

E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 24
CM ETO 835

VOLS. 1-2

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JAGC, ASS'T EXEC ON 26 FEB 1952

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Judge Advocate General's Department
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EXEC.

ON 26 FEB 1952
Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 1 B.R. (ETO)

including

CM ETO 24 - CM ETO 439

(1942-1943)

Office of The Judge Advocate General

Washington : 1945

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BY REGINALD C. MILLER, COL.

JAGC, EXEC. ON 26 FEB 1952

F O R E W O R D

By direction of the President, pursuant to Article of War 50 $\frac{1}{2}$, the Branch Office of The Judge Advocate General with the United States Army Forces in the British Isles was established on 22 May 1942; on 9 November 1942, this office became the Branch Office of The Judge Advocate General with the European Theater of Operations. Concurrently with its establishment, the Secretary of War by direction of the President vested in the theater commander confirming authority under Article of War 48 and the powers set forth in Articles of War 49 and 50. From its inception until 20 June 1943, Brigadier General Lawrence H. Hedrick, U. S. Army, was the Assistant Judge Advocate General in charge, and since the latter date Brigadier General Edwin C. McNeil, U. S. Army, has been in charge. At first there was one Board of Review, but this number was increased as the volume of work necessitated.

The present collection contains (to the best of materials and information available at the time of publication) all the opinions and holdings of these Boards of Review, together with the 1st Indorsement and an indication of the final disposition with GCMO reference. "Short holdings," which find the record of trial legally sufficient to support the findings of guilty and the sentence, without any discussion of the facts or arguments, are not included. In the CONTENTS of each volume, there is indicated, opposite the original ETO number of each case, the CM number allocated to the case in the JAGO when the record of trial is received.

In addition, Branch Offices of The Judge Advocate General were established to serve the Army forces in the Mediterranean Theater (formerly North African Theater) of Operations, in the India-Burma (formerly China-Burma-India) Theater, and in the Southwest Pacific and Pacific Ocean Areas. On 1 July 1945 the Branch Office in the Southwest Pacific Area was redesignated Branch Office in the Pacific, and the Pacific Ocean Areas office was inactivated. A similar collection of Board of Review materials will be made for each of them. An index and tables covering these materials will be added as soon as practicable. The volumes of materials from the foreign Boards of Review will constitute a companion series to the compilation of Holdings, Opinions and Reviews of the Boards of Review sitting in Washington, D. C. Together these will make conveniently accessible the most comprehensive source of research materials on military justice in the zone of the interior and in combat areas.

1 August 1945

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

703

CONTENTS OF VOLUME 1 B.R. (ETO)

<u>ETO No.</u>	<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
24	244447	White	24 Sep 1942	1
25	230379	Kenney	29 Sep 1942	13
29	235609	Davis .	10 Oct 1942	29
72	234999	Jacobs, Farley	5 Nov 1942	31
78	234989	Watts	26 Nov 1942	45
82	234998	McKenzie	26 Nov 1942	69
90	235003	Edmonds	27 Nov 1942	87
105	234990	Fowler	1 Dec 1942	91
106	234993	Orbon	4 Dec 1942	95
108	236446	Abrams	14 Jan 1943	111
110	236447	Bartlett	14 Jan 1943	115
121	236448	Shoupe, Ellis, McDevitt, Saroka, Thompson, Burke, Vanderlip, Farlow, Hass, Loddo, Wilson, Barker, Gullett, Hinson	24 Dec 1942	141
128	265294	Rindfleisch	19 Dec 1942	153
132		Kelly, Hyde	20 Jan 1943	161
134	243281	Stump, Hayes, Gibson, Szweda, Howe, Johnson, Kilpatrick, Martin, Millhorn, Mitchell, Morton, Robinson, Snow, Swingle, Taylor, Tice, Walker, Woodruff, Mayberry, Combs, Folk, Gaskill, Geissler, Hamilton, Campbell, Chandler, Rice, Puskoskie, McCullough, Peters, Yuhas, Wolf, Tudor, Harper, Gullett, Carbone, Chavis, Delaney, Gibson, Hall, Hambrick, Hamby, Hinson, Moore, Vitali, Whaley	27 Jan 1943	177

<u>ETO No.</u>	<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
139	235002	McDaniels	11 Dec 1942	205
255	258068	Cobb	19 Feb 1943	211
268	234992	Ricks	18 Feb 1943	219
292	234995	Mickles	23 Feb 1943	231
314	241103	Mason	26 Mar 1943	263
339	237825	Gage	31 Mar 1943	299
364	234996	Howe	31 Mar 1943	315
393		Caton, Fikes	29 May 1943	325
397	237826	Shaffer	16 Apr 1943	339
422	237827	Green	10 May 1943	345
438	258070	Smith	5 Jun 1943	377
439	236450	Nicholson	18 May 1943	397

WAR DEPARTMENT
In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(1)

SEP 24 1942

Board of Review.

ETO 24.

1ST ARMORED DIVISION

UNITED STATES) Trial by G. C. M. convened at Cas-
v. : tlewellan, County Down, Northern
Private First Class DANA E. : Ireland, August 31, 1942. Dishon-
WHITE (15013057), Company G, : orable discharge, forfeiture of all
13th Armored Regiment.) pay and allowances and confinement
: at hard labor for three (3) years,
: Federal Reformatory, Chillicothe,
: Ohio, is designated as the place of
: confinement.

HOLDING by the BOARD OF REVIEW
RITER, VAN BEN SCHOTEN and IDE, 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 First Class Dana E. White, Company "G", 13th Armored Regiment, did, at Washington Court House, Ohio, on or about April 7, 1942, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Private First Class Melvin A. Hunton, Company "G", 13th Armored Regiment, in that he, the said Private First Class White, did insert into his own mouth the penis of the said Private First Class Hunton, a male human being.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three (3) years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50¹.

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JAGC, EXEC ON 26 FEB 1952

24

3. The accused, at the time of the incident giving rise to the charge, was a member of Company "G", 13th Armored Regiment (R 12). On or about April 7, 1942, this regiment was engaged in an overland movement from Fort Knox, Kentucky, to Fort Dix, New Jersey (R 6, 12). It moved by its own power. The first night's bivouac was near Washington Court House, Ohio (R 6, 7). At the time camp was made, the accused and Private First Class Melvin A. Hunton, Company "G", 13th Armored Regiment, became tent mates (R 12, 22). They pitched their pup tent together, but it was not a deliberately planned, nor previously ordered, companionship (R 24, 25). Before the night of this bivouac, the two soldiers had not been tent mates (R 24, 25), and, subsequently, they did not sleep together under the same pup tent (R 24), although they had slept in the same squadroom or floor (R 10, 24). Private Hunton had known the accused for about two years (R 8, 10). It was raining when the pup tents were pitched (R 12, 22). Hunton and the accused went to bed in the tent, dressed in their combat suits (R 15, 20). Hunton wore the old type of combat suit - "the kind that zip up the front" (R 15, 20). The zipper on the suit was closed when Hunton went to bed that night (R 20). Hunton also wore summer undershirt and shorts (R 21). The two soldiers slept with their feet towards the tent opening (R 14, 19). Accused on the left side of Hunton (R 26). The evidence establishes the foregoing facts without conflict.

^{Hunton} The prosecution's case is dependent upon the evidence of Private ^{Hunton} and that of Herman T. McWatters, Captain, 13th Armored Regiment. Hunton's testimony is direct and positive that, when he was awakened by the guard on the morning of April 8, 1942, at or about the hour of 3:00 o'clock A.M., he discovered the accused lying across his stomach (R 7, 26); that accused was lying on the left side of Hunton with his right arm on Hunton's chest (R 8, 26); and that his (Hunton's) penis was erect and in the mouth of the accused (R 7, 25). He asserted that such situation was without his volition or desire (R 7). Hunton's combat suit had been opened - "it had been zipped all the way down" (R 21). Hunton had no blanket covering him, but had slept in his combat uniform on top of his bed roll (R 21). When he discovered accused's actions, Hunton shoved accused away and got out of the tent (R 8, 21). He did not report the incident to a superior officer until five hours later (about 8:00 A.M.), then it was to an unidentified lieutenant who was on the convoy with Hunton (R 9, 23, 21). Hunton also made report to a non-commissioned officer of his company when he reached Fort Dix (R 23).

Captain McWatter's testimony was to the effect that, in the last week of April, 1942, he questioned accused in connection with the alleged offense (R 16); that, at that time, he warned accused that anything he said could be used against him; that he did not lead accused to believe that, if he confessed, his punishment might be lighter; that he did not threaten accused (R 17); that he propounded to the accused the specific question: "Had he been guilty of an unnatural sexual act?";

and that accused responded: "Yes, sir, he had been" (R 17). Thereafter, in the course of his testimony in rebuttal, Captain McWatters was interrogated by a member of the court, and the following colloquy ensued:

"Q. What was specific question that resulted in that answer?

A. I told Private White he had been accused of the act of sodomy or of having unnatural relationship with another man.

Q. Is that the way you put it?

A. It is.

Q. And he said what?

A. He said it was true.

Q. Did he later in the same investigation change his answer or qualify it in any way?

A. Not at that time, sir.

Q. Did he change it at another time?

A. Yes, sir. It was after Private White was brought in to Northern Ireland. I asked him why the trial had been delayed or what disposition had been made of the case before he left Fort Dix. In the conversation it was brought out that he misunderstood the questions on which I based my charged.

Q. Did you ask him whether he had put his mouth on the penis of Private Hunton?

A. I didn't ask him that.

Q. Did Private White seem to understand what you were talking about?

A. I thought he did understand what I meant, but he states to me since he arrived in Northern Ireland that he did not understand and that he did not have sexual relationship with Private Hunton. The charges which you have here in court now are as they were drawn in the last week of April, 1942, at Fort Dix, New Jersey". (R 17, 18.)

(4)

On rebuttal, the prosecution produced as a witness, Private John Blanton, Company "G", 13th Armored Regiment (R 27) and, after qualifying the witness as to his acquaintanceship and contact with accused, propounded to him the following question:

"What was accused's general reputation by those who know him best as to any perversion or the like? What is accused's general reputation by those who have known him best * * *" (R. 28).

The defense objected to the question, and thereupon the trial judge advocate declared: "The prosecution contends that the defense has introduced two character witnesses as to accused's good character or reputation, which is normally presumed to be good. The matter in issue is whether he is a pervert. The prosecution wishes to establish the accused's reputation as to perversity. The defense, in its introduction of the character of the accused in the case, immediately placed the accused's reputation and character" (R 28). The president and law member of the court ruled: "The testimony of the witness will be limited to such facts as he may know himself. Is that clear?" (R 28). The prosecution declined to question the witness further (R 28). Thereupon, the court, of its own motion, proceeded to interrogate the witness, Blanton. Questions were propounded for the obvious purpose of extracting from the witness evidence of specific acts of perversion or immorality between the accused and witness, or between third persons and the accused (R 28-30). Pertinent examples of these questions and the responses of the witness thereto are:

"Q. Has he at any time asked you to have sexual relations with him?

A. No, sir." (R 28).

* * * * *

"Q. Has he ever made a grab for your privates?

A. No, just laid his hand over it or something like that.

Q. Did I understand you to say that he laid his hand on your privates?

A. Yes, sir." (R 28).

* * * * *

"Q. Did he lay his hand on your leg or your privates?

A. On my privates, sir." (R 29).

* * * * *

"Q. Did you ever see him do it to anybody else?

A. No, sir.

Q. Did you ever see him propositioning anybody else?

A. No, sir." (R 30).

Following this examination of the witness by the court, the prosecution asked the witness the following question:

"Private Blanton, in the organization of which you are a member, what is the accused's general reputation among those who know him best as to any perversion, sexual perversion?" (R 30).

The defense objected to the question (R 30). In the colloquy between the trial judge advocate, the defense counsel and president and law member of the court, which ensued, the president stated: "It is the opinion of the court than ay evidence tending to establish the bad character of the accused should be presented in the testimony of persons who have personal knowledge of those facts. The present witness has testified as to his knowledge of the actions of accused (underscoring supplied). If the prosecution desires to establish that, it should be introduced in the form of direct evidence" (R 30). Thereupon, the president sustained the defense's objection (R 31), and the prosecution rested its case.

5. The accused appeared as a sworn witness in his own behalf, after being duly warned by the court as to his right, and that, if he elected to testify, he was subject to examination as any other witness (R 11, 12). His testimony corroborates that of Private Hunton as to all preliminary matters (R 11, 12). On direct examination, he made no specific denial of the offense, but, upon asked: "Did you have any recollection of being close to Private Hunton?", he replied: "Not very well, sir. I don't remember. I don't recall real clear, sir, because I was awakened by the rain and I had just moved and I went back to sleep again" (R 12). On cross-examination by the prosecution, the following colloquy occurred:

"Q. At any time during the night had you fondled Private Hunton's organ?

A. If I had I did it in my sleep (underscoring supplied).

"Q. Had you his penis in your mouth?

A. No, sir. Not unless I did it in my sleep (underscoring supplied)"(R 14).

A member of the court interrogated accused and, in the course of the examination, the following discussion developed:

"Q. What kind of combat suit had he (Hunton) on - old style or new style?

A. I believe it was the new style. I don't know whether there are any new types.

Q. Did it have a zipper on the front?

A. I think it did.

Q. Did it have a zipper on the side? Did it have one on the side and one in the front?

A. I am not sure.

Q. Did it zip up or down?

A. As I remember, sir all of them zipped down.

Q. How do you know that?

A. I was kind of in a subconscious mind. That's how I happened to know. Just realized it when I woke up and saw it was in that condition (underscoring supplied)" (R 15).

The defense also produced two character witnesses (R 10, 11) who each testified, without objection, that, prior to April 7, 1942, the accused had never "propositioned" the witnesses and that they did not know of him "propositioning" anyone else (R 11).

6. The evidence thus shows without contradiction that the accused had access to Private Hunton at the time and place alleged in the specification under circumstances that corroborates Hunton's specific testimony as to the commission of the offense by accused. The testimony of Private Hunton as to the act charged is direct and positive (R 7, 25-27), and it was not shaken by cross-examination of the defense or by the examination of the court. The accused made no categorical or

positive denial of the criminal act; rather, his denials are qualified and evasive. They are in the nature of a confession and avoidance (R 14). He said if he fondled Private Hunton's organs, "I did it in my sleep", and if he had Private Hunton's penis in his mouth, "I did it in my sleep" (R 14). Such denials are unconvincing. They do not meet the test of honesty and frankness. They indicate an unwillingness on the part of accused to make a forthright denial. They are attempts to meet a direct charge by an explanation instead of by a straight forward denial. They reveal a guilty conscience and not the clear conscience of a man falsely accused of a filthy crime. There is no element of indignation in them, such as would be naturally aroused in the breast of an innocent man.

Further, corroboration of the testimony of Private Hunton is furnished by the accused himself when, interrogated by a member of the court (R 15). He had been questioned as to the style of combat suit worn by Hunton on the night in question (R 15). He was then asked, "Did it zip up or down?". He answered, "As I remember, sir, all of them zip down". The court member then asked, "How do you know that?". (R 15) Then came a most interesting answer, "I was kind of in a subconscious mind. That's how I happened to know. Just realized it when I woke up and saw it in that condition (R 15)". Private Hunton testified that his combat suit was closed when he went to bed that night (R 20) but, that upon his awakening, in the morning, it had been opened - "It had been zipped all the way down (R 21)". It therefore appears that the accused himself agrees with Private Hunton that the latter's uniform had been opened during the night. The accused then unconsciously reveals an equivocal mental process. He says that Private Hunton's uniform had been "zipped down" because he happened to know it in his "subconscious mind", and that he realized it when he woke up and "saw it was in that condition". His statement indicates a desire on his part to admit that Hunton's uniform had been opened, but he connects such facts with his "subconscious mind", in order to evade an implication that he himself "zipped it down". Such testimony necessarily creates an unfavorable impression in the minds of the court as to the verity of his entire testimony.

The court heard Private Hunton and the accused testify; observed their demeanor on the witness stand, and had the advantage of personal contact with them. It was the court's duty to reconcile conflicts in their evidence; determine the probative value of evidence accepted by it; and discover the honesty and trustworthiness of the witnesses. The so-called "character evidence" either for or against accused is valueless, and its introduction served no good purpose except to excite legal questions hereinafter considered.

The Board of Review is of the opinion that there is compelling evidence that accused committed the crime charged; that the prosecution sustained its burden of proving, beyond a reasonable doubt, the

commission of the offense charged.

7. The admission of testimony involving the so-called confession of accused requires but brief consideration. Excerpts from the record above abstracted clearly show that Captain McWatters, at the time of first interrogating accused (at Fort Dix), warned him that anything he said could be used against him; that he did not lead accused to believe that, if he confessed, his punishment might be lighter; and that he did not threaten accused in order to obtain the confession. On the occasion of the second interrogation of accused by Captain McWatters (in Ireland), the accused made no confession, but, instead, a denial. The defense raised no objection to admission in evidence of the alleged confession. The accused first indicated the existence of the confession in its original cross-examination of Captain McWatters (R 9, 10), although the prosecution, on direct examination, made no mention of it (R 9). Under these circumstances, the Board of Review is of the opinion that there was no error committed by the court in admitting, in evidence, Captain McWatter's testimony as to the accused's confession (MCM, Par. 114, Page 116).

Captain McWatter's testimony (R 16-18) concerning his second interview with accused, affects only the probative value of the confession. The accused, on the second interview, declared he did not understand the meaning and purport of the questions propounded to him by the Captain at the first interview, and specifically denied he had committed the crime with which he is charged. This conflict in the statements of accused is not relevant, nor material, in considering the question of the admissibility of the McWatter's testimony covering the confession. It goes to the weight and sufficiency of the confession and that was matter exclusively for the court.

8. The defense produced two "character" witnesses (Lynch and Garland) (R 11), who, without objection from the prosecution, testified that accused had never "propositioned" either of them, and that neither of them had ever known of accused's "propositioning" anyone else (R 11). This is not evidence of "good reputation" or "good character" within the meaning of the rule permitting an accused to introduce evidence of his own good character (MCM, Par. 112, Page 112). This testimony should have been excluded by the court, had the prosecution objected. It was entirely immaterial to the issue before the court. It was of no value. The two witnesses might have been the only two persons out of two hundred individuals that the accused had not "propositioned". It was negative evidence.

Two of the principal rules concerning the introduction of evidence of an accused's general reputation are declared as follows:

"General character is the reputation one has made in the community in which he lives, the result of his general walk and conversation, and it cannot be shown by proof of particular acts of good conduct or bad conduct, but only by proof of his general reputation, that is, what his neighbors say about him, or/he is generally accepted, received or regarded by them". (Wharton's Criminal Evidence, Vol. 1, Page 463-4; Sec. 331.)

"* * * the state cannot offer evidence of bad character of the accused except to rebut his evidence of good character, but when the defendant puts his character in issue, the prosecution may rebut such evidence by proof of bad reputation * * *". (Wharton's Criminal Evidence, Vol. 1, Page 456; Sec. 330.)

The prosecution, on rebuttal, attempted to meet the so-called "character" evidence of the accused (R 27, 28). The trial judge advocate, apparently having mind the rules of evidence above stated, propounded to the witness, Blanton (R 28), a question in substance as follows:

"Private Blanton, in the organization in which you are a member, what is the accused's general reputation among those who know him best as to any perversion, sexual perversion (R 28, 30)".

The defense objected to the question and the court sustained the objection with the comment: "The testimony of the witness will be limited to such facts as he may know himself. Is that clear? (R 28)". The prosecution declined to question the witness further. It was then the court, of its own volition, asked the witness, Blanton, in substance, whether the accused solicited witness to have sexual relations with him; whether accused ever made a "grab for his privates"; whether witness had ever seen accused do it to anyone else; and whether witness ever saw accused "proposition" anybody else (R 28-30). At the conclusion of the court's examination, the prosecution renewed its question as to the general reputation of accused as to sexual perversion (R 30). Again the defense objected (R 30) and again the objection was sustained (R 31) with the observation that "The present witness has testified as to his knowledge of the actions of the accused (R 30)". With this state of the record, the question arises as to whether the court, in its rulings, committed errors seriously affecting the substantial rights of the accused.

It is to be observed that the defense counsel, in the first instance, misconceived the nature of "character" evidence. His witnesses did not testify as to the general reputation of the accused for morality

and normal sexual conduct; rather, they gave only negative evidence. Their evidence was not even testimony as to specific acts of good conduct. On rebuttal, the trial judge advocate, in order to meet this evidence, asked the witness, Blanton, a question as to the general reputation of the accused. The court refused to permit such question to be answered; made Private Blanton its own witness, and proceeded to secure from him evidence of solicitation or "propositioning" of the witness by the accused.

The court was correct in sustaining the objection to the trial judge advocate's interrogatory to the witness, Blanton, but not for the reason stated by it. As above indicated, the accused's interrogatories to his witnesses, Lynch and Garland, did not put in issue any question as to accused's general character or reputation. They raised no issue, because they were entirely negative and without materiality to the issue before the court. Hence, the prosecution was not authorized to draw into issue the question of accused's general character. The prosecution had no evidence of accused's good character to rebut. This is the true reason for the ruling.

However, when the court made the witness, Blanton, its own witness, and secured from him evidence of commission by accused of specific acts of perversion not connected with the offense for which accused was on trial, a different question is presented. Was this evidence admissible? The accused had previously testified that if he had performed the acts of perversion on Private Hunton, he had done so in his sleep (R 14). Thereby, he introduced the element of accident, mishap or unintentional criminal conduct. Blanton's responses to the court's questions negative such element and they were thereby both relevant and material and served to rebut the inferences of accused's testimony. On this basis, the evidence was admissible.

"Evidence which shows, or tends to show, the commission of another crime, is admissible when it shows the absence of accident or mistake in the commission of the act charged against the accused". (Wharton's Criminal Evidence, Vol. 1, Sec. 354, page 536.)

Although the record shows that the court and counsel did not properly appreciate the correct application of the rules of evidence hereinabove discussed, the Board of Review is of the opinion that the court, in its rulings on the admissibility of evidence, did not commit any error substantially affecting the rights of the accused.

9. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of both the charge and specification and legally sufficient to support the sentence. The court was legally constituted. No error injuriously af-

fecting the substantial rights of the accused were committed during the trial.

The accused is twenty-three (23) years of age. Pursuant to paragraph 5 (d), General Order 37, ETOUSA, 9 September 1942, the execution of a sentence of dishonorable discharge may be ordered executed when an accused is sentenced to confinement for three (3) years or more for an offense which renders his retention in the service undesirable. Obviously, sodomy is such an offense. A general prisoner may be returned to the United States for service of sentence of three (3) years or more. The Secretary of War, by instructions dated 26 February 1941 (AG 253 (2-6-41) E), directed that prisoners in such cases under thirty-one (31) years of age and sentenced to not more than ten (10) years, will be confined in the Federal Correctional Institution or Reformatory, which is nearest the port of debarkation in the United States. The Federal Reformatory, Chillicothe, Ohio, is the proper place of confinement.

B. Franklin Miller Judge Advocate.
Alfred Dana Burkhart Judge Advocate.
O. G. Tde Judge Advocate.

1st Ind.

WAR DEPARTMENT, Office of The Judge Advocate General, European Theater of Operations, APO 871, U. S. Army, SEP 24 1942
 TO: Commanding General, 1st Armored Division, APO #251, U. S. Army.

1. In the case of Private First Class Dana E. White, (15013057), Company G, 13th Armored Regiment, attention is invited to the foregoing holding of the Board of Review, that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 endorsement. The file number of the record in this office is ETO 24. For convenience of reference, please place that number in brackets at the end of the published order.

(ETO 24)


 L. H. HEDRICK,
 Brigadier General,
 Judge Advocate General,
 European Theater of Operations.

WAR DEPARTMENT
In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(13)

Board of Review.

SEP 29 1942

ETO 25.

U N I T E D S T A T E S) HEADQUARTERS, SERVICES OF SUPPLY
v. :
Captain JOHN F. KENNEY, : Trial by G. C. M. convened at Chel-
(O-904840), 344th Engineer Reg- : tenham, England, September 3 and 4,
iment.) 1942. Dismissal.

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

1. The record of trial in the case of the officer named above, having been referred by the Commanding General, European Theater of Operations, the confirming authority, prior to his action thereon, and pursuant to the provisions of Article of War 46, to the Assistant Judge Advocate General in charge of the Office of The Judge Advocate General in the European Theater of Operations who, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, has, with respect to this case, like powers and duties as The Judge Advocate General, and, to the end that the accused should have an independent review of the record of trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Article of War 50 $\frac{1}{2}$, having been referred by the Assistant Judge Advocate General to the Board of Review for examination and review, has been examined by the Board of Review and the Board submits this, its opinion and holding thereon, to the Assistant Judge Advocate General.

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

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

Specification 1: In that Captain John F. Kenney, Corps of Engineers, did, at Gloucester, Gloucestershire, England, on or about July 28, 1942, wrongfully accost Kathleen Webb on a public street, and against her will, grasp her, force her into a vacant area and therehold her until aid summoned by her outcry forced him to release her.

Specification 2: In that Captain John F. Kenney, Corps of Engineers, did, at Gloucester, Gloucestershire, England, on or about July 28, 1942, in public in the vicinity of the

330379

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junction of Oxford and Denmark Roads, wrongfully say to Lily Ellis, a resident of Gloucester, in the hearing of other such residents, "You English swine, you are all cowards, all of you", or words to that effect.

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

Specification: In that Captain John F. Kenney, Caps of Engineers, did, at Gloucester, Gloucestershire, England, on or about July 28, 1942, wrongfully strike Francis V. Egan on the face with his fists.

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

3. As the facts are disputed, the testimony is rather fully set out. The evidence shows, by accused's own testimony, that he is a Captain of Engineers, stationed at Ashchurch, and that, on the night of July 28, 1942, he went to Gloucester (R 58) on a motorcycle to find a W.A.A.F. with whom he had a date. Failing to find her or to accomplish a second attempted date with the first girl's chum, he made an engagement by telephone with the telephone operator who was trying to put through his calls (R 58). By his testimony, he was to meet her for a moment at 8:30 that night, when she had a temporary rest period. He says he did so meet her (R 59) and made a date to meet her again at 11:00 P.M. in the alley on which the entrance to the telephone office was located. At eleven o'clock, after a social evening drinking with some new-found friends (R 59), accused returned to the alley or lane and there encountered a sentry, who asked him if he was looking for Kathleen Webb. He replied in the affirmative, and the sentry said she had left word for an officer that might come there; that she had gone home, stating directions as to her route (R 60). Accused further stated that this girl came up to him, as he came out of the alley, and said that, as every place was closed, the only thing to do was to go on back home; that she got on the motorcycle with him and told him where to go. He claims they decided to stop a couple of blocks from her home and talk a while. They got off the motorcycle and, at his suggestion, went into the yard of a girl's school and stepped over to where it was dark, at which time she insisted she must go right home. Accused told her he didn't like that after waiting all evening for her (R 61) and "sat her down". She screamed and tried to "scamper" when accused grabbed her by the arm as she was trying to pull away. A Mr. Egan appeared and asked what was going on. Some women also appeared on the scene. Egan struck accused and during the fight the girl broke away and disappeared, and they all went outside the gate. Egan was taken to a house

230379

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across the street (R 62) and accused stood with his back to the gate to protect himself. He remembers saying at the time that they were all "pig-headed" and "smug", for he was not molesting the girl but just standing there holding her. "She was just jerking and pulling." Accused tried then to find his motorcycle, but missed it. The police, who had just arrived, informed him where it was and he, at his own suggestion, went to their headquarters and made a written statement. Accused testified that, before leaving the scene, Egan came out and shook hands with him and everybody agreed Egan had been a little hasty (R 64). The testimony of the accused covers nearly eighteen pages of the record and beginning with his schooling as a boy and outlining his educational and professional background. He insists that he held the girl only as proof that nothing wrong had happened and that he had not molested her (R 62).

Kathleen Webb, a Gloucester telephone operator, the prosecuting witness, identified accused, and testified she first met him about 11:05 the evening of July 28, 1942, (R 6), on Northgate Street, when he rode up on a motorbike, stopped and offered to take her home and she refused (R 7); then, later he again stopped her but she went on and tried to avoid him but again he intercepted her, and dragged her across the street (R 8). She fell down in a school gateway and tried to run when accused grabbed hold of her and tried to touch her under her clothing (R 21); she continued to struggle and then screamed for help and a man came and tried to release her and eventually she got loose and ran home (R 10). She did not make a date with accused (R 10); did not ride on the motorcycle at any time (R 24); but she was close enough to smell liquor on his breath (R 20, 23).

Her story is in part corroborated by witness Egan, who was badly bruised by accused in the fight to release the girl and who denied that (R 26) he struck any blows after the girl was released or that at any time later he shook hands with accused (R 29); by witness White, who saw the motorbike as it stopped on Oxford Road (R 31) and, as he passed, saw a soldier and lady standing by it (R 32); that shortly thereafter, he heard screams and returned in time to see somebody being led or carried across the road from the gate, to some houses on the other side and, going to the house, he recognized Egan (R 33). He (White) called the police. He also heard the accused, a big man in uniform, directly across the road by the iron gate, call the people there abusive words. "His exact words were, 'English swine, you are yellow!', and he also said he was a German. Witness Lily Ellis, housewife living directly across the road from the school yard gates, who, on the evening in question, was about to retire, when she heard repeated cries for help from across the road. With her daughter and next-door neighbor, Mrs. Wilkinson, crossed the street and saw two men struggling and a girl who ran past them; one man was in khaki uniform with two bars on his shoulder (R

280379

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39) and the other was a civilian, who asked her, "For God's sake, get some help and get this man away from me (R 38)". They succeeded in getting the civilian away and across the street into her home, the officer shouting, "Where is he, let me at him". "You interfering British swine". He also said he was of German descent and proud of it (R 38). Accused was identified by witness Henry A. Ellis, who arrived as Egan was being taken across the street; the Captain (accused) was there and used very insulting remarks, calling them "interfering British swine", and among other things, "yellow" and "curs" (R 46). He saw there Mrs. Wilkinson, his own wife and two daughters and Mr. White. Witness Henry Freeman, was at this mother's house (R 48), where Miss Webb stayed, when Miss Webb arrived that night some time after 11:30. She ran into the house in a very distressed condition, her legs from the knee down being covered with mud and blood.

On the other hand, a vital part of the testimony of Kathleen Webb, and of the other witnesses, is seriously contradicted by two disinterested witnesses. The witness, Mrs. Nellie Wilkinson, testified that she resides immediately opposite the entrance to the school grounds, 71 Denmark Road (R 42); that, at about 11:30 P.M. on July 28, 1942, she looked out of an upstairs window of her home and saw a gentleman in uniform and a lady crossing the road toward the high school and heard the school gate open and close (R 42, 88); they were walking together quite casually, as an ordinary couple (R 44, 88). The couple walked rather quickly and Mrs. Wilkinson heard the woman's high heel shoes clicking on the pavement (R 42, 88); and there was nothing unusual in their conduct noticed by the witness (R 88).

