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EUROPEAN THEATER OF OPERATIONS

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VOLUME 2 B.R. (ETO)

CM ETO 455 - CM ETO 835

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WASHINGTON, D.C.

Judge Advocate General's Department

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Branch Office of The Judge Advocate General

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Volume 2 B.R. (ETO)

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(1943)

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Office of The Judge Advocate General

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APO 871

Board of Review.

1 JUN 1943

ETO 455.

UNITED STATES	WESTERN BASE SECTION, SOS, ETOUSA
v.	Trial by G.C.M., convened at Lichfield, Staffordshire, England, 8 March 1943. Sentence: Dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for four years. Disciplinary Training Center No.1, Shepton Mallet, Somerset, England.
Private CLARENCE E. NIGG, JR., (alias Private Clarence E. Nigg) (12016383), of Company "A", 2211-B, Casual Replacement Group (Provisional).	

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

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

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

> CHARGE: Violation of the 58th Article of War.
> Specification: In that Clarence E. Nigg, Company A, Casual Replacement Group (Provisional), did, at Lichfield, Staffordshire, England, on or about 17 January 1943, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty to-wit: transfer to an overseas station, and did remain absent in desertion until he was apprehended at London, England, on or about 31 January 1943.

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He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for four years. The reviewing authority approved the sentence but suspended the execution of that part thereof adjudging dishonorable discharge until the soldier's return from confinement and designated the Disciplinary Training Center Number 1, Shepton Mallet, Somerset, England, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Order No. 4, Headquarters, Western Base Section, Services of Supply, U.S. Army, dated 16 April 1943.

3. The accused was, on 17 January 1943, a member of Company "A", Casual Replacement Group (Provisional), stationed at Lichfield, Staffordshire, England.

The evidence disclosed by the record of trial shows that accused had been a member of Company "A", since "about the third of January" (R.32), that Captain Newburger was his battalion commander, Lieutenant Spooner, his company commander and Lieutenant Finklestein his platoon commander, and that accused was an acting squad leader (R.32). He was paid "about the 14th of January" a little over 23 pounds which was his pay "up to and including December". Accused, with another soldier, traveled by train to London on the morning of the 17th January (R.37) after having failed to get a pass on application to his platoon Sergeant who told accused if he went "it would be up to" accused, meaning it would be up to accused to suffer the consequences. The sergeant also informed accused "it would be safe enough to go. He didn't think we were moving out for some time" (R.37,45,46). They stayed in London "about 14 days" when they "run out of money" and "turned in to the military police at Paddington Station" (London) (R.37) on 31 January 1943 (R.18). Accused's unit departed from its station "the night of January 20-21" (R.20). He was issued some equipment but "nothing out of the ordinary outside of our usual shortage between the 3rd and 17th of January" but he was not informed that the unit was alerted or was about to leave i t s station. Neither was he on any "hazardous" duty. Accused knew his unit was being equipped "to make a change of station in the future" (R.33,46). Any equipment in excess of TBA allowance was taken away from the man (R.7). They were "routine issues of clothing and equipment" (R.12). No announcements or notices of an alert were given the unit (R.10,22,31) though it was understood Task Force 2211-B would "be leaving in a few weeks" (R.11) or "in the near future" (R.21). Accused was a member of "the outfit known as 2211-B".

An extract copy of the morning report of accused's unit relating to accused was received in evidence as Exhibit "A" (R.6). This exhibit attached to the record of trial shows accused "from duty to AWOL 17 January 1943," and "from AWOL to desertion 19 January 1943." It is initialed "T.D.S." and is certified to by "K. M. Nicholson, Capt., F.A., Asst.Adj." It was read to the court by the trial judge advocate without comment or explanation.

A stipulation was entered into by the accused, his counsel and the trial judge advocate in open court, to the effect that accused surrendered himself at Paddington Station, London, to the military police on 31 January 1943 (R.18). Corporal Floyd Sonnier, a witness, testified that he had seen accused just once, that being the time he brought accused under guard from the detention barracks, London, to the Provost Marshal's office on the post at Lichfield (R.18).

It was also stipulated in open court by accused, his counsel and the trial judge advocate that if James A. Kilian, Colonel Cavalry, Commanding Officer, Replacement Depot Number 10, was called and sworn, he would testify as follows: "That he was notified on 14 January 1943 from higher authority that Task Force 2211-B was to move forward, and that on or about 14 January 1943 Colonel Kilian then notified Captain Newburger of the Task Force 2211-B of that fact, ordering Captain Newburger to publish this information to all members of his command; that Task Force 2211-B did depart this station on or about 20 January 1943" (R.24).

Private David McAlpine, a member of Company "A", Casual Replacement Group, also known as 2211-B (R.6) until 16 January 1943, a prosecution witness, testified that needed equipment and clothing was issued but any excess they had over TBA allowance was taken away from them (R.7). He could not identify accused (R.9).

Sergeant Greengarde, 10th Replacement Depot, Post Supply Sergeant, was responsible for securing and issuing supplies on the post including the Casual Replacement Group (Provisional) also known as 2211-B (R.16) and testified as to the issue of clothing and equipment to such unit.

Lt. Col. Alfred H. Aldrich, F.A., 10th Replacement Depot, testified "customary" checkups were made but was unable to fix any definite dates when any such inspection did take place nor did he know of his own knowledge that 2211-B was alerted (R.22).

Sergeant Thomas D. Babcock testified that he was assigned to Task Force 2211-B as supply sergeant for a short time prior to 16 January (R.25), and that some equipment was issued and barrack bags marked about that time. He could fix no dates when formations of the unit were held nor what if anything was said to such formations.

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The accused was sworn as a witness for himself and denied being informed that his unit was alerted or was going to move (R.33), and testified he was doing no hazardous duty nor was any equipment other than usual shortage, issued. The accused testified in part as follows:

"Q. Did you do anything particular that morning other than start off? Did you see anybody?
A. I seen Sergeant Counsel.
Q. Sergeant who?
A. Sergeant Counsel.
Q. Who is he?
A. He is the platoon sergeant.
Q. Your superior non-commissioned officer?
A. Yes sir. I seen about a pass to London, and he said it was pretty doubtful whether we could get one or not. There hadn't been any so far. And I told him I would like to go to London.
Q. You told him you would like to go to London?
A. Yes sir. And he said, if I went, it would be up to me. He said it would be safe enough to go. He didn't think we were moving out for some time. He said, it would be up to me if I went
Q. But he wouldn't give you a pass?
A. That I wouldn't get a pass, but if I went, it was up to me to suffer the consequences.
Q. What else did he say?
A. He didn't believe the outfit would move for quite some time.
Q. He meant your particular outfit?
A. That's right, sir.
Q. Wouldn't leave for quite some time?
A. That's right, sir.
Q. And by leaving, what did you think he meant?
A. I don't quite understand that question, sir.
Q. He said he didn't believe the outfit would be leaving for sometime. Does he mean this company A or B that you were in wouldn't be leaving this station?
A. That's right, sir.
Q. Is that what you understood him to mean?
A. Yes sir.
Q. Then what did you do? Did you tell him whether you were going to take off or not?
A. I thought I would take a little time to London.

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Q. You told him you would go anyway?
A. Yes sir.
Q. What did he say?
A. He didn't say anything. He said it was up to me. That my mind was my own. That if I made up my mind, it was up to me." (R.35-36).

****

Q. And what did the sergeant tell you when he said you couldn't have a pass to London?
A. He said, if you wish to go, I would have to take it upon myself.
Q. What did you at that time take him to mean by that?
A. That any punishment I would get would be my own.
Q. Could it have been to your mind that if the unit moved out, you would be stuck?
A. He stated the unit wasn't going to move.
Q. Did it occur to you that he might have meant that if the unit moved out, you would be stuck?
A. No sir.
Q. How did the topic of conversation come up that the unit wouldn't move out for a couple of weeks?
A. I asked him if he thought we were ready to leave. He didn't believe so for quite some time. (R.45,46).

****

Q. Still, you thought enough to ask the platoon sergeant?
A. I knew we were about to leave sometime, sir. That is what I came here for.
Q. You came here for what?
A. To go away. That is what we came to England to naturally end up in a battle place." (R.45-46).

4. Article of War 58 reads:

"Desertion - Any person who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of was, suffer death or such other punishment as a court-martial may direct ********".

Article of War 28 provides:

(6)

"*** Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter".

"Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty or to shirk important service." (1928 M.C.M., par.130, p.142).

"Absence without leave with intent to avoid hazardous duty or with intent to shirk important service.- Under AW 28 any person subject to military law who 'quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter'. The 'hazardous duty" or 'important service' may include such service of troops as strike or riot duty; employment in aid of the civil power in, for example, protecting property or quelling or preventing disorder in times of great public disaster; embarkation for foreign duty or duty beyond the continental limits of the United States; and, under some exceptional circumstances such as threatened invasion, entrainment for duty on the border. Such services as drill, target practice, maneuvers, and practice marches will not ordinarily be regarded as included." (1928 M.C.M., par.130, pp.142,143).

"Absence without leave.- Absence without leave is usually proved, prima facie, by entries on the morning report. **** But the morning report, even though it refers to the accused as a 'deserter', is not complete evidence of desertion; it is evidence only of absence without leave, and it is still necessary for the trial judge advocate to prove an intent to remain permanently absent, or else to avoid hazardous duty or to shirk important service." **** (1928 M.C.M., par.130, p.143).

5. The evidence shows, in fact accused himself admits, that he left his organization on January 17th and went to London where he remained "about 14 days" when his money becoming exhausted, he surrendered to the military police at the Paddington railroad station in London. Much of Prosecution's testimony with respect to change of station and movements of Task Force 2211-B and as to accused's knowledge of its proposed movements was hearsay or was incompetent and immaterial or represented conclusions of the witnesses. Such evidence was clearly inadmissible, but it was undoubtedly conducive to the court's findings that accused deserted the service. It was therefore, prejudicial to accused's rights. When this evidence is eliminated, as it must be, accused's admission as to his absence without leave constitutes practically the entire competent, pertinent evidence on the vital issues. Accused's identification and surrender to the military police were both established by stipulation in open court (R.18). The testimony vaguely shows that accused had arrived from the United States about January 3rd and because of lack of records his unit received no pay until about January 14th; that the equipment of accused's unit was checked and completed, barrack bags were marked and the unit generally understood that in the course of time they would likely move on. Accused states that his sergeant said: "It would be safe enough to go for he didn't think they were moving for some time". The desertion charge against accused rests solely on proof that he left his unit to avoid "hazardous duty, to-wit: transfer to an overseas station". No intent to desert need be shown in such case, but the hazardous duty together with the intent of accused to avoid it, must both be proved. One of the necessary elements of the proof that accused absented himself from his command to avoid hazardous duty is proof that he was either <u>notified</u> or otherwise <u>informed</u> or <u>had reason to believe</u> that his unit was about to be transferred for "over-seas" service. Proof that accused's unit had been notified of prospective movement without additional proof that accused was actually present when such announcements were made does not suffice. (CM 230826, <u>McGrath</u>). Nor does proof of knowledge by accused that his unit was stationed at an embarkation camp and that eventually his unit would depart for "over-seas" meet the requirement of proof. (CM 231163, <u>Sinclair</u>). In the instant case the evidence, characterized by hearsay and opinion testimony, is far short of establishing the vital fact that accused was informed or advised of prospective movements of his unit, or that he otherwise knew his organization was about to depart from the United Kingdom for duty beyond the seas and that he absented himself for the purpose of avoiding accompanying the same. The evidence with respect to the clothing and supplies issued to members of Task Force 2211-B prior to 17 January 1943 (R.7,8,12,13,16,33,34) discloses that it was primarily routine equipment. Such evidence considered alone or in conjunction with the other evidence submitted is not legally sufficient to permit the inference that by the issuance thereof accused was given notice that his unit immediately was to engage in

hazardous duty. Whether there is evidence in the record legally sufficient to support such inference is a question within the province of the Board of Review (Bul., JAG., Aug. 1942, par.422, p.162). The proof of the Charge therefore, fails on this item.

Another element necessary to sustain the Charge of desertion herein against accused is proof that accused's unit "was under orders or anticipated orders involving **** hazardous duty", which accused sought to evade. (Manual for Courts-Martial 1921, par.409, p.344). It does not appear from Col. Kilian's order (R.24) or from other evidence that the duty accused's unit was to perform was hazardous. There can be no presumption that Task Force 2211-B departed to engage in such duty.

> "No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. **** No where is the presumption held to be a substitute for proof of an independent and material fact." (United States v. Ross, 92 U.S., 281,283, 23 L.Ed. 707,708).

Nor can judicial notice be taken of its whereabouts.

> "Overseas movement being secret, the precise nature and place of the duties performed by the landing team after embarkation were not matters of common knowledge of which the court could properly take judicial notice". (Bul., JAG., Feb 1943, par.395, p.61; Bul., JAG., July 1942, par.385, p.104).

Proof in the instant case shows that accused's organization, Task Force 2211-B, departed from its station at Lichfield "the night of January 20-21", but the record wholly fails to disclose whether it embarked for services without the United Kingdom or simply moved to a new camp or station within the British Isles. The record is totally silent as to the nature of the duty accused's organization was to perform; hence there is a failure of proof on a vital element of the case.

There is therefore no evidence in the record legally sufficient to support the findings that accused is guilty of desertion as Charged.

6. The evidence does show, by the accused's own admissions, that he was absent without leave for some 14 days and is legally sufficient, therefore, to support a finding of guilty of absence without leave for 14 days in violation of Article of War 61. Limitations upon the punishment which may be given for "absence without leave" in violation of Article of War 61 were removed December 1, 1942. (WD. Bull.57, 1942).

7. This record purports to cover the trial of "Nigg, Clarence E. 12016383 Private" and that name is given in the General Court-Martial Order, the Charges as written, the action, the record of previous convictions and the certificate attached to the morning report, (Exhibit "A"). However, the charge sheet covers "Nigg, Clarence E. Jr., Pvt. 12016383" as does the reference to and report of the investigating officer, and the extract copy of the morning report. That they are one and the same person is sufficiently established by the same serial number.

8. Extract copy of morning report (Pros.Ex."A") was read to the court without comment or explanation that the fact of the desertion therein mentioned must, nevertheless, be otherwise proved. The copy was certified by "K. M. Nicholson, Capt., F.A., Asst.Adjutant". The certification was erroneous. It should have been made by the company commander. (AR 345-5, par.13a, Aug.15,1942; J.A.G. 250.46, Apr 26, 1928; Bul. JAG., Dec.1942, par.395, pp.358,359). Attached to Pros. Ex."A" is a copy of "Report of Desertion" made under AR 615-30, also certified as aforesaid. However, it apparently was not introduced in evidence nor read to the court inasmuch as it was hearsay. (Bul. JAG., Feb 1943, par.395, p.60). These irregularities and defects were harmless as the absences therein shown were admitted by accused.

9. Accused is 24 years of age. The charge sheet shows that he enlisted 11 October 1940, with no prior service.

10. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and of the Specification as involves a finding that accused did, without proper leave, absent himself from his organization at Lichfield, Staffordshire, England, from about 17 January 1943 to about 31 January 1943 and did remain absent without leave for a period of 14 days, until terminated by surrender at the place and time alleged in violation of Article of War 61, and legally sufficient to support the sentence imposed.

B. Franklin Pitts, Judge Advocate

Judge Advocate

Elwood W. Sargent, Judge Advocate

455

(10)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 2 JUN 1943 TO: Commanding General, ETOUSA, U.S. Army.

1. In the case of Private CLARENCE E. NIGG, JR., (12016383), Company "A", 2211-B, Casual Replacement Group (Provisional), I concur in the foregoing opinion by the Board of Review. I recommend, for the reasons therein stated, that only so much of the findings of the Charge and Specification be approved as involves a finding that accused did, without proper leave, absent himself from his organization at Lichfield, Staffordshire, England, from about 17 January 1943 to about 31 January 1943 and did remain absent without leave for a period of 14 days until terminated by surrender at the place and time alleged, in violation of Article of War 61, and legally sufficient to support the sentence imposed.

2. The evidence shows that accused, newly arrived in the United Kingdom and two days after receiving a rather large amount of pay, went to London without permission where he remained 14 days, surrendering to the military police when his money was spent. In his absence his unit moved, how far or where is not disclosed. Knowledge on the part of accused that his unit was to move was not shown and further it was not proved that the duty accused's unit was to perform was hazardous. He admitted his intentional absence but denied any notice or knowledge that the moving of his unit was imminent and claimed his superior non-commissioned officer informed him when a pass was requested, that the unit would not move for a substantial period of time. The prosecution therefore failed in their proof of any other offense than that of absence without leave.

3. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of desertion herein be vacated and a finding of guilty of absence without leave be substituted therefor. The sentence as imposed remains legal for the substituted offense and is not the maximum.

4. Inclosed herewith is a form of action designed to carry into effect the recommendations hereinabove mentioned should it meet with your approval.

L. H. HEDRICK,
Brigadier General,
Assistant Judge Advocate General,
Branch Office with the
European Theater of Operations.

455

2 Incls:
Record of Trial
Opinion of Board of Review.

CONFIDENTIAL

(Finding of guilty of absence without leave approved and

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

Board of Review.

ETO 489.

26 JUN 943

UNITED STATES v. Privates ROBERT (NMI) RHINEHART (7087457), and RAYMOND F. FALLUCCO (33134947), both of 326th Ordnance MTS Company (Q).	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Depot G-25, APO 518, Ashchurch, Gloucestershire, England, 4 May 1943. Sentence: Each dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Robert Rhinehart and Private Raymond F. Fallucco, all of 326th Ordnance MTS Company (Q), acting jointly and in pursuance of a common intent did, at or near Ashton Cross, Gloucestershire, England, on or about 2230 hours, 5 April 1943, with intent to commit a felony, viz., rape, commit an assault upon Miss Mary Ellen Elizabeth Dunn, by wilfully and feloniously assaulting her person and endeavoring to have carnal knowledge of the said Miss Mary Ellen Elizabeth Dunn by force and against her will.

239535

CONFIDENTIAL

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

3. Mary Ellen Elizabeth Dunn of Cheltenham, a factory worker, testified that she with two friends, Edna L. Mason and Miss Parker, were cycling on the night of 5 April 1943 (R.6). They arrived at the "Queen's Head" public house at Ashton Cross, where witness had one drink at about 9:30 P.M. (R.10). While standing outside of the public house soon after 10:00 P.M., they were accosted by three soldiers who asked if the "Queen's Head" were open and were told "Not tonight". The three girls then mounted their bicycles, Miss Parker going on ahead. Witness and Miss Mason were riding side by side when someone, she thinks deliberately, collided with her bicycle and she was knocked off. Miss Mason was frightened and rode away (R.6) going for help (R.7). Witness was knocked down by two soldiers who grabbed her (R.9) and "dragged (her) along the road" and "pulled (her) on to the floor". She called for help from Miss Mason. "They tried to prevent me by putting their hands over my mouth. I was dragged from one side of the road to the other. They dragged me to the ditch and then I stopped crying for help". Witness identified accused as being the two soldiers. While she "was still struggling a fellow told me he would knock me out if I did not stop. I still cried for help". She was covered with mud and was lying on her back in a ditch. One of the soldiers had his hand over her mouth, and the other was on top of her. Fallucco was holding his hand over her mouth. His clothes were unfastened and he had his person in his hand. One of them, she doesn't know which, attempted to undress her (R.11). They tore her clothes. Witness knew the meaning of "rape" and testified the "two fellows" attempted it by getting on top of her and starting to tear off her clothes and her under-clothing (R.8). She does not remember whether they asked if they could have intercourse with her but while she was struggling with them she asked them to let her go. While she was screaming another soldier came on the scene, flashed a torch at them and asked what was going on. Her two assailants then released her and disappeared. Witness was taken to the military police at the guardroom where she identified accused (R.10).

First Sergeant James A. Parsons, 326th Ordnance MTS Company (Q), identified accused as soldiers in the United States Army and members of his Company (R.1).

Technical Sergeant Carl D. Lawson, 204th Signal Depot Company, testified that he saw both of accused at about 9:15 P.M., on the night of 5 April 1943 at "The Crown Inn", the village public house at Kemmerton, approximately two miles from Ashton Cross. They were boisterous and noisy. Witness asked one of them if they knew they were in improper uniform and was told to mind his own business. He asked the proprietress not to serve them, 'phoned the MP's and then left. They had been drinking (R.1).

Private Henry T. Drodwell, 80th Ordnance Company (Depot), testified that he was riding his bicycle slowly along the road about 2000 yards from the "Queen's Head" and by the bridge at about 11:10 P.M., on the night of 5 April 1943 when he heard three screams in succession originating some 30 or 40 yards away. He shouted "What goes on there" and saw a man and a woman crawling up on the road. The man had on a greenish colored suit but witness could not say he was a soldier. The man disappeared through the bush and the woman, who was Miss Dunn, told witness she had been attacked by soldiers. She was covered with mud and was bruised. Witness went along with her toward the guardhouse and met Lt. Col. Walden (R.2-3).

Edna L. Mason of Cheltenham, Gloucestershire, testified that she was cycling with the Misses Dunn and Parker on the night of 5 April 1943, and at about 10:00 o'clock they were at Ashton Cross. After a stop they mounted their bicycles. Miss Parker was ahead and witness and Miss Dunn were riding side by side when a bicycle collided with Miss Dunn and she fell off. Witness rode on and soldier, Spisak, riding a bicycle, came along side her. Accompanied by him witness rode on about 50 yards and stopped. She heard repeated screams but afraid she might have the same trouble, she joined Miss Parker who had preceded her in order to secure help. They traveled a full quarter of an hour and when they returned Miss Dunn was already at the Camp. The men must have been hiding in the hedge and came out behind them. She could not identify any of them (R.5).

4. Accused were warned of their rights and each elected to make unsworn statements (R.11). The statement of Fallucco made when directed by defense counsel to "tell the Court what happened on the evening of April 5, 1943, from the time you rode your bicycle in the company of one or more soldiers to the Queen's Head, near Ashton Cross" was:

> "All three of us came in the Queens Head and saw three girls talking to the fellows there and somebody said 'Let's wait for the girls'. We waited at the corner. Two girls went by. The last one was Mary Dunn. I said 'Hello, Mary Dunn'. She said nothing. I le(f)t her go. I heard a bike hit another one. I heard Miss Dunn scream out and found her in the middle of the road. I said

'What are you screaming after?'. She said she had hurt her ankle and hand. I said 'That is too bad'. I sat her down and she lay with her dress up. I spoke about having intercourse with her. Then Pvt Rhinehart came up. Pvt Rhinehart said he would have intercourse with her. She said all right but not here. We went down the road. I do not know whether she tripped. She grabbed me by the jacket. I tried to keep her from falling but we both fell together in the ditch. I saw a light coming towards me. Mary began screaming again. I went across the road. After Miss Dunn and the other guy left I went to my bike and found out that the chain was off so had to push my bike to the Camp. I went to bed. Lt. Hoskins came in and said 'What happened'. They got Pvt Rhinehart and me. I came up in front of girl and said 'Can you identify me?' She said 'No, I have never seen you in my life'. The following day I went up to the Provost Marshall. In the afternoon they brought me back and Miss Dunn was there. Capt. Cherry said 'Do you recognize these boys?'. She said 'Sure' right off the bat. Lt. Hoskins said I had a bit of dirt on my forehead. I think that is how she recognized me the next day." (R.12).

The statement made by Rhinehart after similar directions by the defense counsel, was:

"At Ashton Cross the three of us stopped and went across the road. We saw some girls and asked if the pub was open. They said 'No'. We sat down beside the road. The girls came riding around. I went down the road. I heard one girl call. The one I was riding with went off on her bicycle. I heard a collision. Pvt Fallucco was talking with a girl, and was asking to have intercourse with her. She said 'Yes', but asked that we should go off the road. We fell in a ditch and then saw a light coming up the road and a man appeared. The girl went off with him. I came back to camp and was told the OD wanted to see me. I went to the Guardhouse and was questioned in one of Capt. Cherry's offices. The girl said 'Do you recognize me?'". (R.12).

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5. On rebuttal Captain Thomas S. Cherry, Provost Marshal, testified that he obtained statements at his office on 6 April 1943 from each of accused. Witness identified his signatures and that of each accused who signed the statements in his presence (R.13). The statements were obtained voluntarily and not under pressure, nor were there any promises, intimidations or threats. They were given as the result of questioning. Each accused in open court was asked by the President of the Court, "Before making these statements were you warned of your rights", and each answered, "Yes, sir". The objection of defense counsel to their being received in evidence was overruled and they were received as prosecution Exhibits B and C (R.13,14). These exhibits are attached to the record and are as follows:

" STATEMENT

Pvt Raymond Fallucco, 33134947
326th Ord. Motor Trans. Supply Co. (Q)

I, Raymond Fallucco, having been warned of my rights, of my own free will and accord, do hereby stipulate:
I was asked by Spisak and Rhinehart to go bike riding at about 1900 hours, 5 April 1943. I told them I wasn't allowed to go anyplace in dirty fatigues. They said there were no MP's where we were going, so I went. We rode to a Pub in a small town where we had some beer. We only stayed here for a short time and rode on to another Pub, I think the Railway Inn. We had a couple more beers at this Pub and a Tech. Sargeant said we were not in proper uniform and he was going to call the MP's. I told him we weren't bothering anybody, reaching out to try to stop him. My field jacket was dirty so I got a fatigue jacket from Rhinehart, putting it on over my field jacket. We left the Railway Inn, and I fell off my bike several times. We rode to the Queens Head. At the Queens' Head we saw some girls with some soldiers, on the outside. We decided to wait for these girls on the Cheltenham Road. They rode toward us on their bikes after leaving the soldiers and I spoke to one of the girls but she did not reply. She was pushing her bike. I grabbed her, since she was behind the other girls. She called to one of the other girls for help. They ran away on their bikes. Rhinehart came up to where I was and grabbed the girl. Together, we threw her in the ditch. I saw a bicycle coming, so I turned her loose.

(16)

The soldier hollered to turn the girl loose. I 'scrambed' until the soldier and girl had left. I later returned for my bicycle and returned to camp and went to bed, where I was when the OD came after me. It was my intention to ..... her. If the soldier hadn't arrived on the scene when he did I would have tried to have forced intercourse with her. Before the soldier came up on the scene, I was holding the girl for Rhinehart, who was on top of her, but the girl wouldn't open up her legs. I was holding her mouth so she couldn't scream. But Rhinehart didn't actually commit the act.

I know what perjury is and am willing to swear to the above statement which I have read and believe to be true to the best of my knowledge.

(Signed) Raymond Fallucco
Raymond Fallucco
Pvt., 326th Ord MTS Co (Q)

WITNESS:
Thos. S. Cherry
THOMAS S. CHERRY,
Capt., Ord. Dept.

S. W. Hoskins
S. W. HOSKINS,
1st Lt., Ord. Dept.

Exhibit B. ".

" STATEMENT

Pvt. Robert Rhinehart, 7087457
326th Ord MTS Co. (Q)

I, Pvt Robert Rhinehart, after having been warned of my rights, of my own will and accord, freely stipulate:

'About 1900 hours or 1930 hours, Spisak, Fallucco, and I left camp on our bicycles, and road past Northway Camp to Bredon. We stopped at a pub by the name of Crown Inn where we drank some beer. We stayed here for only 5 or 10 minutes. We stopped at another pub in Bredon for more beer. We circled around the town then rode on the next small village.

We went into a pub to have a beer where we had a little trouble with a Tech Sgt about being in

fatigue clothes. He told us he was going to call the MP's. We followed him outside and told him he'd better not call the MP's. He walked on down the road with his girl. He went back in the pub and had a few more drinks.

We then went back to Bredon to a pub just across the railraod tracks and drank beer there till closing time.

We left this pub and I remember I fell of(f) by(my) bike four or five times. We rode from Bredon to the Queen's Head. We asked a soldier, in the company of a girl, if the pub was open. They told us the pub was closed.

We started back to camp and saw three girls, with bicycles, talking to some soldiers. We decided to round the corner and wait for these girls, on the Cheltenham road. As they road by, we got on our bikes and rode along with them. I was riding in front with one of the girls.

We were riding along together when one of the girls called. This girl I was riding with told me to go back and see about my mate. She then rode well ahead of me, and I attempted to catch up with her. But I couldn't catch her and turned off the back road to camp.

When I got to camp I went to bed and the MP's came for me at about 2300 hours.

I know what perjury is, and am willing to swear to the above statement which I have read and believe to be true to the best of my knowledge.

Signed Robert Rhinehart
Robert Rhinehart.

WITNESSES:

Thos. S. Cherry
THOMAS S. CHERRY,
Capt., Ord. Dept.,

Pvt. Paul Galloway
Pvt Paul Galloway,
Hq & Hq Co, 1st OMB.

EXHIBIT C.

CONFIDENTIAL

"SECOND STATEMENT OF Pvt. Robert Rhinehart, 7087457,

I, Pvt. Robert Rhinehart, after having been warned of my rights, of my own will and accord, freely stipulate:

There are a few corrections I would like to make in my first statement. This statement is true and correct up until the time we were waiting for the girls.

As the girls rode by, I started riding down the road with one and I heard the other girl who was left behind with Fallucco call. The girl, I was riding with told me to go back and see about my mate. She ran off and left me, so I turned around and went back. On the way back I heard her screaming. I had intentions of making him leave the girl alone, but when I arrived she was on her back alongside the road, with her legs spread a little. So I decided then to have intercourse with her, while Fallucco held her. I did not have intercourse with her because of a light I saw coming down the road. I left when I saw the light coming, and later went back for my bicycle, and met Fallucco, and we rode back to camp.

I have read the above statement and believe same to be true to the best of my knowledge.

(Signed) Robert Rhinehart
Robert Rhinehart

WITNESS:
Thos. S. Cherry
THOMAS S. CHERRY,
Capt., Ord. Dept.,

S. W. Hoskins
S. W. HOSKINS,
1st Lt. Ord.,

EXHIBIT C.

6. Assault with intent to commit rape "is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. *** The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice. Once an assault with intent to commit rape is made it is no defense that the man voluntarily desisted". (M.C.M., par.149 l, p.179). "*** Intention is a fact which cannot be positively known to other persons, no one can

testify directly concerning it and the matter must be an inference which the jury must find from the established facts. ***" (1 Wharton's Cr. Ev., sec.79, p.96).

One accused, intentionally collided with and knocked Miss Dunn from her bicycle, dragged her to the road side and acting in unison with the other accused, bruised and mistreated her and attempted to undress her in the effort to compel her to have sexual relations with them. By her resistance and the timely intervention of Private Drodwell, accused were defeated in their purpose. Every element of the crime of rape was shown except penetration. The victim's testimony is amply corroborated. In the opinion of the Board of Review the record is legally sufficient to sustain the findings of the court that accused were each guilty of the Charge and Specification herein (CM ETO 78, Watts; CM ETO 492, Lewis).

7. (a) - On the second and third unnumbered pages of the record, being completed printed forms, it is assumed that all references to the "accused" where printed in the singular is intended to refer to each of the accused herein.

(b) - On page seven of the record of trial, the trial judge advocate states: "Subject to objection by the defense, I offer in evidence these articles of clothing, identified by the witness, Miss Dunn, as belonging to her and indicating by their appearance the struggle which is alleged to have taken place". The defense counsel stated he had "no objection" and "the same was then received in evidence and marked prosecution Exhibit A. Permission was granted to withdraw the same at the end of the trial". Attached to the record is a sheet labelled "Exhibit A" and listing, "Ladies undergarment, torn; Outer coat with mud stains; Pair high-heel shoes with mud; Ladies waist soiled with mud and buttons torn". Nowhere are these articles identified by anyone nor in any way described except as above. They were improperly admitted in evidence but any claim of prejudice to accused by such action was waived by the defense counsel.

8. The court was legally constituted and had jurisdiction of each of accused and of the 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 sentences.

9. Accused, Fallucco, is 27 years of age and accused, Rhinehart, is 22 years of age. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 Sept 1942, as amended by GO #63, ETOUSA, 4 Dec 1942, a sentence of dishonorable discharge may be ordered executed when the accused is sentenced to confinement for three years or more or for an offense which renders his retention in the service undesirable. Attempt to

commit rape is such an offense. The approved sentence is five years in the case of each accused. Both conditions of the order are therefore met. A general prisoner may be returned to the United States for serving a sentence of three years or more. Confinement in a penitentiary is authorized for the offense of attempted rape (USCA., Title 18, sec.455, p.337). The designation of the Federal Reformatory, Chillicothe, Ohio, is correct.

B. Franklin Pete, Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 28 JUN 1943 TO: Commanding Officer, Southern Base Section, SOS, ETOUSA.

1. In the case of Privates ROBERT RHINEHART (7087457) and RAYMOND F. FALLUCCO (33134947), both of 326th Ordnance MTS Company (Q), 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 the execution of the sentences.

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 489. For convenience of reference please place that number in brackets at the end of the order: (ETO 489).

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

1 Incl:
Holding of Board of Review.

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

Board of Review.

ETO 492. 11 JUN 1943

UNITED STATES	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private First Class WILLIE F. LEWIS (33125149), Headquarters and Service Company, 827th Engineer Aviation Battalion.	Trial by G.C.M., convened at Cambridge, Cambridgeshire, England, 12 May 1943. Sentence: Dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 15 years. Penitentiary.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification 1: In that Private First Class Willie F. Lewis, Headquarters and Service Company, 827th Engineer Aviation Battalion, did, near Eye Airdrome, Suffolk, England on or about 18 April 1943, with intent to commit a felony, viz: Rape, commit an assault upon Private Joan Swarbrick, 45th South Eastern Platoon, ATS, by willfully and feloniously grasping the arm of the said Private Swarbrick and forcing her to the ground and attempting to have sexual intercourse with her.

Specification 2: In that Private First Class Willie F. Lewis, Headquarters and Service Company, 827th Engineer Aviation Battalion, did, near Eye, Airdrome, Suffolk, England, on or about 18 April 1943 with intent to do him bodily harm, commit an assault upon Technician 5th Grade John M. Black, Company A 827th Engineer Aviation Battalion, by willfully and feloniously striking the said Technician Fifth Grade Black in the face with his fist.

CHARGE II: Violation of the 96th Article of War.
Specification: In that Private First Class Willie F. Lewis, Headquarters and Service Company, 827th Engineer Aviation Battalion, did, at Eye Airdrome, Suffolk, England, on or about 18 April 1943, wrongfully and without lawful permission or authority take and use a two and one-half (2½) ton G.M.C. cargo truck, property of the United States.

He pleaded not guilty to and was found guilty of all the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of fifteen 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 Article of War 50½.

3. On 17 April 1943, accused was stationed, with his unit, at Eye Airdrome, Suffolk, England (R.35). He was one of the regular truck drivers (R.29). On Saturday night, 17 April 1943, he was selected with Corporal Arthur Fitts to drive two G.M.C. 2½ ton trucks to take the "men to the dance at Fressingfield" (R.25,30), which is about 12 miles distant from the Eye Airdrome (R.25). Both men with their trucks left the motor pool at about 6:30 or 7:00 P.M., on 17 April 1943 (R.30) and drove to the dance together (R.33). The dance concluded at 11:30 P.M., (R.34) and both trucks were loaded with soldiers for the return to Eye Airdrome (R.33). On the way back to the Airdrome the Command car with the Chaplain in it stopped when about 3 or 4 miles from camp. Fitts stopped his truck, and accused allowed his truck which was third in line to bump into the rear of the truck driven by Fitts (R.40). Fitts got back to the battalion area about mid-night (R.33) and left his truck in the parking area of the Headquarters Company (R.31,34,40). Between mid-night and 1:00 A.M., 18 April 1943 he went to the motor pool for a flash-light (R.31,33). Accused in his unsworn statement declares that they stayed at the dance until 11:30 P.M.; that on the return trip his

truck bumped Fitts' truck; that he came back to the camp, put off the men, and left his truck at the motor pool around 12:00 P.M., or 12:30 A.M., 18 April 1943. He further avers, in his statement, that he rode in a truck he "believed was Fitts" from the motor pool to Headquarters and Service Company, 827th, where he got out of the back of the truck and went to his hut and went to bed and slept until reveille (R.40).

Joan Swarbrick, a private of the British 45th South Eastern Platoon, (ATS), (R.7,14) Wellington Road, Brighton, Sussex, England, was an acquaintance of some six months of Corporal John Black "of the 827th" and without having made any previous arrangement, came by train via London, to Diss (R.14) meeting Black about 9:30 Saturday evening outside the American Red Cross at Eye (R.15). Later in the evening about 11 o'clock being unable to get any place to stay in Eye (R.15), she and Black started to walk the five miles from Eye to Diss so that she could take a train back to London (R.8,15). Some distance along the road they met an American soldier (Corporal Young) who loaned them his bicycle (R.15) and later they met a second American soldier who said he would send them another bicycle. While waiting for this bicycle accused came along driving an army truck and told them he was a guard patrol picking up all girls walking with soldiers along that road and said something about getting off the road (R.15). It was a moonlight night and she could see accused's face and recognized him as an American soldier (R.16). By this time both Black and Pvt. Swarbrick each had bicycles (R.16). They separated from accused but he returned and came along the road after them. Black and Pvt. Swarbrick turned left into another road. Accused turned down another road and met them at the bottom of the road traveled by the couple (R.16). He said Provost Marshal and another officer were "sitting at the end of the road and he would have to take me (Pvt. Swarbrick) back to camp for a medical examination" (R.16). When she refused, accused hit Black on the jaw three times and also hit Pvt. Swarbrick just below the left eye. Black fell and cut his head on the "floor". "He didn't know what hit him. *** He never spoke anymore" (R.16). Accused forced both of them into the front seat of the truck and drove down the road a little way when he stopped, took Pvt. Swarbrick by her arm out of the truck, and threatened that if she "didn't do it" she would get hurt (R.16). He had a pistol. She refused accused's order to get down on the grass. Accused told her that she would "get the same" as Black. Accused then pulled her to the ground and demanded that she take off her clothes. On her refusal he started to remove her "pantees". He "came down very heavy" on top of her. Although she tried to get up she could not move. She was "very scared" but resisted the attack (R.17). Accused had put Black and the bicycles out of the truck at the first stop but drove Pvt. Swarbrick around until about 4:30 or 5:00 o'clock Sunday morning, 18 April 1943, when accused left her at the station at Diss after making at least four further attempts to attack her, and each time she resisted.

She returned to camp where Black was stationed at about 6:00 in the morning and reported accused and was physically examined by Capt. Minor of the Medical Corps that afternoon (R.17,18). She saw accused later that Sunday morning at the American Red Cross Club about 11 or 11:30 o'clock A.M., when accused showed them his identification card (R.18). She recognized accused independent of his identification card (R.18).

Corporal John M. Black, as a prosecution witness, confirmed Pvt. Swarbrick's testimony in the main part (R.7,8,9). Accused in the Army truck came up to Black and Pvt. Swarbrick as they were walking on the road from Eye to Diss, about 12:30 A.M. He could see accused's face and positively identified him. It was a moonlight night (R.9,10, 12). Accused told them "I am working for Captain Minor and Lieutenant Conti, and I am supposed to pick up all girls on the road with soldiers. **** If you get off the road with her, it is all right". Then accused drove off and Black and the girl continued on with their bicycles. Corporal Young had earlier met them on the road and loaned them his bicycle and had sent soldier, James Barber, to bring them another bicycle (R.8). Barber had arrived about the same time as accused and the truck, and got in the truck and left with accused after the above conversation. About 10 minutes later the truck returned and detouring, stopped so as to block the road traveled by the couple. Accused said: "Captain Minor and Lieutenant Conti saw me stop, and they knew it was a girl, and I will have to take your name". Black testified that he shone his light in accused's face and then looked through the truck (R.10). Accused stepped out of the truck and hit Black on the left side of the face (R.10), knocking him out (R.11). "That's all I remember. When I come to I was in a daze". When Black came to he was on the ground in a different place (R.13). Upon his memory being refreshed he remembered being put out of the truck by accused, also seeing accused pull Pvt. Swarbrick back into the truck (R.12,13). He got back to headquarters about 7:30 Sunday morning (R.11). He saw accused later that Sunday morning, and identified him in court as the same man who punched him and who spoke to him about Captain Minor and the Lieutenant (R.12).

Private James E. Barber, a prosecution witness, took his bicycle out to Black who was with a girl in British uniform on the side of the road between Diss and the camp (R.21). Accused alone arrived with a truck at about the same time and told them that the Provost Marshal had him out to pick up girls and that he was going to take all girls in but that he would take all three to where they were going. Black said they would use their bicycles. Barber gave Black his bicycle. Black and the girl got on the bicycles. Barber got in the truck and rode with accused who took him to camp where Barber left the truck. Accused "turned around and went back straight the way he come. I heard the sound of the truck stop and everything" (R.22). This all took place around two o'clock Sunday morning (R.22). Barber saw

accused again about ten o'clock that Sunday morning in his hut. "I asked him where my pocket book was that I had left in his truck" last night, and he said "he didn't have one last night". Barber recognized accused as the one who drove the truck and who had spoken to Black and the girl. It was moonlight, "almost bright as day" (R.23).

Captain Allen H. Minor, M.C., Battalion Surgeon of the 827th Engineer Aviation Battalion, testified that he gave Private Swarbrick a complete examination about 2 o'clock on Sunday, 18 April 1943, based on the complaint herein. He found a small bruise above the left eye and bruises and chafed areas about the genital region. The bruises and roughness and freshness in her genital region indicated to Captain Minor that a sexual attack had been made on her but there had been no penetration (R.19). He also examined Black about 7:30 A.M., that morning and found lacerations of the scalp and a bruise on the back part of the scalp. Black appeared to have been struck on the back of the head and was in a dazed condition. He was placed in quarters. A blow similar to the one he received would cause a concussion (R.20).

Second Lieutenant Wyatt P. Best, transportation officer of 827th Engineer Aviation Battalion, a prosecution witness, testified that accused was selected on Saturday, 17 April 1943, to drive an entertainment truck to be accompanied by the Chaplain and to use the truck for the time needed. It was a 2½ ton G.M.C., truck, property of the United States. The dance closed at 10:30 P.M., and accused had ample time to take the men back from the dance 12 miles away and go to the motor pool by 12 o'clock, mid-night. If he was driving the truck after mid-night without any officer or Chaplain, it was unauthorized. Accused had had his rights and privileges concerning the use of the truck explained to him numerous times and his duty was to return the truck to the motor pool after the use for the truck was accomplished (R.25). The Provost Marshal reported the Lewis truck illegally used and his dispatcher reported it "returned to the motor park approximately 4:30 the following morning". The other truck dispatched to the same dance returned approximately quarter to 12 or 12 o'clock (R.26). Accused is one of the regular drivers (R.29) and knew that when he brought the truck in he should have signed in (R.29).

Corporal James Monroe, 827th Engineer Aviation Battalion, identified accused. Monroe was the dispatcher to check the trucks out and in from 7 o'clock Saturday morning, 17 April 1943, till about one o'clock the next day and he slept at the motor pool. He issued a 2½ ton G.M.C., truck to accused about 6:30 or 7:00 o'clock in the evening of Saturday, 17 April 1943 to go "on the recreation to a dance at Fressingfield", to be returned "about midnight". A similar truck was issued to Corporal Arthur Fitts for the same purpose (R.30) and Fitts returned to the motor pool between 12 and 1 o'clock. Accused had not then come in and witness did not know at what time accused's

truck was brought in (R.31).

Corporal Arthur Fitts, 827th Engineer Aviation Battalion, a prosecution witness, was in charge of a 2½ ton G.M.C., truck on Saturday, 17 April 1943. Accused had a similar truck and they were supposed to take men to the dance at Fressingfield. The dance did not break up until 11:30 P.M., when both witness and accused loaded up the soldiers at the dance. Fitts came back to the company arriving about midnight, put out the men and left the truck in the battalion area about 1 o'clock (R.33,34,35). Witness did not see accused after the dance. (R.35).

Private Marvin Lindsay (R.35,36) and Private First Class Waverly C. Coles (R.37,38), defense witnesses, both testified they slept in the same hut with accused and that they each saw accused in his bed around 1 or 1:30 but neither had a watch and in each case they only guessed the time (R.37,38,39).

4. Assault with intent to commit rape "is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. ***** The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice. Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted". (M.C.M., par.148f, p.179).

> "*** The law presumes that a person who voluntarily did an act intended to do that which he did and intended the natural and probable consequences of doing it, unless the circumstances raise a reasonable doubt as to what his intentions were. ***** However, since intention is a fact which cannot be positively known to other persons, no one can testify directly concerning it and the matter must be an inference which the jury must find from the established facts. ****". (1 Wharton's Cr. Ev., sec.79, p.96).

Specification 1 of Charge I alleges but one assault with intent to commit rape upon the person of Pvt. Swarbrick on 18 April 1943. The testimony of Pvt. Swarbrick discloses that accused assaulted her with the intent to commit rape on at least five occasions during the course of the forced truck ride with accused during the early morning of said date. The evidence was first directed at and is specific and particular as to the first act of assault committed by accused at the time Black and the bicycles were thrown out of the truck by accused. A motion by the defense to require the prosecution to

elect the act upon which it seeks to rely for conviction would have been proper when Pvt.Swarbrick testified as to four other assaults. (16 C.J., secs.2168 & 2169, pp.860,861; 32 C.J., sec.138, p.1106). No such motion was made. The Court, therefore, should treat the first act as to which the prosecution introduced evidence as the act upon which it elects to rely. (52 C.J., sec.138, p.1107; 16 C.J., sec.2177, p.863; 23 C.J.S., sec.1044, p.434). The Board of Review, sitting in appellate review, will therefore consider only the assault upon Pvt. Swarbrick by accused at the time of Black's eviction from the truck.

The evidence clearly shows that accused, upon halting the truck, made Pvt. Swarbrick dismount therefrom. He took her by the arm and walked her down the road. He had a pistol. He threatened the young woman that if she did not consent to an act of sexual intercourse, she would be hurt. He commanded her: "Get on to the grass" and upon being met with a refusal he said: "Get down there. You know what Black got, and you will get the same". He took her by the arm and pulled her to the ground. When she refused his demand to disrobe he commenced to take her "pantees" off. Finally he "came down very heavy on top" of her as she lay on the ground. She resisted and was scared (R.16,17). There was no penetration.

This evidence stands uncontradicted, and presents all of the necessary elements of proof of the crime charged. There was a factual assault upon Pvt. Swarbrick with intent to have intercourse with her by force and against her will, notwithstanding resistance on her part, and accused was in a position to effect his intent had he not been defeated by her resistance. Every element of the crime of rape was shown except penetration. The young woman suffered from all of the indignities and injuries of the detestable crime of rape, except the actual accomplishment of that crime. (M.C.M., par.148b, p.165; 52 C.J., sec.35, p.1026). While it is true that rape and its lesser included offense, assault with intent to commit rape, are within that class of crimes where an accusation is "easy to be made, hard to be proved but harder to be defended by the party accused, though innocent" (M.C.M., par.148b, p.165), in the instant case, the victim's testimony receives substantial corroboration. Capt. Minor, M.C., testified that upon an examination of her the afternoon following the assault, he found physical evidence in her genital region of recently inflicted bruises and chafing, and expressed the opinion that she had been subjected to a sexual attack. Black's version of events immediately prior to and leading up to the first attack on the young woman by accused fits accurately into the composite picture. He was the companion of Pvt. Swarbrick. He stood between accused and the effecting of his vile purpose on her person. Accused twice intercepted Black and his young woman companion. The first time he informed them "*** I am supposed to pick up all girls on the road with soldiers *** If you get off the road with her it is all right". Returning later

he announced that "Captain Minor and Lieutenant Conti saw me stop, and they knew it was a girl, and I will have to take your name" (R.10). Accused then without notice or warning stepped from the truck and struck Black a brutal blow which rendered him helpless. After being placed in the truck by accused in company with the Pvt. Swarbrick and driven a distance, Black and the bicycles were put out of the truck and were left by the way side. Black remembered seeing accused put the young woman back in the truck.

In the opinion of the Board of Review the record is legally sufficient to sustain the findings of the Court that accused was guilty of an assault with intent to commit a felony, viz: rape, upon the person of Pvt. Swarbrick (Charge I, Specification 1).

5. Accused without provocation or warning struck Black in the face with his fist. The blow knocked Black to the ground. Upon falling he struck his head on the ground. He was rendered temporarily unconscious The blow was undoubtedly a vicious, disabling one. Black's testimony in this regard is corroborated by that of Pvt. Swarbrick. The physical examination of Black at 7:30 A.M., on 18 April 1943 by Captain Minor showed that he had sustained head injuries and had suffered a concussion of the brain. At the time of the examination he was yet in a dazed condition and was placed in quarters (R.20).

In the opinion of the Board of Review the record is legally sufficient to sustain the findings of the Court that accused was guilty of an assault with intent to do bodily harm upon Black (Charge I, Specification 2). (M.C.M., par.149n, p.180).

6. With respect to Charge II and its Specification whereby accused is charged with a violation of the 96th Article of War in that he did on 18 April 1943 "wrongfully and without lawful permission or authority take and use" a Government cargo truck is fully proved by the evidence, and the record is legally sufficient to sustain the conviction (CM: ETO 393, Caton and Fikes). It was clearly proved that instead of returning the vehicle to the motor pool upon completion of the duty to which he had been assigned, accused, without authority, wrongfully used it for his own purposes.

The Specification fails to place a value on the "two and one-half (2½) ton G.M.C. cargo truck, property of the United States" and no testimony was given as to its value. The testimony does show that it was a 2½ ton 10 wheel truck. Considering the type of vehicle concerned, the court may properly assume that the truck was at least of a value not in excess of $20. The failure to allege any valuation in the specification was not an error which in the light of the proof in this case, prejudicially affected the substantial rights of the accused. (CM 124566 (1919); 1912-1940 Dig.Ops.JAG., par.451(36) p.323)). The offense of wrongfully and without lawful permission or authority,

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taking and using the truck is an offense similar to larceny and the same punishment may be imposed therefor. (par.7, Military Justice Bul., JAGO., 6 May 1942). The fact that a value was neither alleged nor proved, does not affect the legality of the sentence. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of Charge II and its Specification.

7. The defense was the plea of alibi. In substantiation of same accused made an unsworn statement wherein he claimed he returned to the camp from the dance, put off the soldiers, went to C. Company to deliver a sergeant, proceeded to the motor pool around 12 mid-night and 12:30 A.M., 18 April 1943 and left his truck. He then rode from the pool on a 2½ ton truck, which he believed was driven by Fitts to the 827th Headquarters and Service Company where he left the truck and proceeded to his hut.

Testimony of Pvt. Marvin Lindsay (R.35) and Pfc. Waverly C. Coles was presented by the defense in corroboration. Both of these witnesses asserted that they were hut mates of accused; that they were awake at about 1:30 A.M., 18 April 1943 and saw accused asleep in his bed. However, each witness admitted he was guessing at the time.

The accused was positively identified by Black and Pvt. Swarbrick as being the individual who inflicted the injuries upon Black and who afterwards assaulted the young woman with the intention of raping her. Barber's testimony also serves to corroborate such identification. The evidence given by Fitts shows that accused was in possession of a motor truck on the night in question which closely resembled the truck driven by the individual who committed the crimes in question.

The burden of proof rested upon the prosecution to prove beyond a reasonable doubt that the crimes alleged had been committed and that it was accused who committed these crimes. The plea of alibi does not deny the corpus delicti.

> "*** its only design is to prove that the defendant, being in another place at the time, could not have committed the offense charged. Impossibility of presence at the time and in the place charged is the essential feature of this defense, and any proof tending to show that it was reasonably impossible for the accused to have been present at the time and place of the commission of the offense charged is sufficient to establish the defense. The rule is well settled that the defendant is entitled to an acquittal if the evidence respecting alibi, together with all the evidence of the case, raises a

> reasonable doubt of guilt. In other words, if there is a reasonable doubt of the defendant's presence at the scene of the alleged crime at the time of its commission, arising upon all the evidence, the jury should acquit; and this reasonable doubt may arise from lack of evidence of defendant's presence at the time and place in question, or from evidence offered by the defendant to prove that he was then at another place.***" (1 Wharton's Criminal Law, 12th Ed., sec.381, pp.505,506).

The prosecution's evidence identifying the accused as the individual who committed the criminal acts at the time and place alleged is in conflict with the accused's unsworn statement and the evidence of his witnesses. It was the duty and province of the Court to resolve this conflict. By its findings it has rejected accused's evidence and his unsworn statement in support of his plea of alibi and has accepted the prosecution's evidence. There is substantial evidence in the record to sustain the findings of the court. Under such circumstances the findings of the Court are binding upon the Board of Review.

8. The use by the Trial Judge Advocate of the prior written statement made by Black to refresh his memory (R.11,12) when he appeared as a witness for the prosecution was proper. (CM: ETO 438, Smith).

9. In copying the affidavit to the Charge and Specifications from the Charge Sheet into the record of trial, the words "and charges" are omitted. Also the indorsement of reference for trial is headed "EBS, SOS, ETOUSA" while the words "Eastern Base Section" are written in full when copied into the record. These irregularities do not prejudice the rights of accused, but the record should reflect an accurate copy of the originals.

10. The court was legally constituted and had jurisdiction of accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The sentence of the court is legal. The Board of Review is of the opinion that the record is legally sufficient to support all of the findings of guilty and the sentence.

11. War Department directive (AG 253 (2-6-41) E) 26 February 1941, requires that prisoners under 31 years of age with sentences of not more than ten years be confined in a Federal Correctional

Institution or Reformatory. Inasmuch as the sentence herein is for 15 years, the reviewing authority correctly fixed the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused.

_____ Judge Advocate

_____ Judge Advocate

(ABSENT ON TEMPORARY DUTY) Judge Advocate

(34)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 11 JUN 1943 TO: Commanding Officer, Eastern Base Section, SOS, ETOUSA.

1. In the case of Pfc. WILLIE F. LEWIS (33125149), Headquarters and Service Company, 827th 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 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 492. For convenience of reference please place that number in brackets at the end of the order: (ETO 492).

L. H. HEDRICK,
Brigadier General,
Assistant Judge Advocate General.

1 Incl:
Holding of Board of Review.

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

Board of Review.

ETO 503.

25 JUN 1943

UNITED STATES v. Private First Class JOE T. RICHMOND (34043109), Company "B", 383rd Engineer Battalion (Separate).	WESTERN BASE SECTION, SERVICE OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Seaforth Barracks, Liverpool, England, 21-22 April 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. Penitentiary.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private first class Joe T. Richmond, Company B, 383rd Engineer Battalion (Separate), did, at Aintree, Liverpool, Lancashire, England, on or about 1 March 1943, with intent to commit a felony, viz; murder, commit an assault on Sergeant Allen E. Hiller and Private Cornelius F. O'Donnell, by willfully and feloniously striking the said Sergeant Allen E. Hiller and Private O'Donnell upon the head, shoulders, and body with his fist and knife.

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CHARGE II: Violation of the 96th Article of War.
Specification: In that Private first class Joe T. Richmond, Company B, 383rd Engineer Battalion (Separate), did, at Aintree, Liverpool, Lancashire, England, on or about 1 March 1943, wrongfully interfere with Sergeant Allen E. Hiller and Private Cornelius F. O'Donnell, Military Policemen, then in the lawful execution of their office.

He pleaded not guilty, and was found guilty of Charge I and of its Specification, except the words "and Private Cornelius F. O'Donnell" where these words appear, and of Charge II and its Specification. No evidence of previous conviction 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 15 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 Article of War 50½.

3. Accused was a member of Company "B" of the 383rd Engineers (R.67,75) stationed on 1 March 1943 at Maghull Camp near Aintree, England (R.27,57).

Robert Godfrey Savage testified he was on 1 March 1943 the licensee and caretaker of the Aintree Institute Dance Hall, Longmoore Lane, Aintree, Liverpool. Prosecution's Exhibit "A" was presented to the witness who described certain of the details shown but did not identify it as a true sketch of the interior of the dance hall. Without objection the sketch was admitted in evidence and marked "Prosecution Exhibit 'A'" (R.9). He stated that about 10:15 P.M., on 1 March 1943 he saw an American Military Policeman attempt to arrest a colored American soldier in the dance hall (R.10,16). Other colored boys closed in on the police and they were absolutely overpowered. (R.10). He did not identify accused as being present (R.10,13). Witness demonstrated on Prosecution's Exhibit 'A' where the fight started and the direction in which the participants moved, and he was sure accused whom he had seen before was not the colored soldier with whom the two MP's were fighting (R.12,16,17).

Margaret Rees testified she saw at the Aintree Institute Dance Hall on the night of 1 March 1943, a tall, colored boy with two white MP's and they started fighting (R.7-8). Accused's photograph (on his identification card) was shown witness and she was examined, over objection of defense, as to her statement made to others at the Walton Hospital (R.20). She admitted that she was shown accused's photograph while in the hospital by "an American boy with red hair", and she told him "I just seen this one boy" (R.21). She admitted that she told the investigating officer that "This boy was standing

in the back", but she did not see a knife in his hand (R.19). He was facing another colored boy, and the MP's must have been trying to separate them and then other colored soldiers came up and the fight started (R.24). The next time she looked around there was another boy coming with a gun (R.20), but she did not see accused walking away from the MP's before the fight began (R.21). She knows accused because he had been at the dances and identified him from the picture shown her in the hospital (R.23,24). One of the MP's had the right side of his face cut (R.25). Witness was sure accused was at the dance the night of the fight (R.26).

Sergeant Allen E. Hiller, 295th Military Police Company, testified that on the night of 1 March 1943 he was on routine motor patrol duty with Private C. F. O'Donnell, 234th Military Police Company, in the vicinity of Aintree and Maghull and visited the Aintree Institute (R.27), a dance hall (R.7,9) which was frequented by American colored soldiers and by white girls and might possibly be a trouble spot. They went to the dance hall around 10:00 o'clock, proceeded upstairs and sat down. Two colored soldiers standing near witness started to argue in a loud voice and push and shove each other. When asked to quiet down, an argument started and the soldiers gathered around. One of these soldiers (McLurkin) was wearing a field jacket and witness spoke to him concerning his uniform. The soldier "blew up in my face. He literally screamed this was part of his uniform, ****". McLurkin's First Sergeant, Walter G. Cannon, (R.117), was standing near and witness asked him to take the soldier's name and to see that a blouse was found for him to wear in public. Sergeant Cannon said he would do so and about then McLurkin, who was under the influence of alcohol, butted into the conversation. "He was literally shouting at me. He had a right to wear a field jacket and to go and leave him alone. ***". To avoid confusion and to quiet him down, witness told him he had better come off the dance floor and come outside the hall (R.28). When the soldier said he wouldn't go witness grasped him by the right arm, O'Donnell took him by the left arm, and they attempted to lead him off. McLurkin resisted. Another colored soldier grasped McLurkin's right shoulder, attempted to wrench him away and demanded: "Where are you taking that boy?" Witness told him they were simply taking McLurkin outside, and to quiet down. This soldier then swung his fist at witness who defended himself and struck back. McLurkin also struck witness with his fist.

> "That started things to going. There was several blows back and forth. Several other colored fellows stepped up into range and one of them grasped the flashlight on my belt and picked it off and started slashing at me with it. About this time, I felt I had been cut along the side of the head. I could feel blood along side my face and I recovered from the blow. I bent my head and I could see blood dripping on the dance floor. About this time there was just an instant lull in the fighting. I just happened to

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> glance over to my right about three feet and I saw a tall husky built colored fellow whom I can identify standing there. He was kind of half facing me and his hand was just coming out in front of him here and he had a knife and he was holding it so I could see part of the handle and I could see the whole of the blade and he was looking at it in this manner (Indicating downwards). It appeared to be a marble make of hunting knife. It had a leather thong on the handle. It had a big guard blade. The blade was six inches long. It was a regular hunting knife". (R.29)

However, witness then found his gun was gone and in defending himself lost sight of the fellow with the knife (R.29). About the same time he felt a sharp pain in his left shoulder, as if he had been stabbed (R.30). There were five soldiers in this group at the time of the stabbing and witness identified accused as the one having the knife (R.29,31), but he did not know who actually stabbed him (R.31-32). He received three cuts, one at the junction of the shoulder and neck, one in the back of his shoulder blade and one in his side. He saw no other knife during the evening (R.32). Witness and O'Donnell, his partner, were dressed in full Military Police uniform, each had a pistol and O'Donnell also had a club (R.33). O'Donnell disappeared during the fight (R.34).

Dr. Norman Otway Knight Gibbons, Resident Surgical Officer of Walton Hospital, testified that Hiller was admitted to the hospital about 11:20 P.M. He was slightly shocked and had three stab wounds involving the chest, neck and shoulders and he had multiple abrasions. The neck wound was about "two inches across and on expiration it penetrated for a distance of about four inches underneath the skin into the muscles and was fairly clean. It didn't involve any important structures in the neck. The wound of his shoulder was three inches across and it penetrated down to the bone of the shoulder blade entering the muscles but without damaging any important structures. The third wound was about one inch across and that was in the right lower chest. It went through between the ninth and the tenth ribs and it penetrated into his lungs. In all, the depth of it would be about three and a half inches. That was also a clean wound." (R.37). These wounds could have been made by an ordinary pocket knife with a blade three and a half to four inches long (R.39). Hiller was hospitalized 18 days because of these wounds (R.43).

Private Cornelius F. O'Donnell, 234th Military Police Company, testified that he was with Hiller at the Aintree Institute dance hall on the night of 1 March 1943 when the fight occurred and helped Hiller remove his clothing at the Palace Theater. He identified the blouse, Exhibit 'B', shirt, Exhibit 'C', tie, Exhibit 'D', pistol belt, Exhibit 'E', as the clothing removed from Hiller. The Exhibits were then, with the consent of the Defense Counsel, received in evidence (R.45,46). Witness turned the clothing over to Captain Heck, his

commanding officer. He told the same story leading up to the time of the fight as did Hiller. O'Donnell's testimony was substantially the same as that of Hiller.

Captain Herman A. Heck, 234th Military Police Company, testified he was on duty at Seaforth Barracks the night of 1 March 1943 and was called to a disturbance at Aintree involving two of his men. He identified accused in court. Witness stated he went out to the company at Maghull Camp in an effort to locate some of the men who on that evening had been at the Aintree Institute dance hall, and questioned several of them. He noticed that accused had a cut on his hand and wrist and finger when he came in and after questioning him placed him under arrest. Captain Heck placed Hiller and O'Donnell on duty at the Aintree and Maghull area the night of 1 and 2 March 1943 (R.57) and he secured the sergeant's clothes from O'Donnell at the Palace Theater at Aintree, and retained possession of them until he surrendered them to the trial judge advocate a half hour before his testimony was given. Witness questioned accused after warning him of his rights, about 2 o'clock in the morning of 2 March 1943, at which time accused admitted being at the hall at the time the disturbance occurred and that he was trying to get out of the place, but asserted he saw no knife during the encounter and that he got the cut on his wrist while trying to get out (R.58). Accused had been in bed, but upon orders of Captain Heck, arose and came to the orderly room. He was dressed in fatigue clothes when questioned and searched. When searched an ordinary pocket knife of a "scout type" was found in the pocket of the trousers he was wearing. Accused claimed that the trousers then worn by him were not his (R.61) and denied knowing who owned the knife. The fatigue clothes seem to fit accused. He had previously denied when asked, that he had a knife and did not say the clothes were not his until he was searched and the knife was found (R.63). Captain Heck produced the knife found in the trouser pocket of accused the morning of 2 March 1943 (R.65) and it was received in evidence without objection as Court's Exhibit 'A'. When received in court the knife had particles of tobacco and grit adhering to the blade and the interior of the knife was dirty. The largest blade was "close to three inches" in length and a half inch in width (R.66).

Private Jack Gray, Company B, 383rd Engineers, of which organization accused was also a member (R.67), testified in part as follows:

> "Q. Directing your attention to the night of March 1st, 1943, can you tell what you were doing on that evening?
>
> ********
>
> A. At eight o'clock that evening I went to the Institute dance that was held at Aintree. About ten o'clock I saw two MP's walk over to McLurkin and ask him something. I don't know what they said to him. They was talking

to him and I saw him get up and I saw the two MP's catch him on both arms, one on each, and then the crowd came in and started to fight.

Q. Did you recognize, or was the accused among those fighting? Can you testify that the accused was among those fighting?

A. Yes, sir. **********

****

Q. Did you see the accused at that time?

A. Yes, sir.

Q. What was he doing?

A. I saw him with the knife in his hands.

Q. You saw him with the knife in his hands?

A. Yes, sir.

Q. What was he doing with the knife in his hands?

A. Yes, sir. He was hitting an MP with it.

Q. Which MP was he hitting?

A. The Sergeant, the tall one.

Q. Could you see where he was hitting the MP with the knife?

A. No, sir. I couldn't say where.

Q. In general, will you describe what you saw?

A. He was standing up and he had a knife in his left hand. I didn't know where he was hitting him offhand. I was upstairs.

Q. Can you describe the knife? What kind of knife was it?

A. No, sir. I don't know just what kind it was.

Q. Did you see the blade of the knife?

A. I saw the blade, yes.

Q. Can you say how long the blade of the knife was?

A. I couldn't say just how long, it was about that long.

Q. How long did it look to you?

A. Just about that (Indicating three inches). (R.68-69).

****

Q. Now, how sure are you that Richmond had a knife? How sure of that are you?

A. Because I saw it.

Q. Because you saw it?

A. I saw it, yes.

Q. What did he do with it?

A. When I saw it he had it in his left hand. He was hitting with it.

Q. He was hitting the Sergeant?

A. Yes.

Q. But you couldn't see what part?

A. I couldn't see what part. I could see him come up like that. I couldn't see how he was hitting him and where he was hitting him. (R.70).

****

Q. Do you know Private Richmond very well?
A. Yes, sir.
Q. Which hand does he use?
A. I think he is left handed. I am not sure.
Q. You are not sure.
A. No, sir. I am not sure.
Q. Do you know whether he struck the Sergeant or not?
A. Yes, sir.
Q. Where did he strike him?
A. I don't know where he struck him I know he was hitting him. I know that. ***** (R.72).

Witness saw the fight from the balcony and it was light enough for him to see them (R.74). Upon being recalled the witness, both on direct and cross-examination testified positively that he saw accused and Hiller fighting on the dance floor and also that he saw accused handling a knife with his left hand raised (R.127-131).

4. The rights of the accused having been fully explained to him, at his own request he was sworn as a witness and testified that he left camp on the night of 1 March 1943 and went to the dance (R.75) where he was supposed to meet a girl. He danced with the girl twice, and sat with her in the balcony. He was dressed in his "Class A" uniform and denied having a drink that evening or having a knife. While they were on the dance floor the girl stopped and there was a fight going on (R.77,79). Witness saw some MP's upstairs checking coats but did not see who was fighting because of the crowd (R.79,99). He "went through the crowd while they was fighting" to go upstairs after his coat and though he did not see anybody with a knife, he was cut on the wrist. In answer to the question, "Who cut you", he said "I don't know. They were pushing behind me, beside me and I cut myself" (R.80,100). He did not hear any shot but got his girl downstairs "went out the door and went to the train" (R.81), the girl going to the train station with him. He got on the train going to Maghull leaving the girl standing at the station. He had no watch and didn't know the time (R.84) but he checked his pass at the orderly tent, went to the dispensary to get the cut on his arm fixed and returned to his tent (R.85), went to bed and to sleep. The MP's came to his tent later and told him not to put his clothes on, just a pair of pants for a few minutes. He had hung up the suit he wore from the dance and he grabbed a pair of pants, fatigues, belonging to William Mobley who had a bunk next to him (R.86,100), and put on his own mackinaw and went to the orderly tent. He didn't feel in the pockets of these trousers (R.86). Captain Heck and others were at the orderly tent and questioned him about being at the Institute and

searched him and found a knife, Court's Exhibit 'A', some cigarettes and keys. He denied ever seeing the knife till it was found in his pocket (R.87,92,102) and insisted the knife and other articles belonged to William Mobley, but he admitted having a similar knife (R.93,101). He was then sent to the guardhouse (R.88). He described the young lady he was with as "sort of heavy set short" brunette, wearing a red coat which she kept on while he danced with her (R.89). She always wore a red coat (R.91). Asked how Captain Heck searched him, accused answered: "He hit that knife. He said, 'What's that there', and I brought it out." (R.89). Accused identified the knife by one missing handle. He first found his wrist was cut outside the door and felt the sting and when he "looked down and **** saw the blood was dripping" (R.90,98). Accused denied knowing anyone by the name of Bridget McCowan or knowing the name of the girl he described as wearing the red coat but said he would know her if he saw her (R.93). He insisted he danced that night with only the one girl who wore the red coat (R.94,96). He sat in the balcony with her and danced with her twice (R.94) but didn't remember her name but would remember it if it was told to him. When asked if it was Bridget McCowan he answered "I don't know, sir" but admitted knowing a girl called Bridie. However, she was not the girl he was with and he denied dancing with Bridie that night and didn't know whether she wore a red coat or not (R.97). When requested to write his name, accused wrote with his left hand (R.99). He identified a pair of trousers which were admitted in evidence as Defendant's Exhibit 'A', bearing serial number M9763, as being the trousers belonging to William Mobley which he found laying across the bed and which he had on about midnight of 1 March 1943 at Aintree (R.102,103).

Bridget McCowan, 16½ years old, testified she knew accused and gave his name. She had seen accused previously, and first saw him at the Aintree dance the night of 1 March 1943 at about 9:25 p.m. He was the only boy she danced with that evening (R.104-105). She was dressed in a pink blouse, blue skirt and red coat, which coat she wore while dancing (R.105). Witness saw no one else in the hall with a red coat (R.107,108). She left the dance hall by herself and met her two sisters and her father and had to wait some time for the "five to eleven" car home (R.105,106). At the end of her dance with accused she said "Thanks" and walked away. She did not at any time leave the dance hall with accused (R.107) nor did she ever go to the station with him (R.114,116). There is an interval during the dances at 9:25 and it was during the interval that she danced with accused. She and accused were alone together talking in the balcony (R.107) for but a short time just before they danced, which dance lasted about five minutes, at the end of which she walked off and talked to Sergeant Cannon. This was before the fight which started after she had danced with accused and while witness was dancing with a girl (R.109). She did not know who was fighting and on seeing some blood on the MP's face, she left and went to the ladies' cloak room.

First Sergeant Walter G. Cannon, Company B, 383rd Engineer Battalion, testified he was at the Aintree Institute Hall attending the dance on the night of 1 March 1943. He saw accused when he first entered the dance floor and when accused was dancing (R.121). There was an investigation that night in camp (R.118). Accused was brought into the orderly room. He had a bruise on one of his hands (R.119).

5. The accused while admitting his presence at the Aintree Institute dance hall on the night of 1 March 1943, denied that he had committed the assault on Hiller, and testified to facts which if true would show that he had not participated in the fracas and was not present when Hiller received the stab wounds. Stated otherwise, accused's defense was that of alibi.

While the injured soldier, Hiller, could not identify accused as the one who stabbed him, his testimony is positive and absolute that accused participated in the assault upon him, and that at the time accused was armed with a knife with a blade six inches long. Hiller saw no other knife during the evening (R.29,30,31). The witness, Rees, identified accused as being one of the colored soldiers who was with Hiller immediately prior to the general disorder (R.23, 48). Dr. Gibbons described Hiller's wounds as being inflicted by a sharp pointed instrument with a blade not exceeding ½" to 3/4" in width and about 3½" in length (R.38). Gray positively identified accused as the soldier who stabbed Hiller (R.68-70,72,127-131). There was also proof that accused had suffered a cut on his left wrist and on one of his fingers (R.59). Accused's statement that he was not present is weakened by the testimony of the witness McCowan (R.105,107,108,116).

An issue of fact was thereby created for determination by the Court. It was wholly within its province to believe or disbelieve accused's testimony or to reconcile it with the prosecution's evidence. There was substantial, competent evidence to sustain the Court's finding that it was accused who stabbed Hiller, and under such circumstances the findings of the Court will not be disturbed by the Board of Review. (CM 145791 (1921); CM 161833 (1924), CM 192609, Rehearing (1930), Dig.Ops.JAG., 1912-1940, par.408(2), p.259; CM ETO 492, Lewis).

6. Accused was charged with assault upon Hiller with intent to commit a felony, to-wit murder (Charge I and its Specification).

The evidence shows that accused was one of the numerous assailants of the military policemen at the time and place alleged in the Specification. During the disorder he was armed with a knife. At a critical moment in the fracas Hiller was stabbed. Gray testifies without reservation or qualification that he saw accused strike Hiller with his knife.

"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. *****". (M.C.M., par.148l, pp.178,179).

There is but one question which can arise under the evidence in this case and that is whether there is proof of a specific intent on the part of accused to commit murder?

The evidence without contradiction shows that the two military policemen, Hiller and O'Donnell, while in the performance of their duty in maintaining order in the dance hall attempted to remove a soldier, McLurkin, from the hall. They immediately became the objects of an attack by a group of colored soldiers who were present. Accused was one of the group, and was armed with and displayed a dangerous, long bladed knife. The policemen defended themselves against the assault, during which they were both disarmed by their assailants. In the course of the combat, Hiller was stabbed by accused.

From accused's own evidence he was fully aware that Hiller and O'Donnell were military policemen (R.78,81,99,100). Both were dressed in full uniform (R.33) and wore military police brazards on their arms (R.15,33). They had been expressly ordered to patrol duty which included the checking of and maintenance of order in the Aintree Institute dance hall (R.27,47,57). Hiller was an officer within his proper district, and known or generally acknowledged to bear the office he had assumed. When Hiller discovered McLurkin in a public place improperly dressed he was performing his duty in calling such irregularity to his attention. Upon McLurkin becoming disorderly the two military policemen acted entirely within the scope of their authority in attempting to remove him from the dance hall.

Accused gratuitously interfered with Hiller's performance of his duty to maintain order and decorum and regardless of Hiller's conduct in defending himself after he and O'Donnell were assailed, the action of accused in stabbing him was without a shadow of excuse, and there is nothing revealed by the evidence which serves to reduce or mitigate the seriousness of the offense. Had Hiller's death resulted, accused would have been guilty of murder (1 Wharton's Cr. Law, sec.541, p.778; 29 C.J., sec.68, p.1093); hence the evidence fully sustains the charge of an assault with intent to commit a felony, to-wit: murder.

There is no evidence in the record that accused made an assault on O'Donnell, consequently the Court was entirely correct in acquitting accused of the charge insofar as it involved O'Donnell.

The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of guilty of Charge I and its Specification: that accused committed an assault upon Hiller with intent to commit a felony, to-wit: murder.

8. The Specification of Charge II alleges that accused wrongfully interfered with the two military policemen, Hiller and O'Donnell, in the lawful execution of their office at the Aintree Institute Dance Hall on 1 March 1943. Such offense is a violation of the 96th Article of War. It is obvious that part of the proof supporting this charge is included within the evidence proving the offense under Charge I and its Specification. There is substantial evidence that accused directly interfered with the two military policemen, Hiller and O'Donnell, when they attempted to remove McLurkin from the dance hall when he became disorderly. While the serious aspect of the interference occurred when accused stabbed Hiller, the preferring of Charge II and its Specification is not in violation of the policy announced in M.C.M., par.27, p.17 "One transaction, or what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person". Involved in its proof is conduct on the part of accused towards both Hiller and O'Donnell constituting a separate and distinct offense from that of the assault with intent to murder Hiller. The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of guilty of Charge II and its Specification.

9. The Court was legally constituted and had jurisdiction of accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The sentence of the Court is legal. The Board of Review is of the opinion that the record is legally sufficient to support all of the findings of guilty and the sentence.

10. Accused is 22 years old. He has been sentenced to 15 years confinement for an act recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by R.S.5346, Crim. Code, sec.276, 18 U.S.C. 455, and which renders his retention in the service undesirable. War Department Directive (AG 253 (2-6-41) E) 26 February 1941, requires that prisoners under 31 years of age with sentences of not more than 10 years be confined in a Federal Correctional Institution or Reformatory. Inasmuch as the sentence herein is for 15 years, the reviewing authority correctly designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. Accused's return to the United States and

execution of sentence to dishonorable discharge is authorized (GO #37, ETOUSA, 9 Sept 1942, as amended by GO #63, ETOUSA, 4 Dec 1942).

B. Franklin Riley Judge Advocate

Gustav Brickbauer Judge Advocate

Edward H. Sargent Judge Advocate

CONFIDENTIAL

1st Ind.

WD, Branch Office, TJAG., with ETOUSA. 25 JUN 1943 TO: Commanding General, Western Base Section, SOS, ETOUSA.

1. In the case of Pfc. JOE T. RICHMOND (34043109), Company B, 383rd Eng. Bn. (Separate), 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 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 503. For convenience of reference please place that number in brackets at the end of the order: (ETO 503).

E. C. McNEIL,
Brigadier General, U. S. Army,
Assistant Judge Advocate General

1 Incl:
Holding of Board of Review.

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

Board of Review.

ETO 506.

UNITED STATES v. Private JAMES (NMI) BRYSON (34302547), Company "A", 827th Engineer Aviation Battalion.	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Ipswich, Suffolk, England, 19 May 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Penitentiary.

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 above named has been examined by the Board of Review.

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

> CHARGE: Violation of the 92nd Article of War.
> Specification: In that Private James Bryson, Company "A", 827th Engineer Aviation Battalion, did at Diss, Norfolk, England, on or about 1 May 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Cyril Easto, 15 Stanley Road, Diss, Norfolk, England, a human being, by cutting him on the throat with a knife.

He pleaded not guilty to the Charge and Specification, and was found guilty of the Specification, except the words "with malice aforethought, deliberately and with premeditation", of the excepted words, not guilty, and not guilty of the Charge but guilty of violation of the 93rd Article of War. Evidence of one previous conviction for failure to take prophylactic treatment was introduced. He was sentenced to

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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 but reduced the period of confinement to five years; designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

PROSECUTION'S EVIDENCE

3. The accused was a member of Company "A", 827th Engineer Aviation Battalion (R.21) which was stationed on 1 May 1943 at or near Eye, Suffolk, England (R.20). Cyril Leonard Charles Easto, hereafter designated deceased, was an unmarried British civilian, aged 36 years, who on and prior to said date resided at Diss, Norfolk, England (R.28,29). He was employed as a garage hand by W. D. Chitty Ltd., at Diss (R.29). At the age of 12 he had suffered an amputation of his left leg at a point 7 inches below the knee (R.28). The excised part of the leg was replaced with a wooden peg (R.7).

4. Victoria Road is a public highway, extending from the shopping center of Diss in an approximate easterly direction. Park Road is a westerly extension of Victoria Road. Mere Street extends north and south from the intersection of Victoria Road and Park Road; it widens as it approaches Victoria Road and forms an inverted "V" mouth. Within the mouth thus formed is an "island", slightly elevated above the street surface upon which is erected a brick structure occupied as a W.V.S. Canteen. The "island" is surrounded by curbing and is triangular shaped.

Approximately 3/5 miles east of the "island", Victoria Road is crossed at right angles by an elevated railway bridge. The camp of the 827th Engineer Aviation Battalion was on 1 May 1943, located on Victoria Road at Brome (R.29) a considerable distance east of the railway bridge.

(Exhibit 5, Prosecution).

5. Jesse Lionel Cobb and Harry Leach, British civilians and residents of Diss, at about 11:12 P.M., on 1 May 1943, were at the "triangle" above described. It was very dark at that hour. Cobb testified that as he was about to cross Park Road to his home, deceased coming from the opposite direction, bumped into him with the remark: "Somebody just hit me in the neck". Cobb recognized deceased by his voice. Deceased collapsed to the ground in a few seconds (R.7) without speaking further. Cobb dispatched his son, who had appeared on the scene, for the police. When the police arrived they flashed a torch and Cobb saw a gash on the left side of

deceased's neck. Blood was streaming from it. The police gave first aid until the appearance of the ambulance 25 minutes later (R.8,12) when deceased was placed in the ambulance for removal to the Emergency Hospital at Eye (R.10). He died enroute (R.10) and upon arrival at the hospital, soon after mid-night 1-2 May 1943, was pronounced dead by the doctor (R.11).

Inspector George William Leyburn of the Norfolk Constabulary stationed at Diss testified that he arrived at the scene of the homicide shortly after 11:20 P.M., on 1 May 1943. He had been preceded by a police constable who was administering first aid treatment upon the Inspector's arrival (R.12). There was an interval of 25 minutes from the arrival of the Inspector to the time the ambulance appeared and deceased was taken away (R.12). In the roadway facing Mere Street he found a large envelope laying about 3 feet from the curb and 5 or 6 yards from deceased (R.12). On the envelope were the following inscriptions, written in ink: "Sgt. T. C. Bryson - 34119870 - C H E F S - APO 989, c/o Postmaster, Seattle, Washington" (in two places on the envelope); "From Pvt. James Bryson, Co.A., 827th Eng. Bn. Avn., APO 527, c/o Postmaster, New York City, N.Y" (in two places on the envelope) and "From Pvt. James Bryson, Co.A, 827" (in one place on the envelope). Contained in the envelope at the time of its discovery were: (1) a photograph of a colored United States soldier which was contained in an envelope bearing the following inscriptions: "From Pvt. James Bryson, Co.A, 827th Engr. Bn. AVN, APO 527 c/o Postmaster, New York City, N.Y" and "Sgt. t H A D E Bryson, 34119870, APO 989, c/o Postmaster, Seattle, Washington"; (2) an Army Institute Catalog 'What would YOU like to learn'; (3) an envelope bearing the inscription "The Writers' Pocket of British Stationery - high class paper at a convenient price". The exterior envelope and its contents were produced in court and were identified by Inspector Leyburn as being the articles found by him at the scene of the homicide and delivered by witness to Detective Inspector William Garner of the Norfolk Constabulary. The same were admitted in evidence without objection; were marked "Exhibit 1, Prosecution" and are a part of the record of trial (R.13). Witness testified that the photograph which was contained in the envelope (Exhibit 1, Prosecution) is a picture of accused (R.13).

Deceased was lying on the pavement facing Park Road with his feet in the gutter and his head near an iron railing which surrounds the W.V.S. Canteen (R.12). The wound was on the left side of the neck and was about three inches long (R.12). There were large splashes of blood from the curb facing Mere Street across the "island" - a distance of 5 yards - to where deceased was found (R.14). Witness stated his opinion that deceased had been struck while standing on the curb facing Mere Street and had staggered across the "island" to the opposite curb on Park Road (R.14). Deceased did not speak after his first statement to witness Cobb (R.8,14).

