,41,43). The one with the gold tooth started the trouble (R36). Hudspeth is not shown to have been arrested on the night of the disturbance. Technician Fifth Grade George Cross, a colored military policeman, who assisted in making the arrests, testified that he knew Hudspeth personally and that he did not see him at or outside the Three Tuns on the night in question (R77,82).

(d) TRAVERS (convicted of riot and resisting arrest) was identified by Mrs. Holmes as present during the disturbance inside the bar room. She had seen him there before (R19). She did not know however, whether he was one of the four who started the trouble. Four military policemen testified he was outside immediately after the bar room was cleared. He was in "a dangerous condition" (R81) and an instigator of the trouble (R84). He argued with Technician Fifth Grade George Cross, who was guarding the door, and expressed his determination to go back in and "tear the place up" (R80-81). When Cross blocked his entrance he started a fight. It took three military police to subdue him and put him in the ambulance (R110-111).

(e) CAMERON (convicted of riot and resisting arrest) was one of the four colored soldiers who started the disturbance in the "pub" (R9,36, 50) and took part in the attack on the white soldiers (R36,51,55). He took part in the trouble outside in the street when they all wanted to get

back inside and "tear the place up" (R82,129). He tried to snatch a military policeman's club (R94) and was one of five men arrested and taken to military police headquarters (R96). They resisted arrest and put up "quite a struggle" before they were forced into the police ambulance (R115, 120).

(f) PINDER (convicted only of resisting arrest) was identified at the investigation previous to the trial by Mrs. Morris as one of the four colored soldiers who entered the "Three Tuns" "pub" after Mrs. Holmes called time and who then asked for drinks and were refused (R41) but she was unable to identify him at the trial. He was out in the street in front of the "pub" in the disturbance there with those who wanted to go back into the "pub" to "tear the place up" (R82). Help was required to get Pinder into the ambulance to be taken to the police station (R96).

5. No evidence was offered by the defense. Each accused was duly advised of his rights as a witness and elected to remain silent.

6. Certain rulings of the court deserve consideration:

(a) Immediately following the arraignment of the accused, the defense counsel submitted a request to the court "for the seating arrangements of the accused to be altered, and to have the accused and the other soldiers shuffled around", asserting, "This case is primarily one of identification, and it is obviously too simple to pick out the accused when you have all the accused sitting in the front row." The president of the court properly denied this request "for reasons of security and normal procedure" (R6-7). The manual provides that "the accused will be seated as the president directs," vesting the president with full discretionary authority in this particular matter with one specific exception, having no application to the point at issue, viz: "that the accused will be permitted to be near his counsel" (MCM, 1928, par.54, p.42). No abuse of discretion is involved in the denial of defense counsel's request in the instant case (CM ETO 804, Ogletree et al, par.8, and authorities there cited).

(b) Defense counsel objected to the barmaid's testimony that her mother was hysterical during the disturbance and that she had "a valvular disease of the heart." The objection was sustained as to evidence of heart trouble and the testimony concerning it was ordered stricken; as to the evidence that the witness' mother was hysterical, the objection was overruled (R20-21). The court's action was proper. Evidence of a clearly discernable emotional reaction manifested during a riot committed in the subject's presence was clearly admissible (CM ETO 804, Ogletree et al, pars.9(c) and (d), and authorities there cited).

(c) A military policeman was permitted to testify, over strenuous objections interposed by defense counsel, that he had previously, while on duty as a military policeman, witnessed four or five major disturbances of the peace "in this country;" that in each instance he noticed a similarity "in the conduct of the mob, and the measures necessary to restore peace and

order resorted to by the Military Police;" that he had reason to believe that the riot in which the accused were charged with participating fell into the same pattern because "although everybody was shouting, swearing at one another, raising hands and throwing threats at one another, only certain men were going about from one group to another and those were the men we tried to get." Although previous cross-examination had developed that not all the colored soldiers who were milling around outside the Three Tuns after the eviction of the rioters, were arrested by the military police, and that some who were arrested were promptly released, without, in either instance, any adequate explanation, the testimony as to the witness' previous observation, in an official capacity, of four or five other "major disturbances of the peace, in this country", and their identity in "pattern" with the riot shown, was clearly inadmissible.

> "It is a well established general rule that a litigant cannot be affected by the words or acts of others with whom he is in no way connected, and for whose sayings or doings he is not legally responsible." (22 C.J., sec.832, p.741).

It was apparently adduced and admitted under the erroneous theory that it constituted "expert testimony", available to the prosecution to explain the discrimination practiced by the military police in their treatment of the soldiers outside the "pub". However, the inadmissible testimony was at most merely faintly corroborative of other competent evidence adduced on the trial, establishing unequivocally the unlawful and riotous nature of the assemblage. There is certainly no affirmative showing in the record that the substantial rights of any of the accused were injuriously affected.

(d) During the course of the trial the defense counsel stated "I believe that some of the members of the court have been to the Three Tuns to look over the place. If possible I would like the other members of the court who have not seen the 'Three Tuns' to go there before we meet again." Thereupon the president announced that arrangements would be made "by some means" to have the remaining members of the court visit the Three Tuns before the next session of the court (R140). When the court convened the next day, the president ordered the record to show "that, in accordance with the expressed desire of the defense counsel, each of the members of the court has had the opportunity to view the premises at the Three Tuns Public House", inquiring, at the same time, "Does that suffice?" to which the defense counsel replied, "Yes, Sir." (R146).

> "The practice of 'viewing the premises' by a military court is authorized procedure (AW 31). * * *. A 'view of the premises' properly conducted and not coupled with the examination of witnesses may in many instances be extremely helpful and informatory to the court." (CM ETO 611, Porter, par.6).

The absence of any showing in the record as to how the view was conducted or, indeed, how many members of the court participated, while irregular, may be reasonably attributed to the informality of the defense counsel's request, with which he acknowledged compliance to his own satisfaction. Such error as was involved was self-invited and cannot be considered as prejudicial to the accused (CM ETO 422, Green; CM ETO 438, Smith; CM ETO 1052, Geddies et al). The Board of Review however, expresses its disapprobation of an informal view of the premises such as was permitted in this case. Members of a court should not visit the locus in quo individually (64 C.J., sec.800, p.1017). A view of the premises should be conducted in a formal manner with all members of the court, the personnel of the prosecution and defense and the accused present. Proper recital of such facts must be made in record of trial (Cf: Diaz v. United States, 223 U.S. 442,454, 56 L.Ed., 505,506; Valdez v. United States, 244 U.S. 432; 61 L.Ed., 1242).

(e) At the close of the prosecution's testimony, defense counsel moved on behalf of each accused for a finding of not guilty of all charges and specifications. The court properly granted the motion as to accused Miller, who was thereupon released; also, insofar as it pertained to Charge III and its Specification (resisting arrest), as to the accused Hudspeth; but overruled the motion as to Hudspeth insofar as it pertained to Charges I and II and their specifications, and the motion on behalf of all the remaining accused as to all charges and specifications. Since the defense adduced no evidence whatsoever, the court had for consideration in arriving at its findings the identical evidence which constituted the basis for its rulings on the motion. In each instance in which the motion was overruled, there was substantial evidence fairly tending to establish every essential element of the offense charged. The action of the court was therefore proper (MCM, 1928, par.71d, p.56; CM ETO 393, Caton and Fikes; CM ETO 527, Astrella).

7. The Specification, Charge I, alleges commission of a riot and depredation at the Three Tuns Public House, in violation of AW 89. The uncontradicted evidence shows that a casual assemblage of colored American soldiers, spontaneously motivated by wholly unprovoked hallucinations of racial discrimination in a British "pub", precipitated a tumultuous disturbance by flinging glassware and other movables, including a knife; assisting one another in a demonstration against the proprietress, employees and customers and - later - civilian and military police, opposing them in an effort to restore peace and order; and actually executing their design in a violent and turbulent manner, to the terror of a considerable number of people. This was a riot in clear violation of Article of War 89 (MCM, 1928, par.147c, p.162; CM ETO 804, Ogletree et al; CM ETO 895, Davis et al; CM ETO 1052, Geddies et al). Each of the accused, except Pinder, was identified as being present in the bar room during the riot. Not only is it a fair inference from the testimony of all of the witnesses who were also there at the same time that every colored soldier present participated, but one witness - Ronald P.J. Armstrong - testified directly that "every one of them did." Corroborating the identification of all (except Hudspeth) who were found guilty of Charge I and its Specification, was the

abundant testimony of their resistance of arrest and the avowed purpose of several respectively to go back in and "tear the place up". Hudspeth was definitely identified by Mrs. Holmes as the man whom she refused to serve immediately before the riot started. Her positive identification of him, as well as Mrs. Morris' more tentative identification of the same accused, appeared to hinge largely on his possession of a gold tooth. The record does not disclose, except by such inference as may be drawn from these witnesses' testimony, that he actually had one. Their testimony does, however, furnish substantial evidence of Hudspeth's participation. The record clearly supports the findings of guilty, as to the accused Davis, Travers, Scott, Hudspeth and Cameron, of Charge I and its Specification.

8. The Specification, Charge II, alleges joint assault with intent to do bodily harm on persons shown to have been injured in the riot by menacing and striking them on the head and other parts of the body with dangerous things, to-wit: beer mugs, bottles, glasses and knives. Each of the persons named was shown to have been menaced or injured during the riot by one of the "dangerous things," mentioned in the Specification. Although the evidence does not show that Davis, Scott and Hudspeth, the three accused found guilty of Charge II and its Specification, personally committed an assault on all the persons named therein, it does show that these victims were all assaulted by negro soldiers present in the bar room during the riot. Each rioter was legally chargeable with the others' unlawful acts to which he contributed by his participation in the riot, to the same extent as if he were the sole offender (CM ETO 1052, Geddies et al, par.12, pp.28-30, and authorities there cited). Since the evidence shows that the "dangerous things" specified were used in a manner likely to produce bodily harm and in reckless disregard of the safety of others, it is not a defense that the assaulting rioters did not have in mind the particular persons injured (MCM, 1928, par.149m and n, p.180; CM ETO 422, Green). The evidence compels the inference that each rioter had knowledge of each other rioter's intent to inflict bodily harm by the use to which all were putting the "dangerous things" specified, in reckless disregard of the safety of others. The evidence therefore, supports the findings of guilty as to Davis, Scott and Hudspeth, of Charge II and its Specification (CM ETO 804, Ogletree et al; CM ETO 1585, Houseworth).

9. The Specification, Charge III, alleges wrongful and unlawful resistance, by force and violence, of lawful arrest. All of the accused except Hudspeth were arrested by the military policemen named in the Specification, in the process of quelling the riot after the rioters had been forcibly evicted from the bar room of the Three Tuns to the roadway outside. The evidence of violent resistance to lawful arrest is clear in the case of each accused found guilty of Charge III and its Specification. Davis, Pinder and Travers each expressed a determination to go back in and "tear the place up". All five cursed, threatened and wrestled with the arresting officers. Davis, by jumping on one's back, enabled a soldier being arrested to escape. Scott displayed an open knife and tried to use it on a military policeman. Cameron seized another's club. The record amply supports the findings of guilty, as to the accused Davis, Pinder, Travers, Scott and Cameron, of Charge III and its Specification (CM ETO 804, Ogletree et al).

10. The charge sheet shows that with no prior service each accused was inducted on the date and at the place shown below, to serve for the duration and six months:

Accused	Age	Place	Date
ARTHUR A. DAVIS	30	Fort Benning, Georgia.	23 Feb 1942
WILLIAM H. PINDER	30	Baltimore, Maryland.	7 May 1942
MILTON F. TRAVERS	29	Fort Geo.G.Meade, Maryland.	21 May 1941
RUFUS (NMI) SCOTT	26	Baltimore, Maryland.	21 May 1941
PLUMER W. HUDSPETH	25	Ralls, Texas.	2 Nov 1942
OZARK (NMI) CAMERON	25	Fort Benning, Georgia.	24 May 1941

All of above named accused were inducted into military service pursuant to the provisions of Selective Service and Training Act 1940.

11. (a) The approved sentences of Davis and Scott for violation of Articles of War 89, 93 and 96, and of Hudspeth for violation of Articles of War 89 and 93: each to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Davis for three years, Scott for four years and Hudspeth for three years, are legal. The designation of a disciplinary barracks as the place of confinement of the named accused is authorized. Pursuant to Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2, the place of confinement should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

(b) The approved sentences of Travers and Cameron for violation of Articles of War 89 and 96: each to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years, are legal. The designation of a disciplinary barracks as the place of confinement of the named accused is authorized. However, the place of confinement of Travers and Cameron should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England and their sentences to dishonorable discharge should be suspended during period of confinement (par.8 b and c, Cir. #72, ETOUSA, 9 Sep 1943).

(c) The approved sentence of Pinder, dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year, is authorized. The accused Pinder, was convicted of an offense under AW 96 for which no statutory maximum is fixed (AW 45). The Table of Maximum Punishments (MCM, 1928, par.104c, pp.97-101) does not prescribe a maximum punishment for the offense of which this accused was convicted. The Table however, prescribes one year as the maximum punishment for the closely related offenses of assaulting a noncommissioned officer in the execution of his office, and likewise for assaulting a sentinel in the execution of his duty. The sentence is therefore legal. The offense of which this accused was found guilty requires confinement in a disciplinary barracks and not in a penitentiary (AW 42). However, the place of confine-

ment of Pinder should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England; and his sentence to dishonorable discharge should be suspended during the period of confinement (par.8 b and c, Cir. #72, ETOUSA, 9 Sep 1943).

12. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of the 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 sentences.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. -6 APR 1944 TO: Commanding General, VIII Air Force Service Command, APO 633, U.S. Army.

1. In the case of:

Private ARTHUR A. DAVIS (34069350),
Private WILLIAM H. PINDER (33199801),
T/5 MILTON F. TRAVERS (33062188),
Private RUFUS (NMI) SCOTT (33062138),
Private PLUMER W. HUDSPETH (38338787),
all of 1929th Quartermaster Company Truck (Avn), 1512th Q.M.Trk.Bn.Avn.(Sp). 1511th Q.M.Trk.Reg. Avn.(Sp), and
Private OZARK (NMI) CAMERON (34062165),
1944th Q.M. Trk.Co.Avn., 1512th Q.M.Trk.Bn.Avn.(Sp), 1511th Q.M.Trk.Reg.Avn.(Sp),

attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the sentences and the following findings, as to the several accused:

(a) Davis and Scott are guilty of Charges I, II and III and their respective specifications;
(b) Travers and Cameron are guilty of Charges I and III and their respective specifications;
(c) Hudspeth is guilty of Charges I and II and their respective specifications;
(d) Pinder is guilty of Charge III and its Specification.

The holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences of all the accused.

2. Pursuant to par.8 b and c, Cir. #72, ETOUSA, 9 Sep 1943, the place of confinement of the accused Pinder, Travers and Cameron should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to Disciplinary Training Center #2912, Shepton Mallet, Somerset, England and the dishonorable discharges should be suspended during their respective periods of confinement.

3. Pursuant to Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2, the place of confinement of the accused Davis, Scott and Hudspeth should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

4. However, notwithstanding the foregoing I recommend that the place of confinement of all of the accused be designated as Disciplinary Training

Center #2912, Shepton Mallet, Somerset, England and that the dishonorable discharges be suspended during their respective periods of confinement. There was not any great degree of viciousness indicated in the conduct of any of the accused. Rather the affair resembled a saloon brawl which in civil life would have earned the offenders police court sentences only.

5. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1284. For convenience of reference please place that number in brackets at the end of the order: (ETO 1284).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871.

BOARD OF REVIEW

31 JAN 1944

ETO 1289

U N I T E D S T A T E S)	VIII AIR FORCE SERVICE COMMAND
)	
v.)	Trial by G.C.M., convened at Warrington, Lancashire, England, 8 December 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. United States Penitentiary, Lewisburg, Pennsylvania.
Sergeant ELLIOTT (NMI) MERRIWEATHER, (13132151), 2057th Quartermaster Truck Company (Avn), 1511th Quartermaster Truck Regiment (Avn) (SP).)	

OPINION by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.
Specification: In that Sergeant Elliott(NMI) Merriweather, 2057th QM.Trk Co.,Avn, 1511th QM.Trk.Regt.Avn (SP), AAF-569, APO 635, did, at AAF-569, APO 635, on or about 2 November 1943, with intent to commit a felony, viz: Murder; commit an assault upon Private George Lewis, Jr. by wilfully and feloniously shooting at the said Private George Lewis with a U.S.Carbine 30 M1.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 2 November 1943, the accused, Private George (NMI) Lewis, Private Houston (NMI) Lloyd and Private First Class Arthur L. Tripp, all of the 2057th Quartermaster Truck Company (Avn), 1511th Quartermaster Truck Regiment (Avn) (SP), were engaged in a game of cards in the common room of a barracks at AAF Station 569. During the course of the game a disagreement arose between the accused and Lewis. The accused seized Lewis' money and hit him on the jaw with his fist (R6,7,13,35). Lewis engaged him in a struggle and the two men wrestled on the floor until separated by Sergeant Dorsey who ordered them to bed (R8,13,22). The accused then left the common room (R7,13,22).

The common room of the barracks was also used as sleeping quarters by Lewis, Lloyd and Private Hosea (NMI) Warren, 2057th Quartermaster Truck Company (Avn). The room is about 18 feet long and about 11 or 12 feet wide. The ingress door is in the middle of one of the length wise walls entering from a hall way. The door swings inwardly to the right. Lloyd's bed - a normal size single bed of army issue - was next to the wall containing the door and immediately to the left upon entering the doorway. Lewis' bed was opposite that of Lloyd's, against the far wall from the doorway. Warren's bed was against the wall to the right of the doorway upon entering and sufficiently close to the entrance so that the door swung back against the bed (R7,10,11,12,14,18,19,37,38).

After accused left the common room, Lewis, Lloyd and Warren went to bed. The lights of the room were extinguished and the door was closed and locked by Lloyd (R7,14). A few minutes after the three soldiers were in bed, the accused was seen in the hallway of the barracks walking in the direction of the common room (R23,24,27). He was armed with a carbine (R23,27,30). He knocked on the door and Lewis called "Who's that?". Accused answered "open the door; I want to talk to you." Lewis replied "I will see you in the morning" (R7,23,27).

Private First Class A. G. Gorman, 2057th Quartermaster Truck Company (Avn) who occupied a room opening upon the hallway had gone to bed but had left the door of his room open. He saw accused going down the hallway toward the common room armed with a carbine and also heard his demand that the door be opened and Lewis' reply. Thereupon Gorman called to Lewis and warned him not to open the door (R7,15,23). Accused then kicked the door open and holding his carbine in his right hand reached with his left hand inside the doorway to the light switch and attempted to turn on the lights. He had projected the carbine into the room and pointed it in the direction of the left wall exclaiming "You can't fight now"(R7,8,11,15,18,23,27). Lewis jumped out of bed, picked up a chair and threw it at the accused. Then he dumped Lloyd out of his bed and used the bed as a flail, striking at the accused, who stood outside in the hallway pointing his carbine through the doorway in the direction of the left wall of the room. Lewis, as he swung the bed at accused, stood close to the entrance wall near the door. He knocked the carbine from the hands of accused who picked it up, and then fired two shots. Lewis was then standing close to the wall at the left of the door.

Lloyd and Warren escaped from the common room by a window and Lewis followed (R8,9,10,15,19,21,24,28). As accused walked back down the hall he said "the only reason I don't kill him is that God is a ---" (R32-33).

A subsequent examination of the room disclosed the fact that there were two bullet marks on the floor and one in the end wall of the room to the left of the doorway upon entering. The hole in the wall was probably a ricochet shot. The two holes in the floor were about 6 feet to the left of the doorway upon entering and 32 inches and 38 inches respectively from the wall containing the entrance way(R20,37,39).

4. The accused elected to remain silent after his rights had been explained to him (R43). The defense, however, recalled Lewis who had previously appeared as a prosecution witness. He stated that he had thrown the chair at accused because the latter was standing there with a rifle although he did not know whether the rifle was pointed at him. Accused kicked the door entirely open and it remained open. Lewis testified "If he had ever come in he could have shot me" (R39), but further stated that accused had been drinking and in his opinion he "would not have done it" had he not been drunk (R40).

Gorman who also had been a witness for the prosecution was recalled by the defense. He testified that he saw accused as he returned up the hall from the common room. He was carrying a rifle; that he (the witness) heard him say something but could not understand what he said (R41).

Sgt Vernon H. Wysinger, 2057th QM Trk Co (Avn), another prosecution witness, was also recalled by the defense. He testified that there was nothing that would have prevented accused from aiming the gun at anyone in the common room and discharging it (R42).

5. The crime of an assault with intent to commit a felony, viz: murder, is properly laid under the 93rd Article of War. The elements of the crime are declared by the Manual for Courts Martial (Sec. 149, p. 178) to be as follows:

> "Assault with intent to murder.-- This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. Where the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible by the means employed does not prevent the person using them from

being guilty of an assault with intent to commit murder where the means are apparently adapted to the end in view. Thus, where a soldier intending to murder another loads his rifle with what he believed to be a ball cartridge and aims and discharges his rifle at the other, it is no defense that he, by accident, got hold of a blank cartridge.*****"

A more specific analysis of the offense is stated thus:

"An intentional attempt by violence with present ability, or in some jurisdictions, apparent ability, and without legal excuse or provocation, to do an injury to the person of another, accompanied by facts and circumstances indicative of an intent to take life, constitutes the offense of assault with intent to murder.*****(30 C.J., sec. 158 pg. 15).

"In addition to the requisite intent, in order to constitute an assault with intent to murder, there must be an attempt or an assault to carry out that intention. In other words, there must be an overt act in pursuance of the intent as distinguished from the mere intent itself, and also from mere threats, or mere preparations not going far enough to constitute an attempt. There must be commencement of an act which if not prevented would produce a battery.*****" (30 C.J., sec.159, pg.16).

"Malice or malice aforethought is an essential ingredient of assault with intent to murder. As in the case of murder, malice may be either express or implied. While the expression 'malice aforethought' includes the element of premeditation, it is immaterial for how short a time the malice may have existed.*****" (30 C.J., sec.163, pg.20).

"*****. The specific intent to take human life is an essential element of the offense of assault with intent to commit murder, and conversely where an unjustifiable assault is made by one capable of cool reflection and not in the heat of passion, with the

intention of killing, it will constitute an assault with intent to kill where death does not result. The requisite intent, however, may be inferred from the attendant circumstances and may be formed upon the instant of the assault.' ***** (30 C.J., sec.164,pg.20).

"While a specific intent to kill is an essential ingredient of the offense of assault with intent to commit murder, this requirement does not exact an intent, other than an intent which is inferrable from the circumstances. So while the intent cannot be implied as a matter of law, it may be inferred as a fact from the surrounding circumstances, such as the unlawful use of a deadly weapon, provided it was used in such a manner as to indicate an intention to kill, or from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result. Other circumstances which may be considered as bearing upon the propriety of an inference of intent are: The character of the assault, the nature or extent of the wound of injury, the presence or absence of excusing and palliating facts or circumstances, and prior threats. The question of intent as dependent upon the physical circumstances and the impression made by them on the mind of defendant must be determined by the facts as they were perceived or understood by defendant.*****" (30 C.J., sec. 165, pg.21).

The principal question revealed by the record is whether or not the evidence is sufficient to prove that accused when he discharged the carbine into the common room of the barracks entertained the specific intent to kill Lewis. Proof of such specific intent is necessary to sustain the conviction. Lewis and accused had quarreled over a card game and engaged in a mutual combat of short duration. The fight was terminated by the intervention of Dorsey. Accused under orders, left the room and returned in a short time armed with a carbine. Upon being refused

admission to Lewis' sleeping quarters, he kicked open the door and projected his carbine into the room. Lewis, upon discovering the accused standing in the open doorway, armed with a carbine, offered defensive resistance: first by throwing a chair at him and later by flailing at him with Lloyd's bed. He succeeded in knocking the carbine from his hold. Accused picked up the carbine and aimed it through the door at an angle. Lewis was standing at the left of the door against the wall at this crucial moment. Accused then fired twice. An examination of the room disclosed two bullet holes in the floor about six feet from the door jamb to the left of the doorway, and about 32 inches and 38 inches respectively from the wall containing the door. Such physical facts compel but one reasonable conclusion and that is that accused directed his fire at Lewis with the intent of shooting him. An intent to kill Lewis is the only possible explanation of his actions. The fact that its consummation was impossible because he failed to deflect the angle of his aim to bring Lewis within the line of fire is wholly immaterial on this issue. (C.M.228955, Bul. J.A.G. Jan. 1943, Vol. II, No.1,Sec. 454 (13), p.14).

Accused acted deliberately and violently in the commission of the overt act of the assault. He possessed the present ability to take Lewis' life. There is evidence of express malice in addition to the implications of malice, which arose out of his acts. Provocation on the part of Lewis is negatived by the evidence. In the opinion of the Board of Review there is abundant competent evidence of a most substantial character of all of the elements of the offense and the court could not have done otherwise than find accused guilty of the crime charged (CM ETO 78, Watts; CM ETO 533, Brown).

6. The court had jurisdiction of the person, and of the offense. 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.

7. The charge sheet shows that accused is of the age of 37 years and six months. He enlisted at Pittsburg, Pennsylvania, on 25 October 1942 for the duration of the war plus six months. He had no prior service. His approved sentence includes confinement at hard labor for three years. Confinement in a penitentiary is authorized for the crime of assault with intent to commit murder (AW 42; Sec.276, Federal Criminal Code, 18 U.S. C.A.Sec.455). By War Department Circular #291, 10 November 1943, Sec.V par.3a,b,c, prisoners under 31 years of age and with sentences under ten years will be confined in a Federal correctional institution or reformatory; all other prisoners subject to penitentiary confinement will be confined in United States penitentiaries. Therefore, designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized.

Pursuant to paragraph 8b, Circular 72, ETOUSA, 9 September 1943 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years or where he has been convicted of an offense which renders his retention in the service undesirable. Assault with intent to commit murder is such an offense. The approved sentence is 3 years. Both conditions of the authorization are present. The dishonorable discharge may be executed.

Judge Advocate

Judge Advocate

Judge Advocate

(196)

1st Ind.

WD. Branch Office TJAG., with ETOUSA. 31 JAN 1944 TO: Commanding General, VIII Air Force Service Command, APO 633, U. S. Army.

1. In the case of Sergeant ELLIOTT (NMI) MERRIWEATHER (13132151) 2057th Quartermaster Truck Company (Avn), 1511th Quartermaster Truck Regiment (Avn), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence; which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1289. For convenience of reference please place that number in brackets at the end of the order: (ETO 1289).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1302

31 MAR 1944

U N I T E D S T A T E S v. Warrant Officer (Junior Grade) JAMES A. SPLAIN (W-2110264), on detached service with Headquarters General Depot G-35, from Headquarters 244th Quartermaster Battalion (Service).	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Sea Mills Camp, Bristol, England, 10-11 December 1943. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. The Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that Warrant Officer, Junior Grade, James A. Splain, Headquarters General Depot G-35, did, at Bristol, Bristol, England, on or about 31 August 1943, feloniously embezzle by fraudulently converting to his own use thirty seven (37) pounds, three (3) shillings, six (6) pence, lawful money of the United Kingdom, and of an exchange value of about one hundred fifty (150) dollars, property of Staff Sergeant William L. Riggsbee, Detachment "B", 329th Quartermaster Depot Company, entrusted to him by the said Sergeant Riggsbee.

Specification 2: In that * * * did, at Bristol, Bristol, England, on or about 1 October 1943, feloniously embezzle by fraudulently converting to his own use forty-nine (49) pounds eleven (11) shillings, four (4) pence, lawful money of the United Kingdom and of an exchange value of about two hundred (200) dollars, property of Private First Class Paul W. Shores, Det. "B", 329th Quartermaster Depot Company entrusted to him by said Private Shores.

Specification 3: In that * * * did, at Bristol, Bristol, England, on or about 1 June 1943, feloniously embezzle by fraudulently converting to his own use forty-five (45) pounds lawful money of the United Kingdom and of an exchange value of about one hundred eighty-one (181) dollars, and fifty-seven (57) cents and one hundred twenty (120) dollars, lawful money of the United States, total amount of about three hundred one (301) dollars, and fifty-seven cents, property of Technician Fourth Grade Anthony (NMI) Angelo, Detachment "A", 2nd Special Service Company entrusted to him by the said Technician Fourth Grade Angelo.

Specification 4: In that * * * did, at Bristol, Bristol, England, on or about 1 August 1943, feloniously embezzle by fraudulently converting to his own use forty-five (45) pounds lawful money of the United Kingdom and of an exchange value of about one hundred eighty one (181) dollars and fifty-seven cents, property of the Baby Adoption Fund Headquarters General Depot G-35, entrusted to him by Major Artie C. Needham for said adoption fund.

Specification 5: In that * * * did, at Bristol, Bristol, England, on or about 1 August 1943, feloniously embezzle by fraudulently converting to his own use one (1) pound and ten (10) shillings lawful money of the United Kingdom and of an exchange value of about six (6) dollars and four (4) cents, property of the Baby Adoption Fund Detachment "B", 329th Quartermaster Depot Company, entrusted to him by 1st Lt., Bernard J. Warshauer, for said adoption fund.

Specification 6: In that * * * did, at Bristol, Bristol, England, on or about 2 March 1943, feloniously embezzle by fraudulently converting to his own use eighteen (18) pounds, six (6) shillings eleven (11) pence lawful money of the United Kingdom and of an exchange value of about seventy-four (74) dollars and four (4) cents, property of the Company Fund Detachment "B" 329th Quartermaster Depot Company entrusted to him by 1st Lt., Bernard J. Warshauer for said fund.

Specification 7: In that * * * did, at Bristol, Bristol, England, on or about 15 September 1943, feloniously embezzle, by fraudulently converting to his own use, forty (40) pounds thirteen (13) shillings lawful money of the United Kingdom and of an exchange value of about one hundred sixty four (164) dollars and two (2) cents, property of Enlisted Mens' Dance Fund, Detachment "B", 329th Quartermaster Depot Company entrusted to him by First Sergeant Barney H. Davidson for said fund.

He pleaded not guilty to and was found guilty of the Charge and all 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 five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused was personnel adjutant of General Depot G-35, located at Bedminster Camp, Bristol, England, from about 17 March to 15 October 1943. His duties included the custody and administration of unit records; the processing of soldiers' deposits and payments of money made by military personnel for transmission to the United States (R6).

In addition to other duties he was required to take and hold the physical possession of British currency and coinage representing several funds as follows: Company Fund of Detachment "B", 329th Quartermaster Depot Company; Baby Adoption Fund of that unit; Baby Adoption Fund of General Depot G-35; and Enlisted Mens' Dance Fund of the post (R6). Separate envelopes contained each cash fund. None of these funds constituted Government property, the ownership of each rested collectively in the various contributors. These funds came under accused's care in his capacity as personnel adjutant (R6,8,14,15,21,22). Suspicions as to irregularities in his financial transactions resulted in a search of his locked field desk where the money evidencing the four funds was kept by him, but the money was not in the desk (R6,47,61).

The Enlisted Mens' Dance Fund and the Company Fund of Detachment "B", 329th Quartermaster Depot Company were repaid by him (Pros.Exs.1 and 2). The evidence relating to funds paid over to accused by soldiers Riggsbee, Shores and Angelo (Specifications 1, 2 and 3) is undisputed. Accused received same and did not make disposition of the moneys, in the cases of Riggsbee and Shores, as required by Circular #49, of the Chief of Finance, Hqs. ETOUSA, 17 July 1943, and in the case of Angelo as required by AR 35-2600 (R29,31,32,38). Repayments thereof were accomplished by accused through others upon his directions (R30,31,38,50; Pros.Exs.5,6,9, 10,11).

All of such reimbursements occurred after he had been relieved of his former duty, placed under restraint and subsequent to discovery of his shortages (R12,44,47). It is undisputed that the funds used by accused for the purpose of effecting reimbursement were his private funds received by him after discovery of his irregularity, and no part of same was the original money deposited or placed with him.

4. (a) Pros.Exs.4 and 8 would provide most damaging evidence against accused were it not for the fact that they were written by him while he was under restraint and coincident with the time his commanding officer (exact date not proven) said to him:

> "You had better know and want to get this thing straightened up. I have given you considerable leniency and I can give you a status other than confinement, and if you don't give us reasons for the shortages, I will probably remove some of that leniency." (R49).

In view of the atmosphere of compulsion and pressure thus apparent, the Board of Review will not consider such exhibits in determining the sufficiency of the evidence to sustain the findings of guilt. The same treatment will be accorded Pros.Ex.10, inasmuch as it was executed during the same period. Their prejudicial effect, if any, upon the rights of accused will be considered subsequent to the discussion of questions involving the substance of the offenses.

(b) Evidence that accused arranged for repayment of the funds to the three soldiers and of the Enlisted Mens' Dance Fund and the Company Fund represents a type of evidence ordinarily introduced by an accused charged with embezzlement on the question of fraudulent intent or in mitigation of punishment (20 C.J., sec.50, pp.455-456; 29 C.J.S., sec.25b, pp.702-703). In the instant case such evidence appeared as part of prosecution's case in chief. It is difficult to discover its prejudicial effect upon accused's rights unless the same be considered as an admission by accused that he did in fact receive the various funds and acknowledged his responsibility for same. Upon such hypothesis the evidence of repayment was certainly admissible as admission by conduct (22 C.J., sec.353, p.317; 31 C.J.S., sec.291, p.1053; CM 123492 (1918), Dig.Op.JAG, 1912-1940, sec.451(17), p.317).

(c) Accused's answers to questions propounded by an officer of the Inspector General's Department (R51-53) were simple admissions against interest and not confessions, and their admissibility is manifest (CM ETO 292, Mickles; CM ETO 804, Ogletree et al; CM ETO 895, Davis et al).

5. Accused's lengthy unsworn statement (R63-71) is the only evidence offered by the defense. It is involved, rambling and unconvincing. Its probative value either as a defense to the charges or as bearing on the severity of the punishment was exclusively a matter for the court (CM ETO 132, Kelly and Hyde; CM ETO 527, Astrella).

6. By the 93rd Article of War, Congress directs:

> "Any person subject to military law who commits * * * embezzlement * * * shall be punished as a court-martial may direct."

Embezzlement is not an offense at the Common Law; it is solely of statutory origin and existence (2 Wharton's Crim. Law - 12th Ed., - sec.1258, p.1574; 14 W. & P. Perm., pp.257-258). In denouncing the crime of "embezzlement" when committed by persons subject to military law, Congress did not define the offense, but simply denounced a crime by that name.

When Congress uses words in a statute which have acquired a well understood meaning, it is presumed they were used in that sense unless the contrary appears (The Abbotsford v. Johnson, 98 U.S. 440, 25 L.Ed., 168).

> "The use of a word which has generally received a certain construction raises a presumption that Congress used it * * * with that meaning, and it devolves on the one claiming any other construction to show sufficient reasons for ascribing to Congress an intent to use it in such sense." (Northern Pacific Railroad Company v. Musser - Sauntry Land, Logging & Mfg. Co., 168 U.S. 604,608; 42 L.Ed., 596,598).

(Cf: Central Union Trust Co. of New York v. Edwards, Internal Revenue Collector, 287 Fed. (2nd Cir.) 324, cert. denied 262 U.S. 744, 67 L.Ed., 1211, error dismissed 266 U.S. 579, 69 L.Ed., 451).

The 93rd Article of War was part of the Act of June 4, 1920 (41 Stat. 805; 10 U.S.C. 1565). At that time there was no provision of the Federal Penal Code of general application defining the crime of embezzlement. Congress had however, in legislating for the District of Columbia, enacted a statute with respect to this offense, which in pertinent part was as follows:

> "If any agent * * * of a private person * * * shall wrongfully convert to his own use * * * anything of value which shall come into his possession or under his care by virtue of his

> employment or office, whether the thing so converted be the property of his master or employer or that of any other person, * * * he shall be guilty of embezzlement * * *." (Act Mar 3, 1901, 31 Stat. 1325 ch 854, sec. 834; Act Mar 3, 1913, 37 Stat. 727, ch 107, sec.851a).

Prior to enactment of the 93rd Article of War the Supreme Court in Moore v. United States,(160 U.S. 268, 40 L.Ed., 422) had defined the crime of embezzlement thus:

> "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking." (160 U.S. 269-270, 40 L.Ed., p.424).

The same high court had in Grin v. Shine, 187 U.S. 181,189,195, 47 L.Ed., 130,136,138, made the following pronouncement:

> "Equally unfounded is it that the complaint is defective because it does not use the word 'fraudulently,' the allegation being 'that the accused wrongfully, unlawfully, and feloniously appropriated said money.' As the word 'embezzled' itself implies fraudulent conduct on the part of the person receiving the money, the addition of the word 'fraudulent' would not enlarge or restrict its signification. Indeed, it is impossible for a person to embezzle the money of another without committing a fraud upon him. The definition of the word 'embezzlement' is given by Bouvier as 'the fraudulent appropriation to one's own use of the money or goods intrusted to one's care by another.' * * *.
> We do not care to inquire into the soundness of the distinction made in some of the older cases between the custody and possession of property, because under the section above quoted nothing more is necessary to constitute embezzlement than that the party charged should have the control or care of of the money."

On 24 November 1919 the Circuit Court of Appeals (8th Cir.) decided the case of Schell v. United States (261 Fed. 593). Schell was indicted under Section 47 of the Penal Code (Act Mar 4, 1909, c 321, 35 Stat. 1097) which provided in pertinent part:

> "Whoever shall embezzle * * * moneys * * * of the United States shall be fined. * * *".

As to the particular question now involved, the court wrote:

> "It will be noted that the statute itself does not define the crime of embezzlement." (261 Fed. 595).

The court then quoted the above statement from the Moore case, and continued:

> "Having in mind the employment of this defendant in the mint and the character of his duties, with the facts and circumstances appearing in the record, the jury was justified in finding that the defendant came into the possession and custody of these coins lawfully, and that he took coins from the larger quantity thus coming under his control, and that, therefore, there was:
> (1) A breach of trust or duty in respect to the coins in question, which belonged to the government of the United States;
> (2) That he wrongfully appropriated the same to his own use.
> Counsel for defendant finally contends that, upon the facts as they appear on record here, the defendant had nothing more than the bare custody, as distinguished from the possession, of the coins in question, and therefore could not and did not embezzle them, but stole them." (261 Fed. p.595).

After setting out the excerpt from Grin v. Shine last above quoted, the opinion concludes:

> "There is substantial testimony to sustain the verdict of the jury that the defendant was an employé of the United States to whom these coins, alleged to have been embezzled, were intrusted, that they lawfully came into his hands by virtue of his employment, and that they were thereafter converted to his own use, in violation of this statute of the United States." (261 Fed. p.595).

It is thus apparent that when Congress (being the same legislative branch of the same sovereign that adopted Section 851a of the District of Columbia Code, supra, and Section 47 of the Act of Mar 4, 1909, supra) enacted the 93rd Article of War the words "embezzlement" and "embezzle" possessed well defined juridical meanings. It is entirely proper to assume that Congress adopted such meaning when it denounced the crime of "embezzlement" in the 93rd Article of War.

It should be carefully noted, however, that reference is made to the embezzlement provisions of the District of Columbia Code, to the Act of March 4, 1909, and to the court decisions solely for the purpose of determining the meaning which Congress intended to give the word "embezzlement" in the 93rd Article of War. Such statutes and judicial decisions are legitimate sources from which Congressional intention may be gathered (See authorities above cited). Where a person, subject to military jurisdiction, is charged with "embezzlement", he is charged with the crime of "embezzlement" denounced by the 93rd Article of War, and he is not charged with nor is he tried for an offense under the District of Columbia Code or any other statute of Congress.

7. The meaning of the word "embezzlement" contained in the 93rd Article of War having been thus ascertained, it is necessary for the solution of the problems arising in the instant case to consider certain legal principles announced in the holdings and opinions of The Judge Advocate General and Board of Review.

(a) There is a well established presumption that a steward of property of others has unlawfully converted it to his own use if he cannot or does not account for it or deliver it when accounting or delivery is required by the owners or others possessing authority to demand same. The burden is then on the steward to go forward with the proof of legitimate expenditure or loss of same. The explanatory evidence when balanced against proof of possession by the steward and failure to account or deliver the property on demand, creates an issue of fact for final resolution by the court. Failing to make an explanation, a conviction of guilt may rest upon the facts of possession, absence of accounting or delivery and the presumption arising from same.

> "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 cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting. The return of the amount of the fund post litem motam is of no probative value, except as an admission that he was responsible for it. It does not tend either to negative or to excuse the offense charged. C.M. 123492 (1918)." (Dig.Op.JAG, 1912-1940, sec.451(17), p.317).

"Any adult man who receives large sums from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, cannot complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence. C.M. 123488 (1918); 203849 (1935)." (Dig.Op.JAG, 1912-1940, sec.451(17), p.317).

"Accused was found guilty of embezzlement in violation of A. W. 93. He received money due the officers' club in his capacity of club officer, and there was a considerable shortage when an audit was made. The evidence showed that he was a poor accountant, that he intermingled club funds with his personal funds, that he had been in debt, and that he was contemplating the purchase of an automobile. Although other persons also knew the combination of the safe where club funds were kept, there was no indication that any funds had been wrongfully taken. Held: The record is legally sufficient to support the findings and sentence. The accused received money entrusted to his care and he failed to account for it. The logical inference of misappropriation is justified by the evidence. C.M. 234153 (1943)." (Bull. JAG, Vol.II, No.9, Sep 1943, sec.451(17), p.341).