The witness, Mr. Sidney H. White, at about 11:20 P.M. on July 28, 1942, was proceeding on foot up Oxford Road on the left-hand sidewalk, and he observed a soldier and a lady standing alongside of a motor-bike on the opposite side of the street, in front of Mrs. Wilkinson's house (R 32, 35, 36, 84). The couple were embracing and there was no sign of a struggle; and the embracement was mutual (R 83, 84, 87).

4. David Wagstaff, Police Inspector of Gloucester, as a witness for accused, testified (R 70) that he first saw accused about 8:30 P.M. the night of July 28, 1942, leaving Bull Lane and walking across the road to the Woolworth shop, and again at the Gloucester police station at 12:40 A.M. that night when witness had been informed of an assault which had occurred and accused voluntarily came to the station to give the details. He informed accused that he was not obliged to make any statement unless he wished to do so, but that whatever he did say would be taken down in writing and might be later given in evidence. Accused made a statement, which was produced in court but not placed in evidence. Five officers (R 74-77), with whom accused had served for periods up to three months, also appeared as character witnesses for him, and testified as to his excellent qualifications and service.

230379

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5. The defense submitted to the Staff Judge Advocate, Headquarters, Services of Supply, European Theater of Operations, a letter-brief on behalf of the accused, wherein it is asserted that the accused was denied substantial rights by not having been given an opportunity to examine the available witnesses at the time the charges were investigated under Article of War 70.

Article of War 70 provides in pertinent part:

" * * * At such investigation, full opportunity shall be given to the accused to cross-examine witnesses against him, if they are available, and to present anything that he may desire in his own behalf, whether in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused (underscoring supplied) * * *".

"The provisions of A. W. 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can be legally referred to trial. A court-martial is without jurisdiction to try an accused upon charges referred to it for trial without having first investigated in substantial compliance with the provisions of A. W. 70 and, in such a case, the court-martial proceedings are void ab initio." (Dig. Ops. JAG, 1912-1940, Sec. 428 (1), page 292.)

There is no authority for paying mileage or witness fees in such preliminary investigation (Dig. Ops. JAG, 1912-1940, Sec. 428 (4), page 293). The accused is entitled to cross-examine all available witnesses who testify at the trial (Dig. Ops. JAG, 1912-1940, Sec. 428 (3), page 293).

The right of cross-examination, made mandatory by the statute, is dependent upon the availability of the witnesses at the investigation of the charges. If they are not available, the right of cross-examination does not exist. The record of trial in this case clearly shows that the prosecution's witnesses were civilians, living in Gloucester, 60 miles distant from the accused's station and the headquarters of the officer ordering the investigation.

Statements of the witnesses were obtained by the Gloucestershire Constabulary, and copies of the same were forwarded by the Chief Constable to the accused on August 4, 1942, being the day prior to the submission of the same to the Provost Marshal, Headquarters, SOS. The trial (of the charges) commenced on August 26, 1942. The accused and his counsel therefore had the time and opportunity to examine these witnesses, who would submit to examination, before the trial. The records show that

230379

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the accused did not object to proceeding to trial after arraignment, and did not raise this question after arraignment nor at any time during the course of the trial.

The word "available" means accessible or capable of being used to accomplish a purpose (Corpus Juris Secundum No. 7, page 1301). There is no method provided whereby these witnesses could have been subpoenaed to appear before the investigating officer at the headquarters of the officer ordering the investigation, and there is no authority for the payment of witness fees and mileage of such witnesses. Under such circumstances, the Board of Review is clearly of the opinion that these witnesses were not "available" within the purview of A. W. 70; that the rights of the accused were fully protected by the procedure followed, and that the court acquired and held jurisdiction to try the charges against the accused.

6. Charge II and its specification alleges that the accused did, at Gloucester, England, on or about July 28, 1942, wrongfully strike Francis V. Egan, on the face with his fists. The specification alleges an offense under A. W. 96 (MCM, Sec. 152 c, page 189). Thereby, the accused is charged with having committed an assault and battery on the civilian Egan (MCM, Sec. 149 1, page 176). The evidence establishes the commission of the offense beyond all peradventure. The accused's testimony is sufficient in itself to sustain the finding of guilty, and, when read in connection with the prosecution's evidence is so convincing that no detailed discussion of same is necessary. The only question that can arise in connection with this feature of the case is whether or not accused acted in self-defense. This point is vigorously urged by the defense counsel in their letter-brief and has been carefully considered by the Board of Review.

A reconstruction of the scene is not difficult. Egan, believed a girl of tender years - a high school girl - was the subject of a bodily attack (R 28). Upon receiving Miss Webb's plea, "Make him let me go", he reacted in a most natural manner. He attempted to free the girl from the accused's hold by striking accused in the face. Assisted by the women who had arrived on the scene, Egan continued his effort to secure the girl's freedom and, during such progress, accused, frightened by the unseemly and awkward predicament in which he found himself, also reacted naturally. He did not know how seriously he was threatened. The blows he struck Egan while Egan and the women were wrestling with him to secure Miss Webb's freedom may, with all propriety, be considered as struck in self-defense. The fact, however, that accused continued his battery upon Egan, after Egan and the women had ceased their physical hold on him, entirely nullifies such plea. From the moment Egan withdrew his hands from accused's body and Miss Webb had been freed, the accused was no longer in a position of peril. He renewed the fight after his opponent Egan had withdrawn. The accused is charged with the knowledge that the whole pur-

330379

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pose of the intervention of Egan and the women was to free the girl. No other interpretation can, with reason, be placed on the evidence. "It is not the defendant's mere notion that he is about to be attacked that justifies; but there must be circumstances leading the defendant, according to his rights to expect an attack(Wharton's Criminal Law, Vol. 1, Sec. 226, page 1115)".

Treating Egan as the original aggressor, and admitting that the accused, during the scrimmage, having for its purpose the release of Miss Webb, had the right to protect himself within reasonable limits against the trespass on his body committed by Egan, there came a point when this right of self-defense ceased and, if accused continued to strike Egan, his attack became an original battery.

"But if "A" really and evidently withdraws from the contest, and resorts to a place of security, and "B", his antagonist, knowing that he is no longer in danger from "A", nevertheless attacks "A", then "A's" rights in self-defense revive (Wharton's Criminal Law, Vol. 1, Sec. 616, page 832)".

The proof is clear that accused struck Egan several times after Egan's trespass on accused's body had ceased and Miss Webb had been released. Judging the situation from the position of accused at this time, it is a most reasonable conclusion that accused was not in peril, nor was his safety threatened. In the opinion of the Board of Review, the record is therefore legally sufficient to support the finding of guilty under Charge II and its Specification. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

7. Specification 1 of Charge I alleges an offense under the 95th Article of War, and in the opinion of the Board of Review, the prosecution has sustained the burden of proving the commission of the offense by accused. The evidence is convincing that the accused, at a time after 11:00 P.M. on July 28, 1942, restrained Miss Webb in an unlighted school yard against her will, by use of force. He admits such conduct (R 61, 62), but the evidence of the prosecution, independent of accused's judicial admissions, is more than sufficient to sustain the finding.

There is a sharp conflict in the testimony as to whether accused "wrongfully" accosted Miss Webb on a public street. Likewise, there is a substantial conflict in the evidence as to whether accused, by use of force and against her will, took her to the school grounds. Miss Webb insists that she had no pre-arranged engagement with accused (R 10); that she never met him prior to the time he accosted her at the intersection of Northgate and Westgate Streets (R 12); that immediately

230379

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thereafter, on three separate occasions, at three separate points, while she was walking towards her home, he accosted her (R 12, 13) and, finally, he dragged her across Denmark Road into the school grounds (R 13, 82). The accused specifically contradicts Miss Webb and swore that he met her on the same evening at 8:00 P.M. and arranged to meet her again at 11:00 P.M., when she quit work (R 59, 68); that he did meet her as she left her place of employment (R 60); that she voluntarily became a pillion rider on his motorcycle (R 60, 66); that he drove up Oxford Street in the direction of Denmark Road (R 60); that he parked his motorcycle on Denmark Road and the girl and he walked into the school yard (R 61). He denies categorically that he dragged Miss Webb across the street into the yard (R 65); or that he used any force whatsoever to procure her presence in the yard (R 65).

Partial corroboration of accused's testimony is found in the testimony of Mrs. Nellie Wilkinson, a British civilian, who testified that she saw from one of her upstairs windows at a time after 11:00 P.M., on the night of July 28, 1942, a gentleman in uniform and a lady cross Denmark Road in a casual, orderly manner in the direction of the high school grounds, and that there was nothing unusual in their conduct (R 44, 48). Further corroboration of accused's statement is furnished by Mr. Sidney H. White, a British civilian, who testified that, at about 11:20 P.M., on July 28, 1942, he was proceeding on foot up Oxford Road, when he observed a soldier and a lady standing alongside of a parked motorcycle in front of Mr. Wilkinson's house, and they were in mutual embracement with no sign of struggle (R 32, 35, 36, 24, 87).

Allowing the accused the full benefit of this testimony of Mrs. Wilkinson and Mr. White, and accepting it as corroboration of accused's contention that Miss Webb accompanied him to the high school grounds of her own volition, and free from compulsion on his part, the fact remains that there was created but a conflict in the evidence and it was a duty and function of the court to resolve this conflict. It had the witnesses before it, observed their demeanor on the stand, and had the benefit of personal contact with the persons involved. While in this case, the Board of Review is permitted to weigh the evidence as shown in the record, it does not believe it should substitute its conclusion for that of the court. The story told by Miss Webb concerning the methods pursued by accused in escorting her to the school grounds, is not so inherently improbable or inaccurate as to justify the Board of Review in refusing to accept the findings of the court. The court elected to believe Miss Webb after undoubtedly considering all of the surrounding circumstances, including the testimony of Mrs. Wilkinson and Mr. White, instead of the accused's version of the affair. With this determination, the Board of Review can find no fault.

Assuming, however, that Miss Webb did enter the school grounds with accused freely and voluntarily (and thereby concluding that the

280379

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prosecution failed to prove the allegations of Specification 1, that accused did "wrongfully accost Kathleen Webb on a public street, and against her will grasp her, force her into a vacant area") the glaring fact remains that she desired to leave the grounds, and to depart for her home, and the accused, by his own admission, forcibly held her against her will, until, by her outcries, she attracted the presence of nearby householders who secured her release. (The remaining allegations of the specification: "and there held her until aid summoned by her outcry forced him to release her" being therefore proved without contradiction.) In addition, Miss Webb asserts that a struggle ensued between her and accused while they were on the school grounds (R 9, 14) while she was endeavoring to force herself from accused's hold. In the melee, she fell against the gates and struck the ground (R 14). The accused tacitly admits such occurrences (R 61).

The facts of this affair admitted by accused and proved beyond a reasonable doubt, are such as to constitute a violation of the 95th Article of War. The accused prowled about the public streets of an English town in the night seeking "dates" with any woman who would accept his company. He finally arrived at a speaking acquaintanceship with a public telephone operator; and he escorted her (accepting his version as being true) to the dark obscurity of a public shool grounds. The facts may only "be opposed to good taste or propriety and not consonant with usage" but when they are considered with the undisputed fact that the woman was forcibly restrained by the accused from departing from the scene of their conflict (when probably she repented her indiscretion or became frightened at the portents of the situation), forces the Board of Review to conclude that such conduct "was unbecoming an officer and a gentleman" within the meaning of the 95th Article of War (Winthrop's Military Law and Precedents (2nd Ed.) page 711).

8. Specification 2 of Charge 1 alleges that the accused did "in public * * * wrongfully say to Lilly Ellis, a resident of Gloucester, in the presence and hearing of other such residents, 'You English swine, you are all cowards, all of you,' or words that effect". The specification alleges an offense under the 95th Article of War (Withrop's Military Law and Precedents (2nd Ed.) page 718. The evidence shows that after Kathleen Webb had fled the scene of the disturbance and the altercation between accused and the witness, Egan, had been stopped, accused applied to the assembled householders (who had been attracted by Miss Webb's outcries) opprobrious epithets. Mrs. Ellis was present at this time. Witnesses testified accused used the following expressions:

S. H. White (R 33)

- "English swine, you are yellow."

Mrs. Lilly Ellis

- "You interfering British swine, I am of German origin and proud of it."

230379

Henry Alfred Ellis (R 46)

- "Interfering British swine." (He also said we were) "yellow".

The accused admits he was angry and did apply epithets to Mrs. Ellis and her neighbors (R 62, 63), but insists that he said to them that "they were pig-headed and smug, and it seemed to me in all reasonableness a person could expect a little more consideration, a little bit more of an investigation before they go off half-cocked like everything had (R 63, 66)". He denied emphatically that he said he was a German, explaining that he was of Scotch-Irish descent (R 66).

A most casual reading of the testimony is convincing that the accused was angry and embarrassed by the turn of events. He considered that there had been an unreasonable interference by residents of the neighborhood. He was also probably apprehensive as to his own safety (R 62, 63). He admits he did criticize the assembled people for their conduct. The difference between the testimony of the prosecution's witnesses and the accused's statement of what he said is only one of degree, and, in any event, such conflict as there was in the evidence was a question of fact to be resolved by the court. It chose to believe Messrs. White and Ellis and Mrs. Wilkinson. The Board of Review is unwilling to disturb such determination.

A consideration of the evidence pertinent to this specification is convincing that accused conducted himself towards the British civilians, on the occasion of this episode, in a manner for which there is neither condonation nor explanation. The behavior of the accused towards Miss Webb, viewed in the light most favorable to accused, is perfidious, but accused's language and actions when he was forced by a group of irate British citizens to free Miss Webb from his hold, is of such serious nature as to pass beyond the domain of propriety or good manners. It involves the relationship of American military personnel towards the civilians of an ally in whose country a substantial American military force is stationed. Under these circumstances, the conduct of accused assumes a more serious mien than if he were guilty of the same acts in the United States. In the opinion of the Board of Review, the prosecution sustained its burden of proving the guilt of the accused under Specification 2, Charge I.

9. The accused is thirty-six (36) years old. The record shows that he was commissioned Captain, AUS, on May 10, 1942, and was assigned to the 344th Engineer Regiment. This was an original appointment and no prior service of accused is shown.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is

230379

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legally sufficient to support the findings of guilty and the sentence. Dismissal is mandatory upon a conviction of a violation of the 95th Article of War, and is authorized upon a conviction of a violation of the 96th Article of War.

11. The accused testified at length concerning his civilian career and activities and his military experience prior to accepting his present commission. The Board of Review has no reason to doubt his representations in this regard. It appears that he has had a broad experience as an engineer and also as a construction superintendent. Fellow officers, who have been intimate with him during his present tour of duty, testified that his reputation has been unimpeachable; that he was unusually interested in the welfare of his men; and that he bore a high reputation as an officer and a gentleman. The Board of Review believes that this officer is able to render valuable service in the prosecution of the war effort. In his training and transportation to the British Isles, the Government has expended a considerable sum of money for which it is entitled to receive substantial value. The offenses for the commission of which the accused has been convicted are most serious and are viewed with particular disfavor by the Board of Review. He has earned severe strictures and condemnation. However, the Board of Review, believing that the Government should have the opportunity of availing itself of the services of accused at a time when services of the nature which the accused is capable of rendering are much needed, recommends that the sentence of dismissal of accused be confirmed but the execution thereof be suspended at the pleasure of the Commanding General, European Theater of Operations.

B. Franklin Ritz, Judge Advocate.
Edmund Ruschdorff, Judge Advocate.
O. A. G. Gde, Judge Advocate.

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J.A.G.O., ETOUSA, A.P.O. 871, 29 September 1942. - To the Commanding General, ETOUSA, A.P.O. 887.

1. Herewith transmitted is the record of trial, together with the opinion of the Board of Review, in the case of Captain John F. Kenney (O-904840), 344th Engineer Regiment (AUS).

2. Upon trial by general court-martial, this officer was found guilty of conduct unbecoming an officer and a gentleman (two specifications), in violation of Article of War 95; and assault and battery, in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial to you, for your action, under Article of War 48.

3. Prior to your action thereon, you referred the record to me under the provisions of Article of War 46, and, in order to expedite final action in the case, and more especially to insure to the accused the independent and impartial examination of the record of trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Articles of War 48 and 50 $\frac{1}{2}$, under the provisions of the latter article and, before examination by me, I referred the record to the Board of Review for its examination and opinion. Normally, pursuant to instructions of The Judge Advocate General, action by the confirming authority (other than the President) is required, under the provisions of the third paragraph of Article of War 50 $\frac{1}{2}$, before the record is referred to the Board of Review and Assistant Judge Advocate General. However, your reference of the record to me, prior to your action thereon, under the provisions of Article of War 46, which expressly authorizes such reference, since I, as Assistant Judge Advocate General, have, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, with respect to this case, like powers and duties as The Judge Advocate General, changes the normal situation indicated above. Under such circumstances, should I pass on the record under Article of War 46, in lieu of and as your staff judge advocate, and return the record for your action prior to its examination by the Board of Review, it would then be necessary, after your action, for the Board of Review and myself, as Assistant Judge Advocate General, to examine the record to determine its legal sufficiency. Such a procedure would deny the accused the independent review of the record by the Board of Review, provided by Article of War 50 $\frac{1}{2}$, since the report of my examination and my recommendation under Article of War 46 would be a part of the file of the case when it reached the Board of Review. It would also place me in the anomalous position of acting as staff judge advocate under Article of War 46 before the review by the Board of Review

and as Assistant Judge Advocate General after such review under Articles of War 48 and 50 $\frac{1}{2}$. In my opinion, to follow such a procedure would deny the accused a substantial right given him by Articles of War 48 and 50 $\frac{1}{2}$. On the other hand, by following the procedure I have adopted denies the accused nothing, but fully protects his rights. I am convinced this is the procedure The Judge Advocate General would follow on a reference to him, under Article of War 46, for the reason that, in such event, he would occupy the dual role of staff judge advocate and The Judge Advocate General, as he does when the President is the confirming authority, and would follow the procedure prescribed for the latter class of cases.

4. The Board of Review summarizes the evidence in the accompanying opinion and holds that the record is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I have carefully examined the record and, while not concurring entirely with the views expressed by the Board, I do concur in the opinion that the record is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

5. a. As to Specification 1, Charge I, it is my view that the conflict between the testimony of accused and that of the prosecutrix can more consistently be resolved in favor of the version of the latter, as the court, by its findings, obviously did so resolve it. I am forced to this conclusion largely by the vein of evasiveness which runs through the testimony of the accused, by his apparent lack of frankness, and by the fact that important parts of his testimony are inconsistent in import, if, indeed, not actually contrary, each to the other. In my opinion the weight of the evidence established the guilt of accused beyond any reasonable doubt.

b. As to Specification 2, Charge I, the evidence is even stronger. True, the witnesses do not entirely agree as to the exact language, but they are in substantial agreement and more cannot be asked. Under such circumstances, the memories of witnesses usually differ, and meticulous agreement would be ground for suspicion. Certainly all heard the terms, "swine", "cowards", and "yellow". Accused admits making some remarks in anger. According to the evidence, including his own, it seems obvious that his condition as to sobriety was not such as to place credence in his memory. His testimony that, instead of the terms mentioned by the other witnesses, he used "pig-headed" and "smug" has earmarks of a forced explanation which, to my mind, is neither convincing nor clever. The evidence fully supports the findings.

c. As to Charge I, the acts charged in the specifications without question constitute conduct unbecoming an officer and a gentleman. Guilt of the specifications having been established, guilt of the Charge follows as a matter of course.

d. The testimony of accused alone sustains the findings as to the Specification of Charge II, and Charge II. I question the legal ac-

curacy of the Board's opinion that the blows struck by accused before Miss Webb's escape "may, with all propriety, be considered as struck in self-defense", since, in my view, the actions of Egan throughout were legally justified, and self-defense excuses only the repulse of a wrong, and "is only permissible against an unlawful attack (Section 128, Wharton's Criminal Law)". However, since the Board and I agree on the legal sufficiency of the record as a whole to support the findings, further discussion of the difference of opinion would be purely academic.

6. The brief of the defense counsel has been considered. As to the investigation, there was a substantial compliance with Article of War 70 and paragraph 35 a, Manual for Courts-Martial, 1928. More is not required. Accused was permitted to read the available testimony, was advised of his rights and stated that he did not desire to offer anything in defense or mitigation, or to make or submit a statement in any form at that time. The remainder of the brief is an attempt to show that the evidence fails to establish the guilt of the accused beyond a reasonable doubt. It is purely argumentative and I am not impressed.

7. While recommending confirmation of the sentence, the Board of Review further recommends that the execution thereof be suspended at your pleasure. In this further recommendation I cannot concur. The reasons given by the Board are that it appears that the accused has had broad experience as an engineer and construction superintendent; that fellow officers testified as to his good reputation and his interest in the welfare of his men; that the Government has expended a considerable sum on his training/and transportation and should have the opportunity of availing itself of his services at a time when such services are much needed.

Such an argument, it seems to me, could be advanced in practically every case of dismissal that may confront us. The Government also has spent a considerable sum on every officer in the theater. It is to be assumed, at least, that all of these officers are qualified to render essential service. The need for such service is, of course, appreciated and admitted. But, as necessary and desirable as their services may be, in the prosecution of any war the personal conduct of our officers is also a vital factor. As well said by the staff judge advocate of the reviewing authority in his review, - punishment has two purposes, - reformation and prevention, the latter being the more important, particularly in this theater where our troops, and especially our officers, are considered as representatives of our Government, and their misconduct reflects directly on our Government and its military leaders. It is highly essential for the conduct of our officers to be kept at a high standard. Unfortunately, casualties will occur in this field as well as on the field of battle, and it is as important to endeavor to keep the conduct casualties to a minimum as it is to keep battle casualties to a minimum.

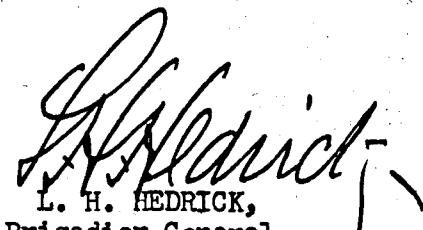
Were we concerned solely with the punishment and reformation of the accused, I would be more inclined to follow the Board's recommendation. However, on this score I do not think a strong case for clemency is made out. This officer has been in the service only since May 10, 1942, most of the time, prior to embarking for this theater on July 1st, spent in training. This comparatively short period of observation and association scarcely furnishes adequate opportunity accurately to judge one's character. He had been in the theater but two weeks when the affair which precipitated his trial took place. He is a married man. Even accepting his own version, his conduct with Miss Webb was reprehensible, and, in the words of the Board of Review, his "language and actions when he was forced by a group of irate British citizens to free Miss Webb from his hold, is of such serious nature as to pass beyond the domain of propriety and good manners. It involves the relationship of American military personnel towards the civilians of an ally in whose country a substantial American military force is stationed. Under these circumstances, the conduct of the accused assumes a more serious mien that if he were guilty of the same acts in the United States".

Nor is this the type of case where the misconduct occurs "within the family", so to speak, where it is known only to our own military personnel. There, often reformation is the primary object of punishment and suspension of the execution of a sentence of dismissal may well be justified. Here, however, the performance was staged in public, before a British audience, and was investigated by British authorities. This brings into full play the importance of punishment as a deterrent. To suspend the sentence under such circumstances well might give rise to an erroneous impression with many young officers unaccustomed to the Army and unaware of the standard of conduct expected of them; and to our allies such leniency would smack of temporizing. To them it would appear that the accused had escaped punishment, and they could be expected to conclude that our "severe" punishments were merely camouflage set up to deceive them as to our real purpose.

To place ourselves in this position is, to my mind, untenable, and could easily result in discrediting our forces, as well as our Government, with the British nation. Hence, regrettable as ordering the execution of a sentence of dismissal may be, I am convinced that this is not a case for temporizing. Being the first case of the kind in this theater, the action on this sentence will set a precedent, in that it will serve notice on the officers of this command as to what they may expect should their conduct materially fall below the standards desired and demanded of officers of the Army of the United States; and will furnish to the British public and the British authorities an illustration of our conception of standards of conduct and the measures taken by us to insure compliance with and to punish violations of such standards.

I accordingly recommend that the sentence be confirmed and ordered executed; and I further recommend that, should you decide to suspend the execution of the sentence, this officer be not kept within the British Isles.

8. Inclosed herewith is a form of action confirming the sentence and directing that it be carried into execution, and also a form of action confirming the sentence and suspending its execution.


L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

2 Incls:
Forms of action.

(Sentence confirmed and ordered executed. GCMO 1, ETO, 2 Oct 1942)

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25

WAR DEPARTMENT
 In the Office of The Judge Advocate General
 for the
 European Theater of Operations
 APO 871

Board of Review

ETO 29.

OCT 10 1942

U N I T E D S T A T E S	:	Trial of G. C. M. convened at
	:	Victoria Barracks, Belfast, N.I.
	:	August 31, 1942. Dishonorable
	:	Discharge, forfeiture of all pay
Private WILLIAM E. DAVIS, 38042586, 518th Engineer Company (WS)	:	and allowances and confinement
	:	at hard labor for eight (8) years,
	:	Federal Reformatory, Chillicothe,
	:	Ohio, designated as the place of
	:	confinement.

HOLDING by the BOARD OF REVIEW
 RITER, VAN BENSCHOTEN AND IDE, Judge Advocates.

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

Accused was convicted of voluntary manslaughter under the 93rd Article of War. His age is 23 years. His length of military service is one (1) year, three (3) months. The character of his service is excellent. He suffered one (1) previous conviction under the 96th Article of War for breaking quarantine restrictions. Pursuant to the policy declared in G.O. 37, ETOUSA, 9 September 1942, par. 5, c and d, the return of the accused to the United States and the execution of the sentence to dishonorable discharge is authorized inasmuch as the accused was convicted of a crime (manslaughter) which makes it undesirable to retain him in the military service and his sentence is for more than three years, viz 8 years. Confinement in the Federal Reformatory, Chillicothe, Ohio is authorized (See: War Department Directive, 26 February 1941, AG (2-6-41) E.).

235609-1 **CONFIDENTIAL** 29

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B. Frank Ritter, Judge Advocate.
Donald Brewster, Judge Advocate.
O. J. T. De, Judge Advocate.

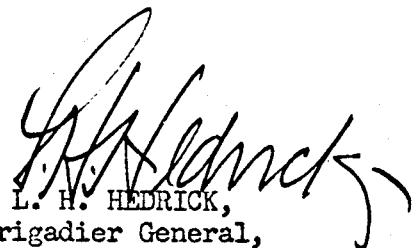
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OCT 10 1942

J.A.G.O., ETOUSA, A.P.O. 871 To the Commanding General,
V Army Corps (Reinf) A.P.O. 305, U. S. Army.

1. In the case of Private William E. Davis, 38042586, 518th Engineer Company (WS), attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 29. For convenience of reference, please place that number in brackets at the end of the published order.

(ETO 29.)


L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

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WAR DEPARTMENT
In the Office of The Judge Advocate General
for the
European Theater of Operations.
APO 871

(31)

Board of Review

FIRST ARMORED DIVISION

ETO 72

NOV 5 1942

U N I T E D S T A T E S)	Trial by G. C. M. convened at
:		Castelwellan, County Down,
v.	:	Northern Ireland. October 9, 1942.
:		DD. TF. and CHL for ten years.
Private HERBERT G. JACOBS, (15056622), Company H, 13th	:	Federal Reformatory, Chillicothe,
Armored Regiment, and	:	Ohio.
Private EMBRA H. FARLEY, (37101923), Company H, 13th	:	
Armored Regiment.)	

OPINION of THE BOARD OF REVIEW,
RITER, VAN BENSCHOTEN and IDE, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Embra H. Farley, Company H, 13th Armored Regiment, and Private Herbert G. Jacobs, Company H, 13th Armored Regiment, acting jointly and in pursuance of a common intent, did at Aghalee, Northern Ireland, on or about 21st of September, 1942, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill, Edward Clenaghan, a human being, by striking him on the head and body with their fists, a helmet or some unknown blunt instrument.

Each of the accused pleaded not guilty to the Charge and Specification. Of the Specification each accused was found guilty, except the words "with malice aforethought", "deliberately and with premeditation"; of the excepted words, not guilty. Of the Charge, each accused was found not guilty, but guilty of the 93rd Article of War. No evidence of previous

72

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convictions of either of the accused was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 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. At Soldierstown, Aghalee, Northern Ireland, prior to and on 21 September, 1942, dwelt a Mrs. Clenaghan and her family consisting of her two sons, James Joseph and Edward, and her daughter Winefred (R.19, 20, 23, 25). Mrs. Clenaghan owned and operated a licensed public house (R.20, 23), located at the intersection of the main Aghalee-Moira road with a cross road which also leads to Moira (R.48). The family dwelling quarters were in the rear of the tap-room (R.20, 24). Mrs. Clenaghan's children were adults and unmarried (R.20, 25). James Joseph was a farmer (R.23). Edward, age 47 years, previously was a cripple on crutches (R.25), having been afflicted with hip-joint disease (R.27), but had recovered sufficiently so that he could ride a bicycle (R.27). He assisted in the operation of the public house (R.25).

The accused were members of Company H, 13th Armored Regiment. On and prior to 21 September, 1942, a detachment of this Company was bivouacked in a field adjacent to the public road leading from the public house to Aghalee (R.7). Across the road from the bivouac was a cow barn, where on the evening of that date, the accused were billeted (R.5, 7).

On the evening of 21 September, 1942, the accused and other members of Company H were visiting in the Clenaghan public house (R.8, 20), and consumed a considerable amount of intoxicating liquor (R.20, 21). The bar was closed at 9 p.m. and the patrons of the public house were requested to leave (R.23). With the exception of the accused all of them left in an orderly manner (R.8, 23), and departed for their camp (R.9, 23). The accused remained and demanded that they be served additional alcoholic beverages (R.8, 20, 23), but finally were prevailed upon to leave (R.8), and the public room was closed (R.20, 23). When accused left, they took with them some half-pint bottles of stout (R.21, Ex.A). The stout made the bottles appear black in color (R.21). The accused were the last of the soldiers to leave the bar room (R.20, 23), but remained in the road in front of the public house (R.9).

At about 9.15 p.m. Mrs. Clenaghan, James Joseph, Edward and Winefred were in the kitchen at the rear of the bar room (R.20, 23). They heard the sound of breaking glass (R.20, 23, 24), and of foot-steps of men running (R.24). James Joseph investigated and found that one of the windows in the bar room had been broken (R.20, 24, 25, 44). Discovering no one in the bar (R.24), he went out on to the road and a short distance from the public house in the direction of Aghalee (R.24), he encountered accused (R.24). He remonstrated with them, but they demanded more drink (R.24), and waved two beer bottles at him (R.24). James Joseph urged them to go up the road stating that they might be able to find drink elsewhere (R.24). He returned to the hall door entering the bar room and accused followed him part way demanding more drink.