Dr. David Hamilton Fulton, pathologist at the Peterborough Memorial Hospital testified that he performed the post-mortem on deceased on 2 May 1943 (R.15). Deceased's body was identified by his brother, Warrant Officer Alexander W. A. Easto, in the presence of Dr. Fulton, Inspector William Garner, Norfolk Constabulary, Sgt. Stephen J. Graham, assigned to the office of the Provost Marshal General, ETOUSA, and others (R.15,27). Dr. Fulton testified that deceased had a wound in his neck beginning 3 inches beneath his left ear and running horizontally to about one inch below the chin. The edges of the wound were cleanly cut. There was a good deal of blood on the man's chest, abdomen and on his right hand. There were no other wounds or bruises. Witness was of the opinion that the neck wound was caused by "a sharp instrument such as a knife" (R.15). The deepest part of the wound was at the back and in front it was superficial. In the back of the wound the sternocleido mastoid muscle was divided and the wound extended down to the vertebrae column. A small chip of bone had been removed at the upper surface of the fifth cervical vertebrae. The left internal jugular vein had been cleanly divided, but the carotid artery had escaped entirely. The larynx was undamaged (R.16). The Doctor expressed the opinion that "it would have needed considerable force to drive the point of a weapon and remove part of the bone", and he also thought "what happened was that the weapon was pushed into the neck almost at right angles and was drawn straight forward. The neck was pierced by the weapon and drawn forward" (R.16). Death was due to a hemorrhage from the divided jugular vein (R.16). Witness further stated his opinion to be that the person delivering the blow "was probably standing in front of the man that was stabbed because had he been standing behind him and reached around to do it, I would expect the wound would come around the neck more. It seemed it must have been done from the front. ** If the knife was very sharp, it wouldn't take much force, and if it was blunt it would take more force" (R.16). The deceased must have been standing upright when the blow was inflicted (R.17).

Detective Inspector William Garner of the Norfolk Constabulary stationed at Norwich, identified "Exhibit 1, Prosecution" as being the envelope and contents delivered to him by Inspector Leyburn on 2 May 1943 (R.17). He identified the photograph contained in the envelope as being that of the accused (R.18). Witness testified he was in charge of the police investigation of the death of deceased (R.18), and in the course of such investigation had occasion to speak to accused. At 3:20 P.M., on 2 May 1943, witness and Lieut. O'Neil of the P.M.G. Department, U.S. Army, interviewed accused at the camp of Co.A, 827th Engr. Av. Bn. Accused was properly warned of his rights. He denied all knowledge of the homicide (R.18). Subsequently on Tuesday, 4 May 1943, accused appeared before Inspector Garner, Lieut. O'Neil and Sgt. Stephen G. Graham at the Diss Police Station. Witness again warned accused of his rights, but he persisted in his denial and then witness informed accused that he (Inspector Garner) "was not satisfied with the statement and didn't believe it, and he should think it over until you were in a position to prove different" (R.18). At 2:30 P.M.,

on the same date, witness was told accused wanted to see him, and upon going to him said: "I understand you want to see me, Bryson" and accused replied: "Yes, sir, I want to tell you the truth about what happened on Saturday". Before accused made any further remarks the Inspector cautioned him as to his rights and "read to him our caution, and wrote it down and he himself signed it" (R.18). This caution was the following: "I have been told that I am not obliged to say anything unless I wish to do so and that anything I say will be taken down in writing and may be used in evidence" (R.20). Accused then made his statement "of his own free will" and there were no promises made (R.20). The Inspector then "took it down in writing and handed it to him and he read it, and he said there was nothing he wanted to add". Accused signed both pages of the statement and also affixed his signature at the conclusion of the warning, - he signed three times. Accused made his statement in the presence of Sgt. Graham and Lieut. Harder (R.19). The confession, "Exhibit 2, Prosecution", without objection, was admitted in evidence and read to the Court. The following is a true and correct copy of same:

"

County Police Station, Diss.
4th May 1943.

James Bryson saith,

'I have been told that I am not obliged to say anything unless I wish to do so & that anything I say will be taken down in writing and may be used in evidence'

(Signed) James Bryson

I wish to tell the truth now about what happened on Saturday night. After I left the pub I came on down towards the corner. I was picking my teeth with my knife as I had been eating fish & the blade was open. Just below the corner I met a man, a civilian. He spoke to me first and said 'Hey, have you had a good time tonight, do you want to have some fun with a girl' I said 'Yes' and he said 'come along with me'. I turned around and just went back up the street with him. He stopped at the corner and grabbed at my flys and pulled them open and grabbed my penis & testicles. I was surprised & got angry and pulled my knife out of my coat pocket with my right hand and struck him in the neck with it. He let go of my privates and I walked away. When I struck him my envelope was under my right arm. When I left him the man was still standing there. I struck him to protect myself I did not mean to kill him. When I got nearly to the little bridge near the pub near the golf course I missed my envelope and turned around to go back and look for it.

James Bryson

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I met two american soldiers and spoke to them and told them I had lost my pass and picture and that I had cut a man and had to go back and find it. I also told them my

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name and my number of my own free will and that I was in Company "A" 827th. After I got to the first filling station on the left I turned around & walked straight back to camp. I called in at the cookhouse and saw James L. Pace and James Barber. I gave Pace a black handled knife but that was not the knife I used on the man. The knife I used on the man was the white handled knife which the guard took from me on Sunday & it is the same knife which Inspector Garner showed me on Sunday, the knife I bought at Eye. If the civilian had not spoken to me I should not have spoken to him, and if he had not caught hold of my penis and testicles I should not have done anything to him. I did not tell you the truth at first because I was kind of nervous and upset. I am sorry for all the trouble I have caused but if the man had not interfered with me it would not have happened. What he did to me made me very angry and for a moment I did not know what I was doing. The knife was open in my pocket because I had been picking my teeth with it until I met this man. This statement has been read to me and it is true. There is nothing I wish to add to it.

(Signed) James Bryson

Statement taken & written by Detective Inspector W. Garner in the presence of Lieutenant E. A. Harder, Company "A" 827th Engineering Aviation Battn. & Stephen J. Graham, Agent, I.D. P.M.G. U.S. Forces. "

There was presented to Inspector Garner a single-bladed knife, with the name "Charles Bratson & Son, Sheffield" on the blade which is approximately 2½ inches long. It has an imitation composition pearl handle with three rivets. The widest part is about ½ inch. The witness identified it as the knife which had been handed to him on 2 May 1943 and testified he showed it to accused, who said it was his knife and he had bought it three days earlier in Eye for five shillings. Subsequently accused was shown the knife and stated to witness that "it was the knife he was picking his teeth with and stabbed the deceased with".(R.19). Without objection the knife, marked "Prosecution Exhibit 3", was admitted in evidence.

Lieutenant Raymond G. Dozier, Jr., 829th Eng. Avn. Bn., testified that his battalion on 1 May 1943 was stationed at Eye next to 827th Eng. Avn. Bn. On that date he was O.D. for both battalions. Upon request of Lieut. Bell, Adjutant of 827th Eng. Avn. Bn., the witness at about 11:30 A.M., Sunday 2 May 1943, took accused into custody. Before placing him in the cell, witness searched accused, and took from his person "a knife similar to 'Prosecution Exhibit 3'" (R.21).

Sgt. Stephen J. Graham, I.D., P.M.G, U.S.Forces, testified that he was present on 3 May 1943 at the camp of the 827th Eng. Avn. Bn., when two statements were taken from accused - being accused's second and third statements. Before the second statement was obtained accused was warned of his rights, and in such statement he denied all connection with the killing of deceased and stated he was not at the scene of the crime (R.22). Upon being shown "Exhibit 2, Prosecution", the witness declared that it was accused's third statement; that witness was present when accused signed it; that accused, prior to making this statement was informed that any statement was purely voluntary, no benefits could be promised, it might be used in evidence against him and it was being taken down in writing (R.23). The statement was read to accused by Inspector Garner before accused signed it.

"Prosecution Ex.3" was shown Sgt. Graham and he identified it as the knife given to him by the O.D. at the time Bryson was brought in. Witness showed the knife to accused who said it was the knife he stabbed the man with (R.23).

"Prosecution Ex.1" (being the exterior envelope, photograph, interior envelope, Manual of the Army Institute and package of writing paper) was identified by the witness. He showed the articles to accused at time accused made his last statement - "Exhibit 2, Prosecution" - who admitted that they were his property and stated he had lost them in Diss (R.24).

Pvt. Calus C. Funderburk, Co.A, 827th Eng. Avn. Bn., testified he knew accused; that on the evening of 1 May 1943, he, with accused, visited Eye and then went to Diss. The two soldiers got off the bus in Diss at the show - "Cinema". They then went to the post-office, visited a chip-shop, and a public house. Leaving the latter place they went to another public house "on the corner" and stayed there until it closed, when they went to the M.P. truck which stood about 200 yards from the last mentioned public house (R.24). At the truck, witness lost sight of accused and did not know what had become of him. The two soldiers drank beer and cider - no hard liquor during that evening. Upon having his memory refreshed by a prior written statement made by him, witness stated that it was about 10:30 P.M., when they reached the truck. Funderburk, upon

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being shown "Exhibit 1, Prosecution", stated it looked like an envelope accused carried under his arm during the evening and which he had at the public house (R.25).

T/5 Jimmie L. Pace, Co.A, 827th Eng. Avn. Bn., stated that he saw accused in the camp kitchen at about 12:30 A.M., 2 May 1943 when "he came in and asked for something to eat, some coffee or something". Accused spoke normal and was very quiet during the course of the conversation (R.27).

Staff Sergeant Todd S. Johnson, Jr., Co.C, 829th Engr. Avn. Bn., testified that he met an American colored soldier about 12:15 o'clock on the morning of 2 May 1943. Witness and Corporal Harry C. Sanders, Co.C, 829th Engr. Avn. Bn., had traveled on a railroad train from Norwich to Diss arriving at the latter point about midnight. They commenced to walk to the company camp which is located east of Diss on the opposite side of Victoria Road from the camp of the 827th Engr. Avn. Bn. When they were about 1¼ miles east of Diss this colored soldier walked up and asked them if they were American soldiers. Upon receiving an affirmative answer the colored soldier said he had just cut a man's throat. He said he had lost something and had to go back to find it and he voluntarily gave his name, rank, serial number and outfit. Witness remembered the soldier said he belonged to the 827th. He didn't appear drunk but he had had something to drink. He was calm and spoke in a clear intelligible voice (R.29,30,31). Defense counsel stipulated that it was accused who had the conversation with witness (R.30).

Mrs. Eileen Youngman testified that she was the wife of the licensee of the "Cock Inn" which is located on Denmark Street in Diss. She identified accused in court and stated that the last time she saw him was in "my own house" at about 8 P.M., Saturday evening 1 May 1943. He was with four other soldiers. He had a "gin and chaser" and that was all. All of the soldiers seemed "quite right" and accused did not appear to have been drinking. The soldiers left before 8:30 P.M., Accused had an envelope similar to "Exhibit 1, Prosecution" and took it with him when he left (R.31,32).

It was stipulated in open court between the Trial Judge Advocate and defense counsel that Corporal Harry C. Sanders, Co.C, 829th Eng. Avn. Bn., if in court and sworn, would testify substantially as did Staff Sergeant Todd S. Johnson, Jr.

DEFENSE'S EVIDENCE

6. The defense presented witnesses who testified as follows:

Pvt. Fred Rogers, Medical Section, Co.C, 827th Engr. Avn. Bn., stated that he had met deceased about 12 April 1943 in Diss. Witness

had been to a public house and when it closed he went to his bicycle. He was in the middle of a street and a civilian approached him (at this point the Trial Judge Advocate conceded that this conversation was between the witness and deceased), and asked, "What's the trouble?" Witness replied: "I have a flat tire". The civilian walked with a limp - he had to pick up his leg. He had been talking to some soldiers and a girl and when he left they all said, "Good night, Dick". Deceased asked witness if he were out looking for a girl friend, and witness replied: "Yes". Deceased said: "You didn't have any luck?" Witness answered: "No, sir" Deceased then asked witness if he were hot natured and witness replied: "To a certain extent". Deceased said: "I bet you have a big penis". Witness: "I have a pretty good sized one". The deceased then asked witness to take his penis out and let him see it to which the witness asked him what he thought he was. Deceased reached down at witness's pants and grabbed his penis. He did not open the fly of the trousers, but grabbed hold of the penis through the pants. Witness pushed him away. Deceased asked witness if he would like a girl friend and said he would take him where he could get one. He walked along with witness, explaining to witness that some people have passion in their throats and informed witness if he went along with him, witness could get relief. Witness told deceased to get away from him, but deceased grabbed his arm and wanted to take him up the road. Witness said he was not that kind, but deceased begged witness four or five times to go with him to which witness replied: "No". The M.P. truck came along and picked up witness (R.33 and 34).

Phillips Charles Nash, testified that his address was 28 Royden Road, Diss, England; that he was an apprentice mechanic at W. D. Chitty, Ltd; that he did not know accused, but knew deceased because he worked with him and that deceased suggested things to him. On several occasions deceased wanted to interfere with him "but not being that type of boy I just didn't have anything to do with him. He certainly wanted to interfere with my body". Deceased made sexual advances to witness but once and then witness "made it quite plain to him". He said: "Can't I just feel you?" (R.35).

Paul Edward Cook, stated his age was 15 years and lived at Horsham - 10 miles from Diss. He also worked for W. D. Chitty, Ltd., in Diss, was a fellow workman of Phillips Charles Nash, and was acquainted with deceased. Deceased made improper advances to witness about six or seven times within the past year while witness was at work; the last one was around January - about three months ago. Deceased asked witness to go into the works laboratory and some words were used such as "toss one off". Witness knew the meaning of such words (R.36,37).

It was stipulated that if one Nathan James Watling were sworn he would testify that he was of the age of 17 years and that within a period of 18 months prior to trial the deceased, Easto, had also solicited him to indulge in unnatural and indecent practices.

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The Defense announced that the accused would make an unsworn statement, that his rights had been fully explained to him and that he understood that he had three options. The court then received accused's unsworn statement as follows:

> "Sir: On Saturday night, May the 2nd, I was in the pub that night and I came out and when when I came out I met this gentleman, Mr. Cyril, and he said 'Hey, did you have a good time tonight', and I said 'No', and he said 'Do you want a girl', and I said 'I don't mind', and he said 'Come with me', and I said 'Alright', and I turned around and went up the street, and we got to the corner, and he said 'Go this way', and we went up the road a little ways and he stopped, and I stopped, and he turned around and grabbed me by the fly and then he grabbed my penis and testicles and squeezed on them, and I had my knife open and I struck him, and I thought about my papers, and I turned around and went to hunt for them, and couldn't find them, and went to camp and went to bed." (R.38).

7. There are several questions with respect to the admission of evidence which require consideration:

(a) - Jesse Lionel Cobb, a witness for the prosecution, testified that the deceased bumped into him at the "triangle" or "island" at the intersection of Park Road, Mere Street and Victoria Road in Diss at about 11:12 P.M., on 1 May 1943. As deceased and the witness met, deceased said: "Somebody just hit me in the neck". Deceased then fell to the ground and spoke no more (R.7). It may be inferred from the evidence that deceased had been stabbed while on the Mere Street side of the "island" and had immediately staggered across the "island" to the opposite curb on Park Road where he uttered the above statement and then collapsed (R.8,12,14). Clearly such statement was part of the res gestae and admissible as such. (M.C.M., par.115b, p.18; CM 193895 (1930), Dig.Ops.JAG.,1912-1940, par.395(24), p.216; CM ETO 438, Smith).

(b) - The record does not recite that the defense waived its cross-examination of prosecution's witness, Dr. David Hamilton Fulton. However, it does state: "There being no more questions, the witness was excused" (R.17). The record of trial was examined by Defense Counsel and initialed by him before authentication (R.39). Such state of the record makes it obvious that the defense waived its cross-examination of Dr. Fulton, although there is no formal declaration of such waiver.

(c) - Prosecution's witness, Sgt. Stephen J. Graham, I.D., P.M.G., U.S. Forces, testified that the envelopes, photograph and papers, constituting in the aggregate "Exhibit 1, Prosecution" were shown accused at the time accused made his last statement (Exhibit 2, Prosecution). Accused admitted the articles constituting "Exhibit 1, Prosecution" were his property and that he had lost them in Diss. This was an admission against interest and admissible as such, independent of any proof of its voluntary nature. (M.C.M., par.114b, p.116; CM ETO 292; Mickles). In view of Sgt. Graham's testimony that "Exhibit 1, Prosecution" was shown to accused and he made this admission at the time of his last statement (Exhibit 2, Prosecution) it might be considered as part of the confession and admissible as such (see sub-par. (d) infra).

(d) - "Exhibit 2, Prosecution" is the signed confession of accused (R.19). Although it was written by Detective Inspector Garner, accused, after having it read to him, signed it. The evidence is clear and positive that it was given by accused voluntarily and that he was free from the influence of fear or promises of leniency at this time. The corpus delicti had been fully established at the time the confession was received by the Court, by the testimony of Cobb (R.7, 8,9), McMullan, (R.9,10,11), Leyburn (R.11,12,13,14) and Fulton (R.15,16,17). The confession was properly admitted in evidence (M.C.M., par.114a, p.114; 16 C.J., sec.1508, p.72; CM ETO 438, Smith).

(e) - Prosecution's witness, Funderburk, while on the stand stated he did not know the time on the evening of 1 May 1943 when he left accused after they had departed from the second public house they visited (R.25). The Trial Judge Advocate showed the witness what was apparently a prior written statement made by him, but did not offer such statement to the Court nor to Defense Counsel. There was no demand for its inspection (R.25,26). The witness admitted the statement refreshed his recollection and then testified he left accused about 10:30 P.M. Although the better practice is to offer such statement for inspection by the Court and opposing counsel before examining the witness upon it, the use of the statement in this instance was entirely proper in the absence of demand for inspection. (CM ETO 438, Smith).

(f) - Prosecution's witnesses, Johnson and Sanders, testified (the latter by stipulation) that at about 12:15 A.M., 2 May 1943, while returning to camp they were approached by a colored American soldier (whom the defense stipulated was accused) who volunteered his name, serial number and outfit and who informed them he had just cut someone's throat and that he had lost something (R.30,31). This statement is an admission against interest and in view of the identification of accused and his confession (Exhibit 2, Prosecution) is manifestly admissible in evidence. (See sub-par. (c) and (d), supra).

(g) - Defense witnesses Rogers (R.33,34), Nash (R.35), Cook (R.36,37) and Whatling (R.37), testified that the deceased had solicited them, respectively, for the commission of acts of indecency and in some instances had actually laid his hands upon their persons in urging such perverted relations. The times and dates of the solicitations or personal contacts were stated by the witnesses to be as follows: Rogers: 12 April 1943; Nash: several occasions but dates not stated; Cook: six solicitations within year prior to 19 May 1943, last being in January 1943; Whatling: several times within period of three years prior to trial. This evidence is entirely favorable to accused and was produced in his defense without objection from the Prosecution. Whatling's testimony was actually stipulated. Under these circumstances if the admission of such evidence constituted error, it was self-invited by accused's counsel and rather than being prejudicial to accused it is favorable to him (24 C.J.S., sec.1843, p.695; CM ETO 438, Smith).

The Board of Review however, cannot ignore the implication created by its present treatment of the testimony of these witnesses. The circumstances connected with its use in this case render moot the question of its admissibility. Such question is specifically reserved by the Board of Review for future consideration and determination in a case where it is directly raised.

(h) - Exhibit 5, Prosecution, "sketch of the various localities the witnesses have spoken of", was received in evidence without proof of its authorship or any proof of its authenticity (R.38). Upon its face it does not indicate by whom or when it was prepared. The defense made no objection to its admission nor did it agree thereto. The proper basis for the admission of the exhibit was therefore not laid, and the Court would have been justified in rejecting it. However, no prejudice or harm resulted to accused through its admission or use. It is a harmless error within the purview of AW 37.

8. The Law Member of the Court, (Major Howard E. Webster) designated by the order appointing the Court did not participate in the trial, having been previously transferred from EBS, SOS, ETOUSA. The order appointing the Court did not require the presence of the Law Member. Under such circumstances the President of the Court properly exercised the function of the Law Member. (M.C.M., par.38c, p.28; M.C.M., par.51c, p.39). However, when a law member is transferred from the command, he should be replaced as soon as possible.

9. At the conclusion of the Prosecution's evidence in chief Defense Counsel moved the Court for a finding of not guilty on the ground and for the reason that the evidence failed to prove that accused acted with malice aforethought when he cut deceased's throat (R.32,33). The charge of murder included the lesser offense of voluntary manslaughter (M.C.M., par.148, p.162). Therefore, before

the finding of not guilty is permissible the Prosecution's evidence must fail not only to establish prima facie the crime of murder, but also must fail in proof of any lesser included offense. (M.C.M., par.71d, p.56). The question as to whether an accused acted with malice aforethought in committing a homicide is usually a question of fact (30 C.J., sec.574, p.326) to be determined by the court. There was substantial evidence before the Court at the time of this motion proving that accused was guilty of the crime of voluntary manslaughter. The Court was fully warranted in denying the motion and in reserving consideration of the question raised by the motion until making its ultimate findings (CM ETO 393, Caton and Fikes).

10. The charge originally preferred against accused and sworn to on 5 May 1943 by the accuser, Lt. Harder, was manslaughter under the 93rd Article of War. After investigation and when it was referred to the Staff Judge Advocate he recommended trial under the 92nd Article of War on the charge of murder. This recommendation was concurred in by Lt. Col. Joel W. Clayton, Chief of Staff, EBS, SOS, ETO, on the 15th May 1943. The charge was accordingly amended but not reverified. Had the accused been convicted of murder a most serious question would have been presented because of the obviously irregular practice above noted. Inasmuch as accused has been found guilty of manslaughter, the original charge, no prejudice thereby resulted to him.

11. The evidence is uncontradicted that deceased's death was due to a hemorrhage produced by the severance of his left internal jugular vein; that such division of the jugular vein was resultant upon the infliction of a deeply cut wound in deceased's throat, and that it was accused who inflicted the wound with his pocket knife. There can be no question as to the identity of deceased's slayer. Independent of accused's confession and unsworn statement the prosecution proved that it was accused who committed the crime. The discovery at the locus of the homicide of accused's photograph contained in an envelope bearing his "return address"; accused's statement to Johnson and Sanders that he had cut a man's throat and "lost something" and Funderburk's testimony placing accused in the immediate proximity of the "island" where deceased was fatally stabbed within a short time before the occurrence of the incident is substantial, uncontradicted evidence that it was accused who cut deceased's throat, and thereby caused his death.

Evidence of the incidents of the homicide is furnished only by accused's confession and unsworn statement supplemented by the opinions and inferences drawn by Dr. Fulton from the nature of the wound suffered by deceased. The Prosecution made no attempt to controvert accused's narrative of events. Oppositely, the record shows that the Prosecution made no objection to the admission of Defense's evidence - in the instance of one witness the Trial Judge Advocate stipulated his testimony - having for its purposes the identification of deceased as a moral pervert and the corroboration of

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accused's assertion that deceased provoked him to his violent act by pulling open the fly of his trousers and grabbing his private parts. Therefore, accused's guilt is determinable upon uncontradicted evidence furnished almost entirely by himself.

Accepting the facts as stated by accused and as the Court undoubtedly found, a situation is presented wherein deceased, a stranger to accused, approached him on a public street in the darkness of near mid-night, and assumed the role of a solicitor for prostitution - a panderer. Upon securing accused's assent to accompany him "to have some fun with a girl", the deceased as the two men walked up the street suddenly pulled open the flys of accused's trousers and "grabbed" accused's private parts. Immediately, accused with his right hand, pulled his open knife from his pocket and with it struck deceased in the neck. He had been eating fish and had just completed cleaning his teeth with the knife. He evidently had placed it in his pocket with the blade open. Deceased, upon being struck, let go of accused's privates and accused walked away leaving deceased still standing. In his confession, accused insists:

> "I struck him to protect myself I did not mean to kill him. *** If the civilian had not spoken to me I should not have spoken to him, and if he had not caught hold of my penis and testicles I should not have done anything to him". (Exhibit 2, Prosecution).

Accused's unsworn statement substantially repeats his confession (R.38)

The Court, in its deliberation, was confronted with the issue as to whether the Prosecution had sustained its burden of proving beyond a reasonable doubt all of the facts necessary to sustain the charge of murder. One of the principal elements was that accused acted with malice aforethought. Whether this proof had been made was essentially a question of fact primarily within the exclusive province of the Court.

> "The characteristic element of voluntary manslaughter is that it is committed upon a sudden heat of passion, aroused by due provocation, and without malice. The passion thus aroused must be so violent as to dethrone the reason of the accused, for the time being; and prevent thought and reflection, and formation of a deliberate purpose. The theory of the law is that malice and passion of this degree cannot coexist in the mind at the same time ***" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.645,646,647).

In reaching a conclusion upon this question the Court of necessity was compelled to answer the directly related subsidiary questions: (a) whether or not the personal violence visited upon accused's person by deceased at the time and place of the homicide was of such character or was inflicted under such circumstances as to be reasonably calculated to arouse anger and rage in the heart and mind of accused, and (b) whether or not accused stabbed deceased under the compelling influence of such anger and rage and not with malice aforethought. Deceased's act in "grabbing" accused's private parts without warning, under the circumstances related by accused, was an act of extreme provocation. This kind of a battery executed by one male upon another male is shocking, repulsive and abhorent. It bespeaks abnormality and degeneracy. It arouses indignation, wrath and anger.

There is certainly substantial evidence from which the Court might infer that when accused struck the fatal blow he was acting under such violent anger and wrath as to displace his powers of judgment and deliberation and that his mental and emotional condition was resultant upon provocation for which deceased was entirely responsible.

The Board of Review is of the opinion that there is not only competent evidence in the record to support the findings of the Court, but also that by its findings the Court has done complete justice. The fact that deceased might have been a moral degenerate or that even he was a menace to the social wellbeing of his community is no legal justification for his death under the circumstances revealed by the record. "A murder is not excusable merely because the person murdered is a bad man" (Underhill's Criminal Evidence, 4th Ed., sec.562, p.1111).

12. Accused is of the age of 34 years. His approved sentence includes confinement for five years for an act recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by 35 Stat. 1143, 18 U.S.C., sec.454, and which renders his retention in the service undesirable. Therefore, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is proper. (AW 42; War Department Directive 2-26-41, AG 253 (2-6-41) E). Accused's return to the United States and execution of sentence to dishonorable discharge is authorized. (GO #37, ETOUSA, 9 Sept 1942 as amended by GO #63, ETOUSA, 4 Dec 1942).

13. The Court was legally constituted and had jurisdiction of the accused and the 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 is legally sufficient to support the findings of guilty and the sentence.

B. Franklin Riter Judge Advocate

Eldan Brownlestin Judge Advocate

Elwood H. Sargent Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 23 JUN 1943 TO: Commanding General, Eastern Base Section, SOS, ETOUSA.

1. In the case of Pvt. JAMES (NMI) BRYSON (34302547), Company A, 827th Engineer Aviation 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 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 506. For convenience of reference please place that number in brackets at the end of the order: (ETO 506).

E. C. McNEIL,
Brigadier General, U. S. Army,
Assistant Judge Advocate General.

1 Incl:
Holding of Board of Review.

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

Board of Review.

ETO 515. 29 JUN 1943

UNITED STATES	29TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at APO 29, 20 May 1943. Sentence: Dismissal, total forfeitures and confinement for one year. Disciplinary Training Center No. 1, Shepton Mallet, Somerset, England.
Second Lieutenant O. D. EDWARDS, (0-1291964), 115th Infantry.	

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: Violation of the 61st Article of War.
Specification 1: In that 2nd Lt. O. D. EDWARDS, Co."E", 115th Infantry, did, in the vicinity of Tidworth, England on or about 4 May 1943, without proper leave, go from the appointed place for training, after having repaired thereto for the performance of said duty.

Specification 2: In that 2nd Lt. O. D. EDWARDS, Co."E", 115th Infantry, did, at Tidworth, England, on or about 11 May 1943, fail to repair at the fixed time to the properly appointed place for training.

(68)

ADDITIONAL CHARGES:

CHARGE I: Violation of the 64th Article of War.
Specification: (Disapproved by confirming authority).

CHARGE II: Violation of the 54th Article of War.
Specification: (Nolle prossed by appointing authority).

CHARGE III: Violation of the 96th Article of War.
Specification 1: In that, 2nd Lt. O. D. Edwards, Company E, 115th Infantry, did, at the Assaye Officers' Lounge, Tidworth, England, on or about 15 May 1943, wrongfully strike, Captain Grat B. Hankins, 115th Infantry, in the face with his fist.

Specification 2: (Nolle prossed by appointing authority).

By direction of the appointing authority a nolle prosequi was entered to the Specification of Additional Charge II and to Additional Charge II and to Specification 2 of Additional Charge III. Accused pleaded not guilty to and was found guilty of all the remaining Charges and Specifications. Evidence of one previous conviction for wrongfully refusing to give his name to military police and for violation of security regulations by writing letters criticising our Allies, 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 seven years. The reviewing authority, the Commanding General of the 29th Division, approved "only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances due or to become due, and confinement for five years" and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the findings of guilty of Additional Charge I and its Specification, confirmed the sentence but reduced the confinement to one year, designated the Disciplinary Training Center No. 1, Shepton Mallet, Somerset, England, as the place of confinement, withheld the order directing the execution thereof and forwarded the record pursuant to Article of War 50½.

3. The evidence for the prosecution is substantially as follows: Captain William B. Sullivan, commanding officer of Company E, 115th Infantry, testified that on the night of May 3-4, his company, in which accused was a platoon leader, was on combat team exercises with the regiment, leaving about 9:00 P.M. Accused was on duty and left with the company (R.11). Witness did not see accused during the night and could not find him in the morning; he found the platoon but accused was not with it. About 3:00 in the afternoon (4 May 1943)

when witness returned, he found accused in his quarters who said he had become ill in the morning and had to return home (R.12,18). He said his stomach was upset and he had lost his breakfast but had not seen a doctor. Prior to this time (4 May 1943) witness had specifically instructed accused about dropping out when he was supposed to be sick and told him that only a surgeon could excuse him because of sickness (R.13). Later accused told witness another story. He said "He had been going up with the company to the bivouac area, was walking along and there was a 3/4 ton truck which he thought was going to the same place and he said he got on it and fell asleep and that the truck and our company separated and he later found himself at the Regimental command post, that he had tried to find our company and that no one seemed to know where it was ***** so he came home" (R.14). Witness did not remember accused saying in the conversation anything about being sick.

Accused was on duty on May 11th when the company was doing garrison training but witness did not see him with the company all day. About 10:30 AM., 11 May 1943, witness went to accused's quarters where he found him in bed asleep and about noon he returned with Lieutenant-Colonel Warfield, the Battalion commander, to whom accused admitted he had been absent from drill that morning, that "when he awakened that morning he was ill and he told Lieutenant Miller he was not coming to drill because he was ill" and when Colonel Warfield said accused could be tried for AWOL accused said "well go ahead and try me or words to that effect" (R.15). Accused admitted he had not been to a doctor (R.16).

Second Lieutenant Vincent D. O'Toole, a room-mate of accused, testified that he saw accused at 8 o'clock the morning of May 4th during the time the company was out on a problem (R.20). Accused came in their room, undressed and went to bed. On May 11th they were awakened by the orderly about seven o'clock; accused did not get up and at 7:45 he was again awakened and said "tell the Captain I am sick" (R.21,22,23). About 12:45 that day after the mid-day meal was finished, accused came to the officers' mess and wanted something to eat (R.21).

Lieutenant Colonel William E. Warfield testified he found accused in his quarters partly dressed on the morning of May 11th and accused said he had not got up for duty that morning because he had felt sick. Witness told him that he had been reported by his Captain as "ducking duty" (R.25), and when told he could be tried for AWOL, accused replied that AWOL could not be proved for that morning (R.26). Witness ordered accused to have an examination at the infirmary and "for them to make a report to me". He learned that accused had gone to the infirmary but witness received no report from the doctor or from accused (R.25,27).

First Lieutenant Richard A. Donnelly, second in command of Company E, 115th Infantry, testified that he was with the company all day May 11th but accused was not present (R.29).

Second Lieutenant Herman Miller, a room-mate of accused, testified that he played cards with accused till after 3 o'clock in the morning of May 11th. Accused was not present with his platoon during that day (R.30). When witness arose that morning accused awoke and said he was sick and to tell Captain Sullivan (R.31).

Captain James S. Morris, 115th Infantry, testified concerning the dance given by the 115th Infantry officers on the night of May 15th. There were lady guests, mostly British, present. While witness was talking to a lady, accused came in with his hat on the back of his head (R.34) and went to the bar. After several minutes witness went over to accused who was standing with both feet on the rail and asked him to remove his hat as ladies were present but accused, who had been drinking, answered that he was leaving as soon as he got a drink. Deciding accused was in no condition to argue with, witness walked away when hearing a commotion he turned around and saw some officers holding accused and at the same time some others trying to quiet Captain Hankins. Colonel Smith told accused to leave (R.35,43) and there was quite a bit of argument. Accused seemed to be in quite a temper, but walked over to the bar and very nonchalantly picked up his glass and drank before leaving. While he was drinking Colonel Smith again told him to leave. Accused started towards Captain Hankins instead of the door and a couple of lieutenants took hold of him and escorted him from the room (R.39,44). The disturbance had drawn the attention of everyone in the room (R.36). This was around 12 o'clock mid-night (R.39).

Captain Grat B. Hankins, 115th Infantry, testified that he was at the dance the night of May 15th. He approached the bar; accused and Captain Morris were standing there and witness could tell by accused's expression and tone of voice that he "was somewhat disrespectful to Captain Morris". He turned to Lieutenant Edwards and said "why don't you quiet down you are acting like a young pup" (R.46,49). As he turned back towards the bar he "felt Lieutenant Edwards fist glance off the point of my chin, a poorly aimed blow not very effective" (R.46,50). Accused attempted to strike him again (R.46,50), but he was restrained by Lieutenant McDonough (R.46). This occurred between 11:30 P.M., and midnight (R.47).

Lieutenant Colonel Louis G. Smith, executive officer of the 115th Infantry, testified that he attended the dance in the officers' lounge the night of May 15th. About midnight while there was quite a number of officers and ladies present and while talking to several

officers with his back to the bar, he heard the sound of two blows being struck and on turning around saw accused by the fireplace being restrained by Lieutenant McDonough and another officer. Accused was struggling to get away and not knowing what had happened, witness told accused to quiet down and leave the room (R.55). Accused said something to the effect that "he can't call me a pup" (R.56,58).

First Lieutenant Raymond R. McDonough, 115th Infantry, testified that he was at the officers' party on the night of May 15th (R.62) when he saw a commotion at the bar about midnight (R.66) and accused "raise his hands to someone". Witness told him to quiet down before he got thrown out and accused made the remarks "the bastard called me a pup". Witness turned around and saw the officer in question was Captain Hankins (R.63). He did not see any blow struck (R.64). Neither Captain Morris nor Captain Hankins were drinking much (R.66).

Second Lieutenant Walter J. Parker, 115th Infantry, testified he was present at the officers' party when the altercation involving the accused took place. He had been sitting at a table and as he went to the bar to order drinks, Captain Hankins passed in front of him. There was a scuffle. Captain Hankins backed into him and he heard accused say "he called me a pup". He did not see any blows struck (R.68,69).

4. The evidence for the defense is substantially as follows: Sergeant Charles E. Merrick, 115th Infantry, testified that his company went out on a problem the night of May 3-4. As mess sergeant his duty was to prepare the meal in camp and load it on a truck for the field (R.71). At about 4:30 or 5:00 A.M., accused came up and got a cup of coffee. He later returned about 7:30 and asked to come back in the truck with witness and rode in getting off at the mess hall (R.73).

Sergeant Charles Creighton, Company E, 115th Infantry, testified that he was with his outfit when it pulled out about 9:30 P.M., on the evening of May 3rd. After the second break between 11 and 11:30 P.M., (R.76) accused called for him to come forward and take over the platoon, "He just dropped out and we went on with the march" (R.77).

Private First Class Wilfred F. Sullivan, 115th Infantry, testified that he drove a jeep on the problem the night of May 3rd. The truck would pass the troops who were marching and would then be passed by the troop (R.78). He saw accused who asked if there was room in the jeep for him and got in the back seat and stayed there until about the time the command post was reached (R.79) which witness told him was as far as he was going. It was about 11 o'clock, dark and he had been riding about an hour in the jeep (R.80).

Captain Louis M. Silverstein, M.C., testified that he saw accused at the 115th Infirmary on the morning of May 11th and he complained of a pain in his chest. On examination witness could find nothing wrong and advised accused to have an x-ray taken which x-ray

showed negative, heart normal (R.81). There was nothing wrong with accused (R.82).

Private Carlos G. Rush testified that he was the bartender at the officers' dance when late in the evening there was a little trouble among a few of the officers. Accused was arguing with Captain Morris when Captain Hankins stepped up and said something and accused took a swing at him striking him on the side of the face. Lieutenant McDonough separated them (R.84).

Private Nicholas Peter Vittacallona was also a bar tender at the officers' dance. He testified that between 11:30 and 12 o'clock P.M., accused came up to order a drink and he turned around and said to Captain Hankins, "What did you call me", so Captain Hankins replied "a pup p-u-p if you want to do anything about it step outside" (R.88). Accused stepped back and struck him once (R.89,91) when some officers grabbed them both (R.89). There was a lot of drinking going on (R.91).

Lieutenant O'Toole was recalled as a witness for the defense and testified he noticed accused and Captain Hankins struggling; that Captains Hankins and Morris were drunk and that he saw Captain Hankins spill a glass of whiskey on the dress of one of the lady guests (R.97, 106,133). He did not see a blow struck by accused (R.105).

The accused, at his own request, was sworn and testified in substance that, with his company, he started out on a C.T. problem about 9:00 P.M., the night of 3 May 1943. He had had no rest on a 48 hour pass just completed and was feeling badly. After marching some time, he turned his platoon over to his sergeant (Creighton) as his feet were hurting and his head ached. He then climbed into a jeep and lay down (R.108). He got out when the jeep stopped, failed to find his battalion and finally secured a ride back to his quarters, arriving about 8:00 A.M., 4 May 1943 and went to bed (R.111). Around 2:00 P.M., the same day accused was at the orderlies' room when the troops returned. The Captain asked him where he had been and he "told him, to make a long story short, that I had taken sick that morning and come in" (R.112).

Around 3:00 A.M., 11 May 1943, accused finished a poker game and with Lieutenant Miller "went over to our quarters to grab a few winks". They laid down on top of the bed without undressing and when awakened at 7:00 A.M., he told Miller he was not going out with the company, that his chest hurt and he was feeling punk and to tell Captain Sullivan he was sick. He then undressed and went to bed. He got up at noon, ate lunch and was straightening up his quarters when Colonel Warfield and Captain Sullivan came in and asked why he had not turned out for drill. When accused told them he was sick and his chest was hurting, Captain Sullivan observed that only a surgeon could excuse one from drill (R.113). Colonel Warfield ordered him to report immediately to the infirmary but there and at the hospital where a

chest x-ray was taken, nothing could be found wrong with accused (R.114).

At the dance the night of 15 May 1943, he had several drinks and dances, got his hat and went back in to bid his friends good-night and was invited to the bar for a drink. As to what happened on this occasion, he testified: "I imagine I put my hat on just more or less to hold it". While waiting for the drink:

> "**** I felt something nudging me in the back and I turned around to see who it was and it was Captain Morris, at the time I didn't know him, he said to me, soldier, in a surly manner, he was drunk, I could see he was drunk, don't you think you ought to take your hat off inside, I said I am leaving in a few minutes, he said, while you are in here you can take it off, I was getting mad- at his expression, he made an attempt to grab my hat and when he did he fell on me, he was pretty well lit and I pushed him back, he said come outside ****" (R.115).

> "Captain Hankins was standing about a foot from me, Captain Morris was standing immediately in front of me. Captain Hankins stepped in and pushed Captain Morris back and Captain Morris made another lunge for my hat and missed it and I took my hat off and laid it on the bar. Nich said here is your drink sir and I reached to get it when I happened to think of what he called me and I asked him, I said I am sorry, do you mind repeating what you said, he then said, I called you a pup p-u-p, a young pup is there anything you want to do about it, if you do step outside right now when he did that I lost my temper and started swinging, I didn't hit him but once, we were taken apart, Lieutenant Parker, I think it was Lieutenant Parker grabbed Captain Hankins and was holding him, Lieutenant McDonough was holding me and he said damn you can't hit my skipper and I said he can't call me a pup and get away with it, he said for Christ's sake calm down or you will get in trouble." (R.115-116).

He did not know he had his hat on when he walked in but did not remove it when Captain Morris reminded him because "of the manner in which he said it" (R.118). He lost his temper "and it set me out of my head, I couldn't see" (R.124).

5. On rebuttal the prosecution presented:

Lieutenant Colonel Smith who stated that Captain Hankins was sober at the time of the altercation (R.125,126,127); Captain Grat B. Hankins who denied he had spilled a glass of whiskey on a lady's dress (R.129) or that he invited accused outside (R.131); and Captain James S. Morris, who admitted he was mad when accused refused to remove his hat on request, but denied any talk of going outside to settle differences with accused (R.132).

6. (a) - There is substantial evidence that accused's duty assignment on the night of 3-4 May 1943, was as a platoon leader in Company E, 115th Infantry, engaged in a regimental combat team exercise. He reported and began such duty but left his platoon without authority and returned to camp.

The duty of accused on 11 May 1943 was with his company which was that day doing garrison training. He played cards till after 3:00 A.M., of 11 May, then returned to his quarters and slept till noon claiming he was sick, which was disproved. He was not present with his company during the day.

The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of guilty of both Specifications and of the Charge.

(b) - As to Specification 1 of Additional Charge III, accused admits striking the blow, as charged, but attempts to excuse his action by saying he lost his temper. In the opinion of the Board of Review, the evidence amply supports the court's findings of guilty of Additional Charge III and its Specification.

7. As noted by the Staff Judge Advocate in his review, the defense challenged for cause Colonel Philip S. Wood, a former commanding officer of accused who had some knowledge of accused's prior service, and Major John A. Metcalfe who had heard some of the charges discussed and knew some of the material facts but had formed no opinion as to accused's guilt. Both challenges were made to and considered by the court at the same time. The court sustained the challenge as to Colonel Wood but overruled the challenge as to Major Metcalfe. The record is silent as to whether these officers withdrew when the court closed to consider the challenges, or, if they remained, what, if any, part they took in the closed session.

> "The challenged member will take no part as such in the hearings, deliberations and voting upon a challenge against him. If a challenge is sustained, the challenged member will withdraw, otherwise he will resume his seat." (1928 M.C.M., par.58f p.47).

"Upon a clearing or deliberation, the challenged member usually and properly withdraws from the court, that is to say, does not remain with it: if however he stays, he takes no part in the discussion or decision. His remaining cannot indeed affect the validity of the proceedings, but his withdrawal is desirable as promoting freedom of discussion and may properly be requested by the court." (Winthrop's Military Law & Precedents, 1920 reprint, p.211-212).

The presence of challenged officers at the deliberations on the challenges by the Court in closed session is not prohibited, either by law or regulation. There is nothing disclosed by the record of trial herein to indicate that the presence of the challenged members, if they were present during the closed session of the court, affected the validity of the trial or prejudiced any substantial righ of accused.

"*** Challenges ***** The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time ****". (Article of War 18).

"Irregularities.- The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of the accused ****". (Article of War 37).

Reference is made to the construction placed upon the sentence: "The court **** shall not receive a challenge to more than one member at a time" contained in the 88th Article of War (1874) by Winthrop's Military Law and Precedents (2nd Ed.) sec.308, p.207) and also to the citation from Simmons in foot-note 20 supporting the text. Without determining whether Winthrop's comments should be applied to the same sentence as it now appears in the present 18th Article of War, the Board of Review is of the opinion that accused suffered no prejudice from the action of the Court in entertaining and passing upon the double challenge in this instance. The Trial Judge Advocate particularly called Defense Counsel's attention to the fact that he had a right to challenge Major Metcalfe peremptorily (R.6), but the defense stated that it did not desire to exercise such a challenge. Under such circumstances the violation of the directory provision of Article of War 18 forbidding the court to receive a challenge to more than one member at a time, did

not injuriously affect the substantial rights of the accused. (AW 37, supra).

8. Over timely objection of the defense, the court permitted the cross-examination of the accused to go into and establish a prior discharge from the United States Navy as undesirable, the exclusion of accused from other parties and particular prior derelictions and happenings to accused (R.120-122) not including offenses for which he had been tried and convicted by a court-martial. The Law Member apparently took the view that this line of questioning was admissible to show accused's bad reputation for veracity and credibility. "If the accused takes the stand as a witness, his reputation for truth and veracity may be shown". (M.C.M., par.112b, p.112). "Generally speaking the same rules are applicable in this regard as apply in the case of other witnesses". (70 C.J., sec.1035, p.822; sec.990, p.793). Impeachment for general lack of veracity of a witness must be limited to evidence of general reputation for truth or veracity in the community in which accused lives or pursues his ordinary business (1928 M.C.M., par.124b, p.133 ; 70 C.J., sec.1039, p.826, footnote 95; Sec.1040, p.828, footnotes 6 and 7). Subject to exceptions not applicable to this case, the basic rule is that the prosecution may not cross-examine the witness as to particular former acts of misconduct not relevant to the issue or involved in the principal controversy or brought out on direct examination (70 C.J., sec.1094, p.879, footnote 21, and p.880). The allowance by the court of the cross-examination of accused as to former acts of misconduct was therefore erroneous. However, the findings of guilty of the Charges herein are fully sustained by the record. The prejudice created could therefore extend only to the severity of the punishment imposed, to correct which the confirming authority has mitigated the sentence given.

9. The court imposed a sentence of "to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined <u>at hard labor</u> at such place as the reviewing authority may direct, for seven years". The reviewing authority, the Commanding General, 29th Infantry Division, approved only so much of the sentence as provided for dismissal, total forfeitures and "confinement for five (5) years", omitting the words "<u>at hard labor</u>". The confirming authority, the Commanding General of the ETOUSA, confirmed the sentence as approved but reduced the confinement to one year.

Article of War 37, provides among other things:

"That the omission of the words 'hard labor' in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive Order prescribing maximum punishments".

The Table of Maximum Punishments authorizes confinement at hard labor as a proper punishment for absence from duty in violation of Article of War 61, and for assault and battery in violation of Article of War 96 (1928 M.C.M., par.194c, p.97). Although the Table does not apply to sentences of commissioned officers, hard labor is authorized for officers as well as for enlisted men. Military law does not contemplate punishment by confinement without hard labor (M.C.M., par.103i, p.95). A fair and reasonable interpretation of the actions by both the reviewing and confirming authorities is that each of them intended to reduce the time or period of confinement without altering the remainder of the sentence of the court. But in any event, hard labor may be required.

10. The accused is 23 years old. He was commissioned a Second Lieutenant, AUS, 29 August 1942 at Fort Benning, Georgia; assigned to 17th Infantry, 29th Division, 5 September 1942 and assigned to the 115th Infantry, 29th Division, 22 December 1942.

11. The court was legally constituted. No errors affecting the substantial rights of the accused were committed during the trial except as mentioned herein. For the reasons hereinbefore stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of the Charge and of the Specifications thereunder and of Additional Charge III, Specification 1 thereunder, and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

(78)

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 JUN 1945 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Second Lieutenant O. D. EDWARDS (0-1291964), Company "E", 115th 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 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 515. For convenience of reference please place that number in brackets at the end of the order: (ETO 515).

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

Incl:
Holding of Board of Review.

(Sentence as previously modified ordered executed. GCMO 11, ETO, 3 Jul 1943)

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

Board of Review.

ETO 527. 23 JUL 1943

UNITED STATES v. Private PHILIP J. ASTRELLA (12009327), Company "D", Casual Replacement Group, (Provisional).	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Lichfield, Staffordshire, England, 22 April 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Disciplinary Training Center No. 1, Shepton Mallet, Somerset, England.

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 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.

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

CHARGE I: Violation of the 58th Article of War.
Specification 1: In that Private Philip J. Astrella, Company D, Casual Replacement Group (Prov.), did, at Whittington Barracks, Lichfield, Staffordshire, England, on or about 16 January 1943 desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Transfer to an overseas station, and did remain in desertion until he surrendered at Newport, Wales on or about 26 February 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 for five years. The reviewing authority approved only so much of the findings of guilty as involves a finding of guilty of absence without leave from 16 January 1943 to 26 February 1943 in violation of Article of War 61, approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge pending (until) the soldier's release from confinement and designated Disciplinary Training Center No.1, Shepton Mallet, Somerset, England, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 23, Headquarters, Western Base Section, SOS, ETOUSA, U. S. Army, 5 June 1943.

3. The following purported extract copy of the morning report of accused's organization was admitted in evidence:

EXTRACT COPY FROM MORNING REPORT OF
Co "D" Cas Repl Gp (Prov) 2211-B

(Company, Troup, Battery or Det.) (Regiment or other Unit)
Pvt. Astrella, Phillip J. ASN 12009327 Fr duty to AWOL as of 1500 hrs 16 Jan 1943.

(Complete Designation of Command) (Station) (Date)
I, _____,certify that I am the Personnel Officer
(Name, Grade and Arm of service)
of _____ and official custodian of the morning
(Complete Designation of Command)
reports of said Company and that the foregoing is a true copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at APO ___for the dates indicated in said copy which relates
(Station)
to
Phillip J. Astrella 12009327 Pvt Cas Repl Gp (Prov)
Full Name, ASN Grade and Organization
referred to in extract copy.

K. M. Nicholson
K. M. NICHOLSON
Captain, F.A.

RD FROM NO. II
2/2/43 Pros Ex 1
FH

The defense counsel stated "There is no objection" to the admission in evidence of the document (R.6, Pros.Ex.1).

It will be thus seen that the extract copy of the morning report (Pros.Ex.1) was executed by Captain K. M. Nicholson, Field Artillery, as

the personnel officer and official custodian of the morning reports "of said company". In CM 227831 (1942), Gregory, the only proof of absence without leave consisted of an extract copy of the morning report of accused's organization, authenticated by a certificate signed by the personnel adjutant of a Separate Coast Artillery Battalion which recited that the signer was custodian of the morning report concerned. In CM 218201, Witowski, the extract copy was certified by the Regimental Personnel Adjutant who stated therein he was official custodian of the morning report involved. The Board of Review in both cases held the extracts of the morning reports inadmissible because the officers certifying them were not their official custodians. The rule of these cases is applicable in the instant case. The company commander was the official custodian of the morning reports (AR 345-5, par.13a(1), April 15, 1942); not the personnel adjutant. Captain Nicholson's certification as company personnel officer is therefore not such an authentication as makes the extract copy admissible in evidence, notwithstanding his statement in his certificate that he is official custodian. The vice is inherent in the document. It is obviously hearsay evidence. The fact that defense counsel stated that he did not object to its admission does not make it legal evidence. It should not have been admitted in evidence and it will not be considered by the Board of Review. Such a document could be admitted by stipulation of the parties or by express consent of the defense after an explanation of his right to object (M.C.M., 1928, par.126c, p.137).

4. To establish the offense of which accused stands convicted, it was necessary to prove by direct or circumstantial evidence that, -

(1) Accused absented himself from **** his **** station for a certain period as alleged, and
(2) that such absence was without authority from anyone competent to give him leave.
(M.C.M., 1928, par.132, p.146).

All of the elements of the offense may be proved by circumstantial evidence (16 C.J., sec.1570, p.766), but mere conjectures or suspicions do not warrant conviction (16 C.J., sec.1590, p.779 and cases therein cited).

No evidence was presented by the defense. Prosecution's undisputed evidence shows:

That accused was a member of a unit first formed and known as Casual Replacement Group (Provisional) (R.10), but whose designation was about 10 January 1943 (R.11) changed to 2211-B. From the 10th till the 19 January 1943 (R.8) this unit had a priority of supply (R.10) under which more and other than normal supplies and equipment (R.9) were received by the members thereof. On 14 January 1943, the Commanding Officer, 10th Replacement Depot, notified the Commanding Officer, Task Force 2211-B, that Task Force 2211-B had been alerted by higher authority and directed that he at once publish this information to his command. On 20 January 1943 Task Force 2211-B departed from its station (Whittington Barracks, Lichfield, Staffordshire, England) for an unknown destination outside the United Kingdom (R.7). On or about 2 March 1943 Staff Sergeant Joseph B.

Fontane and another sergeant were detailed as military police to go to Cardiff (Wales) with orders to take into custody three prisoners of whom accused was one. They were then held by the 707th Military Police Company. Fontane and fellow soldier executed their orders. Accused was brought back and confined. He was in proper uniform, when picked up by Fontane. He stated to Fontane that he surrendered himself at Newport (R.6), and that he belonged to 2211-B (R.7). Newport is more than 150 miles distant from Lichfield and about twelve miles from Cardiff.

5. It is reasonable to assume that accused was with his unit subsequent to 10 January 1943 for he was familiar with the new unit designation and would thus be aware of the significance of the unusual issue of clothing and equipment to his unit. It may also properly be assumed that very restricted or no leaves of absence would be granted members of this unit after 10 January, and certainly not after 14 January 1943 when their Commanding Officer was notified that Task Force 2211-B was alerted by higher authority. Task Force 2211-B departed from its station (Whittington Barracks, Lichfield) enroute outside of the United Kingdom 20 January 1943, 41 days before accused was returned in the custody of the military police to his former station. His statement that he "surrendered" indicates in soldiers' parlance, a return to military control from an unauthorized status, subjecting him to apprehension. Moreover the military police would not have been sent a distance of 150 miles to secure and keep him in custody if he had not been subject to apprehension. He was placed in confinement on return to his post. The limitations prescribed by paragraph 104(c) 1928 Manual for Courts-Martial, United States Army, upon punishments for absence without leave in violation of Article of War 61 were suspended by Executive Order No. 9267, which became effective 1 December 1942. It removed the necessity of proving the duration of an unauthorized absence or its definite beginning or ending.

When the record of trial is considered as a whole it is obvious that the issue which was tried involved accused's guilt of the offense of desertion. His guilt of the lesser included offense of absence without was not actually contested. The examination of Greengarde, the supply Sergeant of the Task Force, was directed entirely to the activities of the unit prior to its departure and the issuance of its equipment and supplies - evidence which was relevant and material to the issue of desertion but of no relevancy or consequence on the issue of absence without leave. The motion of defense counsel was "for a finding of not guilty of the charge, the 58th Article of War on the grounds that there has been insufficient evidence to prove knowledge on the part of the accused here." (R.16). The response of the trial judge advocate directed the court's attention to the fact that the unit's activity was "similar to that of all alerted units" and that accused participated in such activity and "therefore had some knowledge of his unit being alerted" (R.16). Upon overruling of the motion defense counsel stated: "The defendant has been advised of his rights and he wishes to remain silent. At this time I would like to renew my motion of a finding of not guilty of the 58th Article of War". The

motion was again overruled. There is not therefore even an implication that the defense was denying accused's guilt of absence without leave although accused had pleaded generally "not guilty" of the offense of desertion. Its sole effort was to defeat the charge of desertion.

The burden rested upon the prosecution to prove beyond a reasonable doubt the ultimate fact that accused was absent from his command and that such absence was without proper permission. The prosecution effected proof of such ultimate fact by establishing certain probative facts - facts which are uncontroverted. There was thereby presented a set of circumstances from which the court might infer, the ultimate facts constituting the gravamen of the offense. Proof of the commission of a crime by an accused may be made by circumstantial evidence:

> "Where evidence is of sufficient probative force, a crime may be established by circumstantial evidence, provided that there is positive proof of the facts from which the inference of guilt is to be drawn and that that inference is the only one which can reasonably be drawn from those facts." (People v. Razezicz, 99 N.E. 557, 564).

> "When a series of facts, distinctly and unequivocally proved, manifestly tends to one conclusion, and another fact is proposed in contradiction to that conclusion, the mere inability to account for such opposite fact is not sufficient to destroy the inference deduced from the others, but the positive inconsistency should be positively shown." (Burrell on Circumstantial Evidence, p.35).

> "Where there is substantial evidence to establish all the elements of the offense charged, verdict for the accused cannot be directed on the theory that the evidence is insufficient to convince the jury of the accused's guilt beyond a reasonable doubt." (Hays v. United States, 231 Fed. 106).

When all of the circumstances, proved beyond a reasonable doubt in the instant case, are balanced against each other and are given their legitimate probative weight it is difficult, if not impossible, to draw any inference other than the fact that accused was absent from his command without leave. To infer that accused was <u>lawfully</u> absent from his command for at least five weeks in time of war when his command was in a foreign country and had during his absence departed therefrom, taxes credulity beyond its utmost limit. Common sense and common experience dictates an opposite conclusion.

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> "A presumption upon a matter of fact, when it is not merely a disguise for some other principle means that common experience shows the fact to be so generally true that courts may notice the truth." (Greer v. United States, 245 U.S. 559, 62 L. Ed. 469).

In any event the circumstances proved by the prosecution in its case in chief are certainly sufficient to establish prima facie guilt of accused. It is, of course, axiomatic that the burden of proof never shifts in a criminal case (Lilienthal v. United States, 97 U.S. 237, 24 L. Ed. 901).

> "But when a prima facie case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused." (Agnew v. United States, 165 U.S. 36, 41 L. Ed. 624).

> "****, there is a manifest distinction between the burden of proof <u>and the burden of adducing evidence, also known as the burden of explanation</u>, and, while the burden of proof never shifts, <u>the burden of adducing evidence may shift from side to side according to the testimony</u>. Thus, while the burden of evidence cannot be placed on accused until proof of guilt beyond a reasonable doubt has been prima facie made by the prosecution, <u>it will devolve on accused after a prima facie case has been made out</u>." (22 Corpus Juris Secundum, sec.573, p.887). (Underscoring supplied).

The accused in the face of the evidence produced against him elected to remain silent. Such was his right beyond all peradventure, and his failure to take the stand cannot be commented upon (M.C.M., 1928, par.77, p.62). However, the burden of adducing evidence excusatory of his prolonged absence - the "burden of explanation" - was on him and his right to remain silent did not relieve him of such burden of going forward with the proof (16 C.J., par.998, p.531). He offered no explanation of his conduct. The inferences arising from the proof presented by the prosecution therefore stand unrebutted and unexplained. The facts supporting such inferences cannot be controverted. The inferences from such facts are legitimate and logical and are in harmony with common sense and experience. The Board of Review is of the opinion that the facts proved and the inferences arising therefrom are legally sufficient proof of accused's guilt of being absent without leave at the time and place alleged in the specification.

Accused's motion for a finding of not guilty of violation of AW 58 was properly denied (R.16). Sufficient evidence had then been

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presented by the prosecution to warrant a finding of guilty of absence without leave, a lesser included offense. Under such circumstances the denial of the motion was not only proper, but also required (CM ETO 506, Bryson).

7. Accused is 20 years of age. He enlisted 28 October 1940 for the duration of the war plus six months.

8. 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 is legally sufficient to support the findings of guilty of absence without leave as approved by the reviewing authority, and the sentence.

_____ Judge Advocate

_____ Judge Advocate

DISSENTING _____ Judge Advocate

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

Board of Review.

ETO 527.

23 JUL 1943

UNITED STATES v. Private PHILIP J. ASTRELLA (12009327), Company "D", Casual Replacement Group, (Provisional).	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Lichfield, Staffordshire, England, 22 April 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Disciplinary Training Center No. 1, Shepton Mallet, Somerset, England.

DISSENTING OPINION by SARGENT, Judge Advocate.

1. I am unable to concur with the majority opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, and the sentence.

The only pertinent evidence with respect to the offense of absence without leave consists of (a) - the entry contained in the morning report to the effect that accused went absent without leave 16 January 1943; (b) - the facts that his organization, a task force, departed for an unknown destination outside the United Kingdom on 20 January 1943 and that accused was "picked up" by Sergeant Fontane at Cardiff (Wales) about 41 days later, being then a prisoner in the custody of the military police, and (c) - his statement to the sergeant that he surrendered at Newport, and was in "2211-B".

When asked by the trial judge advocate if he knew how long the three prisoners were held by the military police, the witness Fontane replied "I couldn't say for certain, sir, but I would say 2 or 3 days. They told me it was 2 or 3 days". The law member then stated "<u>That is all hearsay</u>" (Underscoring supplied). There is no further indication of any action by the court concerning the admissibility of this evidence, and no statement was made by defense counsel with reference thereto. The evidence does not show whether the accused, one of the two other prisoners, or the military police, told Fontane that the men had been in the custody of the military police for two or three days.

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Even if the fact that accused had been in the custody of the military police at Cardiff for two or three days should be considered as properly established in evidence, there is no evidence as to the circumstances surrounding his surrender at Newport, and no evidence as to whether his surrender at Newport was prior or subsequent to 20 January 1943, the date of departure of his organization from the United Kingdom. It is entirely possible that accused was with his organization on that date, and that he had surrendered at Newport prior to 20 January 1943. Moreover, if he did surrender at Newport after the departure of his organization, such a fact would not necessarily indicate that the surrender terminated a period of absence without leave. There are any number of valid and sufficient reasons why a soldier does not accompany his organization upon its transfer to another location. Accused's "surrender" to either civil or military authority at Newport might equally have been because of the commission of an offense other than that of absence without leave, during a period when his absence from his organization was fully authorized.

In CM 227831 (1942), Gregory, the evidence of absence without leave consisted of entries contained in an extract copy of the morning reports of accused's organization. It was stipulated that accused surrendered in New York, New York about 12 July 1942 in uniform. The Board of Review in holding the record of trial legally insufficient to support the findings and sentence, stated that the only proof of absence without leave consisted of the morning report entries, and made no comment with reference to the stipulation concerning the surrender. (Bul. No.7, JAG., Vol.I, Dec 1942, par.395(17), p.359).

In view of the foregoing I am of the opinion that the statement by accused that he surrendered at Newport is of no probative value. The mere fact that accused was in the custody of the military police at Cardiff about six weeks after the departure of his organization, similarly did not warrant the conclusion that he was then in custody as the result of having been absent without leave. It is equally justifiable to infer that accused did not accompany his organization for perfectly legitimate reasons and that he was in custody of the military police for the commission of other offenses.

> "On a prosecution for absence without leave a sergeant testified that accused was not present when the company left on August 23, and that he had not seen the accused until the day of the trial on September 3. A corporal testified to the same effect. Accused stated on the witness stand that he was sleep in a barn when his company left. There is no evidence that the accused did not have permission to be absent, an essential element of the offense, and the finding of guilty should be disapproved. CM 125261 (1919)." (Dig.Ops. JAG., 1912-1940, sec.419(2), p.282)). (Underscoring supplied).

The statement by accused that he belonged to "2211-B" shows that he was aware that this was part of the designation of his organization. However, such knowledge by accused, considered either alone or in conjunction with the other evidence under consideration, did not establish the fact that he absented himself without leave because his organization was a task force and was about to depart from the United Kingdom.

> "****. Circumstantial evidence is limited by, or rather should be tested by, the following rules, which, while they may be differently phrased, are fundamental rules in all jurisdictions: (1) ******; (2) all the essential facts must be consistent with the hypothesis of guilt, as that is to be compared with all the facts proved; (3) the facts must exclude every other reasonable theory or hypothesis except that of guilt; and (4) *****."
> (2 Wharton's Criminal Evidence, 11th Ed., sec.922, pp.1605-1606). (Underscoring supplied).

> "****. But when circumstantial evidence alone is relied upon, the facts and circumstances must form a complete chain, and point directly and unerringly to the accused's guilt. In other words, they must be of a conclusive character. Mere suspicions, probabilities, or suppositions do not warrant a conviction. The circumstances must be sufficient to show guilt beyond a reasonable doubt. ****."
> (2 Wharton's Criminal Evidence, 11th Ed., sec.922, pp.1604-1605). (Underscoring supplied).

To recapitulate the evidence aside from the entry contained in the extract copy of the morning report, accused's organization, a task force, departed for an unknown destination outside the United Kingdom 20 January 1943. Accused was "picked up" about 41 days later at Cardiff, Wales, being then in the custody of the military police. He surrendered at Newport, Wales, but the evidence did not show whether such surrender occurred prior to or after the date of departure of his organization. Accused knew that the designation of his organization was "2211-B". In my opinion such evidence, circumstantial in character, and considered in its entirety, is not legally sufficient to establish a prima facie case of absence without leave.

For the reasons stated therein, I concur with the majority opinion of the Board of Review that the extract copy of the morning report of accused's organization (Pros.Ex.1) should not have been admitted in evidence and that it should not be considered.

3. For the reasons stated I am of the opinion that the record of trial is legally insufficient to support the findings and sentence as approved by the reviewing authority.

Ellwood H. Vasgsen Judge Advocate.

In reply refer to:
CM ETO 527

23 Jul 1943

A. P. O. 871.
U. S. Army.

SUBJECT: CM ETO 527, Private PHILIP J. ASTRELLA (12009327), Company D, Casual Replacement Group (Provisional).

TO : Staff Judge Advocate, Headquarters, Western Base Section, SOS, ETOUSA, APO 515, United States Army.

1. Herewith transmitted is a copy of the holding of the Board of Review in the case of the soldier named above. You will note that the Board finds the record legally sufficient to support the findings of guilty as approved by the reviewing authority, and to support the sentence.

2. I concur in the holding of the Board of Review.

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

1 Incl:
Holding of Board of Review.

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

Board of Review.

ETO 531.

3 JUL 1943

UNITED STATES	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private THADDEUS G. McLURKIN, (18015986), Company B, 383rd Engineer Battalion (Separate).	Trial by G.C.M., convened at Seaforth Barracks, Seaforth, Lancashire, England, 9 May 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Penitentiary.

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 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 93rd Article of War.
Specification: In that Private Thaddeus G. McLurkin, Company B, 383rd Engineer Battalion (Separate), did, at Aintree, Liverpool, Lancashire, England, on or about 1 March 1943, with intent to do him bodily harm, commit an assault upon Sergeant Allen E. Hiller and Private Cornelius F. O'Donnell, by willfully and feloniously striking the said Sergeant Allen E. Hiller, and Private Cornelius F. O'Donnell about the head, shoulders and body with his fists.

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that Private Thaddeus G. McLurkin, Company B, 383rd Engineer Battalion (Separate), did, at Aintree, Liverpool, Lancashire, England, on or about 1 March 1943, wrongfully appear at a public dance, without his blouse.
Specification 2: In that Private Thaddeus G. McLurkin, Company B, 383rd Engineer Battalion (Separate), did, at Aintree, Liverpool, Lancashire, England, on or about 1 March 1943, drunk and disorderly in uniform in a public place to wit, Aintree Institute Dance Hall.
Specification 3: In that Private Thaddeus G. McLurkin, Company B, 383rd Engineer Battalion (Separate), did, at Aintree, Liverpool, Lancashire, England, on or about 1 March 1943, wrongfully resist arrest by Sergeant Allen E. Hiller, and Private Cornelius F. O'Donnell, Military Policemen, then in the lawful execution of their office.

ADDITIONAL CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Thaddeus G. McLurkin, Company B, 383rd Engineer Battalion (Separate), did, at Park Lane, Liverpool, Lancashire, England, on or about 28 February 1943, with intent to commit a felony, viz: murder, commit an assault upon Private James S. Gordon, by willfully and feloniously striking the said Private James S. Gordon about the head, shoulders, and body with his fist and knife.

He pleaded guilty to Charge II and the three Specifications thereunder, not guilty to Charge I, the Additional Charge and the Specification under each, and was found guilty of all charges and specifications except Specification 3, Charge II, of which he was found not 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 20 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. With respect to the Additional Charge and Specification, the evidence for the prosecution may be summarized as follows: The International Cafe is located at 133 Park Lane, Liverpool, England. Margaret Alice Cornes was manageress of the cafe on 28 February 1943 (R.11). Lance Corporal James Stewart Gordon, a member of 277th Pioneer Company, British Army, stationed at Sefton Park, Liverpool, entered the cafe at about 10:30 P.M. on the above mentioned date to secure his supper. He was known to Cornes as a previous patron. There were 12 or 14 American colored soldiers in the cafe arguing among themselves and creating noise and confusion. It was evident that they had been drinking and were intoxicated. Accused had also been drinking and was standing when Gordon entered. Gordon took no notice of the colored soldiers and seated himself at a table with "a Norwegian and a girl" and ordered supper. Three of the colored soldiers and a white girl sat at a nearby table. The white girl was facing him. Accused was jumping about and kept kicking Gordon's chair who moved it to avoid contact with accused. On looking around Gordon saw accused was armed with a knife and said to him: "You should put that knife away, Jack. If the police come you will get into trouble". Accused turned around to a companion - a sergeant, and said: "This white cunt has told me to put my knife away. I will cut his fucking head off". (R.1,4,8-9,11-12,18-20). Gordon replied: "There is no need for any of that". Accused's knife had a blade about four or five inches long, and he was holding it in his right hand. He was the only colored soldier who had a knife. Accused, who was on Gordon's left, made a dive at Gordon striking him in the neck with the knife and inflicting a superficial cut, being the deepest at the "wind-pipe". The cut left a scar about 1½ inches in length. Gordon raised from his chair and struck accused knocking him down. As he fell his knife struck Gordon's hand inflicting a slight cut on the back of it. Seven or eight of accused's companions then joined in the assault on Gordon, who fought back. He grabbed hold of a sergeant and exclaimed to him: "For God's sake call your palls off. I am only a soldier like yourself" (R.1-2,12,13,28-29). The sergeant struck Gordon in the eye and said something about "yellow white bastards". Gordon fell to the floor and as he was falling he received a knock back of the ear. Accused joined the assault on Gordon, who became unconscious and remained in that condition for about ten minutes. When he regained consciousness he was lying on the stairs of the cafe, and the colored soldiers, including accused, were gone. As they left one remarked: "There he is; let him die" (R.3,13,16,18,28).

Subsequent to the assault and while accused was engaged in washing an automobile at Seaforth Barracks, Gordon identified him as his assailant (R.5,7-8,14,26). He was wearing the same coat as on the night of the assault. Later Gordon picked out accused at an identification line-up (R.5,7,14,18). Cornes accompanied by Gordon, in April 1943 also identified accused as he was coming out of a barrack's door at Garstang. When he saw Cornes he withdrew (R.14,22, 24).

In addition to the knife wounds on his neck and hand, Gordon received bruises on his body and a black eye (R.8). He was not hospitalized, but treated his own wounds (R.5).

4. The facts proved in support of the specifications of Charges I and II are uncontradicted and are as follows:

Sergeant Allen E. Hiller, 295th Military Police Company, and Private Cornelius F. O'Donnell, 234th Military Police Company were, on the night of 1 March 1943, on a roving motorized police patrol between the towns of Aintree and Maghull, England. They wore regulation uniforms with Military Police brassards, and were armed with .45 caliber pistols. A dance, which was attended by both male and female British civilians and colored American soldiers, was held on that evening at the Aintree Institute Hall. At about 10:10 p.m., the two military policemen, Hiller and O'Donnell, made a routine call at the dance hall (R.31,36-37). At that time Hiller saw accused talking loudly with another colored soldier and they were pushing each other back and forth and thereby attracting attention. Hiller intervened and told them to quiet down and behave themselves in a more orderly fashion. Accused was dressed in a field jacket in violation of orders (Prosecution's Exhibit E). Hiller asked accused if it was customary for him to wear a field jacket in town to which accused made an unintelligible reply. Hiller then turned to First Sergeant Cannon (accused's First Sergeant) who was standing near-by, and inquired if it were customary for his men to wear field jackets in town and asked why accused was not in a blouse with his O.D. uniform. Cannon could make no explanation but said accused would be dealt with when he returned to his organization. Hiller asked accused his name and he replied it was McLurkin. His breath smelled of alcohol and the appearance of his eyes and face and his emotions indicated he was under the influence of alcohol. Hiller again mentioned to McLurkin the matter of his uniform. McLurkin stepped close to Hiller and screamed: "A field jacket is part of our uniform. We wear it at all times". Not desiring to create a commotion on the dance floor Hiller decided to remove accused therefrom. He took accused by his right arm and O'Donnell grasped him by his left arm and they attempted to lead him away. Accused resisted. Hiller told accused: "I am only going to take you off the dance floor. I want to talk to you". Accused continued to resist. At this point, another colored soldier, later identified by Hiller as Jones, grasped accused's shoulder and attempted to wrench him away from the policemen. Jones said: "Where are you taking that boy?". He repeated his question several times and finally struck Hiller with his fist. Hiller let go of accused's arm and struck at Jones. Accused broke loose from O'Donnell and with his fist struck Hiller and struck O'Donnell once. Thereafter Hiller did not see O'Donnell. Hiller struck at accused several times. Other colored soldiers intervened and Hiller became involved with four men whom he could identify (R.31-34,36-38). There were at least eight soldiers in

the group. In the fight that ensued Hiller received stab wounds and five superficial cuts on the hands and face. He did not know whether accused had a weapon or whether or not accused stabbed him. He was hospitalized for five weeks. Accused not only struck Hiller at the commencement of the disorder but repeatedly during the affray. The fight moved towards the center of the floor in front of the orchestra pit. Hiller knocked Jones down. McLurkin struck Hiller again with his fist, shouting: "Kill him, kill him". Hiller had been stabbed and had lost his pistol in the fight. In his efforts to escape from his assailants he moved towards the double doors at the end of the hall, during which time the soldiers persisted in their attack. Accused continued to shout: "Kill him", and followed Hiller down the stairs, but the latter made his way outside to a nearby theater (R.33-34).

Hiller positively identified accused as the man in the field jacket, who had kept crying: "Kill him, kill him" (R.33,34). During the fight O'Donnell was dragged down a flight of stairs leading from the dance hall by two colored soldiers but freed himself and returned to the dance hall. Hiller was then gone (R.37).

5. The Charges as originally drafted and verified by the accuser, Major John D. Holm, on 17 March 1943, contained Charge I and Charge II and Specifications. On 18 March 1943, the charges as then existing were referred by the Commanding Officer of 383rd Engineer Battalion (Separate) to Captain Vaughan C. Shaw, of the same unit, for investigation. On 19 March 1943, Captain Shaw made his report of investigation to the Commanding Officer.

Thereafter on 28 March 1943, the Commanding Officer referred the Additional Charge to First Lieutenant Dale A. Lehr, also of the same unit, for investigation who made his report thereon on 31 March 1943.

By third indorsement dated 1 April 1943, the Commanding Officer forwarded the original Charges and Additional Charge to the Commanding General, Western Base Section, Services of Supply, European Theater of Operations, with recommendation for trial by General Court-Martial.

The Staff Judge Advocate, WBS, SOS, ETO, in his report on charges preliminary to trial, dated 8 April 1943, commented:

> "The Additional Charge as drawn should be sworn to, as the original affidavit refers to 17 March which is before the time the additional charge was entered."

The original Charges and Additional Charge were referred for trial by General Court-Martial on 4 May 1943, but apparently nothing was done to comply with the recommendation of the Staff Judge Advocate. Accused was therefore brought to trial upon an unverified Charge and

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Specification. Insofar as the documents attached to the record of trial indicate, the Additional Charge and Specification were written on the charge sheet without the knowledge or approval of the accuser but were duly investigated pursuant to the requirements of the 70th Article of War and were regularly referred for trial. The defense raised no objection. Copy of the charges were served on Defense Counsel on 5 May 1943, and this defect presumably appeared upon the face of the copy of the charge sheet served.

The Board of Review is of the opinion that the rule of CM 172002, Nickerson, governs this situation:

> "The provisions of AW 70 requiring the Charges and Specifications to be sworn to was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution and if he did not object to the irregularity and the accusation is sustained by the proof the fact that the Charge and Specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused."

In CM ETO 106, Orbon, the Board of Review in its own holding reached the same conclusion as announced in the Nickerson case. The reasoning of CM 229477, Floyd, is also applicable to the instant case. (Cf: M.C.M., par.31, p.21).

The Board of Review is of the opinion that the rights of accused were not in any manner prejudiced by the fact that the Additional Charge and Specification were unsworn.

6. The accused did not take the stand as a witness in his own behalf nor did he make an unsworn statement. The record is silent as to whether his rights were explained to him as provided in M.C.M., par.75, p.59 and par.86, p.61. In the absence of evidence in the record that accused was denied any of his rights and privileges it will be presumed that Defense Counsel made proper explanation to accused of his rights, and that the usual and ordinary procedure of court was followed. (M.C.M., par.45b, p.35; CM ETO 139, McDaniels).

7. The defense presented two witnesses, Private First Class Sylvester Greenlee and Private Joseph D. Covell, both of Company B, 383rd Engineer Battalion (Separate) (R.40,59,70) who were barrack-mates of the accused, in an attempt to prove that accused, at the time and date of the assault on Gordon (Additional Charge and Specification) was in a highly intoxicated condition and was in and around the Battalion Headquarters and in his barracks. The witnesses were examined and cross-examined at length. It is not necessary to summarize their evidence. Insofar as it conflicted with Gordon's and Cornes' positive

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identification of accused as Gordon's assailant an issue of fact was created for the court's determination. There is substantial competent evidence to sustain the court's finding that it was accused who assaulted Gordon at the time and place alleged in the Specification, and such finding is binding on the Board of Review (CM ETO 492, Lewis; CM ETO 503, Richmond).

8. Charge I and its Specification alleges that accused on 1 March 1943, assaulted Hiller and O'Donnell with intent to do him (them) bodily harm, by striking them with his fists. Hiller's and O'Donnell's testimony is uncontradicted that accused struck each of them with his fists. The defense offered no evidence either in denial or explanation of the affair at Aintree Institute dance hall. The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of the court that accused was guilty of the offense charged in Charge I and its Specification. (M.C.M., par.149n, p.180).

9. The accused pleaded guilty to Charge II and the specifications thereunder. Prosecution's evidence is uncontradicted and fully proves the commission by accused at the time and place alleged of the offenses charged in Specification 1 (appearing at a public dance in improper uniform) and Specification 2 (drunk and disorderly in uniform in a public place). The word "did" appearing in the latter specification renders the meaning of the allegation ambiguous or obscure. It should be read "was". (People v. Duford, 66 Mich. 90, 31 C.J., sec.177, p.656). Notwithstanding accused's plea of guilty to Specification 3, the court found him not guilty. It is noted that this specification was also unsworn, but this is immaterial in view of the court's findings thereon. The court correctly made such finding. The evidence is clear that Hiller and O'Donnell did not place accused under arrest in the dance hall. They were merely attempting to escort him from the hall to talk with him concerning his improper uniform and such fact was explained to accused by Hiller. At that time the military police had no thought of charging accused with an offense.

The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of the court that accused was guilty of the offenses charged in Specifications 1 and 2, Charge II.

10. The Additional Charge and its Specification charges accused with assaulting Gordon with a knife with intent to commit a felony, to wit, murder, in violation of the 93rd Article of War. One of the principal elements of such offense which must be proved by the prosecution beyond a reasonable doubt is that accused committed the assault with the specific intent viz, to commit murder (M.C.M., par.149 l, p.178). Accused's threat to cut Gordon's "head off" followed immediately by his vicious and unprovoked attack with a knife upon Gordon is substantial evidence proving the specific felonious intent (CM ETO 503, Richmond; CM ETO 533, Brown). The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of the offense charged by the Additional Charge and its Specification.

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11. The court was legally constituted and had jurisdiction of the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The sentence of the court is legal. The Board of Review is of the opinion that the record is legally sufficient to support all of the findings of guilty and the sentence.

12. Accused is 23 years of age. He enlisted 31 December 1941, for duration of war plus six months. His approved sentence includes confinement for 20 years for an act, to-wit assault with intent to commit a felony, murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by 35 Stat. 1143, 18 U.S.C., 455, and which renders his retention in the service undesirable (AW 42). War Department directive (AG 253 (2-6-41)E, 26 February 1941) requires that prisoners under 31 years of age with sentences of not more than ten years be confined in a Federal Correctional Institution or Reformatory. As the confinement in this case is for 20 years, designation of the United States Penitentiary, Lewisburg, Pennsylvania, is proper. Accused's return to the United States and execution of sentence to dishonorable discharge is authorized (GO #37, ETOUSA, 9 Sept 1942 as amended by GO #63, ETOUSA, 4 Dec 1942).

R. Franklin Kite, Judge Advocate

Edward Burchfield, Judge Advocate

Elwood N. Sargent, Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 3 JUL 1943 TO: Commanding General, Western Base Section, SOS, ETOUSA.

1. In the case of Private THADDEUS G. McLURKIN, (18015986), Company B, 383rd Engineer Battalion (Separate), 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. 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 531. For convenience of reference please place that number in brackets at the end of the order: (ETO 531).

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

1 Incl:
Holding of Board of Review.

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

Board of Review.

ETO 533. 1 JUL 1943

UNITED STATES v. Private First Class AARON (NMI) BROWN, (18061091), Company B, 383rd Engineer Battalion (Separate).	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.- Trial by G.C.M., convened at Seaforth Barracks, Seaforth, England, 8 May 1943. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. Penitentiary.

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 soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private First Class Aaron (NMI) Brown, Company "B" 383rd Engineer Battalion (Separate), did, at Preston, Lancashire, England, on or about 18 March 1943, with intent to commit a felony, viz, murder, commit an assault upon Police Constable John Martin by willfully and feloniously stabbing the said policeman in the chest with a knife.

ADDITIONAL CHARGE: Violation of the 93rd Article of War.
Specification: In that Private First Class Aaron Brown, Company "B" 383rd Engineer Battalion (Separate), did, at Preston, Lancashire, England, on or about 4 March 1943 by force and violence feloniously take, steal, and carry away from the person of Mrs. Norah Booth the property of one handbag, value about sixteen (16) dollars.

He pleaded not guilty to and was found guilty of both Charges and of the Specifications thereunder. 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 20 years.

The reviewing authority approved only so much of the findings of guilty of the Specification of the Additional Charge and of the Additional Charge, as involves a finding that accused did, at the time and place alleged, and from the person alleged, feloniously steal, take, and carry away one handbag of a value less than $20, approved the findings of guilty of the Specification of the Original Charge and of the Original Charge, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and forwarded the record for action under Article of War 50½.