"Accused was found guilty of embezzlement in violation of A. W. 93. He was the war bond officer of his organization. On pay day he received several hundred dollars from enlisted men for the purchase of war bonds and stamps. It was contemplated that the purchases would be made as soon as possible; and it was shown that the bond office at the camp was open and ready to deliver bonds on the days immediately following his receipt of the money. The accused did not make any attempt to return the money or obtain the bonds or stamps until he was approached by the soldiers. Restitution was made two months later. At the trial, accused contended that he lost the money in a dice game the next night and that he was too drunk to realize what he was doing. However, he did remember

the details of his action on that night in considerable detail. Held: The record of trial is legally sufficient to support the findings and sentence. Even if the court did accept his unsupported story that he had lost the money in a dice game, this use of funds involved such a reckless disregard of his trust as would warrant an inference of fraud. The court was justified in rejecting his contention that he was too drunk to entertain any intent to defraud. The accused's later evasive conduct was wholly inconsistent with innocence. CM 237192 (1943)." (Bull. JAG, Vol.II, No.10, Oct 1943, sec.451(19), pp.382-383).

(b) The old doctrine that when a person holds the "custody" only of property as distinguished from "possession" of it, his wrongful and unauthorized conversion of it constitutes the crime of larceny and not embezzlement has been modified in the Congressional definition of the crime of "embezzlement" as denounced by the 93rd Article of War. Under the current doctrine proof that accused had converted property under his care and control obviates the necessity of determining whether he had possession or merely custody.

"An Army pistol was issued to a soldier for use on guard duty. While on guard duty he deserted, taking the pistol with him, and remained absent in desertion until apprehended, six months later. On the question whether the offense proved constitutes embezzlement or larceny, Held, That the testimony presented at the trial clearly sustains the charge and conviction of embezzlement as that offense is defined by the Supreme Court of the United States, in the case of Moore v. United States, 160 U.S. 268,269-270, and Grin v. Shine, 187 U.S. 181,195-196. * * * CM 198485 (1932)." (Dig.Op.JAG, 1912-1940, sec.452(3), p.335).

"In the administration of criminal justice by the Federal tribunals in recent years we find the old theory of constructive taking in larceny giving way to the more workable doctrine of the modern landmark cases of Moore v. U.S. and Grin v. Shine, supra, which fix the elements of embezzlement and which, in effect, obliterate any distinction between bare custody and possession on the part of the offender as a requisite of embezzlement. Illustrative cases are Schell v. U.S., 261 Fed. 593,595; Cooper v. U.S., 30 F. (2d),

567,568; Weinhandler v. U.S., 20 F. (2d), 359,361. On the authority of all these cases, and to simplify the whole process of adjudication of cases of fraudulent appropriation of property whether in the custody or the possession of the offender, it may be affirmed as a fact of law that whenever the property of another passes into the custody or the possession of him to whom it is entrusted or lawfully delivered and who fraudulently appropriates the same, not manifesting the intent to do so when the property is received by him, such fraudulent appropriation is punishable as embezzlement within the contemplation of that offense as denounced in Article of War 93. See hereon CM 148528 (Jacobs); 155621 (Drezner); 170613 (Williams); 193195 (Cavanaugh); 195772 (Wipprecht); 196960 (Anderson); and the consonant exposition of 'Embezzlement' in paragraph 149 h, Manual for Courts-Martial." (CM 197396, Christopher).

(c) The fact that an accused, who has converted property entrusted to his care, intended to return the property or even has made complete restitution of same is no defense.

"The act of a custodian of company funds in borrowing them for even temporary personal use constitutes the offense of embezzlement. The fraudulent conversion which is the essence of the offense of embezzlement, exists in such case despite the fact that accused may have intended to return the money. CM 192530 (1930)." (Dig.Op.JAG, 1912-1940, sec.417(18), p.317).

The above doctrine rests securely upon this well established principle:

"Repayment or restitution of money or property embezzled, after the completion of the crime, will constitute no defense to a prosecution for the embezzlement, and a subsequent settlement with the prosecuting witness or an arrangement between the employee and employer for the refunding of the money embezzled, will not constitute a defense to a prosecution for the crime charged." (2 Wharton's Crim. Law - 12th Ed., sec.1316, pp.1628-1629).

The Board of Review sitting in ETOUSA is cognizant of the fact that portions of the above quotation from CM 197396, Christopher, were called into question by the Board of Review (sitting in Washington) in the subsequent approved opinion in CM 211810, Houston in the following language:

> "The Board has carefully examined the cases cited and does not think that they justify so sweeping, so revolutionary a statement as that they obliterate the distinction, drawn for generations in scores of authoritative text books and hundreds of opinions between custody and possession. The Board furthermore thinks that statement was not required for the decision in the Christopher case and must be considered as dictum."

The opinion in the Houston case received the concurrence of The Judge Advocate General on 10 August 1939. On 17 August 1939, the Board of Review (consisting of the same officers who wrote the opinion in the Houston case) released its opinion in CM 211900, Edwards. On 7 November 1939, The Judge Advocate General dissented from the views of the Board of Review in the Edwards case. It is believed desirable to quote at length from the indorsement of The Judge Advocate General:

> "The evidence shows that accused, 'first cook on duty' (R.11) in the mess of his organization (R.6), was 'in charge' of the kitchen and stores therein during the absence of the mess sergeant (R.11) and along with other cooks was 'entrusted' with bacon issued to the mess and 'had keys to everything' (R.10). The mess sergeant having discovered an apparent shortage in bacon, a search was made whereupon a slab of the issued bacon was found in accused's personal locker. Accused later removed the bacon to a barracks bag (R.13,14). In response to a question as to why he had taken the bacon he stated that he 'needed it for himself' (R.14).
>
> The Board of Review interprets the evidence as falling short of establishing that accused had possession of the property at the time of his appropriation of it, but as showing only that he had access to the property. Its opinion that the record of trial is legally insufficient to support the findings of guilty of embezzlement is based upon this interpretation of the facts and a legal premise that embezzlement as denounced by the

Articles of War may be accomplished only if the offender at the time of the fraudulent appropriation has possession of the property. The board cites as precedents for its views an approved opinion in CM 211810, Houston, and an approved holding in CM 206567, Sneeden, et al. In my opinion the evidence shows that accused not only had access to the property but that the property had been intrusted to him and had lawfully come into his hands. I believe that his fraudulent appropriation of the property under such circumstances amounted to a breach of trust and constituted embezzlement as that offense is defined by the Manual for Courts-Martial and by the Federal civil courts.

Paragraph 149 h of the Manual for Courts-Martial defines the offense of embezzlement denounced by Article of War 93, as follows:

> 'Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268.)
>
> The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship.'

It is enough that the property comes lawfully into the hands of the offender under circumstances which make his conversion a breach of trust. There is no requirement that control of the property by the offender shall be of any greater degree or that such control amount to possession within the meaning of that term as defined by the Manual in relation to larceny as 'the present right and power absolutely to control a thing' (par.149g, Manual for Courts-Martial).

The definition quoted appears in substantially the same language in a decision by the Supreme Court of the United States in Moore v. United States (160 U.S. 268,269). The language of the Moore case was quoted with approval by the same court in Grin v. Shine (187 U.S. 181,196),

and by a United States Circuit Court of Appeals in Schell v. United States (261 Fed. 593,595). In Cooper v. United States (30 Fed. (2d) 567), and Weinhandler v. United States (20 Fed. (2d) 359), the principle involved in the definition was applied. The Board of Review, with the approval of one of my predecessors, applying this definition and citing precedents of this office, has expressed the view that distinctions between possession and custody are immaterial in embezzlement cases.

The circumstances that larceny may be committed by a servant or other person with respect to property lawfully placed in his custody, the owner retaining legal possession (see par.149g, Manual for Courts-Martial; CM 206567, Sneeden, et al), does not mean that fraudulent appropriation of the property may not also amount to embezzlement if there be a breach of trust by the person to whom the property has been intrusted or into whose hands it has lawfully come. It is elementary that a particular act or omission may result in the commission of two or more distinct offenses if all the elements of two or more such offenses are present.

My views as herein expressed do not involve a conclusion that there is no legal distinction between embezzlement and larceny. Larceny involves a trespass against the owner's possession within the meaning of the term as laid down in paragraph 149g, Manual for Courts-Martial; embezzlement involves some degree of lawful control and a breach of trust. In many cases the facts are such that the proper classification of the particular mideed as larceny or embezzlement is manifest. There is a very considerable field in which classification is difficult and in which error in differentiation may be fatal. In view of this practical but highly technical difficulty, I recommended by memorandum to The Adjutant General, dated October 21, 1939, an amendment of Article of War 37 to provide, in effect, that misdescription of an offense as embezzlement when it is larceny or vice versa, may be treated as harmless.

In its opinion the Board of Review relies primarily on CM 211810, Houston, a case in which the board, with my concurrence, expressed the

> view that the accused did not have rightful custody or possession of the property found to have been embezzled and that he was not intrusted with it. The board concluded that accused had access only to the property and that his offense was not embezzlement. My concurrence in that conclusion and my recommendation that the findings and sentence be vacated are not to be construed as involving the view that embezzlement may be committed only with respect to property of which the offender has possession as distinguished from lawful custody."

The Secretary of War adopted the views of The Judge Advocate General by action dated 11 December 1939.

Without indulging in a speculative discussion as to the distinctions between the facts of the Christopher, Houston and Edwards cases and thereby attempting to reconcile the opinions it is obvious that the basic principle of the Christopher case has not been impugned. Rather it appears that it has been reinforced by the approval of the Secretary of War of the dissent of The Judge Advocate General in the Edwards case. When proper consideration is given to the judicial and legislative background of the term "embezzlement" in the 93rd Article of War and then setting against it the full weight of the principle asserted in the Houston case, it appears to the Board of Review (sitting in ETOUSA) that the doctrine announced in Grin v. Shine:

> "Nothing more is necessary to constitute embezzlement than that the party charged should have the control or care of the money"

is unquestionably the rule which must govern military courts in their deliberations and to such doctrine this Board of Review gives its unqualified assent. This conclusion received extremely satisfactory confirmation in Henry v. United States (DC App), 273 Fed. 330, (decided 2 May 1921; Cert. denied 257 U.S. 640, 66 L.Ed., 411) wherein the court cited Calkins v. State, 18 Ohio St. 366, 98 Am.Dec.121 and quoted with approval the following from the note to this case:

> "The phrase 'under his care' will cover property merely in his custody, and therefore, under such a statute, it is immaterial whether he receives possession of the property from a third person or from his master; for in either case the property is under his care, and if he converts it he is guilty of embezzlement."

Commenting further on the situation presented in the Henry case the court said:

"Even if we admit that Henry had only the custody of the certificates, and that their possession was in the Helmuses, whose agent he was at the time of the conversion, it would make no difference, because they were certainly 'under his care.'" (p.334).

It is recognized that cases will arise where the question as to whether the accused had the "care and control" of the property will be a cogent and pertinent issue. However, in the instant case the determination of accused's guilt does not turn on any such narrow issue.

8. Riggsbee (Specification 1) and Shores (Specification 2) delivered their respective private funds in actual currency and coins to accused for transmittal to designated persons in the United States and accused received the same pursuant to authority of Finance Circular Letter No.49 Office of the Chief Finance Officer, Hqs., ETOUSA, 17 July 1943. Angelo, likewise delivered his funds in the form of currency and coins to accused (Specification 3) as a "soldiers' deposit" under AR 35-2600. As to Riggsbee's and Shores' funds accused was under duty to cause the same to be transmitted in accordance with the directions of the Chief Finance Officer, ETOUSA. Accused was obligated to make disposition of Angelo's deposit in accordance with the mandates of the cited Army Regulations.

The prosecution's proof is convincing beyond all reasonable doubt that accused did not even commence the processing of Riggsbee's and Shores' funds so that the designated persons in the United States would receive the same and wholly disregarded established procedure as to Angelo's "soldiers' deposit". None of the said funds were ever covered into the Treasury of the United States. It is clear beyond contradiction that accused converted the same to his own use while they were under his control. Under the most orthodox definition of the crime of embezzlement there can be no doubt as to accused's malfeasance with respect to Riggsbee's, Shores' and Angelo's property (2 Wharton's Crim. Law - 12th Ed - sec.1258, p.1568). The conviction of accused of embezzlement of the Riggsbee (Specification 1), Shores (Specification 2) and Angelo (Specification 3) funds would alone support his sentence were he an enlisted man (MCM, 1928, par.104c, p.99).

Accused received the Baby Adoption Fund of Headquarters General Depot G-35 (Specification 4), the Baby Adoption Fund of Detachment B, 329th Quartermaster Depot Company (Specification 5) and the Enlisted Mens' Dance Fund, Detachment B, 329th Quartermaster Depot Company (Specification 7) for safe-keeping only. There is not a scintilla of evidence that he had any authority to use, disburse or expend all or any part of same. He was bound to return to the organizations or their agents the specific funds entrusted to him. The funds were in the form of British currency and coins. The record supplies no direct evidence or inferences of accused's authority to change even the form of the funds described in (Specifications 4, 5 and 7) or to use the same for his own benefit or satisfaction.

As to the Company Fund of Detachment B, 329th Quartermaster Depot Company (Specification 6) it is true that under AR 210-50, 29 Dec 1942, sec.I, par.5a(1) the Detachment Commander was the lawful custodian thereof, but it is proved that for safe-keeping purposes only he placed the actual money representing the fund under the care and control of accused (R25). It was first placed in the safe located in the office where accused was employed and thereafter removed by him to his field desk (R13). The evidence is clear and convincing beyond all doubt that he actually received and took into his physical control the money representing the company fund.

The fact the proof shows that the Enlisted Mens' Dance Fund (Specification 7) was not the exclusive property of Detachment B, 329th Quartermaster Depot Company, as alleged, but was the property of all of the enlisted personnel of Bedminster Camp (R12) was an immaterial variance in the proof (20 C.J., sec.75, p.480, footnote 13b). It also is apparent that accused knew exactly the property to which reference was made in the specification. In his unsworn statement he declared:

> "I had a desk drawer which I kept * * * the Enlisted Men's Dance Fund which was nothing but a common ordinary slush fund. The dance fund was nothing but a slush fund and was never of the 329th. It was the Enlisted Men's Dance Fund made from the proceeds of beer" (R68-69).

Furthermore, with respect to embezzlement it makes "no difference in whom the title to the property rests, provided it is not in accused. It is immaterial that the ownership of the property involved is in one or two or more persons." (29 C.J.S., sec.8, p.677).

There can be but one conclusion concerning accused's defalcations in respect to the several funds described in Specifications 4, 5, 6 and 7. He certainly had the "care and control of the money". He certainly did not own any of the funds. He certainly had no authority to use or expend them. There is not a shadow of a doubt but what he converted each of the funds to his own use and benefit. Under such state of the evidence the findings of guilty were not only proper but they were the only findings possible.

The Board of Review has considered the question of accused's guilt without reference to Pros.Exs. 4, 8 and 10 because of the questionable circumstances under which they were obtained. The conversion of the moneys entrusted to his care is proved by evidence which stands uncontradicted in the record. Accused's unsworn statement is in truth a confession and avoidance. He does not deny his misuse of the funds; rather he attempts to explain that he was a victim of circumstances that made it necessary for him to convert to his own use the property of other persons. Manifestly his explanation, even giving it some quality of truth affords no justification for his conduct. Under such circumstances these questionable exhibits could not have prejudiced any of his substantial rights. Assuming that the exhibits are in law confessions and assuming further that they were improperly secured, the Board of Review is of the opinion that their admission

in evidence did not injuriously affect the substantial rights of accused and that such irregularity is within the purview of the 37th Article of War.

7. The charge sheet shows that accused is 25 years of age, that he was appointed Warrant Officer (Junior Grade) 14 March 1943, and that he has had five years prior enlisted service. However, at the trial he claimed an additional three years enlisted service.

8. The court was legally constituted and had jurisdiction of the person and the offenses. 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 and the sentence. However, a warrant officer is "dishonorably discharged" - not "dismissed" (SPJGJ, 1943/13066, 5 Oct 1943, Bull.JAG, Vol.II, No.10, Oct 1943, sec.408(2), p.380). The Table of Maximum Punishments does not apply inasmuch as accused is not an enlisted man (MCM, 1928, par.104a, p.95). Under the District of Columbia Code, the crime of embezzlement is punishable by confinement in a penitentiary where the sentence is more than one year (District of Columbia Code, sec.22-1202 (6:76), sec. 24-201 (6:401)). Confinement in the Federal Reformatory, Chillicothe, Ohio is therefore authorized (AW 42; Cir. 291, WD, 10 Nov 1943, sec.V, par.2a(1) and 3a).

B. Franklin Riter Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 31 MAR 1944 TO: Commanding Officer, Western Base Section, ETOUSA, APO 515, U.S. Army.

1. In the case of Warrant Officer (Junior Grade) JAMES A. SPLAIN (W-2110264), on detached service with Headquarters General Depot G-35 from Headquarters 244th Quartermaster Battalion (Service), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. A warrant officer is not a "commissioned officer". Consequently, he is "dishonorably discharged" - not "dismissed". However, with respect to warrant officers the terms are equivalent (SPJGJ 1943/13066, 5 Oct 1943, Bull.JAG, Vol.II, No.10, Oct 1943, sec.408(2), p.380).

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1302. For convenience of reference please place that number in brackets at the end of the order: (ETO 1302).

4. Pursuant to the request of the Staff Judge Advocate, Western Base Section, Services of Supply, ETOUSA, the record of trial is returned herewith. When it has served its purpose it should be returned to this office.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

1 Incl:
Record of trial.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

- 8 MAR 1944

ETO 1317

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND
v.	
Private JAMES D. BENTLEY (35129010), 1945th Quartermaster Truck Company Aviation, 1511th Quartermaster Truck Regiment Aviation (Special).	Trial by G.C.M., convened at Derby, England 20 December 1943. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for two years. 2912th Disciplinary Training Center, APO 508, U. S. Army.

HOLDING of the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

1. The record of trial of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentence in part. The record has now been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private James D. (i.o.) Bentley, 1945th Q.M.Trk. Co., Avn., 1511th Q.M. Trk. Regt. Avn. (Sp.), AAF Sta. 158, APO 635, U.S. Army, did at the corner of Nottingham Rd. and Alice Street, Derbyborough, Derby, Derbyshire, England, on or about 12 October, 1943, wilfully, feloniously and unlawfully kill Mrs. Veronica Edith Andrews, 45, Keys Street, Derby, Derbyshire, England, by driving a motor vehicle, to wit: a 2½-ton G.M.C. cargo 6 x 6 truck, into and crushing her against the wall of a building.

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * *, did at the corner of Nottingham Rd. and Alice Street, Derbyborough, Derby, Derbyshire, England, on or about 12 October 1943, wrongfully strike George Youngman, 19, Rockhouse Rd., Alvaston, Derbyshire, England, by knocking him down with a motor vehicle, to wit: a 2½-ton G.M.C. cargo 6 x 6 truck.

CHARGE III: Violation of the 83rd Article of War.
Specification: In that * * *, did at Nottingham Rd. and Alice Street, Derbyborough, Derby, Derbyshire, England, on or about 12 October 1943, through neglect, suffer a 2½-ton G.M.C. cargo 6 x 6 truck of a value of more than ($50.00) fifty dollars, military property belonging to the United States to be damaged by driving said truck against the wall of a building.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the 2912th Disciplinary Training Center, APO 508, U.S. Army as the place of confinement.

The result of the trial was promulgated in General Court-Martial Order No. 14, Headquarters VIII Air Force Service Command, APO 633, 18 January 1944.

3. The evidence showed that at about 12:10 a.m. on 12 October 1943, at Derby, Derbyshire, England, accused, while driving a United States Army 2½-ton G.M.C. 6 x 6 cargo truck at a speed of about 12 or 15 miles an hour, fell asleep at the wheel. During this lapse, his truck ran to the opposite of "the normal driving side" of the road, proceeded over a 3 or 4 inch curb, crossed the sidewalk, and struck Mrs. Veronica Edith Andrews and her companion, Mr. George Youngman, who were standing on the sidewalk. Mrs. Andrews was instantly killed, and Mr. Youngman suffered serious injuries. The truck then crashed into a brick building (R9-10,12,15-16,31), and was damaged (R24, 25). Accused was driving the leading truck of a two-truck convoy (R15). When the accident occurred, he had been on the road about twelve consecutive hours but had stopped on three occasions during his journey, each for about an hour, to adjust his brakes. On previous days of the three-day trip he had also stopped to adjust his brakes (R46). According to his own testimony accused had noticed some of the brake fluid on his clothing and the fumes in the closed cab may have had something to do with his going to sleep (R31-32).

Some evidence of the prosecution indicated that the odor of this fluid seemed to have sleep-producing propensities and may have contained "a certain amount of ether" (R34). There was no evidence of any previous lapses of attention of accused on this trip. The night previous to the fatal trip he had remained up until "way after 12 o'clock" with a girl (R32), but did not start the trip until noon the next day (R14).

4. The Specification of Charge I alleges that accused "did *** wilfully, feloniously and unlawfully kill" Mrs. Andrews. The allegation is obviously based on Form 88 (Appendix 4, Forms for Charges and Specifications) appearing on page 249 of Manual for Courts-Martial, 1928. The theory of the prosecution's evidence was that accused operated the motor vehicle in such grossly negligent and reckless manner as to constitute the resultant homicide involuntary manslaughter. The defense contended that the allegations of the specification charged accused with the crime of voluntary manslaughter and that the proof of negligent homicide did not support the charge.

The legal validity of the defense's claim turns upon the meaning of the word "wilfully" appearing in the specification.

Former R.S. 5341 in pertinent part provided:

> "Every person who * * * unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, is guilty of the crime of manslaughter."

In construing this statute it has been said:

> "Voluntary manslaughter, as defined by the common-law writers, is an intentional killing in hot blood, without malice; and 'involuntary manslaughter, according to the old writers, is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed.' * * *. But the distinction above adverted to between voluntary and involuntary manslaughter is now obsolete at the common law, and becomes here immaterial. Any unlawful and willful killing of a human being without malice is manslaughter, and, thus defined, it includes a negligent killing which is also willful." (United States v. Meagher, 37 Fed. 875, 880).

The words "willful" and "willfully" were accorded the following treatment in an instruction to the jury, which on appeal was not questioned:

> " The word 'willful' as used in connection with the charge of murder, such as that which is preferred in this indictment against these defendants, means an intentional killing, and not an accidental killing. It means an act which results in death that is intentionally done, and one that is not accidentally done. Now, there is a great difference between that which is in the law accidental and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death that is outside of the definition of the word 'accident' is intentional in the law, whether it grows out of a specific design to take life or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken. That which is an accident in the law is something that occurs after the exercise of the care that the law requires to be exercised to prevent its occurrence. When a man exercises the amount of legal care exacted by law, and something occurs beyond that, that is not his willful act. The law recognizes that he does not do it willfully. But when he does an act which naturally or reasonably or probably, from its nature, and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally the result is intentional." (United States v. Boyd, 45 Fed. 851,855; 142 U.S. 450; 35 L. Ed. 1077).

The principal case defining the word "willfully" so used in the above quoted statute is Roberts v. United States, 12[illegible] Fed.(5th Cir.) 897, 127 Fed.818, Cert.denied 193 U.S. 673, 48L.Ed. 842 which cites the Meagher case with approval. In the Roberts case the trial court instructed

the jury:

> "The term 'willfully' here means done wrongfully, with evil intent. It means any act which a person of reasonable knowledge and ability must know to be contrary to duty, and while the act must be done with evil design and knowingly, as herein stated, still a killing which takes place under circumstances showing a reckless disregard for the life of another, and the reckless and negligent use of means reasonably calculated to take the life of another - such killing would be willfully done, as the term is herein defined." (p.903).

The Circuit Court of Appeals in approving this instruction said:

> "We understand this to define 'willfully' as acting voluntarily with evil intent or design, and that it may be shown by acting with reckless disregard of the life of another, coupled with the use of means reasonably calculated to take such life." (p.903).

The foregoing principle has been confirmed by a leading text writer (1 Wharton's Criminal Law - 12th Ed., sec.427, p.666). It therefore appears that by the use of the word "willfully" the allegations of the specification become sufficiently broad to permit proof of either voluntary or involuntary manslaughter. An accused is thereby given notice that the prosecution's proof may take either one direction or the other or possibly both, as occurred in the Meagher, Boyd and Roberts cases cited above. The Board of Review therefore concludes that the court committed no error in denying the defense's motion or in overruling its objection based on this particular legal issue.

5. With respect to the finding of accused's guilt of Charge I and its Specification the basic question for consideration is whether there is substantial evidence that accused was criminally negligent in the operation of the truck at the time and place alleged with the resultant death of Mrs. Andrews. In order to sustain a conviction of involuntary manslaughter at common law the homicide must be occasioned by "criminal", or "gross", or "culpable" negligence. These descriptive words are sometimes used singly. At other times all three are used conjunctively. The terminology indicates, and the courts are practically unanimous in holding, that this type of negligence is of a degree higher than that required to sustain civil liability for negligence. They have declared that criminal, gross or culpable negligence must be of such a character as to show an utter disregard for life or limb, or a total disregard for the consequences,

or conduct indicating such willful disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons (State v. Murphy, 324 Mo. 183, 23 S.W.(2d) 136 (1929); Dunville v. State, 188 Ind. 373, 123 N.E. 689(1919)). Culpability for death of a human being caused by the grossly negligent act of the driver of a motor vehicle, is subject to the same measure of responsibility for death which is caused by the grossly negligent handling of other instrumentalities. The test is the same: Was the accused so negligent as to show an utter indifference to the consequences and did his criminally negligent act proximately result in the death of the person alleged? The test is not what a reasonably prudent man would or would not do but whether his negligence is sufficiently gross to come within the descriptive phrases set out above. In CM ETO 393, Caton and Fikes and CM ETO 1414 Elia the Board of Review affirmed the principle that the degree of negligence required to establish a charge of involuntary manslaughter under the 93rd Article of War must possess such culpability as to be denominated "gross" or "culpable" or exhibit a "willful wanton and reckless" disregard of human life, and limb. In any event the negligence must be greater than that which suffices in civil tort actions.

Due to the paucity of decisions in criminal courts involving situations analogous to the facts of this case, it is necessary and expedient to refer to the civil recovery cases interpreting automobile "guest" statutes. These statutes usually contain one or more, sometimes all three, of the words "willful, wanton and reckless", and have been interpreted by courts in much the same manner as "criminal", "gross" and "culpable" negligence in the criminal cases involving charges of assault and battery and manslaughter. It has been said that these words in "guest" statutes "apply to the type of negligence which borders on intent, and has been called quasi-intent" (Prosser, Torts, p.261). Willful, wanton and reckless conduct:

> "have been grouped together as an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care. Since recklessness often is inferred from any highly dangerous conduct, there is seldom any clear distinction between 'wanton' and 'gross' negligence. It is clear, however, that such aggravated negligence must be more than any mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertance, or simple inattention, even to the extent of falling asleep at the wheel of an automobile, except in those cases where a reasonable man in the actor's place would have been aware of great danger, and would have taken corresponding precautions"(Prosser Torts, pp.262-263).

And at another point the author says:

> "'Wantonness' or 'recklessness' * * * means that the actor has intentionally done an act which was of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, which was so great as to make it highly probable that harm would follow. It is usually accompanied by a conscious indifference to the consequences, but not necessarily so, so long as the great danger would be apparent to a reasonable man" (Prosser, Torts, p.261).

It has been held that a driver of an automobile overcome by sleep is not guilty of gross negligence or willful and wanton misconduct under "guest" statutes unless he continues to drive in reckless disregard of premonitory symptoms (Boos v. Sauer, 266 Mich. 230, 253 N.W. 278 (1934); Perkins v. Roberts, 272 Mich. 545, 262 N.W. 305 (1935); Wismer v. Marx, 289 Mich. 38, 286 N.W. 149 (1939); Richards v. Parks, 19 Tenn. App. 615, 93 S.W. (2d) 639 (1935)). However, if he has had some preliminary warning such as drowsiness, or continued yawning, or there is evidence that accused had fallen asleep before on the trip, or that he had not had sufficient sleep the night before, or had had a strenuous day or night and had not had sufficient sleep, these, and perhaps other symptoms which ought to have put him on his guard are evidence of negligence which are persuasive when coupled with proof of his nodding or sleeping at the wheel (See illustrative cases in 138 A.L.R. at pp.1390-1392). The fact that he is shown to have nodded or gone to sleep at the wheel raises an inference that he was guilty of the negligence required under these statutes and it is for him to come forward with proof that, under the circumstances, will rebut that natural inference. This proposition is well stated in Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785 (1925), as follows:

> "In an ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, without having been negligent. It lies within his own control to keep awake, or cease from driving. And so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a prima facie case, and sufficient for a recovery, if no circumstances tending to excuse or justify his conduct are proven. * * * If such circumstances

> are claimed to have been proven, it then becomes a question of fact whether or not the driver was negligent; and, in determining that issue, all the relevant circumstances are to be considered, including the fact that ordinarily sleep does not come upon one without warning of its approach." (p.791 of 44 A.L.R.) (For cases in accord, see cases cited in annotation, 138 A.L.R. 1388, at p.1389 et seq.)

The same case further states:

> "It is probably true that one cannot ordinarily fix with certainty upon the precise moment when he lapses into unconsciousness, but it is not true that ordinarily sleep comes unheralded. Purves Stewart, in his 'Diagnosis of Nervous Diseases,' 3d ed., p.423, thus describes the chief phenomena of ordinary healthy sleep: 'Firstly, there is diminution and then loss of conscious recognition of ordinary stimuli, such as would ordinarily attract our attention, whether these stimuli be derived from the outer world or from within the sleeper's own organism. There is also, as consciousness is becoming blunted, a characteristic; and indescribable sense of well-being. Voluntary movements become languid and ultimately cease and the muscles of the limbs relax. Meanwhile there develops double ptosis or drooping of the eyelids; the pupils contract; the respiratory movements become slower and deeper, the pulse is slowed, the cutaneous vessels dilate to a slight extent and the general temperature of the body falls, whilst many processes of metabolism, such as those of digestion and of certain secretions are retarded'" (Bushnell v. Bushnell, supra, 44 A.L.R. at p.791).

While there is no evidence of outward manifestations of drowsiness or sleep by the accused, who was riding alone, the court was justified in utilizing its common sense and knowledge of the process involved in the approach of somnolence (Manual for Courts-Martial, 1928, par. 78a, p.62). The common experience of man that oncoming sleep has its own special warnings is fortified by the scientific investigation of Purves Stewart, a part of which is quoted in the above opinion.

The accused admitted that he fell asleep (R21). He had stopped to adjust his brakes on the two or three days preceding the day of the accident but evidence is lacking as to whether he noticed anything peculiar (in the sense that it was sleep producing) about the odor of the brake liquid at these times. Nor does the evidence establish the time when the liquid was first noticed on his clothes. Under these circumstances it was for the court to decide whether there was gross or criminal negligence sufficient to prove beyond reasonable doubt the guilt of the accused. In Blood v. Adams, 269 Mass. 480, 169 N.E. 412 (1929), another automobile "guest" statute case, the accused testified that he must have fallen asleep, or probably fell asleep, and did not remember just what happended preceding the accident. Said the court, in part:

> "Voluntarily to drive an automobile on a public street at any time of day or night with eyes closed or to yield to sleep while operating such kind of dangerous machine as is an automobile on a public highway is to be guilty of a degree of negligence exceeding lack of ordinary care and is a manifestation of recklessness which may be found by judge or jury to be gross negligence within any reasonable definition of that phrase."

Once there was submitted in the instant case competent proof of a substantial nature that accused was asleep at the steering wheel of the truck at the time of the accident the burden was cast upon him to go forward with the evidence and prove that there were no forewarnings of the approach of sleep. The burden of proving accused's guilt beyond a reasonable doubt never shifted from the prosecution, but the burden of producing evidence that he was overcome by sleep without premonitory warnings or symptoms - the "burden of explanation" - passed to accused (CM ETO 527 Astrella). The issue as to whether accused was guilty of gross negligence in continuing, under the circumstances, to drive the vehicle was one of fact to be decided by the court on all of the evidence in the case.

An automobile or truck is dangerous in the hands of a man fully awake and exercising all of his faculties. In the hands of one drowsy or asleep, with control partially or entirely gone, the possibilities of injury it may cause to person and property are unlimited. Every driver knows that. However, it is not determined herein that a motor vehicle is a dangerous instrumentality. While the test of guilt of involuntary manslaughter is always one of culpable or gross negligence, the court in the instant case was entitled to infer accused's gross negligence from the fact that he fell asleep at the wheel. There is absent any exculpatory evidence of the nature indicated. The proof is therefore ample to support the charge of involuntary manslaughter.

6. The evidence supporting Charge II and its Specification which alleges accused "did * * * wrongfully strike George Youngman * * * by knocking him down with a motor vehicle" is the same evidence as supports the charge of the negligent killing of Mrs. Andrews. It need not be determined at this time whether such charge may be supported by proof of simple or ordinary evidence or requires proof of the greater degree of evidence denominated "gross", "culpable" or "criminal" negligence inasmuch as the evidence was sufficient to sustain a finding of the greater degree of negligence in this case as has been above demonstrated. The findings of guilty of Charge II and its Specification are satisfactorily sustained by the evidence.

7. The evidence fully sustains the finding of accused's guilt of the offense under the 83rd Article of War (Charge III and Specification)- that he did "through neglect, suffer * * * military property belonging to the United States to be damaged" (CM ETO 393 Caton and Fikes, supra).

8. The charge sheet shows that the accused is 24 years six months of age and that he was inducted at "Fort Thomas Ky" 25 August 1941 for the duration of the war plus six months. The accused had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offenses. 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. The sentence is within the applicable maximum limits of punishment (Manual for Courts-Martial, 1928, par.104c, pp.98,99,100). Confinement in a disciplinary training center in the United Kingdom is authorized (Circular No. 72, ETOUSA, par. 8c, 9 September 1943).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

19 FEB 1944

ETO 1327

U N I T E D S T A T E S)	VIII FIGHTER COMMAND
v.)	
First Lieutenant KENNETH E. URIE, (O-1549400), Ordnance attached 1806th Ordnance Company, 97th Service Group.)	Trial by G.C.M., convened at AAF Station F-341, 28 December 1943. Sentence: To be dismissed the service.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that 1ST LT. KENNETH E. URIE, attached 1806th Ordnance Company, 97th Service Group, did at AAF Station F-367, on or about 30 October 1943, feloniously take, steal, and carry away one pair pink trousers, one tan khaki shirt, value about $20.00, the property of 2ND LT. RUSSELL F. STAUDACHER.

CHARGE II: Violation of the 96th Article of War.
(Motion granted for finding of not guilty)
Specification: (Motion granted for finding of not guilty)

He pleaded not guilty, and was found guilty of the Specification of Charge I except the words "$20.00", substituting therefor the words "$4.00", of the excepted words, not guilty, of the substituted words, guilty, and guilty of Charge I. A motion by the defense for a finding of not guilty of the

Specification of Charge II was granted by the court. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, VIII Fighter Command, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows in substance that on 29 October 1943, accused arrived at Army Air Force Station F-367 together with Second Lieutenant Raymond J. Johnson, attached 1806th Ordnance Company, and the two officers became room mates. Second Lieutenant Russell F. Staudacher, Headquarters and Headquarters Squadron, 97th Service Group, who occupied another room in the same hut, returned to the station on 30 October after a week's absence at Widewing (R5-7,23). When he left for Widewing a pair of pink trousers and a tan khaki shirt were hanging on the wall of his room. The trousers, which were purchased about March 1943, were stamped "Russell F. Staudacher, 0-570374", and the shirt, purchased in July or August 1942, bore the markings "S5754" and "Stau" (R6-7). After 30 October he discovered that the shirt was missing from his room, and during the third week in November he found that the trousers were also missing (R10,12-13). He did not lend these articles nor did he give anyone permission to use them (R7-8). He reported his loss to his commanding officer about the third week in November (R11-12).

On 1 December, Lieutenants Staudacher and Johnson searched accused's room at the latter's suggestion and found the former's shirt under the bed in a pillow case containing soiled laundry. Staudacher notified Captain Charles E. Bartels, 1221st Military Police Company (Aviation) who went to the room, removed the shirt from the pillow case and found Staudacher's trousers rolled up under some impregnated clothing in a "Val-Pac" which hung on the wall. The trousers and shirt were identified at the trial by Staudacher, Johnson and Bartels and were admitted in evidence (R8-9, 14-15, 24-25; Pros. Exs. 1,2). It was stipulated that the "reasonable market value" of the trousers and shirt was $3 and $1 respectively (R17; Pros.Ex.3).

Sometime after 1 December, accused told Lieutenant Staudacher that he planned to go to a dance, that he entered all the rooms to find some trousers, that he borrowed Staudacher's because they were the only ones which fitted him, and that he did not know him at that time (R9).

Shortly after their arrival at the station on 29 October, because his own clothes had not arrived, accused borrowed Lieutenant Johnson's trousers with the latter's permission. He wore them until the two officers ceased to live together about two weeks later (R23-24, 26). Johnson observed accused wearing pink trousers after their separation (R24). He told Johnson after 1 December that Staudacher's trousers were too long and too big for him (R25).

Cleaning facilities were available on the post between 30 October - 1 December. Dry cleaning was sent on Wednesdays and was returned in about two weeks. Laundry was sent weekly (R16).

On or about 6 December, after he was warned of his rights, accused made a statement to Staff Sergeant Philip C. Brennan, Criminal Investigation Division, stationed at Cambridge, England. The statement, which was reduced to writing by Brennan and signed by accused, was admitted in evidence (R18-20; Pros.Ex.4). He stated in pertinent part as follows:

"I reported to A.A.F Station F-367 on Oct. 26, '43 from the replacement depot at Chorley. *****.

When I arrived on this station I came minus my personal clothing and equipment.

About Oct. 30, '43 I intended visiting Stamford and since I did not have a suitable pair of trousers to wear, I went into an officer's room in my hut. **** There was no one in the room. I took a pair of officer's pink trousers from a hook on the bedroom wall and wore them to Stamford that evening. I took these trousers without the owner's permission and have not returned them. ***** At the time I took Lt. Staudacher's trousers, I noticed that they had a name marked on the inside and thought at the time that the name was: "Stovall".

At about the same time I took a tan Khaki shirt from the Officer's Club on this base. At the time I took the shirt I made no attempt to get the owner's permission. I wore this shirt once and then put it in my soiled laundry.

I had the intentions at the time I took the above two articles of having them cleaned and pressed and returning them to their owner. I knew where the trousers belonged, but did not know who the owner of the shirt was. I intended leaving the shirt in the place where I found it.

Up to Wed. Dec. 1, '43 when the shirt and trousers were seized by Capt. Bartels, the Post Provost Marshal, I made no attempt to locate the owners of the articles taken from my room.

I was and am aware of the fact that cleaning facilities are available to officers on this post.

I have read my statement of 3 pages and it is true."

4. For the defense accused testified in substance as follows:

He arrived in England 17 October with a "Val-Pac" and musette bag. Among other belongings he had two pairs of "O.D." trousers and two "O.D." shirts. His foot locker and bedding roll which were on his boat were supposed to be delivered to him about one week later (R30). He took a shirt from Lieutenant Staudacher's room and wore it. He also took a shirt belonging to Staudacher from the officer's club. He had this second shirt laundered and returned it to its owner a week before trial. About 10 November he took a pair of trousers from Staudacher's room and wore them to a dance that evening. He took the shirt from the room "long before" he took the trousers. Accused knew that it was wrong to take the clothing and he did not have permission to do so (R31-34,36). He decided that the trousers were too large for him. He stated, "I put them on and they were too large for me and I decided that they were of no value to me", and because he soiled them he was going to have the trousers cleaned and to return them. He planned to send the shirt to the laundry. He did not at any time intend to keep the articles permanently (R31-32). He rolled up the trousers and put them in his "Val-Pac" where he usually kept his dry cleaning, and placed the shirt in his laundry bag (R32). After he discovered Lieutenant Staudacher's identity and found that he was a "pretty swell fellow", accused was somewhat ashamed and decided to return the clothing without his knowledge after they were cleaned. However, because of his own "negligence" he was not able to have the shirt and trousers cleaned and to return them before they were discovered (R35). He made no effort to return the articles before they were found on 1 December nor did he inform Staudacher that he had them in his possession. He knew that cleaning facilities were available on the post but did not have the trousers cleaned although he had another pair of pink trousers which he could have worn and which did not belong to either Johnson or Staudacher. His own two pairs of "O.D." trousers were "very dirty" and "greasy" and he did not have them cleaned because he "had to have some to work in" (R33-35).

5. Recalled as a witness by the court, accused further testified that he had a pair of pink trousers in the baggage which was to be delivered later (R39), that he received his foot locker 19 December and his bedding roll 23 December (R36-37). No Quartermaster sales store or Quartermaster representative was on the post during the month of November. His allotments totalled $206.60 and he personally received $102 of his pay. He was paid on 31 October. During the latter part of November he went to London to meet a friend. He arrived about noon, and waited until late afternoon for his friend who did not appear. He had no opportunity to buy any clothing and returned to his station that evening. At the time he wore a pair of pink trousers which he borrowed from an officer whose name he could not recall.

It was not Lieutenant Johnson. When he took Lieutenant Staudacher's trousers it appeared that "they had just been cleaned and pressed". They then bore "little tear marks", but accused was responsible for certain grease spots, and also for some creases which were caused by the fact that he rolled them up in order to prevent them from becoming muddy (R37-38).