Eventually they went up the road, and James Joseph returned to the kitchen, (R.24), where he found that his brother Edward had left on his bicycle (R.21, 22, 24), at about 9.15 or 9.20 p.m. to report to the commanding officer of the American Camp on the road (R.26).

At approximately mid-night (21-22 September, 1942) Edward Clenaghan was discovered lying on the left hand side of the road leading to Aghalee, about three-tenths (.3) mile distant from the public house (R.27, 28, 29, 35). His head was in the ditch at the road side (R.25, 29), and his legs and feet projected on to the traveled part of the road (R.25, 29). The witness, Hendron, (R.27), who made the discovery, stopped a passing motorist and requested that he summon the constabulary (R.28). Constable McFarland arrived, at about 12.25 a.m., 22 September, 1942 (R.25, 29). Edward Clenaghan was unconscious. He had a lacerated wound over his left eye brow two inches long, his left eye was blue and he had a lacerated wound on the lower side of his chin (R.29, 31). They removed him to the Lurgan hospital in a motor lorry (R.29), where, without regaining consciousness, he died at 7.02 a.m., 22 September, 1942, as a result of a basal fracture of the skull (R.32). The fracture could have been caused by a bottle, blunt instrument or the edge of a soldier's helmet (R.31).

There was found, scattered on the Aghalee road within three or four feet of the body of the deceased, pieces of broken glass from mineral water or soft drink bottles (R.29, 30). About ten yards from where deceased lay there was also found a pint sized tumbler or water glass (R.29). This tumbler was identified by Winifred Clenaghan as being one belonging to and used in her mother's licensed public house (R.21, 22).

4. The accused, Farley, on 17 September, 1942 was suffering from an attack of pharyngitis, an infection of the throat membranes (R.4). Pharyngitis may develop into laryngitis, an inflammation of the larynx, which is indicated by hoarsness or huskiness of the voice (R.4).

Between 8 p.m. and 8.30 p.m., 21 September, 1942 Corp. Fred. C. Russell, Co. H., 13th Armored Regiment went to the billet of accused and left verbal orders that they were to report at mid-night to go on guard. They failed to report on post (R.5, 6). Both of them left the billet at dusk on the evening of 21 September, 1942. By mid-night neither had returned, but accused Jacobs returned to the billet and went to bed sometime between mid-night and 2 a.m., 22 September, 1942 (R.7). Accused Farley did not return to the billet (R.7).

Shortly after 9 p.m. on 21 September, 1942, two persons, taken by him to be American soldiers, stopped at the home of a Mr. Smylie, located on the Aghalee road about 100 yards in the direction of Aghalee from Clenaghan's licensed public house (R.44), and asked for a drink of water. He gave them water and noted that one of them who was very hoarse wore an oil-skin coat (R.44, 45).

The soldiers left Smylie at about 9.15 p.m. and went up the road towards Aghalee.

(34)

George Henry Hendron, a civilian (R.47), at about 9.45 p.m. on the same evening encountered an American soldier, clad in a glazed water-proof coat at Aghalee, who enquired in a hoarse voice as to where he could be taken in for the night (R.48).

At about 10.10 or 10.15 p.m., the accused Farley was seen sitting on a stone wall at Aghalee village corner by Sergeant Robert Stewart Smith who was in charge of the barracks of the R.U.C. at Aghalee (R.43). It is 2.2 miles from the R.U.C. Barracks to the Clenaghan public house (R.44, 48). Farley was under the influence of drink; his voice was "very, very bad"; and he had his helmet in his hand (R.43). He said he had been on manoeuvres, but had become lost from his party (R.43). The constabulary sergeant suggested that Farley telephone from the barracks for transportation (R.43) which Farley did about 10.45 p.m. He appeared to have been drinking liquor but was not drunk. His voice was very hoarse, and he seemed to have a cold in his throat (R.19). Army transportation was provided (Ex. B) and he was taken to the camp of the 81st Reconnaissance where he remained for the night (R.17), being still very hoarse the next morning (R.17).

James E. Beckett, a civilian, at about 9.30 p.m., 21 September, 1942, encountered an American soldier on the Aghalee road about one-half mile from the Clenaghan public house in the direction of Aghalee. After enquiring where he could find a wine lodge the soldier struck Beckett on the nose (R.15) with something hard, felling him into a hedge (R.46). Hendron, the civilian witness before mentioned, prior to his meeting with the soldier wearing a "glazed water-proof coat", encountered another American soldier who had fallen over a bicycle. This soldier stated he was drunk and he had to go about 30 miles. This encounter occurred between 9.30 p.m. and 9.45 p.m. (R.47)

At about 11.30 p.m., 21 September, 1942, an American soldier called at the home of William R. McKeown who was lock-keeper on the canal and a member of the special constabulary at Aghalee. He had been preceded in the McKeown home by Mathew Wilson, Sr. and Thomas Chapman (R.32, 38). The McKeown house is near the canal which crosses the Aghalee road immediately below Aghalee and about 1.4 miles from the Clenaghan public house (R.49). After drinking stout and tea the four men - the soldier, McKeown, Wilson and Chapman - left the McKeown house and walked to the Wilson house which is situate on the Aghalee road going from the McKeown house in the direction of the Clenaghan public house (R.33, 38). McKeown walked with Chapman and Wilson walked with the soldier (R.33, 38). The latter pair walked under a horse walk arch under a canal bridge. The former couple passed over the bridge on the road (R.33, 34, 38). In the horse walk arch was a bicycle (R.33, 34, 38), which the soldier presented to Wilson (R.33, 34, 38, 40), who rode it to his home (R.33, 34, 38). The four men entered the Wilson house (R.33, 34, 36, 38, 40), where the soldier displayed card tricks to them and Mrs. Wilson (R.33, 34, 38, 40). Chapman, Mathew Wilson, Sr. and Mrs. Wilson, Sr. in their testimony positively identified accused, Jacobs, as the soldier involved in this transaction (R.34, 38, 40), as did Mathew Wilson, Jr. (R.36). The last named person arrived at the home of his father, Mathew Wilson, Sr. while the soldier, Chapman and McKeown were present with his

father and mother (R.36, 40, 41), and he informed them that Edward Clenaghan had been found "near dead" on the road (R.36, 40, 41). The soldier, Jacobs, (as identified by Chapman, Wilson, Sr., Mrs. Wilson, Sr., and Wilson, Jr.) asked "which way, out towards Aghalee?" (R.36, 41). Wilson, Jr. replied; "No, down there", pointing towards Clenaghan's public house (R. 36, 39, 41). Wilson, Jr. identified, while on the witness stand at the trial, the bicycle which had previously been admitted in evidence (Ex. E) as the bicycle he found at his father's home on the night in question (R.37, 40) and which he advised his father to deliver to the constabulary (R.37). Wilson, Sr. also identified the bicycle as the one given to him by Jacobs (R.40). The soldier, Jacobs, left the Wilson home about 12.30 a.m. 22 September, 1942 (R.37, 39) accompanied by Wilson, Sr. who walked with him for a half mile up the road to the armored vehicle of the soldiers (R.39). While at the Wilson home, the soldier wore a helmet (R.35, 41). Mrs. Wilson testified there was a spot of blood on the helmet (R.41) and three or four dents in it (R.42) and that there was also a spot of blood on the left sleeve of the overalls worn by the soldier (R.42). The soldier, Jacobs, informed Mrs. Wilson that he had been fighting with "one of my own chaps and fighting with a man like my husband" (R.42).

The bicycle, introduced in evidence and identified as "Exhibit E", was delivered by Wilson, Sr. at 2 a.m. 22 September, 1942 to Special Constable Samuel McKeown at the R.U.C. barracks (R.18). After it was introduced in evidence, it was positively identified as being the property of the deceased, Edward Clenaghan, by his sister, Winefred (R.21), and his brother James Joseph (R.26).

A soldier's helmet was also introduced in evidence and was identified as "Exhibit C" (R.14). It was worn by the accused, Jacobs, at the time of his arrest (R.14). There are four dents in the helmet: one directly in the high front center, one right front, one almost directly on top and one in the left rear (R.15).

6. The accused, Farley, was placed under arrest on the morning of 22 September, 1942 (R.11) at the location of the 81st Reconnaissance. At that time he was dressed in combat suit, wore his helmet, and was very hoarse (R.17). He was under suspicion, not accusation and was duly warned concerning his rights to speak or remain silent (R.11). On 23 September, 1942, after receiving a like warning (R.10, 11, 12, 13) he elected to make a written statement (R.11, 12), which was introduced in evidence as "Exhibit A" (R.14). After Charges were filed and the case was in process of investigation under A. W. 70, accused Farley made a further statement on 3 October, 1942, having previously received the warning required by par. 35 U. C. M. (R.16). The statement was reduced to writing and admitted in evidence as "Exhibit D" (R.16).

The accused, Jacobs, was arrested also on suspicion (R.10) separate and apart from accused, Farley, at the camp of his battalion (R.15) on 22 September, 1942 (R.11). On 24 September, 1942, he was questioned by Major Joseph H. Kifer, F.A., Lurgan, N.I., in the presence of Capt. Barry W. League, 13th Armored Regiment, and Sgt. Donald W. John, 205th Military Police Company, Lurgan Detachment, after being first fully advised of his rights in answering questions (R.10, 13). The examination was taken

stenographically; reduced to writing; signed by Jacobs and was admitted in evidence as "Exhibit B" (R.13). Thereafter when the case was under investigation, after filing of charges, Jacobs, after being warned as to his rights to talk or remain silent, made the same declaration as did Farley but stated he could not remember any facts to make a further statement (R.16).

Each of the accused before making his statement had been informed that Edward Clenaghan was dead and that they were under suspicion of murdering him (R.12). Major Kifer, stated to each of the accused, prior to the making of their respective statements, that while they did not have to make a statement it would ease their minds if they told what they knew about the case (R.10, 12, 13). No promise of leniency or threats were made to either of accused (R.10, 12, 13).

7. The battalion of which the accused Jacobs was a member was held in ranks after breakfast on 22 September, 1942. Mathew Wilson, Sr. identified Jacobs as the soldier who was with him the preceding evening and who gave him the bicycle (R.15, 39, 40). At 3 p.m. on 22 September, 1942, an identification parade of American soldiers was held. Both of the accused were identified by Winefred Clenaghan (R.15), and James Joseph Clenaghan (R.25) as being the men who were at the Clenaghan public house the evening of 21 September, 1942, and whom James Joseph met on the road after the breaking of the window.

At approximately 12.30 p.m. 22 September, 1942, both of accused were carefully examined by Major Joseph A Ridgeway, Medical Corps, Special Troops, V Army Corps, and he found no evidence of injuries (R.17). The examination of Farley was repeated by the same medical officer at 12.15 p.m., 23 September, 1942, and he again found no evidence of injuries. A similar examination of Jacobs was made by the same officer at 12.30 p.m., 24 September, 1942 and no evidence of injuries was found.

8. Both of accused elected to remain silent at the trial after again having their rights explained to them (R.49). There is no direct evidence from eye witnesses that the accused inflicted injuries upon the deceased which caused his death. There can be no doubt that at about 9.15 p.m., 21 September, 1942, the accused and deceased met upon the public road a short distance from the Clenaghan public house. The peregrination of each accused from the time of such meeting to the hour of their respective apprehensions is traced with accurateness as to time, incident and place. Each episode involving accused, happening as they progressed separately up the road towards Aghalee, after the time during which the assault upon deceased must have occurred, cogently proves the ultimate fact that they were the persons who inflicted the fatal injuries upon the deceased. Farley's hoarse voice and his oil-skin coat; the unprovoked assault upon the civilian, Hendron by an American soldier; Jacobs' possession of the deceased's bicycle and his gift of same to Wilson, Sr. together with his ownership of a dented and blood-spotted helmet and blood-spotted uniform; the positive identification of each accused by disinterested civilians, and the finding of the Clenaghan tumbler or glass at the scene of the fight,

are facts beyond dispute. When they are considered in connection with the time element and the movements of each accused during the night, they present a composite picture and lead to the conclusion that the accused not only encountered the deceased but also fatally assaulted him. A further detailed examination of the evidence on this point is unnecessary. Its recital is sufficient.

9. The rulings of the Court admitting in evidence Farley's two statements of 23 September, 1942, and 3 October, 1942, and the transcription of Jacobs' examination and interrogation of 24, September, 1942, (R.14, 16, Exs. A. B. D), were free from error or prejudice to the accused. The prosecution laid the necessary foundation for the introduction of Farley's statements and Jacobs' answers to the oral interrogatories propounded to him (R.9 - 16). It is clear that each of the accused received proper and timely warnings of their rights when so questioned, and that no compulsion was used upon nor leniency was offered to either of them. Major Kifer's statements to them "that it would ease their minds if they told what they knew about the case" and "that it might be best for them to get it off their minds" (R.10) must be considered in the light of circumstances under which they were made. In view of previous or simultaneous warnings to the accused concerning their rights to remain silent, it is not possible to construe these statements of Major Kifer as constituting either threats or bribes. They were expressions to them of the opinion of the officer that if the accused spoke honestly and frankly they would experience more tranquility of mind. They were but "casual remarks or indefinite expressions" and as such cannot "be regarded as having inspired hope or fear" (M. C. M. sec. 114a, pg. 116).

"It is well settled that a confession will not be excluded because of a mere exhortation or adjuration to speak the truth. On the question whether an exhortation accompanied by an expression that it would be better for accused to speak the truth is sufficient to exclude a confession, the authorities are divided, some holding that it is, and others that it is not. The real question is whether the language used in regard to speaking the truth, when taken in connection with the attending circumstances and with other language spoken in the same or in some prior interview, shows that the confession was made under the influence of some threat or promise, the confession being inadmissible where it was made under such influence, and being admissible where no threat or inducement was made or offered." (16 C.J.S. 1476, pg. 721).
 See also: 2 Wharton's Criminal Evidence, sec. 624, pg. 1046)

10. The evidence concerning the actions of each of the accused on the evening of 21 September, 1942, together with proof of Edward Clenaghan's death are sufficient proof of the corpus delicti to permit the use of the confession;

"If unlawful homicide is charged, evidence of the

234999

CONFIDENTIAL

death of the person alleged to have been killed coupled with evidence of circumstances indicating the probability that he was unlawfully killed, will satisfy the rule and authorize consideration of the confession if otherwise admissible". (M. C. M. sec. 114a, pg. 115).

"It has been said that the corroboration of an extrajudicial confession is met if the additional evidence is sufficient to convince the jury that the crime charged is real, and not imaginary; and again, that it is sufficient if the independent evidence establishes the corpus delicti to a probability. In the last analysis however, the sufficiency of the corroboration of a confession must depend on the circumstances of each case, always having in view that the essentials of the crime must be established beyond a reasonable doubt" (2 Wharton's Criminal Evidence (11th Ed.) sec. 641, pg. 1073). (cf. Isaacs vs. United States, 159 U. S. 487; 40 L. Ed. 229).

11. Inasmuch as the confessions of the accused were legally admitted in evidence and are part of the prosecution's case it is desirable to consider the effect of same in connection with other evidence in the case. Farleys' confessions were admissible as against him but not as against Jacobs. Jacobs' answers to the questions propounded to him, being in fact a confession, were admissible as against him, but not as against Farley. (M. C. M. sec. 114c, pg. 117; 2 Wharton's Criminal Evidence, sec. 714, pg. 1204). It should also be observed that the declaration or confession of one co-defendant that he alone committed the offense with which both are charged is not admissible in favor of the other defendant. (16 Corpus Juris, sec. 1340, pg. 670; 2 Wharton's Criminal Evidence, sec. 722, pg. 1215). The court was at liberty in applying each confession to the accused making it, to believe all or any part of it. It was its function to weigh and evaluate it, and reconcile it with the other evidence in the case against the confessor (excluding of course the confession of the co-defendant). The determination of the reliability of each accused in making his statement, and the truth or falsity of each confession were matters within the exclusive province of the Court. While each of the accused elected to remain silent and did not appear on the witness stand, their presence in the court room afforded the Court the opportunity of observing their demeanour and conduct and forming an opinion as to their respective mentalities and moral statures. (2 Wharton's Criminal Evidence, sec. 644, pg. 1078).

12. The pertinent details of the fatal encounter, as narrated by Jacobs are as follows:

"After we broke the glass, we went up and got a drink of water, we goes on up the road and meets this guy. He gets off his bicycle, we were

there talking about something-- I am telling you the truth now I don't know just, what was said, but any how, the next thing I know me and him, me and this guy, was over in the ditch and he was on top of me. He was on top of me and I kicked him off. I was laying with my head right on an angle of the ditch. He was on top of me and I kicked him off. When I got back off, he grabbed me around like this (both arms around the waist) and my helmet flew off and I grabbed my helmet and hit him with that. After we quit fighting, I picked the man up and asked him if he could get where he was going. I didn't know the man.***"(pg. 1, Ex. B)

"Me and this man was laying in the ditch.*** Yes (the man was on top of me) and I kicked him off. I drawed my feet off and kicked him off. When I got up and started to get on the bank, he grabbed me around like this (both arms around the waist) and we went down again: I don't know how I got up then. Anyhow, I know my helmet came off and I hit him with my helmet. I didn't hit him no four or five times with that helmet". (pg. 2, Ex.B)

"When I hit him with the helmet I was up on my knees and got back against the bank. I had this arm back against the bank when I hit him. It was kind of a little ditch and I was up on my knees when I hit him. I didn't hit him very hard and I didn't hit him but once with it." (pg.5, Ex.B).

The accused, Jacobs, in his answers to the interrogatories, admits that Farley was present when the conversation with deceased commenced, but declares he never saw Farley strike deceased (pg.1, Ex.B); declares he did not hear Farley tell deceased he (Farley) would pay for the broken bar-room window (pg. 3, 6, Ex.B); declares that he has no memory that the cost of whisky was under discussion (pg. 6, Ex.B); declares he has no memory of deceased stating that the "Americans thought they ought to get everything for nothing" (pg. 7, Ex.B); denies that he (Jacobs) told deceased that he (Jacobs) was man enough to whip the whole of Northern Ireland (pg. 7, Ex.B), and declares he did not remember deceased saying to Farley that he (deceased) "would cut his bloody throat" (pg. 7, Ex.B).

Farley's recital of the critical incidents of the fight is as follows:

"*** this man said we had gone far enough and he put his hand in his pocket and said: "I will cut your bloody throats", and I hit him with my fist, and Jacobs started swinging at him with his steel helmet and I heard the helmet hitting something, and I turned and took off up the road as I was

afraid he might have a gun and shoot. *** (Ex.A).

"*** and he said we had gone far enough and put his hand in his pocket and said 'I'll cut your bloody throats'. He stepped towards us and I "shoved him back. He throwed up his left hand when I shoved him back. Jacobs said: 'let me have him', and he struck him with his helmet but didn't knock him down. And I told Jacobs 'to let him alone' and not have any trouble with him, to let's go. And I turned and started off and Jacobs told me 'to go on' and he'd come on when he got ready. And I left and went up the road*** (Ex.D).

In connection with the confessions of accused it is necessary to consider the testimony of Dr. James O'Connel, the House Physician of Lurgan and Portadown District Hospital, who attended deceased, and who was qualified to speak as an expert. He described deceased's injuries thus:

"I found a lacerated wound over his left eye brow, one two inches long and blackened bruises of the upper left, the right pupil was dilated and fixed, the left contracted, neither responded to light. Lacerated wound to the left side of the chin, there was dried blood around the nostrils due to external wound. The cause of death was cerebral laceration following fracture of the skull. The patient was unconscious and did not regain consciousness, his pulse was slow and binding, and there were no internal signs of injury" (R.31).

The doctor further testified that the injuries were due to a blow - direct violence; that a fist might have caused it and any blunt instrument could have caused it (R.31); that there were no scratches about the injury; that if the helmet were used to strike a man its rough surface would probably leave scratches; that the fracture could have been caused by a bottle; that the injuries could not have been caused by the crown of the helmet although the edge may have; that the fact deceased wore a hat when struck would not have prevented the injury (R.31); that the location of the fracture was at the base of the skull "about the center of the ear but level with the eye" (R.32).

Jacobs' helmet (Ex.C) is the regulation (new style) army helmet. It has been carefully inspected by the Board of Review and a serious doubt has been raised in the minds of the members thereof that the helmet was the means or instrument by which deceased was killed. The dents in the helmet do not appear to be such as would result from striking the human skull. Rather they appear to have been produced by striking the helmet against a firm, hard, projecting object. Tests made by the Board indicate that a blow on the human skull sufficient to have made the dents would have either seriously lacerated deceased's scalp or crushed the skull bone. However, it is recognized that it is within the realm of possibility for Jacobs to have struck the fatal blow with the edge of the helmet, and that therefore such theory should not be discarded as an impossibility.

Farley undoubtedly with his fist struck deceased a severe blow on the side of his head. Dr. O'Connel states that a fist blow might have caused the fracture. This expert opinion taken with the fact that the fracture was on the side of the head above the ear and level with the eye arouses a strong conjecture that Farley's first blow caused the fracture. In any event such theory should be included in any estimate of the situation.

It therefore appears that it is within the range of reasonable possibility that either Farley or Jacobs, separately could have struck the fatal blow. Further it lies within the realm of logical possibility that the fracture was the result of both Farley's and Jacobs' batteries. It is certain that either one or both of the accused actually inflicted the injury to deceased which caused his death. This homicide is clearly not murder; it is manslaughter beyond all peradventure.

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought." (1 Wharton's Criminal Law, sec. 423, pg. 640).

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary." (M. C. M. sec. 149, pg. 165).

"If a sudden quarrel arises, the parties to which fight, upon fair terms either immediately or at a place to which they immediately resort for that purpose, and one of them is killed, the person killing the other, provided he took no unfair advantage, is guilty of man-slaughter and not murder, whichever of them may have struck the first blow." (9 Halsbury's Laws of England (2nd Ed.) sec. 755, pg. 440; sec. 748, pg. 436).

"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 on some jurisdictions been made expressly to include a killing without malice in a sudden fray. 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, pg. 1128; sec. 121, pg. 1138).

"Manslaughter at common law was defined to be the unlawful and felonious killing of another without any malice, either express or implied.**** Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, viz., the circumstances leading up to and surrounding the killing. The definition of

the crime given by U.S. Rev. Statutes, sec. 5341 is substantially the same. 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 facts for the jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder or 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).

It was not necessary for the prosecution to prove specifically which of the accused struck the fatal blow. The evidence beyond a reasonable doubt excludes the possibility of any person or persons other than the accused participating in the fight with the deceased at the time and place fixed definitely by the evidence. Likewise any other cause or causes of death except blows inflicted by accused are excluded from consideration. Under circumstances shown by the record in this case Farley and Jacobs were common and joint participants in the assault and battery upon deceased and are equally responsible for his death.

"All persons who are present when a crime is committed, and who take part in the actual perpetration of it, or aid or abet those who perpetrate it are called principals." (9 Halsbury's Laws of England, sec. 27, pg. 28)

"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 Corpus Juris, sec. 117, pg. 130).

"Where one assailant strikes a blow which is not fatal, and a confederate follows it up with a fatal blow, both are principals in the homicide." (1 Wharton's Criminal Law, sec. 255, pg. 340)

"**** if men join together to break the peace, if in the course of the transaction a fatal blow is struck, in my opinion that is the blow of all,

234999 - 12 - 11/11/1971

although the person before you is not the man who actually struck the blow, he is equally guilty with the man who actually did it****" (Reg. v. Harrington, 5 Cox's Criminal Law Cases, pg. 231).

The Board of Review is therefore of the opinion that the record is legally sufficient to support the finding that both the accused, Farley and Jacobs, are guilty of voluntary manslaughter.

13. The sentences of the Court which have been approved by the reviewing authority, are legal. The accused, Jacobs, was 22 years 6 months old and the accused Farley, 26 years 6 months old at date of commission of offense. Pursuant to G.O. 37, ETOUSA, 9, September, 1942, pars. 5c and d, execution of sentence of dishonorable discharge will be ordered only when accused has been convicted of an offense which renders his retention in the service undesirable, and when he has also been sentenced to a term of not less than three years confinement. A general prisoner whose approved sentence to confinement is for three years or more may be returned to the United States for the service of such sentence, without express orders Hdqs. ETOUSA. Voluntary manslaughter when committed under the circumstances of this case is an offense which renders the retention of accused in military service undesirable and inasmuch as confinement is for ten years, the execution of the sentence to dishonorable discharge, and the return of the accused to the United States for service of sentence are proper.

War Department Directive, A.G. 253 (2 - 6 - 41) E. 26 February, 1942, requires prisoners under 31 years of age and with sentences of not more than ten years be confined in a Federal correctional institution or reformatory. The action of the reviewing authority correctly fixes the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of both accused.

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

Judge Advocate.

Judge Advocate.

Judge Advocate.

CONFIDENTIAL 72
-13-

234999

(44)

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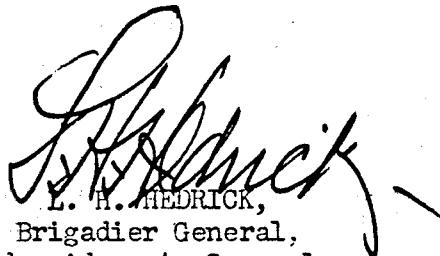
WAR DEPARTMENT, Office of The Judge Advocate General, European Theater
of Operations, A.P.O. 871, U.S. Army. NOV 5 1942

To: Commanding General, 1st Armored Division, A.P.O. 251, U.S. Army.

1. In the case of Private Herbert G. Jacobs, (15056622), Company H, 13th Armored Regiment, and Private Embra H. Farley, (37101923), Company H, 13th Armored Regiment I concur in the foregoing holding of the Board of Review. You now have authority to order the execution of the sentence as thus 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 72. For convenience of reference, please place that number in brackets at the end of the published order.

(ETO 72)


L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

WAR DEPARTMENT
In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871.

(45)

Board of Review.

. 5TH INFANTRY DIVISION

ETO 78

26 NOV 1942

UNITED STATES)

) TRIAL by G. C. M. convened at
: Camp Curtis, Iceland, October 5,
: 6 and 7, 1942. Dishonorable
: discharge, forfeiture of all pay and
: allowances due or to become due and
: confinement at hard labor for
: 30 years, United States Penitentiary,
: Lewisburg, Pennsylvania, is designated
: as the place of confinement.

v.

Private MONTANA WATTS, (7041515),
Battery C, 46th F.A. Bn.

HOLDING of the BOARD OF REVIEW

RITTER, VAN BENSCHOTEN and IDE, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private MONTANA WATTS, Battery C, 46th Field Artillery Battalion did, at Smaravellir, Iceland, near Camp Hilton, on or about August 30, 1942, in the nighttime feloniously and burglariously break and enter the dwelling house of George Vilhajlnsson, with intent to commit the felonies, viz: rape, robbery and murder therein.

Specification 2: In that Private MONTANA WATTS, Battery C, 46th Field Artillery Battalion did, at Smaravellir, Iceland, near Camp Hilton, on or about August 30, 1942, with intent to commit a felony, viz: rape, commit an assault upon Klara Sigurdardottir by wilfully and feloniously attempting to have sexual intercourse with her forcibly and against her will.

284389

CONFIDENTIAL

(46)

Specification 3: In that Private MONTANA WATTS, Battery C, 46th Field Artillery Battalion did, at Smaravellir, Iceland, near Camp Hilton, on or about August 30, 1942, by force and violence and by putting her in fear, feloniously take, steal and carry away from the person of Klara Sigurdardottir, one ladies' wrist watch the property of Klara Sigurdardottir, value about twenty dollars and forty cents (\$20.40).

Specification 4: In that Private MONTANA WATTS, Battery C, 46th Field Artillery Battalion did, at Smaravellir, Iceland, near Camp Hilton, on or about August 30, 1942, with intent to commit a felony, viz: murder, commit an assault upon Klara Sigurdardottir by wilfully and feloniously striking said Klara Sigurdardottir on the head with a dangerous instrument, to wit, a hatchet.

He pleaded not guilty to, and was found guilty of, the charge and specifications. Evidence was introduced of one previous conviction. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. For convenience the names of civilian Icelandic witnesses are designated herein as follows:

NAME OF WITNESS	DESIGNATION
Mrs. Klara Sigurdardottir, the victim.	Klara
Georg Vilhjalmsson, the owner of Smaravellir; husband of Mrs. Gudbjorg Megvantsdottir (Gudborg) and father of Anna Georgsdottir (Anna II) and Hallfridur Georgsdottir (Halla).	Georg.
Mrs. Gudbjorg Megvanstdottir.	Gudbjorg.
Anna Gerdur Gunndottir, daughter of Gunnar Steffanson and Laura Jonsdottir.	Anna.
Hallfridur Georgsdottir daughter of Georg and Gudbjorg.	Halla.
Anna Georgsdottir, a daughter of Georg and Gudbjorg.	Anna II.
Trausti Olafsson, neighbor of Georg and Gudbjorg and chief chemist of University Reykjavik.	824889 Trausti.

CONFIDENTIAL

NAME OF WITNESS

DESIGNATION

(47)

Injgaldur Isaakson,
neighbor of Georg and Gudbjorg

Isaakson

Sverrir Sigurdsson,
a jeweller.

Sigurd

Haukur Magnusson,
a policeman.

Haukur

4. On 29 August 1942, Battery C, 46th Field Artillery was stationed at Camp Hilton, Iceland. (R.59, 92, 202). On that date there were two details taken from that battery for work on the coke pile (R.60, 92, 99, 202). Corporal Monroe and Corporal Yates were in charge of the details (R.59, 61, 92, 99). In Corporal Monroe's detail were the accused, and also Privates Kenneth W. Moore, Thomas, and others (R.59, 61, 96, 99). The Monroe detail went to work at 9.45 p.m., that night and worked until 11.45 p.m. (R.60, 67, 96, 100). At that hour the detail quit work to eat (R.60, 67, 96) the mid-night meal in the maintenance shop (R.60, 67, 97). The accused and Moore were present when food was served. Immediately thereafter Moore went to the coke pile (R.61, 67), and then he met accused near a cream colored house located about thirty yards from the Camp Hilton gate (R.61, 68, 202). With them were Seale, Morris, Hunt and Leffler. The men "monkeyed" around the first mentioned house for a time, and then accused and Moore saw a light issuing from another house located about 200 or 300 yards from the first house. The second house was Smaravellir, owned and occupied as a summer house by Georg and Gudbjorg and particularly described below, (R.61, 69, 202). The two soldiers had heard that the latter house was one of prostitution (R.61, 69, 202), and they went over to it at about 2 a.m., 30 August 1942. They went through the gate to the window on the bed-room side of the house (R.61, 69, 203, 206, 208).