3. With reference to the Additional Charge and the Specification thereunder (robbery in violation of Article of War 93), the evidence for the prosecution shows that at Preston, Lancashire, England, about 10:30 P.M., 4 March 1943, Mrs. Norah Booth, Longridge, Lancashire, was asked by a colored soldier if she knew "the time of the Garstang busses". Mrs. Booth replied that she did not, and as she turned to walk away, the soldier snatched her handbag from under her left arm and ran towards the bus station. She followed the soldier, could not find him, and then reported the incident to the police. Mrs. Booth was unable to identify accused as the soldier who had taken her handbag as it was "going on for dark", she had not taken much notice of the man, and she "had had a certain amount of drink as well ***" (R.1-4). Mrs. Booth identified as her property which was taken that evening, a black handbag (Ex.A), a change purse, a note wallet which, at the time, had contained money and a small black mascot in the form of a cat. She also identified a card case. From the evidence it would appear that the purse, note wallet, mascot and card case, all contents of the handbag, were introduced in evidence as Exhibit B. Mrs. Booth further identified the ration book of her son, John Rudd (Ex.C), this article also having been in the handbag at the time of the theft (R.2-3).

The handbag (Ex.A), containing a lady's purse was found about 11:30 P.M. on the same evening (4 March) by one Charles Bore in the

mens' lavatory at the bus station, Preston. Mr. Bore gave both articles to the Preston Police. Several colored soldiers of the United States Army had been in the lavatory that evening (R.4; Ex.D-stipulated testimony of Bore).

On 25 March 1943, accused was in the custody of the military police at Preston. First Lieutenant Matthew Racki, 383rd Engineer Battalion, who was assigned to accused's company stationed at Garstang, went to Preston and secured from the military police some keys which were among the effects belonging to accused. He returned to Garstang for the purpose of obtaining for accused, at his request, some toilet articles and underwear which were in accused's small wooden locker. On opening the locker with the keys in question, Lieutenant Racki found therein a black wallet, apparently of English manufacture, and the mascot (parts of Ex.B), and also a ration-book (Ex.C) inside the wallet, which bore the name "John Rudd". The articles were under a towel. The following day (26 March), Lieutenant Racki left accused's toilet articles with the military police, and gave the wallet and ration book to an inspector of the Preston police. Accused, who was questioned by Lieutenant Racki concerning the articles in his locker, replied that he knew nothing about them (R.5-7).

4. With reference to the original Charge and Specification thereunder (assault with intent to commit murder in violation of Article of War 93), the evidence for the prosecution shows that on the evening of 18 March 1943, accused and Private John Barnes went to Preston and met two girls, Kathleen Brown and Mary Somerville. Miss Brown had known accused both as Reid Brown and as Reid Taylor, and knew Barnes as Johnny Johnson. During the evening, accused, Miss Brown and Miss Somerville, each had three bottles of beer and Barnes drank two (R.18-20, 28,33-34,40). They also visited a restaurant where, according to Miss Brown, accused and Barnes compared knives which each had in his possession (R.20,24). During the evening accused went to a dog track to get a handbag belonging to Miss Brown. Upon his return she left it in his custody (R.18,20-22,28,33). Finally, about 10:30 P.M., the group left a restaurant to go to a "chip" shop, and on the way passed a group of English soldiers who remarked "Oh, look at those niggers". Accused turned back, drew a knife and said "I will cut your darned throat. Repeat what you said". The police then intervened, and the party proceeded to the chip shop, purchased some chips, went to a bus shelter and began to eat them (R.18,23,28-29,34).

At about 10:30 P.M., Constable John Martin, Preston police force, was informed by some British soldiers that two United States Army colored soldiers had drawn knives on two British soldiers. During his investigation, Constable Martin saw in a bus shelter two colored soldiers and two British girls. One of the girls had on an army

overcoat and one of the soldiers was not wearing an overcoat. Constable Martin, who knew the girls, told the party to move along. Three of the group left the shelter, but the soldier without an overcoat remained. When Constable Martin again told him to leave, this soldier left the shelter and turned to face Martin, holding an open knife. Martin told the man to put the knife away and walked toward him. However, the soldier stepped back, holding the knife in a threatening manner and replied several times "Don't you follow me around. I will kill you". When Martin drew his staff to defend himself, the soldier shouted to his friend "Get behind him". As the friend started to comply, Martin requested a passing cyclist to go to the police station for aid. He then lost sight of the two men and the girls. Later, he saw the party near an air raid shelter, and one soldier was putting on an overcoat which he had taken from one of the girls. The two girls "made off". One soldier, who had a knife in his hand, went to the left and did not appear to threaten the constable. The other soldier went to the right. Martin told the men that they were to accompany him to the police station. When the man on the left requested the reason, Martin replied that "*** you can't go round threatening people with knives like you have been doing". Suddenly, the soldier on the right sprang at Martin, who then felt a severe blow just below his left shoulder. Martin pursued the man who stabbed him but was forced to give up the chase. He identified accused as the man who had previously been without his overcoat, and who had first threatened him with a knife outside the bus shelter. However, he was unable to identify accused as the man who had subsequently stabbed him as "it was in the blackout" and both men were wearing overcoats at the time. As the result of his wound, Martin was hospitalized for two weeks and received a blood transfusion of four pints (R.8-11,13-16).

Medical evidence disclosed that Martin was wounded in the anterior and upper part of the left chest and that he lost considerable blood. The wound was about 1 inch in extent, and appeared to have been caused by a cutting instrument. The muscles were lacerated, and the injury extended to the space between the second and third ribs. A transfusion was necessary and four days after the injury occurred, Martin's wound was repaired by an operation (R.17;Ex.G).

Private Barnes (Johnson), who was with accused, Miss Brown and Miss Somerville, testified that a British "bobby" requested the party to leave the bus shelter as they were eating chips. Accused asked for a chance to put on his overcoat and the policeman again told accused to get out. When accused started to comply "the bobby got him by the neck and pushed him out". After the two girls had left the scene, accused remained, arguing with the policeman and paid no attention to the suggestion of Barnes that they depart. The two men then left, followed by the policeman who told them to come to the police station. Accused replied that if the constable got a military policeman and brought him there "he would go with him like a soldier should". The policeman then shone a light in the face of accused who told him to "get the light out of his face". The "bobby" put the

flashlight in his pocket, repeated his request that they go to the police station, and dropped a stick which he had in his right hand. Accused then "jumped up", hit the policeman in the chest, turned to the right and ran, pursued by the policeman. Barnes went to the left and proceeded to the dog track (where both he and accused were staying that evening). Barnes did not see a knife in accused's hand when he struck the policeman. However, he did see accused take a knife out of his pocket when he was talking with the constable at the bus shelter. The policeman told accused to put the knife away. Later in the evening, about 11:30 or 12:00 P.M., accused met Barnes at the gate leading to the dog track. Accused had a knife in his hand, and told Barnes that he thought that he (accused), "had stabbed the bobby". The knife then "had a little bloodstain right around the handle where you close it". Barnes denied having a knife in his possession that evening (R.33-39).

Miss Mary Somerville testified that during the evening Kathleen Brown had been wearing accused's overcoat. When the party were in the bus shelter eating chips, a policeman came by and told them to move on. Accused replied "Why should we move? We haven't done anything wrong". The girls left the shelter and walked to a point about 10 yards away. Accused remained, and argued with the policeman. The policeman was shining his light and "must have pushed Reid" (accused) as the latter's hat fell off. She heard the policeman say "Put that knife away" but did not see accused strike the constable or make any motion toward him. The girls then went around the corner to an air raid shelter. Accused joined them, asked for his overcoat and said "I am going to kill this god-dam guy". Five minutes later he ran past her pursued by the policeman who was shouting "Stop that man, he has knifed me". The other soldier (Barnes), who had been witness's companion, ran in a different direction. The girls ran after the policeman and found him lying in a shop doorway, attended by some members of the air force. The only occasion that evening when she saw a knife in accused's possession was when he drew it on the English soldiers. Early the next morning witness went to the dog track and identified accused, and was present when Miss Brown's handbag and identification card was found in his overcoat pocket (R.28-32, Ex.H).

Miss Kathleen Brown in general corroborated Miss Somerville. She further testified that Miss Somerville and Barnes were kissing each other when a policeman came by and told the party to move on. As Barnes and the two girls left the shelter, accused was arguing with the policeman who called him a "bloody nigger" and then hit him. Accused fell "till he nearly reached the floor". The two girls then walked up the street. Later, accused joined the girls, asked Miss Brown for his overcoat and then returned to the constable. Subsequently, accused ran by the girls, followed by the constable who said "Stop that man". Barnes ran in another direction. Miss Brown did not see accused stab the officer. Neither did she see a knife in the possession of accused either at the bus shelter, or when he ran past

the girls pursued by the policeman. She did see accused and Barnes comparing knives earlier in the evening, and also saw accused draw a knife when the English soldiers made the remark about "niggers" (R.18-20,22-27).

5. For the defense, Private Solomon Becton, Company B, 383rd Engineer Battalion, testified that he lived in the same quarters as accused, that accused had a "lock-up box", and that he had never seen anyone other than accused "go into his box". He did not know whether the box was open or loose, whether it was always locked or whether one of the hinges was broken (R.41).

Accused, upon being advised of his rights, elected to make an unsworn statement. With reference to the night of 18 March 1943 (on which date accused was alleged to have committed an assault with intent to murder), accused stated in substance, that Miss Brown had that day telephoned him with reference to her purse. He left Garstang about 6:00 P.M., went to a dog track at Preston and obtained the purse from a Private Meehan. He then got some money from a sergeant and went back to town. He had a drink of beer at one pub, met Barnes at another pub, where he had some more beer, left Barnes and went to another bar hoping to see Miss Brown and give her the purse. He remained there until 10:00 P.M., but she did not appear. He then returned to the dog track and went to bed, intending to return to Garstang the following day. He was awakened "by one policeman, a civilian, and a girl, Capt. Webb and an M.P." He was searched and Miss Brown's purse found. He was then taken to jail where he had since remained (R.42).

With reference to the charge of robbery on 4 March 1943, accused stated that while he was in jail, Lieutenant Racki brought him some toilet articles, and asked him whose ration book was in his locker. He was shown "some coupons and some other articles" and denied knowing anything about the articles and could not account for their presence in his locker. He had never seen the articles before. One of the two hinges on his locker had been loose. One day accused had put a screw in the loose hinge, and had locked the box. Upon his return that same evening, he found the screw removed, and the locker unlocked. Accordingly, he had been afraid to leave anything valuable in the locker (R.43).

6. The evidence clearly supports the findings of the court, as approved by the reviewing authority, that accused did, at the time and place alleged and from the person alleged, feloniously take, steal and carry away the property described, of a value of less than $20 (Additional Charge and Specification thereunder). Although Mrs. Booth was unable to identify accused as the colored soldier who had taken her handbag, some of the articles contained in the handbag including the ration card of Mrs. Booth's son, John Rudd, were found three weeks

later in accused's locker. "Proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it" (M.C.M., par.112, p.110). The unsworn statement by accused to the effect that he could not account for the presence of the articles in his locker, that he had never seen them before, and the implication that another person could have easily opened the locker because of a loose hinge and could have put the articles therein, was a matter of evidence to be considered by the court. The findings of guilty indicate that the court did not believe accused.

The alleged value of the handbag, namely about $16, was not established in evidence. However, in view of the nature of the property, which was before the court and the evidence with respect thereto, it may properly be inferred that it was of some substantial value not in excess of $20. The action of the reviewing authority with regard to the value of the property was proper and justified.

Accused was charged with robbery. One of the essential elements of this offense is that the property must be taken "by violence or intimidation" (M.C.M., par.149f, p.170). The evidence does not disclose that Mrs. Booth was intimidated in any manner. The only violence used by accused was that employed in snatching the handbag from under her arm. "Where an article is merely snatched out of another's hand *** and no other force is used and the owner is not put in fear, the offense is not robbery" (M.C.M., par.149f, p.170). "Larceny from the person may be a lesser included offense of robbery" (M.C.M., par.149f, p.171). The action of the reviewing authority in approving only so much of the findings of guilty of the Charge and Specification alleging robbery as involved findings that accused committed the lesser included offense of larceny, was proper.

7. The evidence also substantially supports the findings of the court that accused committed an assault upon Police Constable John Martin with the intent to commit murder (Original Charge and Specification thereunder). Although Constable Martin could not identify accused as his assailant because it was dark, and each of the two soldiers involved had on overcoats at the time, the evidence shows that it was accused who stabbed the policeman. Accused, who was then without his overcoat, had threatened Martin a few minutes earlier with a knife saying "Don't you follow me around, I will kill you". Accused then joined the two girls, asked Miss Brown for his overcoat, and said "I am going to kill this god-dam guy". Martin, who was then approaching the group, saw a soldier putting on his overcoat. As he was talking to the two soldiers, one suddenly lunged at him and inflicted a serious wound. Barnes testified that he saw accused strike the constable, although he did not, at the time, see a knife in accused's possession. Accused then ran by the two girls, pursued by the constable who was shouting "Stop that man, he has knifed me". Approximately an hour later, accused met Barnes at the dog track and

said that he thought that he (accused) "had stabbed the bobby". Accused then had a knife in his possession with a bloodstain on it. The identity of accused as the assailant was clearly established.

The medical evidence disclosed that the injury inflicted on Martin, which necessitated a blood transfusion, an operation and hospitalization for two weeks, was apparently "caused by a cutting instrument". Accused's use of a knife to inflict a serious injury on Martin, his threat, addressed to Martin at the bus shelter, to the effect that he would kill him if he followed accused around, and his subsequent statement to the two girls that he was "going to kill this god-dam guy", fully warranted the court in finding that accused specifically intended to murder the constable when he committed the assault. Such a specific intent was a requisite element of the offense alleged. (M.C.M., par.149l, p.177).

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, as approved by the reviewing authority, and the sentence. Confinement in a penitentiary is authorized for the offense of assault with intent to commit murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 455, Title 18 of the United States Code (R.S. Section 5346; 35 Stat. 1143).

B. Franklin Riter, Judge Advocate

Edward Swartwout, Judge Advocate

Edward Nielsen, Judge Advocate

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1st Ind.

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WD, Branch Office TJAG., with ETOUSA. 1 JUL 1943 TO: Commanding General, Western Base Section, SOS, ETOUSA.

1. In the case of Private First Class AARON (NMI) BROWN, (18061091), Company B, 383rd Engineer Battalion (Separate), 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, as approved by the reviewing authority, 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 533 For convenience of reference please place that number in brackets at the end of the order: (ETO 533).

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

1 Incl:
Holding of Board of Review.

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

Board of Review.

ETO 548. 30 JUN 1943

UNITED STATES	EIGHTH AIR FORCE.
v.	
Second Lieutenant THADD E. TABB, (0-885685), Headquarters & Headquarters Squadron, 6th Fighter Wing, VIII Fighter Command.	Trial by G.C.M., convened at AAF Station F-343, ETOUSA., 17 May 1943. Sentence: Dismissal.

HOLDING of 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 93rd Article of War.
(Finding of not guilty).
Specification: (Finding of not guilty).

CHARGE II: Violation of the 61st Article of War.
Specification: In that 2nd Lt. Thadd E. Tabb, Hq. & Hq. Sq., 6th Fighter Wing, VIII Fighter Command, did, without proper leave, absent himself from his post and duties at AAF Station F-342, from about 0900 hours 16 April 1943 to about 1350 hours 16 April 1943.

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ADDITIONAL CHARGE: Violation of the 96th Article of War.
Specification: In that 2nd Lt. Thadd E. Tabb Hq. & Hq. Sq. 6th Fighter Wing, VIII Fighter Command, did at AAF Station F-342 on or about 9 April 1943, willfully, wrongfully and unlawfully convert to his own use $400.00 of U.S. currency, the property of Captain Edgar A. James, Det. Hq & Hq. Sq. 333rd Service Group.

He pleaded guilty to Charge II and to its Specification, and not guilty to Charge I and the Additional Charge and the Specifications thereunder, and was found not guilty of Charge I and its Specification and guilty of Charge II, the Additional Charge, and of the Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, Commanding General, Eighth Air Force, AAF Station 586, APO 633, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, Commanding General, European Theater of Operations, confirmed the sentence and pursuant to Article or War 50½, withheld the order directing the execution thereof.

3. With reference to the Additional Charge and Specification (willful, wrongful and unlawful conversion to his own use of $400) the evidence for the prosecution shows that on 8 April 1943 shortly before noon, at Station F-342, Captain Edgar A. James, Air Corps, went to the bath house, taking with him a leather money belt containing $400 in United States currency, $1.10 in United States silver currency, two "threepenny bits", a five shilling piece dated 1937 and 2 old Roman coins (R.6-7). Captain James undressed, hung his clothes and the money-belt on a towel rack, and took a bath. When leaving the bath house he forgot to take his money belt and left it hanging on the towel rack. Upon discovering this fact, he returned to the bath house two hours later but the money belt was not there (R.7-8,13). The belt was not marked with his name or by any other means of identification (R.11). Captain James did not post a notice of his loss on the bulletin board but did report the fact to the club officer and for six days conducted a private investigation (R.8,12). On 14 April 1943 he reported the loss of the money belt to his commanding officer who ordered Lieutenant Pelton, provost marshal, to search the quarters of accused (R.8,19).

On 14 April First Lieutenant Glenn E. Pelton and Second Lieutenant Samuel A. Williams, both of 989th Corps Military Police, by direction of the commanding officer searched accused's quarters (R.19,29), where Lieutenant Pelton found a leather money belt tucked in the toe of a flying boot (R.29). Lieutenant Pelton showed the belt to Captain James who identified it as the belt he had lost. In the belt were two old Roman coins, $1.10 in silver and two threepenny bits (R.9-10). No paper currency was found (R.22). The belt found by Lieutenant Pelton was introduced in evidence as "Prosecution Exhibit A" (R.29). At the trial, Captain James identified the belt

as his and also identified the Roman coins contained in the belt (R.10, 36). On 16 April 1943 Lieutenants Pelton and Williams by order of the commanding officer searched accused's person in his room (R.30,47). Accused then told them that they would find the money belt in his flying boot and was informed that the belt had already been found (R.25,30). After being warned of his rights, accused told the two officers that he had not stolen any money. He said that he had found a money belt containing about $400 in American money in the washroom of the officers' quarters (R.24,30); he could find no identification marks on the belt and had watched the bulletin board for a week to see if the money was advertised as lost but no notice had been posted (R.25,31). Accused further stated that he converted $91 of the money into British currency in London in order to pay a debt of 25 pounds; he had changed another $100 with an American pilot now in Africa and changed another $10 with Lieutenant Williams himself. Accused said that he spent most of the balance in small quantities and could give no account of the expenditures (R.24,28,30). He had two 5-pound notes left of the money (R.28).

Major V. L. Day, Headquarters Squadron, 6th Fighter Wing, investigating officer, warned accused of his rights prior to his investigation and told him that any statement he made could be used against him. Accused then stated that he had found a money belt hanging in the bath house and that he had taken it to his room. He kept it for a week expecting the owner of the belt to advertise its loss. As the loss was not published, he used some of the money for his own purposes, thinking perhaps that "no one cared for it". He asserted that he did not know he was committing any offense in converting the money (R.33-34).

On the evening of 9 April 1943 accused was at the Morris Dance Hall, Shrewsbury and had some American money in his possession. He asked Private First Class Muro P. Duca, 99th Military Police Corps if he knew "a man who turned in American money for English money". Duca asked accused, who had some American money with him, how much money he had. Accused replied about 100 pounds (R.14-15). Upon being told by Duca to put the money away, accused put it in his left-hand pocket. All Duca saw were "10's and 20's" (R.16-17).

On 13 April 1943 Second Lieutenant Samuel A. Williams, assistant provost marshal (one of the two officers who searched accused's room and person on 14 and 16 April respectively) saw accused at the Morris Dance Hall at Shrewsbury (R.20-21). A quart of whiskey was auctioned and accused's bid for the bottle was successful. Accused asked Lieutenant Williams to change $10 American currency into English money which he did. Accused took the $10 from a roll of money "folded in the middle; *** a quarter inch to half an inch thick, bills 10's or 20's" (R.21).

Accused pleaded guilty to Charge II and the Specification thereunder (absence without leave) and the evidence shows that he was

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granted leave for 24 hours and overstayed it for the period alleged.

4. For the defense accused, upon being advised of his rights, testified that he became a member of the Royal Air Force 8 September 1941. He had been a civilian pilot. He transferred to the American Air Corps 9 December 1942 and was assigned "to be with the gunners" but for a long time had nothing to do. After attending a school as a student officer on fighter aircraft, he applied for a transfer and became a mail censor for the 6th Fighter Wing (R.43-44).

With reference to the alleged absence without leave (Charge II and Specification) on 14 April 1943 accused was granted a 24 hours pass by "verbal order" and he went to London. He missed the midnight train from London which would have enabled him to arrive at his station early in the morning (16 April). He got the "next best conveyance in the morning" (16 April), a train leaving London at 9:05 a.m., which "brought me in *** a few hours late". (R.45-46).

With respect to the offense alleged in the Additional Charge and Specification (willful, wrongful and unlawful conversion to his own use of $400) accused testified that on 8 April 1943 he found in the bath house a money belt hanging on a rack. After bathing he took the belt away (R.44). He put the belt in his boot by his bed, as it was his custom to put things in his boots, and carried the money in his blouse. He denied that he was trying to hide the belt, stating that if such was his intent he would have burned the belt in the fireplace. He thought that he would keep the money and see if a reward was offered for its return. From 8-13 April he watched the bulletin board daily for a report of lost property but no such report appeared (R.44,55). He recalled telling Private Duca at the Morris Dance Hall that he had approximately 100 pounds or $400 in American currency but testified that it was on the 13th and not on the 9th of April that the incident occurred (R.44-45). Also on the 13th of April during an auction at the Morris Dance Hall, he won a bottle of whiskey for 50 shillings. As he did not have any English currency, he gave Lieutenant Williams $10 in United States currency for which he received two pounds ten shillings. This was the first occasion on which he had used any of the money (R.45). He thought that if a notice as to the lost money should appear on the bulletin board the following day, he could obtain $10 and make restitution of the amount used to purchase the whiskey (R.55).

On 14 April accused exchanged $100 for English currency with another officer who was going to Africa. On the same day he went on leave to London (R.51) where he changed the balance of the money into English currency. He paid some personal debts which aggregated 25 pounds, loaned 10 to 15 pounds to friends and "blew the rest". With the exception of 15 pounds which he had when he returned to his station he spent the $400 found in the money belt between the 13th and 16th of April (R.51,54-55). Although it had occurred to him to report the

finding of the money to the station commander, "*** sometimes, you know, just on the spur of the moment, you do not think right" (R.56). There was no name on the belt or any means of identification. He figured the money would belong to him if no one claimed it and "knew of no law it had to be turned in". If someone had announced its loss it would be his duty to turn over the money. At no time between the 8th and 14th of April did he tell anyone of his discovery, nor did he believe it was his "place" to post a notice on the bulletin board. The last time he looked at the bulletin board was on 14 April. When in London, as no one had reported the loss accused, who was out of money of his own, figured he "had waited long enough". He did not consider it his duty to look for the owner. He said he would make restitution of the money (R.56-57).

A letter attesting to the good character of accused and another personal letter addressed to accused, both signed by Bebe Daniels, were introduced in evidence by the defense (R.46-47; Def. Exs. 1,2).

5. The pleas of guilty to Charge II and to its Specification (absence without leave) are fully supported by the evidence. He was granted leave for 24 hours and overstayed it by the period alleged. Accused in his testimony admitted being absent without leave for this period.

6. The evidence also fully supports the findings of guilty of the Additional Charge and Specification (wrongful conversion to his own use of $400). It was clearly established by the evidence for the prosecution and by the testimony of accused himself that after finding the money belt on 8 April, he told no one of his discovery and did not take what would have been the normal course of action, namely, to turn over the belt and its contents to proper authority. He did nothing about the matter except to watch the bulletin board for about six days. On 13 April he exchanged $10 for two pounds ten shillings English currency and purchased for that amount a quart of whiskey. On 14 April he exchanged $100 for English currency. He then went to London and as he had no resources of his own, he used 25 pounds to pay personal debts, loaned from 10 to 15 pounds to friends and "blew the rest". He returned to his station with 15 pounds of the money remaining. The evidence thus clearly established the fact that accused disposed of about $340 of the $400 contained in the belt for his own purposes. He had had it all changed to English money. The court was fully warranted in finding accused guilty of the offense of conversion as alleged.

7. First Lieutenant Herbert R. Talmage detailed as a member of the court, Second Lieutenant Herbert R. Elsas appointed trial judge advocate, and Captain Daniel C. Eberly appointed defense counsel were apparently promoted prior to trial. No statement to this effect is contained in the record of trial. The staff judge advocate, Eighth Air Force has commented in his review upon several other irregularities appearing in the record of trial. Further detailed comments on such irregularities are unnecessary.

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The defense placed in evidence a letter from Bebe Daniels concerning accused's good character. Over strenuous objection by the defense, the court then received evidence offered by the prosecution concerning a former reprimand administered to accused under Article of War 104 for having woman in his hotel room, and for a false official statement in connection therewith (R.52-53,59-63; Pros.Ex.D). The substantial rights of accused were not injuriously affected by any error committed by the court in the admission of such evidence in view of the overwhelming facts establishing accused's guilt of the offense alleged. Accused admitted finding the money belt, changing the $400 contained therein into English currency and using the money for his own purposes.

9. Accused is 27 years of age. He was ordered to extended active duty 9 December 1942 upon transfer from the Royal Air Force to the Army of the United States. Accused testified that he became a member of the Royal Air Force on 8 September 1941.

10. The court was legally constituted. No errors injuriously affecting the rights of accused were committed during the trial. He was found not guilty of Charge I and of the Specification thereunder. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge II, the Additional Charge and of the Specifications thereunder, legally sufficient to support the sentence and the action taken by the confirming authority. Dismissal is authorized upon conviction of violation of Article of War 96.

B. Franklin Kite, Judge Advocate

Gordon Bruderhofer, Judge Advocate

Ellwood W. Sargent, Judge Advocate

CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 30 JUN 1943 TO: Commanding General, ETO, U. S. Army, APO 887.

1. In the case of Second Lieutenant THADD E. TABB (0-885685), Headquarters and Headquarters Squadron, 6th Fighter Wing, VIII Fighter Command, 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 II, the Additional Charge and of the Specifications thereunder, legally sufficient to support the sentence and the action taken by the confirming authority, which holding is hereby approved.

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 548. For convenience of reference please place that number in brackets at the end of the order: (ETO 548).

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

Incl:
Holding of Board of Review.

(Sentence ordered executed. GCMO 12, ETO, 6 Jul 1943)

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

Board of Review.

17 JUL 1943

ETO 559.

UNITED STATES v. Private RAYMOND (NMI) MONSALVE (39161683), Battery "D", 25th Coast Artillery (HD).	UNITED STATES ARMY FORCES IN ICELAND. Trial by G.C.M., convened at Fenton Street Camp, Iceland, on 23-26 May 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. 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 and the Board submits this, its holding, to the Assistant Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Raymond Monsalve, Battery "D", 25th Coast Artillery (HD), did, at Camp Saurbaer, Iceland, on or about 3 April 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one John M. Donnelly, Lieutenant Colonel, U.S. Army, a human being, by shooting him with a rifle, thereby inflicting a wound in and upon his body from which the said John M. Donnelly, Lieutenant Colonel, U.S.Army, died on or about 3 April, 1943.

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Accused pleaded not guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General of the United States Army Forces in Iceland, approved the sentence and forwarded the record of trial for

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action under Article of War 48 and Article of War 50½ as amended. The confirming authority, the Commanding General, European Theater of Operations, commuted the sentence 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 accused's natural life. As thus commuted, he confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record for examination under AW 50½.

3. On 2 April 1943, accused was on duty as a cook's helper (R.7,22) at Camp Saurbaer, Iceland. His current shift of duty as such extended from noon 2 April 1943 to noon 3 April 1943. He lived with the mess Sergeant, mess orderlies and the other cooks together with Sergeant Daniel Birnbaum attached to the same unit, in hut number nine (R.59,70, 169,175). Around 10:45 P.M. 2 April 1943 he was drinking rum in the cooks' hut (R.57,70) from which place, with First Class Private Lloyd P. Maggard, Private Thomas O. Liparote and Birnbaum, he went to the supply hut about 11:00 P.M. (R.58,67,70) and sat there drinking with them (R.71) until about midnight when the rum was wholly consumed (R.58,66). Accused informed the group that he thought he knew where there was "some more to drink" and left the supply hut immediately before midnight (R.71) with Liparote. The latter went to his hut (R.67). Accused, who was unarmed (R.63) walked towards his hut which was also in the direction of the officers' quarters (R.67) some 200 yards away (R.63). The weather was bad; the wind was blowing and it was raining (R.9,10,16,27,74). Accused was wearing a parka belonging to Maggard who had loaned it to him when accused left the supply hut (R.58). Birnbaum, in anticipation of some more liquor, waited and did not leave the supply hut until some 15 or 20 minutes later (R.71). He arrived at the cooks' hut sometime between midnight and 12:15 A.M. of 3 April 1943. At that time accused was not in his bunk or in the hut. Birnbaum went to bed and did not see accused again until about 9:30 the next morning (R.72). When accused left the supply hut he was "jovial, boisterous, but in possession of his faculties" (R.74). He returned later to the supply hut, time unknown, and delivered the parka to Maggard, who was in bed and had been asleep. At that time accused wanted to borrow money from Maggard who told him it was too late and that he would give it to him in the morning (R.58,59). Maggard did not see a gun in accused's possession on either of his visits (R.63).

Lieutenant Colonel John M. Donnelly, on 2 April 1943, was commander of Camp Saurbaer (R.7,20) and lived in the officers' quarters with First Lieutenant James D. Pepper, Supply and Battery Officer of Battery "D", 25th Coast Artillery (HD), and Captain Herbert W. Purick, Commanding Officer of Battery "D" of the same unit. The officers' quarters were located in a British Nissen hut, having a length of about 36 feet. It was divided into five small rooms with an open room in the center and a hallway leading from this open room to the outside. Both the front rooms were vacant. Captain Purick and Lieutenant Pepper had adjoining rooms in the rear. Colonel Donnelly's quarters took up

half of the center of the hut (R.8). His room was about 12 feet wide (R.11). His cot stood opposite the door, against the wall which was the outside wall of the hut and its head was against a partition which separated Colonel Donnelly's room from a vacant front room. There was a wardrobe made of celotex against the inside wall opposite the cot and about two feet to the right of the doorway upon entering (R.11,23,24). The stove was in the open center room of the hut opposite the Colonel's room (R.9). Lieutenant Pepper last saw the Colonel alive at 11:15 P.M. 2 April 1943, when he (the Lieutenant) went to his room to write a letter. At about 11:45 P.M. the Colonel called out that he was going to bed. At approximately midnight Lieutenant Pepper finished his letter, put on his raincoat and left to inspect the guard. He returned at approximately 12:35 A.M. (R.10,16) took off his wet clothes, turned out his light and went to bed. He arose at 7:20 the next morning, 3 April 1943, without seeing or hearing anything unusual (R.16). As he came out of his room the Colonel's door was open and he could see across the foot of the Colonel's bed a sheet of celotex, later found to be the door of the clothes' closet (R.26), at about a 45 degree angle to the floor (R.10).

Private Earl A. Harold, the fireman whose duty it was to tend the stoves during the night, entered the hut at 11:15 P.M. 2 April and at 3:15 A.M. and 5:30 A.M. 3 April, to stoke the fire. He noticed nothing unusual. The fire was not out in the morning (R.17,188,189).

Lieutenant Pepper testified that .45 pistols and rifles were issued to the battery and identified a WDA AGO Form #30 initialed by him (marked as Prosecution's Exhibit 1) as the Quartermaster Property Account, Form No.33, for Raymond Monsalve, showing among other articles a M-1 U.S. Army rifle, caliber .30, number 179511 (marked Prosecution's Exhibit 2) as issued to accused (R.13). He also testified that whiskey or liquor was kept in the officers' quarters; that Privates Reel and Dean and the night fireman, Private Harrell (Harold) were the only persons other than the officers, who had authority or permission to be in the officers' quarters (R.13), and that the two orderlies, Reel and Dean, knew whiskey or liquor was kept there (R.14).

Captain Purick after talking to Colonel Donnelly at approximately 11:00 P.M. (R.23) reported for duty at the Battery Commander's station at the Gun Battery (R.25) returning to his quarters about 8 o'clock on the morning of 3 April where he met Lieutenant Pepper who was preparing to leave for Reykjavik (R.15,25). He happened to look through the open door (R.27) of the Colonel's room at the time. The blackout curtains were down but he did notice a piece of celotex lying at an angle against the outer wall. Lieutenant Pepper suggested that the window might have leaked and the celotex was placed in the position observed to keep the water from the bed (R.25). Captain Purick went to breakfast and then to the battery office, returning to the officers' quarters at approximately 11:00 A.M. 3 April. He went into Colonel Donnelly's room to awaken him for dinner (R.28), and found him lying in bed (R.24), on his left side in a sleeping position. Colonel Donnelly was dead. There was some blood around his nose and mouth which had spilled on to the bed clothing and also on the floor (R.25). He immediately tried to locate a doctor and

called First Lieutenant Wenke (R.26), Medical Corps (R.28) who arrived about noon. Lieutenant Wenke testified that he saw Colonel Donnelly dead in his quarters at Camp Saurbaer. The body was lying on the cot in a relaxed position with the covers pulled up to its neck. His left arm was beneath the pillow. His face was visible from the doorway. Blood was caked around the nose and mouth but there was no evidence of the body being disturbed either before or after death (R.35). There was a pool of blood at the head of the bed, some of which had splattered on an exploded .30 caliber (R.42) shell lying there (R.29), which shell he picked up and gave to Major Richerson (R.32). Lieutenant Wenke had the body moved out into the light in the open center room and found that death was caused by a bullet passing through the head. The body was taken to the 208th General Hospital (R.33). In the opinion of Lieutenant Wenke, Colonel Donnelly had been dead 12 hours or less when he first saw him (R.38).

Major John L. Richerson, 495th Coast Artillery Battalion, Camp Castle Hill, Iceland, was present in the officers' quarters with Lieutenant Wenke and saw Colonel Donnelly's body at noon 3 April 1943 (R.40). He searched the rooms of Colonel Donnelly, Captain Purick and Lieutenant Pepper but found no guns which had been recently fired (R.41). Major Richerson found a bullet hole in the celotex wall at the head of the cot in a position that would have been behind Colonel Donnelly's head when he was lying in bed. He also discovered another bullet hole in a corrugated iron exterior wall of the vacant room adjoining Colonel Donnelly's room. Lieutenant Colonel Jesse P. Green, Provost Marshal, later put his finger through the hole in the exterior wall and dug around in the dirt. He recovered a rather badly mangled spent .30 caliber bullet (R.43,77; Pros.Ex.4). He also put a ramrod through the bullet holes and estimated the angle and direction of the bullet (R.77). Colonel Green tested by firing into a box and recovering the bullets, all the rifles in the battery and by comparison of the bullets and shells determined that Prosecution's Exhibit 2, being rifle No.179511 issued to accused, was the rifle that had fired the evidence bullet (R.80). The evidence bullet (Pros.Ex.4), the evidence cartridge case (Pros.Ex.3), the test bullets and cartridge cases (Pros.Ex.6a,b,c,d, and 7a,b,c,d) and rifle were turned over to Major King, Military Police Corps, Provost Marshal General's Office of the European Theater of Operations, who delivered them in Washington D.C. to Marion E. Williams, firearms expert of the Federal Bureau of Investigation, to be tested in the laboratory of the Federal Bureau of Investigation (R.86). Mr. Williams testified that the tests showed that the bullet found by Colonel Green in the soil (Pros.Ex.4) was a tracer bullet fired from the rifle of accused (R.95).

Colonel Donnelly's pocket book containing 2150 kronur and three one dollar bills, was found, with other articles, in his clothes which lay on the floor beside his bed (R.44).

The autopsy (Pros.Ex. 5a to 5i) made by Captain Richard C. Taylor, Medical Corps, 208th General Hospital, showed the death of Colonel Donnelly to have been caused by a gunshot bullet wound through the head, entering to the right of the nose and leaving through the back of the

head (R.49,50), causing almost immediate death (R.56). In the opinion of the Captain, death probably occurred when the victim was asleep (R.53) and sometime between midnight of 2-3 April and six o'clock of the morning of 3 April (R.55).

On 19 April, Major King secured from accused, who had been sent to the 208th General Hospital for psychopathic observation (R.132), a written signed statement, Prosecution's Exhibit 10, which reads as follows:

STATEMENT OF RAYMOND MONSALVE ASN 39161683 MADE AT THE 208th MEDICAL HOSPITAL. 19 April 1943.

Present: RAYMOND MONSALVE
Arthur M. O'Connor, Chief Specialist USNR.
William J. King, Major Cmp
Lloyd A. Craig, T/5G, ASN 37132301

By Major King.

You are advised that I desire to take a statement from you regarding certain actions taken by you on or about the night of April 2nd and the early morning of April 3, 1943. You have the right to refuse to make such a statement and I further warn you that such statement when completed will constitute government evidence and may be used by the U.S. Army in any way it sees fit. Do you understand?

Answer by Raymond Monsalve: Yes.

Understanding, do you wish to make a statement?

A. Yes.

Duly sworn by Major King.

Q. Please identify yourself.

A. My name is Raymond Monsalve. ASN 39161683. I was drafted into the U.S. Army the 22 July 1941 from Los Angeles, California. I have been in Iceland since 11 May 1942. R.M.

Q. Did you on the night of April 2, 1943 shoot with an M1 Army issue rifle Lt. Colonel Donnelly at Camp Saurbaer?

A. Yes.

Q. Please explain the circumstances.

A. I started drinking beer about 7 P.M. that evening and I had about 5 beers. I finished the beer about 8 P.M. and at about 10 o'clock I bought a bottle of bootleg rum from Corporal Pennington in my outfit. I paid him 50 kronur. I had given him the money early in the evening in the kitchen and he put it under my pillow of my bed where I got it at 10 o'clock. I took it to the supply room with Private Liparote. I think he paid Pennington some money also. Anyway he was with me when I got the stuff from under the pillow. First we sat on my bed and had a couple of drinks then Private Maggard came in and he took a drink then we all went to the supply room. We all

SIGNED: Raymond Monsalve

had a drink there and Sergeant Burnbaum came in and he had a drink. We sipped on the bottle till around midnight when it was finished then Liparote and I went to my hut to see if we (end of page 1) could get more liquor from Corp. Pennington. We seen him and talked to him and he said he didn't have any more so we went back up to the supply room and joined the other two. We sat around for a while and Sergeant Burnbaum went off to bed. I borrowed Pvt. Maggard's parka and went to the latrine. Then I went to my hut. Everybody was asleep by the time I got there. Then I went and got my rifle from the rack and went looking for whiskey. First I went to the officers' mess. The door was open and I went in. I couldn't find anything. Then I went over to the officers' sleeping quarters. The door was open and I went in. There was a door open on the right hand side and I went in that room. I didn't think anyone was in the room. I got inside the room and I was searching around to see if I could find anything and I knocked the door off the cupboard which is on the right as you go in. The colonel woke up. The noise he made sitting up frightened me. I was carrying my rifle on my left hip; I shoot with my left hand. I swung the gun around and it went off as I turned. I didn't mean to kill him; I didn't mean to shoot him. I liked the colonel myself and everybody else did. I wouldn't want to hurt him at all. After the gun went off I got more excited and I don't remember just what I did, but I ran to my hut. I put the gun in the rack. Then I gave Maggard his parka back. I asked him for some money; I don't know why I did that, I was so nervous that I don't know what I was doing half the time after the gun went off. Then I went into bed and lay down. I didn't sleep well that night, and the next morning about ten o'clock I cleaned my rifle.

SIGNED: Raymond Monsalve

Q. Have you made previous statements about this?
A. Yes, to Col. Green about 3 times; to Captain Larkin about 3 times.
Q. Were the statements to them true?
A. No, sir.
Q. Is this statement you are making now true?
A. Yes.
Q. When you went after the gun that evening was it loaded?
A. No but I loaded it when I got it.
Q. Why did you load the gun.
A. I don't know.
Q. How many rounds of ammunition are you supposed to have?
A. 80 rounds.

Q. Did you replace the round you fired?
A. No, but the clip I had in the gun when I fired it came from another belt which was hanging in the kitchen.
Q. What did you do with that clip?
A. I don't know but I think I threw it away; I don't remember where. (end of page 2).
Q. Did you put the gun back in the rack after you fired it?
A. Yes.
Q. Was anyone assisting you in attempting to steal the whiskey?
A. No.
Q. Is there anything further you wish to say?
A. No, except that I had no intention to hurt nobody. It was an accident. I didn't have any help. No one has been told about this up to now. I've been frightened and sorry because of what I did.
Q. Have you been threatened or have you been given any promises for making this statement?
A. No. I am making it of my own free will. I want to get it off my chest.
Q. Have you understood all my questions?
A. Yes.

I now ask you to read this statement consisting of three pages, and as an indication that it is true and correct, sign your name below.

Statement read in its entirety by:

(t) RAYMOND MONSALVE
(s) Raymond Monsalve
(Signature).

WITNESSES:

William J. King (s)
WILLIAM J. KING, MAJOR CMP (t)

Arthur M. O'Connor (s)
ARTHUR M. O'CONNOR, (t)
Chief Specialist USNR. 7085236.

I certify that the foregoing is a verbatim transcription of the statement of Raymond Monsalve taken by me direct on typewriter as indicated.

Lloyd A. Craig (s)
LLOYD A. CRAIG, T/5Gr. 37132301 (t)

EXHIBIT No. "10"

Prosecution's Exhibit No.10

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An additional statement was made by the accused on 20 April 1943, (Prosecution's Exhibit 11) as follows:

Statement continued 15 hours, 20 April 1943, at the same location and with the same individuals present.
Raymond Monsalve again duly sworn by Major King.
By Major King to Raymond Monsalve
You have made a statement in which you confessed that you shot and killed Colonel Donnelly on 2 April 1943. I warn you that this statement is a confession of your guilt of that offense; that you are not bound to make a confession or statement in the matter, and that if you do make a statement or if you adhere to and ratify this statement it may be used as evidence against you in any trial for the commission of the offense of killing Colonel Donnelly. A. I understand.
Do you wish to repudiate this statement? A. No.
Do you, after again reading this statement, wish to ratify and confirm this statement?
(Statement read in its entirety by Raymond Monsalve)
A. Yes.
Do you wish to make any change or additions to this statement?
A. On page 1 it shows "I have been in Iceland since 11 May, 1943" that should be 11 May, 1942.
Q. Will you make the change on the original statement?
A. Yes. (Change made and initialed)
Q. Is there anything further you wish to say?
A. No.
Q. Have you understood all the questions I asked you to-day.
A. Yes.
I now ask you to read the portion of this statement made to-day, and as an indication that it is true and correct, sign your name below.
(Portion of this statement made to-day read in its entirety by:

RAYMOND MONSALVE (t)
Raymond Monsalve (s)
Signature.

WITNESSES:
William J. King (s)
WILLIAM J. KING, MAJOR, CMP. (t)

Arthur M. O'Connor. (s)
ARTHUR M. O'CONNOR. (t)
Chief Specialist, USNR., 7085236.

I certify that the foregoing is
a true verbatim transcription of
statement of Raymond Monsalve
taken by me direct on typewriter
as indicated.
Lloyd A. Craig (s)
LLOYD A. CRAIG T/5G
37132301 (t)

PROSECUTION'S EXHIBIT No. 11.
EXHIBIT No. 11.
Page 4.

4. The Defense objected to admission in evidence of Prosecution's Exhibits 10 and 11 on the ground that same were obtained by means of threats and compulsion. The issue thereby created was tried by the court upon voir dire. In partial support of his contention the accused submitted the following unsworn statement, designated Defense Exhibit B:

May 25.1943
Witnessed by Terrill E. Price, Col G S C. 920 AM
Camp Fenton Street.
Thomas P. Dart. Major 50th Sig Bn.

I was in that particular room with Howerton and was called out and went into the adjoining room, a little room like the one I was in. And Major King and the sailor was in there. He give me his rank and told he was a former man from F.B.I. or the Dept of justice ~~whichever~~ or whatever it is. Then he started asking me what had happened there at my camp and I told him I didn't know. He kept on telling me that I knew plenty about it and he kept on pulling my night shirt, ~~and telling~~ and he just kept on asking me questions. And then he told me they had ways of making a man talk. And then he said that a few slaps over the mouth would make me talk. And then I told him I didn't know anything about it. He said the doctors and nurses in there if he tried anything wouldn't stand for anything out of the way. And he said that he could take me out some place where it was nice and quiet. Where nobody would bother, ~~and I kept silent for a while,~~ and a few slaps over the mouth and knock a few of my teeth out would make me talk and that's about all he said. And then I told him I would make a statement And then he would say How did it happen Did it happen this way? And he would write it down and pass it to the stenographer.
Naturally I was afraid when I made the statement.

RAYMOND MONSALVE.

EXHIBIT No. "B"

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In his defense in chief, after his rights had been carefully explained to him by the court (R.200) the accused submitted an unsworn statement, designated Defense Exhibit D, as follows:

Written Statement:

Witnessed by on May 26th 1943. 10:00 A.M. (1)
Thomas P. Dart, Major 50th Sig Bn.
Carroll M. Mershon, 1st Lieut. Field Artillery.
Terrill E. Price. Col. G.S.C.

Statement of Private Monsalve. After we stopped drinking the rum I felt sick in the stomach and I borrowed Maggards parka and then me and Liparote left. And after we left he went direct to his hut, and I continued going to the latrine. After I got to the latrine I started to throw up and I must have stayed there 15 minutes or maybe a little more. And then I went to my hut and I went to bed. And I was awakened about five in the morning by the mess sergeant, and being about half asleep and with a hangover me and the mess sergeant had a little argument. Then I went to the mess hall to my regular duty. (end of first page)

Witnessed by on May 26th 1943 at 1000 A.M. (2)
Thomas P. Dart. Major 50th Sig Bn
Col. Terrill E. Price Col G. S. C.
Carroll M. Mershon, 1st Lt. Field Artillery

Besides this statement here I don't think I need say more than the statement already before the court about ~~the~~ Major King and the sailor and the stenographer they had and myself on the 19th and 20th of April. On the 20th I felt very nervous and upset because I have never been asked any questions before in my life like that I have never been in no trouble. They didn't make any threats next day but I did not know whether they could.

Defense
Exhibit No. "D".

An attempt was made by the defense to show that Technician 5th Grade John R. Pennington, Battery "D", 25th Coast Artillery (HD), the other cook, was more likely to be the guilty party. He was seen going from the kitchen to the cooks' hut which he shared with others, with a gas mask and carrying a rifle, at 6:30 to 7:00 the morning of 3 April (R.177). He appeared to have been drinking (R.178). The rifles in the cooks' hut were kept in an unlocked rack (R.169) and it was customary to

carry rifles back and forth and orders issued required them to do so (R.204). A clip of M-1 ammunition loaded with 8 bullets the first being a tracer bullet was missing from the rifle rack in the dining room the night of 3 April 1943 (R.190-191). Pennington was a heavy drinker and at times had smoked marihuana (R.175,178,192). Since the death of Colonel Donnelly he had become depressed, he was listless, morose and kept to himself. He seemed to be losing his mind (R.172,173,175,176,178,183, 185,186). On 14 April 1943 on his own request he visited the Provost Marshal, Lieut. Colonel Green, and asked if he was in any way implicated in the shooting of Colonel Donnelly (R.181) and seemed to be under a heavy strain of some kind. As a result of this he (Pennington) was placed in the hospital for observation (R.182) where he remained at the time of trial (R.198). During the week prior to trial while Captain Gerald J. Whalen, Chaplain Corps, was visiting Ward 21 of 208th General Hospital, Pennington approached him in tears and begged Captain Whalen to "do something to save an innocent man", intimating that he (Pennington) was the one who had done the killing (R.199).

5. On April 14th Lieutenant Colonel Green in questioning accused "told him that it may be hard for him to tell us but it would probably help him more than it would hurt him". Accused, however, made no statement connecting himself with the death of Lieutenant Colonel Donnelly until his statements of the 19-20 April. Without these statements, it may well have been found impossible to prove definitely who was the killer. A confession made to a military superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the confession is made by an enlisted man (1928 M.C.M., par.114a, p.116). If accused had told his story on 14 April, its voluntary nature might well have been questioned. Five days later accused did confess to a different officer under circumstances into which the court diligently and fully inquired. Accused, in an unsworn statement, claimed to have been both threatened and assaulted at the time of the confession. An exhaustive examination by the court, the trial judge advocate and defense counsel of those present on the occasions of obtaining accused's statements fails utterly to substantiate such claim.

6. "Murder is the unlawful killing of a human being with malice aforethought (M.C.M., 1928, par.148a, p.162; 29 C.J., sec.59, p.1083).

The evidence herein clearly shows Lieutenant Colonel Donnelly to have been killed unlawfully, without justification or excuse. The only question is whether the offense committed was murder or manslaughter. The important element of murder, to-wit: "malice aforethought" has been analyzed by the authorities as follows:

> "In its popular sense the term 'malice' conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will towards the individual injured, but signifies rather a

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general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse, or extenuation and malice has been frequently, substantially so defined as consisting of the intentional doing of a wrongful act towards another without legal justification or excuse. ***"((29 C.J., (sec.61)2, p.1084). (Cf. CM ETO 292, Mickles; CM ETO 255, Cobb; CM ETO 422, Green; CM ETO 438, Smith)).

The distinction between murder and manslaughter is stated by Wharton to be "the absence of deliberation and malice aforethought". (1 Wharton's Criminal Law, sec.149, p.165).

"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 (sic) bodily harm to, any person, whether such person is the person actually killed or not (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, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grevious (sic) bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. ***" (M.C.M., 1928, par.148a, pp.163-164).

Accused admits he loaded his rifle and "went looking for whiskey ***". He entered the officers' quarters and was startled while in Lieutenant Colonel Donnelly's room, possibly by the door falling off the clothes closet, and fired his rifle as he turned at the interruption. He "didn't mean to shoot him" (Donnelly). However, he was a soldier, familiar with the use of a rifle. He knew that the use of the rifle would "probably cause the death of or grievous bodily harm to *****" someone. (M.C.M., 1928, sec.148, p.163). He had committed the offense of housebreaking with the intent to commit a further offense, the larceny of whiskey. Like the burglar, who is surprised while at work and fires his pistol in the dark to aid his escape and kills an inmate of the house, it is murder (Winthrop's Military Law & Precedents, 1920 Reprint, p.673).

7. The possibility that another, Pennington, committed the offense is negatived by the evidence, including the fact that he was in his bed at some distance from the scene midway of the half-hour period in which the shooting apparently took place. His possession of a rifle while on duty the following morning is satisfactorily explained. It is not open to dispute that he is mentally unbalanced, being rational only at times as shown by expert testimony and by his own conduct on the witness stand, and that his worries that he might have been involved in the shooting have been expressed over the time that such unbalance has developed. The showing made is not such as to admit of a reasonable doubt of accused's guilt.

The purpose of the evidence submitted by the defense was to establish an alibi. Insofar as it was in conflict with the prosecution's evidence an issue of fact was created. It was the duty and function of the court to resolve this conflict; to weigh and evaluate all evidence and to judge the credibility of the witnesses, both for the prosecution and defense. There is substantial competent evidence to sustain the court's finding that it was accused who shot and killed Lieutenant Colonel Donnelly at the time and place alleged in the specification, and such finding is binding on the Board of Review (CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, McLurkin).

8. During the investigation of the charge pursuant to the requirements of AW 70, the accused when interviewed by the investigating officer and at the time of examination of other witnesses, requested the presence of his counsel. The investigating officer, Major Dewey B. Gill, denied the request, explaining that the investigation was not a judicial proceeding and that accused's rights could not be impaired (R.131,132,133). Major Gill's action was correct. (Romero v. Squier, 133 Fed (2nd) CCA, 9 Cir. 528, Bul. TJAG., April 1943, p.133).

9. Attached to the record of trial is an appeal for clemency for accused, signed by defense counsel and assistant defense counsel, claiming discovery of new and important evidence increasing the probability of the sole guilt of Private Pennington of the murder, and the consequent complete innocence of accused. The new evidence is a spot of blood on some trousers belonging to Pennington. It is not known if it is human blood and is a fact readily attributable to any number of innocent causes.

10. Accused was given safeguard of a fair and impartial trial. While it was shown by competent medical testimony that accused was of a mental age of 11 years, there was similar medical testimony to the effect that he was able to distinguish right from wrong and was able to adhere to the right and to understand the conduct of his own defense. The defense particularly disclaimed the defense of insanity and the court in closed session found him mentally competent. (R.195-196).

11. Accused is 26½ years of age. He was inducted into service at Los Angeles, California, on July 4, 1941.

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12. The court was legally constituted and had jurisdiction of the person and the 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. Confinement in a penitentiary is authorized for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 454, (Criminal Code, section 275) and section 567, (Criminal Code, section 330) Title 18 of the United States Code, Annotated; AW 42; War Department Directive 2-26-41, AG 253 (2-6-41) E). Return of prisoner to the United States and execution of dishonorable discharge is authorized (GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942).

B. Franklin Pitts Judge Advocate

Edward Bunselmeier Judge Advocate

Ellwood W. Sargent Judge Advocate

CONFIDENTIAL

(133)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 17 JUL 1943 TO: Commanding General, ETOUSA, U. S. Army, APO 887.

1. In the case of Private RAYMOND (NMI) MONSALVE, (39161683), Battery "D", 25th Coast Artillery (HD) 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, the sentence and the action taken by the confirming authority, which holding is hereby approved.

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 559. For convenience of reference please place that number in brackets at the end of the order: (ETO 559).

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

(Sentence ordered executed. GCMO 15, ETO, 20 Jul 1943)

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

Board of Review.

ETO 564. 29 JUN 1943

UNITED STATES v. Private DONALD (NMI) NEVILLE (12021600), Casual Replacement Group (Provisional).	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Lichfield, Staffordshire, England, 19-20 March 1943. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement for 18 months. Disciplinary Training Center No. 1, Shepton Mallet, Somerset, England.

OPINION of 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. The record has now been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of the Branch Office.

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Donald Neville, Casual Replacement Group (Provisional) did, at Lichfield, Staffordshire, England on or about 20 January 1943, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Transfer to an overseas station, and did remain absent in desertion until he was apprehended at Lichfield, Staffordshire, England on or about 21 January 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 eighteen months. The reviewing authority approved the sentence but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated Disciplinary Training Center No. 1, Shepton Mallet, Somerset, England, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 41, Headquarters, Western Base Section, SOS, ETOUSA, APO 515, U. S. Army dated 21 June 1943.

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

It was stipulated by the prosecution and defense "that the accused is Private Donald (NMI) Neville, ASN 12021600, and that Private Donald (NMI) Neville was assigned to 2211-B on 20th January 1943; that he was a member of the organization on 20 January 1943" (R 10). Unit 2211-B was stationed at the 10th Replacement Depot (Lichfield, Staffordshire, England) and departed from that station between the 18th and 20th January 1943 (R 6). It was also stipulated by the prosecution and the defense that if a Colonel Killian were present he would testify that "Unit 2211-B left in two groups - one lot at about 11:45 by train and the other shortly after midnight - in two special trains" (R 48). It was further stipulated that if Second Lieutenant Casper F. Betson, Infantry were present he would testify in substance that on the morning of 21 January 1943 he entered the barracks of Company C, TF (Task Force) 2211-B. Upon receiving certain information he made inquiries concerning a soldier then in the barracks. The soldier was accused, who told Lieutenant Betson "that he had missed his shipment" and that he did not have any orders to do so. Accused was then confined (R.10-11).

Between 16-20 January a large quantity of clothing was issued (R 7). Eighty rounds of ammunition were issued to each man between 5-6 o'clock on the evening of 20 January. Rifles were issued on either the 15th or 16th of January (R 8).

4. For the defense, accused testified that he was assigned to unit 2211-B in the United States and that he arrived at the unit's station (Lichfield, England) 16 January 1943 (R 27). On direct examination accused testified in part as follows:

> "Q. What did the issue of these articles - what did that convey to you?
> A. I thought we were going to move out sooner or later - we were told that in the States, that we had just 'stopped off' here.
> Q. Were you told for where?
> A. No sir.

Q. You understood for an overseas place?
A. Yes.
Q. Did anybody tell you where you would go when you left here?
A. No sir." (R 28).

On cross-examination accused testified:

"Q. During all this time - do you remember having to fall in on the parade ground?
A. I was not assigned - never saw anybody the following day - not on the 18th sir.
Q. But you did know you were going to go overseas?
A. I did know when I came over to this country. I knew this was only a stopping off place." (R 34).

On the evening of 16 January he went on pass to Erdington, two miles from Birmingham, and saw a girl (R 28, 32-33). The girl, whose name was Caroline Tate, lived at Erdington (R 30) and accused had first met her on 15 January 1943 (R 43). On the nights of 17 and 18 January he went to see her at Lichfield (R 28-29, 33-34). From 16-18 January the men of unit 2211-B were members of a battalion. On 18 January they were transferred to companies and accused was assigned to Company D (R 28). On 18 January they were furnished impregnated clothing, gloves, an extra pair of shoes, eye shields, gas cape and rifle (R 28, 31-32). On 19 January accused requested a pass which was not obtained. At 4:30 P.M., the men were informed that they were restricted and that no passes would be allowed as equipment was to be issued (R 29,31,34,40). During the evening of 19 January canteens were issued and the men were instructed how to roll blankets in the shape of a horse-shoe, and how to pack the rest of their equipment in their barrack bags. Rations were also issued. When he finished packing his bag accused went to bed at 10:00 P.M. (R 32,44-45). The men were then living from a full field pack and had to unroll their packs in order to use their blankets that evening. The barrack bags were packed except for toilet sets which were kept out for use (R 41). After he became a member of Company D and subsequent to 16 January, the Articles of War, including Articles 28 and 61, had been read and explained to accused who understood their significance (R 34-35,40). On 20 January accused remained in camp until about 8:30 P.M. when he asked the platoon sergeant "what the score was". He "figured we was going to move out" and wanted to see Miss Tate and ask her to marry him, believing he could get back at midnight (R 29,35). The sergeant told accused that the men were restricted for a few days, that they had to "stick around", but that nothing would happen for a day or two, probably Friday or Saturday (22-23 January) (R 29-30,35,38). The sergeant also stated that no passes would be issued (R 43). At about 8:30 P.M. accused left camp and went to Erdington to ask Miss Tate to marry him. He knew that by doing so he would be absent without leave (R 29-30,35). Before he left, shortages were being issued (R 42). He proposed marriage, became engaged and

started back to camp at 11:45 P.M. Although the weather was clear when he left camp, it became foggy at 10:00 P.M. He walked 18 miles and arrived in camp at 5:45 A.M. 21 January. He found that his company had left, the barrack bags were missing and there was no equipment around. Accused was very tired and went to sleep. The following morning he was awakened by a lieutenant. He was taken to the guard house after he disclosed the name of his organization (R 29-31,36,41-42). When accused left camp at 8:30 P.M. 20 January, his field pack was ready except for the blankets and toilet set. However, he could have been ready to move in ten minutes (R 36,41). He denied that the organization had been alerted. When an organization is alerted the alert "is read or posted up". No such action had been taken and nothing had been said about an alert (R 36-37). He had previously stood one alert. Had there been an alert on this occasion, the men would have been so informed and told to stand by. However, they were informed only that they were restricted (R 38). The platoon sergeant had also informed accused that there would not be any movement until the end of the week (R 37-38). No ammunition had been issued, there was no undue movement or additional activity, nor had accused heard of any orders (R 42-43).

5. Miss Caroline Tate of Erdington, Birmingham, a rebuttal witness for the prosecution, testified that she first saw accused in Birmingham on a Friday in January (15th). He came to see her on Monday or Tuesday (18th and 19th) but she was not at home. She saw him on Wednesday night (20th) when accused told her the unit was leaving and asked her to marry him. She accepted (R 50-53). Accused told her that "the men might be leaving that night". She wanted to know when she would see him again and he replied that he did not know, that "he might be put in the guard room" but he offered no explanation when she asked the reason for his statement (R 51,54-55). Accused arrived between 7:30-8:00 o'clock on Wednesday night (20th), and left about 10:30 (R 53). Miss Tate had never seen accused in Lichfield; she was going to come but did not (R 50,53) and had met him twice only (R 50,54).

6. The order appointing the court lists Lieutenant Colonel Orville W. Harris, Infantry (0-190326) as the senior member. In accounting for the court, the name of Lieutenant Colonel Theodore C. Wenzlaff, (0-16448), Transportation Corps, appears first and with the designation "President". Trial occurred on 19-20 March 1943. Informal inquiry discloses that Lieutenant Colonel Wenzlaff was promoted to Colonel on 26 February 1943, became senior member of the court, and therefore acted as president. The fact that the record does not disclose these facts does not affect the validity of the proceedings.

7. After the prosecution had rested its case the defense moved "that all facts stated by witnesses pertaining to what occurred prior to Jan 16, 1943 be stricken ***". With the exception of the testimony of one witness (Sergeant Adams), the court granted the motion. The defense then moved for a finding of not guilty on the ground that it was not proved

that accused had absented himself without leave (R 26). The motion was denied (R 27). The subsequent testimony of accused contained many pertinent facts not developed by the evidence introduced by the prosecution.

> "Error in denying a motion for dismissal or non-suit, made at the close of the state's case, is waived where accused proceeds with trial by presenting his evidence, and does not, at the close of the whole case, renew his motion, or move for an instructed verdict. The failure of accused to stand on his motion requires a consideration of all the evidence, and if on such consideration there is sufficient evidence to sustain a conviction, the denial of the motion is not ground for complaint." (23 C.J.S., sec.1149c, pp.681-682). (Underscoring supplied).

If the evidence which had been produced by the prosecution when the defense made its motion had warranted a finding of guilty of the lesser offense of absence without leave, a denial of the motion of the court would have been proper (MCM., 1928, par.71d, p.56). The Board of Review expresses no opinion as to whether such evidence would in fact have supported such a finding. However, after denial of its motion the defense proceeded with the trial, presented evidence and did not renew its motion at the close of the case. As will be subsequently shown, the Board of Review is of the opinion that the complete evidence is legally sufficient to "sustain a conviction", namely that of absence without leave. Therefore, in view of the foregoing citation the Board is of the opinion that the denial by the court of the motion by the defense for a finding of not guilty was not error.

8. It is provided in Article of War 28 that:

> "*** Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter."

The Manual for Courts-Martial provides:

> "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty or to shirk important service." (MCM., 1928, par.130a, p.142).

> "The 'hazardous duty' or 'important service' may include such service as ***** embarkation for foreign duty or duty beyond the continental limits of the United States. ***" (MCM., 1928, par.130a, p.143).

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It is alleged that accused deserted the service of the United States by absenting himself without leave from his organization with "intent to avoid hazardous duty, to-wit: Transfer to an overseas station ***". One element necessary to sustain the charge of desertion is proof that accused's organization "was under orders or anticipated orders involving *** hazardous duty" which accused sought to evade (MCM., 1921, par.409, p.344). It was established in evidence that accused's organization, 2211-B, left its station at Lichfield in two groups, one at about 11:45 P.M. 20 January, and one at shortly after midnight, that is on the morning of 21 January 1943. There was no proof of the nature of the duty to be performed. The record of trial is silent as to the unit's destination. It might have left the British Isles or merely have departed for another station within the United Kingdom itself. There was no proof that accused knew the destination of his organization when it left Lichfield. He admitted that when he left the United States he knew that his unit was going overseas and that England was only a "stopping off place". Such evidence is not of itself sufficient proof of his knowledge that his organization was in fact leaving for an overseas station on the night of 20-21 January. Thus, one essential element of the offense alleged was not established in evidence (CM ETO 455, Nigg).

In order to sustain the finding of guilty it is also necessary that the evidence be legally sufficient to support the conclusion that accused intended by his absence to avoid the hazardous duty alleged. The evidence plainly shows that on 20 January accused knew that his organization would, in all probability, depart in the near future. The men were restricted and accused's own equipment was fully packed with the exception of his blankets and toilet set. He would have been able to finish packing in ten minutes. Rations had been issued and no passes could be obtained. The organization had been completely equipped. On 20 January accused "figured we was going to move out" and asked the platoon sergeant "what the score was". He testified that the platoon sergeant told him that nothing would happen for a day or two. He admitted that when he left at 8:30 P.M., to see Miss Tate, he was absent without leave. He told her that the unit was leaving and that "the men might be leaving that night."

However, accused had left camp on the nights of 16, 17 and 18 January for the purpose of seeing Miss Tate. On each occasion he had returned voluntarily. His statement that the reason for his absence on 20 January was to ask her to marry him was corroborated by the testimony of the girl herself. On that evening he left camp at 8:30 P.M., and began his return journey about three hours later. There was no evidence that when he left at 8:30 P.M., accused had actual knowledge that his unit would leave later that evening, nor is his statement to Miss Tate that the men might be leaving that night sufficient proof of such knowledge. His further statement that he "might be put in the guardroom" is as well explained by his knowledge that he was then absent without leave, as it is a basis for concluding that accused believed he would be confined because his unit would depart without him. After his

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proposal had been accepted, accused walked 18 miles to camp arriving about 10 hours after his departure. He returned voluntarily as he had done after his previous visits. There is no proof that accused knew when his unit would actually leave. He did know that he had broken restriction and was absent without authority. He knew that he was taking a chance, but his short absence and the fact that he walked 18 miles to get back negatives an intent to avoid leaving with his organization. His arrest on apprehension was in the barracks of his organization. The fact that accused intended to avoid the hazardous duty alleged was not established. However, it was proved, and accused admitted, that he went absent without leave. The evidence is legally sufficient to support only so much of the findings of guilty as involves absence without leave for ten hours in violation of Article of War 61, and legally sufficient to support the sentence (CM ETO 455 - Nigg).

9. Accused is 22 years of age. He enlisted 6 December 1940 for the duration of the war plus six months and had no prior service.

10. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his organization and did remain absent without leave until he was arrested at Whittington Barracks, Lichfield, Staffordshire, England, in violation of Article of War 61, and legally sufficient to support the sentence.

B. Franklin Pike, Judge Advocate

Richard Burchstead, Judge Advocate

Ellwood W. Vergason, Judge Advocate

(142)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 JUL 1943 TO: Commanding General, ETOUSA., U.S. Army, APO 887.

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Public Law 693, 77th Congress, August 1, 1942 is the record of trial in the case of Private DONALD (NMI) NEVILLE (12021600), Casual Replacement Group (Provisional), APO 874.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty of the Charge and the Specification be vacated as involves findings of guilty of an offense by accused other than absence without leave at the place and time alleged, terminated by arrest at Whittington Barracks, Lichfield, Staffordshire, England in violation of Article of War 61, that the sentence be approved, but that all rights, privileges and property of which the accused may have been deprived by reason of that portion of the findings of guilty so vacated, viz: conviction of desertion in time of war, be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinabove made, should such action meet with your approval. Also draft GCMO for use in promulgating the proposed action. Please return record of trial with required copies of GCMO.

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

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

(Findings vacated in part in accordance with recommendation of the Assistant Judge Advocate General. Sentence approved. GCMO 17, ETO, 4 Aug 1943)

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

Board of Review.

ETO 567.

UNITED STATES v. Technician 5th Grade HORACE E. RADLOFF, (6668608), Company H, 10th Infantry.	5TH INFANTRY DIVISION. Trial by G.C.M., convened at Fenton Street Camp, Iceland, 14 June 1943. Sentence: Reduced to ranks, confinement at hard labor for six months and forfeiture of $35 per month for like period. Confinement: 10th Infantry Guardhouse.

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 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 holding, to the Assistant Judge Advocate General in charge of said office.

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

CHARGE: Violation of the 96th Article of War.
Specification: In that Technician 5th Grade Horace E. Radloff, Company H, 10th Infantry, then Technician 5th Grade, Headquarters Company, 1st Battalion, 10th Infantry, being under standing War Department orders providing that no military personnel on duty in a foreign country may marry without the approval of the Commanding Officer of the United States Army Forces stationed therein, did, at Reykjavik, Iceland, on or about 3 April 1943, wrongfully and willfully disobey the same by marrying one Kristin Lara Gisladottir without such approval, the same being a military offense to the prejudice of good order and military discipline.

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Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous convictions was introduced. He was sentenced to be reduced to the grade of private, to be confined at hard labor for six months and to forfeit $35.00 per month for a like period. The reviewing authority approved the sentence and designated the 10th Infantry Guardhouse as the place of confinement. The proceedings were published in General Court-Martial Orders No. 46, Headquarters, 5th Infantry Division, 19 June 1943.

3. The evidence shows that by War Department Circular No. 179 dated 8 June 1942 and No. 305 dated 8 September 1942, prosecution's exhibits 1 and 2, marriage of military personnel on duty in a foreign country is prohibited unless prior permission is granted by the Commanding General of the United States Forces stationed therein. Prosecution's exhibits 3 and 4 are bulletins issued by Headquarters, United States Army Forces in Iceland calling the attention of military personnel on leave or furlough to Circular No. 179. Prosecution's exhibit No. 5 is a stipulation to the effect that (1) accused never received the permission of the Commanding General of the United States Army Forces in Iceland to be married, and (2) that it has been the policy, strictly adhered to and without exceptions, of the Commanding General of such forces, not to permit any marriage by military personnel (R 9). Over the objections of defense counsel, the court admitted as evidence prosecution's exhibit No. 6, being the deposition of Fridrik Hallgrimsson, a clergyman of the Icelandic Established Church, that he knew accused and one, Kristin Lara Gisladottir, a young Icelandic lady, and had married them on 3 April 1943 in his home at Gardastraeti 42, Reykjavik; he being legally authorized to perform marriages. Proper notice and opportunity to provide interrogatories therein were given defense counsel (R 10). The evidence further shows that accused had talked with Captain Richard F. Hanson, 10th Infantry, whom he had known for nearly nine months, of his desire to marry and that Captain Hanson after visiting the girl and telling accused that such marriage was contrary to regulations, required accused to put his request in writing. Captain Hanson then approved the request and forwarded it through military channels about the 29 or 30 March 1943 (R 13). The letter, prosecution's Exhibit 7, was returned a day or two later disapproved by indorsement thereon by both Battalion and Regimental commanding officers (R 14). The letter was admitted in evidence (R 16).

The defense called four witnesses only, the accused making no statement. The first defense witness, Lieutenant Colonel William M. Breckinridge, 10th Infantry, testified he had known accused approximately two years during all of which time accused had been a clerk, until recently, battalion clerk of the 1st Battalion. He was a superior clerk and an excellent soldier (R 19). The other defense witnesses, First Lieutenant Malcolm R. Wimbish, commanding officer of Company H, 10th Infantry (R 20), First Lieutenant Albert C. Henry, a platoon leader of Company H (R 21), and Staff Sergeant Charles M. Yancey, acting first sergeant of Company H (R 22), gave similar testimony.

4. Accused is charged with wrongfully and willfully disobeying standing War Department orders forbidding marriage of military personnel on duty in foreign countries without the permission of the Commanding General of the army forces there stationed. The evidence shows he had knowledge of such prohibition and made a written request to such Commanding General for permission to marry which request was disapproved. By the deposition of the clergyman who officiated, it is also fully proved, and it is the only proof thereof, that accused went through the marriage ceremony almost immediately after the disapproval of his request. This deposition was taken in the usual, regular and authorized manner on the order of the Commanding General of the United States Army Forces in Iceland. Counsel for accused objected to the admission and use of the deposition in the trial on the grounds that it was taken at Reykjavik, Iceland about 10 miles from where the trial was had. Article of War 25 reads as follows:

> "Depositions-When Admissible.- A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases." (MCM., 1928, p.208).

Defense counsel contended that as Mr. Hallgrimsson, whose deposition was presented, is a clergyman holding services weekly in his church and being located within 10 miles of the place of holding court, no basis for taking his deposition in lieu of his personal appearance appears. The trial judge advocate stated that the court was powerless to compel the attendance of the witness, an Icelandic subject, by subpoena and a needless and unreasonable delay would result from attempting to secure such attendance by request directed to the Icelandic government. The witness refused to appear before any United States military court and testify unless ordered by his government to do so. The trial record justifies the conclusion that no agreement exists between the governments of the United States and of Iceland for compelling the attendance of Icelandic subjects as witnesses in trials by courts-martial. If the use of the deposition is not authorized, proof of the offense fails. Accused was given an opportunity to provide cross-interrogatories to be annexed to the prosecution's direct interrogatories

before the deposition was accomplished by the witness.

> "Under appropriate constitutional provisions, **** the legislature may be authorized to enact legislation providing for the taking of depositions of witnesses whose presence cannot be had at the trial ***" (26 C.J.S., sec.2, p.808).

> "The statutes, as well as the common law, delimit the power to take testimony out of court to clearly marked emergencies and situations. So an application to take depositions may be granted, and should be granted only, where one or more of the established grounds therefor exist; where there is some reasonable ground for believing that actual necessity requires it; where the applicant acts in good faith; where the desired testimony is material or proper, or may become relevant, and is not merely cumulative or where it could not be otherwise procured, **** where opposing parties will have the opportunity for cross-examination; and where the matter to be proved is of such a nature that depositions may be satisfactorily substituted in place of personal examination of the witnesses. ***" (26 C.J.S., sec.9, pp.815-816; 18 C.J., sec.13, p.612).

> "A commonly recognized ground for taking a deposition is that the witness does not reside within the jurisdiction of the court in which the action is to be tried. ***" (26 C.J.S., sec.10, p.816; 18 C.J., sec.14, p.612).

> "Where a deposition may be taken, if a witness resides out of the county in which his testimony is to be used, <u>or</u> more than thirty miles from the place of trial, it is sufficient if he lives without the county, <u>although his place of residence is less than thirty miles from the place of trial</u>." (Skidmore v. Taylor, 29 Cal. 619; 26 C.J.S., note to sec.10, p.816). (Underscoring supplied).

This provision allows the use of depositions of witnesses <u>not</u> in the jurisdiction of the court of trial, subpoenas, summons and other process of the court of trial to compel the attendance of witnesses being ineffective by reason thereof.

In the present case, the clergyman, Fridrik Hallgrimsson, an Icelandic citizen, in Iceland, was as far removed from the jurisdiction of the present court, by reason of that fact, as he would have been if the court had been located in the United States and he located where he then was. In either case he was beyond the jurisdiction of the court of trial and was immune to any process issued from such court.

5. In the opinion of the Board of Review the deposition was properly admitted by the court as evidence herein; the witness did not reside within the jurisdiction of the court; there was reasonable ground for believing that actual necessity required it; it was taken in good faith after due notice; the desired testimony was material and proper; it was relevant, was not cumulative and could not be otherwise procured and the matter to be proved, the marriage of accused, was of such a nature that depositions might be satisfactorily substituted in place of personal examination of the witness.

6. The question of the validity of regulations, War Department Orders or orders of the Commanding General of United States Army Forces on duty in a foreign country in time of war because they infringe upon or restrict rights guaranteed by the Federal Constitution, may not be entertained. In 1823 Justice Washington in Corfield v. Coryell, 4 Wash. (U.S) 371, listed as the rights protected under the Fourteenth Amendment to the Federal Constitution:

> "The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the good of the whole." (Constitution of the United States of America, Revised and Annotated, 1938, p.767; Senate Document No. 232, 74th Cong., 2nd Sess.)

This definition has been repeatedly used by the courts since.

When accused took the oath as a soldier in the Army of the United States, he by that act, of necessity, surrendered some of the privileges and immunities belonging to him as a citizen (McAuliffe v. Mayor of New Bedford, 29 N.E. 517).

7. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence herein. The sentence is legal. The court was legally constituted and no error injuriously affecting the substantial rights of accused were committed at the trial.

(CONCURRING HOLDING) Judge Advocate

Judge Advocate

Judge Advocate

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

Board of Review.

ETO 567.

UNITED STATES	)	5TH INFANTRY DIVISION.
v.	)	Trial by G.C.M., convened at Fenton Street Camp, Iceland, 14 June 1943.
Technician 5th Grade HORACE E. RADLOFF, (6668608), Company H, 10th Infantry.	)	Sentence: Reduced to ranks, confinement at hard labor for six months and forfeiture of $35 per month for like period. Confinement: 10th Infantry Guardhouse.

CONCURRING HOLDING by RITER, Judge Advocate.

1. The accused is charged with the violation of the 96th Article of War in that he wrongfully and willfully disobeyed "standing War Department" orders prohibiting marriage of military personnel on duty in a foreign country without the approval of the Commanding Officer of the United States Army Forces in that country by marrying an Icelandic woman without the required approval of the Commanding General, USAFI, at Reykjavik, Iceland, on 3 April 1943. In proving the fundamental fact of the charge against accused, to-wit: the marriage of accused, the prosecution relied upon the deposition of one Fridrik Hallgrimsson of Reykjavik, a clergyman of the Icelandic (State) Established Church, who was duly authorized to perform marriage ceremonies. The deposition was taken by command of the Commanding General, USAFI, upon written interrogatories propounded by the prosecution before the officer designated in the order authorizing the deposition. The defense declined to propound cross-interrogatories. The deposition was admitted in evidence over the vigorous objection of the defense, and is attached to the record of trial and designated "Prosecution Ex.6". The only proof of the marriage of accused is the evidence of the clergyman contained in the deposition. Exclusion of the deposition will therefore result in total failure of proof of the marriage.

It appears from a statement of the trial judge advocate that Rev. Mr. Hallgrimsson lived about ten miles from the place of trial, and that the trial judge advocate had endeavored to prevail upon him to appear voluntarily in court as a witness, but that he refused unless ordered by the Icelandic government to do so. It further appears from the statement

of the trial judge advocate that an unreasonable delay would be occasioned in securing through diplomatic channels from the Icelandic government a direction to Mr. Hallgrimsson to appear as a witness. There is no formal proof in the record of the foregoing facts relative to Mr. Hallgrimsson's place of residence or of his refusal to appear as a witness, and there is also absent from the record proof that such direction from the Icelandic government would be forthcoming. The trial judge advocate, however, represented the foregoing situation to the court and the defense counsel in his argument in support of his objection definitely admits the existence of same. Under such circumstances the Board of Review is justified in accepting the facts stated by the trial judge advocate as being true and correct.

The record of trial in the instant case directly and specifically implies that there did not exist at the time of the trial a treaty or agreement between the United States of America and the Danish or Icelandic governments authorizing a United States Military Court sitting in Iceland to subpoena and thereby compel an Icelandic subject or citizen to appear before it and testify as a witness. In default of such treaty authorization, United States military courts sitting in Iceland possess no such power or authority, and their process would be null and void (70 C.J., sec.17, p.42; 33 C.J., sec.17, p.397, note 90; Glass v. The Sloop, Betsy, 2 Dall. 6; 1 L. Ed. 485). Process of courts-martial issued under the 22nd Article of War has validity only in the United States, its territories and possessions. I therefore believe that the record of trial justifies the conclusion that United States courts-martial in Iceland were, at the time of the trial of accused, without power or means to compel an Icelandic citizen or subject to appear before it as a witness and that the presence of such witness could be secured only as a result of diplomatic negotiations with the Icelandic government.

The record of trial shows that the trial judge advocate supported the admission in evidence of the deposition on the authority of the 25th Article of War. In ruling favorably to the admission of the deposition, the Law Member construed and interpreted said article. The argument of defense counsel in opposition was premised on the fact that the witness lived about ten miles from the place of trial. There is no suggestion in the record that the deposition was admitted on any other authority than this article.

2. The American Articles of War of 1776, enacted by the Continental Congress on 20 September 1776, made no provision for the presentation of evidence by means of depositions. However, on 16 November 1779, the Continental Congress:

> "Resolved: That in cases not capital in trials in courts-martial, depositions may be given in evidence, provided the prosecutor and person accused are present at the taking of same." (III Journal of the American Congress, p.392).

Thereafter the Continental Congress by Act of May 31, 1786, repealed the 14th Section of the Articles of War of 1776 and substituted a new section consisting of 27 Articles.

Article 10 of this new section provided:

> "On the trials of cases not capital, before courts-martial, the deposition of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence; provided the prosecutor and person accused are present at the taking of same."

The Articles of War of 1806 (Act of April 10, 1806) superseded all prior legislation on the subject. Article 74 of the new code perpetuated Article 10 above quoted, but added the phrase: "or are duly notified thereof" following the word "same" so as to make the proviso read:

> "provided the prosecutor and person accused are present at the taking of same, or are duly notified thereof."

It is to be noted that "the provision of 1806 was restricted to civil persons because such could not (then) legally be required **** to attend as witnesses before courts-martial (Winthrop's Military Law & Precedents, Reprint, p.352).

In the Articles of War 1874 (Act of June 22, 1874, R.S.1342) Congress directed in the 91st Article:

> "The deposition of witnesses, residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital."

By this enactment Congress introduced for the first time two new factors with respect to the use of depositions in courts-martial: (1) testimony of witnesses, either military or civilian could be presented by deposition, but (2) a witness must reside "beyond the limits of the State, Territory or district in which any military court may be ordered to sit "before his deposition could be read in evidence. The phrase "residing beyond the limits" was strictly construed so that a deposition was not admissible if the witness did actually reside (as distinguished from temporarily absent) "beyond the limits etc." (Winthrop's Military Law & Precedents, Reprint, p.353).

The latter of these alterations contains an element characteristic of the common law, viz: geographical or political limitations - limitations almost unknown in military jurisprudence. Their presense in the 91st Article strongly suggests that Congress used as its model R.S.863 (Act of

24 Sept. 1789, c.20, sec.30, 1 Stat. 88, as amended; 28 U.S.C., sec.639) which authorized the taking and use on the civil side of the Federal courts of depositions de bene esse; such legislation providing that depositions de bene esse might be taken and used "when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm". The comparison of the civil procedure provision with the 91st Article makes it reasonably certain that the above suggestion is correct. There is a striking versimilitude in the limitations prescribed and also certain language is almost identical.