Also recalled as a witness by the court, Lieutenant Staudacher testified that the trousers were "very much more soiled" at the time of trial than when he departed for Widewing (R39-40).

6. The undisputed evidence shows that accused took the articles alleged from Lieutenant Staudacher's room without the latter's knowledge or consent. Staudacher and accused lived in the same hut. The only question presented for consideration is whether he intended to deprive the owner permanently of his property. Accused denied that he had such an intent at any time and testified that he planned to have the clothing cleaned and to return it.

> "The existence of the intent must in most cases be inferred from the circumstances". (Manual for Courts-Martial 1928, par.149g, p.173).

Lieutenant Staudacher returned to his billet on 30 October after a week's absence. Accused testified that he took the trousers on or about 10 November and that he took the shirt "long before" he took the trousers. These articles were discovered in his room on 1 December. During this interval he made no effort to return the shirt and trousers to the room from which he had taken them, nor did he make any attempt to find the owner, who was quartered in the same hut, and inform him that he had the articles in his possession. Instead, he maintained a complete silence until his room was searched about three weeks after he had taken the trousers, and the clothing found therein. He wore both the shirt and trousers and soiled the latter. Accused testified that as the trousers were too large, they were of no value to him and that he intended to return the articles after he had them cleaned. He made no effort whatsoever to have the trousers cleaned, although cleaning facilities were available on the post and he testified that he had in his possession another pair of pink trousers which he could have worn. He did not have the shirt laundered although two "O.D." shirts of his own were available for his use.

> "Proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it" (Manual for Courts-Martial 1928, par.112a, p.110; CM ETO 885, Van Horn).

This question as to whether accused intended to deprive the owner permanently of his property was one of fact for the sole determination of the court and in view of the foregoing substantial evidence the Board of Review will not disturb its findings (United States v. Wilson, 44 Fed. 593; Tractenberg v. United States, 293 Fed. 476).

7. The prosecution introduced evidence without objection by the defense that on 1 December when the search of accused's room was made, another pair of pink trousers were found in his room. The inside band of these trousers bore the name of another person which was partially obliterated and the name of accused was inserted in lieu thereof (R9-10, 16-17, 25-27). The purpose of such evidence is conjectural. It may have been presented as evidence of the commission of a possible similar offense by accused (MCM., 1928, par. 112b, p.112), or to show that he had another pair of trousers which he would have worn during the time he had possession of the property alleged to have been stolen. However, because of the presence of other competent and substantial evidence establishing accused's guilt of the offense alleged, it is considered unnecessary to discuss the admissibility of the evidence in question. Its admission did not injuriously affect his substantial rights.

8. The charge sheet shows that accused is 23 years of age; that on 8 August 1938 at Salinas, Kansas, he enlisted in the National Guard (U.S.) in which he served until 9 April 1939; that on 10 April 1939 at Fort McArthur, California, he enlisted in the Regular Army and served until 18 September 1942; and that he was commissioned in the Army of the United States 19 September 1942 at Aberdeen, Maryland. He was promoted to first lieutenant 1 April 1943 (R41).

9. The court was legally constituted and had jurisdiction of the person and offenses. 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. Dismissal of an officer is authorized upon conviction of a violation of Article of War 93.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 19 FEB 1944 To: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of First Lieutenant KENNETH E. URIE (O-1549400), Ordnance, attached 1806th Ordnance Company, 97th Service Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1327. For convenience of reference please place that number in brackets at the end of the order: (ETO 1327).

E.C.McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 13, ETO, 26 Feb 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1360

24 FEB 1944

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private LEMUEL G. POE (34703811), Company B, 49th Replacement Battalion, 10th Replacement Depot.	Trial by G.C.M., convened at Lichfield, Staffordshire, England, 18 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Lemuel G. Poe, Company B., 49th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, without proper leave, absent himself from his Organization at Whittington Barracks, Lichfield, Staffordshire, England, from on or about 1830 hours, 8 January 1944, to on or about 2300 hours, 8 January 1944.

CHARGE II: Violation of the 64th Article of War.
Specification: In that Private Lemuel G. Poe, Company B., 49th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, on the Lichfield-Tamworth Road, near Lichfield, Staffordshire, England, on or about 8 January 1944, strike JAMES A. KILIAN, Colonel, Cavalry,

his superior officer, who was then in the execution of his office on the body and face with his hands and feet.

He pleaded not guilty to and was found guilty of both charges and their specifications. Evidence of two previous convictions was introduced: one by summary court for absence without leave for one day in violation of the 61st Article of War and one by special court-martial for offenses against persons suppressing a disorder in violation of the 68th Article of War and for assault and battery in violation of the 96th Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct "for the rest of your natural life". The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence introduced by the prosecution was substantially as follows:

Colonel James A. Kilian, Cavalry, commanding 10th Replacement Depot, testified that he was driving alone (R13) at about ten o'clock on the night of 8 January 1944, towards Whittington Barracks from Sutton-Coldfield. He had been on an inspection trip (R11) and was dressed in Class "A" uniform (R13). As he paused at the intersection of the Lichfield-London road by the Shoulder-of-Mutton "pub", he noticed that it was closing. He crossed the London road and entered a narrow lane on the other side. Two soldiers were standing in the lane. As he approached the smaller of the two stepped into the car-lights and signaled. Colonel Kilian stopped and the soldier stuck his head in the open right-hand car-door window and said, "'Buddy, are you going to Lichfield?'". On being answered in the affirmative, the soldier opened the door and both soldiers entered the rear seat of the car. The smaller one sat on the left side. Colonel Kilian then put the car in motion. One of the soldiers remarked they were lucky to get a ride or they would have been late and Colonel Kilian asked them, "'Late for what?'", knowing that it was only ten o'clock (R11). He was answered, "late for bed check". As they approached the Horse and Jockey "pub", one of the soldiers suggested they stop and have a last drink, to which Colonel Kilian answered, "'These pubs are closed. You boys don't think you've had about enough to drink tonight anyway? I'll take you to the barracks.'" He looked over his shoulder and his impression was that the right fist of the man sitting in the left rear seat struck him on the cheekbone. He stopped the car, turned his flash-light in the man's face, told him who he was and flashed the light on his shoulder so that they could see his insignia. He asked for their identification tags which they produced and held towards him. As he took hold of the tags to look at them with the illumination of his flashlight, one of the soldiers moved backwards broke the chain and took his tags back. He again identified himself to the soldiers and ordered them to cease. They

appeared belligerent. He stepped from the car through the right front door. The soldier who struck him dismounted from the automobile by the left rear door and came around to the other side of car. The other soldier made his exit by the right rear door. Colonel Kilian again told them to behave and quiet down but they rushed at him. One of them struck at him and knocked his glasses from his face. As the two soldiers approached to attack, he momentarily stopped them with a body kick to one and by a fist blow in the face to the other (R12). Being very near-sighted he had difficulty, without his glasses, in recognizing anything (R16). As he stooped over to recover his glasses, the larger man bumped into him and the smaller one kicked his hand and the glasses as he reached for them, knocking them further down the road. When again he attempted to recover his glasses, a similar attack was made and the glasses knocked into the grass. Colonel Kilian moved towards the car. The two soldiers followed and attempted to strike and kick him. He told them to stop. As he reached the car, they both charged, forced him back about eight feet against the bank and, one on each side, continued to strike him (R12). The larger soldier, at the direction of the smaller one had removed the keys from the car. Then one soldier said to the other,"'Have you got your knife? Let's cut his throat'". Not having a knife, they said,"'We'll get some rocks and beat his head off.'" They started back towards the car, the smaller soldier still trying to strike and kick. The larger soldier suddenly disappeared towards Whittington Barracks and Colonel Kilian chased the other down the road as a British man and his wife, an American soldier and a truck arrived. They caught the soldier Colonel Kilian was chasing and placed him forcibly in the truck. The British lady searched for and found the glasses and also an overcoat, which was placed in the car (R13). It was a bright moonlight night and the struggle lasted about a half-hour (R14). Colonel Kilian did not smell liquor on the two soldiers whose approximate height and weight he described. Neither soldier wore an overcoat but the larger carried one over his arm. It was the smaller of the two soldiers, the aggressive one, who was caught and taken to the guard-house and whom Colonel Kilian positively identified as accused (R16-17).

First Lieutenant Arthur O. Burnett, commanding officer of Company S, formerly Company B until its reorganization on 9 January 1944, 49th Replacement Battalion, 10th Replacement Depot, identified the morning report of Company S which was admitted in evidence. It showed accused from duty to absence without leave 1800 hours 8 January 1944, and to confinement as of 2230 hours the same night (R7; Pros.Ex.A).

Private Robert P. Gossett, Company S, Casual, 10th Replacement Depot, in charge of the wing of Sullivan Barracks in which accused lived, testified that accused was not present in the barracks either at retreat when roll was called or at bed check at 11 o'clock on the night of 8 January 1944. He further testified that soldiers in his charge were allowed one six-hour and one 24-hour pass a week. Passes were requested during the mornings. Accused did not ask for a pass on 8 January 1944 (R8).

Second Lieutenant William J. Kuehlne who was commanding officer, of Company B, 49th Replacement Battalion on 8 January 1944, testified as to the method of issuing passes. A typewritten record of passes was kept under his direction and the company records of six hour passes from 4 January to 11 January 1944 and of 24-hour passes, from 27 December 1943 to 16 January 1944 were admitted in evidence as Pros. Ex. B and C respectively. Extract copies of these two pass records for 8 January 1944 were substituted in lieu thereof (R9-10). The name of accused does not appear on either of them.

Technician Third Grade Alvis L. Fletcher, Company A, 49th Replacement Battalion, testified that about 10:15 on the night of 8 January 1944, he was about a "block this side of the Horse and Jockey pub, coming toward the post from Lichfield." He heard a commotion in the direction of a sedan which was parked on the side of the road and noticed two figures which came from the vicinity of the car. They were struggling. One called for help. He approached and saw that they were a colonel and a private of the United States Army, who were apparently fighting. He heard the private say to the man who had fallen on the ground "'I'll kill you, you son-of-a-bitch'" (R17). He was kicking the colonel in the face (R24). The Colonel asked him to help and as Fletcher walked up to grapple with him the soldier backed away. He reached towards his hip pocket and stated that he had a gun and would kill him. Fletcher tackled him, "frisked" him, found no weapon and held him. He identified the men as accused (R18). He saw only Colonel Kilian and accused at the scene (R19).

Private Joseph Quercia, Motor Pool Detachment, 10th Replacement Depot testified that he was on his way to Lichfield about 10:15 or 10:20 on the night of 8 January 1944. About a 100 yards before he reached the "Horse and Jockey" he saw a car parked beside the road with a truck behind it (R19). Thinking it was an accident, he stopped, flashed a light and saw on the walk, a man lying face down. A sergeant held him. Colonel Kilian ordered him to help. He searched the ground and found two dog tags. Attached to one was a piece of bullet. He looked at the name on them and identified two dog tags shown him in court as those he found. Each had the name Poe thereon (R20). They were admitted in evidence as Pros. Ex. D (R21).

Captain Milton Feinberg, a medical officer, 37th Replacement Battalion, 10th Replacement Depot, testified that he examined Colonel Kilian on the night of 8 January 1944 and found contusions on his head and face, a black eye and an abrasion of the right knee (R22) all recently incurred (R23). He also examined two men in the guardhouse, one of whom he identified as accused, who had a contusion on his lip and scratches on his right hand, all of recent origin. He smelled liquor on accused's breath but could find no impairment of his mental or physical faculties (R23-24).

4. The only testimony for the defense was accused's unsworn statement as follows:

"On January the 8th, about six-thirty or seven o'clock, I went to a pub which is down the road towards Lichfield about a mile and a half, and I had several beers there. And then I made my way on down to another pub which is on the left side of the road about a quarter of a mile on down towards Lichfield, and I had several drinks. Scotch, beer. I stayed about an hour at the first pub and about an hour at the next pub. And then I came back to the Horse and Jockey, which is the first pub and just dropped in there for about fifteen minutes, I'd say, and had another beer. Then on my journey home to camp here, about I don't know how far it was from the pub, but I saw a car of some kind, I can't identify it, and men running around. I couldn't tell who they were. And someone attacked me. Jumped on my back. I thought it was an MP, and I was held on the ground and brought to the guardhouse Number 1. I was a little bit intoxicated. That is all I know, sir." (R25).

5. In rebuttal, Private Michael E. Flood, Jr., Company A, 37th Replacement Battalion, 10th Replacement Depot, testified that he had known accused about three months. On the night of 8 January 1944 he was in the Shoulder-of-Mutton "pub" and saw accused leave there about ten o'clock. The "pub" is located on the old London Road about a mile from Lichfield in the direction of the camp (R26).

6. There is evidence that accused was absent from his organization without official leave on the night of 8 January 1944. He was not present at retreat nor at bed check at eleven o'clock that night. The record of passes in the company for that day does not show him as on pass and the company morning report showed him absent without leave at 6 p.m. He was positively identified by the witness, Fletcher, as the soldier whom he saw kicking Colonel Kilian. His identification tags were found at the locus of the crime. Colonel Kilian upon hearing the accused speak in the court room was positive in his identification of the accused as one of the soldiers who attacked him. His physical condition immediately following tha attack on Colonel Kilian evidenced the fact that recently he had been engaged in an affair of violence. There is therefore substantial evidence identifying accused as Colonel Kilian's assailant, and under such circumstances the findings of the court on the issue of identity are binding on the Board of Review (CM ETO 78, Watts; CM ETO 492, Lewis).

7. The evidence is clear and replete that accused was absent from his battalion without official leave at the time alleged. The findings

of guilty of Charge I and its Specification are sustained by the evidence.

8. Proof of the violation of Article of War 64 as alleged in Charge II and its Specification requires a showing:

> "(a) That the accused struck a certain officer **** as alleged;
> (b) That such officer was the accused's superior officer at the time;
> (c) That such superior officer was in the execution of his office at the time" (Manual for Courts-Martial, 1928, par.134a, p.148).

The record of trial shows there is substantial evidence to support each of the above requirements. There is not the slightest doubt that accused struck and kicked Colonel Kilian as alleged, after his victim had offered him the courtesy and kindness of transportation to his station.

9. Colonel Kilian, during the course of his examination by the court on the issue of accused's identity, requested that the accused speak. Upon inquiry from the Law Member as to whether there was objection, both the prosecution and defense declared that there was none. Thereupon the following colloquy occurred:

> "Accused: What do you want me to say?
> Witness: The voice is not the same as they were down there. Say, 'Buddy, give me a lift', or something.
> Accused: Buddy, give me a lift, will you?
> Witness: That's the fellow.
> Q. You're positive in your identification that this man is the one that attacked you and is the one that you described as the smaller of the two fellows?
> A. Yes." (R17).

It is not necessary to consider the question as to whether accused's immunity against being a witness against himself under the Fifth Amendment to the Federal Constitution was infringed by these proceedings inasmuch as it is self evident that he personally and voluntarily waived same (14 Am.Jur.Criminal Law, sec.162, p.880; Ann. 64 ALR. 1099; 1 Wharton's Criminal Evidence - 11th Ed - sec.382, p.607, footnote 16). In any event, he was positively identified by the witness Fletcher who apprehended him at the scene.

10. The charge sheet shows that accused is over 21 years of age. He was inducted into service at Fort McClellan, Alabama on 28 January 1943. He had no prior service.

11. The court was legally constituted and had jurisdiction of the person and offenses. 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 approved. Confinement in a United States Disciplinary Barracks is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(242)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 FEB 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private LEMUEL G. POE (34703811), Company B, 49th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Attention is invited to the designated place of confinement which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. #210, Sec.VI, par.2a, 14 September 1943 as amended by Cir. #331, Sec.II, par.2, 21 December 1943). This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record of trial in this office is ETO 1360. For convenience of reference please place that number in brackets at the end of the order: (ETO 1360).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

17 FEB 1944

ETO 1361

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private WALTER I. STORY (33520797), 223rd Port Company, 485th Port Battalion Transportation Corps.	Trial by G.C.M., convened at Manchester, England, 15 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE I: Violation of the 64th Article of War.
Specification: In that Private Walter I Story, 223rd Port Company, 485th Port Battalion Transportation Corps, having received a lawful command from SECOND LIEUTENANT HOYT B DAVIS, 223rd Port Company, 485th Port Battalion Transportation Corps, his superior officer, to go to the guardhouse, did, at Race Course Camp, Manchester, Lancashire, England, on or about 0045 hours 27 December 1943, willfully disobey the same.

He pleaded not guilty and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for willful disobedience of a superior officer in violation of Article of War 64. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The charge sheet shows that accused is 29 years of age, that he was inducted 30 December 1942 at Richmond, Virginia, and that his period of service is governed by the Service Extension Act of 1941 as amended. He had no prior service.

4. The court was legally constituted and had jurisdiction of the person and offense. 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.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

17 FEB 1944

WD, Branch Office TJAG., with ETOUSA. TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private WALTER I. STORY (33520797), 223rd Port Company, 485th Port Battalion Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence imposed by the court, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. By virtue of the provisions of section II, War Department Circular No. 331, 21 December 1943, so much of paragraph 5, section V, Circular No. 291, War Department, 1943 as reads "Eastern Branch, United States Disciplinary Barracks, Beekman, New York," has been amended to read "Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York." The place of confinement designated in your action should be changed accordingly.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1361. For convenience of reference please place that number in brackets at the end of the order: (ETO 1361).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1366

24 FEB 1944

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND
v.	Trial by G.C.M., convened at Bamber Bridge Police Station, Near Preston, Lancashire, England, 20 January 1944.
Private CLARENCE (NMI) ENGLISH (33590563), 1947th Quartermaster Truck Company (Aviation), 1511th Quartermaster Truck Regiment Aviation (Special).	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 96th Article of War.
Specification 1: In that Private Clarence (NMI) English, 1947th QM Trk Co (Avn), 1511th QM Trk Regt Avn (Sp), AAF 569, APO 635, did at Preston, Lancashire, England, on or about 12 December, 1943, wrongfully take and use without proper authority, a certain automobile to-wit: 4 x 4½ ton truck, property of the United States, of a value of more than Fifty Dollars ($50.00).
Specification 2: In that * * * * * * * *, did at Preston, Lancashire, England, on or about 12 December, 1943, while under the influence of alcohol, recklessly operate a motor vehicle upon the public highway in such manner as to cause an accident.

Specification 3: In that * * * * * * * *, having been duly restricted to the limits of AAF Station 569, APO 635, did, on or about 12 December, 1943, break said restriction by going to Preston, Lancashire, England.

CHARGE II: Violation of the 83rd Article of War.
Specification: In that * * * * * * * *, did, at Preston, Lancashire, England, on or about 12 December, 1943, through neglect suffer a 4 x 4½ ton truck of a value of more than fifty dollars ($50.00), military property belonging to the United States, to be damaged by collision with another vehicle.

ADDITIONAL CHARGE: Violation of the 96th Article of War.
Specification: In that * * * * * * * *, did, at Bamber Bridge, Preston, Lancashire, England, on or about 10 December, 1943, wrongfully and unlawfully have carnal knowledge of a female person, to-wit: Margery Thompson, who was then under the age of 16 years, and above the age of 13 years.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of two previous convictions was introduced, one by special court-martial for willful disobedience of and threatening to strike a noncommissioned officer in violation of Article of War 65 and one by summary court for selling his valid pass to another enlisted man in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, designated Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused's guilt of wrongfully taking and using a Government vehicle without authority (Specification 1, Charge I), driving it upon a public highway while intoxicated (Specification 2, Charge I), and suffering it to be damaged through neglect (Charge II) is established beyond reasonable doubt. The allegation in Specification 2, Charge I, that accused did "while under the influence of alcohol, recklessly operate a motor vehicle upon the public highway in such a manner as to cause an accident" states an offense in violation of Article of War 96. It is not necessary that the words used in the specification state specifically that the alleged act was "wrongful" or "unlawful" if they imply such character (CM 113535 (1918); CM 130811 (1919) (Dig.Ops.JAG., 1912-40, sec.451(8), p.312); and see CM 226512 (1943), (Bul.JAG., Vol.II, No.1, Jan.1943, sec.454(37a), p.17)). The act of driving of a Government motor vehicle under the circumstances

alleged is inherently wrong. The omission of the words "wrongfully" and "unlawfully" was, therefore, immaterial.

4. With reference to Specification 3, Charge I, the evidence shows that on 12 December 1943, the commanding officer of accused's company informed him that he was "restricted to the post" for one week effective immediately. The restriction was imposed upon accused as company punishment under Article of War 104 for absence without leave for 12 hours, from eight o'clock on the e vening of 11 December to eight o'clock on the morning of 12 December (R33-36). It was entered in the company punishment book (R37). Accused broke the restriction, left the post and became involved in the motor accident which was made the subject of Specification 2, Charge I (R38,52). The only evidence with respect to compliance with the provisions of Article of War 104 and with the regulations thereunder (Manual for Courts-Martial 1928, par.107, p.104) is that the commanding officer informed accused that "it was a court-martial offense, but that I was going to impose company punishment upon him." (R34).

The company commander in the maintenance of discipline and control of his unit possessed inherent authority to impose such restriction upon accused. It is a usual and ordinary form of punishment under the 104th Article of War and is so understood by every soldier and officer.

This case contains one element which is absent from CM ETO 1015, Branham. There the order was not only illegal because of noncompliance with the provisions of the Article and Manual for Courts-Martial but the punishment was improper because beyond the disciplinary power of the officer giving the order. In the instant case the punishment was clearly within the commanding officer's disciplinary power. However in both cases there was a total failure to comply with the provisions of the 104th Article of War with respect to informing accused of his right to demand court-martial in lieu of summary punishment and of his right to appeal from the punishment imposed. The Board of Review affirms the doctrine of the Branham case. Regardless of the legality of the punishment imposed in the instant case it concludes that the restriction imposed upon accused was the result of an order which was not a "lawful command" within the purview of the 64th Article of War.

Such conclusion does not relieve accused from culpability. The company commander attempted to exercise lawful authority over accused. The commander failed to comply with conditions contained in the statutory authority granted him by Congress. Such failure however did not confer upon accused the license deliberately and willfully to flout the commander's disciplinary control over him. His conduct in ignoring his commander's control and authority displayed such a spirit of insubordination and defiance as to constitute a disorder prejudicial to good order and military discipline under the 96th Article of War (Manual for Courts-Martial 1928, par.134b, p.149; Manual for Courts-Martial 1921, par.415, p.355; Winthrop's Military Law & Precedents, Reprint, p.575 and footnote 26).

5. The offense of unlawful carnal knowledge of a female under the age of 16 years was properly laid under the 96th Article of War (Additional Charge and Specification). This offense is denounced and made punishable for a first offense by imprisonment for not more than 15 years by Federal Criminal Code Section 279 (35 Stat. 1143; U.S.C. 458). Under the Federal Law the allegation that the female involved was "above the age of 13 years" was immaterial and may be treated as surplusage (CM ETO 895, Davis et al, par.10a, p.36). Evidence bearing upon the extent of the female's age below 16 years and accused's knowledge or belief with respect to her age was immaterial to his guilt. The trial judge advocate's reference to the English Law was improper but non-prejudicial (Military Justice Cir. #6, BOTJAG with ETO, par.2, 11 Nov 1943).

6. The charge sheet shows that accused is 20 years of age and that he was inducted at Fort George G. Meade 15 March 1943 to serve for the duration and six months thereafter. He had no prior service.

7. The court was legally constituted and had jurisdiction of the accused and offenses. No errors injuriously affecting his substantial rights 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. Confinement in a United States Disciplinary Barracks is authorized (AW 42).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 FEB 1944 TO: Commanding General, VIII Air Force Service Command, APO 633, U.S. Army.

1. In the case of Private CLARENCE (NMI) ENGLISH (33590563), 1947th Quartermaster Truck Company (Aviation), 1511th Quartermaster Truck Regiment Aviation (Special), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The Additional Charge and Specification laid under Article of War 96 charges the offense of carnal knowledge of a female under the age of sixteen years, a crime denounced by Federal Criminal Code Section 279 (35 Stat. 1143; 18 U.S.C. 458). The reference by the Trial Judge Advocate, at page 12 of the record, to a memorandum stating that:

> "if evidence of the law of England is introduced to show that 'statutory rape' is a crime in England, evidence of this statutory defense would appear to be admissible in evidence in applicable cases to show a recognized extenuating circumstance"

was manifestly improper. The memorandum referred to (Memo No.1 JA, SOS, ETO, 1 Jan 1943) is not in force(see Index, Military Justice, 31 Jan 1944, Memo No.4 JA, SOS, ETO, 1 Feb 1944 and Military Justice Cir. #6, BOTJAG with ETO, par.2, 11 Nov 1943). The English Law covering this type of offense is entirely irrelevant and not for consideration or application by United States courts-martial (See Military Justice Cir. #6 BOTJAG with ETO, par.2, 11 Nov 1943).

3. Prosecution's Exhibit A - certified copy of the birth certificate of Margery Thompson - is not included in the record of trial. This exhibit or a true copy thereof must be forwarded to this office for attachment to the record.

4. The place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. #210, sec. VI, par.2a, 14 September 1943 as amended by Cir. #331, sec.II, par.2, 21 December 1943). This may be done in the published general court-martial order.

5. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1366. For convenience of reference please place that number in brackets at the end of the order: (ETO 1366).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1388

16 FEB 1944

U N I T E D S T A T E S)	XV CORPS
v.)	
Captain CHARLES C. MADDEN (0-236484), 654th Tank Destroyer Battalion.)	Trial by G.C.M., convened at Lurgan, Armagh County, Northern Ireland, 17 January 1944. Sentence: To be dismissed the service.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 95th Article of War.
Specification 1: (Finding of Not Guilty).
Specification 2: In that Captain Charles C. Madden, 654th Tank Destroyer Battalion, did, at The Argory House, Armagh County, Northern Ireland, on or about 25 December, 1943 use insulting and defamatory language about Captain D. L. Benton, Jr., 654th Tank Destroyer Battalion to Lieutenant Colonel William V. Martz, Commanding 654th Tank Destroyer Battalion, to wit, "D. L. is a rat. He was just a private when I came into the Army and as far as I'm concerned he's still a private," or words to that effect.
Specification 3: In that Captain Charles C. Madden, 654th Tank Destroyer Battalion, did, at The Argory House, Armagh County, Northern Ireland, on or about 25 December, 1943 use insulting and defamatory language to and in the presence

of Lieutenant Colonel William V. Martz, Commanding 654th Tank Destroyer Battalion, to wit, "You're just a God Damn Son of a bitch, and you've been giving me a dirty deal", or words to that effect.

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that Captain Charles C. Madden, 654th Tank Destroyer Battalion, was at The Argory House, Armagh County, Northern Ireland, on or about 25 December, 1943 drunk and disorderly in uniform in a public place, to wit, a dance attended by civilians at The Argory House, Armagh County, Northern Ireland.
Specification 2: In that Captain Charles C. Madden, 654th Tank Destroyer Battalion, having received a lawful order from Lieutenant Colonel William V. Martz, Commanding 654th Tank Destroyer Battalion to remain in the area of The Argory House, Armagh County, Northern Ireland on 26 December, 1943, the said Lieutenant Colonel William V. Martz being in the execution of his office, did, at The Argory House, Armagh County, Northern Ireland, on or about 26 December, 1943, fail to obey the same.

He pleaded not guilty, and was found guilty of Specifications 2 and 3, Charge I, and of Charge II and the specifications thereunder, and not guilty of Specification 1, Charge I, and not guilty of Charge I but guilty of violation of the 96th Article of War. Evidence of one previous conviction by general court-martial of being drunk and disorderly in camp in violation of Article of War 96, was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, XV Corps, approved the sentence but remitted the forfeitures and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as mitigated by the reviewing authority and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

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

The companies comprising the 654th Tank Destroyer Battalion were stationed, part at Derrygalley, Tyrone County, Northern Ireland, and part at Argory House. Accused was the commanding officer of the Reconnaissance company and lived at Argory House (R9). On the evening of 25 December 1943 a battalion dance was held at Argory House. Lieutenant William V. Martz, commanding the battalion visited the dance about 2200 hours. About 2300 or 2330 hours, one of his officers Captain D. L. Benton, Jr., informed him that there was a little difficulty with accused and that Captain

Benton had him taken upstairs. Colonel Martz found accused upstairs surrounded by several officers and some of the camp guard who were holding him. He ordered the others to leave and, with Captain Witherspoon, took accused into Lieutenant Healey's room and put him on the bed. Accused was still fighting and kicking and trying to get away. The others left Colonel Martz alone in the room with accused who appeared to recognize him and said to him, "'a lot of the men in the battalion like you and you have done a lot of good for the battalion. As far as I am concerned, you are just a God damn son-of-a-bitch and you have been giving me a dirty deal'" (R10). Then a moment later he said, "'That D.L.'" referring to Captain Benton, "'is a rat. He was a private when I came into the Army and as far as I am concerned he is still a private'". Colonel Martz testified that accused was "very drunk" and that he considered these comments as coming from a drunk man spouting off.

About noon the next day, 26 December 1943, Colonel Martz went over to the Argory Camp and spoke to accused and Lieutenant Cooper. He saw that accused was not fully recovered from his drinking bout of the evening before and told both accused and Lieutenant Cooper, "'I want you to stay in the area for the rest of the day and take care of yourself so you will be in fit shape for work tomorrow morning'". Both answered "'Yes, sir'". These instructions were not changed (R11-12).

Captain Benton went to the battalion dance at Argory House on 25 December about 9:30 p.m. Accused was dancing and was apparently normal. When Captain Benton returned to the dance room some forty minutes later, accused was:

> "running around the room and slinging his hands and tapping everybody as he came by, kicking a little bit **** he would grab the girls out of the men's arms and dance with them a little bit and grab another and dance with her a little bit. Then he started running around tapping men and girls on the shoulders and in the face **** he was very unruly"(R6).

Accused was in uniform earlier in the evening but later removed his blouse (R9). There were at least 40 or 50 girls present as well as members from the whole battalion (R6). In the opinion of Captain Benton, accused was drunk. He had known accused since October 1941 and had been and still considered that they were very good friends (R7,8).

Staff Sergeant William A. Lands, Company "C", 654th Tank Destroyer Battalion, saw accused at the battalion dance the night of 25 December 1943 and noticed the same conduct described by Captain

Benton (R13). Accused was drunk(R14).

Private First Class Leon R. Anderson, Reconnaissance Company, 654th Tank Destroyer Battalion, was assigned as driver of a jeep on 26 December 1943. He drove accused and a Captain Giedd that evening, first to Dungannon, about six miles from camp and then to a dance at Hotel Lough Neagh about ten miles from camp. He returned to camp with accused a little after three o'clock the next morning (R15).

4. Accused was sworn as a witness only as to Specification 2, Charge II. He testified that about noon of 26 December 1943, Lieutenant Colonel Martz came to Argory House; he was in Lieutenant Cooper's room when Colonel Martz came in.

> "I got up and he said, 'Be seated. How do you feel today?' I said, 'I feel pretty bad'. And he stayed around just a few minutes. And as he left to go all I understood him to say was 'Take it easy'".

Accused understood this to mean that he was not to get drunk again(R16-17).

He was stopped by the guard at the gate when leaving in the jeep driven by Anderson on the night of 26 December 1943 and admitted he might have told the guard "'I want to go by Derrygalley'", or "'I want to go over to see the O.D.,'"(R18). He was delayed at the gate about five minutes and didn't know what caused the difficulty. He explained that when an officer needed a vehicle, he wrote out a request for it and the dispatch was signed either by accused or his executive. He dispatched his own vehicle and the dispatch on this vehicle was made early in the day. His company was separate from the battalion and the quarter ton vehicle accused used that night was used every day for "whatever purpose comes up"(R19). He had later heard, though he had seen no official orders, that "any vehicle dispatched after 5:00 o'clock, that is after duty hours, would be signed by the battalion officer of the day" (R20).

He stated he was married and had two boys, one seven and one nine years of age (R18).

5. On prosecution's rebuttal, First Lieutenant Scott P. Cooper, 654th Tank Destroyer Battalion testified that he was with accused on 26 December 1943 at Argory House when Colonel Martz came in and said "take it easy. Stay in close. I want you to be ready for duty in the morning". This was said to both of them and witness understood that Colonel Martz intended both of them to remain in the camp area i.e. Derrygalley and Argory which are 3/4 of a mile apart (R21).

6. The evidence is clear and undisputed that accused made the statements as alleged in Specifications 2 and 3 of Charge I, and that he was drunk and disorderly in uniform at the dance in a public place, as charged in Specification 1, Charge II. The court found that the statements made by accused to Lieutenant Colonel Martz while they were together alone in the room in Argory House as alleged in Specifications 2 and 3 of Charge I, were not of such an aggravated nature as to amount to conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. While it was neither gross nor conspicuous in character, it was undoubtedly discreditable and as such properly punishable under Article of War 96 (CM 227651, Hess).

With reference to Specification 2, Charge II, accused testified that when Lieutenant Colonel Martz visited him about noon of 26 December 1943, all he heard him say to him and Lieutenant Cooper as he left to go was "Take it easy," to which he replied, "Yes sir". He understood it to mean "I was not to get drunk again". Colonel Martz stated:

> "I observed that he was not fully recovered from the evening before and I wanted him to stay in camp, so I spoke to he and Lieutenant Cooper and instructed them both in approximately this manner, 'I want you to stay in the area for the rest of the day and take care of yourself so you will be in fit shape for work tomorrow morning'."

The answer from both was, "Yes, Sir'". These instructions were not changed. Lieutenant Cooper stated that Colonel Martz said, "Stay around the area. To be ready for duty in the morning," and that he understood that it was meant that both he and accused were to stay "in the camp area". Accused admitted he left Argory House by jeep about seven o'clock. The driver of accused's jeep testified that he drove first to Dungannon about six miles from camp and then to the dance at Hotel Lough Neagh about ten miles away. They returned "about 3:15" the next morning. There is substantial competent evidence that accused did violate the order given him as alleged in Specification 2, Charge II. Any conflict therein was resolved against accused by the Court and the findings will be accepted as final by the Board of Review (CM ETO 492, Lewis).

7. The charge sheet shows accused is 38 years old. He accepted appointment 2nd Lieutenant, Infantry Reserve Corps, 1 February 1927 and entered on active duty 25 November 1940.

8. The court was legally constituted and had jurisdiction of the person and offenses. 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. Dismissal is authorized upon conviction of a violation of Article of War 96.

B. Franklin Peter Judge Advocate

Edward Swarthout Judge Advocate

Elwood H. Seymour Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 16 FEB 1944 TO: Commanding General, ETOUSA, APO 887, U.S.Army.

1. In the case of Captain CHARLES C. MADDEN, (O-236484), 654th Tank Destroyer Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1388. For convenience of reference please place that number in brackets at the end of the order: (ETO 1388).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as mitigated by convening authority ordered executed. GCMO 11, ETO, 23 Feb 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1395

1 MAR 1944

U N I T E D S T A T E S	5TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Mourne Park Camp, County Down, Northern Ireland 31 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class RUSSELL R. SAUNDERS (16012875), Battery "B", 46th Field Artillery Battalion.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private First Class Russell R. Saunders, Battery "B", 46th Field Artillery Battalion, did, at Tidworth Garrison, Tidworth, England, on or about 5 November, 1943, desert the service of the United States, and did remain absent in desertion until he surrendered himself to Corporal William A. Springhorn, 707th Military Police Battalion, at Tidworth Garrison, England, on or about 16 November, 1943.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * * * * * * * * * * * * *, having been duly placed in confinement in 19th Field Artillery Battalion Guard Room, on or about 3 November 1943, did, at Tidworth Garrison, Tidworth, England, between 1930 hours and 2000 hours, on or about 5 November 1943 escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * * * * * * * * * * * *, having been restricted to the limits of Collett Park, Berkenhead, Liverpool, England, on or about 31 October 1943, did, break said restriction by going absent without leave.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by summary court-martial for absence without leave for one hour and fifteen minutes in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, reduced the period of confinement to fifteen years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that about 2 p.m., 31 October 1943, at Collett Park, Birkenhead, England, the members of Battery B, 46th Field Artillery Battalion, were assembled and informed by the battery commander that the unit was to move overseas for an unknown destination that night, that no passes would be issued and that they were restricted to their "living huts". The battery commander explained that to leave "at this time" would constitute desertion and accused, who was present, signified that he understood the explanation. At 6 p.m. on the same day, accused was reported missing and a search of the area did not reveal his whereabouts (R6-7). The battery morning report of 31 October, which indicated that the organization was stationed at "APO #5 USS LAKEHURST", contained the following entry as to accused's status: "Dy to AWOL 1730" (R7; Pros. Ex.A).

The record of trial shows, without explanation, that on 4 November, accused was returned to Tidworth Barracks from the military police station at Birmingham and was confined in the 19th Field Artillery Battalion temporary guardhouse which was a stable. The battalion was in the process of moving to Northern Ireland and the Division guardhouse was "closed down and locked" (R4-5, 8). Between 7:30 and 8:00 p.m. 5 November, accused escaped from this guardhouse (R4-5, 9-10). It was stipulated by the prosecution and defense that if Corporal William A. Springhorn, 707th Military Police Battalion was present, he would testify "'That on or about November 16, 1943, the accused, Russell R. Saunders, Battery B, 46th Field Artillery Battalion, did in uniform surrender himself to military police authorities at Tidworth Garrison, England'" (R11).

4. Accused was informed of his rights and elected to remain silent (R11-12).

5. The findings of guilty of Charges II and III and of the specifications under each (escape from confinement and breach of restriction in violation of Articles of War 69 and 96), are clearly supported by the evidence.

6. With reference to Charge I and its Specification, accused was charged with desertion on 5 November, one day after he was returned to Tidworth Barracks, a military station approximately 200 miles from Birkenhead where he went absent from his own organization on 31 October. The question presented for consideration is whether accused absented himself without leave on 5 November with the intent not to return. His absence without leave for the period alleged, November 5 to 16, was clearly proved. With reference to the intent not to return:

> "A prompt repentance and return, while material in extenuation, is no defense. The fact that such intent is coupled with a purpose to return provided a particular but uncertain event happens in the future, *** does not constitute a defense"(Manual for Courts-Martial, 1928, par.130a, p.142)(Underscoring supplied).

Accused was confined at Tidworth in a temporary guardhouse of the 19th Field Artillery Battalion. There was evidence that it was commonly known that this battalion was in the process of moving. However, there was no evidence whatsoever that accused had knowledge of any impending movement, or that he absented himself with the intent to return after the organization had departed from the station. Also there was no evidence when the battalion actually left Tidworth Barracks whether before or after his surrender at that station on 16 November.

An inference of an intent not to return may in some cases be drawn from the fact that accused had escaped from confinement at the time he went absent, as in the case under consideration (Manual for Courts-Martial, 1928, par.130a, p.144). On the other hand, a short period of absence terminated by surrender may, under certain circumstances, serve to negative such an intent. Eleven days after his initial absence without leave from Tidworth Barracks on 5 November, accused surrendered in uniform at the same station. There is no evidence that he knew where his own organization was then stationed.

> "It cannot be said that an unexplained absence without leave for 11 days, even when terminated by apprehension, constitutes desertion as a matter of law" (CM 125904 (1919), Dig.Ops.JAG., 1912-1940, sec.416 (8), p.268).

> "The fact that accused was absent without permission from his organization for 12 days in France, terminated by voluntary return, is not sufficient to support a finding of desertion"(CM 125887 (1919), CM 127372 (1919),Dig.Ops.JAG,1912-1940, sec.416 (9), p.268).

"Accused was convicted of desertion under AW 58. The evidence showed that he went absent without leave and surrendered 20 days later in uniform at a place 40 miles from his post. *** In this case, the absence being of short duration and the place of surrender being a short distance from his post, proof of intent to desert cannot be supplied from these facts alone" (CM 198750 (1932), Dig.Ops.JAG, 1912-1940, sec.416 (9), pp.269-270).

In view of the short absence of 11 days, terminated by surrender in uniform at the same station, and in the absence of any other evidence from which a court might reasonably infer that accused intended not to return to the military service, 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 Charge I and its Specification as involves a finding of Guilty of absence without leave for the period alleged, in violation of Article of War 61.

7. Had the evidence been legally sufficient to sustain the charge of desertion, the designation of a United States penitentiary as the place of confinement would have been authorized. As the evidence is legally sufficient to support the findings of guilty of the military offenses of escape from confinement, breach of restriction and absence without leave only, penitentiary confinement is not authorized (AW 42).

8. The charge sheet shows that accused is 24 years of age and that he enlisted at Detroit, Michigan on 14 November 1940 for a period of three years. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused, except as herein indicated, were committed during the trial. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charges II and III, and of the specifications thereunder, legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the time and place alleged, absent himself without leave and did remain absent without leave until he surrendered at the place and time alleged, in violation of Article of War 61, and legally sufficientto 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 15 years in a place other than a penitentiary, Federal reformatory or correctional institution.

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

1st Ind.

WD., Branch Office TJAG., with ETOUSA. 1 MAR 1944 To: Commanding General, 5th Infantry Division, APO 5, U.S.ARMY.