5. Smaravellir is the name of the summer home of Georg and Gudbjorg. It is in Fifilhvammi, Iceland (R.52). The house stands a distance back from the street line and there is a pathway from the street to the front door. On one side of the pathway is a hedge (Prosecution's Ex.F). The pathway is covered with gravel. The house consists of three rooms (R.7, 47); a bed-room, kitchen and a parlor (R.7, 47). The bed-room adjoins the parlor and the door between the two rooms consists of a curtain or drapery (R.24, 63). The kitchen also adjoins the parlor (R.46). Ingress and egress to the house is gained through an entrance facing the street and which opens into an enclosed hall-way or entrance-way (Prosecution's Ex.H; Defense Ex.C; R.7, 47). Upon entering the hall one turns and passes through a second door-way into the parlor (R.7, 47). These two apertures each possess doors which swing on hinges and are equipped with latches. The bed-room has a window facing south (R.50) and the parlor has a window next to the door and a window on the side (R.47). The bed-room has a window on the side facing the street (R.47; Prosecution's Ex.H).

~~CONFIDENTIAL~~

(48)

On the evening of 29 August 1942, Georg and Gudbjorg left their home at about 7 p.m. (R.52). Klara is a sister-in-law of Gudbjorg (R.20, 52). Klara was left in charge of the home and with the care of the three daughters of Georg and Gudbjorg, viz: Halla, age 11, (R.38), Anna II, age 9 (R.6) and an unnamed infant (R.6, 52). That evening Anna, age 11 (R.28), and a friend of Halla, was also present in the home (R.5, 28). Georg and Gudbjorg returned to their home at about 10 p.m. for a few minutes and then departed and did not return until approximately the hour of 3.30 a.m., 30 August 1942 (R.52, 53). The three small girls and the infant were in bed by 11 p.m. (R.28); Klara also retired about that hour (R.28, 38). The group slept in the bed-room (R.28, 38). At about 2 a.m., 30 August 1942, Klara was awakened by noise she heard outside the house (R.7, 29, 39). A light had been kept burning in the bed-room (R.7, 13). She was then dressed in a yellow night-dress (R.7, 8) but she immediately clad herself in an ecru colored shirt and pants, negligee, a brown dress and brown jersey (R.7, 8, 179). She also continued to wear her night-dress (R.8, 179) and a watch on her arm (R.10).

((The prosecution introduced the foregoing clothing in evidence as follows: Ex. A: Brown dress (R.27); Ex.B: Night-dress (R.27; Ex.C: Shirt (R.27); Ex.D: Pants (R.27). The jersey or sweater had been burned prior to trial (R.179)). She heard someone approach the front door (R.6, 25). She first saw a man through the window next to the door entering the hall-way (R.6, 22, 23, 25, 26) and she informed the children of such fact (R.6, 22, 24, 29). She then turned on the parlor light. The man was then standing in the door way (R.6, 23, 24, 29). Prior to the entrance of the man the doors had been closed and it was dark (R.10). The man was dressed in blue and held an axe or hatchet in his hand (R.6, 23, 29) and wore a white cloth over the lower part of his face, leaving his eyes exposed (R.18, 21, 29). He went into the bed-room and pulled Klara into the parlor (R.6, 20, 33, 39) and threw her to the floor (R.6, 14, 18, 29), knelt over her and got on top of her (R.63, 74) and pounded her in the face with his fists (R.6, 18). He gagged her mouth with a rag (R.6, 14, 18) but she succeeded in removing the gag (R.9, 14). He held her hands behind her (R.6) and while on the floor he felt with his hands up her pant's leg (R.9), and tore her pants (R.9) while holding her down (R.9). She wore a wrist watch on her left arm at the time of the assault (R.10). When the man pulled Klara into the parlor and pushed her to the floor she screamed (R.24, 29, 34, 39, 41) loud enough to be heard outside of the house (R.34, 39, 41). The man after beating Klara severely picked her up in his arms and carried her outside of the house (R.6, 14, 15) onto the pathway and threw her to the ground (R.6, 15, 19). At about this time Klara was struck on the head with an axe or hatchet and was rendered unconsciousness (R.6, 11, 16). She wore artificial teeth (R.11) which were found in a broken condition that night by Isaakson on the ground immediately outside of the exterior hall-way door (R.57, 58). Upon recovering consciousness Klara returned to the house (R.11, 16) while Trausti was standing in the door way (R.11, 16). The girls, Anna and Halla, immediately after the man pulled Klara from the bed-room into the parlor escaped from the house by climbing through the bed-room window (R.29, 30, 40), and went

234289

CONFIDENTIAL

(49)

to Trausti's house (R.30, 40, 45). Trausti was a neighbor of Georg and Gudbjorg (R.30, 44) his house being distant about 100 meters. The girls awakened Trausti and gave the alarm (R.30, 45). Upon making their exit through the bed-room window, the two girls saw an American soldier, dressed in blue pants, blue blouse and blue hat, standing in front of the house (R.31, 32, 35, 36, 40, 41, 42). Trausti immediately went to Smaravellir and found the outer door open (R.45), and the rooms lighted (R.45). There was a large pool of blood about one meter from the threshold (R.45, 49), and drops of blood on other places on the floor (R.45). No one was in the parlor, but there was a little girl and baby in the bed-room (R.45). Trausti returned to his house and consulted his wife (R.45), and then returned to Smaravellir and placed a coat on the little girl and wrapped the infant in covers and carried it in his arms (R.45). As Trausti was leaving the house with the children he saw Klara approaching the door (R.46). Klara entered the house (R.11, 16, 46). Her hair was unkempt; her face and hair were covered with blood; her right eye and lower lip were swollen; and there was a wound and blue spot on her face (R.22, 46, 53, 57). She wore a dress (R.48), and was barefooted (R.46). Trausti bathed her head with fresh water to remove the blood (R.46, 49). He then went for aid (R.46, 50) and secured the presence of two neighbors, one of whom was Isaakson (R.58). At about 3.30 a.m., 30 August 1942, Georg and Gudbjorg returned to their home (R.53). Klara was taken to the hospital by Haukar, and arrived at the accident ward at 5 a.m., 30 August 1942 (R.147). She was badly injured and was suffering from shock (R.135). There were definite indications of a concussion of the brain, and further examination revealed that her skull was fractured (R.135). She had three deep wounds about the middle of the head (R.136); also a wound on her nose and lower lip (R.136), and four or five smaller wounds (R.136). There was no evidence of any unnatural condition of her vagina nor signs of dirt, blood or scratches around her reproductive organs (R.136).

6. The watch Klara wore at the time of the assault had been purchased on 7 August 1940, by her from Sigurd, the jeweler, whose place of business was in Reykjavik, Iceland (R.80), for the price of 145 kronur (R.80). Sigurd testified that the replacement cost of the watch on 29 August 1942, was 250 kronur (R.81). On 31 August 1942, while policing up the hut in which accused slept and lived, Sgt. Roy H. Mitchell, Battery C, 46th Field Artillery Battalion, discovered the watch in the crack between the wall and the floor of the hut at a place in the hut where accused's cot had been located (R.104, 105). He delivered it to Acting 1st Sgt. Colbert (R.105), who in turn delivered it to the Battery Commander (R.107, 108). The watch (Prosecution's Ex.E) was produced in Court and was positively identified by Klara as being the watch she wore on her arm at the time of the assault (R.10). It had a brown leather band or strap (R.10) which was broken at the time it was identified by Klara on the witness stand (R.10). Klara stated that the watch was on her arm when she was carried outside of the house and thrown on the ground by the man who assaulted her (R.10).

7. Prosecution's Exhibit F is a hatchet (R.36). It was identified by Gudbjorg as being the property of Georg and herself which she had used about 6 p.m. on 29 August 1942 to split wood or break coal. She left it in the back of her house (R.53, 54). The hatchet was also identified by

234389

~~CONFIDENTIAL~~

(50)

Anna as having been seen by her in the rear of Smaravellir (R.29). It was discovered about 7 o'clock on the morning of 30 August 1942, by Private Harold E. Arvin, 812th Military Police Company at a spot about 60 ft to the right from the front of the house and in the corner of the fence towards the road (R.111, 123, 195). It was in high grass about four feet from the road (R.112, Defense Ex.C). There was what appeared to be woman's hair along the handle and around the blade (R.112, 196), and also strands of woman's hair on the barbed wire fence a few feet from where the hatchet lay (R.196). Both the accused and Pvt. Kenneth W. Moore agree that the hatchet, or axe, was found by them in the rear of the house on the night of the commission of the crimes charged (R.62, 75, 76, 203).

8. Prosecution's Exhibit G is the accused's field jacket (R.115); Prosecution's Exhibit J is the accused's woollen underdrawers (R.114); Prosecution's Exhibit K is accused's O.D. Shirt (R.115); Prosecution's Exhibit L is accused's O.D pants (R.115). They were removed by accused from his body at 9 a.m. on 31 August 1942 and delivered to Capt. Richard D. Martin, M.C., 46th Field Artillery Bn. (R.113, 114, 115). At the time of removal accused informed Captain Martin that he had been wearing those clothes, without removing them, since the night of August 29, 1942 (R.114, 212, 215). Captain Martin delivered Exs. G, J, K, and L to Captain Richard C. Taylor, M.C., 208th General Hospital, Camp Helgafell, Iceland, for examination.

Prosecution's Exhibit M is accused's overalls (R.210, 238) which he wore on the night 29-30 August 1942 (R.210). They were delivered to Capt. Taylor, M.C., 208th General Hospital for examination (R.116, 248).

Prosecutor's Ex. N is Private Moore's fatigue clothes (R.121) which he wore on the night 29-30 August 1942 (R.122). They were delivered to Capt. Taylor, M.C., 208th General Hospital for examination (R.145).

A laboratory analysis (208th General Hospital) was made for the purpose of determining whether or not there was human blood on accused's clothes and the type of blood (Prosecution's Exs. G, J, K, L, M). The method used is that prescribed in an Army text book and is acceptable (R.127). A satisfactory control was established whereby false results could be detected (R.128). It was the opinion of Capt. Taylor, who ran the tests, that there was human blood on accused's underwear (Prosecution's Ex. J) (R.130). It was of type "O" (R.128). Accused's field jacket (Prosecution's Ex. G) and accused's O.D. pants (Prosecution's Ex. L) were subjected to the Benzidine test for blood (but the blood was not typed) (R.129) and blood was found present (R.130).

Accused's blood type was proved to be "A" (Prosecution's Ex.O) (R.143). Klara's blood type was proved to be "zero" (R.136). The test of her blood was made while she was in the hospital suffering from injuries (R.136). The "zero" type of human blood in the classification used in Landspitalin Hospital, Reykjavik, Iceland, is the same as the "O" type used in the American Army system inasmuch as both are the international system of blood typing (R.141, 142).

~~CONFIDENTIAL~~
234389

Several areas of Private Moore's fatigue clothes were subjected to the Benzidine test, but blood was not found on any of them (R.129).

9. Private Homer C. Thomas, Battery C, 46th Field Artillery Bn. was in the Monroe detail working on the coke dump on the evening of 29 August 1942 (R.92). This witness testified that at 2.15 a.m., 30 August 1942, he had a conversation with accused at the side of a truck in the rear of the maintenance shop near the coke dump (R.93, 246). Accused asked Thomas to look at his field jacket to see if witness could detect blood on it. The witness could see no blood as the jacket was wet, but asked accused how he got the blood on it. Accused informed witness that he had killed two Icelandic men and struck a woman with a hatchet (R.93, 245). Thomas asked accused where this happened and accused replied: "Over on the hillside", and being questioned as to who was with him replied: "Moore". Accused then said to witness that he didn't think he had hurt the woman bad, but had just struck her when accused hit at the second Icelandic man and that as accused started to leave the woman grabbed at him and during the scuffling he grabbed a watch; got hold of it somehow and brought it along with him to prevent discovery of finger prints on it. Witness further stated there were two kids there that kept screaming and hollering and that Moore tried to keep them from getting in the way (R.93, 94, 245, 246). Thomas further testified that accused took a watch from his pocket book and showed it to witness, and said: "This is the watch I took". Witness said that Prosecution's Ex. E. resembled the watch he saw and the broken strap or wristband on the watch was seen by witness (R.94, 244, 246). Accused did not tell witness that he had bought the watch from Private Moore (R.245).

The witness, Thomas, first fixed the hour of this interview with accused at 4 a.m. 30 August 1942 (R.92); then on re-direct examination stated the time of the interview to be between 3.15 a.m. and 3.45 a.m. (R.98). On further cross-examination by the defense, the witness admitted that on investigation of the case he had fixed the time "as between 2 a.m. and 2.30 a.m. or just before quarter to 3" (R.151). Again on re-cross-examination he admitted his confusion and error as to time and stated that it was 3.15 a.m. - "some where between quarter after 2:00 and quarter to 3:00". Upon being recalled to the stand later in the trial he again changed the time of the conversation to the period from 2:15 a.m. to 3:15 a.m. (R.246). Thomas admitted he made no report of the accused's statement to him until the investigation because he did not believe accused's story (R.247).

10. On the morning of 30 August 1942 at about 4.30 a.m. Corporal Norman E. Halprin and Private Harold E. Arvin of the 812th Military Police Company, Camp Haggi, were sent to Smaravellir to investigate an unusual occurrence (R.112, 193), and discovered on an investigation of the ground outside the house, a set of false teeth (R.193) and a bloody rag with woman's hair on it (R.193). Later in the morning at about 8:00 o'clock, Col. Moore, Sgt. Dewey Stoner, C.M.P., Corporal Halprin, Private Arvin and a civilian police officer returned to the place (R.194, 195). The hatchet (Prosecution's Ex.F) was found at this time (R.194) and a foot-print in the flower bed near the bed-room window was discovered (R.194). Also a piece of elastic was discovered about 10 ft. from the

CONFIDENTIAL
34389

(52)

hatchet (R.196). Foot-prints about 10 to 12 ft. from the fence and leading directly away from the hatchet (R.196) were also found. Later in the day an old pair of hob-nailed shoes owned by Private Kenneth W. Moore was obtained. Two hob-nails were missing from the sole of the left shoe (R.197). The shoe fitted the foot-print in the flower bed (R.197), and the print also indicated it was made by a shoe with such hob-nails missing (R.197, 198; Defense Exs. C,D,E,F).

11. The accused elected to appear as a witness on his own behalf after his rights as such were explained to him (R.201). The evidence is conclusive that the crimes were committed by either accused or Private Kenneth W. Moore. Both Moore and the accused agree that they arrived at Smaravellir at about 2 a.m., 30 August 1942 (See para. 5 hereof). They also agree that they went to Smaravellir to determine whether or not it was a house of prostitution and that at that time they were seeking the company of prostitutes (R.69, 202, 225).

12. The events which transpired at Smaravellir after the arrival of accused and Private Moore are related by the latter substantially as follows:

Accused was dressed in a rain hat turned up, field jacket, fatigue clothes, leggings and gloves. The trousers of his fatigue clothes were tucked in his leggings (R.62, 66, 82, 85). Moore was dressed in a rain hat, mackinaw, one piece green fatigue suit, hob-nailed shoes, and gloves (R.82, 121) and wore his trousers outside of his leggings (R.64, 82). Both of the men entered by the gate and went up to and looked in the bed-room window. There was a light in the bed-room when the men arrived at the house (R.62). When Moore and the accused looked into the bed-room window the first time they saw a woman standing looking around the room and children in bed. She was in night clothes and had on a black coat or jacket over her night-gown. She wore a watch on her left arm (R.63, 70, 71, 74). Moore said to accused: "I don't believe this is a whore house because there are kids in there" (R.72). Accused then went to the front door of the house. Two or three minutes later Moore followed accused and both then went completely around the house, walking to the right (R.62, 70, 72). Moore stopped at the bed-room window and accused walked around to the front door (R.62, 72, 73). Moore remained a moment and peered in the bed-room window for a second time and again saw the woman ^{clad} in a night-gown and jacket. She suddenly looked through the curtain hung in the door way leading to the parlor (R.63, 70, 71, 72, 160). Moore then joined the accused at the front door where he saw that the front door was ajar and accused was holding a hatchet (R.62, 74). Moore testified on direct examination that when the two men walked around the house they found a hatchet at the rear of it (R.62) and that at that time accused said: "It would be good for chopping kindling wood". (R.62, 87). Moore replied: "It would". On cross-examination he stated that the first time he saw the hatchet was when he joined accused at the front door and at that time the conversation regarding the hatchet occurred (R.75). Moore later stated that the conversation occurred at the corner of the house (R.88). For the third time Moore returned to the bed-room window (R.76, 82), and looked into the bed-room (R.76, 82), and saw the woman poke her head through the drapes of the door (R.76, 82). She spread them apart and

28088

looked into the next room (R.76). She was dressed in a night-gown and jacket and had the watch on her arm (R.76, 82, 85, 159). Moore remained at the side of the house about two minutes, and hearing the woman scream he went around to the front door (R.77, 82, 160) and looked in the house and saw the woman on the floor. Accused was on top of her beating her head and face with his fists and hands (R.63, 65, 82, 83, 84, 160, 241). She was on her left side facing the back of the house. Accused straddled her and had his legs over her chest and was bent over her (R.83). There was a light in the room (R.63). She wore her watch on her left arm as it lay on the floor by the side of her body (R.86). Accused had a white mask on his face; it looked like a handkerchief (R.63, 65, 85, 240). Moore saw accused's gloves on the floor and picked them up (R.63, 84) and then started to leave. When about ten yards from the door he said: "Watts let's go" (R.241). Accused replied: "Help me". (R.63, 84, 91). Accused said something, but Moore directed his steps toward the coke pole (R.241). He looked around and saw two children in white clothes out in the yard (R.63, 85). The next time Moore saw accused was at the coke pile, and the two men walked together over to the garage to be relieved from duty (R.63). On the way to the garage Moore asked accused "if he got any". Accused answered: "No", but told Moore he had trouble and threw the hatchet at the Icelandic man and it hit the woman on the side of the head (R.64). After Moore and accused entered the garage, Moore noticed accused with his raincoat off, but wearing his field jacket. It was wet in front and had blood on it. A few minutes later accused showed Moore a watch in his wallet (R.64, 240, 242). Accused said he found the watch down at the house (R.64). Being shown the watch (Prosecution's Ex.E) witness stated it looked like the watch accused had shown him and that, as far as he could remember it was the watch accused had in his wallet. (R.64). Moore also identified the hatchet (Prosecution's Ex.F) as the hatchet accused held in his hand while standing at the front door of Smaravellir (R.64, 65).

13. The accused's version of the events transpiring at Smaravellir on the night of 29-30 August 1942 is as follows:

Private Moore, accused and several other soldiers were in the vicinity of the first named house for about half an hour. At about 2 a.m., 30 August 1942, Private Moore saw a light over in a distant field and said: "That's a prostitute house over there. Let's go over there". Accused replied: "You sure that is a prostitute house?" Moore replied: "I am positive that it is". Accused then said: "How do you know that it is a prostitute house?" Moore said that some boys told him it was, and continued: "We will go over there. Do you want to go with me?" Accused replied: "I don't care if I do". (R.203).

Accused and Moore went over to Smaravellir, Moore leading the way. They was a light in the bed-room. The two men looked in the window, but accused saw no one (R.203, 208). They walked around the house a couple of times. While in the rear of the house Moore picked up a hatchet he found in the grass. He said: "We will take this in and make a kindling axe out of it". Accused replied: "Yes, it would make a good kindling axe" (R.203). As the pair came up to a window in the rear of the house, Moore

CONFIDENTIAL

334989

looked in the window and said: "I see a woman in there". Accused looked in the window and saw a woman in the room. Moore then said: "I see one woman in there". Accused replied: "Yes, one woman is all I see in there". (R.203, 206). The two men then went around to the front of the house. Moore tried to open the window in front of the house next to the door, but could not do so. They then went to the door "and smashed down the door latch and the door came open". Moore stepped inside of the house. Accused said to him "Don't you go in that house". (R.203, 218). Moore gave no answer. Accused then turned, and keeping the house on his left, started for the coke pile, and when about half way round the house he heard a woman's scream (R.203, 218, 219). He then ran back to the door, and as accused reached the door Moore knocked Klara out of the door^{way} on to accused (R.203, 219, 221). Accused thought Moore struck her with the axe at this time (R.225). She fell on accused, who jumped out of the way. She then sank to the ground, accused reached down and picked up her head. Moore asked: "Is she killed?". Accused replied: "No, I don't think she is". Accused laid Klara back on the ground and stepped back eight or ten feet. Her head was on the walk and she was gushing blood from her head (R.234). Klara arose and started down the walk, reached the gate and tried to open it. Moore followed her. Accused said: "Don't you go down that walk. Come, let's go back and work". Moore went down the walk and as Klara was trying to get the gate open, he hit her on the right side of the head with the back of the axe. When Klara fell to the ground accused ran off (R.204, 213, 221, 222, 224, 225, 228, 230, 237). Moore and accused were at the house for about an hour (R.204, 205). Accused went back to the coke pile and then to the motor maintenance shop (R.205, 211, 216). He met Private Thomas and at the latter place engaged in the following conversation:

Thomas: "Where have you been?"

Accused: "Me and Private Moore had been over to some
Icelander's house".

Thomas: "What was you doing over there?"

Accused: "Private Moore was over there in a fight with some
Icelanders. (R.205, 212, 216).

Accused wore a watch on his arm and showed it to Thomas and told him he (accused) had got it from Moore (R.205, 217).

Accused testified that at the fire near the coke pile a short time after the incidents at Smaravellir, Moore was wearing a wrist watch (R.212.) Moore said: "You want to buy a good watch?" Accused: "What kind of a watch have you got?" Moore: "I got a small wrist watch here". Accused: "What do you want for it?" Moore showed accused a watch and again accused asked: "What do you want for it?" Moore: "I will take 200 kronur for it". Accused: "O.K. I will buy the watch off you". (R.205, 212). Accused then bought the watch and put it on his wrist (R.205, 212, 222). He did not put it in his wallet and the strap was not broken (R.212, 217).

Accused testified he was wearing a field jacket (Prosecution's Ex.G) which he identified as his own (R.214) and did not know whether or not he got blood on it (R.213, 214); and that he did not wash it (R.213). He identified Prosecution's Ex.J - underwear - as his own, but stated he did not know whether he got blood on it or not. Accused went to sleep in his

CONFIDENTIAL

33389

hut about 6.30 a.m. on 30 August 1942, but did not undress. He awakened at about 2.30 p.m., when an investigation had been ordered (R.214). He admitted taking off his clothes when ordered by Captain Martin (R.215). He wore the watch on his wrist when he went to sleep, but when he was awakened by Corporal Monroe and was told there was to be a shake-down inspection he took the watch off his wrist and placed it on his bunk intending to turn it in to the Battery Commander. Moore came into the hut about 15 minutes after the Corporal and told him to throw the watch away as there was to be a shake-down (R.205, 206, 215, 228). Monroe and accused were alone at this time (R.205, 215, 216, 228). Accused denied that he put the watch down in the crack between the wall and the floor, and asserted it was on his bunk when he left the hut for the inspection (R.215).

Accused, on cross-examination, stated he saw a little girl come to the front door after Moore had entered the house and was scuffling with the woman, while he was standing on the walk looking through the bed-room window (R.209). He then stated he saw the little girl through the bed-room window (R.210). Then further on in his cross-examination he declared the little seven or eight-year-old girl came to the first or storm door after Moore had pursued Klara to the front gate (R.219, 220, 223, 229) and while he (accused) was standing eight or ten feet from the door (R.220, 223, 224).

Accused declared that on this evening he wore fatigue clothes, blue denim trousers, field jacket, rain hat and leggings with the trousers on the inside of them (R.210). He denied he wore a mask or handkerchief over his face that night (R.220), and also denied there was any blood on his clothing (R.226, 227).

14. Specification 1 charges accused with the crime of burglary. The elements of this offense are set forth in the Manual for Courts-Martial (sec. 149, pg. 168) as follows:

"Burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. (Bishop.)

The term "felony" includes, among other offenses so designated at common law, murder, manslaughter, arson, robbery, rape, sodomy, mayhem, and larceny (Irrespective of value). It is immaterial whether the felony be committed or even attempted, and where a felony is actually intended it is no defense that its commission was impossible.

To constitute burglary the house must be a dwelling house of another, the term "dwelling house" including outhouses within the curtilage or the common inclosure. (Clark & Marshall.)

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The house must be in the status of being occupied at the time of the breaking and entering. It is not necessary to this status that anyone actually be in it; but if the house has never been occupied at all or has been left without any intention of returning to it this status does not exist.***

384389

(56)

"There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door, even if left only slightly open and pushed farther open by the person entering, will not constitute a breaking; but where there is any removal of any part of the house designed to prevent entry, other than the moving of a partly open door or window, it is sufficient. Thus opening a closed door or window or other similar fixture, or cutting out the glass of a window or the netting of the screen is a sufficient breakage. So also the breaking of an inner door by one who has entered the house without breaking, or by a servant lawfully within the house, but who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with intent to commit a felony therein burglary is not committed.

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An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient; and an insertion into the house of an instrument except merely to facilitate further entrance is a sufficient entry.

Both the breaking and entry must be in the nighttime, which is the period between sunset and sunrise, when there is not sufficient daylight to discern a man's face, and both must be done with the intent to commit a felony in the house. If the available evidence appears to warrant such action, the actual commission of the felony alleged as intended in the burglary specification should be charged in a separate specification."

There is substantial evidence in the record establishing the following elements of the crime of burglary:

- (a) At the date of the alleged offense, Smaravellir was a dwelling house occupied as a summer home by Georg and Gudbjorg and their family. (R.7, 34, 47, 52, 54, 55, 56);
- (b) On the evening of 29 August 1942 it was inhabited by Klara, Halla, Anna II and the infant child (R.5, 6, 28, 52, 53);
- (c) Prior to the breaking, the front doors were closed (R.10);
- (d) The accused actually broke into the dwelling house; he "smashed down the door latch and the door came open" (R.62, 74, 203, 208);
- (e) The accused entered the dwelling house in the night time (R.6, 63, 65, 67, 68, 82, 83, 84, 160, 241).

The accused admitted the breaking (R.203) but denied he entered the dwelling house (R.203, 218). This presents a conflict between the evidence introduced by the prosecution and accused's testimony. The resolving of this

conflict was a matter exclusively within the province of the court. It was for the court to determine the probative sufficiency of the testimony and to judge of the credibility of the witnesses. The Board of Review is satisfied with the sufficiency of the evidence to support the finding in respect of the elements of the crime above mentioned.

The Specification alleges that the accused entered Smaravellir with the intent to commit three felonies, (1) rape, (2) robbery and (3) murder therein. This form of pleading is not objectionable.

"An indictment for burglary may lay the offense with several intents, as with intent to steal and intent to murder or to rape, either by alleging the several intents conjunctively in the same count, or by alleging them in separate counts. (9 C.J. sec. 97, pg. 1054 ; State vs. Fox 80 IOWA 312, 45 N.W. 874; State vs. Tytus, 58 N.C. 705, 4 S.E. 29).

"Where the breach and entry are with intent to commit distinct felonies, - as, rape, larceny, and murder, - there is but one burglary. On principle, therefore, the indictment may, and for convenience it practically should charge the whole in one count. Hence, if the pleader doubts what felony was intended, he may lay in one count all the probable ones, and proof of any one will suffice. Still the common course seems to have been to put this matter into separate counts - a method not legally objectionable." (3 Bishop's New Criminal Procedure (2nd Ed.) sec.150 pg. 1329).

The accepted rule concerning proof of intent is as follows:

"The intent must be proved as laid in the indictment. An allegation of breaking and entering with intent to commit a particular felony is not sustained by proof of a breaking with intent to commit some other felony. It is not necessary, however, to prove the whole intent if enough is proved to make out the offense. Thus under an indictment alleging an intent to commit 'grand and petit larceny', an intent to commit either of which is sufficient under the statute, an intent to commit both need not be shown. People vs. Hall, 94 Cal. 595, 30 Pac. 7." (9 C.J. sec. 118, pg. 1063).

"As the felonious intent alleged in the indictment is an essential element of the offense, it must be established affirmatively by the evidence beyond a reasonable doubt, unless there is a statute allowing presumption of intent from the breaking and entry.

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(58)

"The intent, however, may, and generally must, be proved by circumstantial evidence, for as a rule it is not susceptible of direct proof. And it has been held that the evidence of intent sufficient to support a conviction of burglary may be slight, in the absence of any evidence that the entry was made with any other intent. The existence, at the time of the breaking and entering, of an intent to commit larceny, rape, murder, or other felony may be inferred as a fact from proof that the felony was actually committed or attempted after the entry, and proof of the actual commission of a felony is the best evidence of the felonious intent. And even where the felony was not actually committed, an intent to commit the same may be inferred from the time and manner at and in which the entry was made, or the conduct of the accused after the entry, or both.

"An intent to rape may be inferred, in the absence of evidence to the contrary, from the fact that defendant broke and entered through the window of the sleeping room of a girl, put his hand on her person, and, on her awakening, left hurriedly without any explanation, or from other circumstances of a similar character.

"An intent to rob rather than to commit a simple larceny, may be inferred from the fact that defendant broke and entered the house noisily.****"
(9 C.J., sec. 138, pg. 1078).

The attempt of accused to conceal his identity by masking his face (R.18, 21, 29, 63, 65, 85, 240); his possession of a hatchet (R.6, 20, 33, 39, 62, 74) when he entered the house; the vicious and brutal assault he committed on Klara (R.6, 14, 18, 29); the motive which prompted accused to visit Smaravellir (R.61, 69, 202) and the undoubted knowledge possessed by him when he entered the dwelling house that it was not a house of prostitution, and its inmates were not prostitutes (R.72), are facts indisputably established by the evidence. It is most reasonable and logical to conclude from them that accused entered the dwelling house with a lecherous, malignant and evil intent to secure his own physical satisfaction and in furtherance of such purpose was prepared to use force and violence without limit. While the evidence of intent to commit robbery is not as strong as that supporting the finding of intents to commit rape and murder, it is not wholly lacking. However, the failure to prove an intent to commit robbery is not fatal, under the authorities above quoted, as proof of intent to commit either rape or murder will sustain the finding.

In the opinion of the Board of Review the record is legally sufficient to support the finding of accused's guilt of burglary.

15. Specification 2 charges the accused with the crime of committing an assault upon Klara with intent to commit a felony, viz: rape. The Manual for Courts-Martial (sec. 149, pg. 179) discusses the offense and the proof required to sustain a conviction therefor as follows:

"This (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. Indecent advances, importunities however earnest; mere threats, and actual attempts to rape wherein the overt act is not an assault do not amount to this offense. Thus, where a man, intending to rape a woman, stealthily concealed himself in her room to await a favorable opportunity to execute his design but was discovered and fled, he was not guilty of an assault with intent to commit rape.