The placement in the 91st Article of geographical or political limitations, which obviously was based upon the fundamental common law concepts of jurisdiction and venue, is an anomaly in military jurisdiction. The jurisdiction and procedure of a military court are "not **** restricted in the exercise of its authority to the limits of a particular State or other district or region." (Winthrop's Military Law & Precedents, Reprint, p.81). The anomaly becomes more apparent when the limitations are specifically examined. For example, a deposition cannot be used if the witness does not reside beyond the limits of a State. There is no statutory or constitutional reason why a court-martial should be thus limited. A general court, sitting in New York can try a soldier for an offense committed in California, or sitting in the United Kingdom even try a soldier for an offense committed in New York - a jurisdictional principle opposite to the concept operative in the civil courts.

Geographical and political limitations in the use of depositions before courts-martial are therefore foreign to one of the basic conceptions of our military jurisprudence.

> "A court-martial, whether assembled in the foreign territory or in the United States, will have jurisdiction of military offenses committed within such places equally as if committed on our own soil". (Winthrop's Military Law & Precedents, Reprint, p.81; 6 C.J.S., sec.54c, p.446).

The Articles of War of 1874 represented a departure from the norm of military jurisprudence in this respect and the same was perpetuated in the 1916 revision of the Articles of War where the statutory authority for the taking and using of depositions in military courts and tribunals first appeared in its present form (Act 29 August 1916, 39 Stat. 625, R.S.1342 as amended). The same was re-enacted in the 1920 revision (Act 4 June 1920, C.227, sub-chapter II, sec.1, 41 Stat. 792, 10 U.S.C. 1496):

"Art. 25. Depositions- When Admissible.- A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: Provided: That testimony by deposition may be adduced for the defense in capital cases." (MCM., 1928, p.208). (Underscoring supplied).

Relevant to the power of courts-martial to secure testimony of witnesses by means of depositions is the authority of such tribunals to compel witnesses to appear before it in person. By the act of March 3, 1863 (12 Stat. 754) Congress directed:

"That every judge advocate of a court-martial or court of inquiry hereafter to be constituted, shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or district where such military courts shall be ordered to sit may lawfully issue."

This statutory provision became Sec.1202, R.S.1878. Prior to its enactment there was no authority for courts-martial to compel civilian witnesses to appear and testify before it (9 Ops.Atty.Gen. 311). The "like process **** which courts of criminal jurisdiction **** may lawfully issue" at the time of the enactment of the above statute ran outside of the district in which the court sat (9 Ops.Atty.Gen. 265 (1859).

When the Articles of War were revised in 1916 (Act Aug 29, 1916; 39 Stat. 625) the Act of March 3, 1863 became Article 22 as follows:

"Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions."

The foregoing Article was carried into the 1920 revision in substantially the same form (Act June 4, 1920; 41 Stat. 759; 10 U.S.C. 1493) and is thus presently effective (AW 22).

From the time of the Revolutionary War to the enactment of Articles of War of 1874, depositions of civilian witnesses could be read in evidence before courts-martial without consideration of the place of residence of the witnesses or where they were found. In 1863 Congress initially empowered trial judge advocates to subpoena civilian witnesses. In the 1874 revision of the Articles of War, Congress for the first time limited the right to take and read such depositions by means of restrictions pertaining to the place of residence of the witness. Such restrictions were undoubtedly prompted by the fact that previously (1863) Congress had authorized the summoning into court of civilian witnesses by courts-martial by process running throughout the United States, and therefore some limitation on the right to take and use depositions seemed expedient or necessary.

3. For primary consideration is the vital question as to whether the provisions of the 25th Article of War are applicable when a military court or tribunal is sitting in Iceland. The answer to this question is found by determining the intention of Congress as revealed by its enactment. The history of the statute as above set forth may properly be considered (United States v. Raynor, 302 U.S. 540, 82 L. Ed. 413; United States v. Morrow, 266 U.S. 531, 69 L. Ed. 425), but legislative intention must primarily be discovered from the language of the statute itself (United States v. Goldenberg, 168 U.S. 95, 42 L. Ed. 394).

In the history of legislation relative to depositions antecedent to the 1874 statute there is not only no implication or suggestion that Congress contemplated or intended to cover the situation arising when the Nation's military courts sit in a foreign country but there are circumstances which compel the opposite conclusion. The 1779 and 1786 legislation was adopted by the Continental Congress during the Revolutionary War. The suggestion that the Congress contemplated that the continental troops would be used in service in a foreign land is so absurd as not to be worthy of further thought. The 1806 provision was a re-enactment of the 1786 law with an immaterial addition. The designation of "some justice of the peace" as the officer before whom depositions should be taken definitely stamps the acts of 1786 and 1806 as intended solely for domestic application.

Commencing with 1874 code and repetitiously thereafter Congress authorized the taking and reading of depositions of witnesses who resided "beyond the limits of the State, Territory, or district in which any military court may be ordered to sit". By use of this phraseology it is evident that Congressional consciousness was not directed to foreign countries. The words "State", "Territory" and "district" are distinctly domestic in their description. "State" and "Territory" occur hundreds of times in Federal statutes, and their meaning is obvious. The word "district" as used in the 1874 code and the word "District" found in present AW 25 are

associated with the words "State" and "Territory". The maxim "noscitur a sociis" is applicable although the disjunctive "or" is used (59 C.J., sec.579, p.979; Crawford, Statutory Construction, sec.190, p.325). "District" or "district" must refer to a political subdivision of the United States, viz: District of Columbia (Benson v. Henkel, 198 U.S. 1, 13; 49 L. Ed. 919, 923).

An additional reason for the conclusion that Congress did not intend that AW 25 should be operative when a military tribunal sat in a foreign country is furnished by the similarity of the Article to the provisions of the Federal civil code governing depositions de bene esse (supra). The latter statute shall "apply to the taking of depositions of witnesses within the United States, and have application to the taking of depositions in foreign countries". (Cortes Co. v. Tannhauser, 18 Fed. 667; Compania Azucarera Cubana v. Ingraham, 180 Fed. 516). It is therefore, my opinion that the legislative history of the 25th Article of War and its intrinsic phraseology compel the conclusion that Congress intended it to be operative only when courts-martial were sitting in the continental United States or territories thereof, and that it did not intend that it should govern the taking and use of depositions when courts-martial sit in a foreign country.

> "Law is a statement of the circumstances, in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain always within the power of the domestic law; but, in the present case, at least, there is no ground for distinguishing between corporations and men. The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." (American Banana Co. v. United Fruit Co, 213 U.S. 347; 53 L. Ed., 827,832).

> "Legislation is presumptively territorial and confined to limits over which the law making power has jurisdiction". (Sandberg v. McDonald, 248 U.S. 185,196; 63 L. Ed., 200,204).

> "It contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose". (New York Central R. Co. v. Chisholm, 268 U.S. 29,31; 69 L. Ed. 828,832).

4. In the instant case the trial judge advocate in his argument and the Law Member in his ruling supported the admission of the deposition upon a construction of the following portion of AW 25:

> "A duly authenticated deposition *** may be read in evidence ** when it appears to the satisfaction of the court, *** or appointing authority that the witness, <u>by reason of age, sickness, bodily infirmity, imprisonment or other reasonable cause, is unable to appear and testify in person</u> *****". (Underscoring supplied).

It was argued by the trial judge advocate that Mr. Halgrimsson's refusal to appear and testify in court until ordered to do so by the Icelandic authorities, was "other reasonable cause". The Law Member adopted such construction of the statute.

There is a two-fold objection to such construction of the phrase "or other reasonable cause"; both objections being closely related, but resting upon separate bases:

(a) The pertinent phrase "or other reasonable cause" is part of the expression "<u>by reason of age, sickness, bodily infirmity, imprisonment</u> OR OTHER REASONABLE CAUSE <u>is unable to appear</u>", which sets forth four <u>specific</u> conditions under which depositions are admissible (1) age, (2) sickness, (3) bodily infirmity and (4) imprisonment. These four causes operate <u>upon</u> or <u>against</u> the witness regardless of his will or wish. He may be so old, sick or infirm or he may be incarcerated so as to be <u>unable</u> to attend court. The word "unable" in this connection has an important implication.

> "This term as used in a statute providing that evidence given in a former trial may be proved in a subsequent trial, where the witness is unable to testify, means mentally and physically unable.- Hansen-Rynning v. Oregon-Washington R. & Nav.Co. 105 Or. 67, 209 Pac. 462.464". (Blacks Law Dictionary, p.1772).

Webster's New International Dictionary defines "unable" as:

> "Not able; incapable; unqualified; incompetent; inefficient ***; impotent; helpless".

These four specifically expressed excuses for the non-appearance of the witness in court bespeak conditions under which the witness cannot appear rather than will not appear. They describe disabilities acting directly upon the witness which prevent him from appearing - prevent him because he does not possess the physical strength, power or liberty of action. He is therefore unable to appear. None of these disabling causes were asserted as the reasons for Mr. Hallgrimsson's non-appearance on the witness stand. He refused to appear in court unless ordered by his government. There was no disability, impotency or helplessness involved in this refusal, which was a wilful, deliberate act. He was able "to appear and testify", but refused except under a condition which is not now material.

The construction adopted by the Law Member requires the definition of the word "unable" to be distorted so as to include in its sense the meaning "unwilling" or in the alternative the insertion of the words "or unwilling" following the word "unable". The first proposition is untenable because it departs from the "natural, plain, ordinary and commonly understood meaning" of "unable". (59 C.J., sec.577, p.975; United States v. First National Bank of Detroit, Minnesota, 234 U.S. 245, 58 L.Ed., 1298). The second proposition is simply judicial legislation and therefore must be condemned (59 C.J., sec.564, pp.944,945; Crooks v. Harrelson, 282 U.S. 55,58, 75 L.Ed., 156,174).

(b) The doctrine of "Ejusdem Generis" as a rule of construction is particularly applicable to the instant case.

> "*** where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated, and this rule has been held especially applicable to penal statutes. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes are therefore to be read as 'other such like', and to include only others of like kind or character ***." (59 C.J., sec.581, pp.981,982).

> "But under no circumstances and regardless of the type of statute involved, must the rule be used where the language of the statute under consideration is plain and there is no uncertainty. Its use is permissible only as an aid to the court in its attempt to ascertain the intent of the law makers. **** Nor is the rule to be applied where specific words enumerate subjects which greatly differ from each other, or where the specific words exhaust all the objects of the class mentioned. *** And still further, in any case, the context of the whole statute may rebut the application of the rule of 'ejusdem generis'. ****" (Crawford, Statutory Construction, sec.191, pp.327-329).

By authority of AW 25 a deposition may be read in evidence "when it appears *** that the witness, by reason of age, sickness, bodily infirmity, imprisonment or OTHER REASONABLE CAUSE is unable to appear and testify in person". The specific excuses for the non-appearance of the witness are four in number, and all of them operate against and upon the physical power of the witness to appear. They describe physical disabilities or restraints upon his freedom of action. It is manifest that Congress in authorizing the use of depositions was concerning itself with the personal physical status of the witness. It intended that the deposition of a sick, elderly or infirm witness or one who was incarcerated might be used and then to make certain that it had covered all causes operating against the physical freedom of a witness it added the omnibus phrase "or other reasonable cause". It is difficult to imagine a more perfect application of the rule "Ejusdem generis". The four specific excuses all relate to the same subject, viz: bodily restraint or disability. However, they do not exhaust all of the possibilities of such restraint or disability: a witness may be quarantined under health regulations; or may be the sole attendant of a seriously ill infant or a bed-ridden elderly person, or his condition of employment may be such as to forbid his absence therefrom without the production of irreparable harm or injury. Congress realized that human relationships are complex and multifarious and that unusual and unforeseen disabilities and restraints upon a witness possibly might arise which would render him "unable" to attend court, and it therefore empowered the court or appointing authority to exercise its discretion in the taking and using of such witness' deposition. The wilful refusal of a witness possessing physical ability and being free from moral and legal restraint to attend court and testify could not therefore have been within the ambit of legislative intention. A recalcitrant witness under such circumstances is able to attend - not unable as the statute specifies - and his attendance may be compelled by process under AW 22. The fact, however, that a court may be sitting in a foreign country where such process is ineffective will not authorize the use of the deposition of a refractory witness where no authority previously existed for its use.

As supporting the conclusion herein expressed with respect to the phrase "other reasonable cause" the following cogent authorities are cited: United States v. Chase, 135 U.S. 255, 34 L. Ed., 117; United States v. Stever, 222 U.S. 167, 56 L. Ed., 145; United States v. Salen, 235 U.S. 237, 59 L. Ed., 210.

5. It is therefore my opinion:

First, that the 25th Article of War did not authorize the taking and reading of the Hallgrimsson deposition because Congress did not intend to make it applicable to courts-martial sitting in foreign countries.

Second, that if AW 25 is applicable to Iceland, its own provisions properly construed, do not authorize the taking and reading of the deposition of a witness residing within one hundred miles of the place of trial, but who refuses to attend court and testify.

6. Inasmuch as the 25th Article of War is not applicable to courts-martial sitting in Iceland the basis for the authority of the officer exercising general court-martial jurisdiction to order a deposition of a witness and also authority for its use must be found elsewhere.

The Manual for Courts-Martial, 1921, par.182, p.149 contains the following statement:

> "In the case of troops serving along the international boundries, outside of the United States proper, <u>or in foreign countries, the officer exercising general court-martial jurisdiction</u> may, in his discretion, detail an officer to take the deposition of a civilian witness, or he may send the interrogatories direct to the consul of the United States nearest the place of residence of the witness with the request that the deposition be taken. In the latter case the interrogatories will be accompanied by the proper vouchers for the fees and mileage of the witness." (Underscoring supplied).

The foregoing was omitted from the 1928 Manual, but "it does not follow that any such omitted portion may not apply to a given case, unless of course, its provisions have been changed" by the 1928 Manual. (Introduction to 1928 Manual for Courts-Martial, p.VII).

It therefore appears from the foregoing that when troops are serving within a foreign country the authority to order a deposition to be taken is vested in the "officer exercising general court-martial jurisdiction". "He may detail an officer to take the deposition" or "he may send the

interrogatories direct to the consul of the United States," etc. The exercise of the foregoing authority of necessity presumes that both the prosecution and defense have been given the opportunity to present to the commanding officer interrogatories and cross-interrogatories pursuant to par.98b, p.89 Manual for Courts-Martial, 1928 upon which the deposition will be taken.

The Manual for Courts-Martial is prescribed by Executive Order of the President under AW 30 authorizing him "by regulations (to) prescribe the procedure, including modes of proof, in cases before courts-martial". The Manual is a legal, binding regulation of the Army having full force of law (In re Brodie 128 Fed. (CCA) 665).

A general grant of powers to perform official duties, unaccompanied by definite directions as to how the power is to be exercised or duty performed, implies the right and duty to employ the means and methods necessary for the due and effective exercise of the powers expressly granted (46 C.J., sec.287, p.1032; In re Neagle 39 Fed. 834; State on inf. McKittrick v. Wymore, 132 S.W.- 2nd - (Mo.) 979; State ex rel Taylor v. Superior Court 98 Pac.- 2nd - (Washington) 985; Cornell v. Harris, 88 Pac.- 2nd - (Idaho) 498; City of Wilburton v. King, 18 Pac.- 2nd (Okla) 1075)). It follows from the above principle that an officer exercising general court-martial jurisdiction, being duly authorized to order the taking of depositions when troops are serving in foreign countries, also possesses the implied power to direct how, when and under what conditions they may be taken. He can adopt the restrictions contained in AW 25 or eliminate them as he elects. However, when the deposition is before the court and is being read, the testimony therein is subject to the same objections as if given by a witness on the stand and the admissibility of contents thereof is exclusively a function for the court, and with which the officer ordering the deposition cannot interfere.

In the instant case the Commanding General, USAFI directed Captain Scully to "take or cause to be taken the deposition" of Rev. Mr. Hallgrimsson, but did not restrict or limit its use by the court in any respect. The ruling of the law member admitting the deposition in evidence was correct. The fact that it was based upon an erroneous premise does not affect its legality (4 C.J., sec.3125, p.1132; 5 C.J.S., sec.1849, p.1335, note 68).

The question as to whether the officer exercising general court-martial jurisdiction over troops stationed in a foreign country has authority without the consent of the accused to order the taking of a deposition on behalf of the prosecution in a capital case is specifically reserved notwithstanding the use of general language herein.

7. War Department Circular #179, 8 June 1942 provided:

> "No military personnel on duty in any foreign country or possession may marry without the permission of the commanding officer of the United States Forces stationed in such foreign country or possession".

The Commanding General, USAFI by his memorandum #155 dated 18 July 1942 invited the attention of his personnel to the foregoing circular of the War Department. By Bulletin of 25 August 1942, the C.G., USAFI reiterated the notice to his personnel concerning the said regulation.

The War Department by its Circular #305 dated 8 September 1942 rescinded its circular #179 and substituted the following:

> "No military personnel on duty in the Panama Canal Zone or in any foreign country or possession may marry without the approval of the commanding officer of the United States Army Forces stationed in the Panama Canal Zone or in such foreign country or possession".

It will be noted that the only difference between the circular #305 and #179 is the addition of the Panama Canal Zone as within the restricted area. At the time of the alleged offense, 3 April 1943, the regulation concerning marriage of military personnel contained in War Department Circular #305 was therefore in operation and effect.

Undoubtedly the accused had actual knowledge of the limitation upon the right of military personnel in Iceland to contract marriage; otherwise he would not have made his written application dated 31 March 1943 for permission to marry the Icelandic woman (Pros.Ex.7).

The defense attacked the validity of the standing order of the War Department contained in Circular #305 on the ground that the same was void under the Fifth Amendment to the Federal Constitution and also that it was promulgated by the Secretary of War under an unconstitutional delegation of legislative power (R 30).

The Constitution provides:

> "The Congress shall have Power *** To make Rules for the Government and Regulation of the land and naval Forces; ***" (Article I, sec.8, Cl.14).

Exercising the foregoing power Congress enacted the following statute:

"The President is authorized to make and publish regulations for the government of the Army in accordance with the existing laws, which shall be in force and obeyed until altered or revoked by the same authority: Provided, That said regulations shall not be inconsistent with the laws of the United States (Act of July 15, 1870, 16 Stat. 319; Act of March 1, 1875, 18 Stat. 337; 10 U.S.C. 16)".

The authority delegated to the President under the aforesaid statute manifestly authorizes the President to establish rules and regulations for the government of the Army. The Secretary of War is the appropriate organ of the President for expressing his directions in matters affecting the administration and government of the Army (United States v. Eliason, 16 Pet. 291,301, 10 L. Ed. 968,972; United States v. Fletcher 148 U.S. 84,89, 37 L. Ed. 378,380; In re Brodie 128 Fed. (CCA) 665).

Although the Constitution confers on Congress plenary power to make rules for the government and regulation of the land forces, the exercise of such authority is undoubtedly subject to the restrictions of the Fifth Amendment to the Constitution which provides; that:

"No persons shall *** be deprived of life - liberty, or property, without due process of law ***".

"The requirement of due process of law imposed by the Fifth Amendment upon the United States is, in its application to the legislative powers of Congress, governed by the fact that the powers are expressly given to that body and, except as expressly qualified or limited by other provisions of the Constitution, are to be construed as plenary in character. This fact is of great importance for the reason that the principle is well established that, where a plenary regulative or controlling power is granted by the Constitution to a legislative body, there is authorized an incidental interference with private rights which may result from the rules and regulations which, in the exercise of that power, the legislature may see fit to establish. This principle follows from the fact that the power being constitutionally granted there can, of course, be no claim that, when exercised, the legislature is exceeding its powers. This does not mean, however, that the requirement of due process of law is to have no application. Upon the procedural side it has full application. No one can be held civilly or criminally responsible

> under the legislatively created rules and regulations except in proceedings which satisfy the procedural requirements of due process of law. Furthermore, upon its substantive side, due process of law operates as a limitation through the application of the rule that the legislative power which is granted is one which must be reasonably and not arbitrarily exercised. But it still remains true that the grant of constitutional power opens up the subject to legislative regulation, and that, therefore, no claim can be made that the subject itself, as one involving private rights, is exempt from legislative regulation. However, the power to regulate, even though plenary, does not carry with it a right, under its guise, to enact legislation, the direct and primary purpose which is to impair or destroy private, personal or property rights. And in general it is, of course, true that not every law, in form, or by legislative avowal declared to be, an exercise of a granted regulative power, is necessarily to be held to be such." (Willoughby's Constitutional Law of the United States, 2nd Students Edition, sec.850, p.797).

Therefore, the objection of the defense is something more than colorable.

The Supreme Court has declared that one of the fundamental rights of the individual protected by the Fourteenth Amendment from infringement by the States is the right to enter into the marriage relationship.

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and, generally to enjoy those privileges long recognized at the common law as essential to the orderly pursuit of happiness by free men. " (Meyer v. Nebraska, 262 U.S. 390,399, 67 L. Ed., 1042,1045; Pierce v. Society of Sisters of Holy Names of Jesus and Mary, 268 U.S. 510, 69 L. Ed., 1070; Farrington v. Tokushige et al, 273 U.S. 285, 71 L. Ed. 646).

The fundamental rights of the individual protected by the Fourteenth Amendment from infringement by the States are guaranteed by the Fifth Amendment against action by Congress (Farrington v. Tokushige et al, supra). It is axiomatic that Congress, except within a limited constitutional area not material here, possesses no authority to legislate concerning marriage or the marriage status. This is a field of domestic law specifically retained by the States under the Tenth Amendment (38 C.J., sec.2, note 20, p.1275).

It is therefore manifest that the authority of Congress under Art.I, sec.8, cl.14 of the Constitution to make rules for the government and regulation of the Army, although plenary in nature, cannot be exercised in such an unreasonable and arbitrary manner as to impair or destroy the personal rights of an individual protected by the Fifth Amendment. A Federal statute absolutely prohibiting marriage of the military personnel under any and all conditions and regardless of their location would probably run afoul of the Fifth Amendment. Such legislation would be arbitrary and capricious and would be denying the individual an inalienable right.

The grant of authority to Congress to make rules for the government and regulation of the armed forces of the nation is a highly necessary auxiliary power to the authority to provide for the common defense and to declare war and to raise and support armies (Art.I, sec.8, cls.1 and 12 of the Constitution). It should therefore be construed in such manner as will insure to Congress the power necessary in the performance of its duty to provide properly for the national defense. Legislation having a legitimate, reasonable and logical connection with the raising, maintenance, discipline and effective use of the army may be sustained notwithstanding the fact that in some degree it may impinge upon personal rights. The liberty of the citizen is at all times subject to limitations and regulations imposed by Congress under Constitutional authority. Under the power to raise armies Congress has the "power to say who shall serve in them and in what way". Compulsory military service is authorized (United States v. Macintosh, 283 U.S. 605,622, 75 L. Ed., 1302,1308; Arver v. United States, 245 U.S. 366, 62 L. Ed., 349).

The synthesizing of the plenary Constitutional power granted Congress to regulate and control the military forces with the personal rights of the individual guaranteed by the Fifth Amendment, is a judicial function (United States v. Darby, 312 U.S. 100,126, 85 L. Ed., 609,623). If an act of Congress prescribing rules for regulating the army has a direct and reasonable relationship to the maintenance of its discipline and control, it is within the legislative power under Art.I, sec.8, cl.14 of the Constitution, notwithstanding its indirect influence on individual rights.

The presence of armed forces of the nation within the territory of a friendly foreign power necessarily creates disciplinary problems not

"*****. Regulations must confine themselves within their appropriate province- must not trench upon that of legislation. A regulation which assumes to prescribe in regard to a matter which is properly a subject for original legislation, departs from 'the range of purely executive or administrative action,' is in a just sense a regulation no longer, and can have no legal effect as such.

****

*** it can scarcely be questioned that an army regulation which should assume to impose a condition upon the enjoyment of a statutory right or the exercise of a statutory authority, to vest or divest rights to pay or rank, to restrict or extend the jurisdiction of a court-martial or otherwise administer justice, to dispose of public property, to direct as to what persons should or should not be enlisted in the army, to prescribe rules of evidence, or to regulate any other subject usually and properly regulated by the legislative department under the powers conferred upon Congress by the Constitution- would be ultra vires and unauthorized.

****

The widest discretion in the framing of regulations may, it is conceived, properly be taken by the Executive in a case where the enactment conveying the authority has been prompted by the necessities of a grave public emergency, and especially an existing or impending state of war." (Winthrop's Military Law & Precedents, Reprint, pp.33,34,35).

The maintenance of discipline and control over the armed forces demands the exercise of a wide discretion and the employment of a great variety of means. The department of government charged with the responsibility of maintaining an efficient fighting force can best determine the methods of obtaining and keeping discipline. Congress may well leave the details of discipline to those best qualified.

The order in question is directly related to the problem of discipline and appears to be a practical and sensible method of maintaining control of officers and soldiers in one of the facets of their relationship to Icelandic citizens and subjects which is particularly personal and sensitive. It is a valid exercise of the constitutional grant to Congress to make rules for the government and regulation of the land forces, and is well within the authority granted the President "to make and publish regulations for the government of the army".

> "The power of the executive to establish rules and regulations for the government of the army is undoubted. ***. Such regulations cannot be questioned or defined because they may be thought unwise or mistaken." (United States v. Eliason, 16 Pet. 291,300, 10 L. Ed., 968,972; In re Brodie 128 Fed. (CCA) 665).

It is suggested in the record of trial that the commanding general, USAFI had adopted a policy not to approve any application for permission to marry, regardless of facts and circumstances. The War Department order vested in the commanding general discretion to determine to whom and under what circumstances permission to marry would be granted. He may well have determined that conditions in Iceland are such that the inter-marriage between military personnel and Icelandic women require universal interdiction. It is his peculiar duty and function to determine such fact. Interference with the exercise of such authority should not be tolerated and is not authorized (Creary v. Weeks, 259 U.S. 336, 66 L. Ed., 973).

8. The violation by accused of the standing order of the War Department is clearly a violation of the 96th Article of War inasmuch as it was a military offense to the prejudice of good order and military discipline.

9. For the reasons herein stated, I am in accord with the conclusions of the majority of the Board of Review and am of the opinion that the record is legally sufficient to support the findings of guilty and the sentence.

B. Franklin Riley Judge Advocate

567

CONFIDENTIAL

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL
FOR THE
EUROPEAN THEATER OF OPERATIONS

In reply refer to:
CM ETO 567

SUBJECT: CM ETO 567, T/5 HORACE E. RADLOFF (6668608), Company H, 10th Infantry.

TO : Staff Judge Advocate, Headquarters, 5th Infantry Division, APO 5, U. S. Army.

1. Herewith transmitted is copy of holding of the Board of Review also copy of the concurring holding in the case of the soldier named above. You will note that the Board finds the record legally sufficient to support the findings of guilty and to support the sentence.

2. I concur in both the majority and concurring holdings of the Board of Review.

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

2 Incls:
Incl.1: Holding of Board of Review.
Incl.2: Concurring Holding.

REC'D JA 5' DIV.
AUG 18 1943

FOR VICTORY BUY UNITED STATES WAR BONDS AND STAMPS

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

Board of Review.

ETO 571.

12 JUL 1943

UNITED STATES	VIII FIGHTER COMMAND.
v.	Trial by G.C.M., convened at AAF Station F-345, 9-10 June 1943.
Corporal ALFRED G. LEACH (11020041), 2031st Gunnery Flight (Prov).	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Disciplinary Training Center #1, Shepton Mallet, Somerset, England.

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 specifications:

CHARGE: Violation of the 96th Article of War.
Specification: Number 1.
In that Corporal Alfred G. Leach, 2031st Gunnery Flight (Prov), did at New Holland-Barrow Road on or about 20 May 1943, unlawfully and indecently assault a British civilian female, named Joyce Brown, aged eleven years.
Specification: Number 2.
(Finding of not guilty).

He pleaded not guilty, and was found not guilty of Specification 2 and guilty of Specification 1 and of the Charge. 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, designated Disciplinary Training Center #1, APO 508, U. S. Army, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The undisputed evidence for the prosecution shows that at 10:30 p.m. on 20 May 1943 Joyce Brown of Goxhill Road (Goxhill community, Lincolnshire, England) an English girl aged 11 years, was sent by her father to secure some evergreens from a Mr. Stainton near Barrow Hall gates (R.8-9). She started out on her father's bicycle and after passing Thornton Crossroads met a "Yankee", also riding a bicycle, who shouted "Oie" and asked her the way to Goxhill. The girl identified accused as the "Yankee". She dismounted to see what he wanted and accused turned around and joined her. After telling accused the way to Goxhill, Joyce walked on and accused accompanied her (R9-10). He gave her two tablets of chewing gum which she put in her pocket. After they passed Thornton Crossroads he asked the girl if she would go into a field with him but she refused, saying that she was in a hurry. Accused, who had been holding on to her bicycle handle-bars, took her across the pathway to a bank and laid down both bicycles (R.10). Taking her wrist he took the girl up the bank and lifted her over a hedge. Accused then went over the hedge, put his hand on her hips and pulled her down on the grass. He removed her knickers, unfastened his trousers "in the front", "took his Thing out" and put it between her legs. Pressing her side hard, accused moved his body up and down for five minutes. Suddenly he jumped up and sprang over the hedge, leaving the girl lying in the field. She put her knickers on and went over the hedge but the "Yankee" and his bicycle had disappeared (R.11-12). Joyce did not know what the man was doing when they were in the field, nor why he did it to her (R.16).

On the same evening two English civilians, Jack Robinson and Thomas Clark, both of Barrow-on-Humber, were walking on the road to Thornton Crossroad when they saw a man take a bicycle from the bank. He ran about 12 yards, leaped on his bicycle and disappeared. A few yards further on they saw a little girl sitting on the bank, pulling up or adjusting her underclothes which were down to her ankles. They asked her "Who is that man?". The girl began to cry, replied that he was a "Yankee" and that "He took off my knickers and laid on my belly" (R.16-18, 20-21). After ascertaining that the girl's name was Brown and securing her father's name and address, Mr. Robinson took her to a police constable named Collingham (R.17-18,21).

According to the records of accused's organization, bicycle number 65694 had been issued to him (R.18-19;Ex.C). A bicycle was "brought into the court-room and marked Exhibit 'D' " (R.19). Both Mr. Robinson and Mr. Clark testified that the bicycle in court was similar to that ridden by the man they saw that evening. Although they could not positively identify the bicycle (Ex.C), the basis of similarity between the two machines was that the rear mudguard in each instance was painted white (R.19,21).

At about 12:15 a.m. (21 May) in the presence of police constable Robert Collingham who was stationed at Barrow-on- Humber, Joyce Brown told Mr. Robinson that a "Yankee" had given her some chewing gum, had

removed her knickers and laid on her belly. Constable Collingham removed from her possession two tablets of chewing gum and returned Joyce to her home (R.22,24). The following morning he was shown by Mr. Clark the place where the girl had been seen the previous evening. A patch of grass in the field on the other side of the hedge was flattened down "as if some heavy weight had been laid on it recently" (R.22-23). When questioned later as to his movements on the evening of 20 May, accused told Constable Collingham that he "went with a girl" but had not raped her. "After being cautioned" by Collingham (R.23) and told that any statement made would be used against him (R.25), accused made a written statement to the same effect. He further stated therein that he did not have intercourse with her, that he had "sucked her off" and that she "*** did not put up any fight about it. In other words, she agreed to it" (R.23-24;Ex.E).

Captain Philip Kremer, Air Corps, Headquarters Squadron, First Service Group was ordered by Colonel Pollard and Captain Martin to obtain evidence and to prepare the charges. After being asked by Captain Kremer if he wished to make another statement and being told by that officer that any such statement would be used against him, accused made a second written statement to the effect that on 20 May 1943 he had gone to New Holland on a bicycle and left the village for Barrow about 2200 hours. On the road between New Holland and Barrow he met a girl riding a bicycle, started talking to her and gave her some gum. He then took her into a field, removed her "pants" and put his penis between her legs. Upon his request she played with his penis while he "sucked her off. She got on her back of her own accord". After "completing the act" he returned to his station on his bicycle (R.25-26; Ex.F).

Joyce Brown later identified accused in a line of four or five men, all of whom were similarly dressed and very much alike in appearance (R.26).

Dr. Thomas H. Kirk of Burgate, Barton-on-Humber examined the girl the day after the occurrence and found no physical evidence of rape (R.6).

4. No witnesses were presented by the defense and accused, upon being advised of his rights elected to remain silent (R.27-28).

5. The evidence is legally sufficient to sustain the finding by the court that accused did, at the time and place alleged, unlawfully and indecently assault Joyce Brown, a British civilian female aged 11 years. The fact that an indecent assault was committed was clearly established by the testimony of the victim and by the two written statements of accused himself, the statements differing from the testimony of the girl only as to the manner in which the assault was consummated and as to the question of consent by the victim.

The girl, who was 11 years of age testified that she did not know what accused was doing when they were in the field, nor did she know why he did it to her.

"It is no defense that the attack was made upon *** one ignorant of the nature of the act. *** The same rule applies where the party assaulted does not know what the act is. *** And even nonresistance is no defense to an indictment for an assault with intent to take indecent liberties, when the defendant is a schoolmaster and the person assailed a female pupil, and there is no actual assent. ***. Where medical practitioner had sexual connection with female patient of the age of fourteen years, *** it was held that he was guilty of an assault, the jury having found that she was ignorant of the nature of defendant's act, ***" (1 Wharton's Criminal Law, 12th Ed., sec.809, pp.1104-1105) (Underscoring supplied).

"Want of resistance on the part of the person assaulted does not purge the assault of its criminality." (5 C.J., sec.184, p.723).

"Mere submission to an indecent act, without any positive exercise of a dissenting will, where, owing to circumstances, the person submitting is in ignorance of the nature of the act, is not such a consent as the law contemplates, so as to prevent the act from being an assault, and the age and the mentality of the subject of an indecent assault should always be considered in determining the presence or absence of consent." (5 C.J., sec.228, p.743) (Underscoring supplied).

The question as to whether the victim consented to the act committed was a fact for determination by the court. The appearance of the victim, her age, her capacity to understand what had occurred and her truthfulness were matters for observation by the court. The court evidently found as a fact that she did not comprehend the nature of the act and the evidence was legally sufficient to justify its conclusion.

The offense committed by accused, namely an indecent assault upon a female minor child was clearly such an act as to bring discredit upon the military service, and constituted a violation of Article of War 96. It is not necessary that the specification contain an allegation to the effect that the offense committed was to the discredit of the military service.

6. The staff judge advocate commented upon several irregularities appearing in the record of trial and further detailed comment on these irregularities is unnecessary. The statement made by the girl before the witnesses Robinson, Clark and Collingham that the man "took off my knickers and laid on my belly" was hearsay and inadmissible.

"Statements made by the victim of a crime, which are not part of the res gestae **** are hearsay and inadmissible ****. There is an exception to this rule **** in prosecutions for rape, where the fact that the prosecutrix immediately made complaint of the offense to a third person is admissible for the purpose of corroboration. Her statements as to the details of the affair are inadmissible, however. **** The rule, however, does not extend to the crime of taking indecent liberties with a child, or to other offenses. The reasons for receiving such evidence is not present in cases of assault, other than rape cases." (1 Wharton's Criminal Evidence, sec.437, pp.685-686) (Underscoring supplied).

Although the foregoing statement by the victim of the assault was in fact inadmissible, in view of the undisputed evidence establishing accused's guilt of the offense alleged, the admission of the statement did not injuriously affect his substantial rights. (AW 37).

7. When the prosecution rested its case the defense "asked the court for acquittal on both the specifications and the charge" on the ground of insufficiency of evidence. The court "dismissed specification 2 and sustained specification 1 and the charge" (R.27). With reference to Specification 1 of the Charge, the denial of what was in substance a motion for a finding of not guilty was clearly justified, as the evidence which had been presented by the prosecution was sufficiently substantial in character to warrant the court's consideration when making its ultimate findings.

8. At the close of the case the trial judge advocate asked the court to take judicial notice of the criminal laws of England, and quoted what purported to be Section 52 of the Offenses against the Persons Act of 1861, wherein an indecent assault upon any female is deemed a misdemeanor and is made punishable by imprisonment not exceeding two years with or without hard labor. It was also provided therein that such an assault may consist of carnal knowledge but need not necessarily do so. The sentence imposed by the court herein, included confinement at hard labor for two years. The imposition of the maximum period of confinement provided for in the English statute justifies at least an inference that the court considered the statute as persuasive if not actually controlling, with reference to punishment imposable for the offense alleged. No statute of England can have any legal effect upon the punishment to be imposed by a United States Army court-martial (CM 210762, Valeroso). The action of the trial judge advocate in requesting the court to take judicial notice of the statute in question was improper and such practice is not approved.

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There is no Federal statute of general application or provision of the District of Columbia Code denouncing the offense alleged. (Dig. Ops. JAG., sec.399(2), pp.246-247). The offense herein described is not listed in the table of maximum punishments (1928 M.C.M., par.104c, sec.A, p.97). It is stated in paragraph 104c, after reference to the table of maximum punishments established by Executive Order, that:

> "*** Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service."

In CM 210762, Valeroso, with reference to the above quoted sentence, it was stated that:

> "The word 'statute' in the above sentence clearly refers to a statute applicable to courts-martial ex proprio vigore or made applicable to such courts by some other statute ****** or competent order. The sentence quoted does not confer any validity in courts-martial upon a statute not otherwise applicable in such courts." (Underscoring supplied).

Therefore, when the court imposed sentence in the instant case, it was not bound by the Table of maximum punishments, or by any applicable statute specifically denouncing the offense alleged, setting forth the maximum punishment imposable therefor and authorizing penitentiary confinement. However, the District of Columbia Code, after prescribing punishments for assaults with intent to kill, to rape, to commit robbery and for other types of assault, further provides:

> "Sec. 22-503 (6:28). ****. Whoever assaults another with intent to commit any other offense which may be punished by imprisonment in the penitentiary shall be imprisoned not more than five years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, sec. 805)."

The assault alleged in the instant case is of a less serious character than the type denounced in the above-quoted section because penitentiary confinement is not authorized punishment for a violation of the offense under consideration, but is authorized punishment for commission of the assaults to which reference is made in the statute. Consequently, the period of confinement imposed for commission of the offense alleged should not exceed the maximum period of confinement authorized for commission of the more serious offenses set forth in section 22-503 (6:28) District of Columbia Code. As the court could, therefore, have sentenced accused to a longer period of confinement, the reference to the provisions of the English statute did not injuriously affect the substantial rights of accused.

9. Accused is 22 years of age. He enlisted September 10, 1940 for three years and had no prior service. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 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. An indecent assault of the nature alleged is such an offense.

10. The court was legally constituted. 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.

R. Franklin Ritter, Judge Advocate

Eldan Bandholm, Judge Advocate

Elwood W. Sargent, Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. TO: Commanding General, VIII Fighter Command, APO 637, AAF Station F-341.

1. In the case of Corporal ALFRED G. LEACH (11020041), 2031st Gunnery Flight (Provisional), attention is invited to the foregoing holding by the Board of Review that the record 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 foregoing holding and this indorsement. The file number of the record in this office is ETO 571. For convenience of reference please place that number in brackets at the end of the order: (ETO 571).

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

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

Board of Review.

ETO 580. 12 JUL 1943

UNITED STATES v. Second Lieutenant BRYCE A. GORMAN, (O-1584285), (AUS), Quartermaster Corps.	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Salisbury, Wiltshire, England, 14 June 1943. Sentence: Dismissal.

HOLDING by the BOARD OF REVIEW
RITTER, 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: In that 2nd Lieutenant Bryce A. Gorman, General Depot G-50, U.S.Army, was, at Bournemouth, Hants, England, on or about 28 March 1943, in a public place, to-wit: in and near the Norfolk Hotel, Bournemouth, Hants, England, drunk and disorderly while in uniform.

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that 2nd Lieutenant Bryce A. Gorman, General Depot G-50, U.S. Army, did at Bournemouth, Hants, England, on or about 28 March 1943, wrongfully and unlawfully solicit 2nd Lieutenant Douglas C. Mitchell, Corps of Military Police, U.S.Army, to commit the crime of sodomy by suggesting an opportunity to feloniously and against the order of nature to have carnal connection with the said 2nd Lieutenant Douglas C. Mitchell, U.S. Army.

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Specification 2: In that 2nd Lieutenant Bryce A. Gorman, General Depot G-50, U.S.Army, did at Bournemouth, Hants, England, on or about 28 March 1943, wrongfully and unlawfully solicit Private First Class Percy O. Purcell, Company L, 115th Infantry, 29th Division, U. S. Army, to commit the crime of sodomy by suggesting an opportunity to feloniously and against the order of nature to have carnal connection with the said Private First Class Percy O. Purcell.

Specification 3: In that 2nd Lieutenant Bryce A. Gorman, General Depot G-50, U.S. Army, did at Bournemouth, Hants, England, on or about 28 March 1943, wrongfully and unlawfully solicit Technician 5th Grade Leslie W. Formby, Company L, 115 Infantry, 29th Division, U. S. Army, to commit the crime of sodomy by suggesting an opportunity to feloniously and against the order of nature to have carnal connection with the said Technician 5th Grade Leslie W. Formby.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, Commanding Officer, Southern 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, approved only so much of the finding of guilty of Charge I and the Specification thereunder as involves a finding that accused was drunk at the time and place alleged while in uniform, in violation of the 96th Article of War, confirmed the sentence and pursuant to Article of War 50½, withheld the order directing the execution thereof.

3. According to his own story, accused, on duty at General Depot G-50, was given leave for the weekend beginning 27 March 1943 and went by train to attend the opening of an American Red Cross Officers' Club in the Ambassador Hotel at Bournemouth where he arrived Saturday about 6:00 P.M. He had "drinks" on the way (R.25). He had been drinking Sunday afternoon 28 March 1943 at the Norfolk Hotel apparently until the bar closed in the middle of the afternoon (R.26), with Berkham White, an employee of the Red Cross Club, had met Second Lieutenant Douglas C. Mitchell, Company "B", 707th Military Police Battalion, and had also developed quite a "headache". Just prior to dinner and while he was "rather hazy" he was invited upstairs to Lieutenant Mitchell's room and after going up to the room he was "quite hazy" (R.25). He awakened in his own room about 5:00 A.M. on Monday morning, remembered his train was to leave about 5:00 or 5:30, got up and "left the room but there was an M.P. soldier there who told me that I could not leave the room and I would have to wait until Lt. Mitchell arrived". He could not recall the later happenings of the afternoon and evening of 28 March 1943 because he was drunk (R.26).

4. The evidence for the prosecution is substantially as follows: 2nd Lt. Douglas C. Mitchell testified that he was introduced to accused by Berkham White on the evening of 28 March 1943 and shortly thereafter invited accused with other officers and a lady up to his room for a drink. He soon discovered that accused was "considerably under the weather or drunk and displaying rather strange characteristics". Accused asked witness if he (accused) could sleep with him and, after being told that there were many vacant rooms in the Club (R.15), persisted in his request "indicating by his actions and statements to me that he had desires for sexual relations of one kind or another" (R.16). To avoid further meeting with accused witness left the hotel by the rear exit as soon as accused and White had left his room. He later had supper in the Norfolk Hotel grill room and on entering the hotel lounge adjoining about 10:00 o'clock, he was approached by White who said he had had considerable trouble with accused that evening in the Norfolk and that he was then drunk outside (R.15). He immediately went out in front of the hotel and found accused "very drunk" in the care of two enlisted men, Private First Class Percy Purcell and Corporal Leslie W. Formby, both of Company "L", 115th Infantry. Witness put accused in his jeep in the rear seat with Formby who got out at the Miramar Red Cross Club. On the way there he "very definitely" overheard accused endeavoring to persuade Formby to spend the night and sleep with him. White and accused were then driven to the American Red Cross Officers' Club where accused was staying and White had to help accused into the hotel (R.16). Accused was definitely drunk; he did not molest witness; it was all talk (R.17).

Purcell and Formby were together having a drink in the Norfolk Bar, a public place (R.14) at 9:15 P.M. of 28 March when they first saw accused who asked Formby for a cigarette (R.7). Purcell testified that accused told him he "was cute enough to kiss" and asked if he would sleep with accused that night. He also asked witness to get rid of Formby. A civilian Red Cross worker asked them to take care of accused while he went for a taxi, and later returned with Lieutenant Mitchell. Accused was pretty drunk. He told witness "he would rather sleep with me than a woman" and in his opinion "he was trying to have sexual intercourse with me". Witness who had a date then left (R.7). Formby testified that he heard what accused said to Purcell. After Purcell left, accused who was drunk, continued his conversation with this witness making substantially the same statements and request and putting his arm around his waist (R.12). Accused was not boisterous nor was he annoying anyone (R.14).

5. The only evidence except his own testimony presented by the accused was character testimony of three officer acquaintances who denied he had exhibited homosexual tendencies towards them, but two of whom admitted that at times he became intoxicated, and that Major Lewis H. Loeser, Medical Corps, specialist in mental and nervous diseases, who had accused under hospital observation for more than a month to determine his sanity and mental condition. Accused was found sane and responsible

for his actions, not only on 5 May 1943 the date of the hospital report, but also on 28 March 1943. The report of the Board was introduced as Defense Exhibit 'A'. Major Loeser testified that the board did not think accused was a homosexual (R.19).

6. That accused was drunk during the afternoon and night of 28 March 1943 is admitted. That he was in the Norfolk Hotel in Bournemouth, a public place, during at least some of this period of time is undisputed. There is no direct evidence that he was in uniform, but as stated by the Theater Staff Judge Advocate, ETOUSA., the fact that he was an officer of the Army of the United States in this theater, and that he was obviously recognized and treated as such by two enlisted men who were strangers to him and who recognized him at the trial, affords a basis for the legitimate inference that he was in uniform (CM ETO 339, Gage; CM 121825, CM 121984, Dig.Ops. JAG., 1912-1940, sec.453(11), p.342-3). He was not shown to have been disorderly.

To offer and solicit the opportunity to commit sodomy is an offense under the 96th Article of War (CM 145266, CM 145155, Dig.Ops. JAG., 1912-1940, sec.454(15), p.349)). The evidence here shows that accused, by words and actions, offered and solicited such opportunity so unmistakedly that all understood his meaning. This was fully and clearly brought out by the testimony of three witnesses. That accused was drunk or in bad company cannot excuse or condone his conduct.

7. There were several irregularities in the proceedings, the principal ones having been commented on by the Theater Staff Judge Advocate in his review and none of which are prejudicial to accused.

8. Accused is 29 years of age and single. He enlisted 8 June 1942 and was commissioned a Second Lieutenant, Quartermaster Corps, AUS., on 11 December 1942.

9. The court was legally constituted. No errors materially affecting the substantial rights of accused were committed during the trial. For the reasons hereinbefore stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and the specifications thereunder and so much of the finding of guilty of Charge I and its specification as involves a finding that accused was drunk at the time and place alleged while in uniform, in violation of Article of War 96, as approved by the confirming authority, and is legally sufficient to support the sentence.

B. Franklin Riter, Judge Advocate

Herbert Burchstein, Judge Advocate

Ellwood K. Forgeus, Judge Advocate

1st. Ind.

WD, Branch Office TJAG., with ETOUSA. 12 JUL 1943 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Second Lieutenant BRYCE A. GORMAN (O-1584285) Quartermaster Corps (AUS), General Depot G-50, attention is invited to the foregoing holding of the Board of Review that the record is legally sufficient to support the findings as modified and confirmed 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 580. For convenience of reference please place that number in brackets at the end of the order: (ETO 580).

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

(Sentence ordered executed. GCMO 14, ETO, 18 Jul 1943)

252278

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

Board of Review.

ETO 595.

20 JUL 1943

UNITED STATES	V CORPS.
v.	Trial by G.C.M., convened at Bristol, England, 2 July 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Penitentiary.
Private JOHN M. SIPES (39239720), Company A, 56th Signal 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. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private John M. Sipes, Company A, 56th Signal Battalion, did, at Patchway, Gloucestershire, England, on or about 2400 hours, 15 June 1943, with intent to commit a felony, viz, rape, commit an assault upon Company Sergeant Major Joan Whiffen, Auxiliary Territorial Service (British), by willfully and feloniously throwing her to the ground and disarranging her dress, and by saying, "I don't care, I'm going to fuck you, I'm telling you", or words to that effect.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for wrongfully striking a fellow soldier in the face with his fist in violation of Article of War 96, 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 10 years at such place as the reviewing authority may direct.

The reviewing authority approved the sentence, but reduced the period of confinement to five years, 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 establishes, without conflict or dispute, the following facts:

Company Sergeant Major Joan Whiffen, of the British Auxiliary Territorial Service, Bicksfields Camp, Winterborne, England, on the evening of 15 June 1943, between the hours of 2300 and 2400 was returning to her station riding a bicycle (R.8). When in the vicinity of Patchway, Bristol, England (R.15,19) she overtook and passed an American soldier also mounted on a bicycle. The soldier overtook her and said: "Where are you going?" Whiffen rode on, paying no heed and making no reply. Upon turning a corner the soldier rode his bicycle straight into Whiffen and knocked her from her bicycle (R.8,11). His action was deliberate (R.12). Whiffen had seen an American sentry some distance past on the road she had traveled. She abandoned her bicycle and ran in the direction of the sentry. The American soldier pursued her on his bicycle. When near her he jumped off the bicycle and grabbed her pushing her to the ground near the hedge at the side of the road exclaiming "I am going to fuck you, I am telling you." He fell on top of the girl and put his hand beneath her clothes and on her personal parts (R.9,10,12-14). The couple were on the ground for a few seconds when Whiffen told him she desired to talk to him (R.12,13). Thereupon he allowed her to regain her feet. She started to walk towards the sentry who was not far away. She screamed as soon as she was free from the soldier who again seized her and pushed her to the ground. During the ensuing struggle the soldier was on top of her. She screamed again and struggled away from him. Two American soldiers approached, and the soldier assaulting her ceased his attack and ran. He had been drinking (R.10,12). Whiffen had previously neither seen nor known her assailant (R.13,14).

Private J. T. Brazil, Company B, and Private James W. Bucher, Company A, both of the 56th Signal Battalion were, on the night of 15 June 1943 at about 2400 hours in the vicinity of Patchway, Bristol, England. They were sitting smoking behind a hedge near a public road. They heard someone talking and the sound of a bicycle falling to the ground and then a cry for help. They sprang to their feet and ran out into the road in front of the hedge. A man, identified by Bucher as an American soldier, was running across the field in the direction of B Company station. Brazil called after him. On the ground was a girl who was hysterical and "upset". Her clothes were disarranged and her hair "twisted and tangled up". Her stockings were torn. Upon Bucher reaching her she asked for her cap. He found it for her. Brazil commenced searching on the ground for her hat pin. The girl said "don't run off, stay here with me" (R.15-19). By that time the sentry had arrived at the scene.

Immediately thereafter the Officer of the Day, Lieutenant Atkins and Sergeant Weller drove up in a "jeep". Brazil went to meet them and upon informing them of the direction taken by the fleeing soldier he returned to Bucher and the girl. An English air-raid warden and his wife appeared. The girl mentioned the fact that there was a bicycle "down the other way". The guards went to look for it, and brought it back (R.15,17,20). The air-raid warden's wife took the girl to her home accompanied by the Officer of the Day (R.11,15,20). A few steps away from the place where the girl had been discovered a guard found another bicycle with a raincoat on it. Bucher picked up the bicycle and took it to Company A's orderly room (R.15,20,23). Thereafter the bicycle was taken to Company B's orderly room. On the morning of 16 July 1943, the accused in the presence of Captain Boggus, his company commander, and Captain Lester O. Fulcher, commander Company B, 56th Signal Battalion, identified the bicycle and stated he had wrecked it and left it by the side of the road. At that time there was a Government issue raincoat and belt with the bicycle, but the coat was not marked so as to identify it as belonging to accused (R.22-24). The only damage to the bicycle was that a staff or wire leaf on the front hub to the front mudguard or fender was bent in slightly, but not enough to prevent it being ridden (R.24).

Captain Fulcher, on the evening of 15 June 1943, went to the home of a Mrs. Clark, a British Air Raid Warden's wife and there saw an ATS Sergeant Major who was identified as Company Sergeant Major Whiffen. Mrs. Clark's home was in the vicinity of the station of Company A, 56th Signal Battalion. Captain Fulcher received a report that a bicycle had been found in the orderly room of Company A. He returned to the orderly room, inspected the bicycle, ordered that it be put under guard and he then returned to Mrs. Clark's home. He had called Captain Boggus, commander of Company A, and in the presence of Captains Fulcher and Boggus and the local police, Whiffen made a statement of events of the evening (R.23,24).

T/5 Elton L. Scifres, Company A, 56th Signal Battalion, was a room-mate of accused. On the night of 15 June 1943 Scifres went to bed at 11:15 P.M. and up to the hour he went to sleep accused had not come into the room (R.25).

Whiffen, while on the witness stand, identified accused as her assailant (R.11). An identification parade was held on the afternoon of 16 June 1943 at Company B's mess hall. Approximately fifteen white American soldiers were placed on parade. All were members of Company A. Whiffen was present and identified accused as her assailant (R.23,24).

4. Accused, upon being advised of his rights, elected to remain silent and no evidence was offered in his behalf.

5. Lieutenant Colonel Russell V. Eastman was named law member of the court (par.1, GO #91, 2 April 1943; Hqrs. V. Corps). Being the

senior officer present he was also president of the court. The record of trial shows the presence of Lieutenant Colonel Eastman and his active participation in the trial, but does not designate him as the law member of the court. "The fact that the law member of a general court-martial may also be the president of the court is expressly recognized in M.C.M., 83 **** and elsewhere in the Manual for Courts-Martial." (Dig.Ops., JAG., 1912-1940, par.365(g), p.175). The failure of the record to designate the regularly appointed law member as such (his appointment and presence being otherwise affirmatively indicated) is but a clerical mis[illegible]ion and did not prejudice the rights of accused nor affect the regularity of the proceedings.

6. On behalf of the prosecution certain hearsay evidence was admitted: statement of Whiffen to Brazil: "don't run off, stay here with me" when he approached her after hearing her cries for help (R.15); Whiffen's statement to Brazil that her assailant was "a dark fellow" (R.16); and the statement of the sergeant of the guard to Captain Fulcher that "an attempted rape had been made down the road" (R.23). While these statements were clearly inadmissible, their introduction could not have prejudiced accused in the face of the undisputed and convincing evidence of his guilt (AW 37).

7. Assault with intent to commit rape:

> "*** is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. *** The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice. Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted." (M.C.M. 1928, par.149 l, p.179).

> "*** Intention is a fact which cannot be positively known to other persons, no one can testify directly concerning it and the matter must be an inference which the jury must find from the established facts. ***." (1 Wharton's Criminal Evidence, sec.79, p.96).

After knocking the girl from her bicycle accused pursued and overtook her as she ran toward the sentry. He jumped off his bicycle, pushed her to the ground and said "I am going to fuck you, I am telling you." He fell on top of her, and put his hands beneath her clothes and on her personal parts. Although he allowed Whiffen to get up when she said she wanted to talk to him, accused again pushed her down on the ground when she screamed. During the struggle which ensued, he was on

top of her. The girl continued to scream and struggled away from him. Accused ran away as two American soldiers approached. Every element of the crime of rape was established except that of penetration. The actions and words of accused show that he assaulted the girl with the intent to have sexual relations with her. His purpose was defeated only by the resistance of his victim and the approach of the two soldiers. The evidence of the commission of the offense and identity of accused as the perpetrator thereof, is clear and convincing. In the opinion of the Board of Review the record is legally sufficient to sustain the findings of guilty. (CM ETO 78, Watts; CM ETO 489, Rhinehart and Fallucco; CM ETO 492, Lewis).

8. Accused is 34 years of age. He was inducted 15 May 1942 for the duration of the war plus six months, and had no prior service.

9. The court was legally constituted and 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.

10. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 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. Attempt to commit rape is such an offense and the approved sentence is five years. Both conditions of the order are present. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the offense of attempt to commit a felony, viz: rape (USCA, Title 18, sec.455, p.337). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is correct.

B. Franklin Pitts Judge Advocate

William Burchstein Judge Advocate

Elwood H. Sargent Judge Advocate

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CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 20 JUL 1943 TO: Commanding General, V Corps, APO 305, U .S. Army.

1. In the case of Private JOHN M. SIPES (39239720), Company A, 56th Signal 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, 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 595. For convenience of reference please place that number in brackets at the end of the order: ~~(ETO 1113)~~ (ETO 595).

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 611. 23 JUL 1943

UNITED STATES	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ISIAH (NMI) PORTER (34122893), 434th Engineer Company (Dump Truck).	Trial by G.C.M., convened at Tidworth, Wiltshire, England, 30 June 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten 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 above named has been examined by the Board of Review.

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Isiah Porter, 434th Engineer Company (Dump Truck), did, at Whitchurch, Hampshire, England, on or about 5 June 1943, forcibly and feloniously, against her will, have carnal knowledge of Beatrice Annie Kebby.

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 the term of his natural life.

The reviewing authority approved the sentence but reduced the period of confinement to 10 years; designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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3. The accused (colored) was a member of 434th Engineer Company (Dump Truck) (R 31) which was stationed on 5 June 1943 at or near Kingsclere, Hampshire, England (Ex.S). Beatrice Annie Kebby is a British civilian, female and unmarried, aged 23 years, who on and prior to said date resided at #21 Council House, Newbury Road, Whitchurch, Hants, England (R 1,5,12). On the evening of said date a public dance was held at the Church Hall in Whitchurch, which was attended by British civilians, both male and female and also by colored soldiers of the United States Army (R 2,34). The Church Hall is situate about ½ mile from Miss Kebby's home (R 2). Normally it would require 10 to 15 minutes to walk between the two places (R 10).

4. Miss Kebby, appearing as a witness for the prosecution, testified: that on 4 June 1943, between the hours of 7:30 P.M. and 11:00 P.M., she, in company with Miss Annie Page, also a British civilian, attended the dance. A Mrs. Hayward introduced her to two colored soldiers designated as "Chico" and "Rock" who were present in the dance hall (R 1). She danced several times with "Rock". During the evening she and "Rock" went to a nearby public house, the "Bell", where she drank three glasses of cider (R 2,37). She consumed no intoxicating liquor (R 2). Returning to the dance hall at about 9:15 P.M., she had a few more dances with "Rock" and later danced with a colored soldier named "Vernon". At the conclusion of the dance, Misses Kebby and Page and Mrs. Hayward left the hall together. They met "Rock", "Chico" and an unnamed colored soldier on the outside. "Rock" asked Miss Kebby: "Can I take you home?" She said "No" and "Rock" accepted her declination. After arranging to meet Miss Page the next day, Miss Kebby walked up Newbury Street and passed the "White Hart" public house. As she passed the "Bricklayers Arms" public house she heard someone approaching from her rear. It was a colored American soldier, who overtaking her asked if he could escort her home. She replied "No". He continued to follow her and when they were opposite the "lodge" he caught hold of her shoulder and asked if he could get under her umbrella. When they reached a point opposite "Dances corner", he forced her across the road. The accused, sitting in the court room, was identified by Miss Kebby as the colored soldier who thus molested her (R 2,7,12,42).

The accused then pulled Miss Kebby up a lane to a gate; knocked her backwards to the ground, and commenced to remove her clothes. He pulled her knickers down and placed his hand on her private parts. She screamed several times but no help came. Accused put his hand over her mouth and attempted to muffle her cries. She attempted to get away and struggled with him for a long time. He put his shoulder over her mouth. Miss Kebby found her umbrella and struck accused with it. He threw it from her. She bit him on the lip. He knocked her about in the nettles. She freed herself and reached the gate, but accused grabbed her again and said "I'm not going to let you go until I had F-U-C-K". They continued struggling, and during such action accused placed his hand on her private parts. The girl protested, but accused held her hands above her head. He flung her on to the bank and she rolled down on to the gravel by the side of the road. Sitting astride her, he held her prostrate. He struck her head on the ground and again

announced his intention to have intercourse with her. She could see white down his legs which looked like his underpants. The victim must have become unconscious. She did not know whether accused had sexual relations with her or not. She had no recollection of further events until accused pulled her to her feet. He then held her handbag and umbrella, which he returned to her. The girl said "look what you have done to me", because her clothing was wet and she was shivering. He struck matches for the purpose of finding his cap. She looked and found her shoes. Accused produced his handkerchief and said the girl had bitten him. He asked where a telephone was located and said he had to get back to Kingsclere. He went down the lane and Miss Kebby started for home arriving at about 2:30 A.M. on 5 June 1943 (R 4,5,42-48). She went immediately to her mother and informed her: "A black man knocked me down" (R 9).

Miss Kebby had never seen accused previously to the time he accosted her about 11:45 P.M. on 4 June 1943 (R 10).

4. The prosecution corroborated the narrative of Miss Kebby by the following testimony and evidence:

(a) Beatrice Nellie Kebby, 21 Council House, Whitchurch, the mother of the victim, testified that her daughter left home about 7:30 P.M. on 4 June 1943, dressed in clean clothing, but returned about 2:45 A.M. 5 June 1943 with her clothing torn and blood-stained. The girl's back was covered with scratches and bruises; her head and hair were full of dirt; there were bumps on her head; her ankles were cut. She was distressed and crying and said: "I have been knocked down by a colored man". Her private parts had been "damaged". Immediately prior to 6:00 A.M. Mrs. Kebby reported the affair to the authorities and her daughter was examined by a doctor about 2 or 3 o'clock of the afternoon of the same day (R 11-14).

(b) Stephen James Hollett, Police Sergeant #10, the Hampshire Joint Police Force, stationed at Whitchurch, on 5 June 1943 made an examination of a lane known as "Dances Lane" leading from Newbury Road in Whitchurch. The surface of the lane was composed of chalky mud and broken flint. On each side of the lane surface there was a bank covered with a growth of grass and nettles. For an area extending over 6 yards the lane surface was churned out and the grass and nettles on the banks - particularly the left bank - going away from Newbury Road - were freshly trodden down. Witness saw accused at about 7:00 P.M. on 5 June 1943 and there was a faint, slight mark on his lip (R 15,16).

(c) James Ewing, Medical Practitioner, Whitchurch, made an examination of Beatrice Annie Kebby between 4 and 5:00 P.M. 5 June 1943. She seemed dazed and partly stupified. She had abrasions on her shoulders between the shoulders and on her arms, legs and hands, which had been received within 48 hours previous. There were dried blood-stains on her lower abdomen, blood matted into the pubic hairs and on both sides

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of the vagina. Upon opening the vulva there was a small hemorrhage of bright blood. The patient complained of extreme tenderness and further internal examination was not attempted. He made another examination on 7 June 1943 when another slight slight vaginal hemorrhage occurred. He sent her to the hospital for an examination under anesthesia. The hemorrhages were not the result of menstruation. Later on 28 June 1943 he made a third examination of Miss Kebby. The various abrasions had cleared up, except on her left hand there were three deep linear scars (R 19-23).

(d) Jack Rubin, Surgeon, Royal Hampshire County Hospital, Winchester, examined Miss Kebby in the hospital on the evening of 7 June 1943 and found her rational, but a little bit nervous. She had abrasions and scratches on both hands, knees and ankles, over the right buttock, and on the upper and inner aspects of her thighs. The same evening she was placed under an anesthesia and the witness made a vaginal examination. She had a small hymeneal tear anteriorly and to the right. Penetration of a male penis into the vagina could have caused the hymeneal tear and the aperture was large enough to admit a penis. There was a profuse leucorrhoea, which could have been caused by inflammation superinduced by infection and irritation. The witness took from Miss Kebby the following specimens: (1) a specimen of pubic hair; (2) a specimen and slides of the vaginal discharge; (3) 4 ccs. of blood for serum grouping, and a suspension of red blood cells in saline. The specimens were delivered to Detective Inspector Old of Whitchurch police on the morning of 8 June 1943 (R 23-29)

(e) Victim's Clothing, consisting of vest (Ex.A); shoes (Ex.B); skirt (Ex.C); blouse (Ex.D); coat (Ex.E); petticoat (Ex.F) and knickers (Ex.M) was identified and admitted in evidence (R 2,3,29) These had been previously submitted by Detective Inspector Old to the laboratory of Metropolitan Police, Hendon, The Hyde, N.W.9, for examination. The report of the technician, James Davidson, admitted in evidence by stipulation (R 17-18), showed that there was blood-staining on the blouse, petticoat, vest, knickers and coat, seminal fluid on the petticoat, vest and knickers; and mud-staining on all of the articles of clothing.

(f) Accused's Clothing, consisting of U.S. Army cap (Ex.N); Army tunic (Ex.O); Army trousers (Ex.P); short pants (Ex.Q); and Khaki shirt (Ex.R) was identified and admitted in evidence (R 17,29) and it was stipulated that same was in the same condition as when taken from accused's barrack bag on 5 June 1943. These articles of clothing had also been submitted by Detective Inspector Old to the same laboratory of Metropolitan Police, for examination. The report of the technician, James Davidson(being the same report as that above) showed that there was blood-staining on the lower part of the lower hem of the shirt, on the inner aspect of both legs near the fork, on the inner surface of the right fly and on the lining of the left side of the trousers, and on the front of the short pants in vicinity of the fly and down the left leg thereof; mud-staining

on the shirt, tunic, trousers and cap and seminal-staining on the left front near the lower hem of the shirt, and on the front of the left leg of the short pants.

(g) Blood analysis and comparisons. The report of the laboratory technician, (reference, supra) shows that Detective Inspector Old delivered to him the two samples of Miss Kebby's blood taken by the witness, Rubin (d, supra) and upon being tested her blood was classified as belonging to Group A. The blood on accused's shirt, trousers and short pants also classified as Group A.

(h) Soil Samples. The report of the laboratory technician (reference, supra) recites that Detective Inspector Old delivered samples of soil taken from the scene of the crime to the technician for analysis and that comparison with mud taken from Miss Kebby's coat and accused's trousers shows that they are similar to the soil samples submitted by the Detective Inspector.

(i) Statements of accused. The court admitted in evidence two statements of accused (Ex.S, R 31; Ex.T, R 32) without objection by the defense. In these statements he asserted he met a girl at the dance on the evening of 4 June 1943 (whom he thought was Annie Kebby but was not certain). He made an appointment to meet her by a nearby hotel after the dance, and the appointment was kept by both. They proceeded to an obscure place on a road. He admitted he had sexual intercourse with the girl, but asserted that the girl was a voluntary party to it. After the consummation of the act they sat talking for about 35 minutes and agreed to meet the next night at Overton. As they were returning down a hill accused fell and the girl stumbled over him. An argument arose wherein the girl hit him with a stick or parasol. She showed him the way back to camp.

5. Accused, upon being advised of his rights, elected to remain silent (R 41), but the following witnesses produced by the defense testified as follows:

(a) Lillian May Hand, Ridgeways, Mickeldene Road, Whitchurch, was serving refreshments at the dance held at the Church Hall, at Whitchurch on the evening of 4 June 1943. Miss Kebby came towards her complaining, "Oh, my head, my head. I do feel ill". A colored boy not the accused, asked for coffee for her but was given a cup of tea. The girl asked for an aspirin tablet. She looked ill. There were three girls and three colored boys in the group (R 33,34).

(b) Francis Maud Perry, Motor Garage, Whitchurch, on 4 June 1943 lived next door to the Church Hall. About 10:00 P.M. she saw Miss Kebby standing between witness's house and the hall talking to two colored men. They appeared to be persuading her to return to the hall, which she did. She did nothing anyone could disapprove (R 35).

(c) Helena Ann Beal, 43 London Street, Whitchurch, assisted in serving refreshments at the dance at the Church Hall on the evening of 4 June 1943. About 10:30 P.M. she saw Miss Kebby in the kitchen. A colored soldier not the accused, had his arm around her. Witness later saw Miss Kebby and thought she looked sick. Witness advised her to go home (R 36).

(d) William Roberts, Bell Inn, Whitchurch, was licensee of the "Bell" public house. On the evening of 4 June 1943, Miss Kebby was in his place of business. He served her with three glasses of cider (R 37, 38).

(e) Edward E. Wolfe, Captain, Medical Corps, stated that hymeneal tears could occur through exercise, horse-back riding and dancing. "Jitterbugging" could effect such condition.

The witness expressed the opinion that a small hymeneal tear, anteriorly and to the right could not have been produced by sexual intercourse and that he would assume that a female with such hymeneal tear and with her vagina patent was virginal (R 39-42).

6. The court after a recess convened at the scene of the crime. The personnel of the prosecution and defense, the accused, Miss Kebby, and the reporter were present. Upon interrogation by the law member and a member of the court and in the presence of accused, Miss Kebby repeated the incidents connected with the assault upon her pointing out to the court the places where the alleged incidents occurred (R 46-48).

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.

In the instant case Miss Kebby appeared as a witness for the prosecution in its case in chief and was subjected to cross-examination by defense counsel (R 1-11). After the arguments by prosecution and defense she was called to the stand as the court's witness and was examined by the President of the court and members thereof (R 42-46), but she was not cross-examined by either the trial judge advocate or the defense counsel. Thereafter the court convened at the scene of the crime and she was examined as previously stated. The record affirmatively shows the presence of accused and his counsel at the "view of the premises"

and during the examination of Miss Kebby thereat, but no objection was offered nor did defense counsel request the right to cross-examine her. A close comparative study of Miss Kebby's testimony presented on the three separate occasions when she appeared as a witness fails to reveal any material differences. The recitation of events given by her while at the "premises" introduced no fact not shown by her prior testimony. If such narrative be entirely eliminated from consideration, there remains in the record her previous competent testimony in proof of the same facts to which she testified at the scene of the crime. Under the particular circumstances of this case it appears to the Board of Review that the examination of Miss Kebby at the "view" was an error of procedure not injuriously affecting the substantial rights of the accused, and under AW 37 the findings were not thereby invalidated.

7. The following comments on the admission or exclusion of certain evidence are relevant:

(a) The statement of Miss Kebby to her mother immediately upon her reaching home on the night of the assault: "I have been knocked down by a black man" (R 5,9,12 & 13) was admissible for purpose of confirming the victim's testimony and not as proof that a crime was committed. It serves to rebut the inference of consent that might be drawn from her silence. The nature of her complaint may be shown although it involves particulars to some extent (52 C.J., sec.90,91, pp.1063-1067).

(b) It was error for the court to sustain prosecution's objection to defense's question directed to Miss Kebby on cross-examination: "*** why didn't you make an outcry, knock on a door, accost some-one?" (R 7) (Underhill's Criminal Evidence, 4th Ed., sec.675, p.1273). However, it is not prejudicial to the rights of accused in the face of otherwise convincing proof of guilt.

(c) Mrs. Kebby testified that since the assault her daughter "is very highly strung ***. Keeps calling out at night ***. I has to have someone sleep with her". Such testimony was admissible to corroborate Miss Kebby's testimony and to show the probability a rape was committed. (Underhill's Criminal Evidence, 4th Ed., sec.671, p.1262).

(d) The use by Miss Kebby on cross-examination of a map or sketch of Whitchurch without proof of authenticity of the map and without introducing same in evidence (R 7) was error. However, it was an error invited by the defense and cannot therefore be prejudicial. (CM ETO 438, Smith).

(e) There is no direct proof in the record that Detective Inspector Old collected a specimen of soil from "Dances Lane" and delivered it to technician Davidson of the Metropolitan laboratory, nor

that Old received and delivered to Davidson, Miss Kebby's clothing (Exs. A,B,C,D,E,F,M) and accused's clothing (Exs. N,O,P,Q,R). The absence of this proof affects only the weight and credibility of Davidson's report and not its admissibility under the stipulation (R 17) accepting it as his testimony. It is obvious that the court, prosecution and defense were satisfied that the articles examined by Davidson and described in his report were the articles which they purported to be. Under such circumstances the absence of formal proof of identity of the examined articles cannot be prejudicial error.

(f) In the statements made by accused and received in evidence (Exs.S, R 31; Ex.T, R 32) accused denied that he had raped Miss Kebby. They were therefore not confessions. (CM ETO 292, Mickles). However, the statements contained admissions against interest and as such were admissible without proof of their voluntary character. (MCM 1928, par.114g, p.117).

8. Accused's identity as Miss Kebby's assailant on the night of 4-5 June 1943 at or near Whitchurch is proved by (a) accused's admission that he had sexual intercourse with a girl whom he "thinks" was Miss Kebby at the exact time and place described by the victim; (b) Miss Kebby's positive identification of accused as the colored soldier who raped her; (c) evidence of the condition of accused's clothing and the presence of blood thereon of the typing within Miss Kebby's blood group and of mud similar to that found in "Dances Lane", the scene of the assault. There is therefore substantial, competent evidence to sustain the finding of the court that it was accused who raped Miss Kebby.

The victim's testimony displays intrinsic proof of its truth and veracity. It was thrice repeated and there are small, if any, variations in the recitals of the vital facts. The differences are of a nature that gives verity to the testimony rather than doubt. It is substantially corroborated by (a) the girl's prompt complaint of the assault to her mother and her physical and mental condition upon her return to her home; (b) the condition of the locus of the crime discovered by Detective Inspector Old within a short time after the commission of the offense; (c) the torn, mud-spotted and blood-stained condition of Miss. Kebby's clothing and (d) the marks of violence upon her body.

Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM 1928, par.148b, p.165). That the accused accomplished the act of intercourse with Miss Kebby without her consent and with great force and violence is proved beyond all reasonable doubt. Penetration was established by (a) accused's admission of an act of intercourse and (b) Dr. Rubin's testimony of the existence of the rupture of the victim's hymen.

All of the elements of the crime of rape exist. (CM ETO 90, Edmonds; CM ETO 397, Shaffer). The Board of Review is of the opinion that there is substantial competent evidence in the record to support the findings of guilty. The crime was one of barbaric violence and was an exhibition of animalism in its most repugnant form. There are no mitigating circumstances. Accused merits prompt and drastic punishment.

9. Accused is of the age of 25 years. His approved sentence includes confinement for ten years. Confinement in a penitentiary is authorized for the crime of rape by 35 Stat. 1143, 18 U.S.C. 457; 35 Stat. 1152, 18 U.S.C. 567; AW 42. By War Department letter AG 253 (2-6-41) E, 26 February 1941 as amended by War Department letter AG 253 6-13-41, prisoners under 31 years of age and with sentences of not more than 10 years will be confined in a Federal Correctional Institution or Reformatory. Therefore, confinement in Federal Reformatory, Chillicothe, Ohio is proper. Accused's return to the United States and execution of sentence to dishonorable discharge is authorized. (GO #37, ETOUSA, 9 Sep 1942 as amended by GO #63, ETOUSA, 4 Dec 1942).

10. The court was legally constituted and had jurisdiction of the accused and the 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 is legally sufficient to support the findings of guilty and the sentence.

_____ Judge Advocate

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CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 28 JUL 1943 TO: Commanding Officer, Southern Base Section, SOS, ETOUSA.

1. In the case of Pvt. ISIAH (NMI) PORTER (34122893), 434th Engineer Company (Dump Truck), 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. 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 611. For convenience of reference please place that number in brackets at the end of the order: (ETO 611).

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 612. 28 OCT 1943

UNITED STATES	)	VIII BOMBER COMMAND.
v.	)	
Second Lieutenant ALBERT CHARLES SUCKOW (0-562161), Headquarters and Headquarters Squadron, 2nd Bombardment Wing.	)	Trial by G.C.M., convened at AAF Station 123, APO 634, on 9 June 1943. Sentence: Dismissal.

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 with the European Theater of Operations.

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that 2nd Lt. ALBERT CHARLES SUCKOW, Headquarters & Headquarters Squadron, 2nd Bombardment Wing, AAF. Station No. 108, did, at AAF. Station No.123, on or about 2300 hours, 22 May, 1943, commit the crime of sodomy, by feloniously, unlawfully, and against the order of nature having carnal connection with a male human being, towit, with Private David Fenton, 1085th Ordnance Company (Avn), by means of taking the penus of said Private Fenton in his, said Lt. Suckow's, mouth.

Accused pleaded guilty to and was found guilty of the Charge and Specification. 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 for five years. The reviewing authority, the Commanding General of

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the VIII Bomber Command, approved the findings of guilty but only so much of the sentence as provided for dismissal from the service 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 approved by the convening authority, withheld the order directing the execution of the sentence and forwarded the record for examination under Article of War 50½.

3. Certain facts of this case appear from the prosecution's evidence to be as follows: Accused and First Lieutenant Richard T. Westenbarger had been acquainted some two or three months (R 8). They roomed together over the Officers' Club located in the Officers' Mess building, Horsham Street, Faith, England (R 9). A dance was held at the club on the night of 22 May 1943 (R 6). About 12 o'clock midnight, Sergeant, then Corporal, John P. Karoly, Lieutenant Westenbarger (who declared he knew something was wrong with accused (R.9)) both of Headquarters 2nd Bombardment Wing and a Lieutenant Armstrong, went upstairs (R.7) "during the time we thought Lieutenant Suckow was up there" (R 6). On opening the door to the room used for trunk and baggage storage and turning on the light, they saw accused on his knees over an enlisted man, Private Fenton, the latter was stretched out on his back on the floor with his breeches open (R 7,10). His pants were down and his drawers were showing (R 10). His penis was not observed. Accused arose and asked what was going on. Lieutenant Westenbarger sent him to his room. He got Private Fenton off the floor and told him to arrange his clothes and go back downstairs (R 11). At the trial First Lieutenant G. M. Bodenheimer, Headquarters 2nd Bombardment Wing (R 11), Assistant Trial Judge Advocate was called to the stand as a witness for the prosecution and testified that on 7 June 1943 he was returning accused from the hospital at Exeter to Station 123, when accused, after being advised that he need not say anything, voluntarily "admitted his guilt in this case (to him) and expressed his consternation that the affair had occurred" (R 12,13).

Accused presented no defense and elected to remain silent.

4. The only irregularities occurring in the trial of this case have been adequately discussed in the review of the theater staff judge advocate. They are not prejudicial to any substantial rights of accused in view of the plea of guilty and of the evidence disclosed.

5. The record of trial shows that the Trial Judge Advocate particularly asked accused if he understood that by entering his plea of "Guilty" he admitted the allegation of facts set forth in the Specification and that he placed himself in the position whereby the court might impose any sentence upon him deemed fit within the maximum fixed by the Manual for Courts-Martial; if he understood he had the right to plead "Not Guilty" but nevertheless wished to enter the plea of guilty. The accused's response was: "Yes, sir".

The prosecution then proceeded to introduce evidence in support of the Charge and Specification. It must be frankly admitted that the evidence fails to establish the necessary fact of entrance of Fenton's penis into accused's mouth (CM ETO 339, Gage). It is apparent that the Trial Judge Advocate realizing the proof was deficient in this regard attempted to supply the necessary evidence by means of Lieutenant Bodenheimer's testimony covering accused's extra-judicial admission of guilt. As pointed out by the theater staff judge advocate Lieutenant Bodenheimer's statement: "He (meaning accused) admitted his guilt in this case, and expressed his consternation that the affair had occurred" (Underscoring supplied) is a mere conclusion of law and is not a statement of fact. (Walker v. McLoud, 204 U.S. 302; 51 L. Ed., 495; 22 C.J., sec.731, pp.634-637). Hence, its probative value is negative.

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 212197, Rocker).

> "A plea of guilty does not exclude the taking of evidence, and in the event that there be aggravating or extenuating circumstances not clearly shown by the specification and plea, any available and admissible evidence as to such information should be introduced." (MCM, 1928, par.70, p.54).

It is clearly indicated that accused fully understood the meaning and effect of his plea, which was entered after proper explanation thereof had been made to him by the trial judge advocate. Sufficient competent evidence was introduced to apprise the court of the circumstances under which the offense was committed. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty.

6. Although not admitted as evidence during the trial, there is attached to the record of trial and marked "Prosecution's Exhibit 1", a copy of the proceedings of a Board of Officers, 36th Station Hospital, dated 31 May 1943, convened in the case of accused. Among the findings, was one that accused "is a sexual pervert, or a true sodomist."

A member of the court requested the presentation of the report involving accused from the 36th Station Hospital. The prosecution objected on the ground that it was irrelevant and immaterial and that it was not proper evidence. The accused stipulated with the prosecution that he was sent to the hospital first, to have a mental examination and second, to get him away from his home station during trial. The Law

Member declared that the reason the question was raised as to the report was to make it available to the defense and ruled that it did not have any bearing on the case at that point of trial (R 13). After a recess, the prosecution offered to stipulate that "Prosecution's Exhibit 1" was the original report of a Board of Officers of the 36th Station Hospital convened under the provisions of paragraph 35c, M.C.M., 1928 and Memorandum No. W6 15/4/43 War Department, AGO Washington and pursuant to paragraph 2, GO #35, Hqrs., 36 Station Hospital in accused's case. The defense declined to agree to the stipulation. As a consequence the report was not admitted in evidence (R 14).

The accused raised no issue as to his mental capacity to commit the offense. The medical report was primarily intended for use by the appointing authority (M.C.M., 1928, par.35c, p.26). The trial judge advocate was correct in refusing to introduce it in evidence and the Law Member acted rightly in sustaining the position of the trial judge advocate. However, the latter by his offer to stipulate it in evidence made it available for the defense if it elected to raise the question of accused's mental responsibility. Inasmuch as the defense refused to stipulate and thereafter closed its case without presentation of further evidence, there was no prejudice to the rights of accused. Oppositely, the rights of the accused were protected by this procedure.

7. Among the accompanying papers is a letter from the accused directed to the Commanding General, European Theater of Operations and to the Commanding General, 8th Air Force, complaining of the "improper administration of military justice" in connection with his trial, together with certificates of the facts and circumstances connected with the trial of accused by the officers referred to in the complaint. The extraneous issues raised thereby were for consideration by the approving and confirming authorities and not for the Board of Review. It is evident that proper consideration was given thereto.

8. Accused is 23 years of age. He was appointed a Second Lieutenant in the Air Corps, 16 September 1942 (accused states his appointment was effective 5 August rather than 16 September 1942) and placed on active duty for the duration of the war and six months, on 16 September 1942.

9. The court was legally constituted. No errors affecting the substantial rights of the accused were committed during the trial. For the reasons hereinbefore 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.

B. Franklin Pike, Judge Advocate

Robert Bendetsen, Judge Advocate

Edward H. Lorgen, Judge Advocate

CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 28 JUL 1943 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Second Lieutenant ALBERT CHARLES SUCKOW (O-562161), Headquarters and Headquarters Squadron, 2nd Bombardment Wing, 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. 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 612. For convenience of reference please place that number in brackets at the end of the order: (ETO 612).

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

(Sentence ordered executed. GCMO 16, ETO, 3 Aug 1943)

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

Board of Review.