1. In the case of Private First Class RUSSELL R. SAUNDERS(16012875), Battery "B", 46th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charges II and III and of the specifications thereunder, legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the time and place alleged, absent himself without leave and did remain absent without leave until he surrendered at the time and place alleged, in violation of Article of War 61, 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 15 years in a place other than a penitentiary, Federal Reformatory or correctional institution, which holding is hereby approved. Upon designation of a place other than a penitentiary, Federal Reformatory or correctional institution, you will have authority to order execution of the sentence. If you should suspend execution of that portion of the sentence adjudging dishonorable discharge, then a disciplinary training center should be designated as the place of confinement.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1395. For convenience of reference please place that number in brackets at the end of the order: (ETO 1395).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

17 FEB 1944

ETO 1400

U N I T E D S T A T E S	NINTH INFANTRY DIVISION.
v.	
Private WILLIAM J. JOHNSTON (33266215), Company "A", 39th Infantry.	Trial by G.C.M., convened at Cefalu, Sicily, 3 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private William J. Johnston, Company "A", 39th Infantry, did, at French North Africa, on or about July 8, 1943, desert the service of the United States, by absenting himself without proper leave from his organization located about 5 miles west of Bizerte, French North Africa, with intent to avoid hazardous duty, to wit: "Action against the enemy", and did remain absent in desertion until he surrendered himself at the bivouac area, 39th Infantry, near Randazzo, Sicily, on or about August 17, 1943.

He pleaded not guilty, and was found guilty of the Charge, and of the Specification guilty, except the words, "the bivouac area, 39th Infantry, near Randazzo, Sicily, on or about August 17, 1943", and substituting therefor the words, "Setif, North Africa, on or about 16 July 1943", of the excepted words, not guilty, and of the substituted words, guilty. Evidence was

introduced of one previous conviction for absence without leave from camp area, drunkenness and disorderly conduct and failure to obey a lawful order in violation of Articles of War 61 and 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 20 years. The reviewing authority approved only so much of the findings of guilty of the Specification of the Charge and Charge as involved a finding of guilty of desertion at the time and place and under the circumstances alleged and terminated in a manner not proven at the time and place alleged, approved the sentence, withheld the order directing the execution thereof pursuant to Article of War 50½, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement and ordered the prisoner held at Oran, Algeria, pending further orders.

3. The charge sheet shows that accused is 36 years of age. He was inducted at Pittsburg, Pennsylvania on 12 May 1942. He had no prior service.

4. The court was legally constituted and had jurisdiction of the person and offense. 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. The penalty for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 17 FEB 1944 TO: Commanding General, 9th Infantry Division, APO 9, U. S. Army.

1. In the case of Private WILLIAM J. JOHNSTON (33266215), Company "A", 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence imposed by the court, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the place of confinement designated, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. #210, Sec.VI, par.2a, 14 September 1943 as amended by Cir. #331, Sec.II, par.2, 21 December 1943). If you should suspend execution of that portion of the sentence adjudging dishonorable discharge, then a disciplinary training center should be designated as the place of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1400. For convenience of reference please place that number in brackets at the end of the order: (ETO 1400).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

26 FEB 1944

ETO 1402

U N I T E D S T A T E S)	EIGHTH AIR FORCE.
)	
v.)	Trial by G.C.M., convened at AAF
)	Station 167, 8 December 1943.
Private JAMES W. WILLISON)	Sentence: Dishonorable discharge,
(15323481), 1142nd Military)	total forfeitures and confinement
Police Company (Avn), 381st)	at hard labor for life. The United
Bombardment Group (H).)	States Penitentiary, Lewisburg,
)	Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private JAMES W. WILLISON, 1142nd Military Police Company (Aviation), 381st Bombardment Group (H) did, at Sandy Lane, Sudbury, West Suffolk, England, on or about 2230 hours, 5 October 1943, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Gladys Muriel Baker.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of no previous convictions was introduced. He was sentenced to be dishonorably discharged from 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 the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record for action pursuant to the provisions of Article of War 50½.

3. The only question deserving consideration is whether the victim, Mrs. Baker, consented to the act of intercourse or whether it was committed by accused by force and violence against her will. This was a question of fact within the exclusive province of the court. Inasmuch as the finding of non-consent by Mrs. Baker is supported by competent, substantial evidence it will not be disturbed by the Board of Review on appellate review (CM ETO 397, Shaffer; CM ETO 709, Lakas; CM ETO 832, Waite; CM ETO 969, Davis; CM ETO 1202, Ramsey and Edwards).

4. The charge sheet shows that accused is 21 years of age. He enlisted at Fort Hayes, Ohio, 23 October 1942 for the duration plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the 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. A sentence of either death or life imprisonment is mandatory upon the conviction of rape (AW 92).

B. Franklin Peters Judge Advocate

Richard Sarnoff Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 26 FEB 1944 TO: Commanding General, Eighth Air Force, APO 634, U.S. Army.

1. In the case of Private JAMES W. WILLISON (15323481), 1142nd Military Police Company (Avn), 381st Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. On conviction of rape in violation of AW 92, the court could adjudge a sentence of death or life imprisonment - no other. They unanimously recommended reduction of the imprisonment to five years, indicating they would have given that sentence if within their power. The C.G., ETOUSA has directed me to recommend clemency so that prisoners returned to the United States will have a reasonable, defensible sentence. I consider this sentence much too severe and recommend your further consideration.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1402. For convenience of reference please place that number in brackets at the end of the order: (ETO 1402).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1403

24 FEB 1944

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION.
	)	
v.	)	Trial by G.C.M., convened at Cefalu,
	)	Sicily 13 September 1943. Sentence:
Private JOHN M. KUMMERLE	)	Dishonorable discharge, total for-
(32002865), Company "L",	)	feitures and confinement at hard
39th Infantry.	)	labor for 20 years. Eastern Branch,
	)	United States Disciplinary Barracks,
	)	Beekman, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private John M. Kummerle, Company "L", 39th Infantry, did, at Castel-travano, Sicily, on or about July 23, 1943, desert the service of the United States by absenting himself without proper authority from his organization with intent to avoid hazardous duty, to wit: "Action against the enemy", and did remain absent in desertion until he surrendered himself at Marsela, Sicily, on or about July 25, 1943.

CHARGE II: Violation of the 64th Article of War.
(Finding of guilty disapproved)
Specification: (Finding of guilty disapproved)

He pleaded not guilty to both charges and specifications and was found not guilty of Charge I but guilty of a violation of the 61st Article of War;

guilty of the Specification of Charge I except the words "desert the service of the United States by absenting himself without proper authority from his organization with intent to avoid hazardous duty, to wit: Action against the enemy, and did remain absent in desertion", substituting therefor the words "absent himself without proper leave from his organization and did remain absent", of the excepted words not guilty and of the substituted words guilty; and guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority disapproved the findings of guilty of Charge II and its Specification, approved the sentence but remitted so much thereof as involved confinement in excess of 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement, directed that the prisoner be held at Oran, Algeria, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence, including accused's own sworn testimony (R16-17), establishes that he absented himself without proper leave from his organization at Castreltravano, Sicily on 23 July 1943 and remained absent until his voluntary return at Marsela, Sicily on 25 July 1943 (R6,8,9-11,17, Exhibit I). His organization was in combat action between those dates (R6,9). The evidence clearly establishes accused's guilt of the Specification of Charge I (CM ETO 564, Neville).

4. The charge sheet shows that accused is 30 years 9 months of age and was inducted at New York City, New York 22 January 1941. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offenses. 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 approved by the reviewing authority. Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Franklin Peters Judge Advocate

Edward Isenbergh Judge Advocate

Edward H. Sargent Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 FEB 1944 To: Commanding General, 9th Infantry Division, APO 9, U. S. Army.

1. In the case of Private JOHN M. KUMMERLE (32002865), Company "L", 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. #210, Sec.VI, par.2a, 14 September 1943 as amended by Cir. #331, Sec.II, par.2, 21 December 1943). If you should suspend execution of that portion of the sentence adjudging dishonorable discharge, then a disciplinary training center should be designated as the place of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1403. For convenience of reference please place that number in brackets at the end of the order: (ETO 1403).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1404

16 MAR 1944

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Cefalu, Sicily 22 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Disciplinary Barracks, Eastern Branch, Beekman, New York.
Private BERNARD J. STACK (32057393), Company "L", 39th Infantry.	)	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE: Violation of the 75th Article of War.
Specification: In that Private Bernard J. Stack, Company "L", 39th Infantry, did, at the vicinity of Nicosia, Sicily, on or about July 31, 1943, run away from his Company which was then engaged with the enemy, and did not return until after the engagement had been concluded.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for life at such place as the reviewing authority may direct. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement, ordered the prisoner be held at Oran, Algeria pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused is charged with running away from his company on or about 31 July 1943 "which was then engaged with the enemy". The phrase "engaged with the enemy" is equivalent to the phrase "before the enemy" as used in the 75th Article of War. It is properly construed as an allegation of place as well as time (CM France,28 January 1919, OAJAG 201-1200, Francis Slagle; CM ETO 1249 Marchetti).

4. On 29 July 1943, the 9th Division, when in the vicinity of Nicosia, Sicily, received orders to relieve the 1st Division which was in the line near that place. On 30 July, the 39th Infantry, a unit of the 9th Division, moved in the direction of the front lines. Company L was a part of the third battalion. The first and second battalions of the regiment went into the lines. The third battalion was in reserve "although at the time, the disposition was not known". Artillery fire could then be seen although shells did not fall close enough to Company L to require dispersion of the men. On the morning of 31 July the first and second battalions attacked the enemy and the third battalion went into the lines prepared to attack. Company L was then under artillery fire. Later on that day it actively engaged the enemy. It was in combat until the engagement ended on 6 August (R6-8).

Accused, on 30 July was a member of Company L as a "basic" in the weapons platoon. He was present with his platoon when it moved forward on that date in the direction of the battle line (R6,9). On the march at a point about 4 miles from Nicosia he received permission to "drop out" to defecate (R9,11). After relieving himself he remained in the area about 30 minutes and then continued his march. Approximately a quarter of a mile further in advance he again stopped to defecate but this time he did not attempt to rejoin his unit. He remained in the vicinity of this point the balance of the day (Friday 30 July), all of the next day (Saturday 31 July) and until Sunday 1 August. On the later date he commenced his wanderings about the island of Sicily, as he claimed, in search of his unit, but inasmuch as he did not discover it, he went to a central position in the island where he remained (R11,20; Matherly testimony). He declared in his testimony: "Since I couldn't find them and I heard the fighting in Sicily was all over, I did not feel so strongly about finding them. In other words, I gave up the search"(R11). About 30 days expired before accused returned to his organization by reporting into his Battalion headquarters (R7).

Accused was given permission to be absent from his unit for the purpose of defecating only. He received no general authority to leave his command (R7,9,20; Matherly testimony). The morning report of the company showed accused was absent without official leave on 31 July and returned to duty on 31 August (R7).

(a) - The Specification alleges that accused ran away from his company "on or about 31 July 1943". The proof is clear that he departed on the 30 July when he failed to return to his unit after he had been granted permission to leave the line for a special limited purpose. The

variance is non-prejudicial. The gravamen of the offense charged is accused's act in running away from his company when it was before the enemy; the duration of his subsequent absence is immaterial (CM ETO 1249, Marchetti). The phrase "on or about" fixed the time of the offense with the necessary degree of accuracy to inform accused when he committed the offense with which he was charged and to enable him to identify the offense on a plea of double jeopardy in any subsequent proceeding (Winthrop's Military Law and Precedents - Reprint-p.138; Berger v. United States 295 U.S. 78, 82; 79 L.Ed.1314,1318; 31 CJ secs. 212,454, pp.682,841).

While his platoon was advancing accused left it under special permission of Staff Sergeant Matherly for a particular limited purpose which contemplated an absence of short duration within immediate contact distance of the platoon. He did not return and thereafter remained away from the platoon for over thirty days. The offense of "running away" from his command can only be committed when a soldier is "before the enemy" when he departs from his command. Accused obtained permission to fall out from the ranks of his platoon temporarily for the purpose of answering a call of nature. Such permission was not a complete severance of his association with his platoon or of control over him by his superior officers. He remained with his platoon while acting within the authority of the permission granted him by Matherly. When he failed to rejoin his company and continue with it, he "ran away" from his company within the purview of the 75th Article of War.

(b) - The evidence is clear that accused and his company were on 30 July 1943 advancing towards the front as part of a movement intended to relieve the 1st Division, then in the battle-line. At that time artillery fire was visible. The 39th Infantry was in the procees of performing a definite tactical mission. Accused's battalion was supporting the first and second batallions in the carrying out of that mission. Although it was "in reserve" the battalion including Company L was tactically "before the enemy".

> "Actual engagement with the enemy at the time of the commission of the offense is not an essential prerequisite to conviction under AW 75, so long as there was a 'real contact with the enemy,' as the term is reasonably used. C.M.126528 (1919)." (Dig.Op.JAG, 1912-1940, sec.433 (3), p.304)).

(Cf: CM France, 26 May 1919, OAJAG 201-4498, Dominik; CM France 28 January 1919, OAJAG 201-1200, Slagle).

(c) - Conduct constituting an offense under the 75th Article of War must be the exercise of a conscious, voluntary will on the part of the offender (Winthrop's Military Law and Precedents - Reprint-p.623). There

is substantial evidence in the instant case to support the finding that accused's failure to return to and accompany his platoon into battle was a deliberate, conscious act on his part.

The record exhibits an attempt by the prosecution to bring home to the accused knowledge that his platoon, at the time he ran away from it was under orders to proceed into the battle line. Much of the evidence on this point is hearsay and inadmissible. However, such proof is not necessary.

> "It is not requisite that the accused should be in terms informed just when and where the fighting with the enemy is to take place. It is not customary for soldiers to be so informed. Where the general position of the enemy was a matter of common knowledge, and when the accused's company was moving in that direction, with identification tags changed to conceal the division to which it belonged, it was evidence enough that his company was expected shortly to be in combat. C.M.126112, C.M.126113 (1919)."
> (Dig.Op.JAG,1912-1940, sec.433(2), p.303)).

(d) - Accused's evidence is obviously an attempt to establish the fact that "he was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior". Such ultimate fact, if proved, would be a defense to the charge (Winthrop's Military Law and Precedents - Reprint-p.624). However, such defense presents an issue of fact, which is peculiarly within the province of the court to resolve either for or against accused. In this instance the court by its finding rejected accused's evidence. The Board of Review is bound by such finding if there is competent substantial evidence in the record to sustain it (CM 211586, Gerber; CM 203511, Wedmore; CM 192609, Rehearing (1930), Dig.Op.JAG, 1912-1940, sec.408(4), p.259; CM ETO 132, Kelly and Hyde, CM ETO 527, Astrella). While undoubtedly accused was suffering from a "mild form of dysentery" (R11) on 30 July, in the opinion of Captain John G. Stall, Medical Corps, he was not incapacitated to the extent of preventing him from continuing his march. There was no permanency in his affliction as shown by X-ray examination made at a considerably later date (R19). By his own testimony accused remained over two days in the area where he left his company without attempting to seek medical aid. Under these circumstances the finding of the court should not be disturbed by the Board of Review (CM ETO 1409, Mieczkowski).

5. The charge sheet shows that accused is twenty-seven years, five months of age and was inducted at Fort Dix, New Jersey on 24 January 1941. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the 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 reduced by the reviewing authority. The sentence imposed is authorized (AW 75). Violations of the 75th Article of War constitute military offenses; hence confinement in the Eastern Branch Disciplinary Barracks is proper. However, the address thereof should be changed to Greenhaven, New York (Cir.210, WD, 19 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN QUARTERS) _____ Judge Advocate

(284)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 16 MAR 1944 To: Commanding General, 9th Infantry Division.

1. In the case of Private BERNARD J. STACK (32057393), Company "L", 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as reduced by the reviewing authority, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2). This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1404. For convenience of reference please place that number in brackets at the end of the order: (ETO 1404).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1405

21 FEB 1944

U N I T E D S T A T E S	NINTH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Cefalu, Sicily, 4 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Private First Class JAMES R. OLIFF (33064853), Company D, 39th Infantry.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private 1cl James R. Oliff, Company "D", 39th Infantry, did, at French North Africa, on or about July 11, 1943, desert the service of the United States by absenting himself without proper authority from his organization located in a bivouac about area 5 miles west of Bizerte, French North Africa, with intent to avoid hazardous duty, to wit: "Action against the enemy", and did remain absent in desertion until he surrendered himself at the bivouac area, 39th Infantry, near Randazzo, Sicily, on or about August 17, 1943.

He pleaded not guilty, and was found guilty of the Charge, and of the Specification, guilty, except the words "the bivouac area, 39th Infantry, near Randazzo, Sicily, on or about August 17, 1943", substituting therefor the words "Constantine, Algeria, on or about July 21, 1943", of the excepted words, not guilty, of the substituted words, guilty. No evidence of

previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 25 years. The reviewing authority approved only so much of the findings of guilty of the Specification of the Charge and Charge as involved a finding of guilty of desertion at the time and place and under the circumstances as alleged, and terminated in a manner not proven at the time and place alleged, approved the sentence but remitted so much thereof as involved confinement in excess of 20 years, withheld the order directing the execution thereof pursuant to Article of War 50½, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement and ordered the prisoner held at Oran, Algeria, pending further orders.

3. The charge sheet shows that accused is 25 years of age. He was inducted at Baltimore, Maryland, on 18 July 1941. He had no prior service.

4. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the 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 (Cf: CM ETO 455, Nigg; CM ETO 1400, Johnston). The punishment for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Franklin Ritz Judge Advocate

Judge Advocate

Edward H. Sargent Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 21 FEB 1944 TO: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private First Class JAMES R. OLIFF (33064853), Company "D", 39th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. #210, sec.VI, par.2a, 14 September 1943 as amended by Cir. #331, sec.II, par.2, 21 December 1943). If you should suspend execution of that portion of the sentence adjudging dishonorable discharge, then a disciplinary training center should be designated as the place of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1405. For convenience of reference please place that number in brackets at the end of the order: (ETO 1405).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1406

25 FEB 1944

U N I T E D S T A T E S	9TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Cefalu, Sicily 3 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Corporal LAYTON G. PETTAPIECE, (32030037), Company "A", 39th Infantry.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.
Specification: In that Corporal Layton G. Pettapiece, Company "A", 39th Infantry, did, on or about July 8, 1943, at French North Africa, desert the service of the United States by absenting himself without proper leave from his organization located 5 miles west of Bizerte, French North Africa, with intent to avoid hazardous duty, to wit: "Action against the enemy", and did remain absent in desertion until he surrendered himself at the bivouac area, 39th Infantry, near Randazzo, Sicily, on or about August 17, 1943.

He pleaded not guilty, and was found guilty of the Charge, and of the Specification guilty, except the words "Until he surrendered himself at the bivouac area, 39th Infantry, near Randazzo, Sicily, on or about August 17, 1943", and substituting therefor the words "Until he surrendered himself at Setif, Algeria, on or about 16 July 1943," of the excepted words

not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Specification of the Charge and the Charge as involved a finding of guilty of desertion at the time and place and under the circumstances as alleged and terminated in a manner not proven, at the time and place alleged, approved the sentence but remitted so much thereof as involved confinement in excess of 25 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, directed that the prisoner be held at Oran, Algeria, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Having been informed by his platoon commander at a formation of his organization that they were about to go into combat (R9-11), accused took his fatigue clothes and toilet articles and left his unit on 8 July 1943 (R6,10). He did not rejoin the organization until 17 August 1943 (R20). However, his unsworn statement (R21) tends to show, and was apparently believed by the court, that he returned to military control after approximately eight days of unauthorized absence. The extract copy of morning report (Exhibit 1) contains an entry for 17 August 1943 as follows:-

> "Cpl.Pettapiece, erroneously carried fr. AWOL to des. Correct status AWOL. Fr. AWOL to abs. hands military authorities Setif. FNA as of July 16/43 to arrest in qrs."

Prior to his departure, the accused made the statement to his platoon commander that he would not make another amphibious landing and that he thought he had done his part in the war and deserved a break (R12-15,16).

4. Absence without leave having been established prima facie by the introduction of an extract copy of the morning report of the accused's organization for the period in question and by satisfactory testimony of those having personal knowledge, the only question presented by the record is whether it contains sufficient evidence of accused's specific intent to avoid hazardous duty, to wit, action against the enemy within the meaning of Article of War 28. In the opinion of the Board of Review, such specific intent is clearly established by the evidence(CM ETO 105, Fowler; CM NATO 397, Barbieri, et al; CM ETO 1400 Johnston; CM 228400, McElroy). Although intent to avoid hazardous duty was not shown in the following cases, they are worthy of citation for the discussion of such issue which they contain: CM ETO 455, Nigg; CM ETO 564, Neville; CM ETO 527, Astrella; CM 227459, Wicklund; CM 230826, McGrath; CM 231163, Sinclair; CM 224805, Conlon; CM 220947, Calvin.

5. The charge sheet shows that accused is 25 years of age. He was inducted at Buffalo, New York, 17 January 1941. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense. 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. The penalty for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(292)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 25 FEB 1944 To: Commanding General, 9th Infantry Division, APO 9, U.S.Army.

1. In the case of Corporal LAYTON G. PETTAPIECE, (32030037), Company "A", 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. #210, Sec. VI, par.2a, 14 September 1943 as amended by Cir. #331, Sec. II, par.2, 21 December 1943). This may be done in the published general court-martial order. If you should suspend execution of that portion of the sentence adjudging dishonorable discharge, then a disciplinary training center should be designated as the place of confinement.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1406. For convenience of reference please place that number in brackets at the end of the order: (ETO 1406).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1408

17 MAR 1944

U N I T E D S T A T E S	9TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Cefalu, Sicily 13 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Private JOSEPH C. SARACENO (32029953), Company "B", 39th Infantry.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE: Violation of the 75th Article of War.
Specification: In that Private Joseph C. Saraceno, Company "B", 39th Infantry, then Private First Class, Company "B", 39th Infantry, did in the vicinity of Randazzo, Sicily, on or about August 13, 1943, run away from his Company which was then engaged with the enemy, and did not return until after the engagement had been concluded, August 23, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for four days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved the sentence but remitted so much thereof as involved confinement in excess of 20 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement, directed that the prisoner be held at Oran, Algeria pend-

ing further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

Accused was an ammunition bearer in the mortar section of the weapons platoon of Company B, 39th Infantry. On 13 August 1943, the first battalion, of which Company B was a unit, was ordered to move from "an assembly area", in column, toward the town of Randazzo, Sicily. Company C was the leading unit and Company B was immediately behind it. Company C moved out and came under light fire. Company B followed this unit and received some artillery fire which was not heavy (R8). At about 1500 hours on 13 August while on a hill it was shelled. Accused ran to First Sergeant Walter P. Zelichowski's fox hole and said he had been wounded. It was "just a split on the thumb nail" and Zelichowski told accused to remain with him. After the shelling was over, accused informed Zelichowski that he was going to the aid station but the latter told him that he was not hurt seriously enough for that and that the company aid man would dress his wound. Having been ordered to take up a defensive position overlooking Randazzo (Company C being then under small arms fire), Company B went forward on the Cesaro-Randazzo road. When Zelichowski checked the personnel of the company at 2400 hours, the accused was not present and a search of the area did not disclose him (R5-7). Second Lieutenant Ernest E. McLaughlin, accused's platoon leader, testified that accused was with the platoon during the shelling and after the shelling ceased, and also with it when they had advanced "a little bit further, into a small draw", but that he did not see him after that. No one had been reported to him as wounded up to this time (R11). The accused was not again seen for ten days when he rejoined his company in the vicinity of Mt. Etna "when the Battalion went into a more or less rest area after the fall of Randazzo" (R9; Pros.Ex.I). No one had given accused permission to be absent (R11).

Captain Heinrich Kohlmoos, M.C., Battalion Surgeon, Medical Detachment, 39th Infantry, testified that on the evening of 12 (sic) August accused came to him with a slight wound, "a very superficial laceration", on the right thumb. He had his technician dress it and told accused to report to his company for duty. The company aid man could have dressed this small wound. Captain Kohlmoos did not remember that accused's right index finger, as well as his thumb, was injured. There was an "old, healed scar" on that finger, but he could not say how old (R12-13).

4. Accused was the only witness for the defense. He testified that on the evening of 12 August, "I think it was", his company was shelled by the enemy. A piece of shrapnel hit "both" of his fingers. He ran to another fox hole near the first sergeant and laid there until the shelling was over. When it became dark, his platoon moved out. He asked the first sergeant if he could go on and the sergeant told him to get in back of the platoon. His fingers were getting "all stiff by now" and he stopped in a gully while the rest of the company was moving out "by leaps and bounds". The soldier ahead of accused did not tell him (as he had

promised) that they were moving out and when he looked again for him, he did not see him. Then he ran about 300 yards to catch up with this soldier but did not find him. He decided to take a "break there" and a company passed him. He waited there a little while then went back to have his hand dressed. After this, he tried to find his outfit but could not. He lost all sense of direction and the following morning found himself in the mountains. He walked all day but did not hear any gunfire and was "up there" for two days looking around. He came to a dirt road, met a jeep, and rode to Palermo where he inquired of the Provost Marshal the location of the 39th Infantry. He was advised to ride to the stragglers' post and then secure a ride to Nicosia where the Division CP was located. He waited two days for transportation and then rode on a ration truck. About a day and a half were required to make the journey. He turned himself into the Division stragglers' post and remained there for two days when "the Division" brought him to his Regiment and he was then taken to his company.

On cross-examination, he stated that the shell, containing the shrapnel which cut his thumb, burst about 15 yards from him. The first sergeant had told him that his wound was "not much" and to go on with the company. He did not tell accused to see the company aid man, nor did accused make an effort to see him. He had remained in his fox hole until the forward part of his company had moved out and he then sought to join it. When he "caught up with the company" he "was all out of wind, and they kept on going on and so I got behind" (R14-16).

5. (a) Accused is charged with running away from his company while it was "engaged with the enemy". The phrase "engaged with the enemy" is equivalent to the phrase "before the enemy" as used in the 75th Article of War (CM ETO 1249, Marchetti, CM ETO 1404, Stack).

(b) The evidence is clear that accused left his company while before the enemy and did not rejoin it until it had reached the vicinity of Mt. Etna "when the Battalion went into a more or less rest area after the fall of Randazzo". While the allegation in the Specification: "did not return until after the engagement was concluded" was surplusage and did not require proof (CM ETO 1659, Lee) it was fully sustained in this instance.

(c) There is no doubt that accused was "before the enemy" when he ran away. His platoon was actually under artillery fire and its members were required to take cover. This basic element of prosecution's case was sustained by substantial proof (CM ETO 1249, Marchetti; CM ETO 1404, Stack; CM ETO 1659, Lee).

(d) There can be no serious contention that accused was suffering from "a genuine and extreme * * * disability at the time of the alleged misbehaviour" such as would constitute a defense (Winthrop's Military Law & Precedents - Reprint - p.624). In any event this was a question of fact which was resolved against accused by the findings of the court and being supported by substantial competent evidence will not

be disturbed by the Board of Review (CM ETO 1409, Mieczkowski; CM ETO 1404, Stack).

6. The charge sheet shows that accused is 24 years nine months of age and was inducted at Buffalo, N.Y. on 16 January 1941. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. 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 approved. The punishment for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 75). Confinement in a United States Disciplinary Barracks is authorized (AW 42). The place of confinement should be changed, however, to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN QUARTERS) _____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 18 MAR 1944 TO: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private JOSEPH C. SARACENO (32029953), Company "B", 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2). This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1408. For convenience of reference please place that number in brackets at the end of the order: (ETO 1408).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871.

BOARD OF REVIEW

ETO 1409

16 MAR 1944

U N I T E D S T A T E S	9TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Cefalu, Sicily, 14, 15 September 1943.
Private RAYMOND F. MIECZKOWSKI (36035548), Company "L", 39th Infantry.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private Raymond F. Mieczkowski, Company "L", 39th Infantry, being present with his Company while it was engaged with the enemy, did, in the vicinity of Cerami, Sicily, on or about August 2, 1943, shamefully abandon the said Company and did fail to rejoin it until the engagement was concluded August 6, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement, directed that the prisoner be held at Oran, Algeria pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The only question requiring consideration is whether the evidence shows that accused "was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehaviour" which condition constitutes a defense to the Charge (Winthrop's Military Law & Precedents - Reprint - p.624). This was essentially a question of fact for the determination of the court. It declined to believe that accused's disability was genuine and extreme and as there is substantial evidence that accused at the time and place alleged was able to perform his military duties, the finding of the court is conclusive on appellate review (CM ETO 492, Lewis; CM ETO 1388, Madden(O); CM ETO 1432, Good).

4. The charge sheet shows that accused is 25 years 11 months of age and was inducted at Chicago, Illinois 10 June 1941. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offense. 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 (CM ETO 1249, Marchetti). The punishment for violation of the 75th Article of War is death or such other punishment as a court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Beekman, New York is authorized (AW 42) but the address should be changed from Beekman, New York to Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN QUARTERS) _____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 16 MAR 1944 TO: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private RAYMOND F. MIECZKOWSKI (36035548), Company "L", 39th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2). This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1409. For convenience of reference please place that number in brackets at the end of the order: (ETO 1409).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations.
APO 871.

BOARD OF REVIEW. 15 Feb 1944

ETO 1411.

U N I T E D S T A T E S	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private GEORGE R. RIESS (15054186), Detachment "H", Headquarters Detachment, Headquarters Eastern Base Section.	Trial by G.C.M., convened at Kettering, Northamptonshire, England, 21 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. The Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates.

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification 1: In that Private George R. Riess, Detachment H, Headquarters Detachment, Headquarters Eastern Base Section, did, at Eastern Base Section Transient Camp Number One, Northamptonshire, England, on or about 27 December 1943, feloniously take, steal and carry away certain property, to wit, one pair of government issue wool olive drab trousers and one government issue wool olive drab shirt all of the aggregate value of about nine dollars and seventy-two cents ($9.72), the same being the property of the United States Government and duly issued to Technician Fourth Grade James R. Leonard, Detachment H, Headquarters Detachment, Headquarters Eastern Base Section.
Specification 2: (Finding of Not Guilty).

CHARGE II: Violation of the 61st Article of War.
Specification: In that Private George R. Riess, Detachment H, Headquarters Detachment, Headquarters Eastern Base Section did, without proper leave absent himself from his organization and station at Eastern Base Section Transient Camp Number one, Northamptonshire, England, from about 0800, 29 December 1943 to about 1300, 8 January 1944.

CHARGE III: Violation of the 96th Article of War.
(Finding of Not Guilty).
Specification: (Finding of Not Guilty).

He pleaded not guilty, and was found not guilty of Specification 2, Charge I, and of Charge III and its Specification, guilty of Specification 1, Charge I and Charge I, and of Charge II and its Specification. Evidence was introduced of one previous conviction by summary court-martial for breach of restriction in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority approved the sentence, withheld the order directing execution thereof pursuant to the provisions of Article of War 50½ and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement.

3. Larceny of Government-owned property may be laid under Article of War 93 (See CM 195454, Fisher; CM 197131, Brantley). There was no direct evidence that the shirt and trousers described in Specification 1, Charge I, were property of the United States as alleged, but each of these articles is described as being "olive drab" and "general issue" (R8; Pros. Exs.B,C), and the owner testified that chevrons were on the shirt before it was stolen and that the shirt was issued to him when he became a soldier (R11-12). The articles were introduced in evidence. The question as to whether the articles described were the property of the United States was one of fact for the sole determination of the court, and in view of the evidence summarized above the Board of Review will not disturb its findings (CM ETO 132, Kelly and Hyde).

4. The only question requiring consideration is the propriety of the designation of a Federal Reformatory as the place of confinement. MCM, 1928, par.90b, p.81, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

Confinement in a reformatory is authorized only when confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized in this case because no offense of which accused was found guilty (larceny of property of a value not exceeding $50 and absence without leave) is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States of general application within the continental United States or by the law of the District of Columbia. (AW 42; 18 U.S.C. sec. 466; Cf: 18 USC 82 as amended 4 April 1938, Chap.69; 52 Stat. 197).

5. The charge sheet shows that accused is 21 years of age and that he enlisted 8 August 1940 at Fort Thomas, Kentucky for three years and that the period of his service was extended for the duration of the war plus six months. He had no prior service.

6. 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 three years in a place other than a penitentiary, Federal reformatory or correctional institution.

_____ Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

(306)

1st Ind.

15 FEB 1944

WD, Branch Office TJAG., with ETOUSA. TO: Commanding Officer, Eastern Base Section, SOS, ETOUSA, APO 517, U.S. Army.

1. In the case of Private GEORGE R. RIESS (15054186), Detachment H, Headquarters Detachment, Headquarters Eastern Base Section, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years in a place other than a penitentiary, Federal Reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1411. For convenience of reference please place that number in brackets at the end of the order: (ETO 1411).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

29 FEB 1944

ETO 1412

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JOHN C. MEDEIROS (31113421), Company A, 37th Replacement Battalion, 10th Replacement Depot.	Trial by G.C.M., convened at Whittington Barracks, Lichfield, Staffordshire, England, 25 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.
Specification: In that Private John C. Medeiros, Company A., 37th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Whittington Barracks, Lichfield, Staffordshire, England, on or about 19 May 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Kingsnorton, Birmingham, Warwickshire, England, on or about 8 January 1944.

He pleaded not guilty to the Charge and Specification but "guilty to the 61st. Article of War in that he was absent without leave from 19 May, 1943 to on or about 8 January, 1944." He was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction

by special court-martial, for absence without leave for 71 days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 15 years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused's absence without leave from Lichfield from 19 May 1943 to 8 January 1944 is established by his plea of guilty of a violation of Article of War 61 (R7), which he reaffirmed after its meaning was explained to him (R11), and by other competent evidence (R8-11; Pros.Ex.A). He was apprehended in civilian clothes at King's Norton, Birmingham on 8 January 1944 by a British detective constable in conjunction with two American Military Police officers. Upon apprehension he admitted to the constable that he was a deserter (R9).

Absence without leave having been established, the only question presented by the record is whether it contains sufficient evidence of accused's specific intent not to return to the military service of the United States. In the opinion of the Board of Review, such specific intent is clearly established by evidence exclusive of accused's admission that he was "a deserter" (CM ETO 656, Taylor; CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet; CM ETO 875, Fazio; CM ETO 913, Pierno; CM ETO 952, Mosser; CM ETO 960, Fazio et al; CM ETO 1165, Vittitoe; CM ETO 1259, Rusniaczyk). It is therefore unnecessary to consider the effect of such statement.

4. The charge sheet shows that accused is 24 years two months of age and was inducted at Providence, Rhode Island 22 April 1942. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offense. 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. The punishment for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is authorized (AW 42; WD, Circular #291, sec.V, 3a and b, 10 November 1943).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 FEB 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private JOHN C. MEDEIROS (31113421), Company A, 37th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1412. For convenience of reference please place that number in brackets at the end of the order: (ETO 1412).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

25 FEB 1944

ETO 1413

U N I T E D S T A T E S	)	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Private FRANCISCO R. LONGORIA, JR., (38073700), Company B, 49th Replacement Battalion, 10th Replacement Depot.	)	Trial by G.C.M., convened at Lichfield, Staffordshire, England, 19 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Francisco R. Longoria, Company B, 49th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, without proper leave, absent himself from his organization at Whittington Barracks, Lichfield, Staffordshire, England, from on or about 1830 hours 8 January 1944 to on or about 2330 hours 8 January 1944.

CHARGE II: Violation of the 64th Article of War.
Specification: In that * * * * * * * * *, did, on the Lichfield-Tamworth Road, near Lichfield, Staffordshire, England, on or about 8 January 1944, strike JAMES A. KILIAN, Colonel, Cavalry, his superior officer, who was then in the execution of his office on the body and face with his hands and feet.

He pleaded guilty to Charge I and its Specification, not guilty to Charge II and its Specification and was found guilty of both charges and their specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for eight days from camp in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 25 years. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused pleaded guilty to Charge I and its Specification (R5). The evidence introduced with reference thereto, showing his absence without proper leave during the period alleged, fully supported the plea of guilty (R11,18,20; Pros.Ex.4) (CM ETO 1266, Shipman).

4. The record contains substantial evidence that accused and Private Lemuel G. Poe (34703811), committed a deliberate and unprovoked battery upon Colonel James A. Kilian, Commanding 10th Replacement Depot, United States Army, their superior officer, who was then in the execution of his office, as alleged in Charge II and its Specification (R13-17). Poe was tried separately for this offense (and for absence without leave) on the day previous to the trial of accused herein. The evidence in both cases is in effect identical. Reference is made to the approved holding in the Poe case (CM ETO 1360, Poe) for a description of the attack upon Colonel Kilian.

5.(a) Accused was identified as one of Colonel Kilian's assailants by evidence independent of the testimony of Colonel Kilian. However, the accused by voluntarily speaking at the trial enabled Colonel Kilian to make a positive identification of him as one of the two attackers. Accused thereby personally and voluntarily waived his immunity under the Fifth Amendment to the Federal Constitution (CM ETO 1360, Poe, and authorities therein cited).

(b) Accused and Poe at request of defense counsel exhibited themselves before the court while Colonel Kilian was testifying for the purpose of demonstrating inaccuracy in the witnesses' testimony (R25). Manifestly no question concerning the regularity of such action can arise since it was initiated by the defense.

6. The charge sheet shows that accused is 25 years eight months of age and that he was inducted at Fort Sam Houston, Texas 9 January 1942. He had no prior service.

7. The court was legally constituted and had jurisdiction of the accused and offenses. 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 approved sentence. Confinement in a United States Disciplinary Barracks is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

(314)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 25 FEB 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private FRANCISCO R. LONGORIA, JR., (38073700), Company B, 49th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. #210, sec.VI, par.2a, 14 September 1943 as amended by Cir. #331, sec.II, par.2, 21 December 1943). This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1413. For convenience of reference please place that number in brackets at the end of the order: (ETO 1413).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

2 MAR 1944

ETO 1414

U N I T E D S T A T E S)	VII CORPS.
v.)	Trial by G.C.M., convened at Downton, Wiltshire, England 30 January 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. 2912th Disciplinary Training Center, Shepton Mallet, Somerset (England).
Staff Sergeant RUSSELL D. ELIA (32085738), Reconnaissance Company, 813th Tank Destroyer Battalion.)	

OPINION by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review which submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Staff Sergeant Russell D. Elia, Reconnaissance Company, 813th Tank Destroyer Battalion, did, at a Battalion Training area, approximately seven (7) miles north, northwest of Tidworth, Wilts, England, on or about 1445 hours, 10 January 1944, involuntarily, with culpable negligence, and unlawfully kill Technician, Fourth Grade Shular T. Freeman, Company "C" 813th Tank Destroyer Battalion, by shooting him in the right side of the back with a twelve (12) gauge shot-gun.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or

to become due and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year, suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Orders No. 1, Headquarters VII Corps, APO #307, 8 February 1944.

3. For the purpose of consideration of the issue involved in the case, the pertinent evidence for the prosecution may be summarized briefly as follows:

Preceding a company field exercise accused, in company with Technician Fourth Grade Shular T. Freeman (the deceased) and First Lieutenant Donald E. Sperry, reached the training area in advance of the company. The three men then engaged in hunting birds and rabbits. They were driving over the field during such venture in a jeep. Lieutenant Sperry carried a hammerless, single barrel shotgun and accused was armed with a 12 gauge shotgun bearing an exposed hammer. Both guns were loaded (R6). Immediately prior to the shooting which resulted in the death of Freeman, the party occupied seats in the jeep as follows: Lieutenant Sperry drove the vehicle - a left hand drive, deceased sat to his right on the front seat; accused occupied the rear seat (R7). Previous to the fatal incident accused was heard to caution the deceased concerning Lieutenant Sperry's gun which he was holding between the two front seats and which was pointed to the rear in accused's direction (R8,9). Accused also testified to that fact (R13). The only evidence regarding the exact position of accused's weapon during the time in question was given when he took the stand under oath on his own behalf. He testified that it lay across his knees, muzzle to his left and pointing out of the vehicle (R13,14).

At the time of the fatal shot accused did not have his hands on the gun (R16). The sole safety device on the gun was the position of "half cock" of the hammer which required it to be drawn back in the direction of full cock before it could go forward to strike the primer of the cartridge (R8,13,16). It was not necessary, however, for the hammer to be put in "full cock" position before it would fall on the primer (R16).

Immediately preceding the shot which killed Freeman, the party was riding over the field in the jeep in search of game at a speed of 15 to 20 miles per hour. The ground was stubble and in the nature of a normal field. Two rabbits were flushed while the driver was driving in the direction of some quail. He applied the brakes at once and swerved to the right. The accused's gun was heard to discharge and the load entered the deceased's right posterior chest (Pros.Ex.1) - the right side of his back. Deceased pulled himself out of the jeep, took a step and collapsed - dying almost

immediately. Following the noise of the shot Lieutenant Sperry heard accused say in an odd tone of voice: "I shot him" (R7,9,13).

Accused was a supply sergeant, had hunted since he was 14 and was fully familiar with the type of gun he was carrying and with general safety rules and precautions governing the handling of fire arms (R8,13, 17). Further, before entering the vehicle he had checked the safe position of the gun (R15).

4. At the close of the case for the prosecution, the defense moved for a finding of "not guilty" (R10) on the ground that the prosecution had failed to prove the degree of negligence requisite to sustain the allegations of involuntary manslaughter as set forth in the specification of the charge. The court denied the motion (R11). The motion was not renewed at the conclusion of the evidence. Under the rule of CM ETO 564, Neville any error in denying the motion was thereby waived. The case will therefore be considered upon the entire evidence.

5. The sole question for consideration is whether the record of trial contains any substantial, competent evidence to support the court's findings of guilty of involuntary manslaughter through culpable negligence. There is neither an averment in the specification nor intimation or inference in the evidence of any unlawful act on accused's part in connection with the homicide. Unless accused's conduct, measured by the standards of the settled law on the subject, amounted to culpable negligence, his conviction must be disapproved and his sentence vacated. It is the proper function and within the province of the Board of Review to determine whether the evidence is legally sufficient to support inferences of fact and whether the record of trial contains any substantial, competent evidence of guilt (CM ETO 455, Nigg; CM 223336 (1942), Bul. JAG., Aug 1942, par.422 (5), p.159,162). Whether negligence is culpable under a given state of facts is ordinarily for the jury; however, it may become a question of law when it is so slight as not to meet the required standard. People v. Angelo, 246 N.Y. 451,159 NE 394,396).