No actual touching is necessary. Thus, when a man entered a woman's room and got in the bed where she was and within reach of her person for the purpose of raping her he committed the offense under discussion, although he did not touch the woman.

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."

The accused admits (and his admission in this respect is confirmed by the testimony of Private Kenneth W. Moore) that he and Moore went to Smaravellir on the night of 29 August 1942 seeking the company of prostitutes. Either one or both of them had been informed that Smaravellir was a house of ill-fame (R.61, 69, 203, 206, 208). This fact stands uncontradicted in the record, and is the true and only reason for the two men going to the house of Georg and Gudbjorg that evening. Both of them were prompted by lustful and lecherous desires (R.225).

A comparison of the testimony of the two men as to events transpiring before the house was entered shows a striking and cogent difference which is highly important in considering the offense under Specification 2. They agree that when they arrived at the house that they both saw Klara in the house. Moore claims he also saw the children (R.63) and then expressed to accused his doubt that the house was one of prostitution (R.72). Accused in his testimony is entirely silent as to the presence of children in the house (R.203, 208). In fact he testified that he did not see the little girls until after Moore went into the house (R.208, 209). Further he does not refer to Moore's statement: "I don't believe this is a whore house because there are kids in there" (R.72). It seems therefore but reasonable to believe that accused continued to carry in his mind his original purpose of seeking sexual intercourse. The failure of accused, in his testimony, to break this connection between his original design and his ultimate actions,

and his positive statement that he did not see the little girls until after Moore entered the house are an unconscious exposure of accused's evil intentions when he assaulted Klara. Such conclusion is not only consistent with subsequent events, but also is one that the Court in weighing and reconciling the evidence was at liberty to draw.

Klara testified that the man who assaulted her felt with his hands up her pant legs and tore her pants (R.9). He committed a brutal battery upon her (R.6, 14, 18, 29). He gagged her with a rag (R.6, 14, 18) and as she lay prostrate on the floor he was straddle of her (R.63, 65, 82, 83, 84, 160, 241). That the assault was ferocious is indicated by the large pool of blood and numerous blood stains on the floor of the room discovered by Trausti (R.45, 49).

Moore's testimony contains an illuminating bit of evidence as to accused's intentions in committing the assault upon Klara. In relating the conversation between him (Moore) and accused in the maintenance garage after the events at Smaravellir, Moore states: "I asked him if he got any? He told me personally no. Then he told me he had trouble down there ****" (R.64). This colloquy between Moore and the accused can be interpreted only to mean that both men were conscious at all times of their purpose in visiting Smaravellir and that both men knew accused assaulted Klara for the purpose of obtaining sexual intercourse with her.

The Board of Review is of the opinion that there is sufficient evidence in the record, to sustain the finding that accused committed an assault upon Klara with intent to commit a felony, viz: rape. The weight and sufficiency of the evidence was for the Court to determine, and having resolved it against accused no basis exists for disturbing the finding.

16. Specification 3 charges robbery. The gravamen of the offense is that accused by force and violence and by putting Klara in fear did feloniously take, steal, and carry away from her person a ladies wrist watch of the value of about \$20.40. Robbery is defined by the Manual of Courts-Martial (sec. 148, pg. 170) as follows:

"Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. (Clark.) ****".

"The taking must be against the owner's will by means of violence or intimidation. The violence or intimidation must precede or accompany the taking..

"The violence must be actual violence to the person, but the amount used is immaterial. It is enough where it overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person."****

The evidence establishes beyond doubt that Klara was the owner of a ladies' wrist watch (Prosecutions Ex.E) on the evening of 29 August 1942 (R.80); that the watch possessed some definite value on that date (R.79, 80); that she had it on her left arm at the time she was seen by Moore through the bed-room window (R.63, 70, 71, 74); that she had it on the same arm as she lay prostrate on the floor of the parlor when accused was beating her (R.85, 86) and that she likewise wore it when accused carried her outside of the house and threw her on the ground (R.10). According to Moore the accused showed him in accused's wallet a ladies' wrist watch with a broken strap on it while Moore and accused were in the maintenance garage later in the evening (R.64, 240, 242). The accused stated he found the watch down at Smaravellir (R.64). Private Thomas testified that he met accused the same evening in the maintenance garage and accused informed him that he (accused) had killed two Icelandic men and struck a woman with a hatchet; that as he started to leave the woman grabbed at him and during the scuffling accused grabbed a watch and got hold of it somehow and brought it along to keep anyone from finding finger-prints on it (R.93, 94, 245, 246). Thomas further testified that accused took a watch from his pocket-book and showed it to Thomas stating: "This is the watch I took." Accused did not tell Thomas he had bought watch from Moore (R.245). The watch had a broken wrist band or strap on it when seen by Thomas (R.94, 244, 246). The watch (Prosecution's Ex.E) was found on 31 August 1942 in the crack between the wall and floor of the hut, in which accused slept, at a place where accused's cot had been (R.104, 105). Klara identified Prosecution's Ex.E. in open court as being the watch she wore on her arm at the time of the assault (R.10).

The Accused denied all of the foregoing and stated he purchased the watch from Moore for 200 Kronur (R.204, 205, 212, 216, 217, 222). He claims he showed the watch to Thomas and informed him he had bought it from Moore (R.205, 217).

There was thereby created a sharp conflict between the evidence for the prosecution and that of accused. It was the function of the Court to resolve this conflict. It was at liberty to believe the evidence of the prosecution and disbelieve that of accused. By its finding it has indicated its acceptance of prosecution's evidence. In the opinion of the Board of Review there is legally sufficient evidence to support the Court's findings.

There is but one possible question that can arise in connection with the legality of the finding and that is whether or not accused took the watch from Klara's person.

The applicable rule of law is stated as follows:

"Since robbery is an offense against the person as well as against property, it is essential to the crime that there should be a taking from the 'person' of the victim. To satisfy this requirement, however, it is sufficient if the property be taken from his 'presence'. In other words, the property must be actually or constructively taken from the person, or as some authorities have phrased the rule, it must be taken from the 'person or presence', or from the 'person or possession' of the victim."
(54 C.J., sec.20, pg.1015).

"At common law it is not necessary that the property should be taken from the physical person of the victim, the requirement that it be taken from his 'person' being satisfied if it is taken from his 'presence'." (54 C.J., sec.21, pg.1015)

"An indictment or information charging a taking from the 'person' may be supported by proof a taking from the 'presence', as such proof does not constitute a fatal variance." (54 C.J., sec.136, pg.1052).

There is substantial evidence establishing the fact that Klara had the watch on her arm when accused assaulted her with the axe or hatchet after he had carried her outside of the house (R.6, 11, 16). Admittedly there is no direct evidence that accused pulled the watch from Klara's arm nor is there any proof that he picked it up from the ground if it had slipped from her arm as she was thrown on the ground. However, the watch was on her arm when accused carried her out of doors. The fact that the leather strap or wrist band of the watch when shown to Moore and Thomas by accused and when produced in court was broken creates a strong implication that accused pulled it from her arm. However, it was not necessary for the prosecution to prove specifically that it was snatched from her arm by accused. The evidence is convincing that if accused did not take it from Klara's person he did take it from her presence. This is sufficient. Taking property from the presence of a person and under his direct physical personal control, as where the property is lying beside the victim, is the equivalent of taking from his person. (Rice v. State, 204 Alabama 104, 85 South. 437; Douglass v State, 98 Fla. 289, 107 South 791, 793; 54 C.J., sec.21, pg.1015, Ann. 39).

Although the specification alleges it was taken from her person, there was no variance between the averment and proof. Evidence of taking from Klara's presence is adequate. (54 C.J., sec.136, pg.1052).

17. Specification 4 charges accused with assaulting Klara with a dangerous instrument, viz: a hatchet with intent to commit murder. The elements of the crime are declared by the Manual of Courts-Martial (sec.149, pg.178) to be as follows:

"Assault with intent to murder.-- This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. Where the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible by the means employed does not

CONFIDENTIAL

- 234389

"prevent the person using them from being guilty of an assault with intent to commit murder where the means are apparently adapted to the end in view. Thus, where a soldier intending to murder another loads his rifle with what he believed to be a ball cartridge and aims and discharges his rifle at the other, it is no defense that he, by accident, got hold of a blank cartridge.****"

A more specific analysis of the offense is stated thus:

"An intentional attempt by violence with present ability, or in some jurisdictions, apparent ability, and without legal excuse or provocation, to do an injury to the person of another, accompanied by facts and circumstances indicative of an intent to take life, constitutes the offense of assault with intent to murder.****" (30 C.J., sec.158, pg.15).

"In addition to the requisite intent, in order to constitute an assault with intent to murder, there must be an attempt or an assault to carry out that intention. In other words, there must be an overt act in pursuance of the intent as distinguished from the mere intent itself, and also from mere threats, or mere preparations not going far enough to constitute an attempt. There must be commencement of an act which if not prevented would produce a battery.**** (30 C.J., sec.159, pg.16).

"Malice or malice aforethought is an essential ingredient of assault with intent to murder. As in the case of murder, malice may be either express or implied. While the expression 'malice aforethought' includes the element of premeditation, it is immaterial for how short a time the malice may have existed.****" (30 C.J., sec.163, pg.20).

"In General. The specific intent to take human life is an essential element of the offense of assault with intent to commit murder, and conversely where an unjustifiable assault is made by one capable of cool reflection and not in the heat of passion, with the intention of killing, it will constitute an assault with intent to kill where death does not result. The requisite intent, however, may be inferred from the attendant circumstances and may be formed upon the instant of the assault.****" (30 C.J., sec.164, pg.20).

CONFIDENTIAL

(64)

"While a specific intent to kill is an essential ingredient of the offense of assault with intent to commit murder, this requirement does not exact an intent, other than an intent which is inferrable from the circumstances. So while the intent cannot be implied as a matter of law, it may be inferred as a fact from the surrounding circumstances, such as the unlawful use of a deadly weapon, provided it was used in such a manner as to indicate an intention to kill, or from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result. Other circumstances which may be considered as bearing upon the propriety of an inference of intent are: The character of the assault, the nature or extent of the wound or injury, the presence or absence of excusing and palliating facts or circumstances, and prior threats. The question of intent as dependent upon the physical circumstances and the impression made by them on the mind of defendant must be determined by the facts as they were perceived or understood by defendant. Where the weapon used was manifestly not of a deadly character and there was nothing in the manner of its use to indicate an intention to take life, a conviction of assault with intent to murder cannot be sustained. The lethal character of the weapon used in making an assault may be inferred from the effect and nature of the wound inflicted."

(30 C.J., sec.165, pg.21).

Klara was positive that she was struck on the head by an axe or hatchet after she had been carried outside of the house by the man who had in the parlor previously beaten her. (R.6, 11, 16). The proof shows that she was suffering from concussion of the brain when she was taken to the hospital and that she sustained a fractured skull. She was in the hospital for five weeks (R.135). The skull fracture resulted from a hard blow on the top of the head (R.139, 140). Prosecution's Ex.F - a hat hatchet - was identified as being the property of Georg and Gudbjorg (R.53, 54) and it was discovered on 30 August 1942 near the scene of the alleged crime with woman's hair on it (R.112, 196). This hatchet was in the possession of accused preceding and at the time he entered the house (R.6, 23, 29, 62, 75, 87). Even the accused himself admits that he and Moore found the hatchet in the rear of the house (R.203). Klara's declaration that she was carried into the yard and there hit with an axe or hatchet receives corroboration from Traustie's testimony as to Klara's return to the house (R.11; 16, 46) with unkempt hair; in a disheveled condition and bruised and with bloody (R.22, 46, 48, 53, 57) face and head. There is a sufficiency of proof in the record to sustain the finding of the court that it was the accused who struck Klara with a hatchet, and in the opinion of the Board of Review the Court could not have found otherwise under the evidence.

CONFIDENTIAL

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The proof of (a) apparent ability of the accused to inflict the assault; (b) the absence of provocation, and (c) the overt act is so complete and obvious that further recital or analysis of the evidence is not required to demonstrate that the prosecution fully sustained its burden of proof in regard to these elements of the crime. Is there sufficient proof of the intention of the accused to commit murder?

As a matter of law a hatchet, when used to strike a human being, is a deadly weapon (People vs. Shaw, 1 Park Cr. (N.Y.) 327; State vs. Shields, 110 N.C. 497, 14 S.E. 779; Dains vs. State, 2 Hump. (Tenn.) 439). This fact when considered in connection with the seriousness of the injury inflicted on Klara; the time and place of the assault and the circumstances that it followed upon accused's attempt to rape her; the total absence of any evidence of provocation; the theft of Klara's watch and the immediate departure of accused from the scene of his crimes - form a substantial and reliable body of evidence from which the Court could legitimately and logically infer the specific intent upon the part of accused to kill Klara when he struck her on the head with the hatchet.

In the opinion of the Board of Review the record is legally sufficient to sustain the finding of guilty of assault with intent to commit murder.

18. The accused's defense is a denial of the charges against him and an attempt on his part to fix on Moore the responsibility for the crimes. Thus arose an issue of fact for the Court to determine, and it was solely within its province. An examination of accused's testimony reveals several unexplained inaccuracies and inconsistencies which undoubtedly influenced the Court in judging of its credibility. A reading of his testimony as it appears in the record does not create belief in his veracity. There is a glibness about it that bespeaks falsity. It probably had the same affect upon the Court. On the other hand both Moore and Thomas do not appear as witnesses of unquestionable veracity. The accused presented evidence of contradictory statements made by both witnesses out of court, many of which remained unexplained, which weakened their testimony. However, in the main, their stories possess the quality of truth.

Evidence connecting accused directly with the crimes is that of the laboratory analysis made of the blood on accused's clothing which he wore on the night of 29-30 August 1942. While probably not of the degree of scientific accuracy that it is possible to produce, yet for practicable purposes it is highly convincing. Its fallibility was for the Court to judge. The fact that human blood was found on accused's underwear, field jacket and O.D. pants and that the blood on accused's underwear, under the international system of blood-typing, was "O" (or zero) and that Klara's blood is of the type "zero" is evidence of cogent, relevant value that cannot be disregarded. The accused offered the explanation of the presence of blood on his clothing (while disclaiming knowledge of such fact) that it got on him when Klara was thrown against him by Moore (R.203, 218, 219, 221) or when he raised Klara's head from the ground (R.234). It is difficult to believe this story in the face of the

CONFIDENTIAL

234989

testimony of Captain Taylor concerning amount of blood found on accused's underwear and O.D. trousers (R.127, 128, 129, 130). The admission by accused that he had possession of Klara's watch under the explanation that he purchased same from Moore and its discovery in the crack between wall and floor of accused's hut near at a point where accused's cot had been standing is further evidence pointing to accused as the actual perpetrator of the crimes. The description by Klara, Halla and Anna of the "blue" clothing worn by the man who entered Smaravellir and the fact that Halla speaks of "brown" shoes (R.39) worn by him possesses some probative value when it is considered that accused wore a fatigue uniform, which is of a shade of blue and that his leggings (brown in color) (R.7) were "outside" or "over" his fatigue trousers - easily to be confused with brown shoes. The absence of blood on Moore's fatigue clothes (R.141, 142) is at least some corroborating evidence of his version of the affair.

Moore was not an accomplice of accused (Bird vs. United States, 187 U.S. 118, 133; 47 L.Ed. 100, 106; 16 C.J., sec.1357, pg.674). However, if it be assumed that he was an accomplice, a conviction may be had on the uncorroborated testimony of an accomplice although such testimony is to be regarded with great caution (M.C.M., sec.124, pg.132). In this case, Moore's evidence was corroborated in many important details, as had been shown above.

It is no duty of the Board of Review to weigh or evaluate the evidence in this case, nor to balance inconsistencies nor to reconcile conflicts therein. That is exclusively the function of the trial Court, which had the advantage of seeing and hearing the witnesses and judging of their conduct on the stand and the manner in which they gave their testimony. Questions concerning their credibility and honesty were exclusively for the Court to answer. The foregoing discussion of the evidence is intended to show that there is sufficient, creditable evidence in the record to sustain the finding of the Court that it was accused, who committed the crimes charged and not Moore.

19. In the record there appears the report of the Board of Officers appointed pursuant to paragraph 35(c) M.C.M., and under the provisions of AR 600-500. The conclusion of the Board is that there is no evidence that accused is insane or mentally defective.

20. The sentence of the court, which has been approved by the reviewing authority, is legal. The accused, Watts, was 22 years old at the time of the commission of the offenses. Pursuant to General Order 37, ETOUSA, 9 September 1942, paragraphs 5(c) and (d), execution of sentence of dishonorable discharge will be ordered only when accused has been convicted of an offense which renders his retention in the service undesirable, and when he has also been sentenced to a term of not less than three years confinement. A general prisoner whose approved sentence to confinement is three years or more may be returned to the United States for service of such sentence, without the express orders of Hdqr. ETOUSA. The offenses of which the accused has been convicted renders his retention in the military service undesirable and inasmuch as confinement is for 30 years, the execution of the sentence of dishonorable discharge, and the

CONFIDENTIAL

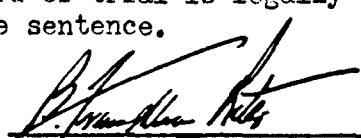
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CONFIDENTIAL

(67)

return of the accused to the United States for service of sentence, are proper. War Department directive (AG 253 (2-6-41)E)26 February 1941, requires prisoners under 31 years of age and with sentences of not more than 10 years to be confined in a Federal Correctional Institution or Reformatory. Inasmuch as accused is sentenced to confinement for 30 years the action of the reviewing authority correctly fixed the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused.

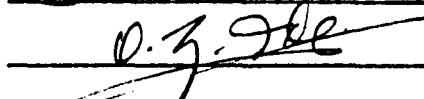
21. The court was legally constituted and had jurisdiction of the offenses involved. No error injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty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



Judge Advocate



Judge Advocate



Judge Advocate

28 NOV 1942

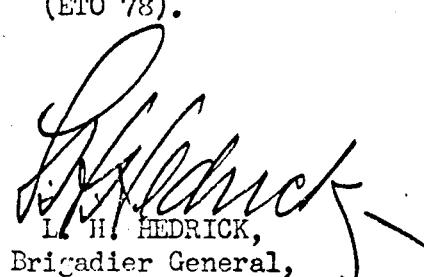
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WAR DEPARTMENT, Office of The Judge Advocate General, European Theater of Operations, APO 871, U.S.Army.

TO: Commanding General, Fifth Infantry Division, APO 5, U.S. Army.

1. In the case of Private MONTANA WATTS (7041515) Battery C, 46th F.A.Bn., I concur in the foregoing holding of the Board of Review. You now have authority to order the execution of the sentence as thus approved.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and these indorsements. The file number of the record of this case in this office is ETO 78. For convenience of reference please place that number in brackets at the end of the published order as follows: (ETO 78).


L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

234380



CONFIDENTIAL

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(69)

Board of Review.

26 NOV 1942

ETO 82.

1ST ARMORED DIVISION

UNITED STATES)
v. :
Tech. Fifth Grade LAWRENCE H. :
MCKENZIE (39389670), Company "G", :
1st Armored Division.)

Trial by G. C. M. convened at Castlewellan, County Down, Northern Ireland, October 20, 1942. Dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for the term of his natural life. Federal Penitentiary, Lewisburg, Pennsylvania, is designated as the place of confinement.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHEOTEN and IDE, 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 92nd Article of War.

Specification: In that Technician Fifth Grade, Lawrence H. McKenzie, Company "G" First Armored Regiment, did, at Upper Camp Ballywillwill, Northern Ireland, 'on or about' October 4, 1942 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mary Jane Martin, a human being by strangulating her with his hands.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the Federal Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under AW 50 $\frac{1}{2}$.

234998

82

CONFIDENTIAL

CONFIDENTIAL

(70)

3. The evidence in pertinent part shows:

The accused on Sunday October 4, 1942, the date of the alleged crime, was a member of Company "G", 1st Armored Division, stationed at Camp Ballywillwill, Northern Ireland, (R.4). At about 7:00 p.m. on that date he was playing cards in his barracks with Privates George A. Redd, Chester Sabinski and Edward Harris. Accused left them at about 7:30 p.m., and Private Harris left about twenty minutes later (R.6). They had all been drinking whiskey (R.31). The accused returned to his barracks at about 8:30 p.m. but witness Redd doesn't know whether or not he retired at that time, but he saw him the following morning. Accused had a cut lip and stated that Private Harris had hit him. Private Harris had a skinned forehead and explained that he had had a fight with a civilian (R.7). A woman named Mary Jane Martin was living alone in a cottage approximately 150 feet from the hut occupied by accused and others (R.10, Exh.A). She was a deaf-mute forty-eight (48) years of age (R.14) and was seen alive on Sunday afternoon at about 4:30 o'clock at which time she was standing in her door and "appeared as usual" (R.12). At about ten o'clock on the morning of October 7, 1942, Sarah Higgen, a neighbor, noticing that no smoke was coming from her cottage, went to investigate and found Mary Jane Martin lying dead in her bed-room and notified the police (R.13, 14). James Ellis Reid, District Inspector, R.U.C., Newcastle, Northern Ireland, arrived at the cottage of deceased at 11:05 a.m., on October 7, 1942, and found deceased lying on the floor with her face in a pool of blood. She was fully dressed, except for her knickers which were lying on the bed. Her clothes were pulled up as far as her stomach. The iron support of the bed was broken and the bedclothes on the bed were in a disordered state. There was one window in the room (R.21) and the lower half of the window-frame consisting of eight panes of glass had been removed and was on the ground outside the window. A plant was growing on the window ledge inside. Its stem and leaves were pushed outwards indicating that some one had passed through the window from the inside. Deceased's upper denture was lying on the bed and had a spot of blood on it. Her lower denture was on the floor. Her clothing was rolled upwards at her back and neatly turned up underneath indicating that it was probably raised by herself. There was no blackout up at the windows (R.22).

Dr. J. A. L. Johnson, physician and pathologist, of Londonderry, Northern Ireland, testified that he had made an examination of the body of the deceased on October 8, 1942, and that he found that most of the external injuries were on the neck. There were abrasions, lacerations and bruises on both sides of the neck in front of the sterno-mastoid muscles. There was also quite a deep scalp wound on the left side of the head. The face was somewhat congested in appearance and the lips were somewhat swollen - an indication of suffocation or asphyxia (R.15). The scalp wound, in his opinion, was caused by a severe blow with a bottle or some blunt instrument but could have been caused from the weight of her body in falling "provided it hit something". There were no signs of rape present but bruises on the legs, thighs and shoulders indicated that a considerable

struggle had taken place. In his opinion the deceased had been dead between three and four days and death was caused by asphyxiation, caused by manual strangulation (R.16).

There were no eye-witnesses of the crime - although there was considerable circumstantial evidence pointing to the accused's implication, the details of which we deem it unnecessary to recite in view of his confession, which was made voluntarily after being duly cautioned by Inspector Reid. The accused's statement was reduced to writing by Inspector Reid and signed by the accused and at the trial was read to the court, received as an exhibit and incorporated in the record of trial (R.23).

The accused's signed statement is as follows -

Statement of T.5 LAWRENCE MCKENZIE, "G" Company, 3rd Battalion, 1st Armored Regiment, made to District Inspector J. E. Reid at Ballykinler, on the 17th October 1942 after being cautioned.

"I have been cautioned by District Inspector Reid in the presence of my officer that anything I say will be taken down in writing and may be used in evidence against me afterwards.

I am guilty of that crime the murdering of that Martin woman. On the Sunday night I saw her in the doorway of her home. It was then dark. I was trying to talk to her and then we went to the bedroom. Before I went to the bedroom I wrote on a piece of paper something to the effect "Let us go into the bedroom". She agreed. I think I put down two florins. She had one in her hand and the other was on the shelf or some place. I went to the bedroom with her and got into bed with her. The bed post broke. There was no light on. After the bed post broke she started to make a noise or tried to make a noise. There was a struggle over the bed and in the room I choked her with both my hands. I held her by the throat until she stopped moving. It was about dark at the time and I could see what I was doing. She was dead when I left the room. The body was then half on the bed and half out of it. I took out through the back window. When I went out I found I had left one glove behind. I went back for the glove and I then thought of the note which I had written. My glove was under the bed and she was then on the floor and I do not think there was any life in her. I got the glove and the note and cleared. I left this time by way of the front door. I was as drunk as could be when I went to the house first. When I discovered what I had done I came to my senses. She did not resent me having intercourse with her and she took off her pants herself. She was quite willing for intercourse when she saw the money. I have destroyed my gloves as there was blood on them. I got rid of the boots I was

CONFIDENTIAL

(72)

"wearing on the Monday after committing the crime.
I am sorry that this has happened and it was caused
by drink. This statement has been read over by me
and is all true. I understand it can be used in
evidence against me for this crime.

LAWRENCE MCKENZIE.

The defense offered the testimony of Lt. Col. Louis V. Hightower, Commanding Officer, 3rd Battalion, 1st Armored Regiment, who testified that accused had acted as Provost Sergeant since July 25, 1942 (R.26); that witness knew accused as well as he knew any soldier in the Battalion; that he was not an habitual drinker and that he had never had occasion to punish him for drinking; that accused's performance of duty had always been of an excellent character and his attention to duty had been superior. That if he were found guilty and needed punishment the witness would be glad to have him back in the battalion after he had served that punishment. The accused then at his own request, after being fully advised of his rights by the President of the Court, was sworn as a witness and testified (R.27) that he went to Mary Martin's house that night for sexual intercourse. That he killed Mary Jane Martin but not with malice aforethought or deliberately but that he was drunk at the time. That the confession which he gave Inspector Reid was correct. That he at first "figured on making off and getting into Southern Ireland and maybe getting away from there some way. I changed my mind and came back and took it." He then appeared voluntarily to make his confession and turned his revolver over to Lt. Fitzgibbon (R.28).

Upon cross-examination the accused testified as follows:-

Q. In your statement that you had given to Constable Reid--Inspector Reid--on the 17th of October, you stated about the bed breaking. What took place at that time?

A. I don't quite understand your question.

Q. In your confession to Inspector Reid on the 17th of October, at Camp Ballykinler,--had you promised to appear there to aid him in the furtherance of this case? Had there been an appointment for you to be there?

A. There had.

Q. Now, when you appeared, in your statement you spoke of the bed being broken. What took place at that time?

A. We were on the bed at that time having sexual intercourse.

Q. And when the bed post broke, what happened? (R.28)

A. I got excited and didn't know what was going on. I was drunk.

- Q. You heard the testimony here in court relative to the bruises and scalp lacerations and the like?
- A. I did.
- Q. Relate to the court as to how they came upon the body of the deceased.
- A. I don't know how those on the head came upon the body of the deceased, but those on the neck were probably made by me.
- Q. You made the ones on the head?
- A. I don't know.
- Q. Did you?
- A. I didn't that I know of.
- Q. You spoke of gloves having blood on. How did your gloves get blood on?
- A. That I don't know. I didn't notice it until just a couple of days ago.
- Q. Did you have your gloves on at the time?
- A. Not that I know of. I couldn't have or I wouldn't have gone back for the other one.
- Q. What was your object in disposing of the shoes?
- A. I really don't know. I didn't think that there was no foot prints at that time.
- Q. The shoes in--Exhibit "D" here--which the witness testified you gave him--were those the shoes you wore that evening?
- A. If he said I give him the shoes, those were the ones.
- Q. Why did you give your shoes away if you didn't know there were any foot prints?
- A. Personally I like that witness and I gave him the shoes for that reason.
- Q. Why didn't you give him a shirt?
- A. I didn't have a shirt to spare.
- Q. Did you have shoes to spare?
- A. I could always get some more.

Defense: The defense objects to the line of questioning in that the witness has already stated why he gave the shoes to the foreman of the construction gang.

Law Member: Objection overruled.

- Q. When you went back to get your gloves, at what hour was this?
- A. I couldn't say the exact hour.
- Q. When you went in and the bed broke--at what hour on Sunday was that?
- A. It was about dark.
- Q. Then how much later was it? What did you do after that--after you left by the window as you stated? (R.29).
- A. I walked around for a while down below the trees south of the building and around in back of the boiler room for I don't know how long, and I reached in my pocket to get my glove and I notice one was gone and I thought I had left it there and I went back after it.
- Q. When you went back after it did you notice any heel prints around?
- A. No, I didn't. I never thought of it.
- Q. Where was Private Harris?
- A. I do not know.
- Q. Had you a fight with Private Harris on October 4--Sunday?
- A. I had that evening. It must have been nine or ten o'clock.
- Q. After the death of Miss Mary Martin?
- A. Yes.

- Q. What was the fight about?
A. He thought I was some civilian.
Q. Where did the fight take place?
A. Between the road going into camp and Barney McVey's store.
Q. Who put the cut on your lip?
A. Harris, sir.
Q. Through all this violent struggle, indicated by the wounds on the deceased, and through the disorderly condition of the room, you received no injury whatsoever?
A. None whatsoever.
Q. Was the deceased a strong woman?
A. I don't know.
Q. What type of struggle went on that her teeth would be lying under the bed--one set of them, and another portion on top of the bed--what type of struggle went on to bring that about?
A. That I don't know.
Q. Do you know how she sustained the injury in the head?
A. No, I do not. (R.30).

Private George J. Redd, Co. G, 1st Armored Regiment, testified that he had been playing cards with accused up to the hour of 7:30 p.m.; they had been drinking whisky; the accused was "pretty tight - pretty full" when he left the barracks; he was able to walk and appeared to know what he was doing. Witness had seen accused in that condition only once before. (R.31, 32).

Private Edward Harris, Co. G, 1st Armored Regiment, testified that upon completion of work the detachment went up to the barracks, played cards for awhile and then went to the store to secure supper. Privates Redd, Sabinski, accused and the witness returned to the barracks at about 7:00 p.m., where they drank whisky. Witness left the barracks about 8:00 p.m. About 6:00 p.m., witness and accused had a fight. Accused was "plumb drunk" (R.33). All of this group drank pretty heavily during the afternoon (R.33,34).

4. Murder is defined thus:

"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.****" (N.C.M., sec. 148, pg. 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, pg. 1023).

"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 and Precedents (2nd Ed.) sec. 1041, pg. 672).

The important element of murder, to-wit "malice aforethought" has been analyzed by authorities as follows:-

"The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent 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 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 and Precedents (2nd Ed.) sec. 1041, pg. 673).

"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, pg. 1084).

"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 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, pg. 1085).

"Malice aforethought or malice prepense, which are the terms usually applied to the malice requisite in murder, is malice existing before the killing and acting as a cause of the killing. The term 'malice aforethought' imports premeditation. It has also been held to involve deliberation, although as to this there is contrary

"authority, but it does not involve deliberation or premeditation in the sense that it is required to exist for any appreciable length of time prior to the killing; it is sufficient that it exists before and at the time of the act. The courts frequently define malice aforethought in the same terms as are employed by other courts in defining malice, or use the terms inter-changeably, and some statutory definitions of murder entirely omit the expression. ****" (29 C.J. sec. 62, pg. 1087).