ETO 656. 4 AUG 1943

UNITED STATES v. Private LYLE C. TAYLOR, JR., (16048202), 367th Bombardment Squadron, 306th Bombardment Group (H), AAF.	VIII BOMBER COMMAND. Trial by G.C.M., convened at AAF Station 111, 8 July 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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 Pvt. Lyle C. Taylor Jr., 367th Bomb Sq., 306th Bomb Gp. (H), did at Station 111, APO 634, on or about 28 May 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Prestwick, Scotland on or about 6 June 1943.

CHARGE II : Violation of the 69th Article of War.
Specification: In that Pvt. Lyle C. Taylor Jr., 367th Bomb Sq., 306th Bomb Gp. (H) having been placed duly in confinement in the Guard House AAF Station 111 on or about 19 April, 1943, did at AAF Station 111, APO 634 on or about 28 May 1943, escape from said confinement before he was set at liberty by proper authority.

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CHARGE III: Violation of the 96th Article of War.
Specification: In that Pvt. Lyle C. Taylor Jr., 367th Bomb Sq., 306th Bomb Gp (H), did at AAF Station 111, APO 634 on or about 28 May 1943, wrongfully take and use without proper authority a certain motor vehicle, to wit; a 1942 four door Ford Sedan government registration number 116524, the property of the United States of the value of more than fifty dollars, ($50.00).

He pleaded not guilty to Charge I and to its Specification, guilty to Charges II and III and to the Specification under each, and was found guilty of all charges and specifications. Evidence of two previous convictions was introduced as follows: (1) by special court-martial, larceny of a bicycle in violation of AW 93; (2) by general court-martial, (a) breaking restriction, (b) wrongfully and unlawfully destroying government property, (c) failing to obey an order of a commissioned officer and (d) wrongfully and unlawfully taking and using a government vehicle without proper authority, all in violation of AW 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 10 years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 19 April 1943 accused was placed in confinement at the guard house at AAF Station 111 by order of Captain Richard E. Walck, 367th Bombardment Squadron (R 12). On 28 May 1943 accused was in bed when a check was made by the guard at 11:00 p.m. Between midnight and 12:15 a.m. it was discovered that accused and another prisoner named Cumbie had disappeared (R 8,10). No one had given him permission to leave the guard house that night (R 11-12). The defense stating that there was no objection thereto an extract copy of the guard house morning report, Station 111, APO 634 was admitted in evidence (R 11; Pros.Ex.I). It contained an entry to the effect that accused escaped on the date alleged at about 2330 hours.

About 11:30 p.m. 28 May 1943 Corporal Charles M. Freeman, detached service, First Bombardment Wing Headquarters, driver for a Colonel Putman, left a four door, six cylinder 1942 Ford in the driveway before the mess hall at Station 111. He gave no one permission to take the car. Freeman left in the shield over the steering wheel a trip ticket which had been issued for the use of the car (R 15-16,18). It was stipulated by the prosecution and defense that the "reasonable value" of the car was $400 (R 27).

About midnight 28 May 1943, accused appeared at a house at 38 Castle Road, Bedford, England which was about four miles from AAF Station 111. He asked Miss Kathleen Higgins who resided there to tell "Dorothy, the WAAF" that "we are getting away", that she should "try and forget him". Accused said that he might be back "after the war", that he was "getting out of the country" and that he "had the Colonel's car" (R 7,25-26).

On 6 June 1943 three non-commissioned officers from AAF Station 111 took accused into custody at Orange Field, near Ayr, Scotland (R.19-20,22). Orange Field was about 430 miles from AAF Station 111 (R 23). During the return trip accused was asked by one of the non-commissioned officers "why he didn't make a break". He replied that he was afraid of getting shot, and that if he did get a break he would take a chance (R 22-24).

Admitted in evidence over objection by the defense was a statement made by accused to the officer investigating the charges, after the former had been warned of his rights (R 13-14; Pros.Ex.II). In substance accused stated therein that during the afternoon of 28 May he obtained two shirts and two pair of trousers and put them in an air raid shelter. After his escape from the guard house, he changed his clothes and he and Cumbie took "the Colonel's car" which Freeman the driver had just parked. They then drove to Bedford where he told Miss Higgins to tell Dorothy Sherwin a WAAF, that he was "shipping for a while" and that he had to have a vacation because "three years was too damn long". He said that he did not know where he was going or how long he would be gone. Obtaining some gasoline at Canadian and British camps, the two men drove to Harrogate where accused told Miss Sherwin's mother that he was going to Scotland. They then went to Edinburgh where they had some trouble with the military police because of wrongfully driving on a one-way street. They drove through Glasgow, obtained gasoline at a Canadian camp at Barrowhead and then drove to Irvine where the transmission of the car was damaged because it struck a rock in the road. Accused and his companion remained in the car over night with two girls they had picked up on the way to Irvine. He sought help at a Canadian camp about four miles away. Being unsuccessful he went to Prestwick to another military station where he told the transportation officer that he had taken an officer to Glasgow, that he had permission to go to the coast and that transmission of the car had been damaged when he was on the coast. He displayed Freeman's trip ticket to substantiate his story. While the officer telephoned for parts accused left the building, took a nearby staff car without authority and returned to Irvine. The two men abandoned the United States Government car and took the girls home to Neilston in the other car. They then drove to Barrowhead, remained over night and returned to Neilston. After accused obtained gas at an R.A.F. camp they drove to Stanroad, secured some more gasoline from an American truck convoy and made arrangements to accompany the convoy to Ireland. Then they decided to return to Harrogate. However, after going to Dalmellington they returned to Glasgow. After visiting Loch Lomond they obtained gasoline at a United States naval base and went back to Glasgow.

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While waiting for a traffic light they were approached by two sergeants who had driven up in a jeep and who were wearing "Engineers" insignia. The light changed and accused drove on, although one of the sergeants shouted for them to wait. After sleeping by the side of the road they picked up two girls and went to Edinburgh. They were chased by a police radio car in Edinburgh but accused, who was driving, managed to get away. When they were subsequently stopped in that city by a "bobby" because of driving with bright lights, the two men were finally apprehended by the police who said that the car in which they were driving had been stolen. Accused said the car had been "checked out" to him and displayed the trip ticket. They were arrested, taken by the military police to Prestwick and confined. They were later returned to Station 111 (Pros.Ex.II).

4. For the defense, accused as a witness on his own behalf confirmed the facts contained in his statement made to the investigating officer with the exception of a few minor particulars (R 29). He further testified:

He left camp because he had received on 26 May 1943 a court-martial sentence of three years, and wanted to "have a little fun" before serving the sentence. He did not know where he was going or how long he would be away. He planned on turning in after he had been "gone a while" (R 28-29). He was apprehended in Edinburgh by the civil police and not at Prestwick (R 28,30). When apprehended they were returning to their home station to surrender. He planned on stopping again at Harrogate on the way back to inform the girl's mother of this fact (R 28). He admitted that when being returned to his home station he told one of the non-commissioned officers that he would break away if he got a chance, and further that he had made one effort to escape since his return (R 29). It was Cumbie who had talked with the dock officer and had told accused of the opportunity of going to Ireland with the truck convoy. Accused decided that instead they would return as they had been away for nearly a week (R 28,30). Cumbie followed accused when the latter left the guard house, and did not know what he was doing as he was drunk at the time. Cumbie was not "part of the idea at all" and accused took him along because "he was making so much racket". Although accused in his statement made to the investigating officer had several times stated that Cumbie was with him, his companion although physically present "didn't know what was going on" (R 29). When he told Miss Higgins that he might see them after the war, he did not mean that he was leaving the country or the Army but "merely that I might see them after it was all over because I had planned on turning in after I had been gone a while" (R 28).

5. It is alleged in the Specification of Charge I that the absence of accused was terminated by apprehension at Prestwick, Scotland. According to his statement made to the investigating officer and his testimony, accused was apprehended by the civil police at Edinburgh, Scotland and taken from that city by the military police to Prestwick where he was confined. The evidence for the prosecution shows that three non-commissioned officers

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from accused's home station went to Orange Field near Ayr, Scotland (about five miles from Prestwick) and returned accused to AAF Station 111. If there was in fact a variance between the allegation and proof of the place of apprehension, such a variance is not fatal (Dig. Ops. JAG., 1912-1940, sec.416(14), p.271) and is immaterial.

6. The pleas of guilty and the evidence fully support the findings of guilty of Charge II and its Specification (escape from confinement in violation of Article of War 69), and of Charge III and the Specification thereunder (wrongfully taking and using without proper authority the Government vehicle described).

The evidence clearly supports the findings of guilty of Charge I and its Specification (desertion in violation of Article of War 58). Two days prior to his escape accused had been sentenced to confinement for a period of three years. When leaving camp he took a Government vehicle without authority. He told Miss Higgins to tell Miss Sherwin that he was "getting away", that she should "try and forget him", that he might be back after the war and that he was "getting out of the country". When the United States vehicle was damaged accused took another vehicle without authority and continued his journey. Although he met an American truck convoy en route he did not surrender to competent military authority, despite his claim that he had decided at that time to return because he had been away nearly a week. He admittedly abandoned his plan to return and instead went back to Glasgow. He was finally apprehended by the civil police in Scotland at a considerable distance from his home station. To avoid detection and to explain his possession of a Government vehicle he twice used a trip ticket issued for the use of Corporal Freeman. Accused admitted making a statement when being returned to his home station that if he got a chance he would make a break, and further that since his return he had made one effort to escape. The court was fully warranted in its determination that when he escaped, accused did not intend to return.

7. The charge sheet shows that accused is 22 years of age and enlisted 9 January 1942 for the duration of the war plus six months, with no prior service. His return to the United States and execution of sentence to dishonorable discharge is authorized (GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942).

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 is legally sufficient to support the findings of guilty and the sentence.

B. Franklin Pete, Judge Advocate

C. W. VanBrunschot, Judge Advocate

Elwood W. Sargent, Judge Advocate

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CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 6 AUG 1943 TO: Commanding General, VIII Bomber Command, APO 634.

1. In the case of Private LYLE C. TAYLOR, JR., (16048202), 367th Bombardment Squadron, 306th Bombardment Group (H), AAF 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 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 656. For convenience of reference please place that number in brackets at the end of the order: (ETO 656).

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 678.

UNITED STATES	5TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Camp Nikel, Iceland, 26 July 1943.
Private PHILIP J. DiNUOSCIO (35009880), Headquarters Company, 2nd Battalion, 11th Infantry.	Sentence: Dishonorable discharge, total forfeitures and confinement for 15 years. Penitentiary.

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 93d Article of War.
Specification: In that Private Philip J. DiNuoscio, Headquarters Company, 2d Battalion, 11th Infantry, did, at Keflavik, Iceland, on or about 16 July 1943, with intent to commit a felony, viz, rape, commit an assault and battery upon Valgerdur Baldvinsdottir, by willfully and feloniously striking and beating her on and about the head with a dangerous instrument, to wit, an iron rod, and attempting to have sexual intercourse with her forcibly and against her will.

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 fifteen 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 Article of War 50½.

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3. The evidence for the prosecution shows that Valgerdur Baldvinsdottir, Keflavik, Iceland was 22 years of age and a clerk in a store owned by Olafur E. Einarsson in that town (R 5,14,18). On the evening of 16 July 1943 accused, who had made purchases at the store on two previous occasions, bought several articles the cost of which amounted to 759 kronur. He told Einarsson that he did not have the money at that time, and would call for the packages the following day. Eirarsson told him that the store would close at one o'clock on Saturday (17 July) and that he (Einarsson) was going to Reykjavik at about 9:00 p.m. that evening (16 July). Accused then decided to return for the packages at 10:00 p.m. Einarsson pointed out Miss Baldvinsdottir and said that she would deliver the articles as she would then be "tidying up the store" (R 18,20-21).

The store was closed at 8:00 p.m. and Einarsson left an hour later. At 10:00 p.m. accused returned (R 5-6). At his request Miss Baldvinsdottir wrapped up in paper an iron bar which he had in his pocket (R 8). He then asked Miss Baldvinsdottir to lend him a telephone directory. When she entered the office to get it accused put out the lights, followed her into the room and closed the door (R 7,9). He seized a belt which was around her jacket and unfastened the buttons saying "You are a nice girl". The girl pushed him away, buttoned up her jacket, touched a telephone in the room and asked him if he wanted her to call the police. Although she believed that his actions in turning out the lights and closing the door were unusual and thought she knew what his intentions were, she did not call the police. She meant it as a threat as she did not then think "he would do anything like he did" (R 9, 13-16). Accused then saw a case of envelopes and asked the girl to get it for him (R 7,10,13,16). When she put the case on the table he put his left arm over her head, put his hand over her mouth and nose and threw her on the floor (R 7). While they were struggling on the floor accused beat her. He asked her three times "whether I did or did not want to give in" (R 8,16-17). The girl screamed when she could, but he covered her mouth with his hand most of the time (R 14). When asked what accused used to beat her with she testified "I believe it was his fist, but I am not certain of it because the blows grew more and more painful later on" (R 8). "I never did see what he hit me with because he kept me close up to his body, but I suspect it was an iron because the blows were very painful" (R 17). Finally, Miss Baldvinsdottir wrestled away from him, ran out to the street and told two men what had happened, informing them that accused was still in the store (R 8). She had a few cuts on her head and a bruise on her hand. At the time of the trial the girl was "just recently out of bed" and had been under a doctor's care because of the attack. She had not been able to resume her work (R 15). She had not previously known accused whom she identified as her assailant (R 14).

About 2210 hours 16 July 1943 as Sigurthor and Gudmundur Gudfinnsson, both of Keflavik were walking by the store, a girl staggered across the floor of the store and ran into the street. She was "bloody all over" (R 26-29). Jona Gunnarsdottir of Keflavik, who was in a

building near the store just after 10:00 p.m. "heard a sound as if something was broken", and saw a soldier who jumped out of the window of the store office and ran across a field. She told some people who were in front of the store (R 32-33). Gudmundur Gudfinnsson and some men saw a soldier running across the fields. They chased the man, caught him and brought him back to the store. The soldier was accused. His right hand appeared to be blood-stained (R 30-32). As the result of a report, Corporal Ruby E. Seymour, 812th Military Police Company went to the store about 10:30 p.m. Accused, who was surrounded by Icelanders, admitted to Seymour he caused the disturbance and asked him to get his coat and cap from the store. Seymour went to the rear of the store, saw a broken window and on the window-sill an iron bar which he believed to be a stove poker (R 34-36).

Lieutenant Colonel Paul C. Febiger, Provost Marshal of the Keflavik sector found on the floor of the store office a girl's coat lapel pin, a soldier's cap, and a service ribbon wet with blood. A soldier's raincoat was on the desk (R 38,45). The last four numbers of accused's serial number were in the raincoat, and accused claimed the cap (R 46).

The service ribbon was admitted in evidence (R 38,45-46; Ex.D). The coat lapel pin was identified as hers by Miss Baldvinsdottir and was also admitted in evidence (R 10-11,45-46; Ex.B). The iron bar found on the window-sill by Seymour was identified by the girl as the one which she had wrapped in paper for accused (R 10), and it was admitted in evidence (R 10,38-39,45-46 ; Ex.A).

About 2345 hours 16 July, Miss Baldvinsdottir was brought to the hospital at Camp Cashman which was in the immediate vicinity of Keflavik. She was suffering from a mild degree of hysteria, showed evidence of shock, had four lacerations in her scalp and a contusion on her right hand (R 24). About 0100 hours, 17 July accused was brought to the hospital and given a blood test which disclosed that he had five-tenths of a milligram of alcohol per one c.c of blood. This represented a very small quantity of alcohol, which was not sufficient to cause drunkenness in any degree (R 22-23; Ex.C). His general appearance was rational (R 26). According to a common medical text book (Cecil), after a single injection of alcohol the blood level would remain approximately at a constant level for about five hours. However, this factor would vary with an individual's capacity to oxidize and to tolerate alcohol (R 25).

After being warned of his rights by Lieutenant Colonel Febiger, accused made two statements. The first was signed about 3:00 a.m. 17 July (R 40-42). The second statement was signed during the afternoon of 17 July after he was reminded of the warning as to his rights which he had previously received (R 43-44). Lieutenant Colonel Febiger testified that the only changes made in the second statement were the spelling of accused's name and the insertion at the end of the statement of part of the warning as to his rights which had been given accused but which the clerk had omitted when writing the statement. Accused was advised of the changes

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and given the opportunity to compare both statements before signing the second. The first statement was then given to him to keep (R 44,53). The statement of accused as to a "hot peter" was incorporated in the first statement (R 54).

Over objection by the defense (R 41), the second statement was admitted in evidence (R 43,45; Ex.E). Accused stated therein that he went to the store to buy a woman's pocket-book. At 7:15 p.m. he was offered by the man in the store and drank "not quite a water glass full" of a white liquid which he thought was whiskey, possibly gin. The man was to get some black neckties for him at Reykjavik and accused said that he would return Wednesday (21 July) for the pocket-book and ties. He refused another drink because he "was already beginning to feel what I had". About 10:00 p.m. he returned to the store and entered when he saw a light burning inside. He started to buy a carton of matches, and when the girl went into the office to get them he followed, seized her by the mouth and began to hit her with the piece of iron (Ex.A) which he had picked up in the store. When asked why he attacked her accused stated "Well sir, to tell the truth I just had a hot peter" (Ex.E).

4. For the defense, Einarsson, the storekeeper, testified that when accused came to the store between 7-8 o'clock on the evening in question he offered him some gin. Accused had two or three drinks (R 47).

Accused testified that he signed the first statement about midnight 16 July (R 50). When he gave Lieutenant Colonel Febiger the statement the latter said that it would not make sense because accused had stated he had no reason for attacking the girl. This statement was the truth. He asked the Colonel if it would help him (accused) to state that he had a hot peter. The Colonel replied "That will be all right", and that if it would help accused he would insert it. The clerk was directed to make the change. The following day accused signed the second statement (Ex.E) after being told that the only change concerned what he had stated the previous evening. Accused signed the second statement without reading it. He was not warned of his rights before signing the second statement (R 51-52).

Captain Woodrow W. Morse, 11th Infantry, a witness for the court, was present on the night of 16-17 July when accused made the first statement. After being warned of his rights accused admitted assaulting Miss Baldvinsdottir, stating that he did not know why he had done it. Captain Morse did not recall any statement made by accused to the effect that he committed the assault because he had a "hot peter" (R 55-57).

5. The evidence clearly supports the findings of guilty. The testimony of the victim of the assault was undisputed. Accused turned out the lights in the store, followed the girl into the office and unfastened the buttons on her jacket saying "You are a nice girl". He later seized her, put his hand over her mouth and threw her to the floor.

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During the ensuing struggle he beat her and asked her three times whether she did or did not want to "give in". He kept his hand over the mouth of the girl who screamed when she was able to do so. She finally wrestled away from him and escaped. Accused admitted in his statement that he assaulted the girl and that he had beaten her with an iron. The reason for the assault was that he had "a hot peter". The evidence clearly established the alleged intent to commit rape and the attempt to have sexual intercourse with the victim forcibly and against her will (CM ETO 78, Watts; CM ETO 489, Rhinehart and Fallucco; CM ETO 492, Lewis).

6. The testimony of accused was in substance confined to the fact that he signed the second statement on the afternoon of 17 July without fully realizing that his statement as to a "hot peter" had been incorporated therein. Lieutenant Colonel Febiger testified that this statement had already been incorporated in the first document and that before he signed the second paper accused was reminded of the previous warning as to his rights and fully advised as to the two changes which had been made. Moreover, accused himself testified that after he made the statement about the "hot peter" Lieutenant Colonel Febiger told the clerk to make the change, and further that he was told the following afternoon that the change made in the second statement concerned what he had told Lieutenant-Colonel Febiger the previous evening. Exhibit E was properly admitted in evidence.

7. The charge sheet shows that accused is 21 years of age and was inducted to serve one year on 14 February 1941 with no prior service.

8. The court was legally constituted and 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.

9. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 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 rape is such an offense and the approved sentence is fifteen years. Both conditions of the order are present. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the offense of assault with intent to commit a felony, viz: rape (USCA, Title 18, sec.455, p.337). The designation of the United States Penitentiary, Lewisburg, Pennsylvania is correct.

B. Franklin Ritter, Judge Advocate

Adrian Bonschoten, Judge Advocate

Elwood W. Sargent, Judge Advocate

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

Board of Review.

ETO 705. - 8 SEP 1943

UNITED STATES v. Private ARTHUR O. MALONE (38225397), Headquarters and Service Company, 843rd Engineer Aviation Battalion.	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Ipswich, Suffolk, England, 27 July 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Confinement: Disciplinary Training Center No. 1, Shepton Mallet, Somerset, England.

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 in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings. 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 office.

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Arthur O. Malone, Headquarters and Service Company, 843rd Engineer Aviation Battalion, did, at Bock Essex, England, on or about 29 June 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with a cow, the same being a beast.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to 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 but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Disciplinary Training Center No.1, Shepton Mallet, Somerset, England as the place of confinement. The proceedings were published in General Court-Martial Orders No.28, Headquarters, Eastern Base Section, Services of Supply, European Theater of Operations, APO 517, 9 August 1943.

3. The prosecution's evidence shows that Stanley Brooks Perry, a British civilian resides on a small farm at Rocking, Braintree, Essex, where he had four cows which on the evening of 28 June 1943 were in a meadow adjoining the house (R6). When about to retire that night he looked from his window across the yard and saw someone chasing a cow. He telephoned for the police and then watched the cow being chased intermittently until the police arrived. The car lights, showing on the yard, disclosed a "man mounted on the cow" in position to have sexual relations with it. The man immediately ran, was pursued and caught by the farmer and police officers when he was found to have nothing on but a vest (R7) and to be carrying his shoes and clothes in his hands (R10). The man admitted he was the man that was with the cow (R7) and he was identified as the accused (R9). Accused had been drinking but was not drunk. The front of his vest was stained. His legs were in a dirty condition (R10). The whole hind quarters of the cow were imprinted on his thighs and his penis was erect and s tained with cow manure as were his hands (R10,11). Accused said he had gone into the yard to relieve himself. He was made to dress, taken to the police station and handed over to the Provost Marshal (R10). The cap of accused was later found near the cow yard (R11).

For the defense, by stipulation, a statement of Colonel R. E. Chambers, Medical Corps, was read to the court, admitted in evidence as defense Exhibit 1 and attached to the record. It shows that accused was from a Louisiana farm family, one of ten children. He has had but a year of schooling and is unable to read or write more than his name. His present mental age is approximately 9 years but he is mentally responsible for his actions, able to conduct his defense and to determine between right and wrong. Also admitted by stipulation between the parties was the testimony of Captain Boleman, Medical Corps, to the effect that he had examined accused at 0115 hours, 29 June 1943 and found him intoxicated to a degree that would greatly impair his normal mental processes (R13).

4. "Sodomy consists of sexual connection with any brute animal ***". To establish the offense, actual penetration must be proved (MCM., 1928, par.149k, p.177).

There is no direct evidence herein of penetration. The farmer "thinks" accused was having sexual relations with the cow (R7) "as far as I could see". He "couldn't conceive anyone chasing the cow in the yard for any other purpose" and "could swear" that accused had sexual intercourse with the cow (R9). The police officer drove his car into the yard and the headlights of the car revealed a cow and a man at the far end and close

against the shed or wire fence. When the lights shone on him, the man went away from the rear of the cow and scrambled over a gate into the field (R10). In the opinion of the police officer accused "was definitely attempting to have intercourse with the cow". Accused was nearly nude, his penis was stained with cow manure and "the whole of the hind quarters was imprinted on his thighs and not extending either way" (Underscoring supplied) (R11).

> "Where evidence is of sufficient probative force, a crime may be established by circumstantial evidence, provided that there is positive proof of the facts from which the inference of guilt is to be drawn and that that inference is the only one which can reasonably be drawn from those facts." (People v. Razezicz, 99 N.E. 557, 564).

The cow was observed for an appreciable length of time prior to the arrival of the police during which period it was being chased and at "intermittent times it was stopped; the police came and as the lights came on the yard, we saw a man mounted on the cow" (Underscoring supplied). When almost immediately thereafter accused was apprehended, his penis was erect and stained with manure and his body marked with filth.

> "In a criminal prosecution, where the evidence is purely circumstantial, the proof must exclude every reasonable hypothesis except accused's guilt." (Sherman v. U.S., 268 Fed. 516).

But upon what other reasonable hypothesis can the circumstances described and the condition in which accused was found, be explained, than that he was attempting to or was having carnal intercourse with the cow? We think the trial court may well have believed from the facts shown that accused had succeeded in his attempts.

> "Though there is no direct proof of penetration in a sodomy case, such penetration may be inferred from the facts shown. The offense of sodomy, including penetration, requires strict proof, but circumstantial evidence may be sufficient." (CM 191413 (1930) 1912-1940, Dig. Ops.JAG., par.451(65), p.333)).

> "Penetration may be established by circumstantial evidence, at least where positive proof is unavailable, ****." (58 C.J., sec.17, p.794).

Whether or not penetration occurred was a fact to be determined by the court. It was wholly within its province to sift and weigh the evidence, circumstantial and otherwise with all the legitimate presumptions and

inferences arising therefrom. There was substantial, competent evidence to sustain the court's finding that accused committed the crime charged and under such circumstances the findings of the court will not be disturbed by the Board of Review (CM ETO 492, Lewis; CM ETO 503, Richmond).

> "Crime **** when committed by an individual who has previously placed himself under the influence of an intoxicant, is committed by one who is wrong ab initio; hence the established general principle of law that voluntary drunkenness furnishes per se no excuse or palliation for criminal acts committed during its continuance, and no immunity from the penal consequences of such acts. ****. Where, to constitute the legal crime there is required no peculiar intent- no wrongful intent other than that inferable from the act itself **** evidence that the offender was intoxicated would, strictly, not be admissible in evidence." (Winthrop's Military Law & Precedents, 1920 Reprint, p.293).

Intoxication can be no defense to the crime of sodomy.

5. Accused is 22 years and 3 months old. He was inducted under the Selective Service Extension Act of 1941, on 14 September 1942, for the duration and six months.

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 is legally sufficient to support the findings of guilty and the sentence.

B. Franklin Pike, Judge Advocate

Sylvan Burchholz, Judge Advocate

Elwood W. Vergeront, Judge Advocate

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

Board of Review.

ETO 709.

15 SEP 1943

UNITED STATES	EIGHTH AIR FORCE.
v.	Trial by G.C.M., convened at USAAF Station #446, APO 638, 30 July 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Penitentiary, Lewisburg, Pennsylvania.
Private HENRY (NMI) LAKAS (34339722), 9th Airdrome Squadron, VIII Air Support Command.	

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: Violation of the 92nd Article of War.
Specification: In that Private Henry (NMI) Lakas, 9th Airdrome Squadron, VIII Air Support Command, did, in the back drive of Stork House, at Lambourn, Berks, England, on or about 4 July 1943, forcibly and feloniously, against her will, have carnal knowledge of Mary Frances Cullinane.

ADDITIONAL CHARGE: Violation of the 93rd Article of War. (Disapproved by reviewing authority).
Specification: (Disapproved by reviewing authority).

He pleaded not guilty to and was found guilty of both charges and of the specifications thereunder. 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 disapproved the findings of guilty of the Additional Charge and of the Specification thereunder,

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 Article of War 50½.

3. The evidence for the prosecution shows that Mary Cullinane, 26 years of age and a housemaid residing at Stork House, Lambourn, England, met accused on a public street in Lambourn about 10:00 p.m. 4 July 1943. They went into a field and sat down but left because horses were present. They then walked up the rear drive leading to Stork House and sat down on a bank (R8-9,14). Accused was "trying to get an intercourse" with her but Miss Cullinane told him that she was not that kind of a girl. About 11:15-11:30 p.m. the girl wanted to go home but he pulled her down on the bank. When she screamed he took out a knife, held it on her and said that he would not let her go until he got what he wanted. They then had intercourse. During the act, accused's left arm was around her neck and he held the knife in his left hand (R13) near her face. She received a slight cut. Miss Cullinane did not consent to having intercourse but submitted because she feared he would kill her (R10). Just as the sexual act was completed, a man walked up the drive and accused asked the girl "to stoop down". She refused, descended the bank and met the man who asked her what was wrong. She replied "He has done everything to me. He had a knife to me" (R10-11). The man then told her to go home and she went home. That evening she made a date with accused for the following night, and because she was afraid of him, as she left the scene she told accused she would keep the date (R13-14). She then went to her own room at Stork House and saw that her underclothes were stained with blood. Within five or ten minutes after entering the house she went to the room of a Mrs. Marsh (R13), told her what had occurred and showed Mrs. Marsh her clothes (R11). The following morning Miss Cullinane picked up on the bank an overseas hat which she gave to a police sergeant. She identified as hers a coat on the inside rear of which there were what appeared to be blood-stains (R10,26-27). After the occurrence the girl washed her underclothes and the stains thereon disappeared (R28). She had never indulged in sexual intercourse before (R14), and denied having had any sexual relations with soldiers of the station (R13).

On the night of 4 July Mr. Terence Athawes of Lambourn heard some screams as he was lying in bed. The screams were very loud, and sounded as if they were "stifled or muffled". Athawes' bedroom window faced directly up the drive to Stork House. As the screams "went on for some time" he dressed and walked up the drive. Miss Cullinane jumped off the bank followed by an American soldier who said "You are all right". Athawes asked the girl, who was crying, if she was all right and she replied "No, he has done everything to me. He has had a knife to my throat". Upon Athawes' request that he show his "pass book", the American soldier displayed his identity tags, but it was too dark to read them. Athawes told the girl to go home and told the soldier that he was taking him to the police. As they walked down the drive the soldier, swore "by Almighty God" that he had

done nothing to the girl, which rather impressed Athawes who dropped the idea of taking him to the police. He made no report. The soldier returned to the bank for the declared purpose of finding his hat and a bottle of cider. Athawes went to bed. He later saw the soldier running down the drive (R16-17).

Mrs. Annie Marsh, a cook who resided at Stork House, Lambourn testified that late in the evening of 4-5 July, Miss Cullinane knocked at her bedroom door. She was crying, appeared "very agitated" and "in a terrible state". Her clothes were bloodstained and there was a cut on the left side of her neck. She said "Will you look what a state I'm in" (R18-19). Over objection of the defense, Mrs. Marsh testified that the girl said "Look what he's done to me". "Whatever can I do?" Asked if Miss Cullinane said that the soldier had produced a knife on her, Mrs. Marsh replied in the affirmative (R20). Mrs. Marsh had been asleep and did not look at the clock when she was awakened. She was of the opinion that the girl came to her room around midnight (R19).

Mrs. Winifred Athawes of Lambourn heard piercing screams from the direction of the drive late in the evening of 4 July (R22). About midnight that evening, George Hailstone of Lambourn heard a scream coming from the direction of Stork House drive and later heard voices and people coming down the drive (R21). Sarah White, also of Lambourn heard the clock strike 12:00 and was "dozing off" when she heard a "dreadful scream" and then "heard another which sounded muffled". The screams came from the direction of Stork House drive (R23).

Constance Morrison, a physician residing in Lambourn examined Miss Cullinane on 7 July. The girl was "in a rather excitable condition". There were no bruises on her body, but there was a slight scratch on her neck. There were slight lacerations on the lower part of her vagina which was slightly swollen and extremely tender. No hymen was present, as it had been ruptured. In Dr. Morrison's opinion the rupture was fairly recent and there had been a recent intercourse. Although she was not prepared to state so definitely, it was also her opinion that this was the first time that the girl had experienced sexual intercourse. Fourteen days later, Dr. Morrison made a second examination, found a "fairly profuse discharge" and sent Miss Cullinane to Reading Hospital for a further examination. At the time of the trial the girl was suffering from an inflammatory condition of the vagina which "might be caused by several things" (R14-16).

On 8 July Sergeant Rudolph Singhoffer, 9th Airdrome Squadron, was given a knife by accused which the latter drew from his fatigue uniform when taken into custody by the sergeant (R24). On 8 July after being "cautioned" by a Lieutenant Sacks, accused was shown a hat. He admitted before Sergeant Frederick Mortimore, a police sergeant stationed at Lambourn, that the hat was his. When shown a photograph of Miss Cullinane accused further admitted that he knew her. Sergeant Mortimer again "cautioned" accused and charged him with raping the girl. Accused replied "I deny that, but I did have an

intercourse and she was willing" (R25). Detective Constable Herbert J. Snowley of Wantage examined the scene of the alleged crime and found "that quite a large area of the grass was flat, indicating that some person had layed and rolled on that piece of bank" (R26-27). The coat, overseas cap and pocket-knife were introduced in evidence (R29; Exhs. A,B,C).

4. For the defense two witnesses, Joseph and Sarah Mooney who lived in a house about 15-20 yards from Stork House drive, testified that they heard no outcries on the night of 4 July. Mr. Mooney retired at 11:00 p.m. and was generally "a very good sleeper during the first two hours". Mrs. Mooney was a "fairly heavy sleeper" and was "hard of hearing in her left ear" (R29-30).

Private Charles M. Johnson, 9th Airdrome Squadron, once met Miss Cullinane on a street in Lambourn and walked home with her. When he met her a second time they lay on the grass outside her home. She permitted Johnson to touch her breasts, legs and "privates". He tried to have intercourse with her and she objected a little. Johnson then became angry and left. He had never indulged in intercourse with the girl (R31-33). Private Carrol E. Roderkuhr, 9th Airdrome Squadron, first met Miss Cullinane on the street in Lambourn, started talking to her and later went out with her on several occasions. She permitted him to touch her "anyplace", but they had never had sexual intercourse (R33-34).

Captain Maurice E. Groff, 9th Airdrome Squadron accused's unit commander, testified that the character of accused's service in this theater had been good, and that his reputation and character were also good. He had once been absent without leave in the United States when his father died but had caused no other trouble aside from minor offenses (R35-36).

Accused testified that he met the girl about 10:00-10:30 p.m. on the evening in question. He had a bottle of cider with him. After Miss Cullinane had taken home a child who was with her, they went into a field, left because horses were there and went up on a bank near the house. He "got to playing around", felt her breasts and "the thing" and then got on top of her. He told her to loosen her knickers "and got it". Just as he completed the act and was buttoning his pants, a man passed by. Accused then made a date with her. The man returned, and the girl started to cry She and accused jumped down the bank. When the man asked what the matter was, accused said that he was an American soldier and displayed his identification tags. The girl promised to keep a future engagement. Accused found his cider and left. She had not objected to having intercourse and had not screamed. Accused denied having a knife that evening. He identified as his the knife introduced in evidence as Exhibit C. He left his cap at the scene of the incident and testified that the hat introduced in evidence as Exhibit B was similar to his own (R36-37).

5. An examination of the papers accompanying the record of trial discloses that the Additional Charge (assault with intent to do bodily harm with a dangerous weapon) was preferred on 19 July and that on the same day both the Original and Additional Charge were referred for trial. No investigation of the Additional Charge was directed. However, the findings of guilty of the Additional Charge were disapproved by the reviewing authority. Moreover, the facts pertaining to the additional offense alleged were fully disclosed in the investigation of the Original Charge. A new investigation of the Additional Charge would have shown the same state of facts. Such a procedure would have been futile and would not in any way affect or safeguard the rights of accused (CM ETO 106, Orbon; CM ETO 393, Caton-Fikes).

The review of the staff judge advocate, Eighth Air Force, contains a discussion as to the improper admission in evidence of accused's knife (Ex.C). Further comment thereon is unnecessary.

6. (a) Without objection by the defense both the victim of the assault and Athawes testified that when he (Athawes) asked her if she was all right Miss Cullinane replied "No, he has done everything to me. He has had a knife to my throat". The testimony of the girl, corroborated by that of accused himself, shows that this statement of the victim was made almost immediately after the sexual act was completed. Moreover, from the testimony of Athawes and accused it was clearly shown that accused was present when the statement was made.

> "Although as a general rule statements which are merely narrative of a past transaction or acts or declarations which are subsequent to the principal event and not directly connected therewith, will not be received in evidence, especially, in the case of declarations, where they are of a self-serving nature, a declaration made **** after the happening of the principal fact may be admissible as part of the res gestae when it is so intimately interwoven with the principal fact by the surrounding circumstances as to raise a reasonable presumption that it was made or done under the immediate influence of the principal transaction or event itself and is the spontaneous utterance or expression of thoughts created by, and springing out of, the transaction itself rather than the result of any premeditation or design" (22 C.J., sec.545, pp.454-458).

The foregoing statements to Athawes by Miss Cullinane were made within such a short time after the incident and under such circumstances as to indicate clearly that they were the spontaneous expressions of a state of mind caused by the commission of the offense alleged. They were admissible as part of the res gestae.

(b) Over objection of the defense Mrs. Marsh testified as to what Miss Cullinane told her when she came to witness's room that evening (R20). The testimony was as follows:

> "A. Well, she knocked on the door and said, 'Let me in.' I said, 'What's the matter?' She said, 'Let me in'....She was crying. I got up and let her in and she showed me her clothes and said, 'Look what he's done to me.' She said, 'Whatever can I do?' She was in a terrible state....feeling so ill. I was talking to her and said, 'Oh, I can see the mark!'
> Q. She said this soldier had produced a knife on her?
> A. Yes.
> Q. And she was crying?
> A. Yes, very much. She told me that Mr. Athawes came to the rescue and told her to come on in." (R20).

Attached to the record of trial is a request by defense counsel for a rehearing of the case. It is recited therein that the statements made by the girl to Mrs. Marsh occurred about two hours after the commission of the alleged assault (1:45 p.m. 5 July), that such evidence could not be considered a part of the res gestae, that it was a vital part of the prosecution's case, that its admission was contrary to the rules of evidence and seriously prejudiced the rights of accused.

Although she did not look at the clock, Mrs. Marsh's testimony indicated that the girl came to her room about midnight 4-5 July and not at 1:45 a.m. 5 July. In any event it is not necessary to base the admissibility of certain portions of the witness's testimony on the ground of res gestae. In cases involving the offense of rape the weight of authority is that one to whom a complaint has been made may testify as to the making of the complaint by the prosecutrix, her physical condition and appearance, and the state of her clothing at that time. Testimony by the witness concerning the details of the outrage as stated by the prosecutrix are, however, inadmissible (Coppage v. State, 137 Pac. 2d (Okla.) 797; CM ETO 611, Porter)

In view of the foregoing, certain parts of Mrs. Marsh's testimony the admission of which was objected to by the defense, were clearly admissible. Evidence that the girl asked to be let in, that she was crying and "in a terrible state", that she said "Look what he's done to me" and "Whatever can I do?" was competent testimony for the consideration of the court. Her statements that the soldier had used a knife and that Athawes came to her rescue, were details of the incident and were improperly admitted in evidence. These utterances were too far removed in point of time from the assault to constitute part of the res gestae. However, because of other evidence establishing accused's guilt of the offense alleged, the Board of Review is of the opinion that the admission of such evidence did not injuriously affect the substantial rights of accused.

7. The evidence clearly supports the findings of guilty as approved by the reviewing authority. Accused first solicited intercourse but the girl refused, saying that she was not that kind of a girl. When she wanted to go home he pulled her down on the bank. When she screamed, he took out his knife and said he would not let her go until he got what he wanted. Intercourse followed, during which his left arm was around her neck and a knife was in his left hand near her face. She received a slight cut on her neck. The girl did not voluntarily consent to the act but submitted through fear of her life. The fact that she screamed was corroborated by the testimony of three witnesses who heard screams from the direction of the drive at the approximate time of the occurrence. The testimony of Athawes and Mrs. Marsh, as to the statements made by the victim, are corroborative of the girl's version of the incident. Accused admitted that sexual intercourse was accomplished but claimed that it was with her consent. The question as to whether the victim consented to the act of intercourse or whether it was committed by accused by force and violence against the will of his victim was one of fact within the exclusive province of the court. Inasmuch as the finding is supported by competent, substantial evidence it will not be disturbed by the Board of Review on appellate review (CM ETO 132, Kelly et al; CM ETO 397, Shaffer; CM ETO 492, Lewis). The evidence clearly established the fact that accused did, at the time and place alleged, have carnal knowledge of the girl forcibly, feloniously and against her will which facts constitute rape (CM ETO 90, Edmonds; CM ETO 397, Shaffer; CM ETO 611, Porter).

8. The court found accused guilty of rape in violation of Article of War 92 and of assault with intent to do bodily harm with a dangerous weapon in violation of Article of War 93. The court sentenced accused to dishonorable discharge, total forfeitures and confinement at hard labor for life. Article of War 92 provides that a person who commits murder or rape shall suffer death or imprisonment for life as a court-martial may direct. No mention is made in the Article of dishonorable discharge or total forfeitures. The maximum punishment imposable for the offense of assault with intent to do bodily harm with a dangerous weapon is dishonorable discharge, total forfeitures and confinement at hard labor for five years (MCM., par.104c, p.99). However, the reviewing authority disapproved the findings of guilty of the Additional Charge and Specification (assault with intent to do bodily harm with a dangerous weapon in violation of Article of War 93) and approved the sentence. As the reviewing authority disapproved the findings of guilty of an offense expressly made punishable in part by dishonorable discharge and total forfeitures, the question arises as to whether the sentence as approved is legal.

It is well settled that upon a conviction of an offense under Article of War 92, dishonorable discharge may legally be imposed with life imprisonment provided the court expressly includes the dishonorable discharge in the sentence. A sentence of dishonorable discharge is not to be implied from a sentence that imposes life imprisonment or any other punishment (MCM., par.103, p.92; Dig.Ops.JAG.,1912-1930, sec.1387, p.688; Dig.Ops.JAG.,1912-1940, sec.402(4), p.250).

The foregoing principle was adopted in an opinion of The Judge Advocate General dated 17 January 1919 (250.479, Payne, Charlie), wherein it was stated that:

> "The fact that the 92d Article of War does not in terms provide for such dishonorable discharge does not negative the power of the court in this respect. *** the grant of power to imprison for life, a punishment which results in the permanent removal of the accused from military service, necessarily includes the power to dishonorably discharge such accused."

In a letter to the Assistant Judge Advocate General, Branch Office, ETO, APO 871, dated 3 August 1943, The Judge Advocate General stated that "While the Payne opinion is limited to the power of the court to impose dishonorable discharge, the same reasoning would apply to the right of the court to impose total forfeitures" (Underscoring supplied).

While the Board of Review is unable to follow the implication of the Payne opinion, in view of the foregoing it now feels itself constrained to hold that upon conviction of the offense of rape alone in violation of Article of War 92, it would have been within the province of the court to impose dishonorable discharge and total forfeitures with life imprisonment, and that the sentence as approved is legal.

In CM ETO 268, Ricks, the Board of Review held upon a conviction under AW 92 that dishonorable discharge but not total forfeitures may be imposed with life imprisonment. That part of the Ricks case which holds that total forfeitures may not be imposed with life imprisonment is hereby overruled and should not be followed.

9. The charge sheet shows that accused is 22 years of age and was inducted 1 September 1942 to serve 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 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. Confinement of accused in a penitentiary is authorized for the crime of rape by 35 Stat. 1143, 18 U.S.C., 457; 35 Stat. 1152, 18 U.S.C., 567; AW 42; War Department letter AG 253 (2-6-41) E, 26 February 1941. Accused's return to the United States is authorized (GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942).

(CONCURRING and DISSENTING HOLDING) Judge Advocate

C. M. Van Benschoten Judge Advocate

Elwood W. Kelser Jr. Judge Advocate

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

Board of Review.

ETO 709. 15 SEP 1943

UNITED STATES	EIGHTH AIR FORCE.
v.	Trial by G.C.M., convened at USAAF Station #446, APO 638, 30 July 1943.
Private HENRY (NMI) LAKAS (34339722), 9th Airdrome Squadron, VIII Air Support Command.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Penitentiary, Lewisburg, Pennsylvania.

CONCURRING (IN PART) and DISSENTING (IN PART) HOLDING
by RITER, Judge Advocate.

1. The accused in this case was brought to trial upon the following charges and specifications:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Henry (NMI) Lakas, 9th Airdrome Squadron, VIII Air Support Command, did, in the back drive of Stork House, at Lambourn, Berks, England, on or about 4 July 1943, forcibly and feloniously, against her will, have carnal knowledge of Mary Frances Cullinane.

ADDITIONAL CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Henry (NMI) Lakas, 9th Airdrome Squadron, VIII Air Support Command, did, in the back drive of Stork House, at Lambourn, Berks., England, on or about 4 July 1943, with intent to do her bodily harm, commit an assault upon Mary Frances Cullinane by cutting her on the neck with a dangerous weapon, to-wit, a knife.

He pleaded not guilty to and was found guilty of both charges and of the specifications thereunder. 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 his natural life. The reviewing authority disapproved the findings of guilty of the Additional Charge and the Specification thereunder, 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 Article of War 50½.

2. The Board of Review holds the record is legally sufficient to support the finding of guilty of the offense alleged in the Charge and its Specification and legally sufficient to support the sentence. I am in accord with the holding of the Board of Review that the record is legally sufficient to support the findings that accused was guilty of the crime of rape upon the person named in the Specification of the Charge at the time and place alleged. However, I cannot agree with the Board of Review in its conclusion that the approved sentence is legal.

3. The Board of Review in its holding in the instant case overrules its prior holding CM ETO 268, Ricks, which announced the rule that upon a conviction for an offense under the 92nd Article of War total forfeitures may not be imposed in addition to a sentence of life imprisonment. The action of the reviewing authority in the instant case in disapproving the finding of guilty of the Additional Charge and Specification without adjusting the sentence consistent with the rule established in the Ricks case required the Board of Review either to strike down that part of the sentence including total forfeitures and thereby sustain the doctrine of the Ricks case or, in the alternative, to overrule the Ricks case. The issue is inescapable.

Manifestly the issue was created by the disapproval of the finding of guilty of the Additional Charge under AW 93 and its Specification alleging assault with a dangerous weapon. Had such finding been approved the sentence in the instant case would be valid under the rule declared by the Board of Review in CM ETO 422, Green, wherein it was written:

> "An accused convicted of murder under the 92nd Article of War 'shall suffer death or life imprisonment as the court-martial may direct' Conviction of the offense of assault with intent to do bodily harm with a dangerous weapon, instrument or thing' under the 93rd Article of War permits the imposition of such punishment as the court-martial may direct excepting the death penalty. The accused in the instant case was found guilty of both offenses and was sentenced to be dishonorably discharged the service, total forfeiture of all pay and allowances due or to become due and to be confined at hard labor for his natural life. The sentence is legal.

> In CM ETO 268 Ricks, the accused was found guilty of murder under the 92nd Article of War and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for his natural life. The Board of Review (AJAG., ETOUSA, concurring) held that part of the sentence involving total forfeitures to be void, but sustained the sentence with respect to the dishonorable discharge and life imprisonment. The instant case is distinguishable from the Ricks case inasmuch as the present accused was convicted not only of murder under AW 92 but also of assault with intent to do bodily harm with a dangerous weapon under AW 93. The finding of guilty of the Additional Charge under AW 93 furnishes the legal basis for sustaining that part of the sentence adjudging total forfeiture." (CM ETO 422, Green, par.15, p.29).

4. A summary of the holding of the Board of Review in the Ricks case is necessary in considering the problem now presented. Ricks was charged with murder under the 92nd Article of War. He was found guilty of the Charge and Specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for life. The reviewing authority approved the sentence and designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement. The record was legally sufficient to sustain the finding of guilty of the offense charged. The Board of Review considered at length the sentence and concluded that dishonorable discharge may be coupled with life imprisonment but that total forfeitures were not authorized by the statute.

5. The solution of the problem presented requires a determination of the intention of Congress in enacting the 92nd Article of War. The legislative intention must primarily be discovered from the language of the statute itself (United States v. Goldenberg, 168 U.S. 95; 42 L. Ed., 394) but the history of the statute may be properly considered in construing and interpreting it (United States v. Raynor, 302 U.S. 540, 82 L. Ed., 413; United States v. Morrow, 266 U.S. 531, 69 L. Ed., 425).

The progenitor of the 92nd and 93rd Articles of War was the 58th Article of War contained in the American Articles of War of 1874 enacted 22 June 1874. Winthrop in commenting upon the 58th Article states:

"ORIGIN AND OBJECT. This provision, which, with but a single material change of language, is a republication of s. 30 of the Act of Congress of March 3, 1863, c. 75, appeared first as an Article of War in the Revision of 1874. Prior to its enactment, court-martial were not invested, either in peace or war, with a jurisdiction of the violent crimes cognizable by the civil courts, except where the same directly prejudiced 'good order and military discipline.' In 1863, however- during the late civil war- the provision, incorporated in this Article, initiated in our military law the marked innovation of investing general courts-martial with jurisdiction, in time of war, &c., of the graver civil crimes when committed by military persons, without regard to whether such crimes directly prejudice military discipline or affect the military service. Its main object evidently was to provide for the punishment of these crimes in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority can not be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government." (Winthrop's Military Law & Precedents, Reprint, p.667). (Underscoring supplied).

The 58th Article of War provided as follows:

"Art.58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or District in which such offence may have been committed." (Underscoring supplied).

It will be noticed that the Article concludes with the following injunction:

"and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or District in which such offence may have been committed."

Winthrop discusses the punishment clause as follows:

> "These words, in directing that the punishment imposed by the sentence shall not be less, i.e. less severe, than that authorized by the local law, evidently also contemplate that such punishment shall, (in part at least,) be of the same species as that thus authorized. Such is certainly the reasonable construction. But the Article, in thus fixing a minimum for the punishment to be adjudged by the court-martial, leaves it discretionary with the court to add to such punishment if it thinks proper, and if such addition be practicable. Thus, where death is the statutory penalty, the sentence of the court-martial must be capital also. But where the penalty is imprisonment for a certain term, or fine for a certain amount, (or both,) the court-martial, while it must impose an imprisonment of at least as long a term, or a fine of at least as large an amount, (or both,) may, if deemed just, increase such penalty or penalties at will; its discretion in the matter being without limit except in so far as it may properly be controlled by a principle analogous to that of the constitutional prohibition of 'cruel and unusual' punishments. So, the court may adjudge, in addition to the penalty prescribed by the local law, (whether or not itself enlarged,) a further punishment of a military character appropriate to the case, such as dismissal, discharge, reduction, forfeiture, suspension, &c.
>
> Where indeed the civil statute, in awarding a particular punishment, fixes a maximum and a minimum for the same, as where it assigns to the offender confinement in a penitentiary for a term not less than a stated number of months or greater than a stated number of years, the Article will be satisfied by a sentencing of the accused to the minimum term thus established, while of course even the maximum may legally be exceeded. But where- as is sometimes done- the statute merely establishes a maximum, as where it enacts that the offender shall be punished by imprisonment for a term not to exceed a certain number of years, or by a fine not to exceed a certain sum named, then, as any degree of the punishment within such limit is legal, the court-martial is without any restriction

whatever, under the Article, as to the term or amount which it shall impose by its sentence.

'For the like offence.' Like means same or similar, and in general the 'like' offence in the local statute will readily be distinguished. Where the statute establishes two or more degrees of an offence, with different punishments for the several degrees, it will be sufficient for the court-martial to impose the punishment belonging to the degree to which the offence found by it is 'like' or corresponds. Where the common-law offence, as charged and found, can not readily be assimilated to either of the degrees of the offence as defined in the statute, it will be safest for the court to impose a punishment not less than that provided for the first or highest degree." (Winthrop's Military Law & Precedents, Reprint, p.689-690). (Underscoring supplied).

When the Articles of War were re-written in 1916 the 58th Article of War of the 1874 code was subjected to radical treatment. The crimes of murder and rape were separated for the first time from the other offenses denounced in the 58th Article. Accordingly we discover in the 1916 codification the following:

"Art.92 Murder-Rape.- Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." (R.S.1342 as amended Act of Aug 29, 1916; 39 Stat. 650-670).

"Art.93 Various crimes.- Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct." (R.S.1342 as amended Act of Aug 29, 1916; 39 Stat. 650-670).

The 1920 codification (sec.1, Chap.II, Act of June 4, 1920; 41 Stat. 805; 10 U.S.C. 1564) re-enacted the 92nd Article of War exactly as it appeared in the 1916 codification. The 93rd Article of War was re-enacted except for the following addition: After the word "burglary" the word "house-breaking" was inserted; after the word "perjury" the words "forgery, sodomy" were inserted; after the word "felony" the words "assault

with intent to do bodily harm with a dangerous weapon, instrument, or other thing" were inserted (sec.1, Chap.II, Act of June 4, 1920; 41 Stat. 805; 10 U.S.C. 1565).

6. The Board of Review in the instant case refers to the opinion of The Judge Advocate General dated 17 Jan 1919 (250.479, Payne, Charlie), wherein was discussed the legality of including a dishonorable discharge with the sentence of life imprisonment resultant upon conviction under the 92nd Article of War. The following statement was made in the cited opinion:

> "It may be noted that the 93d Article of War which punishes assault with intent to kill and assault with intent to do bodily harm both of which are lesser offenses included in the crime of murder does give such power (to include dishonorable discharge in the sentence) and it is inconceivable that it was the legislative intention to withhold it in cases of murder under the 92d Article of War." (Parenthetical insertion).

I believe the foregoing reason advanced by The Judge Advocate General to sustain the imposition of a dishonorable discharge in addition to the sentence of life imprisonment is unsound, and that it will fall of its own weight when the history of the 92d and 93d Articles of War is considered.

Until the 1916 codification, murder and rape were denounced in the same Article as the crimes of larceny, robbery, burglary, arson, etc., (AW 58, 1874 code). The punishment for the offenses thus denounced were not "less than the punishment provided, for the like offence, by the laws of the State, Territory, or District, in which such offence may have been committed". The operational effect of such provision is discussed by Winthrop in the quotation above set forth. When the 1916 Articles were enacted, Congress saw fit to segregate the crimes of murder and rape from those other offenses of the civil law with which murder and rape had been associated under the 58th Article of War of the 1874 code. Can it be said that such separate treatment was a mere matter of convenience or of draughtsmanship?

In the case of United States v. McClure, 305 U.S. 472, 83 L. Ed., 297, the Supreme Court of the United States had occasion to consider the effect of a situation involving the construction of Sections 304 and 305 of the World War Veterans Act (Act of June 2, 1926, 44 Stat. 686). These sections were originally Section 408 of the War Risk Insurance Act (42 Stat. 147), but by the Act of June 7, 1924 (43 Stat. 607) Section 408 was severed and thereafter appeared as two separate and distinct paragraphs, Sections 304 and 305. The Supreme Court said:

"While both sections emanated from a single prior section, Congress evidently separated them to provide for the individual treatment that has been given reinstatement as distinguished from revival of lapsed policies. A deliberate separation of the two parts of the old section - applying a restriction to one and not to the other - indicates that a change was intended."

The distinguishing feature between the 92d Article of War and the 93d Article of War is that portion thereof which pertains to punishment. Crimes denounced by the 93d Article of War "shall be punished as a court-martial may direct." Punishment therein is limited by the provisions of AW 43 and by such maximum penalties as may be prescribed by the President under authority conferred upon him by AW 45. Except as to these limitations the court is vested with full discretionary authority in prescribing the punishment. Within the field where Congress has granted the court this discretion total forfeiture is recognized as a legitimate method of punishment (Winthrop's Military Law & Precedents, Reprint, pp.427,433).

The 92d Article of War approaches the matter of punishment in a radically different manner. It requires that a murderer or rapist "shall suffer death or imprisonment for life, as a court-martial may direct". This difference in method of prescribing punishment in comparison with the 93d Article cannot be ignored. A broad discretion was granted to the court in fixing punishment under the 93d Article. Opposed to such process, the 92d Article authorizes only two punishments: death or life imprisonment. Within this narrow sector the court may exercise its discretion. It may elect to sentence an accused either to be imprisoned for life or to be executed. When Congress severed the old 58th Article of War and classified the crimes of murder and rape separately from the other heinous offenses there is a definite indication that a change was intended (United States v. McClure (supra)). The argument of The Judge Advocate General in his opinion above mentioned wholly ignores this situation. Reason and logic appear to dictate that Congress fully intended to fix its own penalties for murder and rape committed in time of war and did not intend for the court to have any latitude in the matter except as applying one or the other punishment, viz: death or life imprisonment. This conclusion is emphasized by the fact that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace". Congress may well have believed that the crimes of murder and rape when committed by military personnel in time of war assume a much more serious mien than when committed in times of peace. The relationship of such offenders to military discipline in time of war cannot be ignored. Inasmuch as jurisdiction was conferred upon military courts to try such offenders in time of war, the implication is definite that Congress intended for itself to nominate

the penalties and not allow the courts in these serious and heinous offenses to exercise any discretion except as to electing between the two modes of punishment prescribed.

When the historical background of the 92d and 93d Articles of War is considered in conjunction with the sharp difference in phraseology used by Congress in prescribing the punishment under the two Articles there appears but little basis for the contention that punishments authorized by the 93d Article are by implication authorized under the 92d Article.

7. The Board of Review in the Ricks case quotes the following statement from Winthrop:

> "In imposing sentence for the offenses made punishable under these Articles, the province of the court is simply ministerial - to pronounce the judgment of the law. It has no power to affix a punishment either more or less severe, or other, than that specified: any different or additional punishment is simply a nullity and inoperative. *****. Indeed in all cases of punishments of the mandatory class, it is not the court which decrees the penalty but the statute; the distinctive function of the court practically terminating with the conviction." (Winthrop's Military Law & Precedents, 2nd Ed., p.395).

The above principle is based upon Chief Justice Marshall's declaration in United States v. Wiltberger, 5 Wheat, 76, 94, 5 L. Ed., 37,42:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department *****. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. ****". (5 Wheat, 94; 5 L. Ed., 42).

The rule thus announced has been consistently confirmed:

"Criminal and penal statutes must be strictly construed; that is, they cannot be enlarged or extended by intentment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted. Only those persons, offenses, and penalties, clearly included, beyond any reasonable doubt, will be considered within the statute's operation. They must come clearly within both the spirit and the letter of the statute, and where there is any reasonable doubt, it must be resolved in favor of the person accused of violating the statute; that is, all questions in doubt will be resolved in favor of those from whom the penalty is sought. *****. Nor can the court, as a general rule, supply or correct any omission of the legislature regardless of what may be its cause. And it matters not that the court believes that the statute should have been more comprehensive, or that a strict construction produces an undesirable result. Since the power to inflict punishment is vested in the legislature rather than in the courts, there is considerable danger in subjecting criminal or penal statutes to a liberal construction, lest the court invade the province of the legislature. Moreover, the creation of an offense by interpretation may operate to entrap the unwary and ignorant and threaten the rights of the people generally. As is obvious, the rule of strict construction largely and properly grows out of the tenderness of the law for the rights of the individual." (Crawford's Statutory Construction, sec.240, pp.460-464). (Underscoring supplied).

"*****, statutes which subject one to a punishment or penalty, or to forfeiture, or a summary process calculated to take away his opportunity of making a full defense, or in any way deprive him of his liberty, are to be construed strictly. And the degree of strictness will depend somewhat on the severity of the punishment they inflict." (Bishop on Statutory Crimes, 3rd Ed., sec.193, pp.216,217).

"It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this Court in Church of the Holy Trinity v. United States, 143 U.S. 457, 36 L. ed. 226, 12 S. Ct. 511; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. Compare Pirie v. Chicago Title & T. Co. 182 U.S. 438,451,452, 45 L. ed. 1171,1178,1179, 21 S. Ct. 906. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. Treat v. White, 181 U.S. 264,268, 45 L. ed. 853,854, 21 S. Ct. 611." (Crooks v. Harrelson, 282 U.S. 55, 59,60; 75 L. Ed. 156,175).

"*****. But the object of all construction, whether of penal or other statutes, is to ascertain the legislative intent; and in penal statutes, as in those of a different character, 'if the language is clear, it is conclusive.' " (Osaka Shosen Kaisha Line, etc. v. United States of America, 300 U.S. 98,101; 81 L. Ed., 532-535; Cf: United States of America v. Noveck, 271 U.S. 201; 70 L. Ed., 904; United States v. Scharton, 285 U.S. 518, 76 L. Ed., 917).

"Penalties and forfeitures in addition to those stated in a statute will not be implied. (Western Fidelity & Guaranty Co. v. Marks, 142 Pac. 524, 37 Nevada 306)". (59 C.J., sec.660, p.1116, note 25).

The phraseology of the 92nd Article with respect to punishment - "shall suffer death or imprisonment for life, as a court-martial may direct" - is specific, explicit and direct. There is nothing to interpret or construe.

The penalty of "death" needs no further description; it is the ultimate. "Imprisonment for life" likewise describes without qualification a punishment which is only one degree less severe than death. The rules of statutory construction announced by the above cited authorities apply with force and vigor.

The Board of Review in the Ricks case applied the foregoing rules of statutory construction insofar as total forfeitures were concerned, but concluded that Congress must have legislated with knowledge of the long established custom and practice of Courts-Martial of imposing the sentence of dishonorable discharge in connection with a sentence of life imprisonment and therefore, by implication, read into the 92nd Article of War authority for the court to include the sentence of dishonorable discharge with the sentence of life imprisonment. The writer hereof, as a member of the Board of Review, gave his assent to the Ricks holding. However, after further thought and study he now believes that the holding in this respect is subject to legitimate criticism and is illogical. It fails to follow the reasoning of the above quoted authorities to its logical conclusion. The Board was undoubtedly influenced by the following provision appearing in the Manual for Courts-Martial:

> "*** For instance, the sentence of the court upon conviction of a violation of AW 95 must be dismissal; nothing less in any event, and, if convicted of that alone, nothing more. However, upon conviction of an offense under AW 92, dishonorable discharge may legally be imposed with life imprisonment. ***" (MCM, 1928, par.103, p.92).

A fearless and consistent application of the well settled rules of statutory construction previously set-forth, compels the conclusion that neither the sentence of dishonorable discharge nor the sentence of total forfeitures may be imposed under the 92nd Article as concomitant punishments with life imprisonment. The above quoted provision from the Manual exhibits the identical inconsistency as the Ricks holding. It declares that the sentence of the court upon conviction of violation of AW 95 shall be "dismissal" and "nothing less" or "nothing more". In the next sentence, which interprets AW 92 it reads "dishonorable discharge" into the Article but remains silent as to "total forfeitures". Total forfeitures as a form of punishment were as well recognized and established as a custom and usage of the service as dishonorable discharge (Winthrop's Military Law & Precedents - 2nd Ed. - p.427) when Congress enacted the 92nd Article. If it legislated in contemplation of one usage it legislated equally in contemplation of the other usage. One cannot be included and the other excluded. The defect in the Ricks holding is that it excised only a part of the illegal punishment, viz: total forfeitures. The part thereof imposing dishonorable discharge was likewise subject to the same interdiction.

It is my considered opinion, that the provision of the Manual authorizing the imposition of "dishonorable discharge" in connection with

a sentence of "life imprisonment" upon conviction of violation of AW 92 is unauthorized by Congress. It is administrative legislation and therefore without force or effect (Winthrop's Military Law & Precedents - 2nd Ed. - p.33). Ergo, the sentence of "total forfeitures" may not be added to such sentence. The doctrine of the Ricks case should be confirmed, and extended as herein set forth to include the nullifying of sentences of "dishonorable discharge".

8. It may be advanced arguendo that the punishments prescribed by the 92d Article are not "optional mandatory punishments, but rather as limiting punishments, - that is as fixing the maximum and minimum limits of the punishments that may be adjudged, and authorizing the court to enter the field between. In such event, since a death sentence may be commuted to dishonorable discharge, total forfeitures and life imprisonment, the latter sentence is less than death, and obviously is greater than life imprisonment alone. Such a sentence then being within the prescribed limits, the court is authorized to impose it". (See letter from Brig. General L. H. Hedrick, Assistant Judge Advocate General, ETOUSA., to The Judge Advocate General, 21 May 1943).

In making a search and examination of the authorities cogent to this suggested construction of the 92d Article I have found an interesting situation arising out of Section 268 of the Judicial Code 28 U.S.C.A. 385 which reads in part as follows:

> "The said courts shall have power **** to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, etc. ****".

It will be seen that there is a parallel between this "contempt" statute and the 92d Article of War in respect to the punishments prescribed:

Sec.268 Judicial Code	A.W. 92
"to punish, by fine or imprisonment, at the discretion of the court".	"Shall suffer death or imprisonment for life, as the court-martial may direct".

Section 268 of the Judicial Code had its origin in Act of Sept 24, 1789 (Judiciary Act) Chap.20, Sec.17, 1 Stat. 83. Section 17 of the Judiciary Act was carried forward into the Act of Mar 2, 1831, 4 Stat. 487, in practically its original terms and was re-enacted without change in the Judicial Code as Section 268.

In the case of Ex parte Robinson, (19 Wall. 505, 22 L. Ed., 205) the Supreme Court had occasion to apply the statute as it then stood under

the act of 1831. Robinson, an attorney, was punished by the District Court of the United States for the Western District of Arkansas, for an alleged contempt. He was sentenced to disbarment from practice. He applied to the Supreme Court for a writ of mandamus directed to the District Judge compelling him to reinstate his name on the list of attorneys. In its opinion the Supreme Court assumed that Robinson had committed a contampt in the presence of the court and the question presented was whether the district judge had authority to disbar Robinson for the alleged contempt. In holding that the punishment was not authorized by the statute the Supreme Court said:

> "The law happily prescribes the punishment which the court can impose for contempts. The 17th section of the Judiciary Act of 1789, 1 Stat. at L., 73, declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for a contempt, was, therefore, unauthorized and void." (22 L. Ed., p.208).

In the recent decision of the Supreme Court in re William V. Bradley (Law Ed., Advance Opinions 1942-1943, Vol.87, No.8, p.441), Bradley was found guilty by the Circuit Court of Appeals of the 3rd circuit of a contempt under present Section 268 of the Judicial Code for intimidating a witness in a corridor adjoining the court-room. The court sentenced Bradley to six months imprisonment, to pay a fine of $500 and to stand committed until he complied with the sentence. Bradley was taken into custody and committed to prison and soon thereafter paid his fine to the court. Later the court realised the sentence was erroneous and delivered to the clerk an order amending it by omitting any fine and retaining only the six months imprisonment. The court instructed the clerk, who still held the money, to return it to Bradley's attorney. The latter refused to receive it and the clerk continued to hold it. Bradley being in jail petitioned the Supreme Court to grant certiorari. With respect to the original sentence the Supreme Court said: "The sentence was erroneous, *** the sentence could only be a fine or imprisonment." The Supreme Court cited the Robinson case (supra) as authority together with two other decisions: Ex parte Lange, 18 Wall. 163,176; 21 L. Ed., 872-878 and Clark v. United States, 289 U.S. 1; 77 L. Ed., 993.

The Lange case arose out of Lange's alleged violation of the Act of June 8, 1872 (17 Stat. 320, sec.290) for stealing, purloining, embezzling, and appropriating to his own use certain mail bags belonging to the Post Office department. He was found guilty of appropriating bags of the value of less than $25, the punishment for which as provided in the statute was imprisonment for not more than one year, or a fine of not less than $10, nor more than $200. He was sentenced under such conviction to one year's imprisonment and to pay a $200 fine. Lange was committed to jail and the next day paid his fine to the clerk who paid the same to the Treasurer of the United States. Thereafter on a writ of habeas corpus the same judge vacated the former judgment and the prisoner was sentenced to one year's imprisonment. A second writ of habeas corpus was issued upon discharge of which Lange appealed to the Supreme Court. In holding the original punishment erroneous the Supreme Court said:

> "We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone; ***". (21 L. Ed., 878-879).

In the Clark case the defendant was adjudged by the District Judge guilty of criminal contempt in that with intent to obstruct justice she gave answers knowingly misleading and others knowingly false on her voir dire examination as a juror. The conviction was affirmed by the Circuit Court of Appeals but was remanded to correct an error in the sentence (61 Fed., 2nd, 695). The Supreme Court's opinion does not discuss this erroneous sentence but full consideration of same is found in the Court of Appeals opinion in 68 Federal (2nd).

The basis of these decisions is clearly that when a court by statute is authorized to adjudge two alternative penalties, the discretion of the court is confined to those penalties. It may adjudge one or the other but not both and it cannot impose any other penalty than those specified in the statute. This doctrine is amplified further in Elliott v. The East Pennsylvania Railroad Co. (99 U.S. 573; 25 L. Ed., 292), wherein the court refused to extend by implication the imposition of a penalty not expressed in the statute under consideration, saying:

> "***** the conclusion is irresistable, that it was the intention of Congress to impose no other penalty for a failure to comply with the requirements of this section than the one which is specifically given." (25 L. Ed., p.293).

Erskine v. Milwaukee & St. Paul Railway Co, (94 U.S. 619; 24 L. Ed., 133) further illustrates the rule that a court will not read into a statute

penalties not prescribed therein. (See also: Western Fidelity & Guaranty Co. v. Marks, (supra))

The foregoing decisions appear to be conclusive on the question of the authority of a courts-martial to adjudge penalties under the 92d Article of War. The court may elect between life imprisonment and death. Its discretion is confined to choosing between these two mandatory punishments. When the choice is made its discretion is exhausted. When sentencing an accused to life imprisonment it cannot add the additional punishments of "dishonorable discharge" and "total forfeitures".

The only remaining question arises out of the suggestion that the power to commute a death sentence imposed under the 92d Article to life imprisonment, dishonorable discharge and total forfeitures, modifies the conclusion above stated. The sentence of death is an alternative mandatory punishment under the 92d Article. The power to commute it in the manner above stated is unquestioned.

A sentence cannot be commuted except by the President or by a commanding general empowered by the President under AW 50 (MCM., 1928, 87b, p.77).

> "Commutation is conditional pardon. It is pardon granted on the condition subsequent that the party receive and undergo a less severe punishment of a different nature- a condition which, like all conditions annexed to pardons, must be accepted or the grant will not take effect. In military cases, the acceptance is general given, not formally, but impliedly by the party's entering upon without objection, and duly undergoing, the substituted punishment. ******. Thus death may be commuted to dismissal or dishonorable discharge, or to imprisonment, or to both,- indeed to any recognized military penalty or combination of penalties, since any such penalty or combination is in law less grievous than the summum supplicium of death. ******. Like other conditional pardon, commutation is, in practice, employed at the time of the approval or confirmation of the sentence or punishment: unlike remission, it is rarely if ever resorted to at a later stage." (Winthrop's Military Law & Precedents, 2nd Ed., pp.471-472).

The Supreme Court of the United States has definitely announced the rule that the commutation of a sentence is the exercise of the power of pardon and is not part of the judicial process:

"*****. A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages ****." (United States v. Wilson, 7 Pet. 150,161; 8 L. Ed., 640-644).

"Indisputably under our constituional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by the law, is judicial, and it is equally to be conceded that, in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative, and includes the

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right in advance to bring within judicial discretion for the purpose of executing the statute elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment fixed by law and ascertained according to the methods by it provided, belongs to the executive department. ****." (Ex parte United States, 242 U.S. 27, 42; 61 L. Ed., 129-140).

"*****. Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check intrusted to the Executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. ****." (Ex parte Grossman, 267 U.S. 87,121; 69 L. Ed., 527,535-536).

"*****. When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put. Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order. Supposing that he did accept, he could not affect the judgment to be carried out. The considerations that led to the modification had nothing to do with his will. The only question is whether the substituted punishment was authorized by law-- here, whether the change is within the scope of the words of the Constitution, article 2, § 2: 'The President . . . shall have Power to grant Reprieves and Pardons for Offenses

against the United States, except in Cases of Impeachment.' We cannot doubt that the power extends to this case. By common understanding imprisonment for life is a less penalty than death. ***." (Biddle v. Perovich, 274 U.S. 480,487; 71 L. Ed., 1161-1163).

"*****. The Probation Act gives power to grant probation to a convict after his conviction or after a plea of guilty, by suspending the imposition or suspending execution of the sentence. This probation is to be after conviction or plea of guilty. The question is, Before what time must it be granted? Two answers to this latter question are possible. It must be grantable either at any time during his whole sentence or be limited to a time before execution of the sentence. If the first answer is adopted, it would confer very comprehensive power on the district judges in the exercise of what is very like that of executive clemency in all cases of crime or misdemeanor. It would cover in most cases the period between the imposition of the sentence and the full execution of it. It would cover a period in which not only clemency by the President under the Constitution might be exercised but also the power of parole by a board of parole, abating judicial punishment to the extent of two thirds of it as to all crimes punishable by imprisonment for more than one year. It seems quite unlikely that Congress would have deemed it wise or necessary thus to make applicable to the same crime at the same time three different methods of mitigation. ***" (United States v. Murray, 275 U.S. 347,356; 72 L. Ed., 309-312).

Since the commutation of a sentence is an exercise of the power of pardon vested by statute in the President or by his direction in a commanding general of an army in the field, it cannot be said that the existence of this power enlarges the authority of a court-martial in adjudging punishment under the 92d Article. The power of pardon is an exercise of clemency; the adjudging of the punishment is a judicial function. The Articles of War neither directly nor by implication vest in courts-martial the powers of clemency. Following the principle and philosophy of the Constitution and acts of Congress applicable to

civilians, the Articles of War sharply separate the judicial area within which the court operates in adjudging a sentence prescribed by statute from the executive range exercising the powers of pardon. The power of the President or of the Commanding General of an army in the field to relieve from the punishment fixed by law and/by the court-does not supplement the authority of the court in the first instance; it cannot authorize a court to impose a punishment not authorized by the statute denouncing the crime.

9. I therefore conclude that the record in the instant case is legally sufficient to support the finding of guilty but legally insufficient to support that part of the sentence which adjudges dishonorable discharge of the accused and forfeiture of all of his pay and allowances due or to become due.

B. Franklin Riley Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 16 SEP 1943 TO: Commanding General, Eighth Air Force, APO 633, U.S.Army.

1. In the case of Private HENRY (NMI) LAKAS (34339722), 9th Airdrome Squadron, VIII Air Support Command, 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, 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 necessary to say that in my judgment the sentence of imprisonment for life is too severe in this case. On conviction of rape in violation of the 92d Article of War, the court was required to adjudge one of the mandatory punishments, death or imprisonment for life, fixed by the statute. The reviewing authority, however, has power to reduce the term of confinement to such number of years as he deems appropriate. For a brutal waylaying and overpowering of an innocent young girl, the maximum punishment is appropriate. But this is not such a case. The woman involved was 26 years of age, she went willingly with the accused to a secluded spot late at night, lay with him in the grass and undoubtedly permitted certain liberties. The evidence indicates that she had so behaved with other soldiers and that the accused knew that. While she did not consent to intercourse, and the crime of rape is established the record does not make out the aggravated crime which would warrant imprisonment for life. It is suggested that you consider some reduction of the term of confinement.

3. When copies of the published order are forwarded to this office they should be accompanied by the record of trial which is transmitted herewith and the foregoing holding and this indorsement. The file number of the record in this office is ETO 709. For convenience of reference please place that number in brackets at the end of the order: (ETO 709).

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.

ETO 739.

27 SEP 1943

UNITED STATES	EIGHTH AIR FORCE SERVICE COMMAND, EUROPEAN THEATER OF OPERATIONS.
v.	
Private LESLIE (NMI) MAXWELL (33084827), 1965th Quartermaster Company Truck (Avn).	Trial by G.C.M., convened at Bristol, England, 18-19 May 1943. Sentence: Death.

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Leslie (NMI) Maxwell, 1965th Quartermaster Company Trk (Avn), Headquarters and Headquarters Detachment 2019th Trk Batallion Aviation Provisional, did at APO 635, AAF Station 473 on or about 1700 hours 14 March 1943 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private first class Leonard R. Boon, 1965th Quartermaster Company Trk (Avn), Headquarters and Headquarters Detachment 2019th Trk Battalion Aviation Provisional, a human being by shooting him with a rifle.

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 hanged by the neck until dead. All members of the court

present concurred in the findings of guilty and the sentence.

The reviewing authority approved the sentence and forwarded the record of trial for action by the Commanding General, European Theater of Operations under Article of War 48. The Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing execution of sentence and forwarded the record of trial for action pursuant to Article of War 50½.

3. The accused and deceased (both colored) were, on 14 March 1943, members of 1965th Quartermaster Company, Truck (Aviation). (All enlisted personnel, except as mentioned, who appeared as witnesses were members of the same organization). They were stationed on said date at AAF Station 473, located at or near Bristol, England (R117). The unit was billeted in Muller's Orphanage Barracks, a three-story structure. The quarters of the soldiers involved in this case were located on the second floor of the building. They consisted of a large barrack or squad room and four attached separate rooms, two at each end. Sleeping cots were arranged in two parallel rows in the squad room with an aisle between the rows. There were two stoves or heaters in the squad room located on left and right of the aisle respectively about equa-distant from a transverse center line. Entry to the squad room was obtained solely through one of these separate rooms which was occupied by T/5 Curtis O. Hopkins. At the opposite end of the squad room were two smaller rooms; one of which was a latrine and the other was the quarters of deceased and S/S Robert P. Jordan. The accused had his cot in the squad room (R9,16,17,47,51,54,83; Pros.Ex.A).

4. On Saturday evening 13 March 1943 accused and deceased had visited neighboring public houses. Accused indulged in the use of intoxicants (R89,90,91,144). He returned to the barracks between 11:00 P.M. and 12 midnight. On Sunday morning 14 March 1943 he arose from his sleep at 8:00 A.M, but ate no breakfast. Soon thereafter he and deceased commenced to gamble at a game of dice. The play continued for about two hours. Accused won all of deceased's money - 18 or 20 shillings (R144). Accused ate no lunch. At noon deceased requested accused to buy him a drink. The two soldiers went to a public house - "Ashley Hill Station Hotel" (R104,105,144,145) which they entered soon after 12:15 P.M. (R110,111). They remained at the public house until it closed at 2:00 P.M. The wife of the proprietor of the public house, Mrs. Phyllis Wren, was a witness for the prosecution (R104). She testified that no spirits or "hard liquor" were sold to either accused or deceased and asserted that she served accused only with "home brew" - a few drinks - and that deceased drank cider (R105,108,109). When the public house closed, accused and deceased returned to the barracks but neither of them were drunk (R106). Accused reclined on his bed for a time but at the solicitation of deceased the dice game was resumed and continued for about an hour (R145,146). Accused testified that the game ceased at this time and he left the barracks and went down to the guard gate and met a friend - a British

soldier - whose name he did not know. The British soldier had a fifth of a quart of whiskey and accused drank half of it. He then returned to the barracks and resumed the dice game with deceased in the latter's room. After playing about 20 minutes an argument arose over a bet. Deceased picked up five shillings and retained it against the protests of accused. The game broke off.

5. The incidents occurring immediately prior and subsequent to and coincident with the homicide, as related by witnesses for the prosecution in its case in chief, are as follows:

(a) T/5 Curtis O. Hopkins had been to the latrine. As he passed through the squad room he saw accused sitting on a cot near one of the stoves. Witness went to his own room. The deceased left the squad room and passed through witness's room on his way out. In about five minutes deceased returned and again walked through witness's room into the squad room (R8). Immediately after deceased walked into the squad room the witness, while in his room, heard a shot. He did not see the discharge but upon hearing the same he went into the squad room. Deceased was on the floor near the left-hand stove. He was bleeding and was saying to tell his mother he was dying. He further said: "Don't let him shoot me any more" and "Maxwell, here's your money. Don't let him shoot me any more" (R8-10). Accused was standing near by with a rifle in his hand. An empty cartridge was on the floor four or five feet from accused and he was trying to re-load the rifle with a live shell. There were coins on the floor. Deceased had nothing in his hands (R10). Corporal Swilley was trying to take the rifle from accused and with witness assisting they succeeded in gaining possession of it (R7,11). First Sergeant Bellamy appeared and witness offered to deliver the rifle to him but it was refused. Witness laid it on a bed. It smelled like a gun recently fired (R11). As Swilley was trying to take the rifle from accused the latter, directing his speech to deceased said: "Are you dead yet? Die, you mother fucker" (R14). Accused and deceased were friends and witness had seen them together several times (R13).

(b) Staff Sergeant Robert P. Jordan testified that accused and deceased appeared to be friends as they associated together (R16). Between 3 and 4:00 P.M. on 14 March 1943 witness left the supply room on the first floor and went to his room adjoining the latrine. Deceased and witness were room-mates. Accused and deceased were in witness's room and were engaged in an argument. Deceased explained the differences arising over five shillings which accused claimed deceased owed him. Witness refused to act as mediator and referred them to others who knew about gambling. The argument re-commenced. Deceased said: "If you want the money you will have to take it". Accused left the room and as he was leaving replied: "That's all right; I'll get you". The next time witness saw accused was at "chow" between 4:30 P.M. and 5:00 P.M. Deceased and witness went to "chow" together but witness returned to the supply room. Deceased thereafter came to the supply room and witness

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paid him a florin which he owed for a hair-cut. Deceased left the supply room to go up stairs. About 5 minutes later Corporal Hopkins appeared and informed witness that deceased had been shot (R16,17), whereupon he went up stairs and found deceased lying on the floor. Accused and the sergeant of the guard were standing outside of the squad room. The first sergeant came in and ordered everyone to leave the room and witness departed (R18). Witness smelled alcohol on deceased's breath while the latter was cutting his hair. Deceased had a straight edge razor which he used when cutting witness's hair (R19). He was company barber and used a straight edge razor to taper customers' hair. Witness was not close enough to smell accused's breath. During the argument between accused and deceased in witness's room, accused appeared normal, was not annoyed and "seemed quite cool" (R21).

(c) Corporal Otto Swilley. Accused and deceased appeared to be on friendly terms (R22). Witness saw them together at about 4:30 P.M. on 14 March 1943 in the squad room. He heard accused ask deceased if he were going to pay him ten shillings but did not hear deceased's reply. A rifle was discharged and witness turned around and saw deceased lying on the floor. Accused was standing in the middle of the aisle about 4 to 6 feet from deceased and deceased lay about 2 inches from witness. Accused said to deceased: "Are you dead yet? No." Deceased said:"Please don't shoot any more." Then accused walked off and said: "I will finish you. Die, you mother fucker" and kicked deceased (R24,25,34). While deceased was on the floor he kept repeating: "Tell mother I am dying". He had nothing in his hands; they were folded across his stomach. There was much blood on the floor about deceased. Jones was on the same side of the stove as witness and Johnston was on the other side. Neither of them had a rifle (R33). When witness turned around accused did not have a gun in his hands but he backed up and got the gun and commenced to re-load it (R24). Witness said to accused: "Don't shoot him any more". Witness grabbed the rifle at the bolt and pushed it against accused's body to prevent him from re-loading it. The bolt was back and witness could feel the hot empty shell in the chamber and the new live shell which accused was trying to put into the gun (R36-40). Witness smelled burnt powder (R35). When accused kicked deceased he must have been angry. He saw no money on the floor (R30,31). He laid hold of accused on his right side. Hopkins came in and grabbed him on his left side (R27). Witness went down stairs and out to the ambulance and brought back a stretcher. Deceased was taken to the dispensary in the same building. Thereafter an ambulance was called and deceased was taken to the British hospital in Bristol. Witness sat in back of ambulance with deceased (R28,29). As deceased was being taken down stairs on the stretcher accused was joking and laughing and said: "Boon, are you going to pay my 10s? If you don't pay it, you will pay it in hell" (R32).