6. The degree of negligence required at common law to support a criminal charge is universally recognized as being greater than that which suffices for civil tort actions.

> "While the kind of negligence required to impose criminal liability has been described in different terms, it is uniformly held that it must be of a higher degree than is required to establish negligence upon a mere civil issue, and it must be shown that a homicide was not improbable under the facts as they existed which should reasonably have influenced the conduct of accused." (29 CJ sec.141, p.1154) (See also : Cain v. State, 55 Ga.App.376; 190 SE 371,374;People v.Hoffman,294 NYS 444).

Criminality under these circumstances is not predicated upon mere negligence or carelessness,

> "....but upon that degree of negligence or carelessness which is denominated 'gross' and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of that indifference to consequences which in some offenses takes the place of criminal intent." (Fitzgerald v. State, 112 Ala. 34,39, 20 S. 966).

The court concluded in the last quoted case that the mere handling of a pistol to another with the muzzle toward him did not amount to such a reckless handling as to make the resulting accidental discharge criminal. The highest degree of care is not the standard of care to be required in measuring responsibility under a statute providing that the killing of a human being by the "culpable negligence" of another shall be manslaughter. (State v. Horner, 266 Mo. 109, 180 SW 873).

The case of State v. Custer, 129 Kan. 381, 282 P. 1071, 1077, 67 ALR 909, lucidly explains that "culpable" in the phrase "culpable negligence" indicates some such meaning as criminal, and its use was intended to mark a distinction of some sort between negligence which is merely a tort, paid for by money damages, and the negligence which is a crime, an offense against society, which must be paid for by penal punishment. The case is valuable not alone for its exhaustive treatment of the subject but also for its many citations. A proper understanding of the meaning of "culpable negligence" of necessity rests upon the assumption that accused knew the probable consequences, but was intentionally, recklessly or wantonly indifferent to the results(State v. Stansell, 164 SE (N.C.) 580,582).

Bare proof of homicide while hunting unaccompanied by evidence that accused was reckless in his manner of hunting or in the handling of his gun - even though the hunting be done on another's property without a permit - is not a criminal offense(State v. Horton, 139 N.C. 588, 51 SE 945, 1 LRA (NS) 991, 111 Am.St.Rep.818, 4 Ann Cas 797). In the cited case the victim's death was accidentally caused by the discharge of the gun when it was unintentionally pointed at him by the accused. The court found no evidence of an unlawful act, carelessness or negligence.

7. The record of trial in this case is totally devoid of any evidence that accused did or failed to do anything which could reasonably be expected of him. The validity of accused's conviction must be supported, if at all, upon the consideration of whether the mere riding in the jeep over a stubble field with a loaded shot-gun resting on the accused's knees, pointed away from the occupants and with the hammer at "half cock",

constitutes "culpable negligence" within the meaning of Paragraph 149a, p.166, Manual for Courts-Martial 1928 and the law set forth in paragraph 6 above. The Board of Review is of the opinion that the record of trial does not contain any substantial competent evidence of "culpable negligence", nor of any facts from which it could be legitimately inferred. It is even doubtful whether the record contains evidence to justify a conclusion that he was guilty of that degree of simple or ordinary negligence which would support a civil judgment for damages. The fact that his gun was not equipped with the most desirable type of safety device is not persuasive, much less conclusive, on the issue of culpable negligence. It is also to be observed that were it not for the abrupt stopping of the jeep by Lieutenant Sperry, the unfortunate event of Freeman's death would not have taken place. Accused cannot justifiably be charged with the duty of anticipating that such fortuitous circumstances would occur. His actions between the time of stopping and the discharge of the gun were more reflexive than conscious and the fact that he did not then have his hands on the weapon is not viewed as evidence of reckless disregard of or indifference to consequences. Such evidence falls short of shocking one's sense of proper action under the circumstances which is implicit in the conception and definition of "culpable negligence".

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

B. Franklin Riter Judge Advocate

Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

(320)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 4 MAR 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C., 1522) and as further amended by the act of 1 August 1942 (56 Stat.732; 10 U.S. C., 1522) is the record of trial in the case of Staff Sergeant RUSSELL D. ELIA (32085738), Reconnaissance Company, 813th Tank Destroyer Battalion. I concur in the opinion of the Board of Review, and for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which accused may have been deprived by reason of such findings and sentence so vacated be restored.

2. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

3 Incls:
Incl.1: Record of trial
Incl.2: Form of Action
Incl.3: Draft GCMO

(Findings and sentence vacated. GCMO 19, ETO, 17 Mar 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

29 FEB 1944

ETO 1415

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ROY P. COCHRAN (35202849), Company A, 831st Engineer Aviation Battalion.	Trial by G.C.M., convened at Manchester, England 20 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private, then Staff Sergeant, Roy P. Cochran, Company A, 831st Engineer Aviation Battalion, did, without proper leave, absent himself from his camp at Willingale, Essex, England, from about 20 May 1943 to about 24 July 1943.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that Private, then Staff Sergeant, Roy P. Cochran, Company A, 831st Engineer Aviation Battalion, did, at 90 Alexandra Road, South, Whalley Range, Manchester, 16, England, on or about 1 June 1943, feloniously steal, take and carry away the following articles, property of Elsie Kathleen Harrison a British Civilian; two rings, value twenty-seven pounds ($108); bank notes, value ten pounds ($40.00); twenty-one National Savings Certificates, British,

value about fifteen pounds, fifteen shillings ($63.00).

CHARGE III: Violation of the 96th Article of War.
Specification: In that Private, then Staff Sergeant, Roy P. Cochran, Company A, 831st Engineer Aviation Battalion, did, at Gardenhurst, Sedjley Park Road, Prestwick, Manchester, England, on or about 6 July 1943, with intent to defraud, unlawfully pretend to the Rev. C. Reed that he, the said Roy P. Cochran, was the real owner of twenty-one National Savings Certificates, British, well knowing that the said pretenses were false, and by means thereof did fraudulently obtain from the said Rev. C. Reed the sum of ten pounds ($40.00).

He pleaded guilty to Charge III and its Specification and not guilty to Charges I and II and their respective specifications and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Adequate substantial proof of the offenses alleged in the specifications of Charges I and II was adduced to support the findings and sentence (CM ETO 885, Van Horn; CM ETO 1327, Urie (0)). Although the accused was proven to have been in possession of only a portion of the stolen property (R7,10), such evidence coupled with proof that he had access to all of it (R9) at a time not unreasonably remote under the circumstances, is sufficient to support the inference that he stole the whole (CM ETO 952, Mosser; CM 157982, Acosta; CM 192031, Allen; Underhill's Crim. Ev., 4th Ed., sec.514, p.1040; 1 Wharton's Crim. Ev., 11th Ed., sec.191, p.198).

4. The Review of the Staff Judge Advocate contains a discussion of numerous irregularities in the proceedings none of which injuriously affects the substantial rights of the accused. Further comment here is unnecessary.

5. The charge sheet shows accused to be 35 years four months of age; he served with Company A, 113th Engineers from 11 April 1941 to 3 November 1941 and was recalled to active service from Enlisted Reserve Corps and inducted in Army of the United States 19 January 1942 for duration of war and six months.

6. The court was legally constituted and had jurisdiction of the person and offenses. 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. Confinement in a penitentiary is authorized for the offense of larceny of more than $50.00 (AW 42; Sec.287 Federal Criminal Code; 35 Stat. 1144; 18 U.S.C., 466). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (WD, Circular #291, Sec.V, 3a and b, 10 November 1943).

_____ Judge Advocate

_____ Judge Advocate

SICK IN HOSPITAL
_____ Judge Advocate

(324)

1st Ind.

29 FEB 1944

WD, Branch Office TJAG., with ETOUSA. TO: Commanding Officer, Western Base Section, ETOUSA, APO 515, U.S. Army.

1. In the case of Private ROY P. COCHRAN (35202849), Company A, 831st Engineer Aviation Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1415. For convenience of reference please place that number in brackets at the end of the order: (ETO 1415).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

-1 MAR 1944

ETO 1432

U N I T E D S T A T E S	)	1ST INFANTRY DIVISION.
	)	
v.	)	Trial by G.C.M., convened at Dorchester, Dorset, England, 21 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States, Disciplinary Barracks, Greenhaven, New York.
Private DONALD R. GOOD (13053072), Company G, 18th Infantry.	)	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Donald R. Good, Company G, 18th Infantry did, in the vicinity of Oued Zarga, Tunisia, on or about April 22, 1943, desert the service of the United States by absenting himself from his organization with intent to avoid hazardous duty, to wit: combat with enemy forces, and did remain absent in desertion until he was apprehended at Algiers, Algeria, on or about September 23, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 1st Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to

become due and confinement at hard labor for the term of the natural life of the accused, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

Private First Class James G. Gilmore, Company G, 18th Infantry, testified that about 22 April 1943 both he and accused were battalion runners. They loaded trucks preparing to move to new area and on arrival at destination unloaded the trucks and placed the rolls in a company pile (R8,9). Gilmore reported to the Company Commander and informed him that he and accused were going to the battalion area as runners. On his return he did not see accused so believed he had proceeded to the battalion. When he arrived at the battalion area he made many inquiries as to accused but he was not there (R6). The next day Gilmore returned to the company and inquired for Good, whose absence meant "double work" for him (R7). The company was "moving up" (R8) to relieve British troops (R9) and "we knew that we were going into an attack" (R8). Gilmore's idea was that the enemy was two miles or less away. At a company formation Captain Jeffrey (Gordon A. Jeffrey, commanding Company G, 18th Infantry) informed the company that it was soon going into an attack (R9).

First Sergeant Joseph McGarrigle, Company G, 18th Infantry, testified that about 20 April 1943 the company "moved up" by truck to the vicinity of Oued Zarga, Tunisia. Accused was a member of the company and moved with it. On the 21 April accused was reported to him as absent and on 22 April he dropped accused in his Morning Report as missing in action. He did not see accused again until he reported "here at APO No.1 U.S. Army" (R11). The general opinion was that the company was moving up to relieve the British who were holding the line (R12) and were in the area when relieved. It was common knowledge that the company was going into combat and it saw the British moving out. It was known to the men that the Company Commander had gone forward on a reconnaissance (R13) to establish front lines and find the position the company was to occupy (R14).

Captain Jeffrey testified that on 20 April 1943, Company G, as part of the 18th Infantry, was moving up from the southern part to the northern part of Tunisia, where the British were being relieved, because of heavy casualties so he believed (R15). On 20th April, he left the company with the battalion commander in order to make reconnaissance of the British lines in order to determine the placement of his company (R15). He had previously assembled the company one morning and informed the men that they were going soon into combat. He could not definitely state whether accused was present on this occasion (R20). Accused was a company runner to the battalion and it was reported to him that accused was missing. A search was made both in the company and in the battalion and he could not be located (R15). Witness identified a duly authenticated extract copy of the

Morning Report of Company G, 18th Infantry, for 27 December 1943 which was received in evidence without objection as Pros.Ex."A". It read in part as follows: "Dec 27/43: 13053072 Good Pvt To correct remark of Apr 23/43 which reads Duty to MIA sn Apr 22/43 as erroneously made should read Duty to AWOL sn 22 Apr/43" (R16; Pros.Ex."A"). On 28 November 1943 accused made a sworn statement to him after he had first duly warned accused of his rights in regard thereto, which statement was typed by the first sergeant as accused dictated it (R17). The statement was received in evidence as Pros.Ex."B" and was read to the court. In pertinent part it is as follows:

" APO 1, U.S.Army,
28 November, 1943.

* *

I Private Donald R. Good, ran away from my company during unloading of trucks in the vicinity of Oued Zarga, northwest of Beja. I unloaded with the Company and then got back on the truck and went back with the trucks to the Quartermaster Battalion at Tebessa, staying with the Military Railway Section at Tebessa for about three weeks. I then went to Constantine, where there were quite a number of men on limited service. I passed myself off as a soldier on limited service to a Quartermaster Master Sergeant and after the Master Sergeant had found out my true status and was ready to turn me over to Military Authorities, I left and went to a town called Athmina, where a British Hospital was located. I met a British Army Nurse who did not know my status and who made me acquainted with a few British Officers. I remained at this town and then for about two months I stayed with some French Soldiers in a farmhouse until I decided where to go. I then went to Algiers with a convoy and was arrested in Algiers by the MBS Military Police. I remained under guard in the MBS Stockade in Algiers for about one month and fifteen days, was transferred under guard to Bizerte to a stockade at that place for about one week, being again transferred to the IBS Army Military Prison in Palermo Sicily, staying there for about two and one half weeks. We were released under guard being turned over to the Commanding Officer, 1st Divisional Provisional Company in Sicily which was attached to the 82nd Reconnaissance 2nd Armored Division. I arrived at this camp joining Company G, 18th Infantry at 0525 Sunday Morning November 28, 1943.

s/ Donald R. Good
t/ DONALD R. GOOD,13053072
Pvt Co G, 18th Infantry "

(R18-19; Pros.Ex."B"). Jeffrey saw accused for the first time after his absence on 28 November 1943 (R20). He stated that accused did not have permission to be absent at any time between 22 April 1943 and 23 September 1943 (R23).

The accused, after conferring with his counsel, announced in open court that he would agree to a stipulation proposed by the prosecution to the effect "that the accused returned to military control on or about the 23rd of September, 1943 in Algiers, Algeria" (R21).

4. The defense presented no testimony and accused elected to remain silent (R23).

5. Under the Specification in this case the proof must show:

> "(a) That the accused absented himself without leave, * * * * from his * * * * organization * * * * as alleged; (b) that he intended, at the time of absenting himself or at some time during his absence, to * * * * * avoid hazardous duty * * * * * as alleged; (c) that his absence was of a duration and was terminated as alleged; and (d) that the desertion was committed under the circumstances alleged" (Manual for Courts-Martial 1928, par.130a, p.143).

Accused was a runner between his company and the battalion and as such it may properly be inferred that he would learn of all matters that were of common knowledge in the organization. The fact that it was moving up to relieve the British and that it was going into the attack was generally known to the men. He had assisted in unloading the trucks which carried the mens' rolls and had placed them in a company pile as was usual when going into an attack. The enemy was possibly less than two miles away. Accused stated in his sworn statement that he ran away from the company at this time. He does not deny that he left his organization for the purpose of avoiding combat with the enemy.

This evidence considered in its entirety is of such substantial character as to support the court's findings that accused was informed and that he knew his company was on 22 April 1943 about to engage in front line combat against the enemy, i.e. hazardous duty and that with such knowledge he deliberately "ran away" from it (CM ETO 564, Neville). On this issue a question of fact was involved. Inasmuch as there is substantial evidence to support the findings, the Board of Review on appellate review will not disturb the same (CM ETO 106, Orbon; CM ETO 132, Kelly and Hyde; CM ETO 895, Davis et al, par.10(b), p.39).

Captain Jeffrey, the company commander, is specific in his testimony that his unit on 20-22 April 1943 was moving up to the front to relieve a certain British unit which he believed had suffered heavy

casualties. During the movement he assembled the company and informed it of immediate prospective combat. On 20 April he and the battalion commander made a reconnaissance of the British lines in order to determine placement for his company. Gilmore declared that the company was moving up to relieve "British troops". McGarrigle stated that the company was moving towards enemy lines and that he knew that the company was shortly going into combat. From this evidence the only logical inference to be drawn is that on or about the 22 April 1943 accused's company "was under orders or anticipated orders involving *** hazardous duty" (Manual for Courts-Martial 1921, par.409, p.344). Therefore, this necessary element of the offense was adequately proved (CM ETO 455, Nigg).

6. The charge sheet shows that accused is 23 years of age. He was inducted at Reading, Pennsylvania, on 30 January 1942. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the 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 commuted. The punishment for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Franklin Riter Judge Advocate

Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

(330)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. -1 MAR 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Private DONALD R. GOOD (13053072), Company G, 18th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1432. For convenience of reference please place that number in brackets at the end of the order: (ETO 1432).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as previously commuted ordered executed.
GCMO 14, ETO, 7 Mar 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1447

- 6 MAR 1944

U N I T E D S T A T E S)	2D ARMORED DIVISION.
v.)	
Chief Warrant Officer ARTHUR W. SCHOLBE (W-2104881), Headquarters Company, 2d Armored Division Trains.)	Trial by G.C.M., convened at Headquarters, 2d Armored Division, APO 252, 4 February 1944. Sentence: Dismissal and total forfeitures.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that CWO Arthur W. Scholbe, Hq Co., 2d Armored Division Trains did at or near Andover, England, on or about 18 January 1944, violate standing orders of the Division Commander prohibiting officers from operating motor vehicles except in stated circumstances, by operating a government motor vehicle which had been duly dispatched to a regular driver, on a trip not involving any emergency, tactical training, or combat.

2: (Finding of not guilty).

3: In that * * * did at Tidworth, England, on or about 19 January 1944 in a sworn statement made before Lt. Col. ORVAL J. ABEL, O-322786, Headquarters 2nd Armd. Div. Trains during an official investigation regarding a motor accident involving a motor vehicle in which accused was known to have been an occupant, make under oath a statement

in substance as follows: "Sergeant Lawrence B. Van Heuklon, 36201956, Hq. Co., 2nd Armd. Div. Trains was driving the vehicle at the time of the accident", which statement he did not then believe to be true, in that he, the said Warrant Officer Scholbe, then well knew that he himself had been driving the motor vehicle at the time of the accident in question.

He pleaded not guilty, and was found not guilty of Specification 2; guilty of Specification 1; guilty of Specification 3, except the words "in a sworn statement made before" and "make under oath", substituting therefor respectively the words "with intent to deceive" and "make", of the excepted words, not guilty, of the substituted words, guilty; and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 50½.

3. The testimony for the prosecution was in substance as follows:

Technical Sergeant Fourth Grade Laurence B. Van Heuklon, a mechanic of Headquarters Company, 2d Armored Division Trains, because of the absence of a regular driver was issued a regular trip ticket and directed to take a quarter-ton Ford peep and pick up accused at 5:30 p.m. 18 January 1944. He picked up accused and another Warrant Officer, Davis. He drove the two warrant officers to the White Hart Hotel in Andover, and then to the train station where two nurses entered the vehicle. He drove the party to the White Hart Hotel and was instructed to return to the hotel at nine o'clock. He returned at that time, the two warrant officers and the two nurses entered the car and Van Heuklon started to drive to Tidworth. The night was foggy and accused became impatient with the speed and uncertain of the road direction. After traveling some distance, he directed Van Heuklon to stop and he took over the driving of the car. He was aware of the standing orders of the 2nd Armored Division forbidding the driving of any vehicle by officers except during a tactical operation or in an emergency. While proceeding at a speed of about 25 miles an hour, the peep and passengers came to the end of the road upon which they were traveling at a point where it is crossed by a transverse road, continued across this latter road and struck a stump causing the car to stop abruptly (R5-6). A fender and bumper of the car were damaged requiring repairs to the extent of $11.60 (R11,18). Accused was slightly injured (R11). At this time accused was driving. Van Heuklon sat in the front seat with one of the nurses sitting between him and accused. Davis and the other nurse occupied the rear seat (R7). Accused and Van Heuklon went to a telephone booth to ask that transportation be sent them. While there Van Heuklon testified that accused "asked me if I knew the score in which an officer isn't supposed to be driving a peep and I said, 'Yes sir, I had,' and then he said, 'You were driving'" (R8)

Lieutenant Colonel Orval J. Abel, Headquarters, 2nd Armored Division, was ordered to investigate the accident. Accused appeared before him and told his story in which he said that Van Heuklon was driving at the time of the accident (Ex."C"; R16). The answers and questions were taken in shorthand at the time and thereafter transcribed. They were presented to accused about noon the next day when he was asked, "Are you willing to sign this testimony as the truth, the whole truth, and nothing but the truth, so help you God," (R15). The accused answered "I do" and signed the statement (R16). He was not required to stand up or raise his hand prior to signing the statement (R15). Accused later made an unsigned statement to Abel (Ex."D"; R17-23) in which he admitted that he was driving at the time of the accident and that he was familiar with the standing order forbidding officers to drive vehicles.

4. The only defense witness was accused, who told approximately the same story as heretofore set out. He stated he took over the driving of the peep because he knew the road and Van Heuklon was lost. He said at the investigation of the accident that Van Heuklon was driving, thinking the investigation would go no further and the nurses would not become involved. He denied being sworn to the first statement though he intended it to be his official statement about the accident. When he was sworn before making the second statement, he then told the truth (R24-27).

5. Accused admitted driving the vehicle as charged in Specification 1 in violation of the divisional standing order. This disobedience constituted an offense under the 96th Article of War (CM 115049 (1918), Dig.Ops. JAG., 1912-1940, par.422(5), p.285; Manual for Courts-Martial 1928, par.134b, p.149). Obviously accused was not driving the car during any training process. Even to suggest that he was driving on the occasion of an "emergency" within the purview of the standing order is an affront to common sense. He was driving for his own pleasure and satisfaction on his own mission. The trial court's finding of accused's guilt of the Specification 1 is substantially supported by the evidence.

6. Accused's false statement, viz: that Van Heuklon was driving the motor vehicle at the time of the collision with the tree stump was made to the investigating officer in course of the official investigation of the accident. It is not necessary for the decision in this case to determine the question as to whether or not such conduct constituted perjury under the 93rd Article of War and such question is reserved for further consideration. It is clear that Specification 3 charges false swearing under the 96th Article of War (Manual for Courts-Martial 1921, par.443, p.432, par. 446 II, pp.462,463; CM 198262 (1932), CM 160143 (1924), Dig.Ops.JAG., 1912-1940, par.451(52), pp.330-331; Manual for Courts-Martial 1928, par.152c, p.191). The evidence is clear and decisive that accused in his statement of 19 January 1944 (Pros.Ex.C) falsely stated that Van Heuklon was the driver of the vehicle at the time of the collision when in truth accused was driving it. Accused's testimony furnishes the evidence that such false statement was the result of willful and deliberate premeditation. The offense was fully proved.

The only question in connection with the finding of accused's guilt arises out of his recantation of his prior statement regarding the identity of the driver of the car on the occasion of the accident when he was again interviewed by the investigating officer on 20 January 1944. He then declared that his prior statement charging Van Heuklon with responsibility as driver was false and admitted that he, himself, was the driver. Did this correction of his prior statement purge his guilt of false swearing?

The Supreme Court of the United States in considering a conviction for perjury under Sec.125 of the Federal Criminal Code (R.S.5392, 18 USCA., 231) declared:

> "Does retraction neutralize false testimony previously given and exculpate the witness of perjury? * * *. The respondent admitted he gave intentionally false testimony on * * *. His recantation on the following day cannot alter this fact. He would have us hold that so long as the cause or proceeding in which false testimony is given is not closed there remains a locus poenitentiae of which he was entitled to and did avail himself. The implications and results of such a doctrine prove its unsoundness. Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness's statement has once been made. It is argued that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth

> by cross examination, by extraneous investigation or other collateral means. * * *. We are free, therefore, to give such meaning and effect to § 125 of the Criminal Code as in justice we think ought to be attributed to it. The plain words of the statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law. This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no wilful intent to swear falsely. We have here no such case." (United States v. Norris, 300 U.S. 564,568,573,574,576; 81 L.Ed., 808,810,813,814).

Such being the rule adopted by the Supreme Court in charges of perjury there can be no argument against its adoption in connection with the lesser offense of false swearing. The Board of Review is of the opinion that accused's retraction of his prior false statement to the officer investigating the vehicular accident did not neutralize or purge his original offense. An opposite rule would place a premium upon falsehood and render more difficult and uncertain the investigations which are highly necessary in the enforcement of discipline. Neither justice nor reason require such holding. Insofar as the holding in CM 220746 (1942), Bull.JAG., Vol.I, No.1, January-June 1942, par.451(53), p.22 conflicts with the instant holding it is not followed.

7. The charge sheet shows accused as 22 years of age. He served from 13 July 1939 to 14 March 1942 as an enlisted man. Current service: 15 March 1942 to date.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the 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. The offenses for which accused was tried may be punished at the discretion of the court (AW 96). The separation of a warrant officer from the service by sentence of a court-martial is effected by dishonorable discharge, not dismissal. Although the use of a sentence of dismissal is inappropriate, it has the same effect as one of dishonorable discharge (SPJGJ 1943/13066, 5 October 1943, Bull.JAG., Vol.II, No.10, October 1943, sec.408(2), p.380).

Judge Advocate

Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

(336)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 6 MAR 1944 TO: Commanding General, 2nd Armored Division, APO 252, U.S. Army.

1. In the case of Chief Warrant Officer ARTHUR W. SCHOLEE (W-2104681), Headquarters Company, 2d Armored Division Trains, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1447. For convenience of reference please place that number in brackets at the end of the order: (ETO 1447).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

26 APR 1944

ETO 1453

U N I T E D S T A T E S	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private GEORGE E. FOWLER (16052055), Company "E", 356th Engineer General Service Regiment.	Trial by G.C.M., convened at Ipswich, Suffolk, England, 19-20 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private George E. Fowler, Company "E", 356th Engineer General Service Regiment, did, at or near Birch, Essex, England, on the main Colchester Maldon Road, on or about 7 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Harry Claude Hailstone, of 127 Maldon Road, Colchester, a human being by strangling the said Harry Claude Hailstone.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: (Finding of Not Guilty).
Specification 2: In that * * *, did, at the 18th General Hospital, Cherry Tree Camp, Colchester, Essex, England, on or about the 5th of December 1943, feloniously take, steal, and carry away the following described items of personal property, value

about £ 18-15-0 (American Currency Equivalent $75.54), the property of Captain John Joseph Weber, R.A.M.C., 13th Canadian General Hospital:

1 - Rain Coat
1 - Gents "Rolex Victory" wrist watch
1 - pr. Brown leather gloves
5 - 1 pound Bank of England notes
1 - Half railway ticket to Haywards Heath from Colchester
1 - Handkerchief
1 - Pencil torch

He pleaded not guilty to both charges and to the specifications thereunder and was found guilty of Charge I and its Specification, not guilty of Specification 1, Charge II, guilty of Specification 2, Charge II except the words "£ 18-15-0 (American Currency Equivalent $75.54)", "1-pr. brown leather gloves", "5 - 1 pound Bank of England notes", "1 - Half railway ticket to Haywards Heath from Colchester" and "1 - Handkerchief", substituting therefor respectively the words "$35.50", of the excepted words not guilty, of the substituted words guilty, and guilty of Charge II, three-fourths of the members of the court concurring. Evidence was introduced of one previous conviction by summary court-martial for absence without leave for five days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life, three-fourths of the members of the court concurring. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence was substantially as follows:

On 5 December 1943, Captain John Joseph Weber, Royal Army Medical Corps, 13th Canadian General Hospital, first met accused at the Liverpool Street Station in London. They had "three or four beers" at Captain Weber's suggestion, and took a train to Colchester at 4:00 p.m. When they arrived at Colchester, Weber suggested that they go to his post but accused demurred, saying that he wanted to go back to his own station. The former said that he would "buy him a drink", and they took a taxicab to Weber's post where accused instructed the driver to return for him. They each had three or four drinks of whiskey and Weber began to get intoxicated, but he did not think accused was in the same condition. He suggested to accused, "who seemed very nice", that they see each other again. Weber went to the lavatory and when he returned about ten minutes later accused was not in the room. Later that evening he missed his macintosh coat in the pockets of which were his watch, five one-pound notes, a pair of gloves, a handkerchief, a flashlight, and a return ticket from Colchester to Haywards Heath. He did not give accused permission to take any of the articles nor did he offer to lend him the coat. The coat was the only one he owned and he was forced to go away the following day without it. At the trial, Weber identified his macintosh, flashlight and "Rolex Victory" wrist watch. He last saw accused sometime after 6:00 p.m. that evening, and the only articles thus taken subsequently seen by him were the macintosh, watch and flashlight (R7-12).

On the evening of 6 December, Private Charles Huntley, Company B, 356th Engineers, saw accused in London and pawned a watch for him. He gave accused the three pounds realized together with the pawn ticket, and was given one pound in return. At the trial he identified the pawn ticket and a "Rolex Victory" wrist watch as the watch in question, and the watch was admitted in evidence (R12-14); (Pros. Ex. 3).

On 14 December, Police Constable James Lawrence, Colchester Borough Police, visited a cell at the Colchester police station where accused was confined and noticed that a window in the cell was freshly broken at the lower right-hand corner. He went outside, removed the blackout board from the window and found on the window sill a "fountain pen" flashlight marked "J.J.Weber". The flashlight was identified by Lawrence and was admitted in evidence. (R44-45; Pros. Ex. 2).

On the morning of 8 December, the stained macintosh identified by Captain Weber as his (R7), was found by the side of the road in Tolleshunt D'Arcy about four miles from the American camp near Birch, by Mr. William C. Lawrence, Fern Cottage, Kelvedon Road, Tolleshunt D'Arcy, who identified the coat at the trial. It was admitted in evidence (R14-16; Pros. Ex. 1).

On the morning of 8 December a Vauxhall taxicab, number CPU 602, was found on Haynes Green Lane, Layer Marney, near the American camp at Birch. The lights were on and the roof was wet, indicating that it had remained outdoors during the night. The car belonged to Harry Claude Hailstone who lived with Mr. and Mrs. Sidney C. Pearce, 127 Maldon Road, Colchester. Mrs. Pearce last saw Hailstone at her home between 11:00-11:30 p.m. 7 December, and she later heard him start the car and go towards Birch (R16-17, 19-21). An examination of the vehicle disclosed that the wires on the steering wheel and the felting "on the offside" between the two doors were pulled away. On the rear seat were found a fawn colored macintosh (the deceased's) which was bloodstained around the neck and a blue serge coat which was inside the macintosh (R16). Mrs. Pearce identified the blue jacket as belonging to Hailstone (R22) and Mr. Pearce identified Hailstone's empty note case which was found lying on the floor of the cab and which was admitted in evidence (R17-18; Pros. Ex. 6).

About 1:00 p.m. 9 December, the body of Hailstone, identified by Pearce, was found in the grounds of the Birch rectory about five miles from Colchester and about 2½ miles from the American camp at Birch. The body was lying on the inside of a hedgerow about six feet from the Maldon-Colchester road. The bank was about four feet high, and along its top were brambles and two strands of barbed wire. The body was "caught up in some shrubs and bushes and hung there" with the head toward the bottom of the bank and the feet toward the top. Because of deceased's position and the fact that the brambles surrounding the hedge were not disturbed, it appeared that the body had been thrown over the bank from the road and that it had rolled down the other side. Hailstone was fully clad, except for his hat, overcoat and jacket. The face was exceedingly bloodstained and the nose and lips were swollen two or three times their normal size (R18-20).

About 4:30 p.m. 9 December, the body of Hailstone was viewed by Dr. Francis E. Camps, pathologist, 99 Harley Street, London. It was his opinion that death occurred about 36-48 hours previously and that Hailstone was dead when his body rolled down the embankment (R22-23, 30-32). Dr. Camps performed a post mortem on the body and found extensive bruising on the left sides of the face and nose, a bruising of the left eye, and a cut on the lip caused by a blow which cut the skin inside of the mouth against the teeth. There was an additional bruise on the under side of the point of the jaw and all bruises were caused before death. On the left cheek was a puncture wound consistent with contact with a sharp object such as barbed wire, which appeared to have been caused either at the time of or just after death, and also superficial scratches which occurred after death and which were consistent with contact with brambles. On the left side of the neck were two very clear imprints, semi-circular in shape, one of which measured exactly seven-tenths of an inch across at its widest part. They were consistent with thumb nail marks (R 23). On the right side of the neck were three sets of marks "consistent with and almost typical of finger nail marks," and certain undistinguishable scratches under the chin which were "consistent with scratches in pulling the head back". An internal examination disclosed a fracture of the "soundbox", the thyroid cartilage, in its left superior corner, congestion and bruising of the air passages in that area and a similar but lesser bruising of the right side thereof. Hemorrhages into the scalp were found which indicated obstruction to the veins flowing back to the heart, and also hemorrhages into the whites of the eyes, the eyes themselves, and hemorrhage of the heart. Both lungs were congested with fluid blood and blood was coming from the mouth. In the opinion of Dr. Camps, death was caused by asphyxia due to "left handed" strangulation. This term signified that strangulation was accomplished with a left hand but not necessarily by a left-handed person. "It was done with a left hand, the thumb marks being on the left and the finger marks being on the right" (R23-24, 30). Also present were abrasions on the shins which were "perfectly typical of the shins grazing against the dashboard of a car. They would be in a perfect position for that if the body were jerked back whilst in a sitting position" (R24). Considering the position of the marks similar to finger nail marks and the shin abrasions, Dr. Camps was of the further opinion that Hailstone was strangled from behind while he was sitting in the driver's seat of the car (R30-31).

On 17 December, Dr. Camps measured the thumb nails of accused and one Leatherberry (Private J. C. Leatherberry, Company A, 356th Engineer General Service Regiment). The right thumb nail of Leatherberry was exactly seven-tenths of an inch at its widest point and was rounded in shape, as was his left thumb nail which measured six-tenths of an inch. The right thumb nail of Fowler was .65 of an inch and was pointed in shape whereas his left thumb nail measured seven-tenths of an inch and was rounded (R25). Of the four nails of Leatherberry and Fowler, "the only one that would be consistent" with the mark on the neck which was seven-tenths of an inch in width, "would be the left hand of Fowler, assuming that it was left hand, but it would also be consistent with the right hand of Leatherberry, assuming it was right hand". However, in Dr. Camps' opinion "it quite definitely was a left-handed inflicted mark" (R26-27).

The measurement of accused's and Leatherberry's nails had occurred about 10 days after Hailstone's death, and such measurements could be affected by a change in the nails between the time the injury was inflicted

and the time at which the measurements were taken. Dr. Camps was of the further opinion that accused's nails "could not have been cut in the meantime but Leatherberry's nails might have been." "* * * in my opinion the right hand of Fowler could not have inflicted these marks, because the right hand of Fowler when I saw it had a fairly pointed nail which clearly had not been interfered with mechanically over some period. It would have taken a considerable time to have grown a nail like that * * *." As accused's right thumb nail was sharp and his left thumb nail rounded, Dr. Camps could state "categorically" that his right thumb nail could not have caused the mark on deceased's neck which was undoubtedly caused by a rounded thumb nail (R31-33).

Dr. Camps took specimens of deceased's blood, scrapings from his finger nails, and on 17 December took scrapings from the nails of accused and Leatherberry (R25).

Admitted in evidence by virtue of a stipulation by the prosecution and defense were photographs of the taxicab, the body of Hailstone, the thumbs of accused and Leatherberry (Pros.Ex.10), and a map of the area in question (Pros.Ex.11) (R35). It was also stipulated that a pair of bloodstained long underwear was found among the possessions of Leatherberry and that the underwear belonged to him. It was admitted in evidence (R45; Pros.Ex.12). The prosecution and defense further stipulated as to the transmission of certain exhibits (R45).

On 13 January, Major E. R. Quinn, Medical Corps, 336th Engineers, took samples of blood from accused and Leatherberry. Accused's blood was found to be type B and Leatherberry's blood, type O. There are four types of blood, A, B, AB and O (R42-43).

Dr. James Davidson, Director of the Metropolitan Police Laboratory, Hendon, examined a sample of blood of Hailstone and found that it was type AB, a type found in 5% of the population. His blue jacket was bloodstained. An examination of Ex. 1 (Weber's raincoat) disclosed that the inner and outer surfaces were extensively bloodstained, and the blood belonged to group AB (R35-36, 39). Leatherberry's long underwear (Pros.Ex.12) were bloodstained on the inner and outer surfaces of both sides of the fly opening and on the top of the waistband at the front. The blood was of the AB type (R38). Scrapings from the nails of deceased, Fowler and Leatherberry were admitted in evidence (R38; Pros.Exs. 7,8,9). Examination of the scrapings taken from the finger nails of the three men revealed the presence of blue fibers which were similar to fibers taken from Hailstone's blue jacket which was found in the taxicab. The scrapings from Leatherberry's nails further disclosed the presence of human blood in all fingers of both hands, insufficient, however, in amount for grouping purposes. A trace of blood was found in the scrapings from the nail of the third finger of Fowler's left hand, which was insufficient in amount for grouping purposes or for a determination as to whether it was human blood (R37-39). Deceased's blue jacket was admitted in evidence (R42; Pros.Ex.5).

(342)

Sergeant Stephen J. Graham, C.I.D. Detachment, APO 633, VIII Air Force, identified the pawn ticket for Captain Weber's "Rolex Victory" wrist watch. The ticket, which he found while searching accused's barracks bag, was admitted in evidence (R41-42; Pros.Ex.4). On 13 December after being warned of his rights accused made a statement to Graham which he signed after the latter reduced it to writing. On 17 December, after again being warned of his rights accused made a second statement to Graham. Both statements were identified and admitted in evidence (R40-41; Pros.Exs.13,14). The two statements are substantially the same with reference to events concerning Hailstone, and accused subsequently testified in his own defense that the second statement (Pros.Ex.14) was the correct one with regard to events relative to the alleged theft of the property of Captain Weber (R48,58).

Pros.Ex.14 was, in pertinent part, as follows:

Accused met Weber in London on 5 December, accompanied him to Cherry Tree camp and remained at Weber's quarters for about an hour. Weber gave him his raincoat and shortly thereafter "passed out" because of an over-indulgence in drink. Accused unsuccessfully attempted to sober him up, then went to Colchester where he put on the coat given him by Weber. He felt something in the pockets but paid no further attention. He took a bus from Colchester to camp and got off at the White Horse "pub" where he drank with a soldier whose name he later discovered was J.C.Leatherberry. He and Leatherberry then went by train to London, arrived about 11 p.m. 5 December, and spent the night in a rooming house. Before getting on the train he put his hands in the pockets of Weber's coat and found a wrist watch and a pencil flashlight which were the only contents of the pockets. He knew that Weber did not intend to give them to him. On 6 December he met Huntley who pawned the wrist watch for him and gave him two of the three pounds received and the pawn ticket. Huntley kept one pound. Accused pawned the watch because he needed the money, and did not intend to return the watch or the flashlight to Weber.

On 7 December accused and Leatherberry took the 8:45 p.m. train from London and arrived at Colchester about 10:20 p.m. On the train Leatherberry "continually" told accused he needed money, that he was "broke" and "was going to get it any way he could get it". He suggested that they rob the driver of the taxi-cab which they would take from Colchester to camp. When they left the train at Colchester, Leatherberry said he was cold and accused loaned him Weber's raincoat. The driver of the taxi which they took at the station stopped at a house in Colchester, told them to wait and that he would return immediately. Leatherberry, who thought the driver was going to get a gun, told accused that he (Leatherberry) would tell the driver to stop by the side of the road and that he would rob him. The driver returned in a few minutes and drove toward Birch. About four miles from Colchester, Leatherberry told the driver to stop as he wanted to urinate. Accused, who was sitting in the left rear seat, left the car "to have a leak" but Leatherberry remained in the vehicle. While urinating he "heard a struggle". Leatherberry called and asked if he was going to help him. Accused did not reply, finished urinating, re-entered the rear of the cab and saw Leatherberry holding the

driver by the throat with one hand and pounding him with his other hand. The driver was limp, the upper part of his body was over the front seat and the lower part was in the front seat. Leatherberry, who was then wearing Weber's raincoat, "asked me to help him get the body out of the taxi as we had to get away from there". "He told me that I was in this just as much as he was". When Leatherberry said this he was searching the driver's pockets and had some papers, a billfold and a wallet in his hands. Leatherberry then seized the driver's shoulders, pulled him out of the right rear door and accused grasped his feet. They carried him across the street and pushed him under a wire fence. "We did not know whether or not the taxi driver was dead when we left him. He was unconscious". Accused did not know what eventually happened to Weber's raincoat and did not recall seeing it after the disposal of the body. When they returned to the cab, accused took the driver's seat and Leatherberry sat beside him. He drove about a tenth of a mile toward camp and then changed places with Leatherberry who said he wanted to drive. They drove to Maldon where they left the car and approached a policeman who was asked by Leatherberry when the train left Maldon for London. When he replied that there were no trains to London that night, accused said he was going back to camp and drove the car in that direction. On the way Leatherberry told him to park the car "along the road someplace". Accused finally parked the car "on the road to Company 'C'", turned off the headlights "but might have left the parking lights on". They left the car and went to accused's hut where "the boys were shooting craps". Leatherberry said that it was no place for them, whereupon they went to Company B guard tent and spent the night. Accused awakened at 8 a.m., did not notice whether or not Leatherberry was still there, went to his own tent and fell asleep. After the charge of quarters told him twice that the company commander wished to see him accused went to that officer. On the night of 9 December Leatherberry came to his hut and told him that he heard the taxi driver was dead. Leatherberry had the driver's cigarette lighter at the time. At an identification parade on 16 December he identified Leatherberry as the soldier who accompanied him to London on 5 December and who returned with him to camp in a taxi-cab on 7 December.

/ In Pros.Ex.13 accused stated that when he returned to the cab after urinating, "his friend" (Leatherberry) was standing in the rear of the car, holding the driver's throat with his left hand and punching him in the face with his right hand.

4. After receiving an explanation of his rights accused testified in substance as follows:

He was 22 years of age, attended high school but was not graduated. He left school about 1939 because his mother was ill and he was forced to work (R70-71). After he entered the Army he taught cooking. He was later "transferred to the Arizona Quartermaster, and I continued doing the same thing". His grade was that of first cook but he was subsequently relieved. "When I came in here I was running a mixer; brick-

layers" (R77).