"**** Malice aforethought may exist when the act is unpremeditated. It may mean anyone 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 grievous bodily harm to, any person whether such person is the person actually killed or not (except when death is inflicted in the heat of 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 grievous bodily harm is caused or not by a wish that it may not be caused; intent to commit any felony." (M.C.M., sec. 148, pg. 163).

5. 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, pg. 640).

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary." (M.C.M., sec. 149, pg. 165).

"The passion which operates to reduce a killing to the grade of manslaughter is ordinarily created by rage or anger, but it may result from other conditions of the mind rendering it incapable of cool reflection, such as fright or terror. It is obvious that a killing due to terror or fright may be closely akin to a killing in self-defense." (29 C.J., sec. 114, pg. 1127).

"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 fray. 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, pg. 1128).

"Manslaughter at common law was defined "to be the unlawful and felonious killing of another without any malice, either express or implied.**** Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, viz., the circumstances leading up to and surrounding the killing. The definition of the crime given by U.S. Rev. Stat., sec. 5341 is substantially the same. 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 the jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder or 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).

6. The function of the Board of Review in examining the record of trial in this case is defined and limited as follows:

"In the exercise of its judicial power of appellate review, the Board of Review treats the findings below as presumptively correct, and examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review, and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrative of justice. C.M.192609, Rehearing (1930)." (Dig. Ops. J.A.G. 1912-40, sec. 407(2), pg. 259).

"In a case in which the President is neither the reviewing nor the confirming authority, the Board of Review may not legally weigh evidence to determine whether or not certain inferences should have been drawn therefrom. It is sufficient if the inferences drawn by the court could legally have been drawn from the evidence. C.M.161833 (1924)" (Dig. Ops. J.A.G. 1912-40, sec. 407(2), pg. 259).

(78)

7. "An unintended homicide, committed by one who at the time is engaged in the commission of some other felony is murder both at common law and under the statutes,*****. (29 C.J. sec. 70, pg. 1097; M.C.M., sec. 148, pg. 163)" "Fornication committed in private and not openly is not an offense, except where it is punishable as such by statute". (26 C.J., sec.3, pg.987). Fornication, under the United States Criminal Code is but a misdemeanor (U.S. Criminal Code, sec.318; 18 U.S.C., 518; U.S. Criminal Code, sec.335; 35 Stat. 1152; 18 U.S.C. 541). The accused, and deceased were guilty of fornication, i.e., sexual intercourse between two unmarried persons. (2 Wharton's Criminal Law (12th Ed.) sec.2104, pg.2413). It therefore follows that the killing of deceased by accused as an incident to the commission of the offence of fornication (a misdemeanor) does not for that reason become murder.

Undoubtedly the Court in finding accused guilty of murder was greatly influenced by the fact that accused strangled deceased while they were engaged in sexual intercourse. However, as has been demonstrated such fact can have no legal force in determining whether the homicide was murder. The fact that they were engaged in such act when the homicide occurred is, however, relevant and material evidence.

8. In order to sustain the finding of murder it is necessary that the evidence disclose, beyond a reasonable doubt, that accused acted with malice aforethought when he strangled deceased to death. Evidence must be discovered that accused's state of mind preceding or at the time of the killing was such as to show an intention to kill deceased or inflict grievous bodily harm upon her, or that he was conscious of the fact that his acts would cause deceased's death or inflict grievous bodily harm upon her.

There is no evidence that accused and deceased had ever met previously. They may have been strangers or possibly casual acquaintances. However, it may fairly be assumed that deceased's reputation as a prostitute was known to accused; otherwise he hardly would have approached her, in the manner shown by the evidence, and bargained for her favors in exchange for two silver coins and a promise to pay the balance of the consideration in the future. They then retired to the bed room where deceased arranged her clothes in a manner convenient to the occasion, and the couple disposed themselves upon the bed and engaged in embraces. There is not a scintilla of evidence, that accused at this time harbored any design on the life of deceased. The lustful conduct of accused is not a correlative of malice aforethought - a necessary element of the crime of murder.

The evidence establishes beyond dispute that accused was highly intoxicated when he went to deceased's house. While it is true that voluntary intoxication is no defense, the fact that accused was in such condition has a direct bearing and relevancy in determining his intention and purpose.

"Evidence of intoxication of defendant is held admissible either as tending to cast some light on the circumstances of the crime; or on the issue of deliberation and premeditation, even though defendant voluntarily became drunk for the purpose of nerving himself to commit the homicide; or on the issue of malice, or intent; or to lower the grade of the crime. Thus, such evidence is admissible to lessen the offense to murder in the second degree, or to manslaughter in some of its grades." (30 C.J., sec.454, pg.223).

"It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, 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 offence." (M.C.M., sec.126, pg.135)
(Cf. 1 Wharton's Criminal Law, sec.407, pg.599).

The accused, in a highly intoxicated condition, and deceased engaged in sexual intercourse. They were prone upon a bed. An iron support attached to a leg at the foot of the bed, broke. One corner of the mattress fell to floor, and the bed covering slid diagonally in the direction of the floor (Ex.B). In the surprise and shock concomitant with the breaking of the support, the deceased commenced to struggle, and being deaf and dumb, uttered weird and unintelligible sounds. The immediate reaction of accused was to attempt to silence deceased. Using both of his hands he grasped her by the throat. A further struggle between accused and deceased ensued. The disturbed condition of the bed clothes is indicative of this fact. The deceased received abrasions and bruises, and probably at this time there was inflicted upon her the principal head injury - a deep linear laceration on the left side of her head, about one inch inside of the hair margin. It did not penetrate through to the cranium and was in fact due to the severity of the bruising at this particular area. (Ex. 6). "By itself it would not be likely to have directly caused death, but judging from the amount of contusion present, etc., etc., there is no doubt that it would have stunning effect and by this effect could quite easily have had a distinct indirect effect in causing death, as for instance in bringing about a cessation of struggling, etc." (Ex. 6). Accused held her until she ceased to breathe.

There is no evidence of malice on the part of accused in this situation. Rather the conclusion appears to be irrefutable that accused was seized with surprise and fright and lost all powers of deliberation and reason. His judgment was unseated. He acted under the impulse of passion accentuated by his intoxication. Provocation existed, not in its usual formal design of an opponent threatening bodily harm to an accused but in a set of circumstances which operated as powerfully and directly upon deceased's mental processes as would have occurred had deceased seized a revolver and pressed it to accused's head.

(80)

"While the word 'passion' usually refers to a state of the mind brought about by anger, it properly speaking expresses that condition of the mind when it has lost its self-control and becomes the passive instrument of the actuating cause or feeling". (Hocker v. Commonwealth, 33 Ky, Law 944; 111 S.W. 676, 681).

The reason the grade of homicide is reduced from murder to manslaughter is:

"Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it - but because it presumes that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent; but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefore as an infirm human being." (State v. Hill, 20 N.C. 629, quoted in State v. Baldwin, 152 N.C., 822, 829; 68 S.E. 148).

"It will not do to hold that reason should be entirely dethroned, or overpowered by passion, so as to destroy intelligent volition. Such a degree of mental disturbance would be equivalent to utter insanity, and, if the result of adequate provocation, would render the perpetrator morally innocent****. The principle involved in the question, and which we think clearly deducible from the majority of well-considered cases, would seem to suggest, as the true general rule, that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment." (Peo. v. Poole, 159 Mich. 350, 354, 123 NW 1093, 134 AmSR 722).

"If a woman kills her newly born child, pursuant to a design formed with a sedate and deliberate mind, whether the design was formed before or after its birth, the crime is murder in the first degree. But if the design to take its life was formed and executed when her mind, by reason of physical or mental anguish, was incapable of cool reflection,

"and she was not sufficiently self-possessed to consider and contemplate the consequences, but yielded to sudden, rash impulse, it is murder in the second degree." Wallace v State, 7 Tex.A.570 (29 C.J., sec.100, pg.1116).

There are certain physiological and psychological factors entering into the situation which cannot be ignored in considering the question as to whether accused acted with "malice aforethought" in strangling deceased. At the moment the bed broke, accused was immoderately sexually excited. The deaf and dumb woman partner, acting under the shock and surprise resultant upon the breaking of the bed support uttered inarticulate, meaningless sounds and struggled to free herself from accused's orgiastic embrace. The reaction upon accused's power of reasoning and judgment was in all probabilities as powerful and drastic as any threat of immediate physical violence. There existed definite, and real provocation, which in its repercussion upon accused's mental processes produced temporary paralysis of their normal functioning. The death of the deceased "must have been the unpremeditated result of the passion suddenly aroused to an uncontrollable degree." (1 Wharton's Criminal Law, sec.426, pg.656).

9. If there is a reasonable doubt as to the guilt of an accused of a higher or lesser crime the Court should convict him of the lesser. (30 C.J., sec.558, pg.312; 23 C.J.S., sec.925, pg.206). If the evidence is as consistent with the guilt of a lesser crime as it is with the guilt of a higher, the conviction should be of the lesser. (Eagan vs. State, 128 Pac. (2nd) (Wyo.) 215, 225). Where, as in this case, malice must be inferred (if it exists at all) from all the circumstances of the homicide, the admission of the homicide by the accused must be considered in connection with any mitigating or exculpatory statements made by him in connection therewith. (Wall vs. State, 5 Ga. App. 305, 63 S.E. 27, 28; Owens vs. State, 122 Ga. 296, 297, 48 S.E. 21, 23; Frazier v. Com. 114 S.W. (Ky.) 268; Eagan vs. State, supra).

It is the opinion of the Board of Review that in this case the proof not only fails to establish one of the important elements of murder to-wit "malice aforethought", but conversely does affirmatively show that accused acted under such passion and emotion aroused by adequate provocation when he strangled deceased, as to dethrone his power of reason for the time being and prevent thought and reflection and the formation of a deliberate purpose. Under such state of the record accused was guilty of voluntary manslaughter and not murder. The maximum sentence for manslaughter is dishonorable discharge from the service, total forfeiture of all pay and allowances due or to become due and confinement at hard labor for 10 years. (M.C.M., sec.104, pg.99).

10. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification and of the Charge as involves a finding of guilty of voluntary manslaughter in violation of Article of War 93, at the time and place and of the person alleged; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 10 years. The court was

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(82)

legally constituted. No errors injuriously effecting the substantial rights of the accused were committed during the trial.

11. The accused is thirty-five (35) years of age. Pursuant to paragraph 5 (d), General Order 37, ETOUSA, 9 September 1942, the execution of the sentence of dishonorable discharge may be ordered executed when the accused is sentenced to confinement for three (3) years or more for an offense which renders his retention in the service undesirable. Manslaughter, when committed under the conditions in this case is such an offense. A general prisoner may be returned to the United States for service of sentence of three (3) years or more. The Secretary of War, by instruction dated 26 February 1941 (AG 253 (2-6-41)), directed that prisoners in such cases under thirty-one (31) years of age and sentenced to not more than ten (10) years, will be confined in the Federal Correctional Institution or Reformatory, which is nearest the port of debarkation in the United States. Conversely, a prisoner over thirty-one (31) years of age is subject to confinement in the United States Penitentiary. The Federal Penitentiary at Lewisburg, Pennsylvania, is therefore the proper place of confinement of this prisoner.

A. Franklin Bates

Judge Advocate.

O. Z. Ide

Judge Advocate.

CONCURRING OPINION

Judge Advocate

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(83)

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

Board of Review.

ETO 82.

1ST ARMORED DIVISION

U N I T E D S T A T E S) TRIAL by G. C. M. convened at
v. : Castlewellan, County Down, Northern
 : Ireland, 20 October 1942. Dishonorable
Tech. Fifth Grade LAWRENCE H. : discharge, forfeiture of all pay and
McKENZIE (39389670), Company "G", : allowances and confinement at hard
1st Armored Division. : labor for life. Penitentiary.

CONCURRING OPINION by VAN BEN SCHOTEN, Judge Advocate.

1. Accused has been convicted of the murder of one, Mary Jane Martin, in violation of the 92nd Article of War. The court imposed the sentence of dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for life. The reviewing authority approved the sentence but the Board of Review holds the record legally sufficient to support only so much of the finding of guilty of the Specification as involves a finding of guilty of voluntary manslaughter under the 93rd Article of War and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of pay and allowances due or to become due and confinement at hard labor for 10 years. I agree with the results and conclusions arrived at by my colleagues but not with their reasons therefor.

2. The statement of facts set out in the opinion of the Board of Review is very sufficient and the legal citations leave little that can be added. However, I find it unnecessary to speculate upon the surprise, shock or reactions of the parties because of the breaking of the bed post. These may have as many variations as there are existing people.

3. The evidence herein establishes beyond dispute that accused was highly intoxicated when he went to the home of deceased. While it is true that voluntary intoxication is no defense, the fact that accused was in such condition has a direct bearing and relevancy in determining his intention and purpose.

"Evidence of intoxication of defendant is held admissible either as tending to cast some light on the circumstances of the crime; or on the issue of deliberation and premeditation, even though the defendant voluntarily became drunk for the purpose

82

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(84)

"of nerving himself to commit the homicide; or on the issue of malice, or intent; or to lower the grade of the crime. Thus, such evidence is admissible to lessen the offense to murder in the second degree, or to manslaughter in some of its grades." (30 C.J., sec.454, pg.223). (Underscoring supplied).

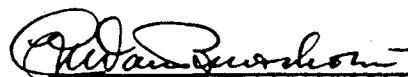
"It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense." (M.C.M., sec.126, pg.135) (Cf. 1 Wharton's Criminal Law, sec.407, pg.601).

"The common law, though it does not indict for mere drunkenness, views it as a wrongful act. As, observes Bishop, "the law deems it wrong for a man to cloud his mind, or excite it to evil action, by the use of intoxicating drinks." Crime therefore, when committed by an individual who has previously placed himself under the influence of an intoxicant, is committed by one who is in the 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. But the question whether or not the accused was drunk at the time of the commission of the criminal act may be material as going to indicate what species or quality of offence was actually committed. Thus there are crimes, or instances of crimes, which can be consummated only where a peculiar and distinctive intent, or a conscious deliberation or premeditation, has concurred with the act, which could not well be possessed or entertained by an intoxicated person. In such cases evidence of the drunken condition of the party at the time of his commission of the alleged crime is held admissible, not to excuse or extenuate the act as such, but to aid in determining whether, in view of the state of his mind, such act amounted to the specific crime charged, or which of two or more crimes, similar but distinguished in degree, it really was in law. So, upon ~~an~~ an indictment for murder, testimony as to the inebriation of the accused at the time of the killing may ordinarily properly be admitted as indicating a mental excitement, confusion, or unconsciousness,

(85)

"incompatible under the circumstances of the case with premeditation or a deliberate intent to take life,
and as reducing the crime to the grade of manslaughter,
or--where such an offence is created by the State
statute--of murder in the second (or other) degree."
(Underscoring supplied). (Winthrop's Military Law
and Precedents (2nd Ed.) pg.292-3).

4. No motive, reason or purpose for the act of accused is disclosed by the record, directly or by inference, but it does affirmatively indicate the accused to have been intoxicated to such a degree as to render him incapable, under the circumstances, of premeditation or of a deliberate intent to take life. Under such state of the record accused was guilty of voluntary manslaughter and not murder. The maximum sentence for manslaughter is dishonorable discharge from the service, total forfeiture of all pay and allowances due or to become due and confinement at hard labor for 10 years (M.C.M., sec. 104, pg. 97).



Judge Advocate

1st Ind.

2 - DEC 1942

(86)

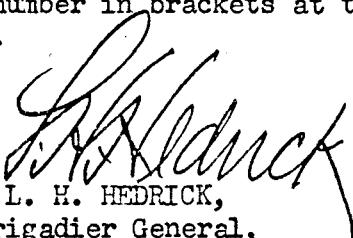
WAR DEPARTMENT, Office of The Judge Advocate General, European Theater of Operations, APO 871, U. S. Army.

TO: Commanding General, 1st Armored Division, APO 251, U.S. Army.

1. In the case of Tech. Fifth Grade LAWRENCE H. MCKENZIE (39389670) Co. G. 1st Armored Regiment, I concur in the foregoing holding of the Board of Review for the reasons stated in both the majority and concurring Opinions. I see no need to rely solely on the alcoholic intoxication. There was much more in this case, a most unusual combination of disturbing circumstances, which combined provided adequate provocation to produce an emotional upset so violent as, for the time being, sufficiently to dethrone the reason of accused to prevent thought and reflection on the formation of a deliberate purpose. In such a case it is the theory of the law that malice and passion or emotion of such degree cannot coexist in the mind at the same time, hence the homicide is not murder but voluntary manslaughter.

I accordingly recommend that only so much of the findings of guilty of the specification and the charge be approved as involves a finding of guilty of voluntary manslaughter in violation of Article of War 93, at the time and place and of the person alleged, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten (10) years. Thereupon, you will have authority to order the execution of the sentence as modified.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial which is herewith returned, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is ETO 82. For convenience of reference, please place that number in brackets at the end of the published order as follows: (ETO 82).



L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

234998 CONTINUED

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(87)

Board of Review.

ETO 90.

27 NOV 1942

U N I T E D S T A T E S)	TRANSPORTATION CORPS
v.	:	TRIAL by G. C. M., convened at
WESLEY EDMONDS (37076497), Private,	:	Maghull, Lancashire County,
Co. "C", 397th Port Battalion,	:	England, 19-20 October 1942.
Transportation Corps.	:	Dishonorable discharge, forfeiture
)	of all pay and allowances and
		confinement for life. Penitentiary.

HOLDING by the BOARD OF REVIEW
RITER, VAN BEN SCHOTEN and IDE, Judge Advocates.

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

The accused was tried upon the following Charge and Specification.

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private WESLEY EDMONDS, Company "C", 397th Port Battalion, Transportation Corps, Maghull, Lancashire, England, did, at or near Maghull, Lancashire, England, on or about October 8, 1942, forcibly and feloniously against her will have carnal knowledge of Ellen Rigby.

He pleaded not guilty and was found guilty of the Charge and Specification. Evidence of one previous conviction, for breach of restriction, 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 the rest of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that Ellen Rigby, a single woman, about 34 years of age, lived with her mother. On the evening of 8 October 1942, at about 7:30 p.m., she proceeded from home to a store in the neighborhood to get some bread. The accused was in the store at the time and he followed her home attempting to engage her in conversation. Shortly thereafter she left home on her bicycle to go to her cousins some little distance in another direction where she got some onions. She passed accused as she left home and he again

attempted to engage her attention but failed. As she was coming along the road on her return towards home nearly an hour later, accused suddenly appeared, she put on her brakes and he got hold of the bicycle saddle and she had to get off. Accused started talking love to her and wanted her to go around to a haystack which she refused to do but he forced her and the bicycle inside the field and wired up the gate. Against her protests, accused started putting his hand up her clothes and said he was going to love her and she was going to love him. He put his coat on the ground and forced her on it and he sat on her stomach. She told him she was menstruating and struggled with him for nearly two hours once almost getting away before he caught and threatened to stab her in the back if she cried out or made any noise (R.50). He hit her on the face and bit her face and breast (R.11-12, 14-15). He also offered her money which she refused. After accomplishing his purpose, accused arose, laughed and said "Now you may go". She was afraid to cry out (R.22-23). She returned home in a disheveled condition, with clothes dirty, stained and torn. She told her mother what had happened and they immediately called the police. The accused was picked up within a few hours, wearing blood-stained underclothing and with a fork in his pocket (R.31. 44). He was identified by Miss Rigby as the man who assaulted her and accused admitted she was the woman he had been out with (R.45, 50), and that the fork was his. He admitted having intercourse with Miss Rigby but claimed it was with her entire consent (R.55-56). Within two or three hours after Miss Rigby arrived home, she was examined by two doctors, one a police physician and the other an army officer (R.39-43). They found her in a distressed condition, numbed and shocked. She had an increased pulse, re-acted very poorly to questions. Her speech was rather slow and halting. Her face and jaws had reddened areas which suggested bruises, as did also her neck and ankles. She had an abrasion on her chest and scratches on the posterior surface of both legs and body. Examination of the genitals showed the hymen ring torn in three places. In the opinion of the doctors she had been a virgin, the lacerations were caused by a brutal entry and the intercourse was not normal nor with the woman's co-operation. They were made when the effort of penetration occurred and would not have been multiple nor so deep if the act had been jointly accomplished.

4. Rape is the unlawful carnal knowledge of a woman by force and without her consent (M.C.M., 1928, pg. 165). The act of intercourse is admitted by accused. That the act was accomplished by force is conclusively shown by the undisputed testimony of the physical conditions found by both examining physicians. The appearance of the girl when she arrived home, her immediate story to her mother and the calling of the police all tends to corroborate her story.

The facts amply support the conclusion of the court that accused committed the offense charged. The sentence is mandatory.

5. Miss Rigby of her own volition at the conclusion of her testimony, asked the court to deal leniently with the accused. Eight of the thirteen members of the court recommended clemency in a signed statement attached to the record.

6. The court was legally constituted and had jurisdiction of the person and offense involved. 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.

7. Accused is 32 years of age. Pursuant to paragraph 5 (d), General Order 37, ETOUSA, 9 September 1942, the execution of a sentence of dishonorable discharge may be ordered executed when the accused is sentenced to confinement of three years or more for an offense which renders his retention in the service undesirable. Rape is such an offense. A general prisoner may be returned to the United States for serving sentence of three years or more. Confinement in a penitentiary is authorized for the offense of rape. The designation of the Federal Penitentiary at Lewisburg, Pennsylvania, is correct.

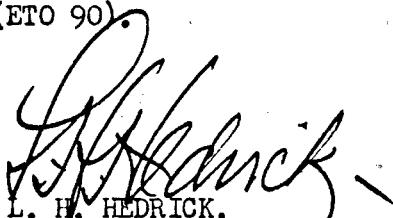
B. Franklin Ritter _____ Judge Advocate
Richard W. Burdette _____ Judge Advocate
O. J. Zell _____ Judge Advocate

30 NOV 1942
 1st Ind.

WAR DEPARTMENT, Office of The Judge Advocate General,
 European Theater of Operations, APO 871, U.S. Army.
 TO: Commanding General, Services of Supply, European Theater of
 Operations, U.S. Army.

1. I concur in the foregoing holding of the Board of Review. You now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial which is herewith returned, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is ETO 90. For convenience of reference please place that number in brackets at the end of the published order as follows: (ETO 90).


 L. H. HEDRICK,
 Brigadier General,
 Judge Advocate General,
 European Theater of Operations.



CONFIDENTIAL

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(91)

Board of Review.

1 Dec 1942

ETO 105.

U N I T E D S T A T E S)	190TH FIELD ARTILLERY
v.	:	TRIAL by G. C. M. convened at
T. C. FOWLER, (38079537), Private,	:	Lurgan, Northern Ireland,
Battery "A", 190th Field	:	12 November 1942. Dishonorable
Artillery.)	discharge, forfeiture of all pay and allowances and confinement for 5 years. Federal Reformatory.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and IDE, 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 58th Article of War.

Specification: In that Private T. C. FOWLER, Battery A, 190th Field Artillery Regiment, did, at Camp Kilmer, New Jersey, on or about 1300 hours, 30 August 1942, desert the service of the United States with intent to shirk important service, to-wit: Embarkation for duty beyond the continental limits of the United States, and did remain absent in desertion until he surrendered himself at Camp Kilmer, New Jersey, on or about 2 September 1942.

He pleaded not guilty to the Charge and Specification, but guilty of violation of the 61st Article of War. He was found guilty of the Charge and Specification. Evidence of two convictions by Summary Court-Martial: (1) absence without leave and breaking restriction, and (2) absence without leave 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 and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

234990

3. The evidence shows that on 27 August 1942, accused, a member of Service Battery, 190th Field Artillery Regiment, was stationed at Camp Kilmer, New Jersey (R.9). That on that date an order was issued from Headquarters, Camp Kilmer, confining all personnel of the Task Force to the post, excluding visitors from the Camp and prohibiting the sending of telegraphic and telephone messages by personnel of the Task Force to persons outside the Post, and the despatching of personal mail until further orders (R.10-Exh."A"). This order was read to accused's battery at retreat on 27 August 1942 and published on the Bulletin board (R.11). It was read at the 1:00 o'clock drill formation of the Battery on 28 August 1942, accused being present at that time (R.19). The organization was usually paid on the last day of the month but in view of the fact that the organization was moving out before Monday, 31 August 1942, it was paid on Sunday 30 August 1942. On 30 August 1942 at the pay formation the battery members were directed to pack their "A" barrack bags and to clean and police up the barracks (R.15). They were directed to carry their "A" barrack bags downstairs (from the barracks) to await loading and entraining (R.16). Members of the battery were informed they were going to an overseas destination (R.18). Accused was present at the pay formation (R.16) and was paid before 11:00 o'clock. At 12:30 o'clock after the members of the battery had carried their "A" bags to the foot of the stairs the accused's "A" bag was found on his bunk. He was not present at the boat drill which was held at 13:00 o'clock (R.17). An entry was made in the Battery morning report on 30 August 1942 carrying accused as AWOL. (R.16). Accused's battery entrained between 6:00 and 7:00 o'clock on the evening of 30 August 1942 (R.12); proceeded by rail on to a port, thence to an overseas destination. Accused was not present on this movement (R.17) but was returned to the regiment after it arrived in Northern Ireland (R.12).

The accused after being fully advised of his rights elected to take the stand in his own behalf and testified:

On 30 August 1942 he had been drinking since 3:00 o'clock that morning, but "not so much". He was paid and left Camp Kilmer about 10:45 o'clock. He admitted "going A.W.O.L" but "didn't think much about it", but after he had "sobered up I seen what I had done so I came back again". He knew his outfit was about to move out but did not think much about it and "didn't know when they was going". He voluntarily returned to Camp Kilmer when he sobered up and asked to be sent on the first boat overseas, after he found that his battery had already moved out (R.23).

Upon cross-examination accused testified that he did not know they were going overseas, but knew they were going somewhere; that he had been in the Regular Army four or five years; that it was unusual to be paid before the last day of the month (R.23); that he made no inquiry about the battery while he was away but came back and turned himself in after three days. He knew the battery was restricted to camp but did not remember hearing the order read (R.24). He knew that his "B" bag was gone, his "A" bag was ready to go and that the battery was going somewhere pretty soon but never heard anything about going overseas. While away he

234990

105

was drinking until the morning he turned himself in.

4. The Specification, Charge I, alleges that the accused did, on or about 30 August 1942, desert the service of the United States with intent to shirk important service.

Article of War 28 provides in pertinent part:-

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

"Hazardous duty" or "important service" may include such service as embarkation for foreign duty or duty beyond the continental limits of the United States (M.C.M. 1928 - P.143).

Mere absence without leave under the circumstances indicated is not in all cases *prima facie* evidence before a court-martial of intent to desert (SPJGS. 251.2 17 June 1942) and evidence must be introduced from which the intent in desertion can be inferred (P.144 M.C.M. sec.130). The accused by his own admission knew that his battery was leaving very soon. His "B" bag was already packed and had gone to the rail-head and his "A" bag was packed and on his bunk ready to be taken downstairs. He had helped police up the barracks and had received his pay a day in advance of the regular pay-day. He knew he was restricted to the post area. He admitted absenting himself without leave - but "didn't think much about it" - although he was a soldier of four or five years of service and experience. There is no claim that accused was intoxicated before leaving. Any testimony by accused that he did not intend to shirk hazardous duty is not compelling as the court may believe or reject such testimony in whole or in part. The accused exhibited a spirit of such callous indifference to his obligations and duties as a soldier that the court was justified in concluding that his departure and absence were intentional and deliberate. There was therefore sufficient evidence before the court from which it could properly infer an intention to shirk hazardous duty. It is not the prerogative nor duty of the Board of Review to weigh the evidence as such function belongs to the Court.

5. The court was legally constituted and had jurisdiction of the person and offense involved. 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.

6. The accused was 28 years old at time of commission of the offense. In view of War Department directive (AG 253 (2-6-41) E) the reviewing authority correctly designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused.

B. Franklin Kite _____ Judge Advocate
Richard J. Burchard _____ Judge Advocate

O. J. Ide _____ Judge Advocate 105
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 - 3 - CONFIDENTIAL

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(94)

1st Ind.

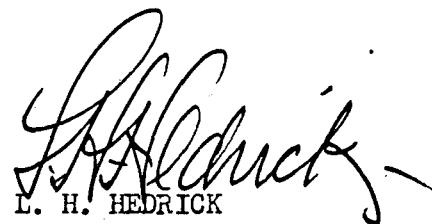
2 - DEC 1942

WAR DEPARTMENT, Office of The Judge Advocate General, European Theater of Operations, APO 871, U.S. Army.

TO: Commanding General, V Army Corps (Reinf.)
APO 305, U.S. Army.

1. I concur in the foregoing holding of the Board of Review. You now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is ETO 105. For convenience of reference please place that number in brackets at the end of the published order as follows: (ETO 105).



L. H. HEDRICK

Brigadier General
Judge Advocate General
European Theater of Operations.

234990

105

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(95)

Board of Review.

ETO 106.

4 - DEC 1942

U N I T E D S T A T E S) EIGHTH AIR FORCE

v. :
Private JOHN J. ORBON, (13026228), : TRIAL by G. C. M. convened at Membury
10th Troop Carrier Squadron, : Berks, England, November 6, 1942.
60th Troop Carrier Group, : Dishonorable discharge, forfeiture of
12th A.F. : all pay and allowances due or to
 : become due and confinement at hard
 : labor for 10 years. Penitentiary.

HOLDING of the BOARD of REVIEW
RITTER, VAN BENSCHOTEN and IDE, Judge Advocates.

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

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

CHARGE I: Violation of the 64th Article of War.

Specification 1: In that Private JOHN J. ORBON, 10th Troop Carrier Squadron, 60th Troop Carrier Group, XII Air Force, did, at Aldermaston, England, on or about October 16, 1942, draw a weapon, to-wit: a .45 Caliber automatic service pistol, against 2d Lt. Robert A. Schneider, his superior officer, who was then in the execution of his office.

Specification 2: In that Private JOHN J. ORBON, 10th Troop Carrier Squadron, 60th Troop Carrier Group, XII Air Force, having received a lawful command from 1st Lt. Edwin W. Barbee, his superior officer, to accompany him to the Orderly Room, did, at Aldermaston, England, on or about October 16, 1942, wilfully disobey the same.

234993

CHARGE II: Violation of the 63rd Article of War.

Specification: In that Private JOHN J. CRBON, 10th Troop Carrier Squadron, 60th Troop Carrier Group, XII Air Force, did, at Aldermaston, England, on or about October 16, 1942, behave himself with disrespect toward his superior officer by carrying a loaded pistol about the camp and threatening to shoot 1st Lieutenant Edward W. Barbee on sight.