(d) Pfc. Grady Johnson was sitting on the floor by the stove in the squad room nursing a sore jaw resultant upon a tooth extraction. He saw accused and deceased in the room about 4:30 P.M. 14 March 1943, and

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heard accused ask deceased when he, deceased, was going to give him, accused, some money. Deceased replied: "Go ahead now. Don't bother me now". Deceased then left the room but returned in two or three minutes. Accused remained in the room and he had a rifle in his hands when deceased came back into the room. When deceased returned accused said to him: "Are you going to give me my money?" Then the rifle was fired. Witness did not see it discharged but saw it in accused's hands after it had been fired. Deceased was lying on the floor about 16 paces from witness and there was blood about him. Accused and deceased were about 6 feet apart. Witness saw no money on the floor, and saw nothing in deceased's hands. Witness left and went to the orderly room (R41-43,46). Later in the evening at about 7:00 o'clock witness saw accused at some office. He asked witness for a cigarette and inquired of Swilley if he were going to make his date that night. He was joking and laughing and did not seem concerned over what had happened (R47,48).

(e) Private Herbert Jones testified that deceased and Sergeant Jordan lived together in a room adjoining the barrack room on and prior to 14 March 1943. Accused and witness lived in the squad room. At about 4:30 P.M. on the before mentioned date witness was in the squad room putting on his leggins preparatory to going on guard at 5:00 P.M. (54-57). His rifle was on his cot. Accused was sitting on a cot but he went over to Private Jerry Jones and took his rifle. Jerry Jones took his rifle away from accused and the accused went to witness's cot and took his rifle. Witness told him three or four times to put it down but he paid no attention to the request but stood in the middle of the floor holding the rifle (R53, 62). Deceased came into the room from the front of the building and advanced towards accused, who held the rifle low on his hip (R62). The front of the building is where the door is shown in Pros.Ex.A. Accused asked deceased for money. Deceased came within seven feet of accused (R62). The rifle was fired. Witness did not see the rifle discharged because he was putting on his leggins. He was sitting 10 or 12 ft from accused (R63). He heard the report and then ran out of the building. He did not thereafter see deceased. Accused had witness's rifle bearing serial number 3307695, which witness identified in court. Witness had had personal possession of the rifle for over a week and had kept it in the squad room under his cot. After the shooting on 14 March 1943, witness took his rifle to the guard-room and turned it over to Sergeant Bellamy, and he had not seen it until produced in court (R58). Witness had no ammunition in his possession at time of shooting (R65). In the early part of the morning of 14 March 1943 witness saw accused and deceased in a crap game, but was not close enough to accused to notice whether or not he had been drinking but he did not think accused was drunk (R59). After the shooting witness saw accused at the guardhouse and on instructions from the officer of the day, witness and corporal of the guard took accused down to the guard-room (R60).

(f) T/5 Fred Howard was, between 3 and 4:00 P.M. on 14 March 1943, standing in the doorway which leads from the main squad room to an adjoining

room and thence to the outside. Deceased passed through this doorway and room. Shortly thereafter he returned and passed witness in the doorway. While deceased was absent, accused, who was in the squad room, picked up a rifle (R67,72) and sat down on one of the beds with the rifle across his knees. When deceased re-entered the squad room accused stood in front of deceased - about 7 or 8 feet from him (R71,72) - and asked about some money. Accused was cool and normal (R72). Accused made a step backwards and the gun discharged (R67). The barrel of the gun was pointed towards deceased's ankles but when it was fired it recoiled upwards (R68,71). Witness was looking directly at accused and deceased and saw the gun discharged. Deceased fell to the ground and accused came to him saying: "If you ain't dead, I'll finish you off, you son of a bitch" (R68) or "Give me another bullet and I'll finish you off, you son of a bitch" (R74). Deceased had both hands in his pockets when shot (R68). He was standing still. Witness did not see deceased make any threatening move towards accused nor did he hear him make any threatening remarks. He did not have anything in his hands. Deceased fell to the left of the stove and soon the blood began to flow. There was a half-crown on the floor. A stretcher was brought and deceased was taken out (R69). After accused had fired the first shot he tried to re-load the rifle but he was grabbed by Swilley and Hopkins. Swilley grabbed the gun around the firing chamber and Hopkins interfered. On the steps as accused left the room he got pretty angry. He said to give him another bullet and he would finish deceased (R69,70).

(g) Private A. D. Whitthorne saw accused and deceased together most of the day on 14 March 1943 (R78). He saw them leave the barracks building together and later at about "chow" time in the squad room witness heard accused ask deceased to give him five shillings. At that time deceased was going through the room. He replied: "Go ahead and quit fucking with me" and they continued arguing. Hampton was shining his shoes and he said something to deceased in a jocular manner. Deceased went into the other room and after a short time came back into the large room, and started down the aisle. Accused had been sitting on a cot but as deceased returned to the room accused sprang from the cot and went into the middle of the floor and said: "Are you going to give me my 5s?" (R81,82). He was carrying the rifle and had it pointed at deceased so that a bullet would hit about his belt buckle. Accused pulled the trigger about 50 seconds after he asked the question. Witness was looking at accused when he fired, but he did not hear deceased make any reply to accused's question. Witness neither heard deceased utter any threatening remarks towards accused nor did he see him make any threatening gestures. Accused appeared to be acting normally. As soon as the shot was fired deceased fell slowly towards the floor. Witness left the room to notify Sergeant Bellamy and did not return (R83,84).

(h) Private Philip Hampton saw accused and deceased together in the large barrack room at about 5:00 P.M. on 14 March 1943. They were engaged in an argument. Witness said to them: "You boys cut out the arguing". He was preparing to shine his shoes. Both accused and deceased appeared to

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have been drinking heavily (R92). Deceased walked out of the room saying: "Oh, fuck it". Accused remained. In a few minutes deceased returned. Witness was busy shining his shoes. There was a report of a gun and witness turned around and saw accused standing holding a Remington rifle. Deceased fell to the floor and said: "You have shot me", and then he cried: "Tell mother I am dying". Accused walked over to deceased and said: "Die, I don't believe you are dead" and then kicked deceased, who was struggling and trying to get up. Accused had pulled the bolt of the rifle back and was trying to re-load it. Swilley and Hopkins took the gun away from accused who was angry (R85-88). The first sergeant appeared and deceased was taken to the dispensary. Accused was standing at the top of the stairs when deceased was being carried out and said: "Die, you son of a bitch. You won't pay me my 10s, but you will pay it off in hell" (R89). Accused was pretty drunk at the time of the shooting. He did not try to run away but was laughing and joking while deceased was dying (R93).

6. The prosecution introduced, in its case in chief, the following additional evidence:

(a) Dr. Betty Fox, a regularly licensed physician under the British law, was Senior Resident Medical Officer of the Bristol Royal Infirmary, Bristol, England, on 14 March 1943 (R74-75). She testified that at about 5:30 P.M. on said date a colored American soldier, whose papers identified him as Leonard Boon, was brought to the hospital in an ambulance. Witness examined him. He was suffering from an entry wound in the abdomen a little to the right side and an exit wound in the back to the left sacroiliac joint. The latter wound was the size of a half-crown and jagged. The two wounds were beyond any doubt gun-shot wounds. There was a good deal of hemorrhage from the exit wound. He was brought into the infirmary in an unconscious condition and pulseless. He died within 15 minutes after his admission between 5:45 P.M. and 5:50 P.M. Death of the patient was caused by the wounds, and there was no evidence of other wounds or causes of death. Witness noticed the deceased's personal effects and among them was a straight-edged razor (R76-78).

(b) Lieut. Colonel Francis Bayless, M.C., 298th General Hospital, Chief of the Laboratory Service, performed an autopsy on deceased on 16 March 1943 at the laboratory of the 298th General Hospital. Without objection from the defense the witness refreshed his memory from "The medical examination autopsy of Leonard Boon". The autopsy report was not introduced in evidence. The witness testified that the body of an American soldier was transferred from the Bristol Royal Infirmary to the morgue of the 298th General Hospital. The body was identified as that of deceased by an American officer. The deceased had been shot in the abdomen by a rifle or revolver bullet. The projectile passed through the intestines and spine and made its exit in the lower part of the small of the back. Other than evidence of the recent gun-shot wounds, there was nothing abnormal revealed by the autopsy examination. There was evidence

of loss of considerable blood. The wounds and the results thereof were the cause of death. The bullet shattered the 5th lumbar vertebrae (R94-96).

(c) 1st Lieutenant John Pikulin of the 1965th Q.M. Company, Truck, was Company Commander and Officer of the Day on 14 March 1943 at AAF Station 473. He testified that deceased was assigned to said station on such date and identified accused in court. Witness first saw accused on that date at the barracks which was filled with men. When witness asked who did the shooting accused spoke up and said: "Here I am lieutenant, I did it". Later he stated to the witness to "let him have it". Accused was taken to the guard-house. Witness saw deceased at Bristol Royal Infirmary after he was dead (R97).

On and prior to 14 March 1943 there were 102 rifles issued to the company. They were entered in the company property book by the serial numbers of each rifle. Each soldier was assigned a specific rifle by number, and entry of such fact was made in the property record. Rifles were kept in the store room and were issued only when men went on guard. The guard was composed of 10 privates and 2 non-commissioned officers. When a soldier went on guard his rifle was delivered to him by the sergeant who made notation of such fact. The guards kept their rifles in the guard-room and used the rifles which had been assigned to them by serial number. Prior to 14th March 1943 no ammunition had been issued - not even to the guard. The only time witness issued ammunition to guards was the occasion when he issued it to special guards put on duty the night accused was placed in the guard-house. On the night deceased was shot, witness had his first-sergeant pick up Herbert Jones' rifle and lock it up in the supply room in witness's custody, where it has been kept (R98-101).

(d) 1st Lieutenant William R. Lynch, C.M.P. testified that on 14 March 1943 he was assistant Provost Marshal of the Bristol Garrison, and was called by telephone to Muller's Orphanage at about 5:10 p.m. On arriving at the barrack-room he saw blood on the floor, and then went to the guard-house where accused was confined. Witness handcuffed accused and as a precautionary measure placed him in the staff car and took him to the guard-house in Bristol for confinement. Accused rode with witness in the back seat of the car. Witness asked accused why he killed deceased, or shot at him. Accused replied: "He owed me this money which we had in this crap game, and I asked him if he would not give me the money back. He said he would not give it to me, so I just up and let him have it". Accused was not intoxicated and his actions were rational. Accused had been on M.P. duty in Bristol and he talked with Sergeant Swartold, who sat in the front seat, and laughed and joked (R117,118). When accused and witness arrived at the Provost Marshal's office in St. Stephen's building in Bristol a statement was taken from accused in the presence of Sergeant Schantz of the Investigation Division of the London office of the Provost Marshal General. Accused was duly warned of his rights. The statement was read to him, which he signed of his free will, in the presence of

witness (R119). In the automobile ride to the Bristol office witness made no threats to accused nor did he hold out any promises to him. Accused and witness engaged in a conversation wherein witness asked accused: "Maxwell, what was your idea in shooting this man?" and then he made the explanation previously stated (R120).

(e) 1st Lieutenant John Dubach, Q.M.C. testified he made the required investigation of the instant case under AW 70. Lieutenant Lynch and his sergeant had previously obtained a statement from accused. The original copy (which accused had signed) was in possession of Lieutenant Pikulin. The witness had a true copy made of it. Accused was at Disciplinary Training Center #1 at Shepton Mallet in Somerset. Witness went to see him on 18 March 1943 and spent about three-quarters of an hour with him. He had the copy of accused's previous statement with him and presented it to accused with full warning of his rights. There were no threats used nor promises made and there was no argument - "just a discussion, very factual, and plainly spoken". Witness read to accused the copy of his previous statement and then gave accused himself opportunity to read it. Accused read it. Witness asked accused whether the gun he used was his own or the property of someone else. Accused said he did not know but he did not believe it was his gun, and finally said he did not know whose gun it was - it was just a gun as far as he was concerned. Therefore, in his presence, witness drew a line through the word "my" preceding the word "gun" and inserted the letter "a". Accused initialed the change, and finally signed the copy in the presence of the witness (R121-125). The prosecution offered the statement in evidence (R122), but on objection by the defense it was excluded, after the court had been closed for deliberation. The President announced the decision of the court (R127).

Subsequently, after Prosecution's Ex.D. had been admitted in evidence, the statement of 18 March 1943, signed by accused in the presence of Lieutenant Dubach, was again offered in evidence by the prosecution. The law member sustained an objection by the defense and the statement was again excluded (R134). It is not attached to nor made a part of the record of trial, although same does appear among the statements taken on the investigation.

(f) Staff Sergeant Vernon H. Schantz, Investigations Division, Provost Marshal General's Office testified that on Sunday evening 14 March 1943, upon being notified of trouble at Muller's Orphanage Barracks in Bristol, he went down to that place and investigated the case. Accused was taken from the barracks down to the Provost Marshal General's Office in Bristol (R123). He was duly warned that he was not required to speak, but that if he did speak his statement would be used against him in any resulting court-martial trial. He understood his rights and voluntarily made a statement. He was not threatened nor were any promises made to him. He was not drunk and seemed very much in control of his senses (R129,130,132). The witness without objection then testified:

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"A. I asked him to tell me what he did the whole day, to give me the chronology of what he did, and he told me that he had been shooting crap with Boon. I think he said he had cleaned Boon out, and then decided to go down and do some drinking down one of the pubs, and he did. As I recall, they were drinking until about 1400 hours, 2 o'clock in the afternoon. Then they returned to their billet and they started to shoot crap again. Some argument arose as to a point that they were shooting for. I think when they shot crap the first time Private Maxwell won all the money, and then Boon borrowed some money from somebody, or got some money some place, and they started to shoot crap again. This time Boon was lucky, and in the course of the shooting of the game, the gambling game, they had an argument and they stopped shooting dice. Then they argued and argued for some time, and Maxwell said that Boon owed him some money.

Q. This is all what Maxwell said?

A. This is all what Maxwell told me. So they stopped shooting crap, and they were walking around the billets; one was following the other and pestering each other for their money, and they got worked up about this argument. I think Maxwell told me they went into the latrine and in there they had some more arguments, at which time I think he drew a razor on him. He walked out, went over to one of the beds in the billet where he slept in the room and picked up a gun. He said it was his gun, but it turned out later not to be. He put a cartridge in it and as Boon came into the room again he walked down the center of the room and he said: 'Boon, I am going to ask you once more. Are you going to pay me the money you owe me?' I forget what Boon's answer was; so he took aim and said he pulled the trigger and discharged the rifle. Boon fell down and some other soldier in the room made a run for Maxwell and took the gun from him.

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Q. Did he bring the rifle up to the normal shooting position with the butt on the shoulder or what. In what position did he shoot?

A. Not the way he showed me. He said he was loading the gun, 'So I stepped back and I said 'Are you going to pay me now?' and he said he was not and the next thing I knew the trigger went off.' I do not think he had it up to his shoulder." (R129,130).

Over the objection of defense the court admitted in evidence accused's statement made to S/S Schantz on 14 March 1943 (R133), and same is "Prosecution's Ex.D." and is attached to the record. The same is as follows:

The following stated by S/Sgt. Vernon H. Schantz, ASN 33024882, ID, PMG Det., to Pvt. Leslie Maxwell, ASN 33084827, 1965th Q.M.Trucking Co., APO 635:

It is my duty to inform you that anything you might say may be used for or against you should this investigation result in a courts martial and you are making this statement of your own free will and without fear or promise of reward. Do you understand what I have said? Answer by Pvt. Maxwell. "I do."

My name is Pvt. Leslie Maxwell. I was born on August 5, 1918. I was inducted into the U.S. Army June 24, 1941. On March 14, 1943 between the hours of 11 and 12 this morning, Pvt. Boon and I were gambling by shooting craps. I won about eighteen shillings from him, we were shooting for half a crown a roll, and I broke him. He borrowed some more money from a friend, and I broke him again. He, Boon, then borrowed two (2) pounds from me and Boon and I went to a pub right down the hill from Mullers Orphanage and had some whiskey, beer and cider. We were alone. We entered the pub at about 1200 hours and left about 1400 hours. We were both about high and came on back to the barracks. I was sitting on the bed and Boon suggested gambling again and I told him that I had broke him twice and he wanted me to give him another gamble for his money. And so we started gambling and he got lucky this time and Boon won all but ten (10) shillings of mine. We then had a misunderstanding in that he said that his point was nine and he hit a seven and

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said he wanted his money back. We were shooting for ten (10) shillings. He said either I get my money back or I quit gambling. I said you can quit gambling because I would not give him his money back. After we stopped gambling I said Boon, pay me the money that you owe me. Boon said that he was not going to pay me the money he owed me. I said after all you're wrong and if I had been right I would have paid you. So he said think what you want, if you want your two pound you can get it out of my ass. I said me and you are friends and we don't want to fall out over two pounds. He said Well I am not going to pay you and I am through arguing with you. I said "Well I am through arguing too." I went out of Boon's room and into the latrine and Boon followed me there. I tried to talk to him there and asked for my money again. I seed that I couldn't talk to him and so he got hot and I got hot too. So he draws his razor out and I walked off aways from him and went out of the latrine. I went in the barrack and got my gun and put one shell in and Boon comes through the barrack and I walked out in the middle of the floor and I said "Boon are you going to Pay me my money?" And he said "No I am not going to pay you your money and kept walking toward me." I just touched the trigger and Boon fell and he said I'LL pay you your money, you did not have to do that. And I said I tried to talk to you but you didn't listen. Cpl. Swilley took my rifle away from me as I was trying to put another cartridge into it. I had three rounds of amunition in my possession since I was at Hattieburg, Mississippi, a period of about four months. This is the whole story and the best I can remember it.

Leslie Maxwell
PVT. LESLIE MAXWELL, ASN 33084827
1965, Q.M. Trucking Co.

Witnessed by:
Vernon H. Schantz
VERNON H. SCHANTZ,
ID, PMG Det.

PROSECUTION EXHIBIT D.

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Lieutenant Pikulin delivered to the witness a bullet which witness marked with the letter "V" (R135). While in the Barracks on 14 March 1943 the witness inspected an Army 30 Remington rifle bearing the number 3307695 which had the initials "F.J.A." on the left side of the stock to the rear of the trigger. He smelled the barrel and noticed a trace of discharged powder. He identified the rifle produced in court as the rifle he described (R136).

(g) 1st Lieutenant Pikulin was recalled as a witness (R136) and testified that on the afternoon of 14 March 1943 he recovered a bullet from the floor of the squad room by means of a crow-bar. He found it about 8 or 9 feet from the pool of blood. Sergeant Schantz marked the bullet with the letter "V" and returned it to witness who placed it in the battalion safe until the assistant trial judge advocate obtained it (R137). A bullet was produced in court, bearing the letter "V", which was identified by the witness as the bullet recovered by him from the squad room floor. Over objection by the defense it was admitted in evidence and marked "Prosecution's Ex.E." (R139). It was subsequently withdrawn with consent of the court.

(h) By stipulation of the counsel a picture of the barrack or squad room was accepted in evidence and is attached to the record and marked "Prosecution's Ex. A.".

(i) S/S Robert P. Jordan upon being recalled as a witness testified that he was the custodian of the company property book and that he personally made the entries therein; that when rifles were issued to the company the numbers appearing on them were immediately entered in the property book by him and that when rifles were issued to an individual soldier his name appears in the record book opposite the number of the rifle delivered to him (R102); that according to the property record book, on 14 March 1943, rifle #3307695 had been issued to Pvt. Herbert Jones and rifle #3306060 had been issued to accused (R103).

Thereupon the prosecution offered in evidence rifle #3307695 and without objection from the defense it was accepted in evidence and marked "Prosecution's Ex. B.". With permission of the court it was subsequently withdrawn (R103).

(j) Without objection, an extract copy of the entry in the company property book, showing that rifle #3307695 had been issued to Pvt. Herbert Jones was admitted in evidence and attached to the record of trial as "Prosecution's Ex. C." (R103). The witness further testified that no ammunition had ever been issued accused through the company supply room (R103).

(k) On stipulation of counsel "Report of Examination and Observation in the case of Pvt. Leslie (NMI) Maxwell, 33084827" dated 8 May 1943 and signed by Moses M. Frolick, Major, M.C., Homer A. Howes,

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Captain, M.C., and Alexander T. Ross, 1st Lieut. M.C., all of the Neuropsychiatric section of the 298th General Hospital was admitted in evidence as "Prosecution's Ex. F." (R140). The report shows that accused has been subjected to observation from 28 April 1943 to 8 May 1943 and that:

> "a. He was not suffering from any defect of reason from disease of the mind either at the time of the alleged crime or at the time of our observation.
> b. He was able to understand the nature of the proceedings at a court-martial, to object to any member of the court, to instruct his defending officer, and to understand details of evidence". (Prosecution's Ex. F.).

7. The following evidence and testimony was presented by the defense:

(a) Attached to the record is copy of a "Report of Psychiatric Examination of Maxwell, Leslie (NMI) Private, ASN 33084827" dated 19 March 1943 and addressed to Commandant, Disciplinary Training Center #1, APO 508. The report recites that pursuant to SO #36, par.6, Hqs. 36th Station Hospital, the accused was examined on 19 March 1943. It was the opinion of the board that the accused was not psychotic. The report further recites:

> "3 - Psychometric examination reveals the following score: Kent emergency test (1941 edition) M.A. Ten years; Binet-Simon test (Revised) M.A. Eight years Ten Months.
> It is the opinion of this board that this man is a high level moron, and that he is responsible for his acts."

The foregoing report was admitted in evidence and marked "Defense Exhibit A" (R14).

(b) The accused elected to appear as a sworn witness in his own behalf after the law member had explained to him his legal rights. He testified in substance as follows:

That he was born in Ruston, Georgia, and came to Philadelphia when three years of age. He spent eight years in school progressing as far as the fourth grade. He was placed in a school for children of deficient mentality. He left school when 15 years old and thereafter became involved in petty crime which resulted in a reform school sentence of two years of which he served 18 months. He met the deceased in

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Hattiesburg, Mississippi, and had known him about six months prior to the homicide. Accused and deceased were fellow soldiers and had "gone out together to pubs." On Saturday night 13 March 1943, he visited public houses in Bristol and drank whiskey, beer and cider - 5 or 6 doubles, 4 ciders, some shandies and beer. He returned to the barracks between 11:00 p.m. and 12 midnight. He ate no breakfast on Sunday morning 14 March 1943 because he "was not feeling so good". Deceased and accused commenced gambling at about 8:00 a.m. and continued about two hours. Accused "broke" deceased, winning 18 or 20 shillings from him. He had no lunch (R144). At noon deceased asked him to buy him a drink. The two soldiers went to a public house where accused consumed 4 pints of cider, 3 shandies, some beer and two "shots of whiskey". Deceased had about the same amount of beverages (R145,154). At 2:00 p.m. they returned to the barracks, and upon deceased's request the gambling was resumed. The game - "shooting craps" - continued about a half-hour or 45 minutes (R145), when accused went down to the guard-room and there remained about half an hour. He met a friend - a British soldier (whose name he did not know) who had a fifth of a quart of whiskey and he drank half of it. Returning to the barracks he and deceased commenced to gamble again. After playing for about 20 minutes an argument arose between them over a bet (R146). Deceased picked up five shillings and accused demanded its return, but deceased refused to return it. They had been playing in deceased's room. Accused went into the latrine. Swilley, Hampton and deceased were also in the latrine. Accused said to deceased: "Boon you are wrong. You have no right to take my money like that. Don't take my money". Deceased replied: "I don't want to argue with you. If you want your money get it out of my ass". Then he drew a straight-edge razor. Deceased was 2 feet distant but made no move towards accused. Hampton told accused and deceased to quit arguing and told deceased to put his razor in his pocket. He put the razor in his pocket and walked out of the latrine (R148,153). Accused went into the barrack room and picked up a rifle and put a cartridge in it. Deceased came out of the latrine and accused said to him: "Boon, give me my money". Deceased had his hands in his pockets and kept walking towards accused. Accused stepped backwards two feet and a soldier bumped into him. The rifle "went off". He did not intend to take deceased's life. Accused did not know the soldier he bumped into; he was drunk at the time. When he shot the rifle deceased fell. Swilley and the other soldiers surrounded accused and took the rifle away from him. He knew deceased was shot and that the gun in his hands had shot him. The gun was pointing towards the floor and deceased kept coming towards him and did not stop. He was three or four feet away when the rifle was discharged. The gun must have kicked up when it was discharged so that the bullet would strike deceased in the abdomen. Accused put a bullet in the gun because deceased had "pulled" a razor on him. He was not going to shoot him unless he tried to hurt accused with the razor. Deceased kept walking towards him with his hands in his pockets and although accused kept asking him for money, deceased said nothing (R148,151,152). He did not have any reason to believe accused would hurt him; they had had a little misunderstanding over money (R154). After deceased was shot, accused was excited and cursed (R148). He admitted that when he walked up to deceased he said: "Die, you mother fucker"

(R156), but denied that he said anything further to him (R156) and also denied that he kicked him (R149,154).

Accused asserted he secured the cartridge from deceased when there was a change in their duties from M.P. to guard duty and vice versa; he did not bring the ammunition from Hattiesburg, Mississippi. When he stated such fact in his confession he was "high" and the Military Police "hollered" at him and crowded around him and that statement was the first thing that came to his mind. He obtained the cartridges while in Bristol (R148). He kept the bullets in his pocket. He got them "off a guard about 2 or 3 days before" and intended to turn them into the supply room. He had three rounds of 30-30 ammunition (R154). If he had turned the ammunition into the supply room he would have to tell that he and deceased got into some trouble so he did not turn it in (R156). He picked up a rifle from a cot and put one round in the gun and had the other two rounds in his pocket. After he fired the first shot he took another round from his pocket and tried to put it into the gun but was prevented by Swilley and other soldiers who surrounded him. He was "quite high" and was angry because deceased had pulled a razor on him about five minutes previously (R156).

(c) There was presented to the court a written stipulation dated 18 May 1943, between the trial judge advocate and defense counsel, whereby it was agreed that upon admission of deceased to the Bristol Royal Infirmary certain specifically described articles of personal property, including "one razor, straight edge, barber's shop style" were found on deceased's person by Sister Kathleen Mackintosh. The stipulation was admitted in evidence, marked "Defense Exhibit B" and attached to the record of trial (R147).

(d) An extract copy of accused's service record as shown by a series of indorsements was admitted in evidence upon presentation by defense and marked "Defense Exhibit C" and attached to the record of trial (R149). The same is as follows:

Extract from Service Record of Private LESLIE MAXWELL.

1st Indorsement:

Character:	Excellent.
Efficiency rating as a soldier:	Not observed.

2nd Indorsement:

Character:	Excellent.
Efficiency rating as a soldier:	Excellent.

3rd Indorsement:

Character:	Excellent.
Efficiency rating as a soldier:	Excellent.

5th Indorsement:

Character: Unsatisfactory.
Efficiency rating as a soldier: Unsatisfactory.

8. The evidence of the Prosecution on rebuttal consisted of testimony of the following witnesses:

T/5 Fred Howard testified that he was sitting behind deceased and he was looking at accused when the rifle was discharged. He was positive that there was no person standing back of accused and that accused did not back into any one at that time. Accused backed up but he did not bump into any thing or any person. After the shot was fired accused walked over to deceased and kicked him and spoke about giving him another bullet and finishing him off (R158-160).

Private A. D. Whittherne testified he was looking at accused when the gun was fired; that there was no one behind him; that he was positive the gun did not hit anyone causing it to discharge and that accused did not back into any person (R160,161).

Corporal Otto Swilley declared he was not in the latrine with accused and deceased a short time before the rifle was fired and that he did not see deceased pull out a razor and threaten accused at any time (R162).

Private Philip Hampton denied that he was in the latrine with accused and deceased at any time during the afternoon of the homicide and denied that he had seen deceased threaten accused with a razor (R164).

First Lieutenant Alexander T. Ross, M.C. of the 298th General Hospital explained certain terms of Prosecution's Ex. A, and stated in particular that the Kent and Binet-Simon tests are for tests of intelligence, education and experience and not of insanity. A low mental age does not necessarily indicate that a person is insane (R165-166).

Pfc. Grady Johnson testified he saw accused immediately after the shot was fired and there was no one behind him. Accused and deceased were about the same height (R168,169).

9. Certain irregularities in the admission of evidence and of procedural practice require comment:

(a) Prosecution's Exhibit A,- photograph of interior of barracks (R50), and Exhibit F,- Report of 298th General Hospital (R142) were admitted in evidence as a result of the trial judge advocate's statement that a stipulation had been agreed upon but in each instance the record does not show the assent of defense counsel to the stipulation nor his affirmation of its existence. However, it is obvious from a study of the record that defense counsel fully understood the purpose and import of the stipulations and of the evidence thereby admitted. Under such circumstances the spirit and substance of par.124b, p.136, MCM 1928 are met, and no prejudice resulted to accused thereby.

(b) The record does not show that the court formally accepted Prosecution's Exhibit F in evidence. However, the law member ordered it to be marked for identification, and inasmuch as it was being considered simultaneously with Defense Exhibit A which was affirmatively admitted in evidence, there is sufficient in the record to sustain the inference that Prosecution's Exhibit F was accepted in evidence by the court.

(c) Staff Sergeant Robert P. Jordan testified he was in the supply room when Corporal Charles O. Hopkins came down and told him that deceased had been shot. Objection by defense that such evidence was hearsay (R17, 18) was overruled by the law member who stated "it is part of the res gestae". The ruling was erroneous (CM ETO 438, Smith; CM ETO 709, Lakas). However, the error of the court was harmless; it did not in any respect prejudice the rights of accused.

(d) On cross-examination of Prosecution's witnesses, Hopkins (R12, 13), Swilley (R31,32), Johnson (R48) and Hampton (R90-93), defense counsel attracted the attention of each witness to a prior written statement made by him wherein each witness made assertions conflicting with certain testimony given by him on direct examination. In each instance the witness was permitted to identify his signature appearing on his prior written statement. The law member ruled that the written statement should not be handed to the witness for inspection, but that defense counsel should ask him if at a specific time and place he stated to defense counsel a certain fact. Defense counsel in each instance read excerpts from the written statement and asked the witness if at a certain time and place he had made such quoted statement. Hopkins, Johnson and Hampton frankly admitted each had testified erroneously on direct examination and that each had made the prior statement attributed to him. Swilley made explanatory statements which attempted to reconcile his direct testimony with his written statement.

> "The foundation must be first laid for impeaching a witness, by calling his attention to the time, place and circumstances of the contradictory statements, whether they were in writing or made orally; ****. The written statement having been presented to the witness, and he having admitted that what purported to be his signature to it was his signature, it was perfectly open to him to read it, and he could have been inquired of as to the circumstances under which it was taken down and signed, so as to advise the jury as to its authenticity and the credit to be given to it." (Chicago, M. and St. P.R. Co. v. Artery, 137 U.S. 507,520; 34 L. Ed., 747,751; See also 70 C.J., sec.1290, p.1113).

The ruling of the law member was unduly restrictive in not permitting the witnesses to inspect and read their respective written statements. However,

there was substantial compliance with proper impeachment practice. The attention of each witness was called to the time and place and the person to whom his prior statement was made, and he was given the opportunity to deny, affirm or explain the same. Inasmuch as three of the witnesses admitted their prior conflicting statements and the fourth witness offered an explanation but did not deny his statement, no prejudice resulted to accused because the court did not allow the witnesses to read their prior statements.

With respect to defense's impeaching questions directed to Hampton which contained alleged prior statements by Hampton that it was his "reaction ** Maxwell would not have done any shooting if he had not been drunk" and "I feel Maxwell would not have shot Boon or said what he said if he had not been drunk" (R92,93), it is manifest that such statements were but conclusions of the witness and were inadmissible as original evidence. It was for this reason that the law member sustained prosecution's objections to the impeaching questions. There is authority sustaining such reason (70 C.J., sec.1239, p.1053; Sec.1252, p.1067). However, the witness in his direct examination was not questioned as to accused's intoxication, nor was he asked for his opinion concerning the cause of accused's conduct. The impeaching questions did not relate to inconsistent statements contained in his testimony in chief. They were for this reason improper (70 C.J., sec.1241, p.1055, foot-note 90; Sec.1274, p.1079, foot-note 64). Further, the question of accused's intoxication was raised by the defense on cross-examination of Hampton. The witness testified that neither deceased nor accused were drunk (R92). The defense by the impeaching questions attempted to controvert this statement. Such practice is prohibited, and for this additional reason the law member was correct in his ruling (70 C.J., sec.1010, p.805, foot-note 85; Sec.1345, p.1163, foot-note 6).

(e) On direct examination of Prosecution's witnesses, Herbert Jones (R52), Whitthorne (R80,81) and Hampton (R89) each witness gave answers to interrogatories, which the trial judge advocate asserted were in conflict with prior written statements made by each witness. Over objection by the defense the trial judge advocate was permitted to present to each witness his prior written statement made at the time of the official investigation. In each instance the witness, after reading his statement, corrected his testimony to correspond with the written statement. The statements themselves were not introduced as independent evidence. No impeachment by the trial judge advocate of the Prosecution's witnesses was thus attempted. The witnesses having unexpectedly given testimony at variance with prior statements, the trial judge advocate properly called each witness's attention to his former statement "to refresh his memory and move him to speak the truth by probing his conscience, thus inducing him to correct his testimony or explain apparent inconsistency" in his testimony (3 Wharton's Criminal Evidence, sec.1392, p.2278; Wigmore's Code of Evidence, sec.825; 70 C.J., sec.1227, p.1032). The method pursued in the instant case conformed with the practice heretofore approved by the Board of Review (CM ETO 438, Smith, par.5(f), pp.10-13).

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(f) Lieut. Colonel Francis Bayless, M.C., a witness for the Prosecution, performed the autopsy examination on deceased. He was permitted to refresh his memory from the autopsy report without objection from defense (R95). The report was not introduced in evidence, but copy of same is attached to the record as part of the investigation under AW 70. It purports to be signed by Dr. Bayless. The practice was regular (70 C.J., sec.749, p.583; Sec.758, p.587, foot-note 81).

(g) Staff Sergeant Vernon T. Schantz, Investigations Division, Provost Marshal General's Office a witness for the prosecution, testified that he talked with the accused on the evening of the homicide at the Bristol office of the Provost Marshal (R128). After testifying that he duly warned accused of his rights he proceeded to relate accused's narrative to him of the events of the homicide (R129,130). Thereafter was produced "Prosecution's Exhibit D" which is accused's signed confession. It was admitted in evidence (R133). The testimony of Schantz as to what accused said to him on this occasion is in substance the same as accused's statement in "Prosecution's Exhibit D". Schantz conversed with accused between 7:00 p.m. and 7:30 p.m; the statement was signed by accused about 8:00 p.m. Defense counsel objected to the admission of "Prosecution's Exhibit D" but offered no objection to Schantz's previous oral recitation of accused's narrative.

In a number of cases the Board of Review and The Judge Advocate General have set aside convictions because oral evidence was admitted of written confessions without accounting for the original (CM 134547, Dig. Ops.JAG., 1912-1930, par.1295, p.641; CM 160570, Hembree et al). However, these opinions were written before publication of the 1928 edition of Manual for Courts-Martial, now in force, which in paragraph 116a says:

> "An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived, if not asserted when the proffer is made: It does not appear that the original has been lost, destroyed, or is otherwise unavailable; ****".

In effect the above quoted provision means that the best evidence rule will not be enforced unless the party, against whom the oral evidence is offered, interposes timely objection thereto and requires that the written document be produced. Consequently the rule indicated in CM 134547 and CM 160570, supra, is modified to the extent indicated by the quoted provision from MCM 1928 edition. The later holdings of the Board of Review substantiate this conclusion (CM 210985, Bonner et al; CM 216904, Frankie). The failure of the defense to object to Schantz's oral testimony concerning accused's statements to him was a waiver of irregularity. No

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prejudice to the rights of accused, however, results because Prosecution's Exhibit D (accused's written confession), admitted in evidence, substantially incorporates accused's statement to Schantz as reported by the latter in his testimony.

(h) The record conclusively shows that the confession (Prosecution's Exhibit D) was given by accused freely and voluntarily, and that at the time he first talked with Schantz and at the time he signed the confession he was free from restraint or compulsion or the effects of promises of leniency, and that he had been carefully warned of rights to remain silent. The corpus delicti had been proved when the confession was admitted (CM 202213, Mallon). The admission of the confession in evidence was free from error (CM ETO 72, Jacobs and Farley; CM ETO 397, Shaffer; CM ETO 506, Bryson; CM ETO 559, Monsalve).

(i) A bullet was produced in court and specifically identified as being the projectile which was found at about 6:00 p.m. on the evening of the homicide, by Lieutenant Pikulin. It was dug from a place in the floor 8 or 9 feet from the pool of blood which had flowed from deceased's body after being shot. It was admitted in evidence as "Prosecution's Exhibit E" over accused's objection (R135,137). Its admission in evidence was free from error (Underhill's Criminal Evidence, sec.116, p.151, footnote 14; 20 Am. Jur. Evidence, sec.718, p.601). Prosecution's Exhibit E was, by stipulation of counsel, withdrawn from evidence (R169). This is an improper practice in view of the fact that the evidence was not "bulky" (Appen.6, p.269, MCM 1928).

10. At the trial defense counsel disclaimed the defense of insanity (R173). Defense Exhibit A, "Report of Psychiatric Examination of Maxwell, Leslie (NMI), Private, ASN 33084827" dated 19 March 1943 was introduced in evidence for the purpose of showing accused's "mental age" (R139). The position of the defense is disclosed by the following colloquy:

> "Law Member: (to Defense). Are you now raising the issue of the mental status of accused?
> Defense : Of his mental age, yes.
> Law Member: Of his what?
> Defense : Of his mental status, yes, I am. Bearing on the matter of intention I want to show what his mental age is, and I have here a report from the 36th General Hospital stating that, and there is also another one from the 298th General Hospital." (R139).

The argument of defense counsel with respect to this defense was as follows:

"Then go just one step further. Joking and laughing is bad enough, but walking over and kicking him. Is it possible that any normal person could do such a thing? There can only be one explanation. The series of facts in connection with this man's life, the physical facts that I have brought out for you, have simply warped his judgment, perhaps not enough that I can claim he is insane; I do not take that position, but all the different things that have happened to him have warped his judgment, have warped his mind. Little things impress him with unusual importance. You have the testimony of one of the two witnesses who saw the gun actually fired. Fred Howard testified that the gun was actually pointed down at Boon's feet at the time, that it was not pointed at him at all, that the gun was discharged and flew back; the recoil brought it back.

Now if Maxwell intended to kill Boon because he owed him 10s., why would he have loaned him £2 the very day of the shooting? He loaned him £2. That is right in the statement you have in evidence from Sergeant Schantz. I say to you that this man is abnormal. It has been brought out by medical testimony that he is a moron, and I do not think you can possibly hold him to the same high standard of conduct that you can a normal person. That, gentlemen, is the case for the accused." (R173).

The Manual for Courts-Martial has defined mental responsibility and has applied the rule as to reasonable doubt within the field of military justice as follows:

"The rule as to reasonable doubt extends to every element of the offense. ****. Prima facie proof of an element of an offense does not preclude the existence of a reasonable doubt with respect to such element. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence.

Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally

> be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right." (MCM 1928, par.78a, p.63).

The above definition of insanity is based on the rule which has been approved by the United States Supreme Court (Davis v. United States, 160 U.S. 469, 40 L. Ed., 499; Mutual Life Ins. Co. v. Terry, 82 U.S. 580, 21 L. Ed., 236; Davis v. United States, 165 U.S. 373, 41 L. Ed., 750; Hotema v. United States, 186 U.S. 413, 46 L. Ed., 1225).

The evidence in this case established beyond all reasonable doubt that accused was sane at the time of the homicide and at the time of trial. "Prosecution's Exhibit F" and "Defense Exhibit A" clearly proved that accused was not suffering under such mental derangement as to constitute him a psychotic or insane subject at the time of the homicide and that he was legally responsible for his acts. His demeanor and mental processes upon his examination are indeed self-revealing as to the status of his mental health at time of his trial. They bespeak an ability to defend himself. The court could not have reasonably reached any other conclusion than it did under the evidence in this case (CM 209548, Jones). The question of accused's legal sanity was essentially one of fact for the court and since its findings are supported by competent, substantial evidence they will not be disturbed by the Board of Review on appellate review (CM 193543 (1930), Dig.Ops.JAG., 1912-1940, sec.395(36), p.227; CM 125265 (1918), Dig.Ops.JAG., 1912-1940, sec.395(36), p.225; CM 225837 (1942), Bul. TJAG., Dec.1942, Vol.1, No.7, p.360; CM 212505, Tipton; CM 223336, (1942). Bul. TJAG., Aug. 1942, Vol.1, No.3, p.162).

The legal responsibility of accused for the homicide being established, the fact that he was a "high level moron" is no defense.

> "Criminal responsibility does not depend upon the mental age of the defendant nor upon the question whether the mind of the prisoner is above or below that of the ideal or of the average or of the normal man, but upon the question, whether the defendant knows the difference between right and wrong, can understand the relation which he bears to others and which others bear to him, and has knowledge of the nature of his act so as to be able to perceive its true character and consequence

to himself and to others." (Commonwealth v. Trippi, 268 Mass. 237; 167 N.E. 354, 356).

"The responsibility of an adult charged with the commission of crime is not to be measured by a comparison of his mental ability with that of an infant of twelve years, or in any other way, the true test being whether he appreciated the nature and quality of his act, and that it was wrong, and if he was responsible without regard to other mental deficiencies." (State v. Schilling, 95 N.J. Law 145, 112 Atlantic 400).

(See also 22 C.J.S., sec.58, p.122; 16 C.J. sec.74, p.99; Nelson v. State, 43 Texas Crim. Rep. 553, 67 S.W. 320; People v. Moran 249 N.Y. 179, 163 N.E. 553).

11. On the merits, there is presented for consideration but one question and that is whether or not the evidence is legally sufficient to sustain the finding that accused was guilty of murder.

Neither by direct evidence nor by inference is there any proof that at the time of the homicide, the accused and deceased were embroiled in "mutual combat" - in fact the idea is negatived by accused's own testimony.

"He (deceased) had his hands in his pockets, and kept on walking towards me. So I steps back, and as I steps back one of the soldiers bumped into me and the rifle went off. I did not intend to take that boy's life."(R148).
"He (deceased) was coming towards me, and I had the rifle pointed down, and when I backed into the soldier - that was when the rifle went off and Boon fell". (R152).

Therefore, questions indigenous of "mutual combat" coincident with the homicide are eliminated from consideration.

Likewise, accused's own admissions obviate the question of self-defense:

"Q. Had you ever had any fights with Boon?
A. No, sir.
Q. Did you have any reason to believe that he would want to hurt you?

A. No, Sir. We just had a little misunderstanding over that money." (R154).

"Q. Why did you put that bullet in that rifle?
A. Because Boon had drawn a razor on me, sir.
Q. When you put that bullet in there, were you going to shoot him?
A. No, sir, not unless he tried to hurt me with that razor.
Q. He did not try to hurt you with it, though, did he?
A. He kept walking towards me with his hands in his pockets. I asked him for my money. He did not say nothing. He kept walking towards me. When I backed back that was when the rifle went off." (R151).

Murder is legally defined:

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse ****. Among the lesser offenses which may be included in a particular charge of murder are manslaughter, certain forms of assault and an attempt to commit murder. ****" (MCM., sec.148, p.162).

"Murder, as defined at common law, and by statutes simply declaratory thereof, consists in the unlawful killing of a human being with malice aforethought." (29 C.J., sec.59, p.1083).

"Murder, at common law, is the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, with malice aforethought, either express or implied." (Winthrop's Military Law & Precedents (2nd Ed) p.672)).

The important element of murder, to wit, "malice aforethought" has been analysed by authorities as follows:

"The term <u>malice</u>, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the <u>wrongful intent</u> essential to the commission of crime. When used, however, in connection with the word 'aforethought' or 'prepense', in defining the particular crime of murder, it

signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, 'a heart regardless of social duty, and fatally bent upon mischief'. The deliberate purpose need not have been long entertained; it is sufficient if it exist at the moment of the act. Malice aforethought is either 'express' or 'implied'; express, where the intent, - as manifested by previous enmity, threats, the absence of any or of sufficient provocation, etc.- is to take the life of the particular person killed, or, since a specific purpose to kill is not essential to constitute murder, to inflict upon him some excessive bodily injury which may naturally result in death; implied, where the intent is to commit a felonious or unlawful act but not to kill or injure the particular person ***;" (Winthrop's Military Law & Precedents (2nd Ed), p.672-3).

"Malice or malice aforethought is the element which distinguishes murder at common law and, commonly, under the statutes defining murder, from other grades of homicides. ***" (29 C.J., sec.60, p.1084).

The distinction between murder and voluntary manslaughter is stated as follows:

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought". (1 Wharton's Criminal Law, sec.423, p.640).

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary". (MCM., sec.149a, p.165).

"At common law a killing ensuing from sudden transport of passion or heat of blood, if upon sudden combat, was also manslaughter, and the statutory definition of voluntary manslaughter has in some jurisdictions been made expressly to include a killing without malice in a sudden affray. However, a sudden

combat is ordinarily considered upon the same footing as other provocations operating to create such passion as temporarily to unseat the judgment". (29 Corpus Juris, sec.115, p.1128).

"The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter". (Stevenson v. United States, 162 U.S. 313,320; 40 L. Ed., 980,983) (Cf: Jerry Wallace v. United States, 162 U.S. 466, 40 L. Ed., 1039; John Brown v. United States, 159 U.S. 100, 40 L. Ed., 90).

The evidence proves without contradiction (a) that accused and deceased had engaged in a dice game for a considerable period of the day prior to the homicide; (b) that the game was recessed for about two hours during which time the two soldiers consumed a substantial amount of intoxicating beverages at a neighboring public house; (c) that upon a resumption of the game differences arose between them as to a certain bet and deceased possessed himself of five shillings claimed by accused; (d) that the game ceased, but accused persistently demanded the money from the deceased which demands were ignored by deceased, who left the squad room for a short period; (e) that during deceased's absence from the squad room accused took a fellow-soldier's rifle and loaded it with a live cartridge which had previously come into his possession, and sat with the gun on his knees awaiting deceased's return; (f) that upon deceased's return to the squad room he approached accused with his hands in his pockets, unarmed and when within seven or eight feet of accused the latter discharged the rifle directly at deceased inflicting a mortal wound; (g) that after the shooting accused kicked the deceased as he lay helpless on the floor, applied obscene and profane epithets to him, and attempted to re-load the rifle with a live cartridge announcing his intention to "finish him off".

The facts thus disclosed form a substantial basis for the court's finding that accused was guilty of murder. Implicit in the finding is

that accused killed deceased with malice aforethought. It is fully justified. The actions of accused prior to the shooting exhibit a cold, calculated determination to kill or inflict serious bodily harm on deceased. His conduct immediately following the fatal shooting shows that blood-lust possessed him. The evidence beyond all peradventure establishes the fact that accused with respect to deceased at least intended "to inflict upon him some excessive bodily injury which may naturally result in death". Such intent constitutes "malice aforethought". There is also substantial evidence that supports the conclusion that accused acted with express malice and premeditation. His prior threat to "get" accused, his deliberate taking of a rifle over the protests of the owner, loading it and coolly awaiting deceased's return to the squad room and then shooting him as he approached with hands in pockets, not only shows that actual malice and vindictiveness were harbored by accused, but completely expels all idea that he acted under such anger and heat of passion as to reduce the homicide from murder to manslaughter. The issue as to the degree of accused's intoxication was one of fact for exclusive determination by the court. The homicide was ruthless, vicious, deliberate and without cause or excuse and in the opinion of the Board of Review the crime of murder was proved beyond all reasonable doubt (CM 221426, Shannon; CM ETO 268, Ricks; CM ETO 422, Green; CM ETO 438, Smith). The penalty for murder is death or life-imprisonment as the court-martial may direct (AW 92). The sentence is legal (CM ETO 292, Mickles).

12. Accused was 23 years 9 months of age at the time of the commission of the offense. He was inducted at Fort Meade, Maryland, on 26 June 1941 for the duration of the war plus six months.

13. 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 is legally sufficient to support the findings of guilty, and the sentence.

B. Franklin Riley, Judge Advocate

Richard Schnitzler, Judge Advocate

Ellwood W. Sargent, Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 SEP 1943 TO: Commanding General, ETOUSA, U.S. Army, APO 887.

1. In the case of Private LESLIE (NMI) MAXWELL (33084827), 1965th Quartermaster Company Trk. (Avn), 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. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. The evidence before the court and the examination of the accused at his trial fully justifies the conclusion that accused was sane on the date of the commission of the offense and at the time of trial. I am informed by documents attached to the record of trial and by Colonel Ed. C. Betts, Theater Judge Advocate (telephonic conversation of 13 Sep 1943) that subsequent to date of sentence, 19 May 1943, accused has been under observation and examination for the purpose of determining his mental condition and that as a result of such study there has been submitted to you, subsequent to the receipt of the record of trial by this office, a report of a medical board expressing the opinion that accused is now insane. It has been indicated to me that, by reason of such situation, you will desire to take appropriate action commuting the sentence of death to dishonorable discharge, total forfeitures and imprisonment for life. Such action is authorized and the record of trial is legally sufficient to support such commuted sentence. The Federal Penitentiary at Lewisburg, Pennsylvania, should be designated as the place of confinement. I transmit herewith the record of trial.

3. 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 739. For convenience of reference please place that number in brackets at the end of the order: (ETO 739).

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

1 Incl:
Record of Trial.

(Original action of convening authority modified to the extent of commuting the death sentence to dishonorable discharge, total forfeitures, and confinement for life. Sentence as thus commuted ordered executed. GCMO 19, ETO, 2 Oct 1943)

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

Board of Review.

ETO 740.

- 4 SEP 1943

UNITED STATES v. Private IRA N. LANE (20843966), 5th General Hospital, Detachment of Patients, ETOUSA, APO 519.	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at London, England, 17 August 1943; Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five 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 Ira N. Lane, 5th General Hospital, Detachment of Patients, ETOUSA, did, at or near Salisbury, England, on or about 10 May, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 23 July, 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 five years. The reviewing authority approved the sentence, d esignated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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3. The evidence for the prosecution shows that during the early part of June 1943 Miss Lillian Sims, 15 North Villas, Camden Square, London, England met accused in London and saw him several times thereafter. On each occasion but the last, he was dressed in uniform. She last saw him on 21 July when he was dressed in civilian clothes. He said he had obtained the clothes from a fellow in a "pub", and that he was wearing them because "he was afraid of being picked up at the time". Accused further stated to Miss Sims that he was "a bit fed up and was thinking of returning back". He had told her on several occasions that he intended to go back to the army pretty soon (R4-5).

On the evening of 23 July 1943, police constable George Gordon, 347 "C" Division, West End Central (London) noticed accused in civilian clothes on Gerrard Street, W.1 (London). When accused saw the constable he "walked sharply off". Gordon, his suspicion aroused, overtook him and asked for his identity card. Accused produced a civilian identity card and, when asked by Gordon if he had been in the army, replied that he had been discharged from the Canadian army two weeks before. When asked for his discharge papers, accused said that he had not as yet been discharged. Gordon then told him he was under arrest as a deserter. On the way to the police station, accused said to Gordon: "I might just as well tell you the truth. I deserted from the American Army about two weeks because they were going to send me to the United States of America on a charge of murder or manslaughter" (R6-7).

About midnight 23 July Staff Sergeant William Manning, Investigations Division, Provost Marshal General, "A" Detachment, saw accused at the West End Central Police Station (London) and accompanied him to the Central Base Section guardhouse. On 24 July, after being warned of his rights, accused made a voluntary statement to Manning, which statement was reduced to writing and then signed and sworn to by accused (R7-8).

The statement, which was introduced in evidence after the defense stated that it had no objection thereto, was in substance as follows: accused joined the National Guard about July or August 1940, and his unit was later inducted into the Federal service. About 14 July 1941, he went absent without leave for several months, and during this time he became embroiled in a fight with a Mexican in Mexico and cut him with a knife. He left the scene not knowing what ultimately happened to the man. About 18 September 1942 he was apprehended and returned to military control. As the army had no records concerning accused, he was later sent to England and subsequently transferred to the 5th General Hospital because of a broken arm. He overheard a doctor saying that he would be returned to the United States because of an old injury to a bone in his hand. He did not wish to return because of "some family trouble". On 9 May 1943 he received a pass to Salisbury which was good until 6:00 p.m. He became intoxicated at Salisbury, decided not to return to the hospital and took the 3:00 p.m. train to London. While in London, he lived in four different rooming houses for about nine weeks, wearing his uniform and registering under his own name on each occasion. He

moved about to "avoid arousing suspicion". As his arm was still in a cast he told the persons in charge, if they asked any questions, that he was on sick leave. About two weeks prior to his arrest he bought some civilian clothes through the aid of an acquaintance and also obtained a civilian identity card from a girl both of whom he met in a pub. He worked for a building contractor for which he received a sum of about eight pounds and was still employed by the contractor when accosted by a police constable who asked for his identity card. He showed the constable the identity card and admitted that he had been in the army. As he was unable to show the constable any discharge papers, accused told him that he "was a deserter from the American Army". He was then taken to the police station. When he left Salisbury on 9 May, he had 87 pounds in his possession. He lived on this sum while in London and took the job with the contractor when his money began to run low. When arrested he had four pounds, six shilling and four pence (Pros.Ex.2).

4. It was stipulated that accused's service record did not show that the Articles of War had ever been read to him (R9).

5. For the defense, accused testified that his organization was 5th General Hospital, Detachment of Patients and that on 9 May he had a pass for Salisbury. He left Salisbury that afternoon about 3:30 p.m. with 87 pounds and "woke up" in London later that day. He put on civilian clothes about 9-10 July in order to get a job, as he never had any money and wanted to get some cigarettes when he returned to the army (R9-10). When he was apprehended on 23 July, he intended to get his uniform the next day and then surrender at military police headquarters (R11). From what his captain told him before he gave him his pass, accused expected to be put in jail on his return. The captain told him not to get drunk, that "he was not supposed to let us go out, but he was doing it of his own free will" (R10). Accused had never had the Articles of Warread to him (R11), and did not know the difference between desertion and absence without leave (R10).

6. The defense, stating that it had no objection thereto, there was admitted in evidence a purported extract copy of the morning report of accused's organization containing entries concerning his initial absence and apprehension (R4; Pros.Ex.1). It is better practice to introduce in evidence the original morning reports, and with the permission of the court, substitute duly authenticated extract copies in lieu thereof. The document actually admitted in evidence was not the usual form of such a certified extract copy. The officer signing the exhibit did not certify that he was the official custodian of the morning reports of accused's organization, although he did sign the document as commanding officer of the detachment of patients. However, further discussion concerning the admissibility of the exhibit is unnecessary in view of the recitation of facts contained in accused's statement (Ex.2), and also in his testimony. The initial absence of accused was thus properly established in evidence. Proof of his subsequent apprehension in London on the date alleged was proved by the testimony of Constable Gordon, by the recitation of facts contained in accused's statement (Ex.2) and by his own testimony.

7. It was clearly established, both by the evidence for the prosecution and by the testimony of accused himself, that he went absent without leave at the time and place alleged and remained absent until he was apprehended on 23 July 1943 at London, England. During a prolonged absence of about 74 days accused changed his address several times to "avoid arousing suspicion", and told his various landlords that he was on sick leave. When his funds became low he obtained employment, wore civilian clothes and obtained a false civilian identity card. He was still employed when apprehended by a police constable to whom he falsely represented himself as a discharged Canadian soldier and displayed the civilian identity card. Although he was for several weeks constantly in the vicinity of military organizations, he did not surrender to military control but resorted to various forms of subterfuge to avoid detection. The specific intent not to return to the military service of the United States was clearly established by the evidence.

8. The charge sheet shows that accused is 32 years of age and that he enlisted 3 January 1941 with no prior service, such service being governed by the Service Extension Act of 1941.

9. The court was legally constituted and 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.

10. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement of accused in a penitentiary is authorized for the offense of desertion in time of war (Article of War 42; par.5d, Section II, AR 600-375, 17 May 1943; par.90, MCM., 1928; War Department letter AG 253 (2-6-41) E, 26 February 1941)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania is correct.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

(285)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 6 SEP 1943 TO: Commanding Officer, Central Base Section, SOS, ETOUSA, APO 887.

1. In the case of Private IRA N. LANE (20843966), Detachment of Patients, 5th General Hospital, ETOUSA, APO 519, 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, which holding is hereby approved. 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 740. For convenience of reference please place that number in brackets at the end of the order: (ETO 740).

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 763.

10 SEP 1943

UNITED STATES v. Second Lieutenant GEORGE A. MORLEY (0-494653), Infantry, Headquarters Company, Headquarters Command, Services of Supply, European Theater of Operations, APO 871.	SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS, APO 871. Trial by G.C.M., convened at Cheltenham, England, 14 August 1943. 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 Charge and Specification:

> CHARGE: Violation of the 96th Article of War.
> Specification: In that Second Lieutenant George A. Morley, Infantry, Headquarters Company, Headquarters Command, Services of Supply, ETOUSA, did, at Race Course Camp, Cheltenham, Gloucestershire, England, on or about 31 July 1943, wrongfully strike Private William E. Horton, Headquarters Company, Headquarters Command, Services of Supply, ETOUSA, in the face with his hand and kick him in the body with his foot.

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, Commanding General, Services of Supply, European Theater of Operations,

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

3. Except in some minor details the uncontradicted evidence herein shows that Private William E. Horton, Headquarters Company, Headquarters Command, Services of Supply, after spending the evening in the "pubs" of Cheltenham, became intoxicated and was brought by another soldier, in a taxicab, back to their quarters at the Race Track Camp. On getting out of the taxicab at the camp, Horton was unable to walk and two soldiers arriving at the same time at the camp by bus also came to his assistance and they started to carry Horton to his barracks to put him to bed. Going along the drive in camp they met accused who was without necktie, cap or blouse, his shirt collar was unbuttoned and open, his sleeves were rolled up (R15,17) and he was accompanied by a female companion. It was fairly dark (R13). Neither Hortonnor any of his party were noisy or disorderly (R15). They were ordered by accused to "drop that man" and did so. Accused then ordered Horton to stand up and on his inability to do, picked him up, then struck him either once or twice, knocked him down and while he was on the ground kicked him in the side (R8,10,12,13,15-17,19-23,25-27). Accused then dragged Horton to the guardhouse where he kept him some 10 or 15 minutes (R12,26), when he permitted Horton's soldier companions to take him out and carry him to his barracks and put him to bed (R26). Accused's companion who was with him from 8:15 in the evening (R18) until after 11:00 did not see him drink all evening (R19).

Accused remained silent and offered but one witness Captain Harold A. Sprinkle, C.E., a character witness, who testified that he came overseas with accused in May 1943, and that accused's conduct was quite satisfactory (R28-29).

4. "Cases will indeed sometimes arise in the military service when a superior is called upon to employ toward an inferior a degree or quality of force not in general permissible. As where he is required to defend himself against an assailant, to suppress a mutiny, to quell a dangerous offender or quiet a turbulent one, **** in such instances the superior may resort to the necessary personal force, use of arms, imprisonment ****. This, however, is repression and restraint, not punishment; no greater force or more severe restriction is therefore to be employed than may be reasonable and needfull under the circumstances; and where the commander is provided with the usual or with

adequate facilities for apprehending and confining an offender with a view to trial, he is not, even in time of war, to inflict personal chastisement upon him or subject him to any arbitrary punitory treatment, much less, by the use of arms, to put him in danger of his life. In violating these rules the superior subjects himself to charges and trial by court-martial *****." (Winthrop's Military Law & Precedents, 1920 Reprint, p.446).

"An officer has no right to punish, by assault, any offense or dereliction of duty on the part of an enlisted man. Such action constitutes an offense against military law, and charges may be preferred against the officer under either AW 95 or AW 96. 250.4, Sept.3, 1918." (1912-1940 Dig.Ops.JAG., par.453(3), p.341; 1918 Ops.JAG., pp.724-725).

Without provocation, accused assaulted a helplessly drunken soldier, knocking him down and kicking him as he lay on the ground. The soldier was committing no disturbance or offense other than being drunk. His friends were in the act of taking him to his quarters to put him to bed. Accused was not in uniform, making it difficult in the darkness to recognize him as an officer, though all his orders were obeyed except the order to Horton to stand at attention with which order Horton was physically unable to comply. Accused does not explain or attempt to justify his actions. No apparent reason for his actions presents itself. Possibly he thought to make an impression on his companion. There are however, no extenuating circumstances in connection with the reprehensible conduct of the accused, unless perhaps, his youth and inexperience. In his request for clemency attached to the file, accused says "*** I was under the influence of liquor to such an extent that I honestly did not know what I was doing." No where in the record however, is there any indication that accused was intoxicated. Accused's conduct certainly constitutes "disorders and neglects to the prejudice of good order and military discipline" under the 96th Article of War.

5. Accused is 20 years of age and entered upon active duty 30 September 1942.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence herein. The sentence is legal. The court was legally constituted and no errors injuriously affecting the substantial rights of the accused were committed at the trial.

Franklin Riter, Judge Advocate

Judge Advocate

Elwood H. Sargent, Judge Advocate

CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 SEP 1943 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Second Lieutenant GEORGE A. MORLEY (0-494653), Infantry, Headquarters Company, Headquarters Command, Services of Supply, ETOUSA, APO 871, 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. Miss Marion Davies, aged 17 years, who described her occupation as that of a waitress at the Queens Hotel, Cheltenham, was a witness at the trial. She testified that while in the officers' mess at The Racecourse neither she nor the accused had anything to drink and that she did not see accused drink at any time during the evening. Among the accompanying papers is a signed statement made to a Cheltenham police officer on 2 August 1943 by Miss Davies. She says she left the Queens Hotel about 8:15 P.M. on Saturday night, 31 July 1943 with accused to go to The Racecourse where he was stationed to have a drink. She further said "he was under the influence of drink and when we arrived there I went with him to the officers' mess where we talked and read books. There was no drink there. ***. Lieutenant Morley was a bit 'tight' himself, and in a bad temper." The record of trial is entirely silent as to whether accused was intoxicated at the time of his assault on Private Horton. While such evidence would not excuse accused's conduct it would serve to explain it. As the record stands accused's assault and battery upon Horton appears to have been wholly without cause or reason and leaves the implication that he was attempting to display his prowess and authority before Miss Davies.

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 763. For convenience of reference please place that number in brackets at the end of the order: (ETO 763).

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

(Sentence ordered executed. GCMO 18, ETO, 15 Sep 1943)

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

BOARD OF REVIEW.

ETO 764.

21 SEP 1943

UNITED STATES v. General Prisoner GEORGE R. COPELAND (15060657), and General Prisoner ALFRED RUGGLES, JR., (15041594).	UNITED STATES ARMY FORCES IN ICELAND. Trial by G.C.M., convened at Camp Curtis, Iceland, 25 August 1943. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for 5 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 cases of the soldiers named above has been examined by the Board of Review.

2. The trials of the accused with their consent were consolidated for convenience.

3. The accused Copeland was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that General Prisoner George R. Copeland did at the U S A F Stockade Annex, APO 860, c/o Postmaster, New York, New York, on or about 25 July 1943, with intent to do bodily harm, commit an assault upon Sgt James Johnston, Company "I", 118th Infantry, by striking him in the stomach, with a dangerous weapon, to wit, a knife.
Specification 2: In that General Prisoner George R. Copeland did, at the U S A F Stockade Annex, APO 860, c/o Postmaster, New York, New York, on or about 25 July 1943, with intent to do him bodily harm, commit an assault upon Pvt George H. Brown, Company "A", 525th MP Battalion, by striking him in the stomach, with a dangerous weapon, to wit, a knife.

4. The accused Ruggles was tried upon the following similar Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that General Prisoner Alfred Ruggles, Junior did, at the U S A F Stockade Annex, APO 860, c/o Postmaster, New York, N.Y., on or about 25 July 1943, with intent to do him bodily harm, commit an assault upon Sgt James Johnson, Company "I", 118th Infantry, by striking him in the stomach, with a dangerous weapon, to wit, a knife.
Specification 2: In that General Prisoner Alfred Ruggles, Junior did at the U S A F Stockade Annex, APO 860, c/o Postmaster, New York, N.Y., on or about 25 July 1943, with the intent to do him bodily harm, commit an assault upon Pvt George H. Brown, Company "A", 525th MP Battalion, by striking him in the stomach, with a dangerous weapon, to wit, a knife.

5. Each accused pleaded not guilty to the Charge and Specifications upon which he was tried. Each was found guilty of Specification 1 of the Charge except the words "striking him in the stomach", substituting therefor the words "threatening him", of the excepted words, not guilty, of the substituted words, guilty. Each accused was found guilty of Specification 2 of the Charge and of the Charge. No evidence of previous convictions was introduced. 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 for five years. The reviewing authority approved each of the sentences, designated the Federal Reformatory, Chillicothe, Ohio as the places of confinement and forwarded the record of trial for action under Article of War 50½.

6. The evidence for the prosecution shows that on the evening of 25 July 1943 General Prisoners Griepentrog, Cooper and Reed were in the kitchen of the USAF stockade annex, APO 860 (R6,14-15,19). The accused, Copeland and Ruggles entered, and each picked up a knife. They asked the whereabouts of a prisoner named Blackburn (R6-7,15,19). Witnesses estimated the knives to be between 9 to 14 inches long and 1 to 2 inches wide (R7,15,26,32). Griepentrog and Cooper replied that Blackburn was probably at the latrine, whereupon Copeland told Griepentrog "I don't want no shit from you" (R7,19). Copeland then had his knife pressed in Griepentrog's stomach and Ruggles had his knife against the stomach of Cooper (R7,15,17, 20,26,32).

Sergeant James Johnston, Company "I", 118th Infantry and Private George H. Brown, Company "A", 525th M.P. Battalion then entered the room. Johnston ordered accused to put down their knives. Ruggles laid his knife on a table but Copeland replied that he did not intend to put down his knife. Johnston repeated his order whereupon Copeland said "We gonna get you too" and "walked fast" or "rushed" toward Johnston, holding the knife in his hand as if he was "ready to make a slash with it". Ruggles picked up his knife and followed one or two feet behind Copeland. Each accused had his knife "drawn up" (R8,11,16,20-21,24,26-27,29,33-34). Johnston backed up to the door and seized a shovel to protect himself against both accused who were "coming on pretty lively", each holding his knife up. He held the shovel in front of him and both accused "stopped for a while then". Johnston backed out through the door into another room followed by the accused. "They followed me out to the end of the doorway and the fireman there was fixing the fire, and when they got by the door I was just outside and at that time I never looked to see if they was coming after me or not." He feared the accused would throw the knives instead of stabbing him. He believed that they intended to cut him, and not that they were just trying to bluff him out of the mess hall (R27-29). The accused were not close enough to Johnston to stab him or to put their knives in the latter's stomach, nor did they attempt to cut him (R18,23, 29-30).

After Johnston had left, the accused turned to Brown. Copeland said to him "You're the cause of this. I'm gonna kill you ***. Come on, Ruggles, let's kill him" (R12,21,34). Ruggles and Copeland both put their knives in his stomach and backed Brown up against a closed door. Brown was "scared" and would have retreated farther if he had been able to do so. The pressure of the knives was such that they were about to pierce Brown's raincoat. A soldier named Collins then interferred and "kept them apart" and told Ruggles to use his head. Ruggles then told Copeland not to cut Brown with the knife, seized Copeland's hand and pulled the knife away. Brown was then pushed out of the room by either Collins or Ruggles (R9,12-13,21-22,34-36). Cooper did not smell any liquor on Copeland's or Ruggles' breath (R24). Brown testified that he "couldn't say" whether accused were drinking, but that Copeland was "wobbling" when he was running after Johnston (R36).

7. For the defense, accused Copeland testified that at about 5:45 p.m. he and Ruggles went to a hut where they drank liquor which "smelled like powerful stuff". About an hour or two later they went to the kitchen where they asked Griegentrog and Cooper where Blackburn was, and took knives "to get something to eat". When Johnston and Brown entered, Johnston asked what they were doing with the knives. Ruggles replied that they were getting something to eat. When Johnston told them to put the knives down Ruggles obeyed but Copeland replied "I ain't aiming to put mine down". "We started looking at them" and Johnston backed up. Copeland chased him to a stove where Johnston seized a shovel. He thought he swung at Johnston who had the shovel drawn up. Ruggles followed Copeland

through the hallway into the other room, turned around and started towards Brown while Copeland "chased the sergeant on out". Copeland denied touching Johnston with the knife. He returned to the room where Ruggles had his arm on Brown's shoulder and his knife "right down here". Copeland "come up" and told Brown that he thought he was "the cause of all this". Collins then pushed Ruggles and Copeland away and thrust Brown out through the door. Copeland denied touching Brown with his knife, and testified that he (Copeland) was intoxicated (R37-39). Although they came against Cooper and Griepentrog and the knives were "right in here like this", Copeland denied that his knife was touching the stomach of either man (R40).

8. For the defense, accused Ruggles testified that at about 5:45 p.m. 25 July, he and Copeland went to a hut where they drank "wine or something" for a long time. They then went to the kitchen. Ruggles took a knife to cut some boloney and Copeland got a knife to cut bread. Ruggles asked Cooper and Griepentrog where Blackburn was. They said they thought he was in the latrine. "We had the knives in our hands and (were) backing Cooper and Griepentrog against the stove" when Sergeant Johnston and Brown entered. Johnston asked what they were doing and Ruggles replied that they were getting something to eat. At Johnston's order, Ruggles laid down his knife but Copeland refused to do so and "went for" the sergeant who started backing away with the shovel in his hands, Copeland being "right in front of him". Ruggles picked up his knife and "walked in" behind Copeland into the dining room. Ruggles then turned, walked back to Brown and holding the knife in one hand and putting the other on Brown's shoulder, told him to get out of the kitchen before he (Brown) caused any more trouble. Copeland then came up. Collins pushed Ruggles and Copeland away, and Brown went out of the room. As Copeland was "pretty drunk", Ruggles suggested that they go to bed. Although he could have cut both Johnston and Brown, Ruggles denied touching them with his knife, nor did he make any attempt to do so (R41-43).

9. The evidence is legally sufficient to sustain the findings of guilty as to each accused with reference to the alleged assault on Johnston. Johnston twice requested the accused to put down their knives. Copeland refused and replied that they were going to kill him. He walked rapidly toward Johnston closely followed by Ruggles who picked up his knife again after having laid it down. Johnston backed up towards the door, seized a shovel and holding it before him for self-protection, retreated through the door into another room still followed by both accused who were holding up their knives. Johnston feared that the men fully intended to use the weapons and left the room because of his belief that the knives would be thrown at him. Although Johnston was not actually cut nor touched by the knives, in view of Copeland's announced purpose that the accused were going to kill him and their armed and joint pursuit of Johnston into another room, the alleged intent to do bodily harm was fully established in evidence.

The evidence is also legally sufficient to sustain the findings of guilty with reference to the alleged assault on Brown. Copeland told Brown that he was the cause of the disturbance and suggested to Ruggles that they kill him. Each accused placed a knife against Brown's stomach and backed him against a closed door. Brown was "scared" and could not retreat farther. The accused desisted only upon the interference of Collins, after which Brown was pushed out of the room. The alleged intent to do Brown bodily harm in the manner described was clearly established by the evidence.

A knife is a dangerous weapon if used or attempted to be used in such a manner that it would be likely to produce death or great bodily harm (CM 209862 - Yaple).

> "Some weapons are so clearly deadly when used under particular circumstances that the court may declare them so as a matter of law. So it has been held that a club, a large stone, a chisel, *** or a knife, when used in striking distance, is a deadly weapon per se, and proof of an assault with any of these will sustain a conviction of an assault with a deadly weapon. If the evidence as to the character of the weapon or the mode in which it was used is at all conflicting, the determination of the question whether a weapon is deadly is exclusively for the jurors, to decide upon all the facts. The size, shape, character and weight of the weapon or implement used, its manner of use, *** are all relevant. (Underhill's Criminal Evidence, 4th Edition, sec.598, pp.1170-1171).

The question as to whether the knives were in fact used by accused in such a manner as to constitute dangerous weapons, was one for the determination of the court.

With reference to its findings that each accused was guilty of an assault on Johnston with the intent to do bodily harm with a dangerous weapon, to wit, a knife (Specification 1, Charge I), the court excepted the words "striking him in the stomach" and substituted therefor the words "threatening him". The essence of the offenses alleged is that each accused, with the intent to do bodily harm assaulted Johnston with a dangerous weapon, namely a knife, and the evidence is legally sufficient to sustain the findings of guilty. The words "by threatening him" are merely descriptive of the manner in which the alleged assault was committed and are surplusage in character. Had such words been entirely omitted the allegations contained in the specification would have sufficiently described an offense.

The testimony of each accused in substance fully corroborated the prosecution's evidence with the exception that each accused denied that his

knife touched Brown, and both testified that they had been drinking. Copeland and Ruggles testified that Copeland was intoxicated. The witness Cooper testified that he did not smell any liquor on the breath of either accused. Brown "couldn't say" whether accused had been drinking, but testified that Copeland wobbled when he ran after Johnston. The question of intoxication was one of fact for the determination of the court.

10. The charge sheets show that each accused is 21 years of age. The accused Copeland enlisted for three years' service 18 November 1940 and the accused Ruggles enlisted for three years' service 19 August 1940. Neither accused had any prior service.

11. 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.

12. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 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 do bodily harm with a dangerous weapon is such an offense and the approved sentence as to each accused is five years. Both conditions of the order are present. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the offenses alleged (18 U.S.C., sec.455; 35 Stat. 1143). War Department directive (AG 253 (2-6-41) E, 26 February 1941) requires that prisoners under 31 years of age with sentences of not more than ten years be confined in a Federal Correctional Institution or Reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio is correct.

B. Franklin Pike, Judge Advocate

Robert Burchsted, Judge Advocate

Edwood N. Langsdale, Judge Advocate

1st Ind.

HD, Branch Office TJAG., with ETOUSA. 21 SEP 1943 TO: Commanding General, United States Army Forces in Iceland, APO 860.

1. In the case of General Prisoner GEORGE R. COPELAND (15060657) and General Prisoner ALFRED RUGGLES, JR., (15041594), 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 as to each, which holding is hereby approved. You now have authority to order execution of the sentences. It is recommended that a separate general court-martial order issue as to each accused.

2. When copies of the published orders 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 764. For convenience of reference please place that number in brackets at the end of the respective orders: (ETO 764).

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 SEP 1943

ETO 765.

UNITED STATES v. First Lieutenant THOMAS S. CLAROS (0-560791), Air Corps, 31st Transport Squadron.	UNITED STATES ARMY FORCES IN ICELAND. Trial by G.C.M., convened at Camp Curtis, Iceland, 18 August 1943. Sentence: Dismissal and total forfeitures.

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 93rd Article of War.
Specification: In that 1st Lieutenant Thomas S. Claros, Air Corps, 31st Transport Squadron, did, at Camp Turner, Iceland, between 1 March 1943 and 13 June 1943, inclusive, feloniously embezzle by fraudulently converting to his own use $1,000.00, the property of the 860-1 Exchange, entrusted to him as Sub-Exchange No. 49 Post Exchange Officer.

CHARGE II: Violation of the 95th Article of War.
Specification: In that 1st Lieutenant Thomas S. Claros, Air Corps, 31st Transport Squadron, did, at Camp Turner, Iceland, on or about 27 May 1943, while Post Exchange Officer for Sub-Exchange No. 49 of 860-1 Exchange, with intent to deceive Captain Harold M. Shaw, Exchange Officer, 860-1 Exchange, officially submit to said Captain Harold M. Shaw, Exchange Officer, 860-1 Exchange,

a false inventory of the stock of Sub-Exchange No. 49 for the month of May 1943, which said inventory was known by the said 1st Lieutenant Thomas S. Claros to be untrue in that all the items listed thereon were not in the stock of said Sub-Exchange No. 49.

CHARGE III: Violation of the 96th Article of War.
Specification 1: In that 1st Lieutenant Thomas S. Claros, Air Corps, 31st Transport Squadron, while Post Exchange Officer for Sub-Exchange No. 49 of 860-1 Exchange, did, at Camp Turner, Iceland, between 1 March 1943 and 13 June 1943, wrongfully sell and authorize merchandise to be sold, at prices higher than the established prices, without authorization and contrary to regulations.
Specification 2: In that 1st Lieutenant Thomas S. Claros, Air Corps, 31st Transport Squadron, did, at Camp Turner, Iceland, between 1 March 1943 and 13 June 1943, while Post Exchange Officer for Sub-Exchange No. 49 of 860-1 Exchange, neglect his duty to the predjudice of good order and military discipline, in that said Lieutenant Thomas S. Claros, on being aware of shortages in the accounts of said Sub-Exchange No. 49, fail to take proper action to correct said shortages or to report them to proper authority.

Accused pleaded not guilty to all the charges and specifications. He was found not guilty of Charge I and its Specification and guilty of Charges II and III and their specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General of the United States Army Forces in Iceland, 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, withheld the order directing the execution of the sentence and forwarded the record for examination under Article of War 50½.

3. The prosecution's evidence discloses that accused was appointed Post Exchange Officer at Camp Turner, Iceland of Branch Exchange No. 49 of Exchange 860-1 (R7) on 9 February 1943 (Pros.Ex.G; R16) and was relieved from this assignment 18 June 1943 (Pros.Ex.H; R17). 860-1 is the Base Post Exchange of the Iceland Base Command and is the headquarters of all the post exchanges on the island, serving all sub-post exchanges from the one control location. It furnishes merchandise to the branch units, collects the sales proceeds and supervises the merchandising. It fixes the retail sales

prices of merchandise and maintains the records (R7). The sub-exchanges operate under a standard Manual of Operations governing their management and control (Pros.Ex.A). Effective standard retail sales price lists of all merchandise carried in the post-exchanges are furnished to all branches and are the prices at which all merchandise must be sold (Pros.Ex.B). The list is posted permanently in each exchange and is accessible to anyone (R8). Requisition invoices identifying the goods, the unit prices and the amounts debited to the officer in charge of a sub-exchange are issued with all deliveries of merchandise by the main post-exchange to the sub-exchange. The debits are based on retail sales prices only (R9) (Pros. Ex.C). Any profit or excess money is figured as overage and belongs to the main exchange. A fire loss is assumed by the main post-exchange; a robbery is passed on by a board of officers. Money received for merchandise sold at more than the listed sales prices is overage. Daily reports of sales on which the amounts of cash paid to the Base Post-Exchange are recorded, are issued to and retained by each sub-exchange as a credit on its sales accountability (R10) (Pros.Ex.D). The total of the report of sales or cash "turn-in" plus the total value of inventory extended at retail sales prices equal the amount of the accountability. A one percent variance from the amount of total sales accountability is allowed (R14). A monthly certified inventory is required to be made and submitted by the sub-exchange officers to Base Post-Exchange 860-1. The purchase of any item by a sub-exchange from any other source than the Base Post-Exchange is not authorized (Pros.Ex.A, p.13) (R7). All merchandise for sale in a sub-exchange must come only from the main exchange on requisition invoices and must be sold only at the prices fixed by the main exchange and shown by the issued price list. No credit sales of any nature are authorized (Pros.Ex. A, p.14; R7).

Pros.Ex."E" contains the monthly inventories of the Sub-Exchange at Camp Turner, Iceland (Branch Exchange No. 49) for March, April, May and for the period 1 June to 20 June 1943; each with Inventory Officer's certificate. Pages 8, 9 and 10 of Pros.Ex.E evidence the physical inventory taken as of May 27, 1943, of Branch No. 49, with Inventory Officer's Certificate dated May 27, 1943 attached. They were submitted to the Exchange Officer of Exchange 860-1 by accused as Sub-Exchange Officer (R11). Unless they are individually checked there is no means of telling whether such reports and inventories are true or false and thus the Base Exchange must accept them as true when certified by the Inventory Officer. No irregularities or shortages were ever reported by accused to the Exchange 860-1 nor was accused ever authorized by Exchange 860-1 to sell merchandise at prices higher than standard listed prices. The sales accountability sheets for Branch Exchange No. 49 for March, April, May and the period 1 June to 18 June 1943 (Pros.Ex.F) show no shortage or overage for March (R12), a shortage of 141 kronur 30 aurar for April, a shortage of 180 kronur 36 aurar for May and a shortage of 4132 kronur 48 aurar for the first 20 days of June 1943 (R13). Accused did not at any time report any irregularities or shortages in the sub-exchange to his Commanding Officer, but just prior to 18 June 1943 such irregularities and shortages were called to the attention of such Commanding Officer who made an inquiry resulting in

the removal of accused as Exchange Officer. This occurred during the absence of accused on leave in Scotland (R16).

4. First Lieutenant Howard M. Wendrup, in charge of the Quartermaster commissary (Nikel) at Keflavik, Iceland during the period 9 February to 18 June 1943 testified that accused purchased pineapple and tomato juice, cigarettes and various other things from him during this period and produced books containing the charge sales slips (Pros.Ex.I) showing such sales by the commissary. The name of the organization for whom purchase is made is required to be placed at the top of each sales slip and each is signed by the individuals making the purchases. Pros.Ex.I consists of nine of such slips showing two sales to Hotel DeGink, two sales to 31st Ferry Squadron, four sales to Officers' Club, and one sale to Transient Officers, on various dates. One was signed "T. S. Claros", one was signed "Thomas Claros" and the remainder were signed "Thomas S. Claros" which witness identified as the signature of accused (R18).