The statements contained in Pros.Ex.13 to the effect that Weber was not drunk, that accused did not pawn the watch but found the pawn ticket in London, and that the pockets of the raincoat were empty were false. He was freightened because Graham, who was in a hurry, was shouting questions at him in a loud tone of voice. Accused desired to protect the British officer who befriended him and did not want to disclose that the officer was drunk. When Graham later told accused that he had secured a statement from the officer, he decided to tell the whole story and gave the second statement contained in Pros.Ex.14 (R47-48, 57-58, 65, 67-68).

He further testified that Weber told him it was chilly outside and urged him to take a coat. At the time the officer was "quite a bit high" and was reeling. Accused had a good deal to drink but controlled himself. He tried without success "to sober" Weber but the only response he received was hiccups (R47,49-50). When he left he took the raincoat "he had given me", found the watch and pencil flashlight in the pockets while enroute to London, but did not find any other articles or any money. Another man pawned the watch for him and accused kept two pounds and gave the other fellow one pound. He kept the pawn ticket because he intended to redeem the watch and return it to its owner (R50, 52-53, 58,64-65,70). The window in the Colchester police station was already broken when he entered the cell and he laid the pencil flashlight across the opening. It accidentally fell outside when the blackout board was removed (R58-59,65).

When he left Colchester with Leatherberry for London accused had about three pounds. Leatherberry did not have enough money to buy their tickets to London and accused paid his companion's expenses while they were in London (R52). They left London for Colchester on 7 December at 8:45 p.m. When Leatherberry first mentioned on the train that he needed money and was going to rob the taxi driver, accused was "half high" and paid no attention. He thought he was "kidding". In his opinion Leatherberry had not been drinking anything. "He can drink but he cannot drink much and if he has drunk anything he is drunk.". He loaned Leatherberry Weber's coat when he complained of being cold at the Colchester station. When the driver stopped and entered the house in Colchester, Leatherberry wondered if he was going to get a gun and again stated that he was going to rob the driver. "He said this was a chance (and) that he would do his job". Accused, who was not perfectly sober but who was not drunk, still thought he was joking (R53-54, 59-60, 64-66). Nothing was said at this time about stopping the driver later on (R76). About four miles from camp, Leatherberry told the driver to stop the car,

> "When the cab driver did stop he told me to take a leak and I had to take one * * *. When he told the cab driver to stop, I thought he was going to take a leak and nothing else was in my mind and I gets out." (R74).

Accused got out of the car on the left hand side.

> "* * *and I still do not think he is going to do it. * * * I was outside slowing around, staggering around. I was not in a hurry. I was taking a leak when I heard a bumping and banging inside the cab and I heard a gurgle and a strangling noise, a yell. Perhaps it

was not a yell. I heard a noise of a gag, a strangle and he calls to me was not I going to help him. I still did not give an answer". (R54).

He had not completed urinating at the time and did not return to the cab when he did finish. Instead he "slowed around" about four feet in the rear of the cab (R54-55). Asked on cross-examination, if he did not have "a pretty good notion as to what was going on" when he heard the noises, accused testified:

"Well, I would not say for sure, sir. No, I did not. I did not have anything like that in mind. A person might turn around and move his feet in a car and make quite a lot of noise". (R62).

The noises did not continue very long. "I should say four or five beating noises were made, and when I finished I started back to the cab with intent to go in". As he returned the struggle was "not as loud" as it was at first. He saw Leatherberry, who was not left handed, holding the driver by the throat with his left hand and hitting him with his right. He had pulled the driver from the front to the rear seat so that his back was across the front seat. Accused could see the driver's white shirt, but did not notice any kind of a coat or blue jacket that night. He saw Leatherberry deliver one or two blows but did not try to stop him because the driver was "out" and was not moving (R55,61-62). Leatherberry had some papers, a bill-fold and a cigarette lighter belonging to the driver (R61). He said, "Help me to get this guy in here. We have got to get away from here. It is better that we get away from here" (R55). He told accused he "was in it as much as he was". Asked on cross-examination, why Leatherberry said that, accused replied "Because I was in his presence" (R61). He told Leatherberry he was getting him in trouble, walked around to the right side of the cab and grasped the driver's feet. Leatherberry took his shoulders and they carried him across the road and rolled him under a fence. The driver was not wearing a colored jacket at that time. Accused did not think he was dead because he did not believe "a person would be that easy to kill". He thought he was merely unconscious (R55,60-61,70-71).

Upon their return accused told Leatherberry "I was doing wrong", and said that he was going to his company. They re-entered the cab and accused began to drive to camp. After they had gone a short distance Leatherberry said he wanted to drive and accused consented because he thought he would drive to the camp. When they reached the turn to "C" Company Leatherberry drove on despite accused's request that he let him out. He said he was going to Maldon to get a train and said "You are in it now as much as me". Accused replied that he was getting him in trouble (R55,60,63, 66). At Maldon Leatherberry asked a policeman what time the train left for London and was informed that there was no train that night. Accused said nothing to the policeman but told Leatherberry he was going to his company. He drove back to camp, parked the car near "C" Company, and the two men went

to accused's hut where they found some soldiers gambling. Leatherberry said "This is no place for us. You do not want to be in your company until the 8th", and they then went to the guardhouse of Company "B", where each took a bed. Accused awakened about 7:30 a.m., went to his barracks and slept until 10:30 a.m. when he was awakened "in a daze" by the charge of quarters. (R55-56,63).

On the evening of 9 or 10 December Leatherberry came to his hut and said that he heard the cab driver was dead. "He asked me what I do about it, and I told him I had not anything to think about it. He asked me was I turning yellow." Leatherberry had the driver's cigarette lighter at the time (R56,61). Later, when they were in the stockade Leatherberry threatened him. He "told me that once before he was in trouble. He was in trouble as a youngster. * * * He said: 'The kid turned yellow', and he said: 'There were boys outside who took care.' I spoke then and said: 'What do you mean?' So we had a few words" (R56).

During the episode with the driver Leatherberry was wearing the raincoat (Weber's) which accused loaned to him at the Colchester station. He last noticed the coat on Leatherberry just before the latter took the wheel on the way to Maldon. He was not wearing it when they returned to camp, but accused did not know when he took it off (R62-63). When he discovered that the driver was dead he did not report his knowledge of the case, for to do so would make him an "Uncle Tom." Leatherberry told him to keep quiet, "to know nothing about the case" (R62,66-67).

5. Recalled as a witness by the court, Captain Weber testified that he did not at any time make a statement which might lead accused to believe that he was agreeable to the taking of the coat. He entertained accused in the quarters of a Major Savage and left the raincoat on the bed (R77-79). The value of the coat, watch and gloves was 18 pounds, 15 shillings. Also in the pocket of the coat were 5 pounds. The value of the torch was 50 cents and the value of the watch, which was a gift, was about $37.50. He paid $25 in Canada for the raincoat which was over three years old at the time of trial (R79-80).

Private Clifford F. Hall, Royal Canadian Army Medical Corps, 13th Canadian General Hospital, a witness for the court, testified that Captain Weber and accused came to Cherry Tree Camp and that the former asked for a room. Hall temporarily gave him another officer's quarters and a few minutes later entered the first room and told Weber that his own room was ready. He "was all lit up", was dozing in a chair drunk, and did not seem to hear. Hall told accused, who seemed to have perfect control of himself, to try to get Weber up to his own room. When Hall last saw accused he was wearing a trench coat, told Hall he was "going out to get something to fix up Captain Weber" and that he would return (R81-85).

Also called as a witness for the court was Private J. C. Leatherberry, Company A, 356th Engineer General Service Regiment, who was accompanied by his regularly appointed defense counsel, and who first received from the president of the court an explanation of his rights under AW 24 and MCM, 1928, par.122b, p.129. Leatherberry's defense counsel announced that he would tell Leatherberry whether or not to answer each question as it was propounded

(R85-87). Upon being questioned by the court his testimony was in part as follows:

"Q. Private Leatherberry, at the Colchester Station, when you were returning with the accused Fowler from London, the accused had a raincoat or mackintosh. Did he lend that mackintosh to you?

First Lieutenant Crane: The accused will claim his constitutional rights in this case and will refuse to answer.

* * * * * * * * *

Q. Are you aware of the fact that Fowler had a mackintosh or a raincoat of a light colour which was allegedly given to you the last time when you and he were out together?

First Lieutenant Crane: Private Leatherberry, you may answer the question.

A. I do not remember him having a mac.

Q. * * *: You know what a mac is?

A. I remember his O.D. uniform, and that is all.

Q. Did he have a raincoat of his own?

A. I do not know, sir." (R87-88).

Leatherberry further testified that on the night of 7 December he was not with accused in a taxicab driven by Hailstone, nor did he drive in a cab to Maldon with accused. He was not with him in a taxicab on roads in the vicinity of Birch Airdrome, Maldon or Colchester on or about 7 December (R 88). He did not leave London for Colchester with accused on 7 December but left London on 8 December about 10:25 a.m. He arrived at Colchester about noon, and took a bus to camp where he arrived about 12:45 p.m. with five other soldiers. He went to his area and did not report. First Lieutenant Dennis Roberts saw him in the area, asked him to come to the orderly room and did so. On 6 December he was with accused in London "a while in the morning and a while in the afternoon". He claimed his privileges with regard to the question whether he was in London with accused at any time on 7 December. During the time he was in London he did not borrow any money (R89-91).

6. There is no evidence that Leatherberry or accused contemplated Hailstone's murder as such, or that accused instigated or actually perpetrated the assault upon him. If the findings of guilty of murder are to be sustained it must necessarily be on the basis that prior to the homicide accused joined Leatherberry in a plan to rob the taxi driver and in some manner aided and abetted him in the commission of that offense. The Board of Review will subsequently consider the fact that accused was found not guilty of robbery.

The distinctions between principals, aiders and abettors have been abolished by Federal statute.

"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,

(348)

is a principal." (18 USC 550; 35 Stat.1152).

The distinction is also not recognized in the administration of military justice (Winthrop's Military Law & Precedents - Reprint, p. 108; CM ETO 72, Farley and Jacobs).

> "* * *and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal. Whitt v. Commonwealth, 221 Ky 490, 298 S.W. 1101" (Morei v. United States, 127 Fed (2d) 827, 831) (Underscoring supplied).

Mere presence during the commission of an offense by another, without more, does not constitute one an aider and abettor (CM ETO 804, Ogletree et al).

> "Something must be shown in the conduct of the by-stander which indicates a design to encourage, incite, or in some manner afford aid or consent to the particular act; though when the by-stander * * * knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement. * * *. It is not necessary, therefore, to prove that the party actually aided in the commission of the offense; if he watched for his companions in order to prevent surprise, * * * or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting" (1 Wharton's Criminal Law, 12th Ed., sec. 246, pp. 333-334).

> "On the other hand, where one's presence is by preconcert, he may be guilty as an aider and abettor, although neither by word nor by act does he encourage or discourage the commission of the felony. * * *" (22 CJS, sec.88b (4), p.161).

If the proof shows that a person was present at the commission of a crime without disapproving or opposing it, the jury may consider this conduct in connection with other circumstances, and thereby conclude that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting the same (People v. Cione, 293 Ill. 321, 127 N.E. 646, 12 ALR 267,273, and State v. Maloy, 44 Iowa 104, cited therein at pp.280-281).

> "Mere presence and participation in the general transaction in which a homicide is committed is not conclusive evidence of consent and concurrence in the perpetration of a crime by a defendant sought to be held responsible for the homicide, as aiding and abetting the actual perpetrator, unless such defendant participated in the felonious design of the person killing. Whether

> or not there was such participation is to be determined by the jury, under the facts and circumstances of the case". (Fudge v. State, 148 Ga. 149, 95 S.E. 980 - Annotation 12 ALR p.277).

In order to convict of an offense

> "* * * the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty" (MCM, 1928, par.78a, p.63).

Common law murder includes the essential element of premeditation or "malice aforethought". Malice aforethought may exist where the act is unpremeditated. It may also exist in the intent to commit a felony (MCM, 1928, par.148a, pp.163-164). An intent to kill is not a necessary element in the crime of murder in those cases where the design is to perpetrate an unlawful act, and the homicide occurs in carrying out that purpose (Wharton's Criminal Law, Vol.1, sec.420, p.632).

> "* * * an intent to kill a particular person is not an essential element in murder, where an unlawful act is done deliberately with the intention of * * * inflicting serious bodily harm, and where death ensues from such unlawful act"(Ibid).

> "In every case of apparently deliberate and unjustifiable killing the law presumes the existence of the malice necessary to constitute murder, * * *" (Winthrop's Military Law and Precedents - Reprint - 1920, p.673).

In United States v. Boyd, 45 Fed. 851 (reversed on other grounds in 142 U.S. 450) the trial court charged the jury in part as follows:

> "Robbery has the very element that enters into it to distinguish it, to make it a crime, as that of violence upon the person; and it is a probable and natural and reasonable consequence of an attempt to commit that crime that a human life will be destroyed" (Ibid, p.862).

> "* * * all who agree to enter upon that robbery, and who are present at the place where it is being committed, * * * while the parties are in the act of committing it, they are aiding, and assisting and counseling and abetting in its commission, and are responsible for the crime growing out of that robbery which may result in the taking of human life"(Ibid, pp.865-866).

1453

> "It is not necessary to show it (the undertaking) was entered into by so many formal words. It may be tacitly entered into. If a man, with the understanding that another purposes to rob a third, joins him, goes to the place where the attempted robbery is made, and is there for the purpose of aiding him, he agrees to it just as much as though he had entered into an obligation in writing to assist him. It is an agreement in the law. That is the way you are to find it, by the relation that apparently the parties bear to each other, by their being there at the place, by their participating in the common enterprise, by their attempt to participate in the common enterprise. All these things are to be taken into consideration by you for that purpose". (Ibid pp.868-869).

Leatherberry twice told accused that he was going to rob the taxi driver. Although accused testified that he thought Leatherberry was "kidding" he admitted that when outside the car he heard a "bumping and banging inside the cab * * * a gurgle and a strangling noise." He also heard "beating noises". He did not return even when he finished urinating but instead deliberately "slowed around" behind the car, about four feet away, and returned only when the struggle was almost at an end. He made no effort to prevent Leatherberry from accomplishing his announced purpose. Deceased's blue jacket was later found in the car inside his bloodstained mackintosh. Although accused insisted that he did not notice any kind of a coat or blue jacket that night, blue fibres similar to the fibres in the blue jacket were found in scrapings from his finger nails. He assisted in the disposal of the body. He accompanied Leatherberry to Maldon where inquiries were made about trains to London. He did not sleep in his quarters that night but went with Leatherberry to the guardhouse of another company when the latter said "this is no place for us". Until he made the statement to Graham he maintained a complete silence concerning the affair even after he learned Hailstone was dead. In view of the foregoing authorities, the Board of Review is of the opinion that the evidence, considered as a whole, fully supports the conclusion that accused aided and abetted Leatherberry in the commission of a felony, namely robbery, and that the evidence is, therefore, legally sufficient to support the findings of guilty of the murder which resulted (Charge I and Specification).

The findings of guilty of murder are sustained by virtue of the foregoing principles notwithstanding the fact that the court found accused not guilty of the offense of robbery (Specification 1, Charge II).

> "While this question has not heretofore been authoritatively decided in military justice administration, in the Federal criminal procedure the better rule on principle and authority is that inconsistent verdicts of guilty and not guilty in the same criminal proceeding do not vitiate the former" CM 197115 (1931) (Dig.Ops.JAG, 1912-1940, sec.395 (44), p.230).

7. Whether accused took Weber's coat without authority or whether Weber actually loaned him the coat was a question of fact for the sole determination of the court. In view of the substantial competent evidence establishing accused's guilt of larceny of the coat, watch and torch, the Board of Review will not disturb the findings of the court. It is doubtful if a value of over $20 was satisfactorily established by the evidence (CM 228742, Blanco). However, as accused was properly found guilty of the more serious offense of murder and sentenced to life imprisonment, a consideration of the question of value of the articles alleged in Specification 2, Charge II becomes unimportant.

8. In response to a question by the law member as to whether he had ever been in jail before, accused replied in the affirmative. Upon further interrogation by the law member as to the cause of his imprisonment and the length of his sentence, he testified that he was sentenced to a year for non support and that he served 11 months (R71). As evidence as to good character had not been introduced by the defense such interrogation by the law member was manifestly improper (MCM, 1928, par.112b, p.112). However, in view of the serious nature of the offenses alleged, the evidence establishing accused's guilt thereof and the sentence, it is apparent that this error did not injuriously affect the substantial rights of accused. Certain minor irregularities contained in the record of trial are discussed in the review of the Staff Judge Advocate and further consideration thereof is deemed unnecessary.

9. The charge sheet shows that accused was 22 years, 10 months of age, and that he enlisted 2 January 1942 at Peoria, Illinois, for the duration of the war plus six months. He had no prior service.

10. The court was legally constituted and had jurisdiction of the person and offenses. 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. The punishment for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (AW 42; 18 U.S.C. 454, 567).

Judge Advocate

Judge Advocate

Judge Advocate

(352)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 26 APR 1944 TO: Commanding Officer, Eastern Base Section, SOS, ETOUSA, APO 517, U. S. Army.

1. In the case of Private GEORGE E. FOWLER (16052055), Company "E", 356th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The number of the record in this office is ETO 1453. For convenience of reference please place that number in brackets at the end of the order. (ETO 1453).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1479

16 MAR 1944

U N I T E D S T A T E S	1ST INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Beaminster, Dorset, England, 27 January 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States, Disciplinary Barracks, Greenhaven, New York.
Private JACK E. SHIPLEY (6942933), Company "I", 16th Infantry.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 75th Article of War.
Specification: In that Private Jack E. Shipley, Company I, 16th Infantry, then Sergeant, Company I, 16th Infantry, being present with his company while it was engaged with the enemy, did at Beja, Tunisia, on or about 22 April 1943, shamefully abandon the said Company, and did fail to rejoin it until the engagement was concluded.

CHARGE II: Violation of the 69th Article of War.
Specification: In that Private Jack E. Shipley, Company I, 16th Infantry, having been duly placed in arrest at St. Leu, Algeria, on or about 9 June 1943, did, at Virginia Area, Tunis, Tunisia, on or about 1330 hours 30 June 1943, break his said arrest before he was set at liberty by proper authority.

CHARGE III: Violation of the 61st Article of War.
Specification: In that Private Jack E. Shipley, Company I, 16th Infantry, did, without proper leave, absent himself from his organization at Virginia Area, Tunis, Tunisia, from about 1330 hours 30 June 1943, to about 13 July 1943, thereby missing participation in the Sicilian Campaign.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, ordered the prisoner to be held at Disciplinary Training Center Number 2912, Shepton Mallet, Somerset, England, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The principles announced in CM ETO 1249, Marchetti and the authorities therein cited are determinative that the evidence is legally sufficient to support the findings of guilty of Charge I and its Specification. There is also competent substantial evidence to support the findings of guilty of Charge II and its Specification (CM ETO 799, Booker(0); CM ETO 817, Yount(0)), and of Charge III and its Specification (CM ETO 1360, Poe; CM ETO 1395, Saunders; CM ETO 1543, Woody).

4. The charge sheet shows that accused is 25 years of age. He served in the 16th Infantry from 12 January 1938 to 16 March 1941. He enlisted at Fort Devens, Mass. in grade of corporal for Company "I", 16th Infantry on 4 April 1941 to serve three years.

5. The court was legally constituted and had jurisdiction of the person and offenses. 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. The punishment for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 75). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN QUARTERS) _____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 16 MAR 1944 TO: Commanding General, 1st Infantry Division, APO 1, U.S. Army.

1. In the case of Private JACK E. SHIPLEY (6942933), Company "I", 16th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1479. For convenience of reference please place that number in brackets at the end of the order: (ETO 1479).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871.

BOARD OF REVIEW

ETO 1486

24 MAY 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private HECTOR A. MacDONALD (31326380) and Private First Class EVERTON N. MacCRIMMON (6538571), both of Company "B", 398th Engineer General Service Regiment.	Trial by G.C.M., convened at Burnshill Camp, Somerset, England, 5 January 1944. Sentences as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.

OPINION by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

1. The record of trial in the cases of the soldiers named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally sufficient to support the findings and sentence as to Private First Class Everton N. MacCrimmon, and legally insufficient to support the findings and sentence as to Private Hector A. MacDonald. The record has now been examined by the Board of Review which submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

2. Accused were tried jointly upon the following Charge and Specification, preferred separately as to each:

CHARGE: Violation of 93rd Article of War.

Specification: In that Private First Class Everton N. MacCrimmon and Private Hector A. Macdonald, both of Company "B", 398th Engineer General Service Regiment, acting jointly and in pursuance of a common intent, did, at Cannington, Somerset, England, on or about 28 November 1943, feloniously take, steal and carry away about eighty-three pounds, currency of the United Kingdom, having the exchange value of about $334.90, property of the United States Army Post Exchange.

Each pleaded not guilty to and was found guilty of the Charge and Specification. No evidence was introduced of previous convictions as to either accused. Each 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 three years at such place as the reviewing authority may direct. As to each accused, the reviewing authority approved the sentence, ordered it executed but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Order No. 28, Headquarters Southern Base Section, SOS, ETOUSA, dated 10 February 1944.

3. The evidence for the prosecution shows that at the time and place alleged, Private William Teisciero, Company B, 398th Engineer General Service Regiment, operated the company post exchange which was part of the regimental exchange. Teisciero was in complete charge of requisitioning and selling supplies, and of all receipts (R16,32). Accused MacDonald tended the fires in the building and took care of the showers and latrine (R41). At intervals of two weeks Teisciero made up an inventory by taking the money value of the stock on hand at the beginning of the period, and balancing it against the cash delivered by him and the money value of the stock remaining on hand at the end of the period. Every month an inventory was made by a representative of the regimental post exchange (R36-37,39). Teisciero delivered his cash receipts to the post exchange officer usually every week and, on occasions, at the end of two weeks (R38-39). No daily record was made of sales (R29,36).

Cash receipts were kept in a cash box fitted with a lock, but the key did not "seem to fit" (R28,36,39). At night the box was kept in a wall closet fitted with a steel door to which Teisciero alone had a key (R28-29,33). He also possessed a key to the entrance door of the post exchange but as the door had no lock he was forced to secure it by "just pulling the door to and taking the knob out" (R33-34). On the other side of a second door leading into the post exchange was a tailor shop. This door was secured by a board which was nailed on the floor behind the door (R33,38,40).

About 7 p.m. 28 November 1943, Teisciero sold cigarettes to two customers and made change from the cash box which he removed from the safe (R33,41). He did not put the box back in the safe because he was about to take an inventory and count cash. He then left the post exchange at least twice during the evening. On one occasion he was away 20 minutes and on another 45 minutes. From 7 p.m. until the time he went to bed the cash box was on the counter. He slept in the post exchange room. No one was in the post exchange when he left, and on each occasion he "locked" the door by removing both knobs and taking them with him. When he went to bed he put the box in the wall safe but did not open it (R33-34,36,38-39, 42). The following morning (29 November) he opened the cash box and found

that all the paper money was missing (R34,38). That afternoon an inventory was taken by Teisciero and the regimental post exchange representative, and by comparison with the inventory taken two weeks before, it was determined that about 83 pounds were missing (R17-18, 34-35,40). Teisciero did not know how much money was in the cash box that evening because he had not counted it for two or three days prior to the theft. He had no way of determining whether the shortage of about 83 pounds was entirely in cash or partially in cash and partially in stock (R40-41).

On the evening of 28 November Private First Class Norvin E. Wroughton, a member of accused's organization, went to a 'pub' with accused MacCrimmon and remained until closing time. When they returned to their hut, MacCrimmon went out, returned and asked Wroughton to go outside with him. He told Wroughton that "MacDonald had robbed the P.X.", that he found him with "the money" and that he gave him (MacCrimmon) part of it (R44,47). Wroughton told MacCrimmon he should rid himself of the money and the latter suggested that he hide it. He accompanied MacCrimmon to a spot some 200 yards distant from their hut, near a barn abd MacCrimmon buried the money in a hole in the ground. Wroughton did not know how much money was involved (R44-45,48). The following evening they again went to the 'pub' and remained until closing time. On their way back to Camp MacCrimmon "decided the money had to be moved" and went to get it, but Wroughton returned to his hut. MacCrimmon later appeared and said that he could not find the money, whereupon Wroughton went back with him, found the money and gave it to him. Wroughton later discovered that "Nine pounds * * * was what we had reclaimed and taken with us." The following morning (30 November) MacCrimmon went over to a Private Stephenson's bed in the same hut "and done something" (R44-45,48). Wroughton did not get any money from either MacCrimmon or MacDonald. On both evenings in question MacCrimmon was "not exactly sober". Wroughton was slightly intoxicated "but I wasn't as drunk as he was". He did not see MacDonald on the first night (R45-47).

On the morning of 29 November MacCrimmon said to Private Paul Stephenson, a member of his organization, "I hit the P.X. last night, for about a hundred pounds." On the following Friday (3 December) Stephenson was sitting on his bed reading when he discovered MacCrimmon standing behind him with an upraised beer bottle. Stephenson left and later returned and moved his bed because he feared trouble over the incident. When making his bed about three and a half hours later he found 10 pounds in the mattress and turned it over to First Sergeant Durand (R63-65).

On 3 December as the result of an interview with Sergeant Durand and Stephenson, MacCrimmon and MacDonald were questioned in turn on several occasions in the presence of Captain John P. Rasmussen, commander of the 1st Battalion, Captain Rolly A. Andrew, commander of Company B, First Lieutenant Robert N. Grunow, administrative office of Company B, and the company first sergeant, John C. Durand (R12,18-20,22,53). It is difficult to ascertain from the evidence the exact order of events leading to the oral and written statements ultimately given by each accused, and the evidence

relative to the discovery of the money is confusing and based to some extent on hearsay. Captain Andrew testified:

> "This all happened in one day, and one afternoon, and we questioned both of them several times, and by tripping them up we finally got one to accuse the other one, and between the two * * *" (R21).

It appears that MacCrimmon was first questioned about "where the 10 pounds had come from" and he denied all knowledge of the theft (R20,22). Wroughton was then questioned and then MacDonald who "swore that he was innocent" (R20-21). His story did not coincide with those of MacCrimmon and Wroughton (R22,53). MacCrimmon was again interrogated and finally said that he "had no knowledge of the Post Exchange robbery" until he went down into the cellar where MacDonald was stoking the furnace and saw him counting a large sum of money. He "blackmailed him for ten pounds" and returned to his quarters (R20,23,53). MacDonald was again questioned and at first protested his innocence but finally admitted that he took the money. He said that MacCrimmon first approached him, told him the location of the money in the post exchange, how the room could be entered and the money taken. MacDonald took the money on the night of 28 November and later that evening when MacCrimmon asked for "his cut on the deal", they divided the money. MacDonald did not know how much he took from the post exchange and neither he nor MacCrimmon knew how much money they divided (R11-12,20,21,23-25,53-54,62). The evidence as to MacCrimmon's ultimate oral statement is somewhat conflicting. Captain Andrew testified on one occasion that MacCrimmon never changed his story about finding MacDonald in the cellar and blackmailing him for 10 pounds (R23). MacCrimmon's ultimate written statement corroborates this testimony except that he stated that he received about half the money when the two men were in the basement (Ex.B). However, Captain Andrew also testified that MacCrimmon did change his statement and that he ultimately admitted that he persuaded MacDonald to commit the crime (R21). Lieutenant Grunow testified that MacCrimmon, when confronted with MacDonald's final statement, admitted that he told the latter where the money was kept, what time to enter the post exchange, "how to go about it" and what to do after he took the money (R54). Admitted in evidence was the written statement of MacDonald which was made after he finally orally confessed his commission of the crime to Captain Rasmussen. MacDonald read the statement before he signed it. Also admitted in evidence was the written statement of MacCrimmon. Before they signed the documents both men were advised by Lieutenant Grunow that they need not sign the statements if they did not desire to do so, and that the statements could be used against them. The defense objected to the admission of the two exhibits on the ground that they were involuntarily made because of certain conduct of Captain Rasmussen (R54-58; Exs.A,B).

Captain Rasmussen testified that when interrogating MacCrimmon he told him "to come clean, on the whole thing * * *."(R11). Before he began to interrogate MacDonald he told him

> "that we wanted his story, and we wanted it honest and straightforward, and we did not want any beating around the bush, and it would be better for him to make a clean breast of this thing because the Government would find these things out sooner or later, and we wanted him to tell us the whole truth of the matter" (R12-13).

Asked what he told MacDonald as to what might happen if he did not confess to any part he played in the incident, and if he said anything about Leavenworth "Prison", Rasmussen testified:

> "I believe that I mentioned that Leavenworth is the place that they put people that commit acts against the government" (R13).

When MacDonald persisted in pleading his innocence and showed "a decided reluctance to tell the truth

> "I think I said to him that what I'd like to do if I had the right was 'to give you a damn 'good beating'" (R13).

When he made this statement he might have been talking to both accused. Captain Rasmussen further testified that he "got quite irritated" and that he raised and lowered his voice (R49).

> "If it was any fear connected with the case it was through my feeling in this matter that showed very plainly that I was anxious for these men to tell the truth, which was evident they were withholding"(R14).

MacDonald declared himself innocent when first questioned and "had a very good case already thought out for himself and had been sticking to it very well."

> "It was only through a lot of hard work on my part, and questioning him, and leading him up to different things that I got him to talk. At the time I did get him to talk was when I brought out to him that his pal MacCrimmon that he

was trying to shield, had no mercy as far as he was concerned, and had already * * * discussed the case, and that we had facts at hand, and finally the boy broke and said 'Well * * * I will tell you. I took it'" (R15).

"* * * in my methods to find out the facts I tried to reach into the heart of these two men to have them come clean with their confessions.

* * * * * * * * *

I was presuming at all times that these men were innocent until they declared themselves differently, and I gave them every opportunity to do so by the questioning of them. At the outset there was evidence and testimony pointing to the fact that these men were involved" (R49).

The defense counsel asked the witness "Captain, did you at the time of this questioning, and at the time you stated MacDonald did make a (oral) statement to you, inform him as to his rights under the 24th Article of War?". The witness replied "No,sir"(R14).

Captain Andrew testified that he was present when Captain Rasmussen questioned MacDonald. Asked by defense counsel if any threatening statements were made he replied "Only in the heat of the questioning"(R26). He could not say whether the same answer applied to MacCrimmon (R26-27). The written statement of MacDonald was in substance as follows:

On the afternoon of 28 November MacCrimmon told him that it would be easy to obtain the funds kept in the "PX" and that "the best time would be before the trucks got back from town or before 2300 hours." About 9.30 p.m. MacDonald went to the post exchange and easily gained entrance as the door was not locked. He lifted the cover of the cash box which was on the counter, removed the currency and hid the money in the basement. After 11 p.m. he met MacCrimmon who asked him how he "made out". MacDonald replied that "it was easy", and showed him the hiding place and the money. MacCrimmon took about half the bills and left, and MacDonald put his half back in the hiding place. He did not see the money after that time nor had he spent any of it (Pros.Ex. A).

The written statement of MacCrimmon was, in substance, that he returned to camp about 11.30 p.m. 28 November, and went to the basement where the furnace was located in order to obtain from MacDonald a carton of cigarettes which he had asked the latter to purchase for him. There he saw MacDonald counting a large number of pound notes and asked him where he obtained the money. When MacDonald replied he "robbed the PX", he told

him he "better give me about half the money or I would squawk". MacDonald "split the bills without counting them and gave me approximately half of them". MacCrimmon took the money, went to his hut and told Wroughton that MacDonald "robbed the PX", and showed him the money. At Wroughton's suggestion, they hid the money near the corner of a barn. The following evening they decided to move the bills but MacCrimmon could not find them. Wroughton found nine pounds later that evening and gave them to MacCrimmon who hid them in his bunk that evening and on the following morning (30 November) placed them in Stephenson's mattress. On Wednesday evening (1 December) they decided to remove the bills but Stephenson walked in during the attempt, became suspicious and left. Later that evening Stephenson returned and moved his bed to another hut. The money was then in the mattress. MacCrimmon did not have the money in his possession when he made the foregoing statement nor had he spent any of it (Pros.Ex.B).

Both statements are dated 2 December which was, apparently, the result of a typographical error.

The sum of 70 pounds was ultimately recovered (R54,58). Captain Rasmussen testified that when he made his oral confession MacDonald told "where the money was". Andrew testified that 36 pounds were found in the cellar by Sergeants Riley and Whatley (R23), and Lieutenant Grunow testified that when MacDonald was informed that some of the money was found in the basement, he said "that was his cache" (R54). MacCrimmon said that he buried some money in a stable. He took Captain Andrew and Lieutenant Grunow to the spot and "dug up" 24 pounds (R24,26,29-30,54,58). Lieutenant Grunow, who had custody of the recovered currency, testified that Captain Andrew gave him another 10 pounds, saying that it was recovered from a mattress of a bed (R52,58).

About a week and a half after 29 November, First Lieutenant Robert A. Steele, Company A, 398th Engineer General Service Regiment, was appointed investigating officer and interviewed each accused separately at the Tidworth Garrison area guardhouse (R67). He told them that he was the investigating officer, explained his duties and advised them that "they did not have to give me a statement; if they did it would be voluntary, and could be used against them in court at a later date" (R67-68). MacDonald in substance orally reiterated the facts contained in his written statement, Pros.Ex.A, and further stated that on the afternoon of 28 November MacCrimmon asked if he would "go in with him on robbing the P.X." MacDonald was hesitant at first but finally agreed to it (R69).

The oral statement given by MacCrimmon to Lieutenant Steele varied in substance from his written statement, Pros.Ex.B, in that he admitted approaching MacDonald, said that it "would be a pretty easy thing to rob the P.X., and asked him about would he come in on it with him". It was finally agreed that MacDonald would commit the offense that night "while the men were in town". When MacCrimmon returned from town about 11 p.m. he met MacDonald and asked "how he did". MacDonald replied that he obtained the money but he

was "scared" because "it was too easy" and that he thought "it was a trap". He gave the money to MacCrimmon who "peeled off" part of it for MacDonald and took the rest. Neither man counted the money. MacCrimmon later saw Wroughton and told him that he met MacDonald who had a considerable amount of currency; that MacDonald told him he had "just robbed the P.X.", whereupon MacCrimmon threatened that he would "squeal" if he did not give him part of the money. The remainder of his oral statement substantially coincided with his prior written statement. He admitted threatening Stephenson with a bottle and stated that he did so in order to obtain the money in his mattress (R68-69).

Captain Andrew testified, on cross-examination by the defense, that during the three months he commanded the company MacDonald followed all orders and was considered a fair soldier. "He was an easy mark by the rest of the men, by earning money running errands for them" (R27). Lieutenant Grunow testified that MacDonald was a hard worker, would do exactly as he was told (R59-60), and that he "has always been honest". He would trust him with 10 pounds of his own money, "would go along" with him and would not hesitate to have him in his company. He further testified "I have talked to other fellows around the Company, and Private MacDonald himself is pretty easily led" (R61-62).

4. For the defense First Sergeant John C. Durand, Company B, 398th Engineers, testified that accused MacDonald was "very good" as a soldier, that he always did what was asked of him although the witness would not trust him with an "important job" (R7173). He was easily led by other men would do willingly whatever was requested of him "regardless of what it was" (R72). Durand was present when both accused were questioned by Captains Rasmussen and Andrew and Lieutenant Grunow. Asked by the court if there were any threatening statements, language or gestures during the questioning, Durand testified:

> "It was a pretty exciting day that day, and I can't recall everything, sir, just the fact that the Captain did mention something about Leavenworth, and said that anybody who committed any offense in the army was subject to go to Leavenworth.
> Q. Was it 'any offense'?
> A. Well, in a case like this, you might say"(R73).

5. The defense objected to the admission in evidence of the written statements of each accused on the ground that the confessions were involuntary because of the conduct of Captain Rasmussen. For the purposes of discussion it is considered preferable to treat the merits of the case as to each accused separately.

> "Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person

competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved (MCM, 1928, par.114a, p.116).

"The fact that the confession was made to a military superior or to the representative agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative/agent of a military superior" (ibid.

"A sergeant obtained a confession from a private by telling the latter, in substance, that he was under suspicion and it would be best for him to tell the truth and 'come clean' as, otherwise, he would be found out sooner or later and then the penalty would probably be more severe. Held - The confession could not be classified as voluntary and was not admissible in evidence. C.M. 152444(1922)" (Dig.Op.JAG., 1912-1940, sec. 395(10), p.206).

"Accused was not warned that he need not answer the questions, except that he was told that he was not compelled to answer any questions which might incriminate himself. An officer advised him to tell the absolute truth; that it would be possible for accused to gain more by that method than by lying. The confession was incompetent. C.M.120821 (1918)" (Dig.Op.JAG., 1912-1930, sec.1292, p.639).

"After the accused had been placed in the guardhouse he was questioned by his commanding officer. He was not warned that he might refuse to answer questions, or that what he said might be used against him. He was told that he had lied, that one of the two men charged with the crime was to be hung and the other to get 20 years in the penitentiary.

> otherwise threatened * * * The confession so obtained was inadmissible. C.M. 124907 (1919)" (Ibid).

> "After accused had been arrested by the civil authorities, he was told by them that they 'had the goods on him, and that he just as well come clean, but no promise of any kind was made.' * * * It was not shown that this confession was voluntary. The corpus delicti was not proved. Conviction is disapproved. C.M. 121458 (1918)" (Ibid, sec. 1293, p.640).

(a) Captain Rasmussen testified that before interrogating MacDonald he said that

> "we wanted his story, and we wanted it honest and straightforward, and we did not want any beating around the bush, and it would be better for him to make a clean breast of this thing because the Government would find these things out sooner or later, and we wanted him to tell us the whole truth of the matter."

He also mentioned that "Leavenworth is the place where they put people that commit acts against the government". When MacDonald persisted in pleading his innocence and showed "a decided reluctance to tell the truth," Rasmussen told him that if he had the right to do so he would like to give him a "damn good beating". He admitted that he was "quite irritated" and raised and lowered his voice. He further testified that if "there was any fear connected with the case" it was from his feeling that disclosed very plainly that he was anxious for the men to tell the truth, and that it was evident they were withholding it. He told MacDonald that "his pal MacCrimmon", whom he was trying to shield, had already discussed the case and had no mercy for MacDonald. Finally MacDonald "broke" and admitted taking the money. He was not advised of his rights when the interrogation began. Asked if any threatening statements were made, Captain Andrewstestified "Only in the heat of the questioning."

In view of the foregoing authorities, the threatening conduct and manner of interrogation on the part of Captain Rasmussen, MacDonald's battalion commander, the fact that his company commander, his battalion administrative officer and his first sergeant were also present during the questioning, and the absence of any warning as to his rights, it is evident that MacDonald's oral confession was not voluntary. Although he was advised as to his rights by Lieutenant Grunow before he signed the written confession, the document in substance embodied his prior oral confession and was signed shortly thereafter on the same day. Under such circumstances it

cannot be reasonably maintained that the warning given by Lieutenant Grunow removed the influence of Captain Rasmussen's prior conduct and rendered the written statement voluntary in character. The Board of Review therefore concludes that MacDonald's oral and written confessions should have been excluded from the evidence (CM ETO 1201, Pheil).

(b) About one week after the written confession was made, Lieutenant Steele interviewed MacDonald in the Tidworth Garrison area guardhouse. He told him that he was the investigating officer, explained his duties and advised him that he "did not have to give me a statement", that if he did so it would be voluntary, and that it could be used against him in court as a later date. MacDonald thereupon in substance reiterated the facts contained in his written confession.

> "And if a confession is induced by threats or violence or any undue influence, a subsequent confession is not admissible, unless it appears to the satisfaction of the court that the prior influences have ceased to operate on the defendant's mind to bring about the later confession. * * * But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown" (Mangum v. United States 289 Fed.213,215).

> "Where a confession has been obtained from the accused by improper inducement, any statement made by him while under that influence is inadmissible, but the question arises as to whether a confession made subsequently to such inadmissible confession is itself admissible. This question, as in the case of any other confession, is one for the judge to decide, and each case must be determined on its own facts. <u>The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof must clearly show, to admit such subsequent confession</u>

in evidence, that the impression caused by the improper inducement had been removed before the subsequent confession was made. The determination of the extent of the influence persisting at the time the subsequent confession is made rests upon attendant circumstances, and the inquiry is whether, considering the degree of intelligence of the prisoner, the nature and degree of the influence, and the time interviewing between the confessions, it can be said objectively that the confessor was not compelled to confess by reason of the pressure or inducement which motivated him to confess on the prior occasion. If the court concludes from all the facts and attendant circumstances that the improper influence had ceased to operate or had been removed, the subsequent confession is admissible. It has also been held, generally, that the influence of the improper inducement is removed where the accused is properly cautioned before the subsequent confession. The warning, however, so given should be explicit, and it ought to be full enough to apprise the accused: (1) That anything that he may say after such warning can be used against him; and (2) that his previous confession, made under improper inducement, cannot be used against him, for it has been well said that 'for want of this information, the accused might think that he could not make his case worse than he had already made it, and, under this impression, might have signed the confession before the magistrate'" (Wharton's Criminal Evidence, Vol.2, sec.601, pp.998-1002) (Underscoring supplied).

"A confession * * * may be rendered involuntary by a prior involuntary confession" (Underhill's Criminal Evidence, 4th Ed., sec.266, p.521).

"Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made. * * * The evidence to rebut the presumption * * * must be presented by the prosecution * * *. The evidence to rebut the presumption must be clear and convincing * * *" (Evidence from American Jurisprudence, Civil and Criminal, sec.487, pp.424-425).

The question presented is whether the prosecution's evidence was sufficiently "clear and convincing" to rebut the presumption that "the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible". Steele informed him that he was the investigating officer, that he did not have to make a statement, that if he did so it would be voluntary, and that the statement could be used against him in court at a later date. No mention, whatsoever, was made of his previous confessions, nor was MacDonald informed that his prior confessions could not be used against him. It is reasonable to conclude under such circumstances that MacDonald, in the words of Wharton, might well have thought "that he could not make his case worse than he had already made it," and orally confessed his guilt to Steele as a consequence. Further, the interview occurred in the guardhouse and after MacDonald had been placed under arrest for the supposed commission of the offense alleged. This confession occurred one week after his earlier confessions, and was made to his military superior by a man who was "pretty easily led". In view of the foregoing authorities and the circumstances under which MacDonald's three confessions were obtained, the Board of Review is of the opinion that the prosecution failed to rebut, by clear and convincing evidence, the presumption that the influence of the prior improper inducement continued, and that the subsequent confession was a result thereof. Although the defense did not object to Lieutenant Steele's testimony concerning the confession, such testimony formed a vital part of the prosecution's case, and the question of its admissibility remains open for consideration by the Board of Review (CM ETO 527, Astrella). The Board is of the opinion that this oral confession should similarly have been excluded from the evidence.

(c) MacDonald, in his written confession (Pros.Ex.A) stated that he had the money in the basement and that after MacCrimmon took "about half of the bills", he restored his own share to the hiding place. When making his oral confession to Captain Rasmussen on 3 December, MacDonald told "where the money was". After Sergeants Riley and Whatley found 36 pounds in the cellar, MacDonald was informed that some of the money was found in the basement. He said that it was his "cache".

Evidence that accused was found in possession of recently stolen property is not only admissible but may also raise a presumption that he stole the property (MCM, 1928, par.112a, p.110; CM ETO 885, Van Horn), and possession of part of stolen property infers theft of all of the property (CM ETO 952, Mosser; CM 157982, Acosta; CM 192031, Allen; CM ETO 1201, Pheil).

The rule with respect to admissibility of incupatory facts is stated as follows:

"The rule is settled that, notwithstanding the inadmissibility of the confession, all facts discovered in consequence of the information given by the accused, and which go to prove the existence of the crime of which he is suspected, are admissible as testimony. * * *. It is obvious that a search made as a consequence of information given by the accused must result in the discovery of the inculpatory facts, as otherwise no testimony, either as to the confession, or as to the search instituted in consequence of it, is admissible. In connection with the discovery of the alleged inculpatory facts, there should be proof, beyond a reasonable doubt, of the identity of the property, the body, or other fact. This is the rule with regard to larceny, and in other crimes, identification should be complete before admission of the inculpatory facts. But when the search reveals the inculpatory facts, and there is conclusive identification of such facts, this necessarily brings with it the reception in evidence of the accused's statements in giving the information" (2 Wharton's Criminal Evidence, 11th Ed., sec.600, pp.995,997,998).

"Independent Facts and Evidence.- discovered through a confession inadmissible because impelled by hope or fear, are not therefore to be rejected. To illustrate: if one under excluding influences confesses a larceny, and thereon conducts an unsuccessful search for the stolen goods, the search equally with the confession will be withheld from the jury; but should the goods be found, they may be exhibited to the jury and identified as those stolen. * * *. But the better common law doctrine in authority and probably in reason is, that when the confession is thus confirmed, simply so much of it as led to the finding, and, should the prisoner have been present at the search and finding, his declarations and conduct during this period, or his declarations when he surrenders back an article stolen, may be shown to the jury in connection with the thing itself. The finding makes the truth of so much of the confession sufficiently evident" (2 Bishop's New Criminal Procedure - 2nd Ed. sec.1242, pp.1061, 1062) (Underscoring supplied).

"Although a confession may be inadmissible as a whole because it was not voluntarily made, nevertheless the fact that it furnished information which led to the discovery of other evidence of pertinent facts will not be a reason for excluding such other evidence; and when such pertinent facts have thus been proved, so much of the accused's statement as relates strictly to those facts becomes admissible. For example, where an accused held for larceny said 'I stole the articles and I tore up a board in the floor of my room and I hid them there,' the fact that the confession was improperly induced by promises or threats would not exclude evidence that the articles were discovered in the place indicated by him, and after the introduction of such evidence, it would be proper to prove that the accused made the statement, 'I tore up a board in the floor of my room, and hid them there.'" (MCM, 1928, par.114a, pp.114,115) (Underscoring supplied).

It is noted that the Manual for Courts-Martial has adopted the rule set forth by Bishop as the "better common law doctrine". Therefore, those parts of his oral confession to Rasmussen and his later written confession, which related strictly to inculpatory facts discovered as a result of information furnished by the confession will be admissible. The inculpatory facts however must be proved by evidence other than that contained in the illegal confession (CM ETO 1201, Pheil). In the instant case the notes recovered in the basement were not before the court. They were not offered in evidence nor were they identified as those taken from the cash box. There was no other evidence whatsoever, aside from MacDonald's confession, to identify the property. His statement that it was his "cache" does not prove that the notes found in the cache were part of the stolen property. In the foregoing words of Wharton - "In connection with the discovery of the alleged inculpatory facts, there should be proof, beyond a reasonable doubt, of the identity of the property," and "identification should be complete before admission of the inculpatory facts".

The prosecution failed to prove the inculpatory facts by evidence other than that contained in MacDonald's illegal confession. The case under consideration is therefore distinguishable from the Pheil case wherein, although the notes were not introduced in evidence, it was held that the recovered currency was identified, although somewhat sketchily, as part of the stolen property and accordingly, that certain portions of accused's illegal confessions "relating strictly to the identity of the pound notes" were admissible in evidence.

(d) As has been stated, the evidence was conflicting as to whether MacCrimmon orally confessed to Captain Rasmussen that he instigated the affair, persuaded MacDonald to commit the offense, and told him how to do it. His written statement (Pros.Ex.B) does not so indicate and implicate MacDonald only as far as the actual theft is concerned. However, according to his oral confession to Steele, MacCrimmon suggested the theft to MacDonald, the two men finally agreed that MacDonald should take the money "while the men were in town", and they later divided the proceeds. Also, Wroughton testified that MacCrimmon told him MacDonald "robbed the post exchange", that he saw him with the money, and that he gave MacCrimmon part of the proceeds. The admissions and confessions by MacCrimmon were inadmissible against MacDonald. It is a well established principle of law that the acts, statements, admissions or confessions of one conspirator done or made after the common design is accomplished, are not admissible against another except when done or made in furtherance of an escape. This fact does not prevent the use of such admission or confession against the one who made it. CM 176607 (1927) (Dig.Op.JAG., 1912-1940, sec.395 (12), p.209) (MCM, 1928, par.114a, p.117; CM ETO 1052, Geddies, et al).

> "When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent action or declaration of his own to affect the others (Wharton's Criminal Evidence, 11th Ed., Vol.2, sec. 714, p.1202).
>
> "The voluntary confession of a co-defendant or co-conspirator made after the commission of a crime or the termination of the conspiracy cannot be admitted against the other defendants where such confession was not made in their presence and assented to by them, even though the several defendants are being tried jointly. This does not, however, necessarily preclude the use of the confession as evidence against the one who made it" (Evidence from American Jurisprudence, Civil and Criminal, sec.493,p.427) (Underscoring supplied).

There is no positive evidence that MacDonald was present when any statements or confessions which implicated him were made by MacCrimmon.

In view of the foregoing authorities and for the reasons stated, the Board of Review is of the opinion that the evidence is legally insufficient to sustain the findings of guilty and the sentence as to accused MacDonald.

6. With reference to MacCrimmon, the legal evidence shows that he made the highly significant statement to Stephenson that "I hit the P.X. last night for about a hundred pounds". He also told Wroughton on the evening of 28 November that "MacDonald had robbed the PX" and had given him part of the money. MacCrimmon "dug up" 24 pounds and gave the money to two officers. The sum of 10 pounds was found in Stephenson's mattress, a hiding place previously selected by this accused. The fact that the 34 pounds was part of the stolen property was established by MacCrimmon's statements to Wroughton and Stephenson, and by his own written statement (Pros.Ex.B). In view of the foregoing competent and substantial evidence, 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 to accused MacCrimmon.

In reaching this conclusion the Board of Review for the reasons hereinbefore stated, has treated as inadmissible in evidence MacCrimmon's oral confession to Captain Rasmussen, his written confession to Lieutenant Steele, and the admissions, confessions, acts and statements of MacDonald which implicated MacCrimmon. It is of the opinion that the legal evidence set forth in the preceding paragraph is, standing alone, "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty * * * C.M.127490 (1919), * * * C.M. 130415 (1919)" (Dig.Op.JAG, 1912-1930, sec.1284, p.634).

7. The charge sheet shows that accused MacDonald was 25 years of age and was inducted 2 March 1943 for the duration of the war plus six months. He had no prior service. The charge sheet as to MacCrimmon shows that he was 35 years of age, and that he was inducted 19 March 1943 for the duration of the war plus six months. His prior service was as follows: "Private - from 9 October 1930 to 14 April 1933 - Coast Artillery unassigned".

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of accused MacCrimmon were committed during the trial, but prejudicial and fatal error was committed as to accused MacDonald. The Board of Review is of the opinion that the record of trial is legaly insufficient to support the findings of guilty and the sentence as to accused MacDonald, and legally sufficient to support the findings of guilty and the sentence as to accused MacCrimmon.

B. Franklin Riley Judge Advocate

Ryan Brookhart Judge Advocate

Elwood Hargest Judge Advocate

(374)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 MAY 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Public Law 693, 77th Congress, 1 August 1942, is the record of trial in the case of Private HECTOR A. MacDONALD (31326380) and Private First Class EVERTON N. MacCRIMMON (6538571), both of Company "B", 398th Engineer General Service Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to accused MacDonald, and legally sufficient to support the findings of guilty and the sentence as to accused MacCrimmon. I recommend that the findings of guilty and sentence herein as to Private Hector A. MacDonald be vacated, and that all rights, privileges and property of which he may have been deprived by reason of such findings and sentence so vacated, be restored.

3. Inclosed is a form of action designed to carry into effect the recommendations hereinbefore made. Also draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

3 Incls:
Incl.1: Record of Trial
Incl.2: Form of Action
Incl.3: Draft GCMO

(Findings and sentence vacated as to Private MacDonald. GCMO 36, ETO, 28 May 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1515

6 MAR 1944

U N I T E D S T A T E S	2D INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Market Hill, Northern Ireland 1 February 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private J.D. (IO) SMITH (6951593), Company F, 23d Infantry.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 96th Article of War.
Specification 1: (Finding of not guilty)
Specification 2: In that Private J. D. (initials only) Smith, Company F, 23d Infantry, having received a lawful order from Corporal James R. Cantrell, Military Police, 2d Infantry Division, to return to his organization, the said Corporal Cantrell being in the execution of his office, did, at Armagh, North Ireland, on or about November 6, 1943, fail to obey the same.
Specification 3: In that * * * * * * * * * * * *, did at Armagh, North Ireland, on or about November 6, 1943, wrongfully attempt to strike Private James B. Edwards, Military Police, 2d Infantry Division, in the face with his fist.

CHARGE II: Violation of the 58th Article of War.
Specification: In that * * * * * * * * * * * * * *, did, at 10th Station Hospital, Belfast, County Antrium, North Ireland, on or about November 22, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Belfast, County Antrium, North Ireland on or about January 10, 1944.

He pleaded not guilty, and was found not guilty of Specification 1, Charge I, but guilty of Charge I and Specifications 2 and 3 thereof and of Charge II and its Specification. Evidence was introduced of one previous conviction by special court-martial for being found drunk while a prisoner and failing to obey a sentinel's order, both in violation of Article of War 96, and for using threatening and insulting language towards three noncommissioned officers in violation of Article of War 65. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 50 years at such place as the reviewing authority may direct. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. With reference to Specification 2 of Charge I, the evidence shows that at about 2330 hours on 6 November 1943 accused while on a public street in Armagh, Northern Ireland, was ordered to return to his organization, by Corporal James R. Cantrell, Military Police, 2nd Infantry Division, who was engaged in regular curfew check. Accused failed to obey the order. He was thereupon placed under arrest by the corporal (R9-10,12-13). This is adequate proof of accused's failure to obey the lawful order of a noncommissioned officer in the execution of his office in violation of Article of War 96 as alleged (Manual for Courts-Martial 1928, par.104c, p.100).

4. In support of Specification 3, Charge I, the evidence shows that accused broke the arrest under which he was placed by Corporal Cantrell and ran down the street. He attempted to strike Private James B. Edwards of the same Military Police Platoon, after the latter had overtaken him and hit him on the neck with his club (R10,13-15). This is clear evidence of an assault in violation of Article of War 96 as alleged (Manual for Courts-Martial 1928, par.152a, p.189; par.149b, p.177).

In the opinion of the Board of Review the findings of guilty of Specifications 2 and 3, Charge I and of Charge I are fully supported by the record.

5. Prosecution's evidence in proof of Charge II and its Specification, shows that on 6 November 1943 accused obtained from the first sergeant of his company a pass which expired at 2330 hours on that date (R6-7). After

his encounter with the Military Police, described above, Corporal Cantrell turned him over to an officer in the Special Units Dispensary (R10). He was then suffering from face injuries (R11). On 7 November he was delivered as a patient to the 10th Station Hospital in Belfast, Northern Ireland, by members of the 2nd Division Medical Detachment, and on 22 November was discharged from this hospital. He entered an ambulance but left it when it reached Belfast and did not return to his organization (R18; Ex.B). On 10 January 1944, accused was apprehended in civilian clothes in Belfast by a sergeant of the Royal Ulster Constabulary, Belfast (R16,17). He was brought before the Head Constable, who asked him for a document of identification which he failed to produce, saying that his papers were at the Red Cross. When asked if he were a United States soldier, he replied that he was a merchant seaman and had to be aboard his ship at 10 o'clock that night. He further stated that he was an American citizen (R17-18). The Head Constable turned him over to the Military Police who brought him to Military Police Headquarters where he was placed under arrest. He there stated "that he was glad that he was picked up by the military authorities so he could be returned to military control" (R18,19-20).

6. Accused elected to appear as a witness on his own behalf. He testified that when he left the ambulance in Belfast he went into a bar, consumed a few drinks and did not return to the ambulance, but intended to travel by train that night to his camp (R22). He had £22 with him at the time. During his absence he slept at the Y.M.C.A., the Red Cross, the Old Soldiers' Home and the Salvation Army. He did not intend to hide and was in contact with members of his regiment. He explained his failure to return as follows:

> "I got drunk and I always had a hangover and I knew that I would be tried and I was scared to come back and I kept on staying until forty-two days passed around."

He expected to return when his money "played out" (R23). He admitted on cross-examination that he had opportunities to return to his organization during his absence (R25). He first dressed in civilian clothes about 0200 hours on the day of his apprehension (10 January 1944), for the purpose of crossing the "border" with another soldier. "He wanted to go to Dundalk across the border and I consented and I told him that I'd put on civilian clothes but when we got back we'd put our uniform back on and turn in" (R23). There was evidence that he was in uniform on 10 January 1944 in the company of another soldier for whom a Belfast resident obtained civilian clothes, and that later in the day he was in civilian clothes (R24).

7. Accused's absence without leave from 22 November 1943 until 10 January 1944 is clearly established by the evidence, including his own sworn testimony. The only question presented by the record therefore is whether it contains sufficient evidence of accused's specific intent not

to return to the military service of the United States. In the opinion of the Board of Review, the record contains substantial evidence of such specific intent, prolonged absence, denial of identity, apprehension in civilian clothing; (CM ETO 656, Taylor; CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet; CM ETO 875, Fazio; CM ETO 913, Pierno; CM ETO 952, Mosser; CM ETO 960 Fazio et al).

8. The charge sheet shows that accused is 22 years seven months of age. He enlisted 24 November 1939 and had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offenses. 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 approved by the reviewing authority. The punishment for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 6 MAR 1944 To: Commanding General, 2d Infantry Division, APO 2, U. S. Army.

1. In the case of Private J. D. (IO) SMITH (6951593), Company F, 23d Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1515. For convenience of reference please place that number in brackets at the end of the order: (ETO 1515).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

- 7 MAR 1944

ETO 1519

U N I T E D S T A T E S	)	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Private FRANK (NMI) BARTEL (38111355), 322nd Replacement Company, 49th Replacement Battalion, 10th Replacement Depot.	)	Trial by G.C.M., convened at Whittington Barracks, Lichfield, Staffordshire, England 8 February 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, 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 I: Violation of the 58th Article of War.
Specification: In that Private Frank (NMI) Bartel, 322nd Replacement Company, 49th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Whittington Barracks, Lichfield Staffordshire, England, on or about 14 November 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Prescott, Lancashire, England, on or about 21 January 1944.

CHARGE II: Violation of the 93rd Article of War.
(Nolle prosequi)
Specification: (Nolle prosequi)

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for 73 days, one by summary court for absence without leave for five days, both in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for 20 years. The reviewing authority approved the sentence but reduced the period of confinement to 15 years, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused's absence without leave from Lichfield from 14 November 1943 to 21 January 1944 is established by his own admission to Police Sergeant Harold Wolstencroft, Lancashire Constabulary, and by his own testimony (R9-10, 12-15; Pros.Ex.A). He was apprehended at Prescott, Lancashire, England, on 21 January 1944 at 0300 hours clad in civilian clothing which he was wearing over his uniform (R9). He wore no head-dress. He admitted to Wolstencroft that he bought the grey flannel trousers from a soldier in Liverpool "today", and that he bought the brown overcoat "in Chester a few days ago" (R10). He testified that he had obtained both articles of clothing from a British soldier in Liverpool "two or three days before I got picked up", that he had not worn this clothing before the day of his apprehension, and that he wore these clothes only for the purpose of avoiding seizure by the military police before he reached Lichfield to surrender himself. If he had secured a ride, he would have taken them off and arrived at camp in his uniform. He was trying to save the government money in the matter of transporting him to his station (R13-14). Asked what he had been doing all the time he was absent, accused replied:

> "Well, sir, I had a little money and I stayed with a British soldier for a while, stayed at his house, and I stayed with some of his relatives and went different places -- to London, for one, and Liverpool for another" (R13).

He asserted that he had no intent to remain away permanently at any time during his absence (R13). At the time of his arrest by Wolstencroft, he had on his person "an identity card issued by the United States authorities, which was identical with his description" (R9).

4. Since absence without leave was established by the testimony of accused as well as by evidence offered by the prosecution, the only question is whether the record contains sufficient evidence of accused's specific intent not to return to the military service of the United States (AW 58). In the opinion of the Board of Review, such specific intent is established by his long continued absence of over two months, by his admitted presence in London and Liverpool near United States military installations with no effort made to surrender himself, and by his seizure by civil police while dressed in civilian clothing (CM ETO 1412, Medeiros, and cases cited therein; CM ETO 1515, Smith).

5. The charge sheet shows that accused is 23 years seven months of age and was inducted at Fort Sam Houston, Texas 15 June 1942. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense. 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. The punishment for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is authorized (AW 42; WD, Circular #291, sec.V, 3a and b, 10 November 1943).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

(384)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 7 MAR 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private FRANK (NMI) BARTEL (38111355), 322nd Replacement Company, 49th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1519. For convenience of reference please place that number in brackets at the end of the order: (ETO 1519).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1535

- 8 MAR 1944

U N I T E D S T A T E S	9TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Cefalu, Sicily, 4 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Private JAMES J. COOPER (34143132), Company A, 39th Infantry.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private James J. Cooper, 34143132, Company "A", 39th Infantry, did, near Cefalu, Sicily, on or about August 27, 1943, assault Sergeant Keith M. Gilman, 36217351, Company "A", 39th Infantry, with intent to commit murder, by shooting him in the chest with a U.S. Army pistol, calibre .45.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of previous convictions was not available as the accused's service record had been forwarded to NATOUSA. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, directed that the prisoner be held at Oran, Algeria pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution was substantially as follows:

On 27 August 1943, accused, with other soldiers, had been "on pass" in Palermo, Sicily. At 7:00 p.m. all of them started for camp in trucks (R5). The convoy commander, Second Lieutenant Jack L. Bivins, Company A, 39th Infantry, rode in the front seat of the truck immediately in rear of that in which accused was riding. On the trip, Bivins noticed two men "scuffling" in the truck ahead and recognized these men as accused and Sergeant Keith M. Gilman. Accused had struck Technician Fourth Grade Paul Theophilos who had returned the blow. Sergeant Gilman, with the aid of Sergeant Robert Waddle, had stopped the fight, pinned accused on the floor of the truck and held him there (R11). Accused then threatened to kill both Sergeant Gilman and Sergeant Waddle. About ten minutes after this occurrence, the trucks stopped and Lieutenant Bivins ordered accused to transfer to Bivin's truck which, after some delay, he did. The convoy moved out again, later stopped and accused told Lieutenant Bivins, "You can get a firing squad ready for sunrise" because he (accused) was going to kill Sergeant Gilman (R6-7). Upon his return to camp, which was approximately 9:45 p.m. (R15), accused procured a .45 calibre United States Army pistol and went to Sergeant Gilman's tent (R17). He asked Gilman "Can you face it?". Without further words or action he shot Gilman in the chest. Sergeant Waddle who witnessed the shooting, stated that accused as he approached Gilman walked steadily. He held the pistol close to his body and chest-high when he pulled the trigger from a distance of about two feet from Gilman (R14). Waddle was of the opinion that accused was "slightly" drunk, his opinion being based upon "the way he handled himself in the truck, with the truck running and him standing up and the way he had gotten from the truck to the bivouac area" (R13). However, Waddle, who was not more than eight feet away from the accused when he fired the shot, testified that accused's actions at that time did not indicate any drunkenness (R13-14). In Lieutenant Bivins' opinion, the accused was not drunk (R8). At the time of the scuffling incident in the truck, Theophilos was of the opinion that accused was drunk because "he was passing the bottle of wine around, sir, and he was just practically flopping all over the truck" (R11).

While in front of his aid station at approximately 9:45 p.m., Captain Heinrich W. Kohlmoos, Battalion Surgeon, 1st Battalion, 39th Infantry, heard a shot which was immediately followed by a groan and a cry of "Medics". With a litter and his aid men he went immediately in the direction of the sound, found Gilman lying on his back and groaning. He examined Gilman and found "a penetrating wound of his right chest and in the middle portion of his back just to the left of the midline", gave him sedation, dressed the wounds and "turned him over to the ambulance" (R19). At about 10:30 p.m., he examined the accused for sobriety. He believed accused had been drinking but he was not drunk. In Captain Kohlmoos' opinion, accused was then in full control of his faculties, his speech being coherent, his coordination good, and his gait normal (R20).

At the 11th Evacuation Hospital where Sergeant Gilman was taken by ambulance, Captain Ralph M. Stuck examined him at about 2400 hours and found him totally paralyzed below the level of the chest. All spinal nerves had been severed by the shot at the level in the spine between the eleventh and twelfth dorsal vertebral interspace. As a result of this injury, Gilman will never be able to move his legs or move his bowels or urinate properly. "This injury, with the resulting paralysis and other items specified above, is likely to be the indirect cause of this man's death, within a year". Such cases usually "don't last more than a year" (R21-22).

4. The defense offered no evidence. Accused elected to remain silent.

5. Accused was charged with and convicted of an assault with intent to murder. This offense is an assault "aggravated by the concurrence of a specific intent to murder" (Manual for Courts-Martial 1928, par.149 l, p.178). Both an assault and battery were proved by competent evidence. The only question worthy of comment is whether at the time of the shooting there was in the accused's mind, as evidenced by word or deed, the specific intent to murder. More specifically, did the accused, without justification or excuse, intend to kill Sergeant Gilman with malice aforethought?. Appropriate and cogent to this question is the following generally accepted principle:

> "While a specific intent to kill is an essential ingredient of the offense of assault with intent to commit murder, this requirement does not exact an intent, other than an intent which is inferrable from the circumstances. So while the intent cannot be implied as a matter of law, it may be inferred as a fact from the surrounding circumstances, such as the unlawful use of a deadly weapon, provided it was used in such a manner as to indicate an intention to kill, or from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result. Other circumstances which may be considered as bearing upon the propriety of an inference of intent are: The character of the assault, the nature or extent of the wound or injury, the presence or absence of excusing and palliating facts or circumstances, and prior threats" (30 C.J., sec.165, p.21).

Within an hour or two prior to the assault, accused had threatened to kill Gilman. Upon arriving at his company's bivouac area, he procured a United States Army pistol, .45 calibre, deliberately sought and found his

intended victim and, at a distance of not more than a few feet, discharged it at Gilman's chest, wounding him so seriously that the medical testimony indicates that he will probably die within a year from the indirect effects of this wound. There were no circumstances present which would either justify, excuse or alleviate the offense. The intent to murder was proved by competent and most convincing testimony (CM ETO 78, Watts).

In the opinion of the Board of Review, the record is legally sufficient to sustain the finding of guilty of assault with intent to commit murder.

6. The charge sheet shows that accused is 21 years and 3 months of age and carries this notation: "No prior service. Current Enlistment: Inducted at (Service Record not available. To be entered at the earliest date) on the 11th day July, 1941."

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the 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. The sentence to dishonorable discharge, total forfeitures and confinement at hard labor for 20 years, for assault with intent to murder in violation of Article of War 93, is authorized (Manual for Courts-Martial 1928, sec.104c, p.99). Confinement in a United States Disciplinary Barracks is authorized. However, confinement in the United States Penitentiary, Lewisburg, Pennsylvania is also authorized (AW 42; sec.276 Federal Criminal Code, 18 U S C A 455; WD, Cir. #291, sec.V, pars.3a and b, 10 November 1943).

_____ Judge Advocate

_____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 8 MAR 1944 TO: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private JAMES J. COOPER (34143132), Company A, 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (WD, Cir. #210, sec.VI, par.2a, 14 September 1943 as amended by WD, Cir. #331, sec.II, par.2, 21 December 1943). This may be done in the published general court-martial order.

However, the accused was found guilty of a deliberate, unprovoked assault with intent to commit murder. No facts appear in mitigation or amelioration of his crime. Section 276 of the Federal Criminal Code (18 U S C A 455) denounces said offense and prescribes a maximum punishment of twenty years confinement in a penitentiary. Therefore, penitentiary confinement is authorized in this case (AW 42; Manual for Courts-Martial 1928, par.90, p.80). I believe the place of confinement of accused should be changed to the United States Penitentiary, Lewisburg, Pennsylvania. This can be done by a supplemental action which should be forwarded to this office for attachment to the record of trial. Prior to promulgation of the court-martial order executing the sentence the reviewing authority possesses the requisite power to effect this modification of his prior action (Manual for Courts-Martial 1928, par.87b, p.78; Manual for Courts-Martial 1921, par.387, p.320).

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1535. For convenience of reference please place that number in brackets at the end of the order: (ETO 1535).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1538

12 APR 1944

U N I T E D S T A T E S v. First Lieutenant CHESTER F. RHODES (O-909321), Quartermaster Depot Q-107, Quartermaster Corps.	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Ipswich, Suffolk, England, 18-19, 24 January 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and SARGENT, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 94th ARTICLE OF WAR.

Specification 1: In that First Lieutenant Chester F. Rhodes, Quartermaster Depot Q-107, officer in charge of the Depot Sales Section (wholesale Post Exchange warehouse) at Quartermaster Depot Q-107, did, at Stowmarket, Suffolk, England, on or about 1 January 1943, feloniously embezzle by fraudulently converting to his own use approximately 19 cases of candy of the value of about $1200., the property of the United States, furnished and intended for the military service thereof, intrusted to him, the said Lieutenant Rhodes by military authority; by selling the said goods and retaining the proceeds therefrom.

Specification 2: In that * * *, did, at Stowmarket, Suffolk England, on or about 5 May 1943, knowingly and willfully misappropriate 60 tins of peanuts and 4 "Zippo" lighters of the value of about $18.38, property of the United States, furnished and intended for the military service thereof by wrongfully exchanging them for three leather Air Corps jackets.

Specification 3: (Finding of Not Guilty).

Specification 4: (Finding of Not Guilty).

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

Specification: In that First Lieutenant Chester F. Rhodes, Quartermaster Depot Q-107, did, at Stowmarket, Suffolk, England, on or about 29 November 1943, with intent to deceive Lieutenant Colonel Joseph F. Hurley, Inspector General, Headquarters Eastern Base Section, officially state to the said Lieutenant Colonel Hurley that he did not receive any sum of money from Captain Horace J. Kimsey, AAF Station No. 595 for 19 boxes of damaged candy delivered by Lieutenant Rhodes to Captain Kimsey and that no candy was shipped to AAF Station 595 other than that which was shown on a tally out form, which statements were known by the said Lieutenant Rhodes to be untrue, in that Lieutenant Rhodes did receive approximately $1,136 from said Captain Kimsey for the sale of said candy at AAF Station 595 (approx. 19 boxes of candy) which was not shown on a tally form.

CHARGE III: Violation of the 96th Article of War. (Finding of Not Guilty).

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

Specification 3: (Finding of Not Guilty).

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

Specification: In that First Lieutenant Chester F. Rhodes, Quartermaster Depot Q-107, officer in charge of the Depot Sales Section (Wholesale Post Exchange Warehouse), at Quartermaster Depot Q-107, did, at Stowmarket, Suffolk, England, during the period from about 1 December 1942 to about 1 December 1943, wrongfully and without proper authority sell and permit to be sold post exchange merchandise from said Depot Sales Section, the property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to all charges and specifications and was found guilty of Charge I; of Specification 1, Charge I, guilty, except the words "$1200" changed to read "$970", of the excepted words, not guilty, of the substituted words, guilty; of Specification 2, Charge I, guilty, except the words "four 'Zippo' lighters of the value of about $18.38", substituting therefor respectively the words "of the value of $15," of the excepted words, not guilty, of the substituted words, guilty; of Specifications 3 and 4, Charge I, not guilty; of Charge II, guilty; of the Specification, Charge II, guilty, except the words "$1136," changed to "$970," of the excepted words, not guilty, of the substituted words, guilty; of Charge III and its specifications, not guilty; of the Additional Charge and its Specification, guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed from 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 three years. The reviewing authority, the Commanding Officer, Eastern Base Section, Services of Supply, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence; designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution was substantially as follows:

Mr. Maxwell Henry Gordon, warehouse manager of "QM Depot 107" (R16) who had served several terms in English prisons for house-breaking, flat-breaking and receiving stolen property, all subsequent to the last war and prior to 16 years ago (R29,35-36) testified that he had been employed as civilian warehouse manager at the warehouse at Q-107 since 1 December 1942 and was still thus employed. The officer in charge was accused. The second in charge was Sergeant Ryan and witness was the third in charge. Gordon's duty was to supervise the incoming and outgoing merchandise, and the assembly and dispatch of orders. He was also responsible for the general care and upkeep of the warehouse. QM Depot 107 was a wholesale warehouse supplying retail "PX" distribution. Merchandise consisted chiefly of cigarettes, tobacco, cigars, razor blades, chocolate, cookies, shaving material, all "PX" merchandise and a certain amount of nurses' items.

The method of operation of the warehouse was described by Gordon as follows: Notification in the shape of a "tally-out" form was received from the bulk depot which furnished "Depot Q-107" its supplies of merchandise. The merchandise usually arrived within a day or two thereafter. A checker checked the merchandise as unloaded and witness verified its receipt into the warehouse (R16). When the shipment was completed, it was examined for pilferages, breakages and damages which were noted on a "tally-in" form submitted to the office. Shortages were shown on an "OS & D" (over, short and damaged) form and a report of survey signed by the sales-store officer in charge of the "PX" warehouse was transmitted to the

bulk depot. The merchandise was distributed to the retail sales stores in bulk according to the units' strength. Occasionally bulk was broken when distribution was for smaller units. To obtain merchandise, a retail sales store submitted a requisition to "Depot Q-107". The items were transferred in the office from the requisition to a worksheet which was sent to witness who supervised the assembly and packing of the items. The worksheet then was returned to the office from which a "tally-out" was prepared showing quantities of merchandise, the prices and total. A copy of the "tally-out" and a copy of the worksheet were delivered with the goods. No cash was ever involved in the normal operation of the distribution of merchandise (R17).

Accused and Ryan deviated from this established method of merchandise withdrawals by making cash sales, the proceeds of which were kept in a cash box in the office. Ryan usually retained the key to it. Pros. Ex.5 was identified as two papers representing the cash which was in the box and the amounts in which two persons received the cash from it. These papers were made out by Ryan in accused's presence and were shown to accused when Ryan was "going on pass and he was going to take some money which was in the box as he thought he had not had enough" (R22). It was customary for both accused and Ryan to take money from the box and these two papers actually are a "statement of accountancy". (The prosecution then withdrew the exhibit without it having been admitted in evidence). The defense did not object (R23-24). Pros.Exs.1 and 2 were identified as orders dated 1 March 1943 and 24 April 1943 signed by accused. They informed all employees, both warehouse and office, that no sale could be made of any warehouse goods unless a slip had been first procured from either accused or Ryan (R18-19). The only record of such case sales were the slip signed by accused or Ryan authorizing the sale and a record of the sale entered in a cash-sales book, also under the care of Ryan (R19). Pros.Ex.3 was identified as the cash sales book in question and was admitted in evidence (R19-20). Witness testified that this book did not contain a record of all cash sales made from the warehouse. To account for items sold for cash, they were listed on the "tally-out" of a sales store and the equivalent in cash was given to the store (R20). This method was authorized by accused and for such purpose two stores only were used: the retail Post Exchange of Q-107 until the end of April (R20) and AAF 595 Post Exchange thereafter. The new "PX" officer of the retail Post Exchange of Q-107 rejected such procedure (R21).

Coca Cola was an item charged into the warehouse at 3d a bottle and sold by direction of accused and Ryan for cash at 4d (R22).

On 12 December 1943 a large shipment valued about £20,000 arrived at the warehouse in bad condition. Many of the items, particularly chocolate or candy, were badly packed but they looked worse than they actually were. There was prepared a report of survey which specified both damaged and undamaged merchandise. Included in the survey report were 19 wooden boxes of candy. At the direction of accused they were concealed

from the survey officers. The candy was vendible and undamaged. At the further direction of accused, these 19 boxes of candy were delivered to Captain Kimsey, "PX" officer at the retail store at AAF Station 595 (R25) and were not shown on a "tally-out" sheet (R43). It was shown nowhere on the records of the warehouse except in the report of survey. "It was sent to Captain Kimsey and the assumption was at that time that when all the stink had died down that he would return it, but he was afterwards asked by Lieut. Rhodes to dispose of it in his PX." Some weeks later towards the end of January 1943, Captain Kimsey brought a sum of money and in accused's office in the presence of witness paid it over to accused (R26). The 19 cases had a value of about £300 (R43).

About 5 May 1943, accused informed witness that Sergeant Zucco of the 91st Bombardment Group was going to give him three leather jackets and directed witness to prepare 60 cans of peanuts for delivery to Zucco. There were also four Zippo lighters to be given Zucco. Accused wore a leather jacket from that time up to December. Witness placed the value of the lighters at 6s. 6d. each and the peanuts at a shilling a can, a total of £4. 6s. 6d. Colonel Spray, depot commander of Q-107, Ryan and accused each received one of these jackets (R27).

On cross-examination witness testified: That he had seen accused take money out of the cash box several times and had also seen him take merchandise from the warehouse; that he was present when accused spoke to Captain Kimsey about the so-called damaged candy and was also present when payment of "a certain sum of money" was made to accused by Captain Kimsey for approximately £300 worth of candy sent to him. Captain Kimsey said to accused, "Here is the money for the candy" (R30).

Accused mentioned to witness that the compensation to Sergeant Zucco for the three "Air Corps jackets" would be by accused giving him the peanuts "and so forth". (R31). The four Zippo lighters were kept in the office safe and witness did not see them (R33). No "tally-out" was made for these items (R41).

Witness unpacked and examined every case of damaged merchandise. He was directed by accused "that a certain amount of merchandise should be put at the bottom of the warehouse on the left-hand side and be kept apart and not to be included in the stock and not to be included in the report of survey" (R33).

Witness protested these various irregularities and informed Captain Israel, the new "PX" officer at the retail store of Q-107 (R42), Second Lieutenant Clarkson and Major Cable, Finance Officer, of conditions (R45). These various unauthorized issues of stock were shown as shortages on the stock records. On two occasions there were received "overages" of stock but the "overages" were not placed on the stock record cards (R44).

Lieutenant Colonel Joseph F. Hurley, Inspector-General, Eastern Base Section testified in substance as follows: He had made an investigation of alleged irregularities at Q-107 for the period from 27 November "1943" (sic 1942) to 10 December 1943. During the investigation he had

interviewed accused at various times including 29 November, 9 December and 22 December. All statements made by accused were made voluntary, after due warning and without promise or duress and were taken under oath (R48). Accused signed a statement taken on 29 November.

On 9 December, accused, being questioned, stated that all merchandise marked "unfit for sale" included in the "OS & D" and Report of Survey amounting to approximately £340, had been all "shipped back to London". He denied that 19 boxes of merchandise were shipped to AAF Station 595. He denied that he asked Captain Kimsey to dispose of some of the merchandise that arrived at the warehouse from London in a damaged condition. He stated that it was regular stock but "terrible" candy they had at Christmas time. He denied that Gordon had shipped 19 boxes to AAF Station 595 on his orders and that it was sold by it or that any candy was shipped except on a "tally-out". He denied that Captain Kimsey handed him about £300 in cash on or about that time or that he ever "received anything". He denied that any of the damaged goods were turned over to Captain Kimsey and asserted that Captain Kimsey received no undamaged goods except on "tally-outs". Accused understood that he gave these answers to witness while the latter was acting in his official capacity (R49). On 22 December, accused was again interviewed by Lieutenant Colonel Hurley. There were read to him parts of statements given by others which declared that accused did sell goods through Captain Kimsey at AAF Station 595 which were not shown on a "tally-out"; that he did receive approximately £284 in payment and that he told Captain Kimsey he would turn the money over to the finance officer. Accused then admitted that Captain Kimsey "did turn over I would roughly say it was approximately £284 and that was going to be turned over to a finance officer. However, I put the money in a field desk until we got all that he claimed was damaged straightened out. However, that was not the damaged candy from London and what happened to the £284 in that desk I do not know". He denied that this was candy on which a Report of Survey was made but stated that it was "additional candy that was not tallied in". The statement made by the accused on 29 November was received in evidence as Pros.Ex.6 (R49a) and was read to the court (R50).

Sergeant George L. Zucco, 322nd Bombardment Squadron, 91st Bombardment Group, Station AAF 121 and Post Exchange steward, testified that some time in May 1943 both Ryan and accused had noticed his leather jacket and said they would give him 20 cans of peanuts for a jacket so he got two and brought them over to their office. Later they wanted one for a Colonel Spray. He received 60 cans of peanuts and three or four Zippo lighters in exchange for the jackets. They were government issue Air Corps jackets worth $8.12 each. No "tally-out" was signed for the peanuts (R50-56).

Second Lieutenant James H. Clarkson, Jr., Quartermaster Corps, stationed at Q-107, testified that he knew that Coca Cola sales at retail for cash were made in the wholesale warehouse at 4d. per bottle to both military and civilian personnel (R58).

Captain Theodore J. Israel, Quartermaster Corps, Depot Sales Officer Quartermaster Depot Q-107, testified he had known accused who was "PX" depot sales officer at the distribution warehouse at Quartermaster Depot 107, since January 1943. Witness was mess officer and retail "PX" officer, beginning 25 March and continuing until 1 December 1943. When he first became "PX" officer he found that accused and Ryan were selling merchandise "over the counter in the wholesale PX warehouse". They would give him, for example, a tally-out for £100, delivering £75 worth of merchandise and the balance of the items represented by cash. The cash items would be listed at wholesale prices on the tally-out though in some cases retail and wholesale prices were the same. Witness complained of the practice and as far as he was involved, it ceased. There were 2400 bottles of Coca Cola issued each week and none of it was handled by the retail "PX". Witness's retail exchange received the money for this Coca Cola on its "tally-out" sheet at 3d, the whole sale price per bottle and it was sold at the warehouse for 4d per bottle (R59-64).

Captain Horace J. Kimsey, Air Corps, AAF Station 595, Post Exchange officer and officers' mess officer at that station since September 1942, testified he secured post exchange supplies from Q-107 from the time it opened. In the early part of December 1942 he received a little less than £300 worth of candy from accused. There were 15 to 20 boxes of the candy. He tried previously to secure extra merchandise for Christmas. Accused informed him that some candy was available. It was loaded on his truck and was taken to his station. This was good candy except for a few bars broken in shipment. It was not placed on a "tally-out" but a list of it was given to him by accused and it was sold unrationed through his "PX" and a separate record was made of it. No receipt was asked of him nor given by him (R68). No record was made (R70) of the candy as it was excess over quota (R69). Sometime about the middle of January 1943 Captain Kimsey paid the proceeds of sale to accused in cash amounting to approximately £284 (R65). This was the only instance in which he made a cash payment to the wholesale warehouse. No receipt was given to him for the money (R68). Beginning in May 1943 he found items on his "tally-outs" which he had not shown on his requisition and he was given the money instead of the items, at retail prices. It was done as an accommodation to accused. Goods were "tallied-out" at retail prices at which prices the witness in operation of his "PX" was accountable.