He pleaded not guilty to, and was found guilty of, the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of 10 years.

The reviewing authority approved the sentence, designated the Federal Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The accused is a member of 10th Troop Carrier Squadron, 60th Troop Carrier Group, 12th Air Force, stationed at Aldermaston Airdrome, England.

The prosecution's evidence shows:

That about 9:30 p.m., 16 October 1942, Sergeant Anthony F. Bianco, who was billeted elsewhere, was visiting Staff Sergeant Wilfred Buersmeyer in the latter's barracks at Aldermaston Airdrome. They were engaged in private conversation (R.11). The accused came into the barracks and ordered Bianco to leave and demanded that the lights be extinguished (R.11). There was no rule requiring extinguishment of lights at that hour (R.11). Buersmeyer and Bianco refused compliance with accused's demand (R.11), and accused became abusive, using profane and vulgar language (R.11, 12). He engaged in a scuffle with Bianco who fell to the floor, and when he arose he left the barracks (R.12, 13). Accused went to bed (R.12).

Staff Sergeant Lawrence W. McCormick was charge of quarters on evening of 16 October 1942 (R.7, 12, 17). Bianco appeared at the orderly room that evening and informed McCormick that he (Bianco) was having trouble with accused and wanted to see Captain Edwin W. Barbee, Air Corps, 10th Troop Carrier Squadron, 60th Troop Carrier Group. Upon Bianco making complaint to Captain Barbee, the latter directed McCormick to accompany him (Barbee) to accused's barracks which he did (R.7, 16). Upon arrival at the barracks Captain Barbee ordered McCormick to go up to accused's bed while he awaited below (R.7). Upon arrival at accused's bedside McCormick ordered accused to get up, dress and accompany him. Accused refused (R.10) and McCormick returned and reported to Captain Barbee (R.7). Captain Barbee accompanied by McCormick, then went up to see accused, who was ordered by the Captain to get up and dress (R.7, 10, 12, 17). While accused was dressing Captain Barbee went to the rear of the room and talked with Buersmeyer and other soldiers (R.7, 17). Accused took his gun from the holster, but upon being ordered by McCormick to put it back, he complied with the order (R.7, 10). When accused completed dressing, Captain Barbee,

234993

106

the accused and McCormick left the barracks and went down to a waiting jeep. Captain Barbee ordered accused to get into the car (R.7, 9, 17). Accused refused and said "I am not going to let you make a fool out of me. I want to see Captain Sherwood" (R.7, 10, 17). Accused went back to his barracks (R.7, 10). McCormick, upon orders from Captain Barbee followed accused back into the barracks (R.8, 17). He found accused with his gun in his hand. The gun was loaded (R.8, 12). McCormick heard him "pull it back" and "heard it click" as a cartridge went into the chamber (R.8, 12). McCormick tried to take the gun from accused, but the latter kept McCormick at a distance by brandishing the gun in front of him (R.8, 12). Accused finally left the barracks (R.8) and went to adjoining barracks occupied by Second Lieutenant Robert A. Schneider but McCormick remained at accused's barracks (R.19). Accused opened the door and shouted "Where's Sherwood" (R.19), referring to Major Sherwood, the commanding officer. He was informed by Lieut. Schneider as to the location of Major Sherwood's barracks (R.19). Accused carried his gun which was loaded and cocked (R.19), and started to point it as he reached the vestibule. Lieut. Schneider followed him and reached him in the vestibule of Major Sherwood's barracks. He saw him take the cartridge and clip out of his gun and put the bullet in the clip (R.19). Lieut. Schneider opened Major Sherwood's door and turned on the light (R.19). Major Sherwood was absent (R.19). The Lieutenant said to accused "Let's go back to the barracks and find out what the trouble is." (R.19). Accused kept complaining about "these shifts waking him up." He had a gun in his hand, and refused to give it to Lieutenant Schneider (R.19). He said "No, as long as he was going to die he was going to take the rest of them with him. He wasn't going to die alone." (R.19). Accused and Lieutenant Schneider went to the former's barracks (R.8, 12, 20). The Lieutenant proceeded to question some of the soldiers as to the cause of the disturbance, and while thus engaged, the accused turned to leave the barracks (R.20). He threatened McCormick with his gun (R.8, 12, 20). He again refused to surrender his gun to Lieutenant Schneider (R.8, 12), and held the gun on him and McCormick (R.12, 20). He also threatened to kill Captain Barbee (R.12). The Lieutenant and McCormick followed accused into the street. McCormick again demanded his gun (R.20), but the accused kept waving it in front of him and saying "Don't come any closer, Lieutenant, don't come any closer" (R.9, 20, 21). He pulled the slide back and cocked the gun (R.12, 20, 21), and had the gun levelled at Lieutenant Schneider's stomach (R.21). Several times, both in the barracks and on the street accused said to Lieutenant Schneider that he (accused) intended "to get Barbee" (meaning Captain Barbee) (R.9, 20). Lieutenant Schneider desisted in his attempt to secure the gun and went to telephone Captain Barbee of accused's threats (R.17, 20). Accused disappeared around the corner of the barracks (R.13, 17). He was not apprehended or confined until the next day (R.18) when he told McCormick that if he had not been there the night before he would have killed Captain Barbee (R.9).

The accused, after having his rights explained to him, was sworn as a witness on his own behalf (R.21). His testimony is a disclaimer of all memory of the events of the evening of 16 October 1942 (R.23, 24). He stated he had been drinking all day on 15 October 1942 and had remained in a public house until 1 p.m., on that day. While returning to the Airdrome in a truck, which he was driving, he was forced off the road by another truck and struck his head on the roof of his truck. He was treated at a hospital (R.22, 23). After leaving the hospital accused and companion secured a

234993

103

case of beer which they drank, finishing it at about 10:30 p.m. (R.23). The next day, 16 October 1942, accused and companion secured three cases of beer which they consumed. Later, a sergeant who had five quarts of whisky, invited accused to his quarters, and the drinking bout was continued. After that he claimed he had no memory of events (R.23, 27). Upon cross-examination accused made contradictory statements (R.25, 26, 27, 28) but in the main the story concerning his consumption of intoxicating liquor appears to be fairly well sustained.

Private Adams, accused's companion testified that on the evening of 15 October 1942 he drank a few beers with accused (R.19). About 7:30 p.m., 16 October 1942 the witness and accused went to a public house where accused consumed alcoholic liquor, including whisky. Accused drove a truck back to the barracks, and it left the side of the road when it hit a gutter (R.30). Accused struck his head on the roof of the truck (R.30) and his head commenced to bleed. Adams took accused to the hospital where the head was dressed. At about 9:30 p.m., the two soldiers went to the barracks (R.31). Accused wanted to go to bed, and stated to Bianco and Buersmeyer that it was time to put out the lights (R.31). Upon Bianco stating: "I don't have to. I am a sergeant" accused grabbed him and ejected him from the barracks (R.31).

Captain William Davis, Medical Corps, 11th Troop Carrier Squadron, 60th Troop Carrier Group, appeared as a witness for the defense. In his opinion it was possible for accused to have been suffering from amnesia as a result of the head injury (R.37) and it was possible accused was unaware of his conduct on the evening of 16 October 1942, either as a result of amnesia or excessive use of intoxicants (R.35).

4. A preliminary question arises in connection with pleading and practice. The charges originally drafted appeared thus:

CHARGE I: Violation of the 64th Article of War.

Specification 1: In that Private John J. Orbon, 10th Troop Carrier Squadron, 60th Troop Carrier Group, XII Air Force, did, at Aldermaston, England, on date of October 16, 1942, draw a weapon, to-wit, a .45 caliber Service Automatic, against 2nd Lt. Robert A. Schneider, his superior officer, who was then in the execution of his duty.

Specification 2: In that Private John J. Orbon, 10th Troop Carrier Squadron, 60th Troop Carrier Group, XII Air Force, did, at Aldermaston, England, on date of October 16, 1942, offer violence against 1st Lt. Edwin W. Barbee, his superior officer, who was then in the execution of his duty, in that he, the said Private John J. Orbon, did threaten to shoot 1st Lt. Edwin W. Barbee on sight.

234993

106

CONFIDENTIAL

(99)

Specification 3: In that Private John J. Orbon, 10th Troop Carrier Squadron, 60th Troop Carrier Group, XII Air Force, having received a lawful command from 1st Lt. Edwin W. Barbee, his superior officer, to accompany him to the Orderly Room, did, at Aldermaston, England, on October 16, 1942, wilfully disobey the same.

The oath to same was made by 1st Lieut. Edwin W. Barbee on 18 October 1942. The affidavit recites that the accuser "has personal knowledge of the matters set forth in specification 3 of Charge: Violation of 64th Article of War and has investigated the matters set forth in specifications 1 and 2 of Charge: Violation of 64th Article of War." Thereafter the Charges were re-drafted so as to lay original Specifications 1 and 3 under the 64th Article of War, and original Specification 2 was eliminated. A new charge for Violation of the 63rd Article of War and a new Specification were inserted. However, no change either in the form or date of the affidavit was made. For purpose of easy visualization the following comparison is shown:

Original Charge

Violation of 64th Article of War:
Specification 2: In that Private John J. Orbon *** did *** on date of October 16, 1942, offer violence against 1st Lt. Edwin W. Barbee, his superior officer, who was then in the execution of his duty, in that he, the said Private John J. Orbon, did threaten to shoot 1st Lt. Edwin W. Barbee on sight.

Amended Charge

Violation of 63rd Article of War:
Specification: In that Private John J. Orbon *** did *** on or about October 16, 1942, behave himself with disrespect towards his superior officer by carrying a loaded pistol about the camp and threatening to shoot 1st Lieutenant Edward W. Barbee on sight.

The accused, by motion timely made (R.5, 6) asked the Court to dismiss the charge under the 63rd Article of War against accused on the ground there is no sustaining oath to same. The Court closed for consideration of the motion and upon being opened, the Law Member declared "**** the court has decided that the charges as drawn will be acted upon, in that the matter has been fairly included in charge 64, as well as charge 63." (R.6). While the action of the Court on accused's motion is stated in inapt language, it was in effect a denial of the motion and will be so treated by the Board of Review.

The record shows that there was full compliance with the 70th Article of War, based on the original Charge and Specifications. When the report of the investigating officer together with the original charge sheet was referred to the Staff Judge Advocate of the Eighth Air Force, pursuant to said Article of War and M.C.M. 35 b, he re-drafted the charges in the manner indicated. There was no further investigation made after the amendment of the Staff Judge Advocate.

The 70th Article of War in pertinent part directs:

"Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief. **** Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice. ****"

The relevant provision of Sec. 35 b, M.C.M., is as follows:

"*** No appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge advocate based on all of the information relating to the case, including any report made under 35 c, which is reasonably available at the time trial is directed. The advice of the staff judge advocate shall include a written and signed recommendation of the action to be taken by the appointing authority. Such recommendation shall accompany the charge if referred for trial".

Section 34 M.C.M. in part provides with reference to the officer exercising court-martial jurisdiction:

"*** Charges forwarded or referred for trial and accompanying papers should be free from defect of form or substance, but delays incident to the return of papers for correction of defects that are not substantial will be avoided. Obvious errors may be corrected and the charges may be re-drafted over the signatures thereon, provided the re-draft does not involve any substantial change or include any person, offense, or matter not fairly included in the charges as received. Corrections and re-drafts should be initialed by the officer making them.****". (Underscoring supplied).

The gravamen of the offense under AW 64 is found in the clause:

"Any person *** who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office ****". The M.C.M. (sec.134) declares that:

"The phrase 'offers any violence against him' comprises any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up'. But the violence where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of this article." (underscoring supplied). (Cf: Winthrops Military Law and Precedents, sec. 880, pg. 570).

The gist of the offense charged by the amended Charge and Specification under AW 63 is found in these words:

"Any person *** who behaves himself with disrespect towards his commanding officer shall be punished etc." (AW 63).

The M.C.M. comments on this offense as follows:

"The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed. It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.*** Disrespect by words may be conveyed by approbrious epithets or other contumelious or denunciatory language. ****" (M.C.M., sec.133, pg.146). (Cf: Winthrops Military Law and Precedents, sec.875, pg.567).

It is therefore apparent that the fundamental difference between an offense under AW 63 and AW 64 is found in the fact that under the former the accused can commit the offense out of the presence of the superior officer while under the latter the accused must commit the offense not only in the presence of the superior officer but also there must be an act or acts of violence physically attempted towards the superior officer.

The offense of behaving with disrespect towards a superior officer under AW 63 is a separate and distinct offense from the offense of wilfull disobedience denounced in AW 64, and the offense under the last mentioned article is not a lesser included offense under AW 63 (C.M.218409 (1942) Bulletin, JAG - VOL.I, No.1, Jan-June 1942, pg.18). In the instant case the differentiation is more pronounced in that the accused was originally charged under AW 64 with offering violence against Lieut. (Captain) Barbee in that he "did threaten to shoot" Lieut. Barbee.

(102)

The conclusion appears to be clearly deducible that there was introduced by the amendment of the charges a new offense "not fairly included in the charges" as received by the Staff Judge Advocate, and that such new Charge and its Specification is not supported by the oath of the accuser. Was the action of the Court in denying the motion to dismiss Charge II and its Specification an error requiring the disapproval of the finding of guilty? The amendment of the charges was the direct result of the report of the investigating officer. The facts reported by him make it obvious that the prosecution could not have proved the offense under Specification 2 of the Original Charge, but the facts did reveal an offense under AW 63. The Staff Judge Advocate remedied this situation by eliminating the original Specification 2 and substituting Charge II and its Specification. In this respect he was acting clearly within the scope of his authority and duty. The question arises however, as to whether or not the Court obtained jurisdiction over the offense alleged in Charge II, when there was no specific investigation of same after it was added to the Charge Sheet.

The pertinent provision of AW 70 reads:

"*** No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline.***"

The investigation required by AW 70 is jurisdictional and in its absence the Court acquires no jurisdiction and the proceedings are void ab initio (C.M. 161728 (1924), Dig. Op. JAG., 1912-40, sec.428(1), pg.292).

While the charges form the basis of the investigation it is the transaction or event which gave rise to the charges which is the true subject of investigation. This conclusion is supported by: (a) The fact that "no appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge advocate based on all of the information relating to the case" (Underscoring supplied) (M.C.M., sec.34) and (b) "The investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline." (Underscoring supplied) (AW 70). The underscored words and clauses above quoted indicate clearly that the investigation envelopes the entire situation. It may be that the charges are inappropriate to cover the offense or offenses revealed by the investigation. Hence, the convening authority is empowered to amend and adjust and should amend and adjust the charges to meet the facts, (M.C.M., sec.34) before referring the charges for trial. The only limitation on his authority in this respect is that the "redraft does not include any substantial change or include any person, offense, or matter not fairly included in the charges as received." (Underscoring supplied) (M.C.M., sec.34). This limitation prevents the

234993

105

insertion of a new charge which is alien to the situation revealed by the facts disclosed by the investigation or preferring charges against persons not originally included, but it does not prevent the convening authority from re-drafting or re-stating the charges so as to make them allege an offense or offenses supported by the facts discovered and shown by the report of investigation. An opposite conclusion leads to the absurd situation of requiring a new investigation which would yield the exact state of facts as the first investigation. It would be a futile effort, which would delay the trial and not protect any rights of the accused. This construction of AW 70 is supported in spirit by C.M.179142 (1928), C.M.182078 (1928), and JAG. 220.26, Aug.30, 1932, digested in Dig.Ops. JAG. 1912-40, sec.428(1), pg.292. It is, therefore, the opinion of the Board of Review that there was no violation of AW 70, in the instant case, because a new and additional investigation was not made on Charge II and its Specification, and that the Court acquired jurisdiction to try the same.

However, the accused was compelled to go to trial upon a Charge and Specification which were not supported by the oath of the accuser. It has been held that the quoted provision of AW 70, requiring that the charges be supported by the oath of the accuser is procedural, and not jurisdictional, is for the benefit of the accused and may be waived by accused either explicitly or by failure to object to the irregularity. (C.M. 197674 (1932), sec.1267, Supp. VIII. Dig. Ops. JAG. 1912-30; C.M.210612 (1939), Maddox; C.M.220625 (1942), Gentry). (Cf. sec.1267, Dig. Ops. JAG. 1912-30). In the case timely and proper objection was made. There was no waiver, either express or implied, of the irregularity.

The supporting of charges by the oath of the accuser is not universally required. M.C.M. 31 particularly provides that the charges need not be sworn to if the accuser believes in the innocence of the accused. In criminal prosecutions, in the civil courts the absence of a verification to an information where one is required by statute, is ground for quashing the information, but it does not render the information void or deprive the court of jurisdiction, and, after committing error in overruling a motion to quash on this ground, the court still holds jurisdiction (31 C.J., sec.166, pg.648). The record of trial in this case fails to show how accused was prejudiced in any respect by the courts ruling which compelled him to stand trial on Charge II and Specification although it was not verified. Nothing appears in the record of trial that accused's rights were injuriously affected by this irregularity in pleading. He was neither surprised nor mislead as to the charges against him. The accused made no attempt to controvert the prosecutions evidence which supports the conviction of violation of AW 63 (Charge II and Specification). He denied all knowledge of his conduct because of being intoxicated. Under such circumstances the verification of Charge II and Specification would have added nothing to his defense, nor does its absence injure him.

The Board of Review is clearly of the opinion that under the provisions of AW 37 the irregularity is no basis for disturbing the finding of the Court with respect to Charge II and Specification.

(104)

5. Specification 1 of Charge I charges accused with violation of 64th Article of War in that he drew a .45 caliber automatic service pistol, against 2nd Lieutenant Robert A. Schneider. The evidence clearly sustains all elements of the offense - almost without contradiction. Lieutenant Schneider was accused's superior officer.

"The phrase 'draws or lifts up any weapon against' covers any simple assault committed in the manner stated. The weapon chiefly had in view by the word 'draw' is no doubt the sword; the term might, however, apply to a bayonet in a sheath or to a pistol, and the drawing of either in an aggressive manner or the raising or brandishing of the same minaciously in the presence of the superior and at him is the sort of act contemplated. The raising in a threatening manner of a firearm (whether loaded or not loaded) or of a club, or of any implement or thing by which a serious blow could be given, would be within the description 'lifts up'." (M.C.M., sec.134, pg.147).

It was a question of fact for the Court as to whether accused was aware that Lieutenant Schneider was his superior officer. Inasmuch as there is substantial evidence (see paragraph 6 hereof, supra) that accused was sober and in a normal condition, in spite of evidence of his heavy consumption of intoxicating liquor, the Court's finding is conclusive.

Lieutenant Schneider was engaged in maintaining discipline within his squadron and quelling a disorder. He was clearly in the execution of his office.

"It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office." (M.C.M., sec.134, pg.148).

The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification I.

6. Specification 2 of Charge I charges the offense of wilfully disobeying the lawful command of a superior officer. Captain Barbee relates the circumstances of the giving of the order as follows:

"I arrived in the barracks and found Orbon asleep in his bunk. Sergeant Buersmeyer was there, and several of the other men that were living in the barracks were up and the lights were on. I asked what the trouble was, and if it was true that there was a disturbance that night, and what it was all about. So Orbon being asleep, I decided that there was something worth investigating, so I told the charge of quarters to go down and rouse him, and tell him to get up and get dressed and go to the orderly room, I wanted to see him. There was a little discussion on his part with the CQ about getting up at that time of night, but I went down myself to the end of the room and told Orbon to get up and get dressed, which he did. He got up and came along, and I then went outside.

105

"He followed me out, as did Sergeant McCormick. I had a Jeep parked outside, and I got in the Jeep. Sergeant McCormick got in, and I told Orbon to get in, and said we were going over to the orderly room. Well, we had some words then. He asked me why we were going, and he wanted to see Captain Sherwood, the commanding officer of his unit. I told him to come along and we would talk it over. During this period I wanted to--first off I wanted to be sure that he wasn't just plain ordinary drunk, or what was the particular cause of this altercation, and I didn't-- I thought he was perfectly normal up to the time he started to get in the car, and he sort of switched his mind on something else, and he turned around and I said "Orbon, are you going to get in this car", and he didn't say anything. I said "You get in this car".

Q. It was an order you gave him to get in the car?

A. Yes sir. So he immediately turns his back on me and walks a few steps into the barracks. Sergeant McCormick was sitting next to me, and I said "McCormick, you stay with him, and I want you to go in there and get that gun off his wall".

Sergeant McCormick corroborates Captain Barbee's statement (R.7). The accused testified he had no memory of this occurrence due to his intoxication (R.24).

It is obvious that accused was informed that he was being taken to the orderly room at the time Captain Barbee first "told him to enter the jeep." He refused and then the Captain and accused "had some words". It was at this point that the Captain directed accused to get into the car. This order was but a subordinate order. The principal order was to accompany the Captain to the orderly room. It is indisputable that accused refused to obey such order. As a consequence there is no variance between the allegations of the specification and the evidence.

The evidence proves beyond contradiction that Captain Barbee was the superior officer of accused; that the order related to military service; that it was an order which Captain Barbee was authorized to give accused under the circumstances; and that accused did not comply with the order.

The offense of wilfully disobeying the order of a superior officer requires the proof of a specific intent on the part of the accused to defy authority, deliberately and consciously. "A neglect to comply with an order through heedlessness, remissness or forgetfulness is an offense chargeable under AW 96" (M.C.M., sec.134, pg.148). Involved in the conscious refusal to obey the order is the ability of the accused to understand the order and to comprehend its nature and purpose and the formation of a mental design not to obey same. The accused must possess sufficient mental faculties to allow this process to come into play. Should accused's mental condition become paralyzed or is rendered ^{to obey} inoperative to the degree that the formation of a wilfull purpose not to obey or to omit a lawful order, then it is impossible for him to possess the specific intent of disobedience which is the gravamen of the offense.

"*** It is a general rule of law that voluntary drunkenness, whether caused by liquor or drugs, 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 offence.***" (M.C.M., sec.126, pg.135).

The evidence on behalf of the accused undoubtedly shows that he engaged in a severe drinking bout for approximately two days prior to the time of the alleged offense, and that during such period he consumed a considerable amount of intoxicating liquor. He also met with a head injury the day prior to the incident giving rise to the charge. There is professional evidence that the use of intoxicants and the blow on the head might have produced temporary amnesia or coma (R.35, 36, 37) although there is no specific opinion or diagnosis that accused was suffering from amnesia or was in a coma when he failed to comply with Captain Barbee's orders. Accused claims entire lack of memory of his conduct on this occasion (R.24).

Opposed to this evidence is the statement of Sergeant McCormick that accused was not drunk on the evening of 16 October 1942, and that he (McCormick) did not see any difference in his condition the morning after (R.9); Staff Sergeant Buersmeyer's opinion that accused was not drunk (R.15); and Captain Barbee's testimony that accused's actions were not such as to lead him (Barbee) to believe accused was drunk and his declaration that accused was perfectly normal (R.18).

It is thus apparent that there is a conflict in the evidence as to whether accused was drunk and as to the degree of his drunkenness at the time the order was given to him. It was the duty and function of the court to determine from this evidence whether accused possessed at the time the order was given him the degree of sobriety as would permit him to understand the order and its nature and purpose and also whether he understood it was given to him by a superior officer. The Court was the sole judge of the credibility of the witnesses, and the weight and sufficiency of the evidence. Particularly was it its duty to resolve all conflicts in the evidence.

The function of the Board of Review in reviewing this case is stated in an approved holding thus:

"The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (AW 50 $\frac{1}{2}$). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference." (C.M.150828, Robles; C.M.150100, Bruch; C.M.150298, Johnson; C.M.151502, Gage; C.M.152797, Viens; C.M.154854, Wilson; C.M.156009, Green; C.M.206522, Young; C.M.207591, Nash et al.).

The present case is clearly distinguishable from C.M.223336(1942), (Bul.JAG. Vol.I, No.3, pg.159). In that case there was "no evidence in the record of trial from which an inference might properly be drawn that accused, at the time of his acts, had mental capacity to understand the orders or that

he was capable of entertaining the specific intent willfully and intentionally to disobey them." In the instant case there is the testimony of three witnesses that accused did not appear drunk and that his appearance was normal. The Court elected to believe this testimony as against that of the defense, and its finding is binding on the Board of Review.

The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of Charge I and its Specification 2.

7. Charge II and Specification charges accused with violation of AW 63 in that he "did *** behave himself with disrespect towards his superior officer by carrying a loaded pistol about the camp and threatening to shoot 1st Lieutenant Edward W. Barbee on sight." The evidence, without contradiction, discloses the fact that accused, at the time and place alleged, went about the vicinity of his barracks threatening to shoot Lieutenant Barbee on sight and that he was armed with a pistol which at times carried a live shell in its chamber. M.C.M., sec.133, pg.147 describes the element of the offense thus:

"The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed.*** It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.*** Disrespect by words may be conveyed by approbrious epithets or other contumelious or denunciatory language.***"

There can be no question that the threats repeatedly expressed by accused to shoot Captain Barbee on sight constitutes disrespectful behavior within the meaning of the article. It is difficult to imagine conduct or language more indicative of scorn and lack of respect. "It is also not essential that the disrespect be intentional: a failure to show a proper respect to the commander, through ignorance, carelessness, bad manners, or no manners, may, equally with a deliberate act, constitute an offense under the article". (Winthrop's Military Law and Precedents, sec.875, pg.567). Inasmuch as it is not necessary to prove a specific intent on the part of accused, his claimed drunkenness could not minimize his offense.

It is the opinion of the Board of Review that the record of trial is legally sufficient to sustain the findings of guilty with respect to Charge II and Specification.

8. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentence. The court was legally constituted and had jurisdiction of the offenses involved. No error injuriously affecting the substantial rights of the accused were committed during the trial.

(108)

9. The sentence of the court, which has been approved by the reviewing authority, is legal. The accused, Orbon, was 33 years old at the time of the commission of the offenses. Pursuant to General Order 37, ETOUSA, 9 September 1942, paragraphs 5(c) and (d), execution of the sentence of dishonorable discharge will be ordered only when accused has been convicted of an offense which renders his retention in the service undesirable, and when he has also been sentenced to a term of not less than three years confinement. A general prisoner whose approved sentence to confinement is three years or more may be returned to the United States for serving of such sentence, without the express orders of Hdqrs. ETOUSA. The offences of which the accused has been convicted are peculiarly destructive of military discipline and morale and render his retention in the military service undesirable. Inasmuch as confinement is for 10 years, the execution of the sentence of dishonorable discharge, and the return of the accused to the United States for service of sentence are proper.

War Department directive (AG 253 (2-6-41) E), 26 February 1941, requires prisoners under 31 years of age and with sentences of more than 10 years to be confined in a Federal Correctional Institution or Reformatory. Inasmuch as the accused is 33 years old the reviewing authority correctly fixed the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused.

B. Franklin Ritter Judge Advocate

Franklin R. Ritter Judge Advocate

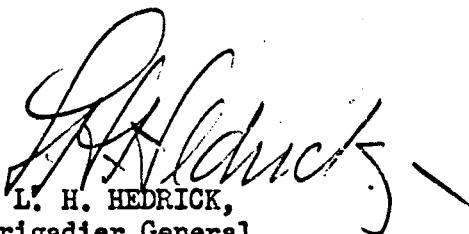
D. Y. T. de Judge Advocate

1st Ind.

WAR DEPARTMENT, Office of The Judge Advocate General, European Theater
of Operations, APO 871, U. S. Army.
TO: Commanding General, Eighth Air Force, APO 633, U. S. Army.

1. In the case of Private JOHN J. ORBON, (13026228), 10th Troop Carrier Squadron, 60th Troop Carrier Group, 12th A.F., I concur in the foregoing holding of the Board of Review. You now have authority to order execution of the sentence as thus 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 of this case in this office is ETO 106. For convenience of reference, please place that number in brackets at the end of the published order as follows: (ETO 106).



L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

(111)

In the Office of The Judge Advocate General
 for the
 European Theater of Operations
 APO 871.

Board of Review.

ETO 108.

14 JAN 1943

UNITED STATES	vs.)	UNITED STATES ARMY FORCES IN ICELAND.
	Private JOHN ABRAMS (13021047), Company "B", 392nd. Port Battalion, Transportation Corps.		

Trial by G.C.M., convened at
Camp Curtis, Iceland, 7 October,
1942. Sentence: Dishonorable
discharge, forfeiture of all
pay and allowances due or to
become due, and confinement at
hard labor for 3 years. U.S.
Disciplinary Barracks, Ft.
Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
 RITER, VAN BEN SCHOTEN and IDE, Judge Advocates.

1. The record of trial in the case of Private John Abrams (13021047), Company "B", 392nd. Port Battalion, Transportation Corps, has been examined in the Office of the Judge Advocate General for the European Theater of Operations and there found legally insufficient to support the findings and the sentence. The record has now been examined by the Board of Review, which submits this opinion to the Judge Advocate General for the European Theater of Operations.

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private John Abrams, Company "B", 392nd. Prt. Bn, T Corps, APO 860, c/o Postmaster, New York, N.Y., having received a lawful command from Captain Clarence W. Archer, his superior officer, to push a concrete roller to level off roadway, did at Camp Haggi, Iceland, on or about September 16, 1942, willfully disobey the same.

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108

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 the term of five years.

The reviewing authority approved the sentence, but suspended the execution of the dishonorable discharge until the release of accused from confinement, remitted two years of the confinement, and designated the United States Disciplinary Barracks, Ft. Leavenworth, Kansas, as the place of confinement. He directed that accused be confined in the U.S. Army Forces Prison Stockade until further orders.

The result of the trial was promulgated in General Court Martial Order No. 87, Headquarters, U.S. Army Forces (in Iceland) A.P.O. 860, c/o Postmaster, New York City, N.Y., dated 30 October 1942.

3. The accused was on 16 September 1942, a member of Company "B", 392nd Port Battalion, Transportation Corps, which was stationed on that date at Camp Haggi, Iceland. Captain Clarence W. Archer was accused's company commander and Major Harold R. Low was Battalion Commander. Accused, and a certain Private Bartlett, failed to stand reveille formation of the company on the morning of 16 September 1942. Accused at that time was under restrictions (R.17). Captain Archer directed Sergeant Clyde S. Bradley to order accused and Private Bartlett to push a concrete roller over the company area (R.18, 23). The two soldiers refused to obey Bradley's order (R.18, 23), and the latter reported the refusal to Captain Archer (R.23), who summoned accused and Bartlett to the orderly room (R.18). Accused, and Bartlett, were then ordered by Captain Archer "to push the roller" (R.18). In giving the order Captain Archer did not explain to accused his right to demand trial by court-martial (R.20, 26) nor his right of appeal to superior authority in event he believed the punishment unjust (R.20, 26).