First Lieutenant Versie E. Fox, Air Corps, testified he was manager in charge of Hotel DeGink during April, May and June 1943. It was not opened until April. He denied ever authorizing accused to purchase any merchandise for Hotel DeGink and particularly the items shown on the two sales slips included in Pros.Ex.I (R19). Further, he denied ever receiving any such quantity of merchandise as shown by the sales slips or any of the merchandise from accused, or that accused was ever in charge of Hotel DeGink (R20).

First Lieutenant Francis M. Becktolt, testified that he did the purchasing for the Officers' Club at Camp Turner during the period 1 March 1943 to 20 June 1943 but that he never made a purchase from the Nikel Commissary; he never authorized accused to buy merchandise from the said commissary for the Officers' Club. He did buy certain supplies at the Camp Turner Exchange (Branch Exchange No. 49) from the accused for the Officers' Club and produced his itemized records of purchases (R21) being sales slips written and signed by accused (R22) (Pros.Ex.J) but denied that the items shown by Pros.Ex.I (Quartermaster sales slips) as sold to the Officers' Club were the items, quantities or dates of his purchases or that the Officers' Club ever received the items so listed as purchased for them (R23)

Corporal Neal N. Fowler, 31st Transport Squadron, testified that he was manager of Camp Turner, Iceland, Sub-Exchange, (Branch No. 49) beginning 17 February 1943 and as such sold merchandise in the sub-exchange to those who came to buy (R27); that all items were not sold according to the standard retail sales price list. He identified a document as being written in the handwriting of accused (Pros.Ex.K) as a list of items given him by accused with the prices at which he should sell them (R28). The list describes 13 items and their respective selling prices, at which

prices witness himself sold some of the items. Pros.Ex.L, witness identified, as a list made by him about 17 June 1943 at the request of the Commanding Officer of Camp Turner, of all articles sold at "boosted prices" in comparison with prices set forth in the standard retail price list effective at Camp Turner (R29). Witness contributed $20 toward the Camp Turner post-exchange shortage for April and helped make up the February shortage (R30). The May inventory showed a shortage of around 600 kronur (a kronur is $.1544) or about $92.64 (R49). When the shortage was revealed, accused, witness and Private Duncan were present and accused stated he would add more cigarettes to the inventory than actually existed. An inventory was taken also on 7 June 1943, accused giving as a reason that the post-exchange door had been left unlocked (R31). It showed a shortage of between 2400 and 2600 kronur. No cash was taken the night the post-exchange door was not locked (R32). Accused insisted that witness "kick-in" to make up the shortage (R33). There were two keys to the sub-post exchange door of which accused had one and Private Duncan the other (R36). Witness, using Pros.Ex.C as a reference, testified that the selling price of toothbrushes should have been one kronur (R37) but they were sold at one kronur 50 aurar (R38). The document "Selling Price of Post Exchange Articles at IBC Sub-Exchange No. 49" (Pros.Ex.M) was effective in general from March until 12 June 1943 (R39). Some cigarettes sold at Camp Turner, Sub-Exchange were obtained from the commissary at Camp Nikel and some from the Olympia Officers' Club. While selling at the "boosted" prices, they had in their possession the official price list for that period issued by the IBC Exchange (R40).

Private Earl F. Duncan, 31st Transport Squadron was a clerk at the Camp Turner post-exchange beginning about 25 March 1943. He sold at prices listed on a sheet of paper given him by accused (R41). He identified Pros.Ex.N, as being in accused's handwriting and stated that it was given by accused to witness when accused left on furlough (R42). Among other orders and directions it contained the following: "When you draw supplies Friday, if you get new stuff, jack the prices up a bit". The April inventory was approximately 800 kronur short. Witness received no pay in April for his work in the post-exchange and was informed by accused that the money had been used to pay part of the shortage (R42). Accused said they could make up the shortage on new stuff coming in and witness saw accused add cigarettes to the inventory "that never existed in the warehouse". The figures of the final inventory were not the same as those on the inventory made by physical check. Accused made up the inventory and had the officer sign it (R43) as witness watched. There was an increase in accused's inventory. Witness was present at the 7 June 1943 inventory which was short about 2500 kronur and he helped take the 20 June 1943 inventory (R44). Witness identified pages 8 and 9 of Pros.Ex.E (inventory of May 27,1943) as being in the handwriting of accused (R45).

Private Robert R. Sheppard, 31st Transport Squadron, testified substantially as follows: That on 15 May 1943 he began working as clerk in the Camp Turner post-exchange (R46). He helped take the inventory at

the end of May 1943. Accused stated to him the morning before he left for England "that he was really pissed off--and that when he come back from England he was going to put the place on a paying basis". Witness saw accused's written direction to "jack the prices up a bit" (Pros.Ex.N) on accused's desk the Sunday morning he left for England, 13 June 1943. The ink-written price lists on tablet paper (Pros.Ex.K), kept in the cash drawers for reference, were the only ones he ever saw or used until after the change of management around the middle of June when he saw the post-exchange price lists similar to Pros.Ex.B (R48).

First Lieutenant Michael Zop, 31st Transport Squadron, testified that he assumed charge as Sub-Exchange Officer at Camp Turner on 18 June 1943 at which date he took an inventory and found there was a shortage of about 2900 kronur. He had received since his appointment from accused and also from the Officers' Club, about 745 kronur and 79 aurar representing credit sales of merchandise (R49-50).

First Lieutenant Edwin L. Hill, 31st Transport Squadron, Assistant Control Officer in Iceland since 1 May 1943, testified he was a member of the board of investigation appointed under Army Regulations 450-5, to examine into the operation of Sub-Exchange No. 49, Camp Turner, Iceland, which inquiry was made during the last part of June and the first part of July 1943. The board examined the records of the post-exchange, questioned the employees, and also accused as the officer in charge. It also interrogated individual soldiers as to prices they had paid for merchandise purchased by them in the sub-exchange in comparison with the required retail prices. Witness made an examination of all of prosecution's exhibits and prepared calculations thereon which showed an approximate profit of 6000 kronur accruing as a result of selling merchandise in excess of the prescribed standard retails prices at Sub-Exchange No. 49 from 2 March to 19 June 1943. In arriving at this figure he used the information shown by each invoice and each item thereon checking the difference between the correct selling price as shown by the invoice and the actual selling price as shown by Pros.Ex.M. This calculation was admitted in evidence as Pros.Ex.O (R52).

5. The defense introduced three witnesses. First Lieutenant George W. Knepper, Executive Officer of the main post-exchange in charge of sales accountability and other records since 3 April 1943, testified that he inspected the Turner exchange on May 24, 1943. It looked in good shape and the sales accountability records were well posted. His records showed a May shortage of 180.41 kronur and when accused turned over the Exchange to Lieutenant Zop the shortage then was 4132 kronur and 48 aurar (R56).

Second Lieutenant Ira Stein, and John T. Stevenson, Air Corps, 17th Airways Communication Squadron, acquaintances of four and eight months respectively of accused, testified they had never known him to do anything under-handed.

By consent, the honorable discharge papers of accused were received in evidence showing former service (Def.Ex.1). Accused remained silent.

6. Certain questions involving practice and procedure and the admissibility of evidence deserve consideration:

(a) The order appointing accused as Post Exchange Officer of Sub-Exchange No. 49 located at Camp Turner, Iceland, and also the order relieving him from such duties (Pros.Exs. G and H) were issued by Headquarters, Thirty-First Ferrying Squadron. The commanding officer of a post, camp, station or installation is authorized to establish and maintain a post-exchange and to appoint the exchange officer (AR 210-65, par.46 and par.166). The Thirty-First Ferrying Squadron was stationed at Camp Turner (R15). Accused's appointment as exchange officer of sub-exchange No. 49 and his relief therefrom are clearly established by competent evidence.

(b) Pros.Ex.A - "Manual of Operations for Sub-Exchanges and Branches" - and Pros.Ex.B - "Price List and Supplemental Price Lists applicable to sub-exchanges" were received by all branch exchanges (R7,8,13), and therefore it is entirely proper to conclude that Sub-Exchange No. 49 received copies of same. While there is no direct evidence that accused had notice of their contents, there is substantial evidence which justifies the inference that he did in fact possess full knowledge of the requirements of the Manual and the proper prices to be charged the buyer for merchandise sold by him in the sub-exchange (R28,31,33,38,40-48; Pros.Exs. K and N). The Board of Review will not disturb such finding under such circumstances (CM ETO 132, Kelly and Hyde; CM ETO 527, Astrella).

(c) Pros.Ex.L is a statement prepared by Corporal Neal N. Fowler on or about 17 June 1943 at the request of the Commanding Officer of Camp Turner showing articles sold at the Sub-Exchange at "boosted" prices in comparison with prices set forth in the standard price list effective at Camp Turner. It was identified and admitted in evidence without objection by the defense as part of Fowler's testimony (R29). As original evidence it was clearly inadmissible. However, the witness in fact refreshed his memory therefrom and definitely testified that the "boosted" prices were used at the sub-exchange and that he sold some of the articles at those prices (R29,30). Its use as an instrument to refresh the witness's memory was unobjectionable (70 C.J., secs.763,764, pp.590-592). Its formal admission in evidence was not necessary (70 C.J., sec.770, p.599, foot-note 57) but its admission under the circumstances shown is not reversible error nor prejudicial to accused's rights (70 C.J., sec.777, p.599, foot-notes 49 and 50).

(d) First Lieutenant Edwin L. Hill, Assistant Control Officer of I.B.E., made an examination of all Prosecution exhibits and based thereon made a calculation that an approximate profit of 6000 kronur accrued as a result of selling merchandise at sub-exchange No. 49 between 2 March 1943

and 19 June 1943 at prices in excess of the standard price list. These calculations were admitted in evidence as Pros.Ex.O. No objection was made by the defense either as to the witness's qualification as an expert or skilled witness or to the admission of the exhibit. Questions as to qualification of Lieutenant Hill as an expert or skilled witness were waived by failure to object at trial (3 C.J., sec.740, p.825, foot-note 75; MCM., 1928, par.116a, pp.119,120). The exhibit was admissible in evidence under the following rule:

> "**** where books and papers are voluminous, a qualified witness may summarize and explain the facts shown by such books and papers when they are all in court and the opposing counsel has full opportunity to cross-examine as to the correctness of the witness' testimony" (20 Am.Jur., Evidence, sec.831, p.698. See also: 22 C.J., sec.625, p.537; Underhill's Criminal Evidence, 4th Ed., sec.239, p.450; MCM., 1928, par.116a, p.119).

7. The evidence is clear and convincing and is uncontradicted that the inventory submitted by the accused as Exchange Officer of Post-Exchange Branch No. 49, Camp Turner, Iceland, to Captain Harold M. Shaw, as Exchange Officer of Exchange 860-1, for the month of May 1943 was a false inventory and had items listed thereon by accused which actually did not exist, and that it was submitted with the intent to conceal an existing shortage. This monthly inventory was a required official report, and the action of accused in knowingly preparing and presenting it is clearly conduct unbecoming an officer and a gentleman as denounced by the 95th Article of War (CM 122249 (1918), Dig.Ops.JAG., 1912-30, par.1496, p.739; CM 208545, Polk).

8. The record is also convincing in its showing that accused while Post-Exchange Officer for Sub-Exchange No. 49 of Exchange 860-1, deliberately, without authorization and contrary to regulations between 1 March 1943 and 13 June 1943 sold and authorized to be sold certain specified merchandise at prices in excess of the prescribed standard retail price list and also contrary to the same regulations made unauthorized purchases from the Quartermaster Commissary. As a result of such unauthorized transactions a profit of 6000 kronur or more was produced. Accused made no accounting for same and has not paid over the same to the Base Post Exchange.

The evidence stands uncontradicted that during such period of time shortages resulted each month from the operation of the branch post-exchange, which were known to accused and that he failed to take any proper action to correct the shortages.

Such acts and omissions of accused are "disorders and neglects to the prejudice of good order and military discipline" described in and punishable under the 96th Article of War.

9. The Board of Review is of the opinion that the record is legally sufficient to support the findings that accused was guilty of violation of the 95th and 96th Articles of War as charged.

10. Accused is 24 years of age. He was commissioned 5 August 1942. He had had prior service as an enlisted man beginning 29 July 1940.

11. The court was legally constituted and had jurisdiction of accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The sentence of the court is legal. The Board of Review is of the opinion that the record is legally sufficient to support the findings and the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 SEP 1943 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of First Lieutenant THOMAS S. CLAROS (0-560791), Air Corps, 31st Transport Squadron, 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 765. For convenience of reference please place that number in brackets at the end of the order: (ETO 765)

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

(Sentence ordered executed. GCMO 20, ETO, 3 Oct 1943)

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

BOARD OF REVIEW.

ETO 768. 24 SEP 1943

UNITED STATES	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JOHAN (NMI) DIXON, (39847354), Company "D", 517 Port Battalion, TC.	Trial by G.C.M., convened at Barry, South Wales, 13 August 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for eight years. Confinement: 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 charges and specifications:

CHARGE I: Violation of the 64th Article of War.
Specification 1. In that Pvt Johan Dixon, Company "D" 517 Port Bn TC, did at at Sea Mills Camp, Shirehampton, England on or about 17 July 1943, strike Lt, George H. Martin Jr, his superior officer, who was then in the execution of his office, in the stomach with his fist.
Specification 2. In that Pvt Johan Dixon, Company "D" 517 Port Bn TC, did at Sea Mills Camp, Shirehampton, England, on or about 17 July 1943 draw a weapon, to wit, a knife, cook's, against Lt George H. Martin Jr, his superior officer, who was then in the execution of his office.

CHARGE II: Violation of the 63rd Article of War.
Specification: In that Pvt Johan Dixon, Company "D" 517 Port Bn TC, did at Sea Mills Camp, Shirehampton, England, on or about 17 July 1943. behave himself with disrespect toward Lt, George H. Martin Jr, his superior officer, by saying: "You white son-of-a-bitch," or words to that effect.

He pleaded not guilty to Specification 1, Charge I, guilty to Specification 2, Charge I and Charge I, and guilty to Charge II and its Specification. He 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 eight 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 Article of War 50½.

3. First Lieutenant George H. Martin Jr., 517 Port Battalion T.C., testified for the prosecution that on 17 July 1943 he was officer of the day at Sea Mills Camp (Shirehampton, England) (R5). About 2245 hours he passed a kitchen and heard considerable noise as though pots and pans were being thrown about. After calling for the sergeant of the guard, he entered the kitchen and noticed pots and pans "littered all around the floor". Accused was standing at a table, eating (R5-6,9). There were two knives in front of him. The officer told accused he was not authorized to be in the kitchen and to come with him whereupon accused picked up a nine-inch kitchen knife, said "Don't come at me", and drew back the knife. Martin told accused to drop the knife and upon the latter's refusal to do so, the officer got out his pistol, inserted a cartridge and told accused he would shoot if he threw the knife. Accused said he would go to bed when he finished eating. A Sergeant Phelan entered the kitchen and accused again "came back over his shoulder with the knife in his hand in a manner of throwing the knife" at Phelan and Lieutenant Martin who ducked behind a brick partition wall. The motions of accused were such as to induce the officer to believe that the knife would be thrown. He sent a soldier to guard the east end door of the kitchen and ordered Phelan outside as he did not want the latter's life endangered. He again tried to persuade accused to drop the knife. "There were other threatening gestures made by bringing the knife back over his shoulder". Accused said "I'm Indian" and said to Lieutenant Martin "You white son-of-a-bitch you don't like me". "He had the point of the knife in his hand and made out as though he was going to throw it from the blade end". Pursuant to the lieutenant's orders, a Private Cobuzzi, a friend of accused, entered in order to persuade him to leave the building. Accused talked to Cobuzzi about a minute and a half and also threatened him. As he did not want Cobuzzi to be hurt, Lieutenant Martin told him to leave.

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"Private Dixon threatened us several times by laying the knife in his hand, the point of the blade toward his shoulder, and bringing his arm forward in a violent manner and led us to believe that the knife was going to be thrown. This went on for something like ten or fifteen minutes and the guards had all left the kitchen ***" (R6-7,9). Finally the officer picked up accused's hat and coat, held them toward him and directed that he accompany him (R7). Accused wheeled around and threw the knife over his left shoulder toward a corner of the kitchen where it hit the wall (R7-9). The knife was not thrown at anyone (R7). As Lieutenant Martin had accused's hat and coat the latter started toward him. He was then removed from the kitchen. Attempts were made to put accused into the truck but he was "hard to handle" (R7). Lieutenant Martin was talking to a guard, with his body facing accused, but with his head turned when suddenly accused hit him in the stomach. The blow was sharp and landed just below the ribs. The officer, who was relaxed and had not noticed any motion by accused was jolted backwards (R7-8). There were "indications" that accused had been drinking (R9). Accused was then placed bodily into the truck and taken to the guardhouse (R7).

The testimony of Lieutenant Martin with reference to being threatened by accused with a knife was corroborated by other witnesses (R10,13,16). Also corroborated was his testimony that he was struck in the stomach by accused. Some of the witnesses believed that the assault might possibly have been more in the nature of a push than a blow (R11,14,16-18). In the opinion of two witnesses, accused was intoxicated (R12,17).

4. The defense offered no evidence and accused elected to remain silent (R19).

5. As stated in the review of the staff judge advocate, Western Base Section, Services of Supply, ETOUSA the record is replete with examples of grossly leading questions by the prosecution on direct examination with reference to evidence pertaining to the offense to which accused pleaded not guilty (Striking a superior officer in violation of Article of War 64). However, the evidence concerned was cumulative in nature as it corroborated the previous testimony of Lieutenant Martin, and there was no objection by the defense. Because of the cumulative nature of the evidence, the absence of objection by the defense and the presence of other competent evidence clearly establishing accused's guilt of the offense alleged, the irregularity involved did not injuriously affect the substantial rights of accused.

6. With reference to Specification 2, Charge I (Drawing a weapon against a superior officer in violation of Article of War 64) and Charge II and its Specification (Behaving with disrespect toward a superior officer in violation of Article of War 63), the pleas of guilty are fully supported by the evidence. The evidence also clearly sustains the findings of guilty of Specification 1, Charge I and of Charge I (Striking a superior officer in violation of Article of War 64). While Lieutenant Martin was standing outside the kitchen talking with a guard, accused without warning

suddenly hit him in the stomach. The blow was sharp and the lieutenant was jolted backwards.

Lieutenant Martin was an officer in accused's own company and was officer of the day on the evening in question. Hearing a disturbance in the kitchen at about 10:45 p.m. he entered to investigate, saw that several pots and pans had been thrown about and found accused eating at a table. He told accused that he had no authority to be in the kitchen and told him to accompany him. Under such circumstances the lieutenant was clearly acting in the execution of his office.

Lieutenant Martin testified that there were "indications" that accused had been drinking. In the opinion of two other witnesses he was intoxicated. There was no evidence as to the degree of intoxication or as to its effect on the ability of accused to recognize Lieutenant Martin as his superior officer. Such questions are ones of fact for the determination of the court (CM ETO 764, Copeland and Ruggles), and the Board of Review will not disturb its findings with respect thereto.

7. The question remaining for consideration is whether the Federal Reformatory, Chillicothe, Ohio was properly designated as the place of confinement. One of the offenses of which accused was found guilty was drawing a weapon, to-wit a cook's knife, against his superior officer Lieutenant Martin in violation of Article of War 64. When ordered by Lieutenant Martin to come with him, accused picked up a knife, held it with the blade pointed toward his elbow, said "Don't come at me" and drew back the knife. The weapon was a nine-inch kitchen knife which could easily have been thrown. When Sergeant Phelan was with the officer in the kitchen, accused "came back over his shoulder with the knife in his hand in a manner of throwing the knife". Both the lieutenant and Phelan jumped behind a brick partition wall and Lieutenant Martin ordered Phelan to leave the room. When Lieutenant Martin again attempted to persuade accused to drop the knife, the latter made other threatening gestures by bringing the knife back over his shoulder. He had the point of the knife in his hand and "made out as though he were going to throw it from the blade end". This went on for about 15 minutes. Lieutenant Martin believed that the knife would be thrown.

Article of War 42 provides in part that:

> "*** no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, **** and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year ***" (Underscoring supplied).

This article formerly provided that no accused could be punished by confinement in a penitentiary "unless the offense of which he may be convicted" would subject him to such punishment by some statute or by the common law (AW 97; 1874) (Underscoring supplied). Hence, it is seen that the word "offense" included in the earlier article was broadened to an "act or omission". It is apparent that Congress intended by the change of language involved that the "act or omission" itself governs the place of confinement and not the fact as to whether the crime is charged in its civil or military aspect.

In Ex Parte John A. Mason (105 U.S. 696; 26 Law Ed., p.1213) accused was sentenced by a court-martial to confinement in a penitentiary for eight years for having, while on guard duty at a jail, discharged a loaded musket at a prisoner with the intent to kill him. He was tried under the then Article of War 62 (corresponding to the present Article of War 96) which provided:

> "All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental, garrison or a field officers' court-martial according to the nature and degree of the offense, and punished at the discretion of the court".

Chief Justice Waite stated in his opinion that:

> "It is objected that the sentence is in excess of what the law allows. The 97th Article of War is as follows:
> 'No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory or district in which such offense may be committed, or by the common law, as the same exists in such State, Territory or district, subject such convict to such imprisonment.'
> Under this Article, when the offense is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true, when the offense, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act charged

> as 'conduct to the prejudice of good order and military discipline' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear, a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline of the army to which he belonged. The 62d Article provides that the offender, when convicted, shall be punished at the discretion of the court, and the 97th Article does no more than prohibit the court from sentencing to imprisonment in a penitentiary in cases where, if the trial had been had for the same act in the civil courts, that could not be done" (105 U.S. 700; 26 L. Ed., 1214-5). (Underscoring supplied).

The court denied Mason's petitions for writs of habeas corpus and certiorari.

As in the Mason case, the offense herein alleged was likewise charged in its military aspect. The evidence shows that the "act" committed was essentially the drawing of a knife against another with the intent to do bodily harm. Such an "act" was in fact an assault with intent to do bodily harm with a dangerous weapon. The words "draw a *** knife *** against" are synonymous with "assault". Such an offense violated a Federal statute and is expressly made punishable by penitentiary confinement (18 U.S.C. 455; 35 Stat. 1143). It violates both the military and civil laws. However, as the victim was an officer the offense was charged in its most serious military aspect, which involves in time of war the possible sentence of death (AW 64), rather than in its civil aspect for which the maximum punishment includes confinement at hard labor for a period of five years.

As however, accused is under 31 years of age and the sentence imposed is not more than ten years, the place of confinement should be a Federal correctional institution or reformatory instead of a penitentiary. The designation of the Federal Reformatory, Chillicothe, Ohio is correct (War Department letter AG 253 (2-6-41) E, 26 February 1941).

8. The charge sheet shows that accused is 24 years of age and enlisted 4 June 1942 for the duration of the war plus six months. 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 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. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be executed where accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 23 SEP 1943 TO: Commanding General, Western Base Section, Services of Supply, ETOUSA, APO 515, U.S.Army.

1. In the case of Private JOHAN (NMI) DIXON (39847354), Company "D", 517 Port Battalion, TC, 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. The three offenses of which accused stands convicted were all charged as military offenses; they were one continuous transaction and are explained by accused's intoxication. It is noted that 2nd Lt. Maynard A. Steinberg, the investigating officer, states that accused is a chronic alcoholic and when intoxicated has homicidal tendencies, which statement is based on one signed by Major Isham Moore, M.C. and Capt. Harold A. Mack, M.C., of the same date. The basis for these statements does not appear. On the other hand, accused had served in the army for over a year and so far as appears, had no previous convictions. It is recommended that further investigation be made as to accused's character and consideration given to suspension of the dishonorable discharge and designation of the Disciplinary Training Center #1, Shepton Mallet, Somerset, England as the place of confinement in order that accused may eventually be restored to duty should his future conduct merit such action. In any event, on the charges of which he was convicted, it is my view that he should go to the Disciplinary Barracks instead of the Federal Reformatory.

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 768. For convenience of reference please place that number in brackets at the end of the order: (ETO 768).

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 774.

18 SEP 1943

UNITED STATES v. Private WILLIAM (NMI) COOPER, JR., (33523967), Detachment "A", Company "D", 383rd Engineer Battalion (Separate).	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Tidworth, Hampshire, England, 30 August 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Federal Reformatory.

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 William (NMI) Cooper Junior, Detachment A, Company D 383rd Engineer Battalion (Separate) did, at Penwood Road, Highclere, Hampshire England, on or about 24 July 1943, forcibly and feloniously, against her will, have carnal knowledge of Dora Amy Black.

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 the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 10 years, designated the Federal Reformatory at Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The uncontradicted evidence for the prosecution shows that accused together with Privates George Smith and Oumis Randolph of the 383rd Engineers, left their camp together on the night of 24 July 1943, and visited a couple of "pubs" (R7) where they drank a considerable quantity of beer (R9). They then went down the road to a bridge, from where they noticed a girl on the road about a quarter of a mile ahead. Accused said he was going to catch up with her. Smith and Randolph stopped till they saw accused catch up with the girl (R1,7) when they returned to a "pub" and waited (R1) till accused returned about 30 to 35 minutes later (R2,7). Randolph says the girl was too far away for him to recognize her (R1) and he did not hear accused say anything concerning the girl on his return (R2). Smith watched until he saw accused and this girl go over a hill (R7). Accused had the girl by the arm and she just swung off to the side of the road from him. Smith did not know whether she was trying to get away from accused, as he was some 50 or 55 yards away from the girl and accused at that time (R9). From here on the testimony varies in some respects. Mrs. Dora A. Black, the alleged victim, states that she "was on our side of the road on top of this hill; I was dragged across the road to the side of the grass verge and then carried into the bushes" (R6). Smith testified that about five minutes (R9) after they went over the hill, he heard a noise (R7); "I don't know if it was a hollering or what -- it was just over the hill" (R8). "It didn't last no time" (R9). Smith also states that when accused returned he said "he got him some, but he said -- he mentioned ten shillings. I don't know what he meant, but he did mention ten shillings" (R8,10). This was around ten o'clock, but "it wasn't all dark" and all he could see was a man and a girl (R9).

Mrs. Black, as a witness for the prosecution, testified in substance that on the evening of 24 July 1943 she returned from Newbury on a bus going to Hollington Corner about ten o'clock; from there she had about a mile to walk (R2).

> "I had to pass down one main road, and along a small lane, over a bridge, and over - just before I got to where I had to cross over the cross-roads on the Andover road, there were two colored boys to the left of me with two girls, and Private Cooper was going the other way by himself on the right. I crossed the - over the road and as I was -- it is a fairly steep hill - as I got going up the hill I heard footsteps behind me. I never took much notice because I thought it was probably these two colored men with these girls. Then I heard somebody panting for breath because he had been running up the hill, and it was this man. **** He said 'goodnight' to me and

I didn't answer. He said 'goodnight' twice, but I didn't want to speak to him so I thought probably if I answered him the third time, perhaps he would go away, because I didn't want to speak to him. He said 'Why won't you speak to me - all the other girls around here do'. I said 'I'm not in the habit of speaking to strangers'. He then caught hold of my wrists with one hand. I started to scream but nobody heard me. He then put a handkerchief in my mouth. I tried to struggle but I couldn't. And then he dragged me into the bushes, still catching hold of my wrists, both my wrists in one of his hands. He got me in the bushes and he threw me on the ground. Took my shoes off and my stockings. I tried to scream again but no-one heard me. He threw me on the ground and put his knee on my chest, or rather on my stomach. He said 'if you don't let me get what I want I'll strangle you.' He then pulled out a rubber Good, pulled my knickers down, then I fainted. When I came round he was still there. The handkerchief was out of my mouth but I felt too weak to cry for help. I then said 'Will you please let me go now?' He said 'I'll go out into the road to see if there is anybody coming'. **** While he was gone into the road I tried to crawl back through the bushes to get to a path which leads to a Lodge, but it was too overgrown and I couldn't get through, so I just stood there and waited. Then he came back, said there was no-one coming, and he caught hold of my hand and pulled me into the road. I had no shoes or stockings on. I said 'What about my stockings and my shoes and my bags?' He went and got them. He caught hold of my wrists again and asked me if I would see him next week at the dance. I said 'No, I don't go to dances'. He then said 'If you will keep quiet about this I'll give you a pound-note.' *** He put the £1. note in to my hand, but I let it fall to the ground and said I didn't want his money." (R3).

Witness denied encouraging accused in any way to accompany her home (R3). While in the undergrowth, accused exposed his penis. Immediately after she revived, accused said "Why didn't you tell me you were unwell". Witness testified she was unwell at the time. After she let the note fall to the ground, accused ran away. She felt so bad she walked slowly home without meeting anyone. After sitting in a chair for a while she

went to bed and did not get up till about one (the next day) o'clock, at which time she told the next door neighbor what had happened (R4).

On cross-examination, defense counsel produced a statement given by Mrs. Black to the Andover police varying in some minor details from her testimony given in court, which statement was admitted in evidence as Defense Exhibit "A".

First Lieutenant Oliver G. Hesselgren, Jr., investigating officer in this case, testified that on 9 August 1943, after his rights to make a statement or to remain silent had been fully explained to him, accused made a sworn statement (R11), which was admitted in evidence as Prosecution's Exhibit "A". It reads as follows:

Sworn Statement

9 August 1943

I, Pvt. William (NMI) Cooper, Jr., 33523967, Det. A, Co. D, 383rd Engr. Bn. (Sep)., having been warned of my rights under the 24th A.W. do of my own free will, and without force, threats, or promises of immunity or leniency, choose to make a sworn statement as follows:

I left camp, about 1800 hrs. with George Smith and Randolph, and we went to the pub. We stated there about an hour. We left there and went back towards camp and stood there about 10 minutes. Then George Smith mentioned, "Let's go down the road towards Newbury and get some girls". After we got down the road to the main road to Newbury (Newbury-Andover road) there were about three couples standing on the road down there. We had been there about half an hour, and a girl came from towards Newbury on a bicycle. Then Randolph say, "There go one now. I am going to see if I can get her." He went after her and during the time he was down the road, I walked back towards Newbury. Two girls and two soldiers came out from the woods. Smith said, "There's two girls now. Let's try them." One of the girls left and went up the hill. The other went back towards Newbury. I told George Smith, "I'm going to try this one going up the hill." Going up the hill he told me, "Go ahead, see can you get her." I went slowly up to her. I said "Hello", and she stopped about half the way up the hill. I talked to her about the dance for a while, and then I asked her, "Did you know anything." She said, "What about?" I asked her how much she wanted for it. She said one pound. She asked me for a cigarette. I gave it to her. Then I say, "You ready to go."

She said, "Yes." At that time Smith was standing close enough to see me walking into the woods. After we got into the woods, she lay down. I pulled her dress up. She didn't have on any underclothing. Then I put my rubber on. Then I went with her. Then, after I got through, I took my handkerchief and wiped myself off, and she asked me when was I going to meet her again. Then she asked me for the money, and I told her I didn't have but ten shillings; I gave her the ten shillings, and we walked out back into the road, and I kissed her. Again she asked me when she was going to see me again. I told her Sunday. She said she couldn't see me Sunday, but she would see me Tuesday. Then I kissed her and told her goodnight. She asked me "Had anyone followed me?" I told her, "No." Then I went on back down and met George. He asked me "Did I get it?" I told him, "Yeah." Then George Smith stated, "I told you I would bring you to the right place where you could get it." Then I told him I had a date with her Tues. night, and we went back to the camp together. That is all that happened.

She was not menstruating when I was with her. I went back on Tuesday but did not meet her. I asked George Smith to come with me, but he said "No", that he didn't feel good. I stayed about an hour but she did not show up. I didn't see anyone but a soldier and a girl going up the road. I went back to camp and I told George I didn't see the girl.

She did not scream at any time on Sat. night, and I did not put a handkerchief in her mouth. After I finished with the handkerchief I gave it to her and asked her if she wanted to wipe. She said, "No", and offered it back to me. I said I didn't want it, so she threw it on the ground. That Saturday night I had on George Smith's pants.

(Signed) William Cooper, Jr.

Sworn and subscribed to before me this 9th day of August, 1943.

O. G. Hesselgren, 1st Lt., C.E., Investigating Officer." (R13,14).

Objection was made to the admission of the statement in evidence on the claim that the rights of accused were not fully and properly first

explained to him (R.11) and the defense counsel was permitted to read to the court a "deposition" in support of the objection which "deposition" the court later in closed session rejected as improperly presented (R12).

The defense re-called Private George Smith as a defense witness and he testified that on 28 July he was taken by a "man" in a jeep for a ride and he was informed "that a girl was raped and said Cooper said I done it and I said no, I didn't have anything to do with that." (R15). Cooper was not present at the time.

Accused was sworn as a witness only in regard to his statement and he denied that at the time the Lieutenant questioned him on 9 August 1943 that the 24th Article of War was explained to him (R15), that he was sworn or told he needn't make a statement if he did not want to. He admitted he voluntarily made and signed the statement and explained "he came to me and asked me if I wanted to make a sworn or unsworn statement. I have been questioned before by the F.B.I. and I gave him a statement." On questioning by the court, accused said the Lieutenant kept saying he (accused) was charged with rape and Smith and Randolph were framing him. Their statements were read to him "so I told him I didn't want to make no statement and said rather than keep them waiting (presumably the Lieutenant) I would do so and make him a statement and sign my name and that was all." The court in closed session decided that the statement (Prosecution's Exhibit "A") made by the accused to Lieutenant Hesselgren would remain in evidence with such weight as the court may care to give it (R17). A stipulation between accused, defense counsel and the trial judge advocate was read into the record by the defense counsel to the effect that, if present as a witness, Second Lieutenant William G. Murray would say that in his contact as an officer with accused, he had found accused to be a hard, faithful and conscientious worker who caused no trouble of any sort.

4. During his closing argument, defense counsel introduced a letter "which was accepted as Defense Exhibit 'B'". The copy attached to the record is unsigned but it is apparently a comment on certain conditions by parties outside and foreign to the record and was therefore immaterial, irrelevant and inadmissible as evidence. However, it was presented by defense counsel and could therefore be considered in no way to affect any substantial rights of accused. In the opinion of the Board of Review, Prosecution's Exhibit "A" was properly admitted in evidence.

Numerous other errors and irregularities have been noted by the staff judge advocate and will not therefore be again commented upon inasmuch as they do not affect the substantial rights of accused.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM., 1928, par.148b, p.165). The act of intercourse is admitted by accused. Facts and circumstances shown by other evidence also establish that fact. The only question to be determined was whether or not the intercourse was by consent - whether accused was telling the truth

or whether Mrs. Black and the other witnesses should be believed. The court was the sole judge of the credibility of the witnesses and the weight and sufficiency of the evidence. It was its duty to resolve conflicts in evidence. There was substantial, competent evidence excluding accused's statement, to support the court's findings, and under such circumstances the findings of the court will not be disturbed by the Board of Review (CM ETO 492, Lewis; CM ETO 106, Orbon).

6. Accused is 21 years of age. He was inducted 28 January 1943, for a period governed by the Service Extension Act of 1941.

7. The approved sentence of accused includes confinement for ten years. Confinement in a penitentiary for the crime of rape is authorized by 35 Stat. 1143, 18 U.S.C. 457; 35 Stat. 1152, 18 U.S.C. 567. AW 42. By War Department letter, A.G. 253, (2-6-41) E, 26 February 1941, as amended by War Department letter A.G. 253, (6-13-41), prisoners under 31 years of age and with sentences of not more than 10 years will be confined in a Federal Correctional Institution or Reformatory. Therefore, confinement in the Federal Reformatory, Chillicothe, Ohio, is proper. Accused's return to the United States is authorized (GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942).

8. 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.

B. Franklin Riley, Judge Advocate

Judge Advocate

Elwood W. Morgan, Judge Advocate

CONFIDENTIAL

(324)

1st Ind.

18 SEP 1943

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

1. In the case of Private WILLIAM (NMI) COOPER, JR., (33523967), Detachment A, Company D, 383rd Engineer Battalion (Separate), 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, which holding is hereby approved. 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 774. For convenience of reference please place that number in brackets at the end of the order: (ETO 774).

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 799.

30 SEP 1943

UNITED STATES v. Captain ROYSTON T. BOOKER (0-921950), Corps of Engineers.	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Mansfield, England, 5-6 August 1943. 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 85th Article of War.
(Finding of Not Guilty).
Specification: (Finding of Not Guilty).

CHARGE II: Violation of the 96th Article of War.
Specification: In that Captain Royston T. Booker C of E 2nd District EBS, was, at Grantham, Lincolnshire, on or about 19 July 1943, drunk in uniform in a public place, to wit, the Angel Hotel Tap Room, Grantham, Lincolnshire, England between 1930 hours and 2000 hours 19 July 1943.

CHARGE III: Violation of the 69th Article of War.
Specification: In that Captain Royston T. Booker, C of E 2nd District EBS having been duly placed in arrest in quarters on or about 20 July 1943, did at or near Grantham, Lincolnshire, England on or about 20 July 1943, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty and was found not guilty of Charge I and its Specification and guilty of Charges II and III and their Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding Officer, Eastern Base Section, Services of Supply, European Theater of Operations, approved the sentence but ordered its execution withheld pursuant to Article of War 50½. The Board of Review has treated the record of trial as if forwarded as directed by Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and pursuant to Article of War 50½, withheld the execution thereof.

3. As accused was found not guilty of Charge I and its Specification charging drunkenness on 8 July 1943, review of the testimony covering that charge is omitted.

Accused is a graduate civil engineer who had been in the construction contracting business for himself prior to entering the army in January 1943. He had spent four months in camps in the United States prior to arriving in this area where he was assigned as "Area Engineer in the Northern District" with general inspection duties in Leicestershire, Nottinghamshire, Derbyshire and Rutland (R29). Colonel John W. Oehmann, Commanding Officer, Second District, Eastern Base Section was his Commanding Officer (R40).

Master Sergeant Carmel H. Broadfoot, Second Engineer District, testified that on the evening of 19 July 1943 between 1900 and 2000 hours, he was in the tap room of the Angel Hotel at Grantham (R17), a town about four miles from Headquarters (R31) where accused lived (R20,23,30,41). At about 1940 hours accused walked in, spoke to witness and proceeded to the bar where he ordered a beer. After it had been served to him witness testified that "he asked the proprietress for a whiskey. After the proprietress served the whiskey he asked that it be made a double whiskey. After the double whiskey had been served, Captain Booker drank the double whiskey. He was standing in there. It looked like he was going to get sick. He made quite a face, hung his head. I thought he was going to get sick from the indications. After he did straighten up, he drank his beer and then walked out of the Angel pub. He was in the Angel pub approximately 15 minutes". In the opinion of the witness accused was drunk. "When the Captain ordered his drinks and the way he walked in before he ordered his drinks he didn't carry himself the way I had known the Captain to carry himself. When he ordered his drink (R17) he didn't order just what he wanted. He ordered singly. The way he paid for his drinks and the money, the lady that served him had to help him count his money and the way everybody watched him".

The following morning at about 900 hours, Colonel Oehmann ordered witness to go (R18) with Second Lieutenant Thomas A. Simpson, Administrative Officer and Detachment Commander (R21) to look for accused. They

went from headquarters to Grantham, approximately four miles away and at about 1000 hours found accused in the British Legion Club in Grantham (R18) and returned him to headquarters to the Commanding Officer, Colonel Oehmann, who, according to witness, informed accused in substance, "Captain, you are under arrest and confined to quarters. You will go to your room ***" (R20).

Lieutenant Simpson testified the Colonel said to accused in substance, "Captain, you are under arrest". "Captain, go to your room", and he said, "Lieutenant, see that the Captain goes to his room", and witness went upstairs to see that the Captain went to his room (R22). This occurred about 11:10 in the morning. Between 5:30 and 5:45 p.m., the same day, 20 July 1943, witness and Major John E. Eilertson, Second Engineer District, Eastern Base Section Headquarters, were again ordered to look for accused and found him at the Angel Hotel in Grantham and brought him back to headquarters (R23). Accused "went back to his room" (R25). Pros.Ex.1, a certificate from the morning report kept by witness in the course of his official duties was identified by him and received in evidence without objection by defense (R23). It reads as follows:

HEADQUARTERS, 2ND DISTRICT
OFFICE OF THE DISTRICT COMMANDER
EBS, SOS, ETOUSA, APO 517

24 July 1943

C O N F I D E N T I A L

C E R T I F I C A T E

Twentieth, July 1943 - Capt. Royston T. Booker
fr dy to arrest in qtr's.

I hereby certify that the above remark is a true copy from morning report of July 20, 1943, Headquarters 2nd District E.B.S., S.O.S.

Thomas A. Simpson
THOMAS A. SIMPSON
2nd Lt. C.E.
Adm. Officer

There had been no change in the status of accused other than this extract from duty to arrest in quarters for 20 July 1943 (R23). No written notice was given accused of his being put in arrest in quarters (R24) because (testimony of Colonel Oehmann), "I didn't have time to. He was gone again" (R43).

Major Eilertson testified that on a day the date of which he does not recall, he accompanied Lieutenant Simpson on a trip after accused (R26) whom they found in a vacant room in the Angel Hotel at Grantham. Accused was located through a telephone message received by witness to the effect that accused "desired some underwear" (R27). Witness further testified,

when asked his opinion of accused "as an engineer with business experience and quality", that "I found he did his work well. He seemed to have the situation well in hand. He exercised good engineering judgement and he had what I would consider quite a tough job **** which he performed in a satisfactory manner" (R28).

Colonel Oehmann, called as a witness by the court, testified that when accused was brought into his office by Lieutenant Simpson and Sergeant Broadfoot on 20 July 1943, he was "in a very disheveled condition, clothing dirty, he had his trench coat on, his cap on the side of his head and was very bleary-eyed. *** In my opinion he was drunk" (R41).

4. Testimony for the accused consists of his own statement covering his engineering background and his explanation of the offenses with which he is charged. He testified he left headquarters about 5:00 or 5:30 on the evening of 19 July 1943 and walked the four miles to Grantham and then walked around Grantham for 30 minutes or more. Feeling nervous and a little exhausted he went into the Angel tap room and ordered a beer and then thinking may be a double shot of whiskey would straighten him out a little and make him sleep, drank the whiskey and walked back to headquarters. He had eaten no supper nor drank anything prior to going to the pub. He denied being drunk. When he got back he couldn't sleep and was nervous. He got up about four o'clock the morning of 20 July 1943 and walked into town and around town till probably nine or ten o'clock. He had nothing to drink that morning and went into the British Legion Headquarters to sit down (R31). He asked a man cleaning up for a 'phone but was told he couldn't use it so asked that headquarters be called for a conveyance as he was too tired to walk. About ten o'clock Lieutenant Simpson and Sergeant Broadfoot came and he rode back to headquarters and reported to Colonel Oehmann's office. When the Colonel asked why he was not on the job, accused told him his car had broken down and was being repaired, that he was waiting for it and it was supposed to be ready for him at most any time. The Colonel said, "Captain, you better go to your room". "At that time I didn't know I was under any arrest. If he had said it, I didn't hear it. I never dreamed I was under arrest". His first knowledge of it was when Major Eilertson and Lieutenant Simpson came to the Angel Hotel about 5:00 o'clock that afternoon and told him he had broken arrest. He had no duties around headquarters and his only means of getting to his construction jobs was his own transportation then at the British repair depot at Huntington about two miles away (R32).

Captain Tarmo Waara, Company "C", 332nd Engineer Regiment, lived with accused. He denied he had ever seen accused drunk and testified that accused was as excellent construction engineer (R38).

A stipulation was entered into in open court between the trial judge advocate and the defense counsel to the effect that if First Lieutenant A. Mays, Corps of Engineers, Adjutant of the American Section,

School of Engineers, Ripon, Yorkshire, England, were present at the trial, he would testify substantially as follows: That he has known accused since he came on duty, 17 January 1943 until about 15 May 1943; that during his period of personal acquaintance with accused which was at Camp Claiborne, Louisiana and Camp Kilmer, New Jersey, he never knew of accused drinking excessively while on duty or being drunk on duty and that in his opinion accused's character is far above reproach (R39).

5. The testimony herein is in conflict. Sergeant Broadfoot states accused acted drunk and in his opinion was drunk on the evening of 19 July 1943. Colonel Oehmann describes accused as bleary-eyed, dirty, disheveled and drunk when brought before him on the morning of 20 July 1943. Accused denied being drunk.

Sergeant Broadfoot testified that Colonel Oehmann informed accused on the morning of 20 July 1943 that he was under arrest and confined to quarters. Lieutenant Simpson testified that the Colonel informed accused "You are under arrest, go to your room". The Colonel himself testified he said, "You will consider yourself under arrest and will report to your room". Accused insists the Colonel said, "Captain, you better go to your room". There is no question but that accused did leave his quarters afterwards.

The court was the sole judge of the credibility of the witnesses and the weight and sufficiency of the evidence. It was its duty to resolve the conflicts in evidence. There was substantial, competent evidence to support the court's findings that the accused was guilty of the offenses charged in the specification of both Charge II and of Charge III. Under such circumstances the findings of the court will not be disturbed by the Board of Review (CM ETO 492, Lewis; CM ETO 106, Orbon; CM ETO 774, Cooper, Jr.). The Board of Review cannot weigh the evidence nor judge the credibility of witnesses (WD letter to C.G., ETOUSA, 28 April 1943, A.G.321.4 (4-26-43) OB-S, MNE/euh - 2 B - 393 Pentagon).

6. Attached to the record of trial is a request for clemency for the accused, signed by defense counsel and eight of the nine members of the court, recommending that the execution of the dismissal be suspended for one year.

7. Accused is now 45 years of age. He was commissioned a captain direct from civil life and began service 17 January 1943.

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 is legally sufficient to support the findings of guilty and the sentence.

Franklin Riter, Judge Advocate

Curtis Murchison, Judge Advocate

Ellwood W. Sargent, Judge Advocate

(330)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 30 SEP 1943 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Captain ROYSTON T. BOOKER (0-921950), Corps of Engineers, 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 799. For convenience of reference, please place that number in brackets at the end of the order: (ETO 799).

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

(Sentence ordered executed. GCMO 21, ETO, 6 Oct 1943)

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

BOARD OF REVIEW.

ETO 800.

29 SEP 1943

UNITED STATES v. Private STEWART UNGARD (16051438), Company E, 112th Engineer Battalion.	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at London, England, 10 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement for ten 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 charges and specifications:

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Stewart Ungard, Company E, 112th Engineer Battalion, ETOUSA, did, at Divisers, Wiltshire, England, on or about 25 May 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 7 August 1943.

CHARGE II: Violation of the 96th Article of War.
Specification: In that Private Stewart Ungard, Company E, 112th Engineer Battalion, ETOUSA, a prisoner lawfully placed under arrest in Leslie Street, London, England, on or about 7 August 1943, did, at London, England, on or about 7 August 1943, attempt to escape from such said arrest.

CHARGE III: Violation of the 93rd Article of War.
(Finding of not guilty).
Specification: (Finding of not guilty).

He pleaded not guilty to Charge I and the Specification thereunder but guilty of a violation of the 61st Article of War, and guilty of Charges II and III and to their specifications. He was found guilty of Charges I and II and of the specifications thereunder and not guilty of Charge III and of its Specification. Evidence of two previous convictions, one by summary and one by special courts-martial for two periods of absence without leave totaling 35 days in violation of Article of War 61 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 Federal Reformatory, Chillicothe, Ohio as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The undisputed evidence for the prosecution with respect to the offenses of which accused was found guilty was as follows:

A certified extract copy of the morning report of Company E, 112th Engineers (C) (Corps) submitted at "ETOUSA" was admitted in evidence and contained the following entry:

> "27 May 1943:- * * Pvt Ungard duty to AWOL as of 2359 hrs 25 May 1943. * * CFC".
> (R4; Pros.Ex.1).

At about 10:55 hours 7 August 1943 Private Joseph C. Senger, Jr., 32nd Military Police Company, was on duty in the vicinity of Lisle and Wardour Streets, London and wore his brassard. He noticed accused in a dirty, unpressed uniform and asked for his pass. Accused produced a pass which did not entitle him to be in London as it was good only for his own station area. When told that the pass was "no good", he produced a driver's license but the name thereon was not his own. He did not possess his "AGO" card or identification tags. Senger informed accused that he was under arrest, whereupon he gave his correct name. The military policeman took him by the arm to the corner of Lisle and Wardour Streets, dropped his arm and attempted to signal an approaching United States Government vehicle. At this moment accused ran down the street. He was pursued by Senger who caught him about four blocks away and took him to the detention barracks (R5-7).

A sworn statement by accused, made to Staff Sergeant William C. Yerg, Investigation Division, Provost Marshal General's Office, was introduced in evidence (R7-8; Pros.Ex.3). In substance accused stated therein that he was 24 years of age, married but separated from his wife. He enlisted 19 December 1941 and arrived in the European Theater of

Operations 6 March 1943. About the middle of May he went absent without leave with another soldier and went to London where he kept himself supplied with money by begging it from other soldiers. He then began to steal money from soldiers who were staying at various Red Cross clubs. On 7 August 1943 he was taken into custody by the military police and while being questioned ran away but was recaptured a few minutes later. He said "I knew I was in a mess and did not want to be taken into custody" (Pros.Ex.3).

4. It was stipulated by the prosecution and defense that accused was in the military service of the United States and that his organization was at "Divisors", Wiltshire, England (R5).

5. For the defense accused testified that when he went absent he intended to return to his organization. When arrested by the military police he ran away because he had not slept the night before and was not able to think clearly. While absent he lived in London and did not work. During the four weeks just prior to his arrest, he lived with a prostitute and existed on her earnings (R9-10).

6. The prosecution introduced in evidence a morning report submitted at "ETOUSA" wherein accused's organization is described as Company E, 112th Engineers, (C) (Corps). His organization is set forth in the specifications as Company E, 112th Engineer Battalion, and it is alleged that the initial absence of accused occurred at "Divisers", Wiltshire, England. It was stipulated that accused's organization was situated at "Divisors". However, no objection to the introduction in evidence of the morning report was offered by the defense. Accused's unit was in fact situated within the area in which the morning report was submitted, namely, the European Theater of Operations and the inclusion of his correct name and serial number in the morning report sufficiently identifies him with the entry contained therein, despite the variation between the document and the specification with reference to the designation of his organization. An examination of a map of England discloses that the name of the place from which accused absented himself is spelled "Devizes" instead of "Divisers" as alleged. Also, from the evidence of record it appears that accused was placed in arrest on Lisle Street, London, instead of Leslie Street as alleged. These irregularities did not affect the substantial rights of accused.

The plea of accused to the Specification of Charge I was not in the usual form of exceptions and substitutions but consisted of a plea of not guilty but guilty of a violation of Article of War 61. Although irregular in form it is clear that accused intended to plead guilty to absence without leave for the period alleged, terminated in the manner alleged in the specification. After a detailed explanation by the president of the court to accused as to the effect of the meaning of his plea, defense counsel stated that accused "adheres to the original plea ***".

7. The evidence fully supports the findings of guilty of Charge II and its Specification (attempt to escape from arrest in violation of Article

of War 96). With reference to Charge I and Specification (desertion in violation of Article of War 58) it was also clearly established by the undisputed evidence that accused absented himself without leave at the time and place alleged and remained absent until he was apprehended on 7 August 1943 at London, England. During a prolonged absence of about 74 days accused lived by borrowing or stealing money, and for about four weeks lived with a prostitute and existed on her earnings. When apprehended he displayed a pass good only for his own station area and also a driver's license bearing another name. He did not reveal his true identity until he was placed under arrest. He attempted to escape from arrest because he knew he was in trouble and did not want to be taken into custody. Although he was constantly in the vicinity of military organizations for several weeks he did not surrender to military control. The court was fully warranted in finding that accused had the specific intent not to return to the military service of the United States (CM ETO 656, Taylor; CM ETO 740, Lane).

8. The charge sheet shows that accused is 24 years of age and that he enlisted 19 December 1941 for the duration of the war plus six months. He had no prior service.

9. 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.

10. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the offense of desertion in time of war (Article of War 42; par.5d, sec.II, AR 600-375, 17 May 1943; par.90, MCM., 1928). As accused is under 31 years of age with a sentence of not more than 10 years the designation of the Federal Reformatory, Chillicothe, Ohio is correct (War Department letter AG 253 (2-6-41) E, 26 February 1941)

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

29 SEP 1943

WD, Branch Office TJAG., with ETOUSA. TO: Commanding General, Central Base Section, SOS, ETOUSA, APO #887.

1. In the case of Private STEWART UNGARD (16051438), Company E, 112th Engineer Battalion, APO #305 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, which holding is hereby approved. 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 800. For convenience of reference please place that number in brackets at the end of the order: (ETO 800).

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 804

-6 NOV 1943

UNITED STATES v. Privates WILLIAM L. OGLETREE (34064159), EUGENE (NMI) NUNN (34171030), both of 1945th Quartermaster Truck Company (Avn); and Privates LYNN M. ADAMS (34151263), JAMES H. WISE (6996370), both of 1949th Quartermaster Truck Company (Avn); all of 1511th Quartermaster Truck Regiment (Av) (Sep).	VIII AIR FORCE SERVICE COMMAND. Trial by G.C.M., convened at USAAF Station #586, APO 633, on 14 August 1943 and at USAAF Station #591, APO 635, on 17-18 August 1943. Sentences: Ogletree, Nunn and Adams - Dishonorable discharge, total forfeitures and confinement at hard labor for three years; Wise, Dishonorable discharge, total forfeitures and confinement at hard labor for two years and six months. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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

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

2. The accused in this case were brought to trial upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private William L. Ogletree, 1945th Quartermaster Truck Company (Avn); Private Eugene (NMI) Nunn, 1945th Quartermaster Truck Company (Avn); Private Lynn M. Adams, 1949th Quartermaster Truck Company (Avn); and Private James H. Wise, 1949th Quartermaster Truck Company (Avn), acting jointly, and in pursuance of a common intent, did, in conjunction with Private William Crossland, 1949th Quartermaster Truck Company, (Avn), and certain other soldiers whose names are unknown, at Bamber Bridge, Lancashire,

England, on or about 24 June 1943, with intent to do them bodily harm, commit an assault upon Corporal Roy A. Windsor, Private First Class Carson W. Bozman, Private First Class Ralph F. Ridgeway, and Private Spurlock Mullins, all of the 234th Military Police Company, by menacing them with dangerous things, to wit, bottles, rocks and bricks, and by striking the said Private First Class Bozman on the head and wrist and other parts of his body, and the said Private First Class Ridgeway on the head and other parts of his body, with dangerous things, to wit, bottles, rocks and bricks.

CHARGE II: Violation of the 89th Article of War.
Specification: In that Private William L. Ogletree, 1945th Quartermaster Truck Company (Avn); Private Eugene (NMI) Nunn, 1945th Quartermaster Truck Company (Avn); Private Lynn M. Adams, 1949th Quartermaster Truck Company (Avn); and Private James H. Wise, 1949th Quartermaster Truck Company (Avn), being in garrison at AAF Station 569, did, at Bamber Bridge, Lancashire, England, on or about 24 June 1943, commit a riot, in that they, together with Private William Crossland, 1949th Quartermaster Truck Company (Avn), and certain other soldiers whose names are unknown, did wrongfully, unlawfully and riotously and in a violent and tumultuous manner, assemble to disturb the peace of said town of Bamber Bridge, and having so assembled, did, unlawfully and riotously assault Corporal Roy A. Windsor, Private First Class Carson W. Bozman, Private First Class Ralph F. Ridgeway and Private Spurlock Mullins, all of the 234th Military Police Company, by menacing them with, and throwing at them, bottles, rocks and bricks, to the terror and disturbance of said town of Bamber Bridge.

CHARGE III: Violation of 96th Article of War.
Specification: In that Private William L. Ogletree, 1945th Quartermaster Truck Company (Avn); Private Eugene (NMI) Nunn, 1945th Quartermaster Truck Company (Avn); Private Lynn M. Adams, 1949th Quartermaster Truck Company (Avn); and Private James H. Wise, 1949th Quartermaster Truck Company (Avn), acting jointly, and in pursuance of a common intent, did, in conjunction with Private William Crossland, 1949th Quartermaster Truck Company (Avn), and certain other soldiers whose

names are unknown, at Bamber Bridge, Lancashire, England, on or about 24 June 1943, wrongfully and unlawfully resist by force and violence the lawful arrest of Privates William L. Ogletree and Eugene Nunn by Corporal Roy A. Windsor, Private First Class Carson W. Bozman, Private First Class Ralph F. Ridgeway, and Private Spurlock Mullins, all of the 234th Military Police Company, military police in the execution of their duty.

Each accused pleaded not guilty to, and each was found guilty of, all charges and specifications. 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,- Ogletree, Nunn and Adams for three years, and Wise for two years and six months. The reviewing authority approved each sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement for each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. On 24 June 1943, the 1945th Quartermaster Truck Company (Avn) and 1949th Quartermaster Truck Company (Avn) of the 1511th Quartermaster Truck Regiment (Av) (Sep) were stationed at Adams Hall Camp, AAF Station #569 at Bamber Bridge, Lancashire, England. Accused, Ogletree and Nunn were members of the first mentioned company, and accused, Adams and Wise were members of the second mentioned company (R25,26).

The principal street of the town of Bamber Bridge is Station Road which has a compass direction of approximately north and south. At the southern limits of the town the street divides, forming a "Y". The east branch is in the direction of Chorley; the west fork is the highway to Wigan. On the east side of Station Road opposite the "Y" was the Hob Inn, a public house. Approximately 1050 feet north of Hob Inn, Station Road is intersected at right angles by McKenzie Street, which leads eastwards approximately 125 feet to the McKenzie Arms, likewise a public house. The first street north of McKenzie Street is Edward Street. The distance between McKenzie Street and Edward Street is about 210 feet. Both sides of Station Road between McKenzie Street and Edward Street are occupied by closely built private dwelling houses. Mounsey Street extends eastward from Station Road approximately 250 feet north of Edward Street and leads to Adams Hall Camp. The American Military Police Station was located on the east side of Station Road near the intersection thereof with Sergeant Street 500 feet north of Mounsey Street (Pros.Ex.1; R.101,111,118).

4. On the evening of 24 June 1943, Corporal Roy A. Windsor, 234th Military Police Company and Pfc. Ralph F. Ridgeway, of the same organization went on patrol duty at 6:30 p.m. in Bamber Bridge. Each was dressed in Class A uniform; each wore Military Police brassards and each was armed with regular military police equipment: shoulder straps, garrison belt,

.45 automatic revolver, night stick and lanyard. The patrol orders were to arrest any soldier who did not hold a pass or who was disorderly or who was dressed other than in a Class A uniform (R99,110,112).

Windsor and Ridgeway performed their patrol duties in a "jeep". Ridgeway was the driver. During the evening they passed the Hob Inn on several occasions. On one of the trips in the direction of Hob Inn, they encountered three American officers who informed them that there was a disturbance at the Inn and that there were soldiers thereabout in field jackets (R99,105). Immediately, they drove to the inn and stopped to investigate. It was soon after 10:00 p.m. Two colored soldiers, dressed in field jackets, were outside and about eight or ten other colored soldiers were standing about drinking beer from bottles. Windsor approached accused Ogletree who was one of the soldiers clad in a field jacket, and asked him what he was doing out of uniform and inquired for his pass (R46,47). Ridgeway went into the public house and encountered accused Nunn who wore a field jacket and whom he asked to come outside (R26,46,110). During Windsor's conversation with Ogletree other soldiers gathered about them, and there was some commotion. Hearing a noise in the public house, Windsor entered and it appeared to him that Ridgeway was in difficulties with Nunn and other colored soldiers. Windsor called to Ridgeway, "Let's go" or "Come outside". Ridgeway complied. As the two policemen started towards the "jeep", two or three soldiers carrying beer bottles came towards them. One of these soldiers, in particular, was aggressive and moved towards Windsor who ordered him to stop, informed him he was under arrest and directed that he "come along". The order was ignored and again it was given and simultaneously Windsor pulled his gun. Staff Sergeant William Byrd, 1949th Quartermaster Company, grabbed the soldier by the arm and spoke to him and then said to Windsor: "I wouldn't shoot if I were you. If you are going to do anything to control do it with your stick" (R26,36, 46,47,111,112). Other soldiers around there declared that Windsor "was not arresting nobody, or taking anybody away from there" (R101). Windsor and Ridgeway then entered the "jeep" and as they were about to drive away, a beer bottle was thrown so that it passed over Windsor's left shoulder and hit the wind-shield of the "jeep" and broke. Particles of the bottle and some of the beer splattered over the two military policemen (R47,100,111). Windsor and Ridgeway then drove north on Station Road towards the military police station. At about 10:30 p.m. they encountered near the station, Private first class Carson W. Bozman and Private Spurlock Mullins, both of 234th Military Police Company, who were on duty as a "walking patrol". Both Bozman and Mullins were dressed and armed the same as Windsor and Ridgeway (R118). Windsor directed Bozman and Mullins to accompany him and Ridgeway. The four policemen then drove south on the east (left) side of Station Road. There were four or five colored soldiers walking north on the east side walk. When opposite them Windsor's attention was attracted to a soldier who was walking in the street waving a beer bottle. Two soldiers dressed in field jackets were also in the street. (R48,101,105, 111,119,125). The "jeep" with its passengers continued on south to a point opposite Hob Inn, where an American captain and a lieutenant were

encountered. Windsor explained the situation to them and sought their help or advice (R102,108,111,119,126). He was informed by the Captain that he must go ahead and do his best. Thereupon, the "jeep" was turned around and was driven north on Station Road on the west side thereof passing "McKenzie Arms". Colored soldiers were encountered at a point north of McKenzie Street. The four accused and three other soldiers, Byrd, Jackson and Crossland, were in the group (R51,52). Nunn and Ogletree wore field jackets. Adams and Wise were dressed in Class A uniforms (R31,34, 47). Two or three were on the side-walk but there was one near the middle of the street waving a beer bottle, and gesturing in a threatening manner as if intending to stop the "jeep". This soldier was the accused, Adams (R69,75,80,102,104,119,126,129).

When the car reached a point north of the McKenzie Arms and between McKenzie and Edward streets, Windsor halted it. The four military police dismounted at about 10:35 p.m. (R62). Windsor walked towards Adams and stopped within two or three paces of him a little to the right of the "jeep" which was then standing on the left or west side of the road facing north towards Preston. It was close to the curb (R49,66,69,102,103,112, 126). As the police left the car a number, perhaps 15, colored soldiers appeared (R106,117,122). Windsor, Ridgeway, Bozman and Mullins were recognized as military policemen (R36,37). The soldiers called them "names" and dared them to make an arrest (R105). Adams made a motion to throw the bottle. Windsor told him to put the bottle down and that he was under arrest. Adams replied that Windsor was not arresting anybody. The crowd commenced to press around Windsor who backed towards Bozman.

Bozman, on dismounting from the "jeep" walked towards the center of the street and faced a group of three or four colored soldiers. One among them was in a field jacket. Bozman told him he was under arrest and took hold of his arm. Other soldiers said to Bozman that he was not arresting anyone. One soldier took Bozman by the arm and tried to pull him into the group, and broke his hold on the soldier in the field jacket. Bozman pulled loose and again grasped the jacket-clad soldier by the arm (R119,120). The soldiers tried to surround Windsor now near to Bozman, and Bozman, who to shield themselves, backed against the "jeep". A bottle was thrown and Bozman was struck on his forehead. Blood flowed into his eyes. He backed into another colored soldier who, standing in the rear of the "jeep", locked his arms around him. The soldier tried to take his gun. Bozman called to Windsor for help and Windsor responding to the call, hit the soldier on the head with his night stick. He fell, remaining on the ground about ten seconds (R62,70,72,75,88,103,104,119,120). While Bozman was wiping blood from his eyes a stone was thrown which struck him on the wrist. He turned and saw another soldier in the rear of the jeep about to throw a stone. Bozman ordered him to halt. He did not. On the second command to halt and disobedience of same by the soldier, Bozman drew his gun and shot at him. There was further disturbance in the street, and as he turned to see the cause of it he saw accused Adams, carrying a xxx beer bottle, and another soldier approaching from across the street.

Bozman ordered them to halt but they refused to obey and Bozman shot in their direction when they were four or five feet distant (R53,104,108,120-123). Adams dropped to the ground. This ended the fighting for Bozman. Two officers arrived and stated they could handle the situation (R121). Four stitches were required to suture the wound in Bozman's forehead. He also sustained a broken nose, and was confined in the hospital for five days.

Windsor, after hitting Bozman's assailant with his night stick, backed across the side-walk as several rocks were thrown at him. He stood against a wall with his gun drawn. He asked a lady the whereabouts of a telephone and learned that one was across the street. At this moment the crowd seemed to scatter and Windsor crossed the street and telephoned Charge of Quarters for help (R103,104).

Ridgeway, upon leaving the "jeep" commenced to cross to the opposite side of the street. About mid-way he met the accused Nunn in a field jacket. Ridgeway informed Nunn he was under arrest. In reply Nunn struck at him but Ridgeway parried his blow. There were exclamations by some of the soldiers to the effect that there would be no arrests by Military Police that night. Two other colored soldiers approached Ridgeway and he backed towards the automobile (R49,52,79,112,113,114). When he reached the "jeep" he was struck on the forehead by a thrown bottle or rock. He then turned around, faced the "jeep" and reached for his gun. Standing beside the "jeep" facing Ridgeway was accused, Adams, with a rock in his hand. Ridgeway passed around the rear of the "jeep" on to the side-walk. He had his back turned towards Adams and was struck in the back of the head with a rock and rendered unconscious. When he regained consciousness a civilian helped him to his feet and he departed with the other military police. Ridgeway suffered cuts about his forehead and back of his head and a broken jaw (R63,71,81,113,114,115,127,128,130).

Mullins rode in the left rear seat of the "jeep" and was the last of the policemen to dismount therefrom. He walked to the front of the car. There he saw Adams (R126,129) holding a beer bottle. As Mullins called to him, he walked in the direction of the crowd in the center of the street. Another soldier approached Mullins as he stood at the front end of the "jeep". Mullins ordered him to stop. The soldier advanced within three steps of Mullins, who pulled his gun and backed across the side-walk against a wall. Another soldier behind him yelled: "Shoot, shoot, you yellow coward". A third soldier approached carrying rocks. A rock was thrown at Mullins striking the wall at his back. One of the soldiers was threatening to throw another rock. Mullins told him he would shoot him if he threw it. Mullins then saw Ridgeway turning around to face the side-walk. Ridgeway was to Mullins' right as the latter faced the street. At this instance Ridgeway was struck in the back of the head with a rock and fell. The colored soldier who threw the rock came up to Ridgeway and kneeling down pushed him partly from the side-walk curb and attempted to secure Ridgeway's gun which was in its holster.

Ridgeway lay on his right side facing the "jeep" with his gun covered. Mullins fired at the soldier who was bending over Ridgeway with his back to Mullins. The soldier fell to the ground close to Ridgeway (R33,72,86, 93,127,130). Mullins identified the soldier he shot as one of the accused sitting in the court room "the second one from the left" (R131). S/S William Byrd declared that it was Adams who was shot under the circumstances described (R34). Pendery (R23) and Byrd (R25) also identified Adams as sitting second "from the left". Another shot was fired simultaneously with the one discharged by Mullins. After the shooting, the fighting stopped, although the colored soldiers continued to shout and curse. Mullins entered the "jeep" and left with the other military police soon afterwards (R131).

Ogletree had been an active participant in the melee. He was seen carrying a rock and was engaged in the fighting (R30,32). At one stage of the disturbance, Adams, Ogletree and Byrd started from the center of the street in the direction of a military policeman who was on the west side of the street near the "jeep". As Ogletree approached with Adams he was shot by one of the policemen (R34,55,57).

Ogletree was treated for his injuries at 2215 hours on 25 June 1943 at the dispensary of the 1511th Q.M. Truck Regt. (Avn). He was suffering from a gun-shot wound. The bullet entered Ogletree's body at a point in the center of the lower third of his back and made its exit in the front (R58). Adams was also examined at the dispensary at the same approximate time and date. He had been wounded by a .45 caliber bullet entering his neck at the rear portion of the left side of his neck and exiting just behind his shoulder blade. Both Ogletree and Adams were hospitalized. Nunn's examination followed that of Ogletree and Adams. He exhibited bruises about his ribs (R58-62).

The area of conflict definitely appears to have been on the west side of Station Road between McKenzie and Edward streets at a point about 30 yards north of the intersection of McKenzie Street and Station Road or approximately mid-block (R62,64,75,80). The breach of the peace was characterized by personal combat between the policemen and the colored soldiers, the throwing of rocks and beer bottles by the soldiers, shouting and use of violent language and finally the use of fire-arms by the policemen (R62-64,71,72,82). The disorder occurred in a closely built-up section of Bamber Bridge (Pros.Ex.1; R62,75,80,82). Trespasses were committed by the colored soldiers upon adjacent private property (R80,88, 90), and rocks struck the front door and window frame of a residence (R75, 96). The turmoil disturbed the peace and quiet of the neighborhood and the house-holders were frightened and excited (R64,76,82,84,88,96). The soldiers had been drinking and some of them were drunk (R84).

5. No evidence pertaining to the disorder and accuseds' participation therein was presented by the defense. There was therefore no conflict between the prosecution's evidence and that of the defense. However, the record of trial reveals conflicts in certain aspects of the testimony of

prosecution's own witnesses, some of whom were obviously biased in favor of accused. In a situation wherein a number of actors are involved in a swiftly moving episode such variations in evidence must be expected. They are resultant upon the inability of certain witnesses to observe accurately or to remember correctly what they saw or heard. It was an exclusive function of the court, as a fact finding body, to resolve such conflicts and determine the ultimate facts. The Board of Review, sitting as an appellate judicial tribunal must accept the facts as found and can neither weigh the evidence nor reconcile conflicts in it nor judge the credibility of witnesses. If there is competent substantial evidence to support the findings of the court the Board of Review will accept them as final (CM 192609, Rehearing (1930), CM 161833 (1924), Dig.Ops.JAG., 1912-40, sec. 408(2), p.259; CM 223336 (1942) Bul.JAG., Aug 1942, Vol.I, No.3, par.422, p.159; CM ETO 82, McKenzie; CM ETO 106, Orbon; CM ETO 132, Kelly and Hyde; CM ETO 422, Green).

The foregoing narrative of events and statement of facts are supported by competent substantial evidence. The same will be hereinafter supplemented in the discussion of the issues presented for consideration.

6. At the proper stage of the trial, and before the court was sworn, the defense challenged Colonel Neal Creighton, the president of the court for cause (R5). It was asserted by the defense and admitted by the prosecution that Colonel Creighton was the commanding officer of Camp Griffiss and that he had been in command thereof during a period of three weeks when accused had been confined at said camp and were under investigation (R6). Colonel Creighton was sworn as a witness and was examined and cross-examined at length (R6-9). The court, excluding the challenged member, deliberated in closed session and when court was re-opened the then senior in rank (Colonel Baker) announced that the challenge had not been sustained (R9). Thereafter, the defense in the exercise of its peremptory challenge excused Colonel Creighton (R13). In the civil courts the following rule by weight of authority is applied where a challenge to a juror for cause is improperly over-ruled:

> "*** such an error will not be regarded as material if the objecting party did not challenge the juror peremptorily and his peremptory challenges were not exhausted, or if the record fails affirmatively to show that such challenges were exhausted, it being held that a party must use all available means to exclude all objectionable jurors, and that a failure to do so constitutes a waiver of his objection." (35 C.J., sec.413, p.372).

No good reason exists why the same rule should not be adopted in courts-martial procedure. The grounds of challenge of a prospective member of a court for cause (MCM., 1928, par.58e, p.45) are substantially the same as

similar grounds of challenge of jurors for cause in the civil courts (35 C.J., par.427, p.382).

The defense in the instant case by exercising its peremptory challenge, preserved for examination and consideration upon appellate review the question as to whether the court committed error in refusing to sustain defenses' challenge for cause directed at Colonel Creighton.

Colonel Creighton was not the accuser nor a witness for the prosecution. He was not therefore disqualified by the interdiction of the Eighth Article of War. His examination shows that he entertained no preconceived ideas on the case; had formed no opinions as to the guilt or innocence of accused, and he declared he could decide the case fairly and impartially on the evidence.

It is true that it is not considered good policy to place a commanding officer of an accused on a court which tries him. However, this is no valid ground for challenge.

> "***. It is quite clear, however, that the mere fact that a member is the commanding officer - colonel, captain, etc.- of the accused is no foundation for a valid challenge." (Winthrop's Military Law & Precedents, Reprint, p.223).

While Colonel Creighton was temporarily commanding officer of the accused in his capacity as camp commander, the incidents of such command and his relationship to the accused were not the usual incidents and relationship of a commander to his men. The accused had been brought to Camp Griffiss for investigation and confinement - a mere temporary arrangement. It is not believed that the policy above indicated applies under such situation.

The challenge must therefore stand or fall on the question as to whether Colonel Creighton was biased against accused personally or whether he had formed a definite opinion as to their guilt or innocence. The record clearly fails to establish any such disqualifying attitude on the part of the challenged officer. "The test is whether, looking to the record as a whole, it appears that the substantial rights of accused have been injuriously affected". (CM 232229 (1943), Bul.TJAG., May 1943, Vol.II, No.5, par.362, p.182). There was no prejudicial error in the ruling of the court denying the challenge directed at Colonel Creighton.

7. The defense also challenged for cause Lieutenant Colonel Robert G. Patterson, the law member of the court. The basis of the challenge was that Lieutenant Colonel Patterson was not a member of The Judge Advocate General's Department and that there was available to the appointing authority for appointment as law member of the court officers of such department (R9). The court upon the challenge proceeded to hear evidence on the question of the availability to the appointing authority of officers of The Judge Advocate General's Department. At the conclusion thereof the court in

closed session, in the absence of the challenged member, refused to sustain the challenge (R13).

The law member of a court is subject to challenge for cause, but not peremptorily (MCM., 1928, par.58d, p.45; AW 18). The Eighth Article of War in pertinent part directs:

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

The question as to whether an officer of The Judge Advocate General's Department was available to the Commanding General, VIII Air Force Service Command, for designation as law member of the court which tried accused was a matter for his exclusive determination. The provision of AW 8 quoted supra is not a mandatory direction to the convening authority, but vests in him discretion in the determination of the availability of a judge advocate. His designation of Lieutenant Colonel Patterson as law member was a decision by him that a judge advocate was not available. It was conclusive and was not subject to review by the court on a challenge for cause and cannot be re-examined by the Board of Review (CM 209988 (1938), Dig.Ops.JAG., 1912-1940, par.365(9), p.176). The ruling of the court denying the challenge was correct, but evidence on the question of availability should not have been received. No issue of fact was involved; only a question of law was presented. The challenge was inherently devoid of legal merit.

8. Immediately prior to the commencement of examination of witnesses the trial judge advocate asked the court to request witnesses in the case to retire from the court room. Defense counsel asserted that none of the defense witnesses were in the court room. Thereupon, the trial judge advocate asked that the four accused be separated from other colored soldiers sitting in the court room and be required to be seated near their counsel (R17). The trial judge advocate in support of his request asserted that colored soldiers in the court room were spectators attending the trial and should be seated accordingly and that the accused were intermingled among these colored soldier-spectators for the purpose of confusing the witnesses as to their identity (R17). Defense counsel in opposition declared:

> "This matter is primarily one of identification and it is the position of the defense that when witnesses have to identify the accused, the accused have a right to have persons of their own color sitting with them so that we can be sure the witnesses are

> making proper identification. **** they are not spectators. They are here for the purpose of identification and it is the provision of the Manual that the accused sit near the counsel for the benefit of the counsel, so that he may discuss the case with accused. They are certainly near enough to discuss the matter. In addition, the Manual says the counsel for the defense is entitled to clerks and orderlies to assist him in the trial of the case and we still submit we are entitled to have these other soldiers along with us in the defense of this case. I refer to page 37 of the MCM, paragraph 48" (R17).

The law member granted the motion of the trial judge advocate and there was no objection to the ruling by any member of the court (R17). The following colloquy then occurred:

> "Defense: Do I understand the court's ruling that they are to sit back?
> Law Member: They can sit back in the first row there" (R17,18).

The record of trial then recites: "The other soldiers were seated in the first row at the side of the four accused" (R18).

While the record of trial does not clearly indicate the final seating arrangement, it implies that the accused were separated from the other colored soldiers. The latter however, were allowed to remain in the court room and were seated on the first row of seats at the side of the four accused.

General courts-martial trials in the European Theater of Operations involving offenses against the peace and quiet of a civil community or against persons who are not members of the command of ETOUSA, will be in open court, except when security provisions forbid. Local officials and others directly concerned will be encouraged to attend (GO #37, ETOUSA, 9 Sept. 1942, par.3c). The above order is silent both as to right of accused to demand the presence in the court room of military personnel who are not witnesses and as to the right of military personnel not witnesses to attend a trial. In the absence of contrary orders by proper authority the rule is that "subject to the directions of the appointing authority, a court-martial is authorized either to exclude the spectators altogether or limit their number. In the absence of good reason, however (e.g. where testimony as to obscene matter is expected), courts-martial will sit with doors open to the public" (MCM., 1928, par.49e, p.38). In the instant case, spectators were not excluded and there was no attempt to limit or circumscribe the attendance or presence of colored soldiers. The order of the court pertained solely to seating of the accused and spectators in the court room. This was a matter peculiarly within the power and discretion of the court. It was its duty to control and regulate in the

court room the conduct of the personnel of the court, the accused and the spectators (MCM., 1928, par.54, p.42; 64 C.J., sec.62, p.65, foot-note 29). Its action in that regard is not subject to review in absence of conduct violative of law or which is so arbitrary as to prejudice the rights of accused (5 C.J.S., sec.1603, p.499). The action of the court in this instance was reasonable and proper and did not prejudice accused. There was no error.

9. Certain rulings of the court pertaining to admission and exclusion of evidence deserve consideration:

(a) "Pros.Ex.1" - Map of a section of Bamber Bridge - was admitted in evidence (R18) without authenticating evidence as to its accuracy or proof that it delineates correctly the locus of the fighting on 24 June 1943, in conformity with approved practice (MCM., 1928, par.118b, p.122). However, defense counsel affirmatively disclaimed any objection and under such circumstances there was no prejudicial error (CM ETO 506, Bryson).

(b) Captain Paul T. Milnamow, M.C., over objection of defense, testified that when he treated accused, Ogletree, for injuries at 2215 hours on 25 June 1943, Ogletree stated he had received the injuries fighting with "some M.P.s in Preston". Similar admissions were made severally and separately by accused, Adams and Nunn (R59). The acceptance in evidence of these statements was restricted as being against only the accused making same. The statements were admissions against interest and were admissible without proof of their voluntary nature. Their effect was properly confined to the accused making same (MCM., 1928, par.114b and c, pp.116-117). The objections were properly overruled.

(c) Mrs. Frances Baldwin, prosecution s witness, was asked: "What effect did this disturbance have on the people of Bamber Bridge?". Defense objected to the question, but before ruling was made on the objection, the trial judge advocate asked the witness: "Who, if any one, among your neighbors were terrorized by this incident?" No objection was offered to the second question. The witness did not respond to the first question, but answered the second question and two supplemental questions having identical purpose by naming her family and two next door neighbors (R76). Both questions were bad in form. The first was too broad - there was no proof that "the people of the town" were present or knew anything about the incident. It would have been proper to ask the witness if there were civilian residents present observing the disturbance. If she gave an affirmative answer she could have then been asked if she observed their re-actions and emotions and what they were (20 Am.Jur., Evidence, sec.823, p.692). The second question was objectionable because it was leading. There had been no evidence that anyone was terrorized. These irregularities, however, are not vital and could not have materially prejudiced accused's rights. The first question was unanswered. Defense did not object to the second question and its supplementals. The value of the

evidence elicited was small; it could have had but minimum influence on the court. These are irregularities which should be disregarded under AW 37. However, the practice is not condoned.

(d) Police Sergeant Laurence Constable, prosecution's witness, was asked: "What was the condition of Bamber Bridge that night with respect to the feelings of the people there, that you know of your own knowledge?" He replied: "Just at that time of night the place was in an uproar about the incident and everyone was very excited and the women folk very frightened ***." (R96). Immediately prior to the propounding of this question the witness had been testifying as to what he had observed at the scene of the fight. It is therefore reasonable to conclude that in spite of the fact the question was sufficiently broad to include all of the people of Bamber Bridge the court understood clearly that his answer was confined to those whom he observed at the locus in quo, and on this basis his answer was unobjectionable (20 Am.Jur.,Evidence, sec.823, p.692; Underhill's Criminal Evidence - 4th Ed. - sec.231, p.432).

(e) During the subsequent investigation of the disorder occurring in Bamber Bridge on the night of 24 June 1943 statements were obtained from each of the accused. Each statement was reduced to type-written form and was signed by each accused. The prosecution submitted evidence as to the circumstances under which each statement was obtained. Staff Sergeant Porter L. Askew, of The Provost Marshal General's Department testified as to the facts surrounding the obtaining of Nunn's statement (R20-22,132-135). Nunn also testified as to the circumstances of his giving his statement (R135,136). Any conflict with Askew's testimony relative to the taking of the statement was resolved against Nunn by the action of the court in admitting his statement. Sergeant Roger A. Pendery, Investigations Department, Provost Marshal General's Department, gave like testimony as to obtaining separate statements from Adams and Wise (R23,24,138-142). Second Lieutenant Charles Jesson, Investigations Division, Provost Marshal General's Detachment, testified as to the conditions under which Ogletree's statement was obtained (R142,143). The original statements signed by each of the accused were presented to the witnesses for identification and the respective signatures of accused were proved (R20,134,139,141,143). With approval of the law member, copies of the original statements, from which the names of all accused except the person making the statement were deleted, were admitted in evidence and read to the court. The same are part of the record of trial (Nunn's statement: Pros.Ex.2, R138; Adams' statement: Pros. Ex.3, R140; Wise's statement: Pros.Ex.4, R141,142; Ogletree's statement: Pros.Ex.5, R143).

The court, trial judge advocate and defense counsel proceeded on the assumption that these statements were confessions of guilt. On this premise the proof is clear that each statement was the voluntary act and deed of each accused; that each accused was given proper warning as to his rights; that no promises of leniency were made nor threats or compulsion used to obtain the same. As confessions they were obviously free from taints of compulsion or promises of leniency (CM ETO 438, Smith; CM ETO 559,

Monsalve). The corpus delicti had been clearly proved prior to their admission (CM 206090, Koehler; CM 202213, Mallon). The fact that the statements were not written by the accused does not deny them admission (CM ETO 438, Smith).