All moneys received by retail "PX" stores were deposited in a bank to credit of the Army Exchange Service except when purchases were made from independent merchants, such as breweries. Invoices for such purchases were paid in cash or by check and the receipted invoices turned in in lieu of cash (R68).

4. Accused and Ryan were the only defense witnesses.

Accused testified in substance that: He was 37 years of age and had received a college education but had never been interested in accountancy or merchandising. He received his commission and was ordered to active duty 23 June 1942 and sailed for England in July 1942. He was

assigned to the Army Exchange (R72). He was in London on a per diem for four months working with the Army Exchange (R73) before coming to Q-107. Ryan, who knew the "PX" set-up and Gordon, a warehouseman were detailed as his assistants at Q-107 (R74).

A shipment of damaged candy arrived at the warehouse. An "OS & D" was made up and sent through followed by a report of survey. Colonel Plank, commander of Eastern Base Section, SOS, ETOUSA came to inspect the candy and suggested it be moved out of the "brcken room". He stated that an officer would check it and "then send it back to Q-110". Gordon took the responsibility of "tallying in" the shipment in its damaged condition. He informed witness he had salvaged enough of the good candy to cover the loss in case the surveying officers did approve the loss. About that time accused heard that an inventory was to be taken. "Not wanting to get into trouble" he informed Captain Kimsey that he could supply him with extra candy. Captain Kimsey agreed to take it. A list was made out and given to him for checking (R75). He did, "and the next thing I knew * * * Captain Kimsey came back into the warehouse and he said, 'Dusty, here is the money for that; I have a list made out according to the price and the total amount of each of the items'". Just then so accused asserted, he was called to the telephone and "happened to lay the money in my field - desk". He was busy and a "couple of days passed and I could not figure out what had happened to the money". The slip Captain Kimsey had given him had also disappeared. Time went on and he was "in hopes that something would happen that would make a break or someone would say, 'Here is this money; what do you want done with this money', but it never happened."

With respect to the Coca Cola transactions he testified that his warehouse received 2400 bottles each week (76). The retail "PX" officer did not want to handle it and suggested it be sold at the wholesale warehouse; that the sales proceeds be paid to him and the merchandise put on his "tally-out". Later Captain Israel came into the retail "PX" as "PX" officer and refused to continue the practice. Coca Cola had been charged on "tally-out" at retail but had been sold by the warehouse at 4d and 5d per bottle. Captain Israel wanted to know what accused was doing with the profit and accused stated, "We are getting ready to paint the building; we have linoleum on the floor; we want some heaters as the men are complaining * * * and I am taking the half-penny that we make from that and buying those things from time to time. * * *. I have purchased radios and several gallons of enamel paint".

Later Colonel Spray wanted some cigars. His office was next to that of accused who secured them from the warehouse for him. That sale was the beginning of the accounts (R77).

Accused testified that Gordon wanted to resign but Colonel Plank and Colonel Hatch said "he is right up to his neck, and I want you to make sure that that man does not get out of this depot." This was the latter part of November 1943.

Accused denied that he ever agreed to remunerate Zucco or anyone else for a leather jacket in any manner whatsoever or that he knew anything about the 60 tins of peanuts (R79). He wanted a jacket to wear because it was cold in the warehouse (R80).

He explained the disposition of the 19 cases of candy by asserting it was not damaged but was a full shipment "tallied in". "How the additional candy was covered I do not know except that Colonel Spray told me that he had happened to see Mr. Gordon kick off a tin of biscuits over there and he said, 'I will bet you money the civilians are eating them in their little room for their tea'". He stated he was confused by Colonel Hurley's insistence that this was damaged candy and as there was no damaged candy, he denied having anything to do with it (R81-82).

He admitted starting the system at Q-107 of cash sales listed on some units "tally-out" with the difference paid them in cash. He stated that "It was being done in London". He also admitted he made and allowed sales of merchandise from the Depot Sales Section "because the Colonel permitted it". On cross-examination he admitted that he knew of the cash sales book and also admitted that no record was kept of the "coke" sales as it "was a cash transaction", though a profit was produced (R83). He denied ever seeing the papers marked Pros.Ex.3, or that he withdrew sums of £35; £45; £17.13s. 3½d; £38. 2s. 6d., but stated that "there were some drawn to pay for the items" purchased for his depot. A radio cost £19 or £20 and the heaters £12 to £14 but he never withdrew as much as £35 or £45 at a time. Probably all the items purchased would amount to roughly £40, and the profits on the "coke" not much more than £30 or £35. He denied profiting personally from the sale of Coca Cola or that Ryan did to his knowledge (R84).

He stated that the 19 cases of candy were not damaged and they were not covered in a report of survey. The candy was "tallied in" by Gordon but that he did not know whether it was placed on the stock record. While it was his duty to see that it was placed on a "tally-out" he did not do so because Gordon had the list. The candy was not placed on Captain Kimsey's "tally-out" because he wanted to get it away from the inspecting officer, - "they were going to take an inventory of the whole warehouse and due to the fact that Mr. Gordon had told me what he had done I knew the answer would be that I would probably get skinned" (R85-86). Gordon had accumulated these 19 boxes of extra candy as a reserve to take care of the losses if the "OS & D" was turned down. He admitted Captain Kimsey paid him $970 which he declared he placed in his field desk. He missed it two days later. He did not report the loss because he was afraid of Colonel Spray (R87). He intended to put the candy on some units "tally-out" but the slip containing the information had been lost. He also intended to pay the money himself directly to a finance officer in Honington whose name he did not know. When asked if that would not result in the unit on whose "tally-out" the candy was charged, being compelled to remit for it, he answered, "No, because there are five copies of tally-outs made and they would all get a copy". On being pressed for a definite answer to the question, accused stated, "The finance officers were just

merely people for depositing the money" and that there was no check on the "tally-outs" of that (AAF Station 595) "PX" unit. He never reported the loss of the money or mentioned it to anyone (R88-89,102).

On cross-examination he was interrogated as to the investigation conducted by Colonel Hurley. In particular he was asked if he did not state to Colonel Hurley:

> "'No, sir, he did not; I don't know anything about that'"

When Colonel Hurley propounded to him the following question:

> "'Did or did not Capt. Kimsey hand you 300 odd pounds in cash on or about that time?'" (R89),

accused neither denied nor admitted that he gave the foregoing answer but attempted an explanation by stating "that was when he was referring to the damaged candy" (R89). Insistently cross-examined as to why he had repeatedly given erroneous statements to Colonel Hurley during the investigation of his conduct and management of the wholesale depot Q-107, accused gave as his reason, that he became very confused at the time and "was all mixed up" (R90-91). He admitted taking merchandise including roughly, a dozen pairs of silk hose, to London "possibly eight or ten times" during the year "to the procurement section of Quartermaster". He stated he was either paid for the articles or brought them back but as he "did not handle the sales book", he could not find the items listed there with records of cash sales. He stated a record was kept of these sales and they were put on the "tally-outs" of "Q-107; some on 595, probably". On being asked if he knew this as a fact, he answered, "Some were put on 107 I would roughly say". He admitted delivering at one time to a Colonel Altoft 40 cartons of cigarettes and 144 bars of candy; at another time 20 cartons of cigarettes and two boxes of cigars (R92-93). He admitted receiving a jacket from Zucco but insisted that he gave nothing for it.

Sergeant Richard A. Ryan, QM Depot 107, a prisoner and a witness for the court, testified that he received a leather jacket from Zucco; that he knew nothing of any trade for three jackets; that he gave Zucco nothing and as far as he knew Zucco received nothing for them. He and accused made all cash sales. The money was placed in a cash box and the items entered in a cash sale book. At the end of the week they would all be put on some "tally-out" and the money paid to the sales officer of the "PX" which received the "tally-out". He denied knowing anything about the "large issue of candy to AAF 595". He did not give Zucco four lighters taken from the safe (R105).

Gordon was recalled by the court and re-affirmed his story of the delivery of the candy to Captain Kimsey at the direction of accused. He received these directions only eight days after he had commenced to work in the warehouse (R107).

5. (a) On 25 October 1942, Headquarters ETOUSA issued Circular #67 which in pertinent part provided:

"VII - SALES STORE SERVICE IN THE ETOUSA.
1. The Army Exchange Service is discontinued in this theater pursuant to instructions of the War Department (Cable S396, 26 September 1942). The Quartermaster Service will provide sales store service and handle appropriate items including those listed in OQMG Circular Letter No.330 (1942).
* * * * * *
5. The CG, SOS, ETOUSA, will establish sales stores in accordance with the needs of the Army in this theater and as personnel and facilities become available. * * *.
6. * * * * * *
b. Supplies of sales items will be obtained by requisition on QMC Form 400. * * *.
* * * * * *
d. Sales officers of organizations will account for all supplies received at the cost price, which is also the sales price shown on 'Tally Outs' issued to them by the depot. Deposit of funds will be made to nearest finance officer as frequently as practicable * * * accompanied by Report of Sales, QMC Form 389, * * *.
e. For audit purposes the sales officer will maintain an account consisting of all 'Tally Outs', QMC Form 490, furnished with all supplies received by him, * * *."

(b) On 25 October 1942 a Memorandum addressed to all Post Exchange officers was issued by Headquarters, European Theater of Operations (signed by the Quartermaster) directing that all merchandise be mentioned and the inventory be priced and computed and be forwarded to Headquarters.

(c) Circular No. 55, 27 November 1942, Headquarters Service of Supply, European Theater of Operations, contained the following relevant orders and directions:

" OPERATION OF SALES STORE SERVICE.
1. * * * * * *
2. DEFINITIONS: To facilitate an understanding of these instructions, the following terms used herein, are defined:
* * * * * *
Distribution Depot: That portion of a Quartermaster section of a general depot or of a Quartermaster depot which is established for

the purpose of issuing sales-store supplies to organizations (formerly referred to as a breakdown depot).

* * * * * *

3. * * * * * *

b. Sales Store Distribution Depots. As soon as personnel and supplies will permit, distributing sections for sales-store items will be established at each depot normally carrying Quartermaster Class I supplies. Distribution depots will be assigned by the Chief Quartermaster SOS to a bulk depot, which will furnish required sales-store supplies. * * *.

(1) Requisitions will be submitted on QMC Form 400 in duplicate.

(2) * * * * * *.

(3) Method of distribution to sales officers.- Sales officers will submit requisitions (in duplicate) to distribution depots, where they will be edited for conformity with authorized allowances in accordance with Section VII Circular No. 67, Hq. ETOUSA, 25 Oct. 1942, and such other instructions as may be issued. Upon approval of requisitions, supplies required will be issued to the sales officer on a tally out, indicating quantity, unit, description of article, unit price, and total price. This tally out will serve as a price list for resale operations. The prices stipulated on the tally out will be identical to the prices shown on the price list issued periodically by the Chief Quartermaster SOS.

(4) * * * * * *.

(5) The following records are required:

Requisition - QMC Form 400
Tally In - QMC Form 489
Tally Out - QMC Form 490 (to be prepared in triplicate).
* * * * * *.
Stock Record Card - * * * *.
Bin or Stack Card, * * * *.
Inventory - * * * * * *.
Register of Debit and Credit Vouchers to Stock Account - * * * *.

4. * * * * * *.

c. Tally Out Forms. The tally out form furnished the sales officer by the distribution depot will be used as a price list for the articles received, and likewise as a receipt voucher. The prices

stipulated on tally out will be the prices shown on the price list issued by the Chief Quartermaster, SOS. These prices will be adhered to in making sales.
* * * * * *."

(d) Circular No. 29, 23 April 1943, Headquarters Services of Supply, European Theater of Operations, as amended by Circular No. 48, 22 August 1943 rescinded Circular No. 55, 27 November 1942 and directed that except insofar as pertains to operations by the Quartermaster Corps of Special Sales Stores and Mobile Sales Units for the sale of officers' uniforms, accessories and other clothing, unit Sales Store Officers will close their accounts with the Chief Finance Officer, SOS, ETOUSA, as of the close of business on 30 April 1943.

(e) General Orders No.16, 21 March 1943, Headquarters European Theater of Operations, designated the Services of Supply as the Commanding General's agency for administrative service and supply of the theater and placed the Army Exchange Service under the supervision, control and direction of the Commanding General, Services of Supply, European Theater of Operations.

(f) AR 210-65 provides:

"(a) The Army Exchange Service is that part of the Army which has jurisdiction over and provides staff supervision of the operation of all Army exchanges, and consists of such officers, enlisted men, and civilian personnel necessary to perform the functions assigned to it.
(b) This Service will have jurisdiction over, and will be extended to, all exchanges of the Army through appropriate personnel on the staffs of commanding generals of service commands and commanding officers of posts, camps, stations, and installations, at whose directions exchanges have been established."
(AR 210-65, par.11, p.8).

(g) Relevant provisions of AR 35-6520 are:

"1. Accountability and responsibility for public property defined.- a. Accountability and responsibility devolve upon any person to whom public property is intrusted and who is required to maintain a property account thereof.
(1) An officer who carries property on a stock record account and has such property in his possession, either in use or in storage, has 'accountability' and 'responsibility' for

the care and safekeeping of such property. He has 'accountability,' but not 'responsibility,' for property which he has issued to others on memorandum receipt. The accountable officer continues to carry on his stock record account the property issued to others on memorandum receipt.

(2) An officer who has given a memorandum receipt for property will not take such property up on a stock record account, and is not 'accountable' therefor, but he becomes 'responsible' for its care and preservation and will not be relieved of such responsibility until he has returned the property to the accountable officer or secured memorandum receipt from a successor, or until he has otherwise been relieved by the operation of regulations or orders.

* * * * * *

4. * * * * * *.

g. The sale, gift, loan, exchange, or other disposition of any Government property not specifically authorized by law, regulations, or orders is illegal.

* * * * * *.

13. Responsibility for property in stock.- a. Property officers will be primarily responsible for the care and safekeeping of the property and supplies under their control, but this provision will not operate to relieve commanding officers of the joint responsibility prescribed in paragraph 18.

* * * * * *.

The court was authorized to take judicial notice of the above cited General Orders and Circulars of Headquarters European Theater of Operations; similar Orders and Circulars of the Services of Supply, and of the Army Regulations (MCM, 1928, par.125, p.135; CM ETO 952, Mosser). The Board of Review may likewise take judicial notice of same upon appellate review (Caha v. United States, 152 U.S. 211,222, 38 L.Ed. 415,419; Thornton v. United States, 271 U.S. 414,420, 70 L.Ed. 1013,1017).

6. From the foregoing data it is manifest that the method of operation of the post exchanges within the European Theater of Operations has from time to time undergone a process of adjustment and change which is of vital importance in determining the responsibility of accused in the instant case. The operations properly classified show:

(a) From an indefinite past date commencing with arrival of military personnel of the United States within the United Kingdom to 25 October 1942, the post exchanges within the theater were operated in the usual and

customary manner and method as provided in AR 210-65. Centralized control and direction appears to have been absent, or at least minimized.

(b) From 25 October 1942 to 30 April 1943 the post exchanges were the sales-stores of the Quartermaster and it was part of his duties and functions to supervise, direct and control the procurement and distribution of all merchandise sold at retail through and by the retail post exchanges.

(c) On 1 May 1943 the post exchanges were removed from the control and direction of the Quartermaster and were placed under the jurisdiction of the Army Exchange Service. The Army Exchange Service has been since said date under the supervision, control and direction of the Commanding General, Services of Supply, European Theater of Operations.

7. Post-exchanges operating as individual units under AR 210-65, or as subordinate outlets of retail distribution of the Army Exchange Service are instrumentalities of the United States, and are in all respects subject to military control and direction.

> "On July 25, 1895, the Secretary of War, under authority of Congressional enactments promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law."
>
> * * * * * *
>
> The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained

> from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.
>
> From all of this, we conclude that post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions." (Standard Oil Company v. Johnson, 316 U.S. 481,483-485; 86 L.Ed. 1611,1615-1616).

However, in their ownership of property and in contractual relations with others in the acquisition and sale of same, the Army Exchange Service and the retail post-exchanges are privately owned and operated. Their property is not the property of the United States but is held in trust for the benefit of the military personnel.

> " A post exchange is an association of military organizations stationed at the post at which the exchange is maintained. The Army Regulations (210-65) provide that its operation is conducted by an exchange officer detailed by and under the commanding officer of the post and subject to the recommendations of the exchange council. The buildings in which exchanges are conducted are constructed, equipped, and maintained from public funds appropriated for the purpose, but the expenses of fitting up the buildings for exchange use and of the goods sold by the exchange are defrayed from the funds of the exchange, which are received from the various organizations belonging to the exchange and from the receipts of sales of goods. The Army Regulations provide that the commanding officer of the post is responsible for the conduct and operation of the post exchange and under him the exchange officer is in charge of and responsible for its management in accordance with the regulations. The post exchange is not established under specific statutory authority, but is maintained under special regulations prescribed by the War Department. It is recognized as a Government instrumentality or agency for certain purposes but indebtedness of a soldier to such exchange is not an indebtedness to the Government. See 25 Comp. Dec.960, which decision held that the property of an exchange is not property belonging to the United States." (9 Comp.Gen. pp.353-354).

" Army Regulations 210-65, 75(e) define a post exchange as a 'voluntary unincorporated co-operative association of Army organizations whose rights and liabilities are measured by the law of partnership.' In Kenny v. United States (1926), 62 Ct.Cls.328,337, the United States Court of Claims held that money which was the property of an Army post exchange was not property of the Government. That court has held, also, in the case of Taggart v. United States, 17 Ct.Cls.322, that no public officer can make the Government either agent or trustee for the collection of private debts." (11 Comp. Gen. p.161).

"The debts of Army exchanges * * * are not obligations of the Government and are in no respect guaranteed by the Government. * * *. SPJGC 1943/9895, 3 July 1943" (Bull.JAG. July 1943, Vol.II, No.7, AR 210-65, par.8, p.294).

"An Army exchange had accumulated a certain amount of profit, but the personnel of a participating organization had been completely destroyed or captured by the enemy. With entirely new personnel, the organization was redesignated under a modified name. Held: In the absence of specific regulations, the Chief of Army Exchange Service may establish the policy for disposition of such exchange profits by analogy to the established War department policy for disbanded organizations (AR 210-65, par.14d (6)). Accordingly, in cases like the present one, he may fix the policy to set aside such exchange profits for disposition according to recommendation of the exchange council and approval of the commanding officer. SPJGC 1943/4165, May 1, 1943." (Bull.JAG, May 1943, Vol.II, No.5, AR 210-65, par.8, p.226).

" Contracts between post exchanges and their suppliers are not subject to renegotiation under sec.403, Sixth Supplemental National Defense Appropriation Act, 1942, as amended by sec.801, Revenue Act of 1942, because post exchange contracts are not Government contracts. SPJGC 1943/2731, Feb.20, 1943." (Bull.JAG, March 1943, Vol.II, No.3, AR 210-65, par.33, p.127).

" A truck belonging to a post exchange was damaged due to the negligence of the operator of a bus owned by a private concern. Held: The resulting controversy should be settled or litigated between the post exchange and the bus company as between private business firms. Post exchange property is not Government property and no action may be taken under AR 35-7220, June 6, 1942. SPJGD 1942/5486, Nov.20, 1942." (Bull.JAG, November 1942, Vol.I, No.6, AR 210-65, par.7, p.351).

" Property of a post exchange, however, is not owned by the United States Government. A post exchange is a legal entity capable of owning property in its own name (Kyle v. U.S., 46 Ct.Cl.197; 9 Comp.Gen. 353; SPJGC 552.02, July 23, 1942). It purchases upon its own credit and not with appropriated funds."

* * * * * *

Army Exchange Service property is of a similar character.

* * * * * *

SPJGC 400.8, August 23, 1942." (Bull.JAG, August 1942, Vol.I, No.3, AR 210-65, par. 9a(20), p.199).

The above rule concerning the non-governmental nature of post exchange property is true notwithstanding the fact that the Army exchange funds are "public funds" within the purview of Act of 11 June 1942 (56 Stat. 356; 12 U.S.C. 265) which authorized national banks to pledge assets as security for deposit of such funds in accordance with Treasury Regulations (SPJGC 1943/7920, 15 June 1943, Bull.JAG, Sep 1943, Vol.II, No.9, sec.1707a, p.360). This conclusion resulted upon enactment of the foregoing statute. Prior to such statutory declaration the exchange funds were private funds not "public moneys" under R.S.5153 and were not entitled to the pledge of securities by bank depositories (SPJGC 123, May 11, 1942, Bull.JAG, Jan-June 1942, Vol.I, No.1, sec.1708, p.62).

8. The evidence is conclusive that Quartermaster Depot Q-107 located at Stowmarket, Suffolk, England, was between 25 October 1942 and 30 April 1943 a distributing depot within the purview of Circular No.55, 27 November 1942, Services of Supply, ETOUSA. Its function was to receive bulk merchandise from the Quartermaster and effect distribution of same to the retail sales stores (post exchanges). Beyond all doubt the merchandise handled and distributed was property of the United States until title passed to the retail consumers. During this period of time the Government of the United States, acting through the intermediary of the Army, was in the business of supplying the "ordinary needs" of the military personnel in the theater.

Accused was the officer in charge of distributing depot Q-107. By his own testimony he admitted that he was the manager and operator of said depot for the Government at the times and on the occasions alleged in the specifications. Upon assuming said post and continuously thereafter until relieved from duty there was imposed upon him the responsibility of complying with all rules and regulations issued or promulgated by higher authority for the management of said depot; the keeping of prescribed books and records of account; the safe warehousing and storing of all property intrusted to his care; the disposing of same only as authorized and directed by superior authority and finally of accounting truthfully and faithfully for all property placed under his care or control (AR 35-6520, supra).

In the recent case of CM ETO 1302, Splain the Board of Review (sitting in ETOUSA) had occasion to consider the crime of embezzlement under the 93rd Article of War. In its holding it reviewed at length numerous relevant opinions of the Federal courts and the holdings of the Board of Review (sitting in Washington) and The Judge Advocate General with respect to the particular crime of embezzlement denounced in said Article of War.

It was concluded that Congress had, in enacting said Article, eliminated the bothersome and vexing question as to the difference between "possession" and "custody" and had adopted the modern rule announced in Moore v. United States, 160 U.S. 268,269,270, 40 L.Ed. 422,424 as follows:

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

The 94th Article of War provides in pertinent part:

> "Any person subject to military law who * * * steals, embezzles, * * * any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; * * *; Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. * * *."

Congress in the 94th Article of War, denounced a crime which it designated as "embezzlement" without attempting to define it. The Board of Review (sitting in Washington) in CM 197396, Christopher, CM 211810, Houston and CM 211900, Edwards construed the meaning of the word "embezzlement" in said Article. Reference is made to the recently decided Splain

case, supra, for a discussion of said opinions. The conclusion is irrefragable, however, that the elements of the crimes denounced by the 93rd and 94th Articles - "embezzlement" - are identical except that the property involved in a charge under the 94th Article must be Government property (CM 198485, Wood, Dig.Op.JAG, 1912-1940, sec.452(3), p.335). The Board of Review (sitting in ETOUSA) therefore concludes that the rule announced in the Splain case as to the crime of "embezzlement" under the 93rd Article is equally applicable to the same offense under the 94th Article.

9. Accused is charged with embezzling 19 boxes of candy (Specification 1, Charge I) which was the property of the United States furnished and intended for the military service thereof. Physically the candy was delivered into the depot over which accused exercised the superior management, control and direction. It thus came under his care and control lawfully and in the usual and ordinary course of business. He had knowledge of its presence in the warehouse and expressly directed its handling and disposition. Under these facts it cannot be denied that the proof is substantial that the 19 boxes of candy were intrusted to accused's care and custody within the principles of the Splain case. He was responsible for its safe-keeping and ultimate disposal. He occupied towards the United States a position of trust. Therefore, the first element of the Government's proof was fully sustained.

The 19 boxes of candy arrived at distributing depot Q-107, on or about 12 December 1942. As hereinbefore demonstrated, between 25 October 1942 and 30 April 1943 the retail sales store operations of the theater were functions of the Quartermaster and "post-exchanges" as conceived under AR 210-65 technically did not exist. The entire process of procurement and distribution of merchandise intended for the "ordinary needs" of the military personnel during this period was a direct operation of the Government. The testimony of both Captain Kimsey (R67) and accused (R73-74) recognized this status of the depot and the retail stores at the time of the candy transaction. The evidence of the methods of operation of depot Q-107 fully sustains this conclusion. In fact no other conclusion is permissible.

The reasonable and in fact the only legitimate inference to be drawn from the evidence in the record and the orders and circulars pertaining to the operation of the retail sales stores during the period commencing on 25 October 1942 and terminating on 30 April 1943 is that the merchandise distributed through the depots and retail stores was property of the United States furnished and intended for the military service thereof.

> " 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 to-

gether with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended." (MCM, 1928, par.150 i, p.185).

The findings of the court that the 19 boxes of candy were Government property furnished and intended for the military use thereof is sustained by the evidence. The burden of proving the second element of prosecution's case was met.

The Specification alleges that the embezzlement of 19 boxes of candy was committed "by selling the said goods and retaining the proceeds therefrom". Under this allegation there would have been a fatal variance if the proof showed that accused sold the candy in a legitimate, authorized manner and converted the proceeds of sale (CM 185034 (1929); CM 188571 (1929), 189471 (1930), Dig.Op.JAG, sec.451(20), pp.317-318; CM 218647 (1942), CM 220061 (1943), Bull.JAG, Jan-June 1942, Vol.I, No.1, sec.451(20), p.21; 20 C.J., sec.73, p.479, footnote 99). Such is not the situation in the instant case. The candy was included in the survey report. Accused deliberately directed that it be concealed from the survey officers and through subterfuge misled them as to the identity of the property subject to survey. Consequential upon these operations accused came into control of 19 boxes of merchantable candy which had been condemned as salvage. Thereafter, under accused's direction they were delivered to Captain Kimsey without recording the disposition of same as required by pars. 3b(3) and 4c of Circular No.55, 27 November 1942 Headquarters Service of Supply ETOUSA. The listing of the 19 boxes of candy on the survey report as damaged property when in fact it was vendible merchandise, its coincident concealment from the survey officers and the procurement of the report which eliminated the candy from stock account when taken together, effectually segregated the candy from the warehouse stock and thereby deprived the Government of its use. By such irregular and clandestine operation accused assumed personal dominion over the property, and an unlawful conversion of the property by him resulted regardless of his receipt from Captain Kimsey of its proceeds of sale (20 C.J., sec.16, p.426). Accused's conduct with respect to the candy was fraudulent and deceitful and bespeaks the necessary felonious intent to sustain the charge (29 C.J.S., sec.43, p.742).

It is alleged that accused committed the offense on or about 1 January 1943. The evidence shows that accused converted the candy sometime after 12 December 1942 and before Christmas 1942. However, it was not necessary to prove that the offense was committed at the precise time laid in the Specification and evidence may be given referring to any other day before the preferring of charges and within the period of limitations (Tyler v. United States, 106 Fed.137; 20 C.J., sec.77, p.481).

The phrase contained in the Specification "by selling the said goods and retaining the proceeds therefrom" is surplusage. The offense of embezzlement was sufficiently alleged without the inclusion of the mentioned phrase. No proof of the same was required in order to sustain the charge (Grin v. Shine 187 U.S.181,189,195, 47 L.Ed. 130,136,138; Jewett v. United States 100 Fed.832,837; CM ETO 764, Copeland and Ruggles; CM ETO 895, Davis et al).

(412)

The Board of Review is of the opinion that there is competent substantial evidence in the record of trial to support the finding of accused's guilt of Specification 1, Charge I.

10. By Specification 2, Charge I it is alleged that on or about 5 May 1943 accused did "knowingly and willfully misappropriate 60 tins of peanuts and 4 'Zippo' lighters of the value of $18.38, property of the United States, furnished and intended for the military service thereof by wrongfully exchanging them for three leather Air Corps jackets." The court by substitution found that he misappropriated 60 tins of peanuts only valued at $15.00. The evidence is uncontradicted that accused caused to be delivered to Zucco 60 tins of peanuts in exchange for three leather Air Corps Jackets and that said exchange occurred on or about 5 May 1943.

The Specification is laid under that part of the 94th Article of War which provides:

> "Who steals, embezzles, knowingly and willfully misappropriates * * * any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; * * *."

Circular No. 29, 23 April 1943, Headquarters, Services of Supply, ETOUSA as amended by Circular No. 48, 22 August 1943 rescinded Circular No.55, 27 November 1942 and directed that with exceptions not here relevant Unit Sales Stores officers will close their accounts with the Chief Finance Officer, SOS, ETOUSA at close of business 30 April 1943. General Orders No. 16, 21 March 1943, Headquarters European Theater of Operations placed the Army Exchange Service under the supervision, control and direction of the Commanding General, Services of Supply, ETOUSA.

It is apparent from the foregoing that at close of business on 30 April 1943, the Theater Quartermaster ceased his operations of the retail sales stores and the inference is reasonable that the Army Exchange Service succeeded to all operations of such nature theretofore conducted by the Quartermaster. On 1 May 1943 post-exchanges, as contemplated by AR 210-65 again came into existence in the theater. The record of trial is silent as to the disposition of the assets and property which were on hand in the distributing depots and in the retail sales stores at close of business on 30 April 1943. The directions of Circular No. 29, 23 Apr 1943 (SOS, ETOUSA) and General Orders No. 16, 21 March 1943 (ETOUSA) support the inference that title to such property was vested in the Army Exchange Service and the Post Exchanges. Reason and practical common sense dictate this conclusion. It cannot be supposed that the Army Exchange Service and its subsidiary Post Exchanges would be activated on 1 May 1943 without vesting in them ownership and control of the stocks of merchandise which were in their possession. Neither does it comport with reason or common sense to assume that the merchandise in the distributing depots and post exchanges continued to be owned by the United States although the post-exchange officers

were directed to close their accounts with the Chief Finance Officer. This fact alone is almost conclusive proof that title to the stocks of merchandise passed from the United States to the Army Exchange Service and the exchanges at close of business 30 April 1943. As long as the distributing depots and retail sales stores were Government owned and operated it was not only proper but also mandatory that cash funds accruing to the retail store officers be deposited with the Chief Finance Officer to be covered into the Federal Treasury. Those funds were property of the United States. After 1 May 1943 the post exchange officers were prohibited from making such disposition of their funds. Obviously these funds could only arise from sale of merchandise in their possession on 1 May 1943 (and replenishments thereof.) The plain inference is that since the funds were not property of the United States, the source of the funds was also not property of the United States.

The prosecution had the duty of proving each principal element of the offense charged beyond a reasonable doubt (Davis v. United States, 160 U.S. 469, 40 L.Ed., 499; MCM, 1928, par.78a, pp.62-63). It was therefore its duty to present evidence that the tins of peanuts and lighters were Government property on 5 May 1943. The record in the instant case is silent as to proof of this fact and in view of the change in status of post exchange operations at close of business on 30 April 1943 as evidenced by the Circulars and Order above set forth, the failure of proof in this respect cannot be ignored.

The 94th Article of War denounces as a crime the act of willfully and knowingly misappropriating Government property "furnished or intended for the military service". Congress thereby intended to provide special treatment for (a) Government property which was (b) furnished or intended for the military service.

> "The larceny, embezzlement, etc., must be of the particular kind of property mentioned in the article (Article 94). Post exchange and company funds and money appropriated for other than the military service do not come within the description 'money of the United States furnished or intended for the military service thereof.'" (MCM, 1921, par.444 (IX), p.457).

> "Accused was convicted of the larceny of United States Motion Picture coupon books, 'property of the United States furnished and intended for the military service thereof,' in violation of A.W.94. Held, That funds accruing from the exhibition of motion pictures are not public funds although the United States has custody thereof. Consequently they are not monies 'furnished and intended for the military service' and that part of

the finding should be disapproved. The offense is a violation of A.W.93 and not of A.W.94. C.M.199737 (1932)". (Dig.Op.JAG, 1912-1940, sec.452(8), p.337).

"An accused was found guilty of larceny of Government property under A.W.93. The reviewing authority approved only so much of the findings as involved a finding of guilty of larceny in violation of A.W. 94. Held, That the action of the reviewing authority was equivalent to disapproval of the finding of guilty of larceny in violation of A.W.93, and an attempt to substitute therefor and approve a finding of guilty of larceny of property of the United States, furnished and intended for the military service, in violation of A.W.94. Held further, That such substitution was unauthorized since larceny of property of the United States furnished and intended for the military service, in violation of A.W.94, is an offense containing elements which are not included in the offense of simple larceny denounced by A.W.93, and that the offense attempted to be substituted was not, therefore, lesser than and included within that charged. C.M.186919 (1929)." (Dig.Op.JAG, 1912-1940, sec.451 (43), p.327).

See also to same effect C.M.191809 (1930), (Dig.Op.JAG, 1912-1940, sec.451(43), p.327). (Cf: United States v. Mason, 218 U.S. 517, 54 L.Ed., 1133; Price v. United States, 74 Fed(2nd) 120, Cert.denied 294 U.S. 720, 79 L.Ed., 1252; Rehearing denied 295 U.S. 767, 79 L.Ed., 1708).

Not only is there no affirmative evidence that the peanuts were Government property on 5 May 1943, but also the status of the post-exchanges and the Army Exchange Service in the European Theater of Operations on said date, was of such nature as to support the inference that such property was privately owned by the Army Exchange Service. Under such condition of the record it is manifest that the prosecution failed to prove a vital element of the offense charged, to-wit: that the property misappropriated by accused was Government property.

In a charge of embezzlement under the 93rd Article of War it makes "no difference in whom the title to the property rests, provided it is not in accused" (CM ETO 1302, Splain). Oppositely, in a charge of embezzlement of Government property under the 94th Article of War, proof of ownership of the property in the United States is one of the vital elements of the offense and failure of proof of same is fatal to the prosecution's case.

The record is therefore legally insufficient to support the finding of guilty of Specification 2, Charge I.

11. On 9 December 1943 Lieutenant Colonel John F. Hurley, Inspector General, Eastern Base Section, Services of Supply, ETOUSA in the course of an official investigation interrogated accused with respect to suspected irregular conduct in the operations at distributing depot Q-107. Accused clearly understood that he was interviewed by Colonel Hurley in an official capacity and the purpose of the investigation. In the course of the interview the following colloquy occurred:

"Question: It has been testified that 19 boxes of merchandise were shipped to AAF Station 595. Is this a fact or not a fact?
Answer: It is not a fact, not that I know of.
* * * * * *
Question: Mr. Gordon testified that he shipped 19 boxes to AAF Station 595 on your orders and that this candy was sold by them. Is that a fact, or not a fact?
Answer: No, sir, that is not a fact. There was no candy shipped other than that what was on tally out.
Question: Did or did not Captain Kimsey hand you three hundred odd pounds in cash on or about that time?
Answer: No, sir, he did not. I don't know anything about that.
Question: It has been testified that Sergeant Ryan knew that you received three hundred off (sic) pounds in cash. Did you or did you not receive three hundred odd pounds in cash?
Answer: No, sir, I never received anything.
Question: Were any of those goods turned over to Captain Kimsey?
Answer: No, sir, none of those damaged goods were turned over to Captain Kimsey.
Question: Was any of the undamaged goods in that shipment turned over to Captain Kimsey?
Answer: Only on a tally out." (R49).

At a subsequent interrogation by Colonel Hurley on 22 December 1943 accused changed his statement and in substance admitted that 19 boxes of candy had been delivered to Captain Kimsey without registering same upon a "tally out" and that he had received from Captain Kimsey approximately £284 representing the proceeds of sale of the 19 boxes of candy. The evidence is conclusive that accused made the two statements alleged in the Specification of Charge II in the course of an official investigation. It is also clear

that they were false in every respect and that accused knew they were untrue when he made them. The only possible inference is that he made them knowingly and willfully with the intent that they should deceive Colonel Hurley.

Upon cross-examination, when faced with the realities of the situation, he attempted to distinguish between "damaged" and "undamaged" candy, and asserted he was confused at the time he replied to Colonel Hurley's questions. Accused's responses upon cross-examination were of such conflicting and illogical nature as to justify the court in placing small credence in his defense. At the most his distinction between "damaged" and "undamaged" candy was a mere parrying of words which fell far short of a bona-fide explanation of an honest misunderstanding of the import of questions to which he made false answers.

Although accused is charged with conduct unbecoming an officer, and a gentleman in violation of the 95th Article of War, the principle announced in United States v. Norris 300 U.S. 564,573-574,576, 81 L.Ed., 808,813,814 is applicable. By analogy, accused's recantation of his false statement at a subsequent interrogation is no defense (CM ETO 1447, Scholbe; CM NATO 154 (1943), Bull.JAG, Jan 1944, Vol.III, No.1, sec.451(53), p.13). The making of false statements by an officer in the course of an official investigation is an offense under the 95th Article of War (Winthrop's Military Law & Precedents - Reprint - p.713; CM 153703, Manchester, Dig.Op. JAG, 1912-1940, sec.453(18), p.345; MCM, 1928, par.151, p.186).

The record is legally sufficient to support the findings of accused's guilt of Charge II and its Specification.

12. Distributing Depot Q-107 as has been shown was an instrumentality of the Theater Quartermaster between 25 October 1942 and 30 April 1943. Its operations were governed by the directions and orders contained in Circular No. 55, 27 November 1942, Headquarters, Services of Supply, ETOUSA. Gordon's testimony as to the methods of operations of the warehouse, corroborated in certain respects by accused's own statements, is highly convincing that the operations between the dates above stated were based upon the instructions contained in the circular. There is therefore substantial evidence in the record which permitted the court to find that accused had actual knowledge of the contents of the circular, which manifestly governed and limited his authority as warehouse manager. The question of accused's knowledge of the contents of the circular was one of fact for the court and its finding, being supported by substantial evidence will not be disturbed by the Board of Review (Boyett v. United States, 48 Fed(2nd) (5th Cir.) 482; 16 C.J., sec.2279, p.924). In view of the evidence in this case imputing knowledge to accused of contents of the circular it is not necessary to consider the binding effect of the instructions upon him in the absence of proof of actual knowledge.

The function of distributing depot Q-107 was to receive merchandise in bulk and distribute the same in smaller lots to the retail sales stores upon their requisitions. Its accounting process was comparatively simple

due to the restricted field of its operations. Circular No. 55 contained no authorization for it to sell at retail to consumers, but oppositely it negatived such authority. While there was no specific prohibition of retail sales, a most casual reading of the circular makes it obvious that such sales were opposed to the purpose of the distributing depot. The prohibition is directly implied (59 C.J., sec.632, pp.1075-1076, footnote 67(a)).

Pros.Ex.3, the unofficial cash book of Q-107, shows that during the week commencing on 3 January 1943 and during each week thereafter to and including the week commencing on 26 April 1943 cash sales were made at distributing depot Q-107. Gordon's, Ryan's and accused's testimony without conflict corroborates the evidence indicated by the cash book and establishes the fact that during this period (and thereafter) retail cash sales were made at the warehouse directly to consumers with accused's full knowledge and approval. The cash book transactions were part and parcel of the irregular method of make those sales. They were shown on "tally-outs" issued to the retail "PX" store at Q-107 and to the post-exchange at AAF 595 and in lieu of the articles of merchandise listed thereon each post-exchange officer received the retail value thereof in cash. The making of said retail sales and the falsifying of the "tally-outs" were acts in direct violation of the instructions and directions contained in Circular No. 55. Accused justified such violation by declaring that such practice "was being done in London" and "because the Colonel permitted it". Such excuses are obviously no defense.

The sale of Coca-Cola at the distributing warehouse to consumers during the time of the Quartermaster's operations and between 1 December 1942 and 30 April 1943 was clearly established by the evidence and in fact was admitted by accused. These sales yielded a profit which accused asserted was used to paint the warehouse and secure radios and heaters for use therein. This operation was clearly in violation of Circular No. 55.

The evidence is therefore substantial that accused wrongfully and without proper authority effected sales of post-exchange merchandise from distributing depot Q-107 between 1 December 1943 and 30 April 1943 - a period when the directions of Circular No. 55 prohibited such sales. The willful violation of an administrative directive constitutes a disorder to the prejudice of good order and military discipline under the 96 Article of War (MCM, 1928, par.152a, p.187; Winthrop's Military Law & Precedents - Reprint - p.723; CM 233196 (1943), Bull.JAG, July 1943, Vol.II, No.7, sec. 441(1), p.271).

The Board of Review is of the opinion that the record is legally sufficient to sustain the finding of accused's guilt of the Additional Charge and its Specification.

13. The charge sheet shows accused as 37 years and ten months of age. He was ordered to active duty 23 June 1942 as a first lieutenant. No prior service is shown.

(418)

14. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereof, Charge II and its Specification, the Additional Charge and its Specification and the sentence, but legally insufficient to support the findings of guilty of Specification 2, Charge I. A sentence of dismissal is mandatory upon conviction of Article of War 95. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 12 APR 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of First Lieutenant CHESTER F. RHODES (O-909321), Quartermaster Depot Q-107, Quartermaster Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereof, Charge II and its Specification, the Additional Charge and its Specification and the sentence, but legally insufficient to support the findings of guilty of Specification 2, Charge I, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The offense alleged under Specification 2, Charge I was of relatively minor importance. The sentence to confinement for three years is reasonable considering the nature of the offenses of which accused was found guilty. No reason appears to disturb the sentence.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1538. For convenience of reference please place that number in brackets at the end of the order: (ETO 1538).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

RECEIVED 14 APR 1944 No. 10 ETOUSA

(Sentence ordered executed. GCMO 25, ETO, 28 Apr 1944)

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BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC. EXEC ON 26 FEB 1952