However, after carefully scrutinizing these statements the Board of Review is convinced that they cannot be classed as confessions. In CM ETO 292, Mickles the distinction between admissions and confessions was considered at length. In the light of the authorities therein cited the Board of Review is of the opinion that the statements insofar as they are inculpatory of each accused are in legal effect admissions. Neither of them contain any acknowledgment of guilt. They were, therefore, admissible in evidence without preliminary proof of their voluntary nature (MCM., 1928, par.114b, p.116-117). The precautionary action of the trial judge advocate in deleting the names of co-accused from each statement before reading same to the court is approved. Such practice obviated the evil of accumulating a "matrix of hearsay evidence" against accused other than the one making the statement which was condemned by the Board of Review in CM ETO 134, Stump et al.

10. At the conclusion of the prosecution's case in chief, the defense made separate motions as follows:

a.- On behalf of all accused for finding of not guilty of Charge I and Specification.
b.- On behalf of all accused for finding of not guilty of Charge II and Specification.
c.- On behalf of all accused for finding of not guilty of Charge III and Specification.
d.- On behalf of accused, Wise, only for a finding of not guilty of Charges I, II and III and their respective specifications.

The motions were denied by the court after deliberation in closed session (R147). There was no error in such ruling in respect to the accused Ogletree, Adams and Nunn. The prosecution had established its case against them for the reasons hereinafter set forth. The motion should have been granted as to accused, Wise. (See paragraph 11, infra). Upon the denial of the motions each accused, having had his rights explained to him elected to remain silent and no evidence was offered in their behalf (R148).

11. The relationship and connection of the accused, Wise, to and with the incidents and events occurring at the locus in quo in the town of Bamber Bridge on the night of 24 June 1943 require a separate treatment of his case. He is charged with three distinct offenses alleged to have been committed by him jointly and in pursuance of a common intent with the other three accused:

(a) With intent to do bodily harm he did commit an assault upon the four military policemen by menacing them with dangerous things and by striking Bozman and Ridgeway with such things; (b) He did commit riot by

wrongfully, unlawfully and riotously assembling to disturb the peace and having assembled did assault the four military policemen by menacing them with and throwing at them dangerous things to the terror and disturbance of the town; (c) Wrongfully and unlawfully he did resist by force and violence the lawful arrest by the four military policemen of accused Ogletree and Nunn.

A summary of the evidence applicable to Wise's activities shows as follows:

S/S William Byrd: Wise was present on the street immediately exterior to the Hob Inn when Windsor and Ridgeway first attempted to make arrests and was in the group of soldiers who proceeded north on Station Road (R26,27). He was present at the situs of the fight between McKenzie and Edward streets with the four military policemen, but left directly after the fight started (R36). He was seen with no weapons in his hands nor was he seen to strike any of the military police (R32).

Pvt. Albert F. Jackson: Wise was at Hob Inn and was standing outside when Windsor and Ridgeway departed (R48). Wise was in the group which proceeded north on Station Road and was present when the four military policemen returned, but was not seen by Jackson any more that evening (R49). Wise was not present later when bricks were thrown (R53).

Captain Paul T. Milnamow, M.C: Ogletree, Adams and Nunn were treated by the medical officer for injuries on 25 June 1943. No mention of Wise is made in his testimony, and he could not identify Wise in the courtroom (R58).

Corporal Roy A. Windsor: Wise was present when the "jeep" containing the four military policemen stopped and the policemen dismounted (R104, 106) but Windsor did not know if he had a weapon or object in his hands (R105). Wise was "just in the crowd" (R108).

The statement of accused, Wise (Pros.Ex.4) should be considered in connection with the foregoing evidence. The declarations therein that bear any degree of inculpatory interpretation are as follows: Wise was at Hob Inn at the time Windsor and Ridgeway appeared. He was in the inn when Ridgeway went into it and addressed a soldier wearing a field jacket (i.e. Nunn). Wise then left the "pub" and was present on the outside of it when Windsor pulled his gun. When Windsor and Ridgeway left in the "jeep", Wise and an A.T.S. girl walked north on Station road accompanied by other soldiers and A.T.S. members. He saw the "jeep" containing the four policemen pass on its way south and then return and stop opposite the crowd of colored soldiers of which he was one. He was present when one of the policemen attempted to take into custody a colored soldier, and saw three policemen leave the "jeep" and walk towards the center of the street. He further saw one of the policemen hit in the forehead, and the police pull their guns. He heard one shot and saw a soldier fall, and heard a second shot and saw another soldier fall. He then left and started back to camp.

(a) The offense alleged in Charge I and its specification, to-wit: assault with intent to do bodily harm with a dangerous thing, requires proof of specific intent (MCM., 1928, par.149m, p.180; 5 C.J., sec.216, p.739; 6 C.J.S., sec.79b(2), p.937). There is no evidence that Wise, himself, either assaulted or actually struck any one of the three military policemen. Likewise there is a total absence of evidence proving that Wise was a party to any preconcert, understanding, mutual plan or design with his co-defendants having the purpose of assaulting or injuring the policemen or preventing them from performing their duties. Wise's knowledge of the intent of Ogletree, Adams and Nunn is not shown and the intent of his co-defendants cannot be imputed to him (CM 200047 (1933), Dig.Ops.JAG., 1912-1940, sec.451 (13), p.314)). Wise's mere presence at the scene of the crimes is not sufficient to establish his guilt (CM 221019, (1942), Bul.JAG., Jan-June 1942, sec.454(14a), p.23). It therefore results that the record of trial is legally insufficient to show that Wise entertained the specific intent necessary to sustain the charge against him.

(b) With respect to the offenses alleged in Charge II and its specification (assembling in a riotous and tumultuous manner to disturb the peace) and Charge III and its specification (resisting the lawful arrest by the military police of Ogletree and Nunn) the evidence is wholly lacking that Wise in any respect participated in or aided and abetted in either the disorder or in resisting of the arrest of Ogletree and Nunn. Likewise there is not even an inference of preconcerted action or mutual understanding on his part. The repeated utterances by the colored soldiers to the effect that the military police would make no arrests on that night is not connected with Wise other than as an auditor. There is not a suggestion that he endorsed or approved such sentiments and there is no evidence he uttered such remarks. By his own statement Wise goes no further than admitting his

party to the crime. He may be indicted for his neglect in not assisting the officers of the law in arresting the offenders. But he is not indictable as concerned in the offense which the offender in question commits. Hence, although a man be present while a felony is committed, yet if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony or apprehend the felon. 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 remains at a convenient distance in order to favor their escape, if necessary, 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. Mere co-operation without an understanding may not make a conspiracy." (1 Wharton's Criminal Law, 12th Ed., sec.246, pp.329-334).

"The mere fact that one present at the scene of a crime may be in sympathy with the person committing the same or may approve of his act will not render the former an aider or abettor. So, also, the mere fact that one present may negatively consent to the commission of the felony will not render him a principal in the second degree, and instructions using the word 'consent' have frequently been held erroneous." (22 C.J.S., sec.88b(3), p.160).

"In the absence of preconcert, or at least of intent to aid and knowledge thereof on the part of the actual perpetrator of a crime, the mere presence of a person at the time and place of a crime does not make him an aider

and abettor or principal in the second degree or principal under applicable statute, where he does not aid or abet, although he makes no effort to prevent the crime, and this is so **** even though he may mentally approve of it, and he benefited by it, unless he is under legal duty to prevent it. 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 C.J.S., sec.88b(4), pp.160,161).

"**** the mere presence of one at the scene of the crime **** does not make one an accomplice. Mere knowledge or belief that a crime is to be committed or has been committed and the concealment of such knowledge does not render a witness an accomplice unless he aided or participated in the commission of the crime. This is the general rule and is sustained by the majority of the cases. ****". (Underhill's Criminal Evidence, 4th Ed., par.150, pp.227-228). (See also CM 200047, supra; CM 221019, supra).

The Board of Review is of the opinion that the record is legally insufficient to support the findings of guilty with respect to accused, Wise, as to any and all of the charges and specifications.

12. Substantial evidence is contained in the record of trial definitely identifying and implicating each of the accused Ogletree, Adams and Nunn with (a) the assault on all of the military policemen and the battery upon Bozman and Ridgeway, (b) the riotous and unlawful assembly of the soldiers and the included assault upon the policemen, and (c) the resistance of the arrest of Nunn and Ogletree. In addition there are the admissions made by each accused Ogletree, Adams and Nunn as follows:

(a) The statements made by each of them on 25 July 1943 to Captain Milnamow that each had been fighting with the military police;

(b) The signed statements of each accused obtained during the pre-trial investigations. These latter statements summarize in pertinent part as follows:

Nunn (Pros.Ex.2): The military policeman who had spoken to him at the Hob Inn approached him and said: "You are the one I am looking for, let's go". Nunn refused. The policeman commenced striking him with a club. The three other policemen approached and Crossland, Jackson and other colored soldiers came to Nunn's assistance. The fight commenced. Nunn saw a policemen who had been injured with blood on his forehead and face, heard two gun shots and saw two soldiers fall. He saw a policeman

by the "jeep" - the same one who had shot the two soldiers. Nunn thought he was going to shoot them again. He ran to him and tried to take his gun. The policeman hit him with his club, pushed him away and shot at him. Then Nunn kept knocking the gun up to keep it from being fired at other soldiers.

Adams (Pros.Ex.3): stated he walked up Station Road from Hob Inn with a bottle of beer in his hands. A "jeep" stopped and three military policemen got out. Adams heard a shot fired and then a second shot and he felt a burning in his back and he knew he was shot. He then threw his beer bottle at one of the policemen but it did not hit him. After throwing the bottle he grabbed another policeman and tried to take his gun. Byrd grabbed Adams and tried to pull him away from the military policemen.

Ogletree (Pros.Ex.5): admitted he was one of the crowd of soldiers who walked north on Station Road after leaving Hob Inn. When the "jeep" stopped a policeman came over to him and tried to hit him with a stick. The policeman and Ogletree "tusseled". Another policeman tried to hit him with his stick. The first mentioned policeman hit Ogletree with his stick on the right side of his head, and drew his gun. Ogletree "started at him". Somebody on Ogletree's left shot him. It was not the policeman he had been fighting with. He fell to the ground.

The legal principles involved in determining the responsibility of Ogletree, Adams and Nunn are found in the following statements:

> "All persons who are actually or constructively present at the time and place of a crime, whether it is a felony or merely a misdemeanor, and who either actually aid, abet, assist, or advise its commission, or are there with that purpose in mind, to the knowledge of the party actually committing the crime, are guilty as principals in the second degree, although they did not themselves accomplish the purpose." (16 C.J., sec.117, p.130; 22 C.J.S., sec.88a, p.157).

> "So, among offenders, the Articles recognize no principals, and no accessories either before or after the fact, as such. The grades of crimes and of participators in crime, familiar to the common law, are unknown to the law military, and the embarrassing technicalities which have grown out of the division of crimes into principal and accessorial are wholly foreign to the procedure of courts-martial. In the military practice all accused persons are treated as independent offenders. Even though

they may be jointly charged and tried, as for participation in a mutiny for example, and each may be guilty of a distinct measure of criminality calling for a distinct punishment, yet all are principals in law." (Winthrop's Military Law & Precedents, Reprint, p.108).

"But where two or more persons acting with a common intent jointly engage in the same undertaking and jointly commit an unlawful act, each is chargeable with liability and responsibility for the acts of all the others, and each is guilty of the offense committed, to which he has contributed to the same extent as if he were the sole offender. And the common purpose need not be to commit the particular crime which is committed; if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal, if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose, or as a natural or probable consequence thereof. In order to show a community of unlawful purpose it is not necessary to show an express agreement or an understanding between the parties. Nor is it necessary that the conspiracy or common purpose shall be shown by positive evidence; its existence may be inferred from all the circumstances accompanying the doing of the act, and from conduct of defendant subsequent to the criminal act; in other words, preconcert or a community of purpose may be shown by circumstances as well as by direct evidence." (16 C.J., sec.115, p.128; 22 C.J.S., sec.87a, p.155).

(a) The evidence shows without contradiction that a group of colored soldiers, some of whom are unidentified, engaged in a breach of the peace on a public street in Bamber Bridge having for its purpose the prevention of arrest of Ogletree and Nunn. Ogletree, Adams and Nunn were members of that group, and were active participants in the rioting and disorder. In this respect their conduct differs from that of accused, Wise, whose activities stopped short of active participation and thereby placed him in the role of a by-stander or non-belligerent spectator. The actions and deeds of Ogletree, Adams and Nunn definitely fix upon them the responsibility of actors.

The evidence is conclusive that each of three accused committed one or more acts of violence upon the persons of the four policemen, although a degree of uncertainty does exist as to exact identity of the perpetrator of a particular act. In determining the legal responsibility of the three accused, uncertainty in the evidence in that respect is immaterial, and unimportant in the face of the uncontradicted fact that they as members of an unlawful assemblage, committed acts of violence directed at the policemen. There was substantial evidence from which to infer that each of the three accused possessed the specific intent to do bodily harm to the policemen. (6 C.J.S., sec.79b(2), p.938). Under the Articles of War all participants are principals. An abundance of competent evidence established the complicity of Ogletree, Adams and Nunn in the assault upon Bozman and Ridgeway wherein rocks and beer bottles were thrown with resultant injury to two of the policemen. Whether it was the three accused who actually committed the batteries is unimportant; they were active members of a riotous mob, some members of which did inflict the injuries upon Bozman and Ridgeway. The record is legally sufficient to sustain the finding of guilty of each and all of the three accused Ogletree, Adams and Nunn of Charge I and its Specification.

(b) With respect to the charge (Charge II) under the 89th Article of War (unlawful and riotous assemblage to disturb the peace) the evidence is substantial and convincing that the three accused were members of an unlawful assemblage of colored soldiers and that they themselves, as well as their confederates, committed acts of violence upon and towards the policemen while the latter were in the performance of their lawful duties. That such disorder on a public thoroughfare of an English town in a residential district thereof occurring in late evening disturbed the peace and quiet of the community and annoyed and frightened the neighboring house-holders is also shown by uncontradicted evidence. Ogletree, Adams and Nunn played principal and active parts in such disorder and turbulence. The common law offense of riot which has been defined and elucidated as follows:

> "Riot is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such.. It involves the execution of an agreement, express or implied between three or more persons to commit an assault or battery or a breach of the peace. ****"
> (54 C.J., sec.3, p.830).

> "A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in

a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful (McClain Crim.Law)" (MCM., 1928, par.147c, p.162).

"The common-law rule requires that three or more persons must act together in committing the offense, and most of the statutes defining riot provide that the offense cannot be committed by less than three persons; ****" (54 C.J., sec.5, p.831).

"It is not necessary that the riotous violence should have been premeditated by the assembled perpetrators; therefore the original assembly may have been by accident or for a lawful purpose. ***" (54 C.J., sec.6, p.832).

"All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common object of the assembly, and all who are present at the commission of any riotous act and actively engaged therein by act, sign or word are principal rioters ***" (54 C.J., sec.15, p.834).

It was urged by the defense that the specification under Charge II failed to state an offense under AW 89 on the ground that the riot or depredation denounced thereby must have been committed by troops when they were "in quarters, garrison, camp or on the march" and that riotous conduct on a public street is not within the condemnation of the statute (R145). The Eighty-Ninth Article of War in pertinent part reads as follows:

"All persons subject to military law are to behave themselves orderly in quarters, garrison, camp and on the march; <u>and</u> any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits <u>any kind</u> of depredation or riot, shall be punished as a court-martial may direct. ****" (Underscoring supplied).

The history of the eighty-ninth article of war is revealed by the statement of Brigadier General Enoch H. Crowder, Judge Advocate of the Army, before the sub-committee on Military Affairs of the United States Senate on 7 February 1916. General Crowder in pertinent part stated:

"We now come to Article 89, 'Good order to be maintained and wrongs redressed'. Articles 54 and 55 (Code of 1874), which it is designed to replace by this new article, are perhaps the most archaic provisions of our code. The existing provisions of our statute law were taken from the British articles, and date in our law from 1775. Their purpose is to protect civilians from disorderly and riotous acts on the part of the military. ****. What the new article provides is fairly summarized as follows:

Article 89 is a consolidation of the punitive parts of existing articles 54 and 55. It omits certain language of the existing articles archaic in character and not descriptive of modern conditions. ****. The word 'depredation' has been inserted with a view to making the article cover all injuries to property. ****. The proposed article is made applicable to all persons subject to military law, as the offense here denounced is quite as likely to be committed by retainers to the camp and persons accompanying or serving with the armies in the field as by officers and soldiers." (Calendar No. 122, Senate, Report No. 130, 64 Cong. 1st Sess., pp.82,83).

There is a singular absence of decisions and opinions involving the eighty-ninth article of war. It therefore becomes necessary to construe and determine the meaning of the statute in the light of its history (United States v. Raynor, 302 U.S. 540, 82 L. Ed., 413; United States v. Morrow, 266 U.S. 531, 69 L. Ed., 425) and the application of established rules of statutory construction. Legislative intention must be primarily discovered from the language of the statute itself (United States v. Goldenberg, 168 U.S. 95, 42 L. Ed., 394).

The first clause of the first sentence of the article - "all persons subject to military law are to behave themselves orderly in quarters, garrison, camp and on the march" - is simply declaratory of a general mode of conduct. It does not denounce any particular act of commission or omission and prescribes no penalty. The second clause of the sentence is the pertinent penal provision. It denounces separate acts of misconduct - "any person subject to military law who (a) commits any waste or spoil, <u>or</u> (b) willfully destroys any property whatsoever, <u>or</u> (c) <u>commits any kind of depredation or riot</u> shall be punished as a court-martial may direct".

It is manifest that the second clause of the first sentence when considered separate and apart from the remainder of the article denounces offenses of the nature described regardless of the situs of their commission.

The question therefore presented is whether the first clause of the first sentence, which simply declares the general mode of conduct of military personnel in "quarters, garrison, camp and on the march", is to be taken as limiting the general denouncement in the second clause in such manner as to require the offenses there described to be committed in "quarters, garrison, camp and on the march" before they will be subject to the penal provisions of the article. If such is the correct construction of the article then obviously the offense alleged (Charge II and its Specification) against Ogletree, Adams and Nunn - "commit a riot" - has been laid under the wrong article of war inasmuch as the riotous disorder occurred upon and in a public street.

The direct antecedent of the first clause of the first sentence of Article 89 is the first clause of Article 55 of the 1874 code which provided:

> "All officers and soldiers are to behave themselves orderly in quarters and on the march;"

The eighty-ninth article is broadened by substituting "persons subject to military law" for "officers and soldiers" and adding "garrison" and "camp" to the designation of places. However, the legal effect of the two clauses is identical; they prescribe a mode of conduct but do not denounce offenses or prescribe penalties.

The second clause of Article 55, Code of 1874 reads:

> "*** and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish-ponds, houses, gardens, grain-fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States **** shall, beside such penalties as he may be liable to by law, be punished as a court-martial may direct."

The above quoted clause inspired the second clause of the first sentence of AW 89 which directs:

> "*** and any person subject to military law who commits any waste or spoil or willfully destroys any property whatsoever ****, <u>or commits any kind of depredation or riot</u>, shall be punished as a court-martial may direct." (Underscoring supplied).

The phrase "or commits any kind of depredation or riot", was not contained in AW 55. It was taken from AW 54, Code of 1874 which provided:

> "Every officer commanding in quarters, garrison, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; and if upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished, as a court-martial may direct." (Underscoring supplied).

With respect to the relevant phrase "committing any kind of riot" contained in AW 54, Winthrop comments: "The expression 'any kind of riot' employed in the Article, may be regarded as of more general import than the technical legal term riot" (Winthrop's Military Law & Precedents, Reprint, p.658, footnote).

The second clause of AW 55 denounced two specific offenses: (a) waste or spoil of real property, and damage to or destruction of animals and things kept thereon, and (b) malicious destruction of any kind of property "belonging to the inhabitants of the United States".

In drafting the present eighty-ninth article, Congress used the old fifty-fifth article as the foundation. It broadened the first or declaratory clause thereof by making it applicable to all persons subject to military law and included "garrisons" and "camps". Retaining the substance of the second clause of AW 55, - the denouncement of two specific offenses - Congress rephrased it, added a third offense - commission of depredation and riot (taken from AW 54) and made it the second clause of the first sentence of AW 89.

The second or denouncement clause of AW 55 obviously prescribed offenses other than and in addition to those arising from disorderly conduct of officers and soldiers "in quarters and on the march". They included waste or spoilage of real property and things kept thereon by military persons whether they were "occupying the premises for the purposes of a camp or bivouac, marching through or near the same, or operating or being quartered in their neighborhood" (Winthrop's Military Law & Precedents, Reprint, p.661) and malicious destruction of any property belonging to inhabitants of the United States wherever located (Ibid., p.661).

The modus operandi of AW 55 was retained in AW 89. The declaratory clause (clause one) of the former remains in broadened scope the

declaratory clause (clause one of first sentence) of the latter. The denunciatory clause of AW 55 (clause two) rephrased and modernized is the denunciatory clause (clause two of first sentence) of AW 89, and to the latter has been added the offense formerly denounced in AW 54 - "riot" and also the offense of "depredation".

The foregoing comparative analysis clearly reveals the Congressional intention with respect to AW 89. Beyond any doubt Congress never intended that the declaratory clause (first clause of first sentence) should in any respect modify or influence the denunciatory clause (second clause of first sentence). The scope of the denunciatory clause of AW 55 (clause two) embraced offenses not committed "in quarters" or "on the march"; likewise the denunciatory clause (clause two of first sentence) of AW 89 includes offenses not committed "in quarters, garrison, camp and on the march".

The legislative history of the eighty-ninth article emphatically denies the contention of defense counsel. The "riot" condemned by the article may be committed at places other than "quarters, garrison, camp and on the march". Charge II and its Specification was laid under the proper article.

The evidence is clear the three accused Ogletree, Adams and Nunn participated actively in a "riot" as defined at common law. Three or more persons were engaged. It is therefore unnecessary to determine whether the phrase "<u>any kind</u> of depredation or riot" is of more general import than the common law designation of "riot". Such point is specifically reserved.

(c) There can be no question as to the legality of the mission of the four military policemen at the time and place of the incidents giving rise to the charges against Ogletree, Adams and Nunn. The patrol order to the policemen required them to arrest any soldier who did not hold a pass or who was disorderly or who was dressed other than in a Class A uniform (R38,99,110,112). Ogletree and Nunn wore field jackets (R26,31,46,47,110) and such dress constituted a violation of orders and rendered them subject to arrest. The military police were properly identified as such (R99,110, 112) and the three accused knew they were policemen (R36,37). The policemen in endeavoring to arrest Ogletree and Nunn were performing their duty. Likewise it was the duty of Ogletree and Nunn peacefully to permit their restraint and upon demand of the policemen to accompany them. The policemen were entitled to use such force as was reasonably necessary to secure and detain the offenders, overcome their resistance, prevent their escape, recapture them if they escaped and protect themselves from bodily harm. Within reasonable limits the amount of force permissible to effect an arrest and the means employed are necessarily left to the sound discretion of the officer and this discretion is not subject to review by a court unless wantonly or maliciously abused (6 C.J.S., sec.13(a), p.612). The evidence clearly indicates that Ogletree and Nunn violently resisted lawful arrest after having been fully informed both as to the nature of their offense and

the identity of the military policemen. Adams was a vicious and active confederate of Ogletree and Nunn in the latter's efforts to avoid being taken into custody by the military policemen. He was one of the principal leaders of the attack upon the policemen. By his own admission he threw a bottle at one of the policemen and grabbed another and tried to take his gun. As a general rule any person who interferes with or obstructs an officer in the performance of his duties is guilty of the offense alleged in Charge III and its Specification (46 C.J., sec.21, p.876). The evidence is substantial and convincing that Ogletree, Adams and Nunn were guilty of such offense; in fact the court could not have done otherwise than reach the conclusion that it did.

13. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of accused Ogletree, Adams and Nunn were committed during the trial. The Board of Review is of the opinion that the record is legally sufficient to support the findings that accused Ogletree, Adams and Nunn, were guilty of each and all of the offenses with which they were charged and to support their respective sentences, but legally insufficient to support the findings of guilty of the accused, Wise, and the sentence imposed upon him.

14. Accused Ogletree, is of the age of 20 years five months and was inducted into service at Fort Benning, Georgia, on 13 September 1941; accused Adams, is of the age of 20 years seven months and was inducted into service at Camp Livingston, Louisiana, on 18 September 1941; accused Nunn, is of the age of 23 years 11 months and was inducted into service at Fort Bragg, North Carolina, on 20 September 1941. The approved sentence of each of said accused included confinement at hard labor for three years in the United States Disciplinary Barracks, Fort Leavenworth, Kansas. Accuseds' return to the United States and execution of sentence to dishonorable discharge is authorized (GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942). Confinement in a disciplinary barracks is also authorized. Pursuant to War Department Circular No. 210, 14 September 1943 the place of confinement of general prisoners convicted by a general court-martial and subject to confinement in disciplinary barracks who are returned to eastern ports of the United States from overseas stations shall be Eastern Branch, United States Disciplinary Barracks, Beekman, New York. The place of confinement of accused should therefore be designated accordingly.

B. Franklin Riley, Judge Advocate

Gustave Rosenhoch, Judge Advocate

Howard Nisbet, Judge Advocate

(364)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 6 NOV 1943 TO: Commanding General, VIII Air Force Service Command, APO 633, U.S. Army.

1. In the case of Privates WILLIAM L. OGLETREE (34064159), EUGENE (NMI) NUNN (34171030), both of 1945th Quartermaster Truck Company (Avn); and Privates LYNN M. ADAMS (34151263), JAMES H. WISE (6996370), both of 1949th Quartermaster Truck Company (Avn), all of 1511th Quartermaster Truck Regiment (Av) (Sep), 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 in respect to accused Ogletree, Nunn and Adams and legally insufficient to support the findings and sentence in respect to accused, Wise, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence as to accused Ogletree, Nunn and Adams. Although the holding of the Board of Review and my concurrence therein serves to vacate the sentence as to accused Wise, such sentence should be formally vacated in the published order.

2. Pursuant to War Department Circular No. 210, 14 September 1943 the place of confinement of general prisoners convicted by a general court-martial and subject to confinement in disciplinary barracks who are returned to eastern ports of the United States from overseas stations shall be Eastern Branch, United States Disciplinary Barracks, Beekman, New York. The place of confinement of accused should therefore be designated 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 804. For convenience of reference please place that number in brackets at the end of the order: (ETO 804).

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 817

15 OCT 1943

UNITED STATES	29TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at APO 29, U.S. Army, 6 September 1943.
Second Lieutenant LESLEY C. YOUNT (O-1292273), 115th Infantry.	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 64th Article of War.
Specification: In that 2nd Lt. Lesley C. Yount, 115th Inf. having received a lawful command from Lt. Col. William E. Warfield his superior officer, to go at once to his quarters, did at Scarne Cross Camp on or about 22 August 1943, willfully disobey the same.

CHARGE II: Violation of the 69th Article of War.
Specification: In that 2nd Lt. Lesley C. Yount, 115th Infantry, having been duly placed in arrest at Scarne Cross Camp, on or about 22 August 1943, did, at Scarne Cross Camp, on or about 22 August 1943, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of both charges and their 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 three years. The reviewing authority, the Commanding General, 29th Infantry Division, approved only so much of the sentence as provides for dismissal 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 approved by the convening authority and, pursuant to Article of War 50½, withheld the execution thereof.

3. The testimony for the prosecution was substantially as follows: Lieutenant-Colonel William E. Warfield, Headquarters 2nd Battalion, 115th Infantry, on Sunday 22 August 1943 saw accused several times in the afternoon and noticed that he had "a couple of drinks of beer or something"; when the Colonel came out of the officers' mess after dinner he observed accused in the vestibule by the telephone with his head on the table (R7,9,10). It was about time for accused, who had been appointed patrol officer for that day, to go on duty in town. The Colonel was of the opinion that accused was not in suitable condition for this duty (R7) and directed Captain Richard P. Scott (R6) 115th Infantry and Adjutant of the 2nd Battalion to take over (R7,9). Colonel Warfield did not believe accused was drunk but he had been drinking (R7). Around 10:30 that evening, Colonel Warfield returned to the officers' mess and as he walked in accused approached him and asked why he had been relieved from duty as patrol officer (R7,10,12) and said he was not drunk (R7). Accused seemed "rather annoyed" that he had been relieved and was a bit argumentative. There were others, including civilians, present so the Colonel with accused moved outside. Accused was getting rather noisy and making such statements as, "I don't like this God-damn outfit and want to get out of it" and "This is no God-damn good battalion" or words to that effect. Captain William B. Sullivan, 115th Infantry, walked up while they were still in the lounge and went outside with them (R7,11) and in the presence of Captain Sullivan, Colonel Warfield ordered accused to go to his quarters and told him that he was under arrest (R7,11). He could tell that accused had been drinking, "don't know if I would call him drunk". Accused then admitted that he understood the order but said he "was not ready as yet to go to his quarters" (R8,11). Captain Sullivan endeavored to persuade accused to go to his quarters before he got into further trouble (R8). Lieutenant Livingston L. Eaddy, officer of the guard, came by and Colonel Warfield directed him (Lieutenant Eaddy) to take accused to his quarters which he did (R8,12,14,17,19,29-31) and told accused he was supposed to stay in his quarters (R17,19). This was 5 to 10 minutes after accused had been ordered to go to his quarters. Lieutenant Eaddy refused to say whether or not accused was drunk (R20). As Colonel Warfield, Captain Sullivan and Lieutenant Eaddy stood in the vestibule talking and a short time later, accused walked in (R8,14,15,21). Colonel Warfield then directed the officer of the guard to take accused to his quarters (R8) and to see that he stayed there (R9,15,17). A half hour later Lieutenant Eaddy reported to the Colonel that he had put accused in his quarters "and had put a guard over him (R9).

4. Second Lieutenant Ted. R. Garney, Company "G", 115th Infantry, a defense witness, testified that Colonel Warfield came to him in the mess-hall around six o'clock and told him to take accused to his quarters as he was asleep by the telephone with his head on the table. Accused was "under the influence of liquor" when witness saw him in the lounge "around 10 o'clock that night"(R21) and he had been "drinking in the afternoon" (R22).

Second Lieutenant Lawrence J. Bushery, Company "E", 115th Infantry, a defense witness, saw accused drinking in the lounge on Sunday, 22 August and overheard some of the conversation between accused and Colonel Warfield, including the statement by accused that he could do anything that Captain Scott could downtown and "that Colonel Warfield had made a statement a few times that if things were getting too tough or hard for any officer in the battalion that he could go to the Colonel and arrangements for a transfer would be made", and accused "told Colonel Warfield that he wanted to get out of the battalion right now" (R23). In the opinion of witness accused was drunk (R23,24). He had known accused since September 1942 and knows "he does not go around talking like that when he is sober" (R23).

Captain Richard P. Scott, 115th Infantry, a defense witness, saw accused on Sunday, 22 August 1943, in the officers' lounge right after mess and he had a bottle of scotch on a nearby table (R25). When Colonel Warfield directed him to take over the officer patrol duty that night he also said for witness to tell accused "that he was restricted" but witness had been unable to do so till later in the evening. He had however, informed the company commander Captain Davenport, to that effect (R26). Accused, in the opinion of witness "definitely was not sober" (R28).

Accused was sworn and in substance corroborated all prior testimony. He admitted drinking but did not remember some of the details. He insisted that Colonel Warfield had told him "that if the pressure got too tough that we should go to see him and he would get us transferred from out of the battalion". He did not remember Colonel Warfield telling him that he was under arrest but remembered Lieutenant Eaddy telling him. When asked if he were drunk that night, he answered, "in my opinion, drunk - is when you can't 'bend the elbow'" (R29). He denied remembering the sergeant of the guard taking him to his quarters but almost immediately afterwards when again asked the same question, answered "Yes, sir" (R31).

5. The testimony presents no substantial conflict in the facts but rather an admission of the offenses charged with drunkenness as an excuse.

(a) - The willful disobedience contemplated in a violation of Article of War 64 is such as shows an intentional defiance of authority. The proof required is:

> "a. That the accused received a certain command from a certain officer as alleged;
> b. That such officer was the accused's superior officer;

c. That the accused willfully disobeyed such command. A command of a superior officer is presumed to be a lawful command". (MCM., 1928, par.134b, p.149).

The testimony is clear and substantial that Lieutenant-Colonel Warfield ordered accused to go to his quarters under arrest and that accused immediately told the Colonel he understood and knew what the Colonel meant but "that he was not ready as yet to go to his quarters" and he did not go until some 5 or 10 minutes later when he was taken to his quarters at the further order of Colonel Warfield by the officer of the guard. The testimony also shows Lieutenant-Colonel Warfield was accused's superior officer, and that accused willfully disobeyed such command.

(b) - In breach of arrest under the 69th Article of War, "the restraint is moral restraint imposed by the orders fixing the limits of arrest ***. The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders *** and the intention or motive that actuated him is immaterial to the issue of guilt ***". The proof required is:

"a. That the accused was duly placed in arrest; and
b. That before he was set at liberty by proper authority, he transgressed the limits fixed **** by the orders of proper authority ***". (MCM., 1928, 139a, pp.153-154).

In the opinion of the Board of Review the facts clearly show the commission by the accused of each of the offenses charged.

"It is a general rule of law that voluntary drunkenness **** is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense. *** In courts-martial, however, evidence of drunkenness of the accused **** is generally admitted in evidence." (MCM., 1928, par.126a, p.135).

The evidence shows that accused recalled in detail all the particulars of the offenses charged except those not convenient to support his implied defense that he was drunk and that he did not intentionally commit the offenses charged. The court by its findings showed it did not believe accused was under the influence of liquor to the extent that he did not know what he was doing. It was the sole judge of the credibility of the witnesses and the weight and sufficiency of the evidence which amply supports the findings.

6. Accused is 23 years old. He enlisted 4 February 1939 and was discharged as an enlisted man on 31 August 1942 to accept a commission.

7. 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 and the sentence.

B. Franklin Riter, Judge Advocate

Thos. Van Buren Allen, Judge Advocate

Ellwood W. Sargent, Judge Advocate

CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 15 OCT 1943 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Second Lieutenant LESLEY C. YOUNT (O-1292273), 115th 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 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 817. For convenience of reference please place that number in brackets at the end of the order: (ETO 817).

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

(Sentence ordered executed. GCMO 22, ETO, 19 Oct 1943)

CONFIDENTIAL

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

BOARD OF REVIEW

ETO 823

14 OCT 1943

UNITED STATES v. Private CHARLES B. POTEET (6996601), Service Battery, 2nd Battalion, 36th Field Artillery.	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Chester, England, 1 September 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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Charles B. Poteet, Service Battery, Second Battalion, 36th Field Artillery, did, at Perham Downs, Hants, England, on or about 3 December 1942, desert the service of the United States, and did remain absent in desertion until he was apprehended at Wrexham, Denbighshire, Wales, on or about 5 May 1943.

ADDITIONAL CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Charles B. Poteet, Service Battery, Second Battalion, 36th Field Artillery, did, at Whittington Barracks, Staffordshire, England, on or about 7 June 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 27 July 1943.

ADDITIONAL CHARGE II: Violation of the 69th Article of War.
Specification: In that Private Charles B. Poteet, Service Battery, Second Battalion, 36th Field Artillery, having been duly placed in confinement in the guardhouse at Whittington Barracks, Staffordshire, England, on or about 6 June 1943, did escape from said confinement before he was set at liberty by proper authority.

He pleaded guilty to the specifications of the Charge (original) and of Additional Charge I except the words "desert" and "in desertion" substituting therefor respectively the words "absent himself from" and "without proper leave", to the excepted words not guilty, to the substituted words guilty, not guilty to the Charge (original) and to Additional Charge I but guilty of violations of Article of War 61, and guilty to Additional Charge II and to the Specification thereunder. He was found guilty of all charges and specifications. Evidence of one previous conviction by special court-martial for absence without leave for a period of about 53 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 the term of his natural life. The reviewing authority approved the sentence "and ordered (it) executed", designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and pursuant to Article of War 50½ withheld the order directing execution of the sentence.

3. By his pleas of guilty accused admitted his unauthorized absences and escape from confinement as alleged. With reference to the Charge (original) and Specification (desertion in violation of Article of War 58) the evidence for the prosecution shows that on 5 May 1943, as the result of receiving certain information, Police Constable Robert W. Wooff of Wrexham (Wales) went to a house in Wrexham where he found accused in bed. The constable informed him that he was a police officer and had reason to believe that accused was a deserter from the United States Army (R6). Accused said that his name was Young and upon request produced an identity card bearing the name of Harold Young and an address in Cheltenham (England), together with a ration book which was also in the name of Harold Young (R7). When told by the constable that he was not satisfied, accused said that about the beginning of December 1942 he deserted the 36th Field Artillery, United States Army, stationed at Tidworth (R7-8). He was then placed under arrest. Accused put on civilian clothes and made no effort to dress in a uniform which he had in a suitcase (R8,10). He also had in his possession an army "greatcoat", some army clothing bearing the name "Thomas J. Carlson" and an American identification card No. 0.485100 which did not contain a photograph. Accused said that he had purchased the civilian clothing with coupons obtained from a young woman with whom he was living (R8). The girl, whose name was Nellie Young told Constable Wooff in accused's presence that she was his wife. She later denied it (R9). Accused was then taken to the Wrexham police station and detained for the

military authorities (R8-9).

With reference to Additional Charge I and Specification (desertion in violation of Article of War 58) the evidence for the prosecution shows that Sergeant John R. Kozak, Investigating Division, Provost Marshal General's Department, APO 887, who had been looking for accused, saw him in the Soho district of London on 27 July 1943. Kozak asked accused for his name, rank, serial number, identification card and tags, and paybook. Accused said that he was Sergeant "Billy Taylor", that he had lost his identification tags and that his pay book and identification card had been stolen. He was placed under arrest (R11). He then told Kozak that he was Private Charles B. Poteet of the 36th Field Artillery unit, and that he had deserted his organization at Perham Downs, England on or about December 3, 1942 (R12,19). After being warned as to his rights, he further stated that he had gone to Eastleigh, remained there about two weeks and then went to Cheltenham where he lived with a Miss Nellie Young in her home as husband and wife. Miss Young's mother lived with them. He was furnished with civilian clothing which he wore most of the time (R12). On 29 July 1943 after again being warned of his rights, accused repeated to Kozak the foregoing statement made on 27 July and further said that he had remained in Cheltenham for about four months. Miss Young's mother had joined the "ATS" and had failed to report for duty. Because of this fact and also because he was becoming too well known around the neighborhood, the three moved to Wrexham, North Wales, where the two women secured work. Accused lived with them until about 5 May 1943 when he was taken into custody, detained for a short time in the guardhouse at Lichfield and later sent to the hospital there because of a throat infection. He escaped from the hospital with another soldier, borrowed money and went to London where he lived on the earnings of prostitutes and by cohabiting with male sexual perverts (R13-15). The statement of 29 July was taken down in writing by Kozak, and was read, signed and sworn to by accused who also signed a warning as to his rights which was contained in the document (R19-20). The statement was not introduced in evidence. On cross-examination, Kozak denied that accused had asked for a drink of water but stated that he had refused his request for a cigarette (R20-21).

Introduced in evidence were certain articles of civilian clothing worn by accused when apprehended in London (R17-18; Pros.Exs. C,D,E). Also admitted in evidence were two articles found in accused's possession when arrested. They were a pair of identification tags reading "Elmer W. Mullen, 19128604 T.43 A", "Cecilia S. Mullen, 727 Neversenk St. Reading, P.A" and the capital letter "C", together with a soldier's individual pay record bearing the name of Private Floyd James Davis, serial No. 37496323, and the name and address of the soldier's wife, Edna Marie Davis, 236 S. Prospect, Sedalia, Missouri (R16-17,19; Pros.Exs. A,B)

4. Accused, upon being advised of his rights elected to make an unsworn statement (R21-22). On 2 December 1942 he drew 73 pounds, won 42 pounds more playing cards, and went to Eastleigh with three friends where they drank "pretty heavily". The civilian police picked up two of his friends

and accused with his remaining companion attempted without success to return to camp. They "kept hanging around and having a few more drinks and still going down to the police station trying to get our two friends out". Accused was finally locked up and detained until 2 o'clock the following day. As his pass had expired at 11:00 p.m. the previous evening he knew "what would happen" on his return to camp and decided to remain another day or two. He drank for about two weeks, went to Cheltenham to stay with his brother for about three weeks and then returned to his station to find that his unit had departed. He remained two days with another company and after futile efforts to find his organization, he returned to Cheltenham intending to surrender. There he became acquainted with Miss Nellie Young and began to stay at her home when her father was away. As Miss Young's mother had joined the "ATS" but did not want to leave for duty because of her two small children, she suggested that the three go to Wrexham, North Wales, where the two women could get employment, and asked accused to accompany them. Mrs. Young secured clothing coupons and furnished him with civilian clothing in order that he might have his dirty uniform cleaned. Accused sent his uniform to the cleaners in Wales and it was returned the day before he was apprehended. The two women worked and obtained enough money to pay the rest. Two weeks after their arrival in Wrexham a "C.I.D" man came to the house and asked accused, who was in bed, if he was Mr. Young. When he replied that he was, the man told accused he was Private Charles B. Poteet and a deserter from the United States Army. Accused admitted this and upon request surrendered a certain identity card which the man knew he had in his possession. When informed that he had to go to the police station, accused started to put on his uniform but was told to wear his civilian clothes. When asked for the ration book he said that he did not have it which was true because Miss Young gave it to him later when he left the house. The ration book was taken from him at the police station (R23-24).

He was taken to Lichfield and subsequently went to a hospital where he received a letter from Miss Young saying that her baby would be born in December. He escaped from the hospital in order to obtain some money to help her "when the baby was born". He went to London and remained there for about a month and a half until he was apprehended (on 27 July 1943) by Kozak who took him to the police station. There, Kozak took away a glass of water which had been given accused, told him that he could keep him there until he was "almost grey-headed" and that he could not have anything to eat until he "started talking and telling the truth". He questioned accused who "told everything I knew". Kozak left, saying he would return in a day or two for a statement. On 29 July he again saw Kozak who told him that a man whom he had arrested the day before had done something he did not like, and that he had taken him down to the latrine where he "beat hell out of him with his stick". Kozak then informed accused that anything he said could be used for or against him, whereupon accused told him "the whole story" (R24-26).

5. It was alleged that accused was confined in the guardhouse at Whittington Barracks, Staffordshire, England and that he escaped from said confinement on or about 6 June 1943 (Additional Charge II and Specification). However, from the evidence it appears that after first being confined in the

guardhouse he was sent to a hospital from which he subsequently escaped (R14,24). An examination of the papers accompanying the record of trial discloses that accused escaped from Detention Ward No. 8 of the 33rd Station Hospital, but that the hospital was in fact situated at Whittington Barracks, Lichfield, Staffordshire, England. Accused pleaded guilty to the offense alleged, did not claim to have been misled by the variance and entered no objection. The irregularity did not injuriously affect his substantial rights.

6. Sergeant Kozak testified as to the details of accused's statement made before him on 29 July after he had warned accused as to his rights. Kozak reduced the statement to writing and it was then read, signed and acknowledged by accused. The written statement itself was not introduced in evidence and the defense offered no objection to Kozak's testimony as to the details of the statement on the ground that the document itself constituted the best evidence. Under such circumstances the objection to the irregularity concerned may be regarded as waived (CM ETO 739, Maxwell).

7. The middle initial of accused's name is set forth in the charge sheets as "B", whereas the initial contained in the action of the reviewing authority is "R". However, accused is properly identified in the action by his serial number and organization. The action is not in the usual form prescribed by par.10, appendix 10, MCM., 1928, p.275 in that the reviewing authority approved the sentence, ordered it executed and then withheld the order directing the execution of the sentence pursuant to Article of War 50½. Although under the circumstances of the present case the sentence should not have been "ordered executed" until the provisions of Article of War 50½ had been fully complied with, it is apparent that these words were inserted through error as the reviewing authority directed that the order directing the execution of the sentence be withheld pursuant to the provisions of that Article. Accordingly, the Board of Review has treated the record of trial as though such words were not included in the action.

8. By the provisions of paragraph 1 of attached Special Order No. 186, Headquarters, Western Base Section, SOS, ETOUSA, 21 August 1943 Lieutenant-Colonel Thomas B. Bagley J.A.G.D., was detailed as law member vice Lieutenant Colonel Leonard E. Webster G.S.C., for the trial of the present case only. It was directed that the case be tried with the law member present. The law member was present but his designation as such was not set forth in the record of trial (R2).

9. The review of the assistant staff judge advocate, Western Base Section, SOS, ETOUSA refers to several objections by the defense to the admission of certain evidence and to other irregularities contained in the record of trial. Further comment thereon is unnecessary.

10. In view of accused's plea of guilty of absence without leave with reference to the offense of desertion alleged in the Charge (original) and Specification thereunder, the only question presented for consideration is whether the evidence was legally sufficient to establish the requisite

intent to desert. His prolonged absence of about five months was terminated by apprehension. Although he was for several months in the immediate vicinity of military installations he did not surrender to military authorities. He existed on the earnings of two women, lived with one of them as husband and wife and wore civilian clothing. One of his reasons for moving from Cheltenham to Wrexham was the fact thathe was becoming too well known in the neighborhood. When apprehended he admitted his identity only after first giving a false name and displaying an identity card and a ration book issued in the name of a civilian. The court was fully warranted in finding that accused went absent without leave with the intent not to return.

In view of accused's plea of guilty of absence without leave, the same question arises in connection with the offense of desertion alleged in Additional Charge I and its Specification. Accused escaped from confinement and was apprehended about 50 days later at a considerable distance from his home station. Although the ostensible purpose of his absence was to obtain money to defray the expenses attending the birth of Miss Young's baby he existed in London upon the earnings of prostitutes and by associating with male sexual perverts. He wore certain items of civilian clothing and although again in the immediate vicinity of military installations he made no effort to surrender. He once more gave a false name when apprehended and was in the possession of identification tags and a soldier's pay record issued to other military personnel. Intent to desert was clearly established by the evidence (CM ETO 740, Lane; CM ETO 800, Ungard).

11. The charge sheets show that accused is 21 years of age and enlisted 7 November 1939, his enlistment being governed by the Service Extension Act of 1941. He had no prior service.

12. 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.

13. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement of accused in a penitentiary is authorized for the offense of desertion in time of war (Article of War 42; par.5d, sec.II, AR 600-375, 17 May 1943; par.90, MCM., 1928; War Department letter AG 253 (2-6-41) E, 26 February 1941)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania is correct.

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

(377)

1st Ind.

14 OCT 1943

WD, Branch Office TJAG., with ETOUSA. TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515.

1. In the case of Private CHARLES B. POTEET (6996601), Service Battery, 2nd Battalion, 36th Field Artillery 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, 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 823. For convenience of reference please place that number in brackets at the end of the order: (ETO 823).

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 832

26 OCT 1943

UNITED STATES v. Private KENNETH M. WAITE (6834779), Replacement Company "B" Separate.	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Seaforth Barracks, Lancashire, England, 26-27 August 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Federal 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 Kenneth M. Waite Replacement Company "B" Separate, did, at Aintree, Lancashire, England, on or about 3 August 1943, forcibly and feloniously, against her will, have carnal knowledge of Annie Parry.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions by special courts-martial of absence without leave for 2 and 42 days respectively 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 but reduced the period of confinement to 20 years, designated the Federal Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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3. The testimony for the prosecution was, substantially, as follows: Annie Parry, a 20 year old factory worker had met accused at the bar of a "pub" in Aintree (R6) the day his organization moved into that place on 23 July 1943 (R97). She and a girl friend, Grace Donoghue left with accused and another soldier when the place closed. On the way home Annie and the accused stopped in a doorway (R7,41) for about an hour, "necking, kissing and talking" (R42,98) during which time "he asked me, would I? - and then said he was sorry; he knew where to get those kind of people, but he didn't want them" (R7,42). A date was arranged for the next Sunday night 25 July 1943 but was not kept. However, on Monday night, 2 August 1943, Annie and Grace returned to the same "pub". Each consumed 4 or 5 half-pint drinks of mild beer and "draught" Bass. Annie accosted accused at about 10:00 p.m. outside the public house (R6,43) and gave him a cigarette. Annie and Grace then started home on a tramcar, but got off at the first stop and returned to the public house. Annie again spoke to accused (R7,41) and at about 10:30 to 10:40 walked with him down the main street (Ormskirk Road) (R8,45) to accused's barracks where he obtained some cigarettes. Grace had walked on ahead with another American. Annie and accused overtook Grace and her American soldier (R48) who said something "about a jeep - that he would drop the young ladies home in it". Grace and companion walked on in front and Annie suggested following them but accused said "No, he has got to come back again down here to report for duty". Annie and accused together then walked down Ormskirk Road. Reaching an American storage camp, accused called the guard, gave him a cigarette and told him of the other American who was "reporting for duty" and "driving a jeep" (R8,46). Accused and Annie then walked down the lane by the storage area. Accused informed Annie he was taking her to meet her friend and the jeep (R15,16,46), but she discovered the lane was a cul-de-sac (R9). She had never been down this lane before (R16) and did not know the area about Aintree very well (R48). While in the lane accused grabbed Annie and knocked her down saying to her "I have got to have you". He struggled with her saying what he was going to do to her. Accused ripped and tore her underwear (R12) while struggling with her, hitting her when she yelled and "mauling me inside" (R9). He hit her in the face everytime she screamed for help (R10,61) and called her a darn fool. He held his hand over her mouth (R11,61) so she could not scream. He lay sideways on her on the ground, holding her while he unfastened his trousers (R11,49). She continued to struggle (R12,47) in order to get away from him (R16) and to scream as loudly as possible (R50). He hurt one of her legs in stretching them apart (R12). "Then we were struggling for a good bit and then he got his private inside me" and "it hurt me" (R17). "He told me then to take my blouse off and I told him I did not have a blouse on, that it was a dress. He said I would have to get undressed for him and I think that was how I come to stand up ***". She explained that when she got up from him she said to accused: "I want to go to the lavatory. He said, you won't come straight back. Yes, I said, I will come back. You hold my handbag and I won't be a minute, and I will be back (R21). When I gave him my handbag I walked away from him

and then I ran down the lane into the main road" (R10,22) to the same camp where accused had previously stopped to speak to the guard. There she encountered an "RAF chap" who was on guard (R22). She identified a picture of the camp (Pros.Ex.J) where she met the RAF guard and also a picture of the situs of the alleged offense (Pros.Ex.K). Because she was so confused, Annie did not know what she told the guard. He took her inside the camp and another man (Corporal Holland) took her to the police station (R10). She was given into the custody of the matron who supplied her with a cup of tea. She was then physically examined by the police doctor and an American doctor. Her clothes were removed and retained and a complete change of clothing was brought from her home (R11) by her sister (R92). Her various articles of clothing so retained were identified by her in court as the garments she wore that night and were admitted in evidence as Pros.Exs. "B" to "G" inclusive (R13,14,19), as were also the gloves (Pros.Ex.H) she had with her (R20). She was unable to say how long she was in the lane with the accused, other than that "it was a long time" (R17). Her knickers had no stains on them before she went down the lane with accused (R18,19) but she noticed blood on them and the stains on her dress when she removed them at the police station (R19,20). She identified her handbag (Pros.Ex.I) when presented in court which she had last seen when she gave it to accused to hold for her so she "could run down the lane".

Dr. Ronald Sinclair Riley of Aintree, Liverpool, a civilian physician, examined Annie at 3:20 a.m. on the morning of 3 August 1943 (R25). She stated she had been criminally assaulted between 11:30 and 12:30 of the night of August 2nd and 3rd. She had a bleeding scar on the outside of the right leg an inch to an inch and a half long, and some blood stained serum on the inner side of the left thigh and around the vulva. Both the outer and inner lips of the genital were swollen. The hymen was bruised and torn and there was a discharge from these areas (R23). The injury to the hymen could have been caused by the penetration of a male penis (R28). It had a tear made "within a period of hours" and was bleeding (R24). At the time of the examination "she was definitely distressed and showed signs of tears and generally appeared to be upset" (R26). He examined Annie again at 7:45 a.m. (R27) the same day (R26), at the same place when medical officer Lieutenant Victor Lampka of the United States Army was present. The doctor noticed no odor of alcoholic drink on her breath (R27).

John Cropper, a police officer of Liverpool, identified several photographs of the road and lane leading to the scene of the alleged crime and of the location of the alleged crime itself which were introduced in evidence as Pros.Ex. "J" to "Q" inclusive. He also identified a pair of ladies gloves, Pros.Ex."H" and a United States Army cap received as Pros. Ex. "R", both appearing in pictures of the scene of the alleged crime (R29-32).

Alan Thompson, a police officer of the Lancashire Constabulary, identified the items of Annie's clothing (Pros.Ex."B" to "G" inclusive) (R33) as well as the articles of clothing of accused and his towel (R81) which were received in evidence as Pros.Ex."S" to "W" inclusive. All of same

were delivered by him to David Noel Jones for biological examination (R33-35).

David Noel Jones, Staff Biologist at the Home Office in Preston of the Forensic Science Laboratory, described the grass and dirt stains he found on the back of Pros.Ex."F", a coat; and the dirt, grass and bloodstains on the back of the shoulders, and a human, male seminal stain on the inside of the back of Pros.Ex."E", a grey frock. Pros.Ex."D", an underskirt, had a bloodstain on the bottom back (R37). On Pros.Ex."C", a vest, he found dirt and bloodstains in the rear center and on Pros.Ex."B", the knickers, the crotch area was very heavily bloodstained (R38). The ladies' stockings, Pros.Ex."G", were dirty and bloodstained and one had a large hole about knee level (R38-39). Accused's trousers, Pros.Ex."S", showed dirtstains on the knees and traces of blood on the inside of the fly. Pros.Ex. "T", an army shirt, had traces of human blood on the buttonhole side of the bottom, both inside and outside, but heavier on the outside. The bottom of the front center part of the front of Pros.Ex."U", a vest, was heavily stained with human blood on the outside, less on the inside. Pros.Ex."U", the trunks, was heavily stained on the outside of the fly area with human blood with some on the top part of the legs, and the towel, Pros.Ex."W", had a few small smears of blood upon it (R39).

Frank Law Bramley, a Police War Reserve Constable, was on duty the night of August 2nd-3rd at the police station in Aintree when Annie came in accompanied by Corporal Holland. She was in a very distressed condition. Her clothing was disarranged, torn and stained. She "was trembling very much and crying tremendously" (R52). She said she had been assaulted by an American soldier. The same night while patrolling Ormskirk Road, Park Lane and Coppull Lane at about 12:20 on August 3rd, he met a young lady, Grace Donoghue who said she was waiting for her friend who was down the road with an American soldier. After conversing with Bramley, Grace went off in the direction of Liverpool (R54).

John Leslie Johnson, Royal Air Force, Aintree, was on guard duty until one o'clock the morning of 3 August 1943, as a sentry. During said tour of duty a young lady named Ann ran up the road. She was excited and nervous and said a Yankee soldier had assaulted her. He called the guard commander who took her to the police station (R56).

Corporal Eric John Holland, N.C.O. in charge of the guard, No. 5, M.T. Company, No.1 Section, Royal Air Force, Aintree, was summoned to the gates shortly after midnight, 3 August 1943 by the guard Johnson who was "supporting this Miss Parry". She was very distressed and in a hysterical condition and said she had been assaulted by an American soldier who was down the road. She was in a very disheveled condition. Her leg was bleeding and her sticking was all torn. She was crying (R59) and hysterical because of which he could "not make much sense out of her". He took her to the police station (R60).

Private Sam E. Orange, Replacement Company "B", Separate, Depot 0-629, Aintree, saw accused on the night of 2-3 August 1943, when he came to the point where witness was posted on guard "between 12:30 and 1 o'clock" after midnight. The post was in the U.S. Storage Area. Accused asked for a match and had a girl with him but witness did not know her or how she was dressed. Accused and the girl immediately turned and walked away (R63). About an hour later accused came again and wanted another match (R64).

Grace Donoghue, a prosecution witness, told substantially the same story as Annie related of the happenings of the night of 2-3 August 1943 while the two girls were together. After the "pub" closed they met accused and another soldier. She walked along Ormskirk Road with the other American soldier and Annie and accused followed. Witness and her soldier went into a lane and sat there talking for about an hour. When they returned into Ormskirk Road they met Annie and accused at a point opposite the R.A.F. camp. The American soldier with witness spoke about securing a jeep to take Annie and witness home instead of walking all of the way. The soldier "had to be on duty at 12 o'clock" and departed. She was to wait outside camp until he came with the jeep. It was getting dark. A policeman approached her and asked for her identification card (R66). After her conversation with the policeman, she went down the lane and shouted Annie's name a couple of times but obtaining no answer she took it for granted that Annie had gone home. Witness then went home (R68). It was about twelve o'clock (R69).

John Jackson, Inspector of Police, Seaforth Station, testified he was called to the police station just after two o'clock the morning of 3 August 1943 where he found Annie Parry. She was in a distressed condition. She was crying. Her face was dirty and her hair tumbled about her face. Her general condition was disheveled. Her clothing was disarranged, her jacket sleeve was torn as was her stocking on her right leg which leg also had a bleeding scratch. He had her examined at 3:20 a.m. by the police-surgeon who delivered to witness four slides with smears and two swabs he had taken from Annie. Witness later took possession of the clothing she was wearing; a blue jacket with right sleeve torn and stained; a grey gabardine dress, also stained; a mauve underslip, stained; a ladies' white vest, stained; a pair of ladies knickers, stained and torn; and a pair of stockings, one of which was stained and torn. He identified these garments as Pros.Ex."B" to "G" inclusive (R74). About 4:00 a.m. the same morning witness went to the American unit stationed at the Aintree Racecourse and after some investigation, was accompanied by some American officers to the sleeping quarters where accused was aroused. Accused at that time had on a pair of white trunks, bloodstained in front and when he dressed he put on a white vest also bloodstained at the bottom of the front (R75). In the presence of Captain Raymond R. Cook, Replacement Company "B" Separate and Lieutenant Rouse, at 4:40 a.m. 3 August 1943 (R80) and after Captain Cook and witness had thoroughly warned accused of his rights (R79), witness informed accused that a woman had been criminally assaulted in Aintree "last night" and there were reasons to believe that accused was the assailant. Accused replied: "I was with a girl. I did have intercourse with her but she did not object", and said he was willing to tell what took place.

Accused then dictated a statement to witness who took it down in writing. When completed accused read and signed it. Witness had accused examined in the dispensary at the camp by Dr. Riley, the police surgeon in the presence of Lieutenant Lampka, the medical officer and of witness. Accused turned his clothing over to witness who described and identified the clothing as Pros.Ex."S" to "V" inclusive and a towel which witness had found hanging over accused's bed as Pros.Ex."W". On accused's bunk was a ladies' handbag which witness took. Later Annie identified it as belonging to her and as having been in her possession when she was with accused. Jackson identified Pros.Ex."I" as this handbag (R81). The statement of accused as written by witness and signed by accused in the presence of Captain Cook and Lieutenant Rouse (R83) was then, with consent of defense, read into the record of trial. In pertinent part it is as follows:

> "Kenneth Melton Waite says: 'I have been cautioned that I am not obliged to say anything unless I wish to do so, but what I do say will be taken down in writing and may be given in evidence. To show that I understand I now sign my name'. He signed that 'Kenneth M. Waite.'
>
> 'On Monday evening I met a girl in a publichouse whom I have met previously. I had had a few drinks, but I was sober. I went down the road with her as far as the Storage Park. I got some cigarettes from the guard at the main entrance and I had some conversation with the guard at the Storage Park. The girl was there at the time. We then went up the little road under the railway and into the field. Another girl who was with her and another boy left us before we got to the Storage Park.
>
> When the girl and myself got to the field we got down in the grass and had intercourse. We stayed there possibly 20 minutes. She had intercourse with me willingly. There was no force used at all. We left the field together, but she left me before she got to the tunnel, practically at the place where we had intercourse. She walked fast towards the roadway and left her bag with me. I thought she was looking for her girl friend. I did not see her again'."
>
> Jackson further testified: "He signed it there 'Kenneth M. Waite', and afterwards made an addition to the statement. He said 'I think it was about 10:30 or a quarter to

11 when we got to the field, and about a quarter past 11 when we left'. He signed my book again there.

I took that statement at five minutes past 5 a.m." (R83).

Captain Raymond R. Cook was aroused about 3:30 a.m. in the morning of 3 August 1943 by Lieutenant Rouse and with Inspector Jackson, called in and interviewed the men on guard at the main gate and also at the so-called storage park (R77). Due to the information received from the guards, accused was interviewed. Accused was asked to account for his activities during the night (R78) and warned as to his rights (R79).

4. The testimony for the defense was substantially as follows:

Accused after his rights had been explained to him by the law member, was sworn and testified (R97). He told in detail the happenings of the nights of 23 July and of 2 August 1943 (R98). His story does not materially vary from that of Annie Parry up to the time they sat down in the grass slightly to the right of the lane leading from Ormskirk Road at a point a short distance through the railroad underpass. Upon further interrogation he testified as follows:

"A. *****. We sat down by the side of the road and were there for some time.

Q. LT. BOURLAND: Let me interrupt you here and ask you to indicate on prosecution's Exhibit 'A' whereabouts this spot was where you sat.

A. It was through the underpass, slightly through the underpass.

Q. Indicating to you this lane running alongside of the U.S. Storage Area as marked on the Exhibit, under these two symbols indicating railroad bridges, there is a small mark, X. Is that the spot to which you refer?

A. That is approximately it, sir; slightly through, and to the right of the road.

Q. Carry on.

A. We were there for some time talking, and there is where we had intercourse. I would not say for certain exactly how long we were there, but I judge it to be the better part of an hour. I had no watch. After we were through Miss Parry said she had to relieve herself.

Q. Will you explain, please, what you did while you were there?

A. As I said before, we sat down and began talking. I was necking the girl, loving her up, and there we did have intercourse. She did not object, she did not fight and she did not scream, as she says. I should say we were there for the better part of an hour, and she gets up with the excuse that she was going to relieve herself, walks towards the underpass, and it seemed I could hear her steps. It seemed as if she stopped. I was arranging my clothes. I did not hear her move on, and when she was gone some few minutes I started in the direction of the underpass. Seeing that she was not there I continued on to the main road. Not seeing her anywhere on the road, I had left my cap, and I started back through the underpass to the right of the road, where we were. I had a few matches in my pocket which I had borrowed from the guard. These I struck trying to find my cap. I did not find my cap, but I did pick her purse up. I took the purse and continued to the main road, walked up the main road, using the road, not the sidewalk, turned in at the main gate and went to my billet. There I was awakened early in the morning by my Captain, Captain Cook." (R99-100).

Accused said the statement given to Inspector Jackson by him and read in court was true (R100) and insisted that he asked Annie for intercourse and she said she was willing (R103).

Private Merle Stopp, Replacement Company "B" Depot, was on duty from 8:00 to 12:00 in the evening of 2 August as guard of No. 2 Post at the U.S. Storage Area some half-mile from the main camp, Depot O-629 (R86). About quarter to eleven accused came in the guard's gate and asked "could he go and take a leak, and so he did **** and **** went back out." A girl was standing outside the post and she and accused "started down that little road" running along the U.S. Storage Area towards the two railroad bridges (R87).

Zilpah Winder, Auxiliary Police Woman, Aintree, was present in the police station when an R.A.F. Corporal brought Annie in about 1:40 in the morning of 3 August 1943 (R91). Annie smelled very strongly of drink when she came in the station at first. "She was very hysterical all the time" (R92), "but I suppose she was sober" (R93).

Private Emery J. Richards, Replacement Company B (Sep) was with accused at both the Sefton Arms and Queens Arms public houses on evening of 23 July 1943 and met Annie and Grace. The four left the Queens Arms. Accused was with Annie and witness was with Grace. On the evening of 2 August accused and witness met the two girls again at the Queens Arms and drank beer with them. Thereafter witness saw accused and Annie walking towards camp (R95).

5. Upon rebuttal, the prosecution's witnesses testified as follows:

Private Merle Stopp was recalled and repudiated his prior testimony that it was accused who came to the guard gate and requested entrance in order to urinate. He could not identify the soldier who thus presented himself.

Corporal Hamilton T. Moody, Company B (Sep), saw accused on the night of 2 August 1943 at 10:00 p.m. when the "pubs" closed at Aintree. Witness was with a girl named Grace who walked with him from the "pub" down the street to the U.S. Storage Area. Witness went into the area to urinate and then with Grace went down the lane adjacent to the area and remained about 20 minutes. Upon returning to the street he saw accused with a girl, whose name he did not know (R116-118).

Annie Parry recalled, stated that she and accused went down the lane next to the U.S. Storage Area but once. She remained in the lane about an hour and it was then she came out of the lane running away from accused.

Grace Donoghue also recalled, stated that on night of 2 August she remained outside of the U.S. Storage Area while an American soldier went inside. Thereafter they went down the lane.

Police Inspector Jackson also testified that actual measurements made by him showed that it is 116 yards from Ormskirk Road to the place of the alleged crime. It is 71 yards from Ormskirk Road to the far side of the first bridge and 45 yards from there to the actual locus. The road has a bend and it is slightly less distance in a straight line (R123-124).

6. Certain errors and irregularities in the admission and exclusion of evidence have been noted in the review of the staff judge advocate. Inasmuch as the substantial rights of accused were not affected thereby there is no necessity for further comment. Other irregularities of a similar nature, not noted by the staff judge advocate, in the opinion of the Board of Review are non-prejudicial to accused and do not require discussion.

7. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM., 1928, par.148b, p.165). The act of intercourse is admitted by accused. The only question to be determined herein was

whether or not the intercourse was by consent - whether accused was telling the truth or whether Annie Parry should be believed. The testimony indicates Annie was with accused at the scene of the alleged crime approximately an hour; that she fled therefrom in haste, leaving her pocket book, and promptly made complaint to the first party she met. That she was hysterical, crying, in a disheveled condition, with torn and bloody clothes appears beyond question. Medical examination of her person proved beyond doubt that her genital organs had been subjected to violence. The court was the sole judge of the credibility of the witnesses and of the weight and sufficiency of the evidence. It was its duty to resolve the conflicts in evidence. There was substantial, competent evidence, excluding accused's statement, to support the court's findings and under such circumstances the findings of the court will not be disturbed by the Board of Review (CM ETO 492, Lewis; CM ETO 611, Porter; CM ETO 774, Cooper).

8. Attached to the record is a letter dated 28 August 1943 signed by Lieutenant Colonel Leonard E. Webster, as President of the court recommending "on behalf of all the members of the General Courts-Martial in this trial," clemency "because of the encouragement given by the complaining witness over a period of weeks". Also attached are additional letters and a statement of an interview between accused and Annie Parry. These indicate efforts on accused's part to enlist the aid of Annie and her friends in his behalf, in which accused offered marriage. They also indicate that Annie has been troubled by the life sentence received by accused but that she does not care for him, will not marry him, and does not want to see him again or have anything more to do with him.

9. The accused is 25 years of age. He enlisted 7 May 1938 for three years service which period of service is governed by the Service Extension Act of 1941. He had no prior service.

10. The court was legally constituted and 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 as approved. Confinement of accused in a penitentiary is authorized for the crime of rape by 35 Stat. 1143, 18 U.S.C. 457; 35 Stat. 1152, 18 U.S.C. 567; AW 42; War Department letter AG 253 (2-6-41) E, 26 February 1941. Accused's return to the United States is authorized (GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

1st Ind.

26 OCT 1943

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 KENNETH M. WAITE (6834779), Replacement Company "B" Separate, attention is invited to the foregoing holding by the Board of Review that the record 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 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 832. For convenience of reference please place that number in brackets at the end of the order: (ETO 832).

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 835

20 OCT 1943

UNITED STATES v. Private COLEMAN L. DAVIS (35458525), Company C, 830th Engineer Aviation Battalion.	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Ipswich, Suffolk, England, 28 August- 2 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven 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 92 Article of War.
Specification: In that Private Coleman Lee Davis, Company "C", 830th Engineer Aviation Battalion, did, at Nuthampstead, Herts., England, on or about the 3rd day of August 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Conrad Pascal, Company "C", 830th Engineer Aviation Battalion, a human being, by stabbing him with a knife.

He pleaded not guilty and was found guilty of the Specification except the words: "with malice aforethought, deliberately and with premeditation", of the excepted words not guilty, and not guilty of the Charge but guilty of a violation of the 93rd Article of War. Evidence of two previous convictions by summary courts-martial for absence without leave for one day in violation of Article of War 61, and for being drunk on duty in violation

of Article of War 85 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, reduced the period of confinement to seven years, designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 2 August 1943 a Sergeant Neopolitano loaned his bicycle to accused. The machine was locked with an "8700". About 7:00 p.m. Sergeant Donald R. Potts, Company C, 830th Engineer Aviation Battalion, loaned accused a knife on which was riveted a key with which to open the lock. Potts did not thereafter see the knife until the trial during which he identified a certain knife (Pros.Ex.1) as the one which he had loaned accused (R45-46).

During the early morning hours of 3 August accused came to the medical section of his battalion for a prophylactic treatment. T/5 Charles P. Kearney, Medical Section, 830th Engineer Aviation Battalion, who was on duty as charge of quarters was asked by accused if he could keep a secret. Accused told Kearney that he had had a fight and had just knifed a fellow twice. He stated that he had Sergeant Neopolitano's bicycle and that this fellow, whom he did not know had said "Hey Davis, where are you going with my bike?". Accused appeared out of breath, his blouse was unbuttoned and "looked like it was washed on the end or wrinkled and wet". He was very calm, bore no signs of injury, walked steadily and did not smell of beer (R38-42).

After midnight on 3 August accused entered his tent and asked Private Thomas H. Carmichael, Company C, 830th Engineer Aviation Battalion, if he could keep a secret. He then said that he was riding his bicycle when a fellow shouted "you have my bicycle" and seized him. After fighting with the man for about fifteen minutes accused rode off leaving the fellow lying on the ground. He asked Carmichael whether he should return and push the man off to the side of the road. Carmichael noticed that the lower left part of his blouse was wet. Accused said that he had started to wash it but that the lights had gone out. He asked if he could borrow Carmichael's blouse because he wanted to have his own either cleaned or pressed. Accused left the tent on two occasions shortly thereafter and was gone "sometime". After leaving the tent a third time to "lock the bike" he returned and went to bed. Carmichael "could smell liquor from him and was under the impression that he was drunk". He appeared to be excited. Early the following morning accused was awake and said that he could not sleep. Carmichael loaned him his blouse and noticed that accused's wet blouse was hanging on the line. After breakfast, when asked by Carmichael with whom he had been fighting accused replied "the Chief", and that the chief was dead because he "went back and saw him lying there". "Chief" was the nickname of a man named Pascal (R42-44).

Between 7:00-7:20 a.m., 3 August 1943 in the Nuthampstead area, Herts, England about a half-mile from their own camp, Corporal Richard P. Usher and Technician 5th grade Arthur F. Brusewitz, both of Company A, 830th Engineer Aviation Battalion, discovered the body of a deceased American soldier lying on the edge of a ploughed field about five to seven feet from the road, just over a bank. Brusewitz went for help to the camp of the 346th Engineer Regiment which was between 200-300 feet away and returned with a lieutenant (R6-7,10-14). The body was lying on its side with the left arm under the head and the right arm extended perpendicularly to the body. The left leg was straight backward, the right was slightly drawn in a bend (R11). The soldier was dressed in "O.D" shirt and trousers and "G.I" shoes (R6,11). The shirt, which was open at the neck was covered with blood, as were the hands and face. There was a blood clot on the throat. Several blood spots were on the ground and a few coins were lying around the body. It appeared that the deceased had bled profusely (R7,9,11-12). About 25 feet away on the other side of the road were a blouse and "O.D" cap, folded (R8,11).

About 7:20 a.m., 3 August as the result of information received, Captain Warren V. Hinshaw, Medical Corps, 1st Battalion, 830th Engineer Aviation Battalion, went to the scene, transferred the deceased from an ambulance of the 346th Engineer Aviation Battalion to his own ambulance and took him to the battalion dispensary (R30-31). On the body were identification tags in the name of Private Pascal, United States Army (R33). Private Conrad Pascal was a member of Company C, 830th Engineer Aviation Battalion. Captain Raymond A. Wilcox, CE., his company commander saw him alive in the company area at 7:30 p.m., 2 August. He next saw him dead in an ambulance "of the 346th" about 7:30 a.m., 3 August (R17-18).

Captain Hinshaw examined the body of deceased in the ambulance (R31). There was a laceration of the left jugular vein of the neck three inches long, which severed the vein. There was another superficial laceration on the right of the neck about four inches in length, a very superficial laceration on the bridge of the nose, a three inch laceration of the left chest posterior and lacerations of the left lumbar area and of the right arm (R31-32). Captain Hinshaw testified that in his opinion deceased had been dead about six or eight hours (R33,36-37). The injury to the internal jugular vein would have resulted in a loss of consciousness within a few seconds (R32,34), and was undoubtedly the cause of death (R36). It was also the opinion of Captain Hinshaw that the injury to the jugular vein was caused by a sharp instrument such as a knife (R32) as were all of the other wounds (R36).

On 4 August, after being warned of his rights accused made a statement to Sergeant Philip C. Brennan, Investigation Division, F.M.C., ETO. Brennan wrote the statement, each page of which was signed by accused whose affidavit thereto was also taken (R20-22,28). Over the objection of the defense (R22) the statement was admitted in evidence (R29; Pros.Ex.2). In substance accused stated that on the evening of 2 August

1943, he borrowed Sergeant Neopolitano s bicycle and went to the Chequers pub in Anstey where he and the deceased Pascal each drank between seven and ten pints of beer from about 9:00 p.m. to 10:00 or 10:30 p.m. when they left for camp. They talked outside the pub with an Englishman and his wife, and later at "site No.6" met a Private Sisler. After they left Sisler, Pascal told accused he wanted to go back to Anstey to see a woman and wanted to borrow money. Accused had only "a little" and told Pascal it was all he had.

> "He then said he would take my money and the bike. I told him if he was going to start any trouble I would leave him and go back to my area alone. I started to get on my bike and he grabbed it, knocking me to the road. He took off his blouse and slung it to the side of the road. When I got up he made a pass at me, I ducked and he clinched me. The fight started on the west side of the road and moved over to the embankment on the east side of the road. Paschal knew where I was carrying my money, which was in my right hand front pants pocket. He kept trying to take the money out of my pocket. I managed to get the knife out of my pocket, the same place where my money was and open it, just as we fell over on to the embankment. I kept cutting him at his back on the left side and when I was getting up from the embankment I swung at his left shoulder and I know I hit him with the open knife. I managed to get away from him and got on my bike. As I left him he was standing slightly bent over, feeling of his left side with his right hand. He said to me 'I'll get even with you, Davis, for this and I'll kill you, God damn you'". (Pros.Ex.2).

Accused went to his tent and told Carmichael that he had just been in a fight and cut a fellow. He then washed his hands, the knife, his handkerchief and washed the blood spots from his blouse. He went to the medical section for a prophylactic and told the charge of quarters that he had been in a fight "where the 346th is" and cut a man. He wiped the blood from his blouse with some gauze. He returned to his tent, left to lock the bicycle and then went to bed. The next morning he cleaned his blouse with gasoline and removed a blood spot from his trousers. Accused believed the fight occurred between 10-10:30 p.m. and midnight, 2 August. He had been on good terms with deceased and had never had any previous trouble with him. He killed Pascal to protect himself and his property

and used the knife as it was his only means of self-protection. He identified a knife with a key attached shown to him by Sergeant Brennan as the instrument he used during the fight (Pros.Ex.1).

Accused had previously given a knife to Captain Raymond E. Wilcox, CE., his company commander, on the morning of 3 August (R17,20). At the trial Captain Wilcox identified a knife as the one which accused had given him but stated that a key was missing from the clip (R46). The captain who had been present when accused made the foregoing statement to Sergeant Brennan, testified that when shown the same knife by Brennan, accused stated that he had borrowed it the previous evening for the purpose of unlocking a bicycle, and that the knife was used in connection with the stabbing. The knife was admitted in evidence, the defense stating that it had no objection (R46-47; Pros.Ex.1). The trial judge advocate stated that a key which had been attached to the knife by a clip had been lost "while awaiting trial" (R20).

4. Upon being advised of his rights accused elected to make an unsworn statement through counsel which was read to the court (R48). In substance the statement was similar to that made before Sergeant Brennan (Pros.Ex.2). During the fight accused realized that he was "getting licked". Pascal's strength, his threats, "and the way he was hurting me were surprising". "There was no one near to give me any help". Accused took out the knife belonging to Sergeant Potts and began to cut at Pascal intending to hurt him only enough so that he would let go and accused could escape. He did not aim a cut at deceased's throat but struck at his shoulder with the knife. Just as accused started the blow toward the shoulder, deceased broke away and changed the position of his body so that the knife cut him in the neck. Pascal's death was therefore an accident. Accused "did not go at him" any harder than he thought necessary. He knew of no other way to protect himself, save his money and the borrowed bicycle (R48-49).

5. When both the prosecution and defense had rested, the president of the court asked whether the prosecution knew of any witnesses who saw accused between 7:00 p.m. and the time of the incident. The prosecution and defense then stipulated that if present Private First Class Arlo F. Sisler would testify that on 2 August he saw accused and deceased drinking in the Chequers pub in "Anster". They appeared friendly and in good spirits. On the way home he saw them talking with another soldier and an Englishman and woman, and later saw them at "number 6 site" between 11-12:00 p.m. Both men appeared to be under the influence of drink. Pascal wanted to return with Sisler to pick up another soldier but accused and Sisler persuaded him to accompany the former back to camp. When Sisler left, accused and Pascal appeared to be on good terms (R49-51).

6. The defense moved to strike the testimony of Corporal Usher and Technician 5th Grade Brusewitz with reference to discovery of the body, on the ground that "it is not connected with any incident. He hasn't definitely established at all that the body he found was that of Pascal".

The court deferred action on the motion until the prosecution presented further evidence (R9,14). Connecting evidence establishing that the body found by Usher and Brusewitz was actually that of Pascal, the person alleged to have been killed by accused, was then introduced by the prosecution, whereupon the law member properly overruled the motion (R38).

The defense objected to the admission of accused's statement to Sergeant Brennan. The basis of the objection in substance was that the statement was not a confession but contained admissions against interest, that prior to the introduction in evidence of the statement the prosecution should introduce testimony corroborative of the facts admitted in the statement, and further that the document was mostly composed of irrelevant and immaterial matters (R22-26). The court allowed defense counsel to cross-examine the witness who was testifying as to the circumstances surrounding the taking of the statement, and reserved its decision as to the motion (R26). The motion of the defense was later denied and the document was admitted in evidence (R29; Pros.Ex.2). The defense then moved to strike the statement from the record on the same grounds. This motion was also denied (R29-30).

The statement was a complete version of the incident by accused, including his movements both prior and subsequent to the quarrel. He freely admitted killing Pascal but in substance asserted that his use of the knife was justified in that the weapon was his only means of protecting both himself and his property. After the statement had been admitted, the prosecution introduced evidence that shortly after the incident accused told witnesses that he had been in a fight and had knifed a man. The next morning he informed Carmichael that the man was the "Chief" (Pascal) and that he was dead. Accused subsequently made an unsworn statement at the trial in which he in substance corroborated the very facts recited in the statement made to Sergeant Brennan. In view of these circumstances a detailed discussion of the arguments advanced by defense counsel concerning the admissibility of the statement to Brennan is unnecessary.

7. Evidence of the details of the homicide was furnished only by accused's statement to Sergeant Brennan and his unsworn statement at the trial, together with the opinion of Captain Hinshaw based upon the nature of the injuries suffered by deceased. Accused's narrative of events was not controverted by the prosecution. The court was confronted with the issue of whether the prosecution had sustained the burden of proving the offense of murder. One of the principal elements to be proved was that of malice aforethought. Whether such proof had been made was a question of fact for decision by the court.

> "Murder is the unlawful killing of a human being with malice aforethought." (MCM., 1928, par.148a, p.162).

The record herein contains no evidence of either malice or premeditation by accused.

"Absence of design to effect death or grievous bodily harm, the homicide is voluntary manslaughter, and not murder, although the act was unlawful and malicious." (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.649-650).

"Assault upon accused, actual or attempted, by the person killed, an attempt to commit serious personal injury, or equivalent circumstances, (is) necessary to reduce a homicide to voluntary manslaughter" (1 Wharton's Criminal Law, 12th Ed., sec.426, p.651).

An instance of sufficient provocation in the case of voluntary manslaughter is assault and battery inflicting actual bodily harm (MCM., 1928, par.149a, p.166).

The court apparently believed that the death of Pascal was caused by accused without intent to kill. It properly rejected his claim that the homicide was justified because of the necessity of protecting himself and his property.

"A slight assault does not justify killing with a deadly weapon" (1 Wharton's Criminal Law, sec.426, p.651).

Trespass and other injuries to property are instances of inadequate provocation in a case of homicide (MCM., 1928, par.149a, p.166).

The Board of Review is of the opinion that the evidence was legally sufficient to sustain the findings of guilty (CM ETO 72, Jacobs and Farley).

8. The charge sheet shows that accused is 26 years of age, and that he was inducted 16 June 1942. He had no prior service.

9. The court was legally constituted and 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.

10. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the offense of voluntary manslaughter (18 USC. 454; 35 Stat. 1143). As accused is

under 31 years of age with a sentence of not more than 10 years the designation of the Federal Reformatory, Chillicothe, Ohio is correct (War Department letter AG 253 (2-6-41) E, 26 February 1941)).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL., JAGC, EXEC. ON 26 FEB 1952

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 20 OCT 1943 TO: Commanding Officer, Eastern Base Section, SOS, ETOUSA, APO 517, U.S. Army.

1. In the case of Private COLEMAN L. DAVIS (35458525), Company C, 830th 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 and 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 835. For convenience of reference please place that number in brackets at the end of the order: (ETO 835).

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

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC ON 26 FEB 1952

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BY REGINALD C. MILLER, COL.
JAGC, EXEC ON 26 FEB 1952

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JUDGE ADVOCATE GENERAL
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