Accused admits he willfully refused to obey this order (R.28). Soon thereafter accused and Bartlett were transported to Halogoland, and were placed in solitary confinement (R.26) for a period of four days (16 September 1942 to 20 September 1942) (R.30). The guard book at Camp Halogoland does not show their confinement during that period (R.12, 13, 14). Accused escaped from confinement on 20 September 1942 (R.12). The charges under which he was brought to trial were preferred two days later (22 September 1942) but no charge was included therein based on the escape from confinement. During the period accused was in solitary confinement he was carried on the company's morning report "for duty" (R.5).

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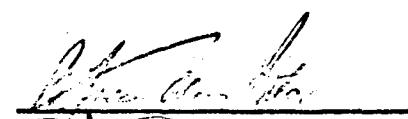
CONFIDENTIAL

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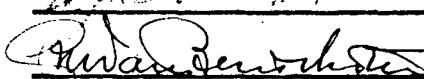
(113)

4. This case is a companion of CM: ETO 110, Bartlett of even date, and the evidence in the two cases is complementary. Upon the authority of and for the reasons set forth in the Bartlett case, the Board of Review is of the opinion that the record of trial in the instant case is legally insufficient to support the findings and the sentence.

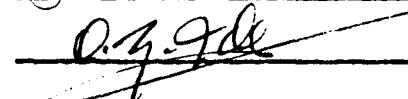
5. As in the case of Bartlett, accused was placed in solitary confinement on a bread-and-water diet. After a period of four days this confinement was terminated by accused's escape. The remarks in the Bartlett case with reference to this illegal confinement are applicable to this case.



John C. H. Smith Judge Advocate



R. W. Pennington Judge Advocate



O. H. G. G. Judge Advocate

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108

CONFIDENTIAL

(114)

1st Ind.

15 JAN 1943

WAR DEPARTMENT, Office of Judge Advocate General, European Theater of Operations, APO 871, U.S. Army.

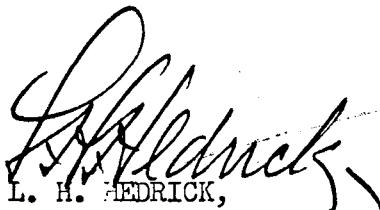
TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of August 20, 1937 (Pub. No. 325, 75th Cong.) and as further amended by act of August 1, 1942, (Pub. Law No. 693, 77th Cong.) is the record of trial in the case of Private John Abrams (13021047), Company B, 392nd Port Battalion, Transportation Corps, together with the foregoing opinion of the Board of Review.

2. For the reasons stated in my indorsement in the companion case, CM - ETO 110, Bartlett, of even date I concur in said opinion of the Board of Review, and for the reasons stated therein recommend that the findings and sentence be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinabove made should it meet your approval.

(ETO 108)


L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

3 Incls:

- Incl. 1 - Record of Trial
- Incl. 2 - Opinion of Board of Review
- Incl. 3 - Form of Action

(Findings and sentence vacated by order of the Theater Commander - see letter Hq. ETO, 10 Feb 1943 (ref. AG 250.4 EJA))

236446

CONFIDENTIAL

108

In the Office of The Judge Advocate General
 for the
 European Theater of Operations
 APO 871

(115)

Board of Review.

ETO 110.

L-1 JAN 343

U N I T E D S T A T E S

vs.

Private MORRIS L. BARTLETT
 (6994476), Company B,
 392nd Port Battalion,
 Transportation Corps.

UNITED STATES ARMY FORCES
 IN ICELAND.

Trial by G.C.M., convened at
 Camp Curtis, Iceland, 9 October
 1942. Sentence: Dishonorable
 discharge, forfeiture of all
 pay and allowances due or to
 become due, and confinement at
 hard labor for 3 years. U.S.
 Disciplinary Barracks, Fort
 Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
 RITER, VAN BEN SCHOTEN and IDE, Judge Advocates

1. The record of trial in the case of Private Morris L. Bartlett, (6994476), Company B, 392nd Port Battalion, Transportation Corps, has been examined in the Office of the Judge Advocate General for 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 opinion, to the Judge Advocate General for the European Theater of Operations.

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private MORRIS L. BARTLETT, Company "B", 392nd Port Bn, T Corps A.P.O.860, c/o Postmaster, New York, N.Y., having received a lawful command from Captain Clarence W. Archer, his superior officer, to push a concrete roller to level off roadway, did at Camp Haggi, Iceland, on or about September 16, 1942, willfully disobey the same.

He pleaded "Not guilty" to, and was found guilty of, the Charge and Specification. Evidence of three 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 the term of 10 years.

110

236447

CONFIDENTIAL

(116)

The reviewing authority approved the sentence, but suspended the execution of the dishonorable discharge until release of accused from confinement, remitted seven years of the confinement and designated the United States Disciplinary Barracks, Ft. Leavenworth, Kansas, as the place of confinement. He directed that accused be confined in the U.S. Army Forces^{PRISON}/Stockade until further orders.

The result of the trial was promulgated in General Court Martial Order No. 89, Headquarters, U.S. Army Forces (in Iceland), A.P.O. 860, c/o Postmaster, New York City, New York, dated 1 November 1942.

3. The accused was on 16 September 1942 a member of Company "B", 392nd Port Battalion Transportation Corps, which was stationed on that date at Camp Haggi, Iceland. Captain Clarence W. Archer was accused's company commander and Major Harold R. Low was the battalion commander. Accused was at that time under sentence of a special court-martial restricting him to the limits of the Camp. He and a certain Private Abrams were late for reveille (R.29) and this fact was reported to Capt. Archer by the first sergeant. Capt. Archer instructed S/Sgt. Bradley to "have Privates Bartlett and Abrams push the roller". Bradley gave the order to accused and Abrams (R.23, 25). They failed to comply with it. Bradley went to their hut, and inquired as to whether they were going to comply with the order he had given them. Accused and companion informed Bradley "We're not refusing anything but we are not going to push the roller" (R.23). Bradley reported this fact to Capt. Archer. Thereafter, accused and Abrams were ordered by Bradley to report to Capt. Archer in the orderly room (R.24). At that time and place Capt. Archer gave a direct verbal order to accused and Abrams to push a certain concrete roller over the camp area. Accused admits he willfully disobeyed this order. Within a short time thereafter accused and Abrams were moved to Halogoland and were placed in solitary confinement for a period of four days (September 16 to September 20) on a bread-and-water diet; which confinement was terminated only when accused made his escape. The charges upon which accused was tried were preferred on 22 September 1942, but did not include any charge for breaking confinement. During the period of confinement accused was shown on the company morning report "for duty".

Relevant and material evidence is hereinafter set forth in connection with the discussion of the legal issues involved.

4. At the appropriate opportunity upon the opening of the trial the accused entered a plea in bar as follows:

"The accused enters a plea in bar of trial in that he received punishment for this offense before, while in confinement, in an area to(o) small where he was placed on bread and water diet for a period of a few days." (R.4).

110

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- 2 -

The trial judge advocate responded:

"If it please the court, the prosecution objects to any such questions that are brought before the court by the defense in that it has no bearing on the case to be tried." (R.4).

The following colloquy then ensued:

"Law Member: The defense has offered a plea in bar of trial and that does have a definite bearing on the proceedings and a definite place in it. Is the defense prepared to present actual evidence or stipulated evidence?

Defense: I have a witness, sir.

Law Member: Proceed. (R.4).

Defense: I should like to call Lieutenant Zober."

Second Lieutenant Francis T. Zober was then sworn and testified on direct examination in substance as follows: The accused was in confinement on bread and water in a place in Halogoland called the "dungeon" for four days; he was placed there because he refused to push a roller as ordered by his company commander; six other men have been confined in this inclosure at various times and they were placed there as punishment (R.5).

Upon the prosecution refusing to cross-examine the witness he was subjected to examination by members of the court and testified further: that he did not see accused in the dungeon, but knew accused broke confinement on the fourth day; that he did not have personal knowledge that accused was fed only on bread and water; that he has never known a man to be in the "dungeon" except for punishment; that there is no other guard-house in Halogoland; that there is the U.S. Army stockade in Camp Haggi, but these men were sent to the Halogoland stockade or "dungeon"; that he did not believe the "dungeon" was an authorized guard-house, but thought it was authorized by the battalion commander (R.6).

At the conclusion of the examination of Lieut. Zober, there was the following discussion:

"Defense: Since there seems to be some doubt as to whether or not the accused was actually in this place as defined by the witness, the accused himself is ready to take the stand and testify where he was during this period. He has been advised of his rights and is willing to take the stand under oath (R.6).

"President: The accused will be given his opportunity to testify regarding anything pertaining to this case at the conclusion of the case for the prosecution, and unless there is some good reason why this testimony has to be given at this time, the court feels that the proper time for the accused to testify is after the prosecution has rested (R.6).
(underscoring supplied).

"Defense: The defense knows of no better way to demonstrate to the court exactly what treatment the accused received than to have the accused tell the court in his own words both the treatment and his reactions to it (R.7).

"Law Member: Has the defense any further evidence to offer in support of this plea?

"Defense: The defense has nothing further to offer in support of this plea except to call judicial notice that the charges in this case were preferred on September 22, 6 days after the commission of the alleged offense -- 6 days after the accused was placed in this confinement which has been related in the testimony. The statement has been made to the court that the accused was punished for the offense now being considered (R.7).

"President: Has the prosecution anything further to offer to refute the evidence presented by the defense?

"Prosecution: The prosecution has not.

"President: The court will call as a witness in connection with this, the commanding officer who had the power to award punishment.

(119)

Thereupon Captain Clarence W. Archer, Company "B", 392nd Port Battalion, Transportation Corps, was sworn as a witness for the court (R.7). His testimony at this point in the trial was in substance that on 16 Sept 1942 he was accused's company commander (R.7); accused has not been adequately punished nor punished at all for any offense committed on September 16 under the 64th Article of War; accused was placed in arrest at time of alleged offense and was sent over to Major Low; he was kept in confinement although witness did not see him; he was at that time also undergoing punishment of three months restriction imposed by a special court; he was also restricted to his own camp area as company punishment; he was confined outside of his own camp because he went AWOL and broke his restrictions; there is a prisoner stockade at Haggi but members of witness's command are not confined there; after court-martial proceedings they are sent to Iceland Base Command Stockade and all others are sent to Camp Halogoland; Major Low gave the witness instructions if he considered accused incorrigible to send him over to Halogoland (R.8).

Upon cross-examination by the defense, Capt. Archer stated that other men had been sent to Halogoland for confinement by calling Major Low and asking him what he wanted to do about it, and then they were sent over; witness did not know there was a guard-house at Halogoland until after he sent accused there (R.10); witness informed Major Low he was sending accused to him because he could not be handled in the company; no one to the knowledge of witness was ever sent to Camp Halogoland as a measure of punishment, but no charges were ever preferred against any of the men held in the Halogoland dungeon, and in witness's mind this was not punishment (R.10); during the period September 16 to 20, accused was marked on morning report "for duty", but he was not for company duty; at the beginning of these four days accused had been sent to Major Low and witness made no effort to find out where he was (R.10), or what disposition had been made of him; witness did not know Major Low placed men sent to him in the stockade, and denied he stated or knew the Halogoland place of confinement was used "to instill religion into the soldier" (R.11), and witness did not remember whether he had seen a Private Hinson in the dungeon (R.11).

Private Edward C. Ritter, Co.B, 392nd Port Bn., Trans. Corps, who was called as a witness by the defense testified that he knew a Private Hinson of Co. B., about September 15, and on said date witness and Hinson were in solitary confinement in the dungeon at Camp Halogoland; accused was confined after witness and Hinson; there were no visitors, except the battalion commander (R.13).

CONFIDENTIAL

It was stipulated that if Major Low were present and sworn as a witness he would testify that to the best of his knowledge the punishment given accused at Halogoland between September 16 and 20, 1942 was not in connection with violation of the 64th Article of War and that subsequent to September 20 orders were received from higher authority to prefer charges against accused for violation of AW 64 and such orders were passed to Capt. Archer (R.14).

Upon the prosecution indicating it had no further evidence to offer the Law Member ruled:

"Subject to objection by any member of the court, the plea in bar of trial entered by the defense is refused." (R.14).

This ruling was made without hearing from accused himself inasmuch as he had been denied the right to take the witness stand in support of the plea in bar. Such ruling was obviously premature, and was a nullity. The accused then pleaded "not guilty" to the Charge and Specification and then the Court proceeded to hear evidence on the merits of the case.

Later in the trial on the merits, when the prosecution had rested, accused was sworn as a witness on his own behalf and testified at length concerning events connected with his confinement at Halogoland dungeon. At the conclusion of his testimony the defense asked the Court to re-consider the plea in bar of trial inasmuch as it had now heard accused's testimony (R.34).

The accused by his plea asserted that he had received former punishment for the offense for which he stood charged before the Court, viz: that he had been confined in the "dungeon" at Halogoland for four days on a bread and water diet as punishment for his refusal to obey Capt. Archer's order to push the concrete roller (R.34). The Law Member then ruled: "Subject to objection by any member of the court the plea of the defense is refused." (R.34).

The record of trial exhibits a lamentable lack of understanding on the part of the President, Law Member, Trial Judge Advocate and the Court itself, of the function and purpose of a plea in bar, and the proper practice in presentation of evidence in support and negation thereof. The plea is not a dilatory plea nor an obstacle in the process of military justice. It is a legitimate and highly important procedure and must not be regarded lightly by any court. Such a plea, properly sustained by evidence, should forthwith terminate the trial, subject to the further orders of the convening authority (M.C.M., sec.64, pg.50). That pleas in bar of trial are recognized by the Articles of War and Manual of Courts-Martial is clear from the following quotations:

236447

(121)

"Pleas in court-martial procedure include plea to the jurisdiction, plea in abatement, plea in bar of trial, and pleas to the general issue. The first three are known as special pleas." (Underscoring supplied).

"Except as otherwise indicated in the discussion of special pleas, an accused will not be asked or required to plead further to a specification or charge as long as the action of the court in sustaining a special plea thereto stands; but when all the special pleas entered to a given charge or specification are overruled, the accused should plead to the general issue." *****

"Notwithstanding the action of the court on special pleas or other similar objections, the trial may proceed in the usual course as long as one or more specifications and charges remain as to which a plea to the general issue may be made or stands. For example, when pleas in bar are sustained to all but one specification and charge, to which the plea is not guilty, the trial on that specification and charge may continue. But where, as a result of the action of the court on special pleas or other similar objections, the trial can not proceed further, the court adjourns and submits the record of its proceedings as far as had to the reviewing authority. *****"

"A special plea should briefly and clearly set forth the nature and grounds of the objection which it is intended to raise. The substance of the plea and not the designation given to it will control; for instance, if an accused enters a plea, which he calls a plea in abatement, but which in fact raises an objection to trial on jurisdictional grounds, the plea will be considered as a plea to the jurisdiction.

Except as otherwise indicated in the discussion of special pleas, the burden of supporting a special plea by a preponderance of proof rests on the accused. With the same exception, a plea to the general issue may be regarded as a waiver of any objection then known to the accused which is not asserted by a special

236447

110

(122)

"plea. *****.

Any objection which might be asserted by a special plea may if not asserted be brought to the attention of the accused by the court.

Before passing on a contested special plea the court will give each side an opportunity to introduce evidence and make an argument. A decision on a special plea is a decision on an interlocutory question." (M.C.M., sec.64, pg.50-51). (Underscoring supplied).

"Punishment under the 104th Article of War may be pleaded in bar of trial. Such punishment, however, does not bar trial for another crime or offense growing out of the same act or omission. For instance, punishment under AW 104 for reckless driving would not bar trial for manslaughter where the reckless driving caused a death." (M.C.M., sec.69c, pg.54).

The orderly and correct method of presenting such a plea is as follows:

- (a) The accused will present his evidence in support of the plea;
- (b) The prosecution will present its evidence negativing or confessing and avoiding accused's evidence;
- (c) The accused will present his evidence in rebuttal;
- (d) The defense counsel will submit his argument;
- (e) The prosecution will submit its argument;
- (f) The accused is entitled to the closing argument. Inasmuch as a decision on plea in bar is a decision on an interlocutory question, the Law Member will render the decision, subject to the objection of any member of the court. Upon such objection being made, the court will close and the issue will be decided by a vive voce majority vote (AW 31).

The above practice is simple and easy to follow, and will meet the ordinary situation. However, there are instances where a deviation is permissible, and in fact is necessary that the ends of justice be assured (M.C.M., sec.64, pg.50). In instances where the plea is over-ruled and in the subsequent trial on the merits, facts are revealed which indicate that the ruling on the plea was erroneous and the plea should have been sustained, the court has authority to reconsider its former ruling and may reverse itself. Such reversal will forthwith end the hearing, subject to orders of the convening

authority. Likewise, should a plea be sustained as to a certain charge or specification, and continued on the merits as to other charges and specifications, the Court may before conclusion of the trial reconsider its decision on the plea in bar and reverse itself if it deems such action proper (M.C.M., sec.64, pg.50).

The burden of proving the plea by a preponderance of the evidence was upon the accused. (M.C.M., sec.64a, pg.51; 16 C.J., sec.769, pg.425; 2 Bishops New Criminal Procedure, sec.816, pg.633; sec.1095, pg.941). Since the accused had the affirmative of the issue he had the right to open and close the evidence and the argument on the issue of the special plea. (64 C.J., sec.71, pg.76). The accused, on his own request, was a competent witness on his own behalf (16 C.J., sec.770, pg.427; M.C.M., sec.120, pg.125).

It was the President of the Court who denied accused the right to testify on the issue created by the plea in bar (R.6). In making this ruling he usurped authority. This request of the accused to take the stand involved an interlocutory question, (AW 31) and it was the right and duty of the Law Member to rule thereon. (AW 31).

"The law member of a general court-martial, whenever present, will, instead of the president, rule in open court on all interlocutory questions other than challenges arising during the proceedings."
(M.C.M., par.51d, pg.40).

Although irregular the ruling of the President became the ruling of the Court because of absence of objection.

The fact that accused was permitted to testify to facts in support of his plea in bar, after the prosecution had submitted its evidence on the merits of the case, does not cure this error. It was the duty of the court to dispose of the plea before it proceeded with the trial on the merits. (16 C.J., sec.771, pg.428; Thompson vs. United States 155 U.S. 271, 39, L.E.D.146). The accused, having offered himself as a witness in support of his plea, was entitled to be heard on the issue created by the plea. He had the right to assert the plea in bar of trial and submit his evidence in support thereof, whether he was ultimately successful, or not. At this stage of the trial the validity of the plea was not in question. It was his right to make the effort to bar trial on the merits, by submitting all of his evidence in support of his plea and to secure from the court its decision thereon before being compelled to defend himself on the merits. The procedure followed by the court forced accused to make his election as to defending the general issue on his plea of "not guilty" prior to the court's determination of his plea in bar and thereby nullified one of the principal protective purposes of the plea. Such action was highly injurious to accused.

CONFIDENTIAL

(124)

The Board of Review is of the opinion that prejudicial error was committed by the refusal to allow accused to testify at the stage of the trial when the issue on the plea in bar was being tried, and that on this ground the record is legally insufficient to sustain the findings and the sentence.

5. The prosecution failed to prove the specific terms of Capt. Archer's order to accused "to push the roller". Capt. Archer testified he ordered accused "to push the roller" but he could not remember for how long a period he ordered accused to perform this task (R.17). The evidence of Trefois simply confirms that of Capt. Archer (R.22, 23). Accused on the other hand definitely asserts that Capt. Archer issued him the following verbal order: "I am giving you a direct order. You will push the roller from 7:45 until 12:00 o'clock noon. I will give you 15 minutes for dinner at which time you will fall out and push the roller until 5:00 o'clock. I will give you 15 minutes for supper and until 9:00 o'clock you will walk full pack." (R.29).

In view of the fact that accused's testimony of the details of the order stands uncontradicted, the court undoubtedly found that the order given was the one related by accused. The Board of Review, sitting in appellate review will accept such finding.

Capt. Archer declares that the order was not given for company punishment (R.16); nor because accused broke restriction (R.19) and that he didn't remember whether accused was late for reveille on September 16 (R.18). He further asserts the order was given accused because he was on camp detail and that he was on camp detail because he was under restrictions as a result of sentence of a special court-martial (R.18). Accused declares that the order was given as company punishment (R.29, 30, 31), but he also admits that he knew it was given to him by a superior officer and that he willfully disobeyed same (R.30).

The Manual for Courts-Martial expressly provides:

"The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article. A person can not be convicted under this article if the order was illegal; but an order requiring the performance of a military duty or act is disobeyed at the peril of the subordinate.****"
(M.C.M., 1928, pg. 148-149).

"An order given by a superior officer for the sole purpose of subjecting accused to the maximum punishment imposable and with the expectation that he would disobey it is unlawful under M.C.M. 1928, par.134b and disobedience thereof is not punishable under AW 64." (C.M.219946(1942); Bul. JAG. Vol.I, No.1, par.422(6), pg.18).

The exact modus operandi of the giving of the order to accused "to push the roller" is exhibited in the following excerpts from testimony:

Capt. Archer:

"Q. Will you describe to the court just exactly what happened?

A. On the morning of September 16, I gave Bartlett-- Private Bartlett an order to push the roller. He did not, so I had Sergeant Przelocki get the Manual for Courts-Martial, and I read him the 64th Article of War. I gave him every opportunity in which to push the roller.

Q. Did the accused say anything to you?

A. At that time he said he wouldn't push the roller.

Q. How long was the accused in the orderly room?

A. Oh, I'd say 15 minutes.

Q. Why was Private Bartlett in the orderly room at this time?

A. Why was he in? Because I wanted him to push the roller.

Q. You mean you had him summoned in the orderly room for the purpose of giving him an order to push the roller?

A. That's right.

Q. Doesn't the First Sergeant take care of such details?

A. Sometimes he does and sometimes he does not. (R.15).

Q. Why in this particular case did you call a private-- soldier into the orderly room in order that you might give him a simple order to push the roller?

A. In the past he had been in the habit of refusing to take orders from non-coms.

Q. Had he previously disobeyed an order on that date to push this roller?

A. I don't remember if he did or not.

Q. Had you instructed any of your non-commissioned officers to tell Private Bartlett to push this roller?

A. Yes, I believe I told Sergeant Bradley-- I don't know whether it was before or afterwards.

Q. Was anyone else in the orderly room at this time?

- "A. There was Sergeants Coughlin, Przevlocki, Bradley, Trefois and Private Abrams.
Q. Why was Private Abrams in the orderly room at this time?
A. Because he also refused to push the roller.
Q. Then Private Bartlett had already refused to push the roller?
A. I said Abrams, not Bartlett.
Q. In your statement you said that Private Abrams also had refused to push the roller. When you say 'also' do you refer to another person who had refused to push the roller?
A. Well, on that particular morning I had about 10 or 15 men that didn't want to take company punishment.
Q. Was Private Bartlett one of these men?
A. No, he was not--he wasn't summoned in to push the roller for company punishment. (R.16).

- Q. But you stated Private Bartlett wouldn't do the job?
A. He wouldn't take the order from the non-com.
Q. Did you think that if you gave him an order he would enter into the spirit of the thing any more than if given by a non-com?
A. About 50 percent of the time, he would.
Q. Why was Private Bartlett on camp detail?
A. Because he was restricted.
Q. Did Private Bartlett miss reveille on September 16?
A. I don't remember whether he did or not.
Q. When you sent Sergeant Bradley out to instruct Private Bartlett to push the roller, did you tell him why Private Bartlett was to push the roller?
A. I don't remember whether I did or not.
Q. What did Sergeant Bradley say when he came back into the orderly room?
A. I don't remember just exactly what he did say.
Q. Do you remember the text of what he said?
A. No, I don't.
Q. Why did he come up to the orderly room?
A. Most likely to tell me that Bartlett wouldn't push the roller.
Q. And that was when you called Private Bartlett into the orderly room?
A. I don't remember whether it was before or after.
Q. When you gave this order to Private Bartlett did you speak to him when he failed to carry it out?
A. Not necessarily.
Q. Didn't Sergeant Bradley tell you that he had already refused to push the roller?
A. I don't remember whether it was before or after. I gave the man about 5 chances. (R.17).

(127)

- "Q. What is the nature of this camp detail--is that a punishment detail?
- A. No, sir, it isn't.
- Q. I would like to ask you again, captain, was Private Bartlett late for reveille on September 16?
- A. I don't remember.
- Q. If he had been late for reveille what would you have done about it?
- A. It all depends on the circumstances." (R.18)

Staff Sergeant Clyde S. Bradley:

- "Q. Will you describe to the court just exactly what happened?
- A. Well, on this morning of September 16, I was sent out to have Private Bartlett and Abrams push the roller by order of the company commander. I did so, I gave him the order. A few moments later I saw he wasn't pushing the roller so I went out and asked about it and was informed that he was in his hut. I went down to the hut and asked him if they refused my order. Private Abrams did the talking. Private Bartlett was sitting there. He said: "We're not refusing anything but we are not going to push the roller", and I reported the fact to the company commander.
- Q. Private Bartlett didn't say anything further?
- A. No, sir, Private Abrams did the talking.
- Q. Where did you go then?
- A. I went to the orderly room. (R.23, 24)
- *****

- Q. Were you in the orderly room with Private Bartlett at any time?
- A. No, sir, I wasn't in the orderly room with him.
- Q. Was Private Bartlett in the orderly room at any time?
- A. I had him report to the company commander.
- Q. How did he get to the orderly room?
- A. I beg pardon.
- Q. How did they get them--did you accompany them?
- A. I didn't go with them, no, sir; I went down and told the company commander.
- Q. When you told Private Bartlett to push the roller where was he?
- A. He was outside the company orderly room. (R.24).
- *****

- Q. I think you said in your statement at the time you arrived to the hut and talked to these two men--to the effect that you asked him if they were going to refuse the order. Did you mean by that that you had given them an order to run the roller?

(128)

- "A. Yes, sir, I did.
 Q. Was that sometime before?
 A. It was that morning, sir. (R.25).
 Q. Sergeant, you testified that you ordered Abrams and Bartlett to push this roller. What were the circumstances of your giving such an order?
 A. Well, I was ordered to do so by the company commander, sir, so I did.
 Q. Well, was that as punishment?
 A. I don't know what the reason was.
 Q. You have also testified that these two men refused to obey that order?
 A. Yes, sir.
 Q. Had either of these men previously refused to obey any order you gave them?
 A. I can't remember, sir. (R.25).

 "Q. What was that roller customarily used for?
 A. Well, for paving the road around camp and levelling the gravel.
 Q. Was that a punishment detail?
 A. Well, in some cases it was and some it wasn't. (R.25).

The accused's narration of events concerned with the giving of the order is as follows:

"A. Yes, sir, on the morning of September 15, 1942, there was a reveille formation. I stood this formation. My name was not called out. I was on camp detail at that time and I figured I might be on camp detail that day and I didn't have to stay in this formation--so the first sergeant was there at that time and on the same day we got this new first sergeant; and on the morning of September 16, 1942, I missed this formation, and at that time Sergeant Simon had put my name down on the list for missing reveille formation, and this list was sent in, and I was sent down to report to the company commander. I reported to him, saluted him. He asked me where I was for reveille. I told him the story, that I stood it the morning before and I didn't have to stand it because I was on camp detail. He told me I was supposed to stand it and then he told me to push the roller. He told me: "I am giving you a direct order". He said: "You will push the roller from 7:45 until 12:00 o'clock noon. I will give you 15 minutes for dinner at which time you will fall out and push the roller until 5:00 o'clock, I will give you 15 minutes for supper and until 9:00 o'clock you will walk full field pack--" and I turned around and I walked out. I never told

230447

110

"him I was refusing that order or anything. I went down to my hut and later on he sent Sergeant Bradley down to the hut. Sergeant Bradley asked us, "Are you going to push the roller?" and Private Abrams told him we weren't refusing to do it but we weren't going to push it. I figured about ten minutes later Sergeant Przevlocki was sent down. He told us to roll up our equipment, keep our bunks, get our mess kits out, and turn the rest of our equipment in, that we were going for a ride. ****" (R.29).
 (Underscoring supplied).

There is no such conflict between prosecution's and defense's evidence that is not subject to reasonable reconciliation. The scene may be reconstructed without difficulty. The accused and Private Abrams were late for reveille (R.29). Sergeant Simon, put their names "down on the list for missing reveille formation", and it is logical to assume this fact was reported to Capt. Archer who instructed Sergt. Bradley to "have Privates Bartlett and Abrams push the roller" (R.23, 25). Bradley gave the order to accused and Abrams (R.23, 25) and they failed to comply with it (R.23, 25). Bradley went to their hut and made inquiry as to whether the two soldiers were going to push the roller (R.23). Upon being informed by them that they were "not going to push the roller", Bradley reported the fact to Capt. Archer (R.23, 24). Thereafter accused and Abrams were ordered by Bradley to report to Capt. Archer in the orderly room (R.24).

Capt. Archer's evidence on this aspect of the case is very vague, indistinct and unsatisfactory. He cannot remember when he instructed Bradley to order accused and Abrams to push the roller - whether before or after he personally gave the order to the two soldiers (R.16); he does not remember whether accused had disobeyed a previous order given on that date to push the roller (R.16); but he states that Abrams was in the orderly room "because he also refused to push the roller" (R.16). Consequently Capt. Archer's evidence is without probative force, except insofar as it suggests he had given the previous instruction to Bradley. When accused appeared before the company commander (R.29), he received the personal order from him "to push the roller" (R.29). Accused returned to the hut and soon Bradley reappeared and again made inquiry of accused and Abrams if they were going to push the roller (R.29). About ten minutes later Sergeant Przevlocki appeared and gave orders for the two soldiers (accused and Abrams) to prepare to go to Halogoland (R.29).

The evidence very firmly fixes the fact that prior to Capt. Archer's direct order to accused, Bradley, under Capt. Archer's instructions, had given accused an order "to push the roller" which

(130)

accused refused to obey. If the order was a legal order, this refusal constituted a violation of AW 65 - the willful disobedience of a lawful order of a non-commissioned officer while in the execution of his office. Thereafter, Capt. Archer summoned accused before him and issued him the direct verbal order "to push the roller" which accused also refused to obey. If the order were valid, such disobedience constituted a violation of AW 64.

The offense of refusing to obey the lawful order of a superior officer under AW 64 is a far more serious offense than willful disobedience of a lawful order of a non-commissioned officer under AW 65. The death penalty is a permissible form of punishment for the former offense and not for the latter.

A reasonable interpretation and analysis of the evidence leads to the inescapable conclusion that Capt. Archer, knew full well when he summoned accused before him and personally ordered him "to push the roller" that accused had refused to obey the same order previously given him by the non-commissioned officer, Bradley, under instructions from the Captain, and that in view of accused's recalcitrance and incorrigibility - persistently asserted by Capt. Archer in his testimony (R.8, 9) there was every probability that he would refuse to obey his (Capt. Archer's) order. Under such circumstances it is a logical conclusion that Capt. Archer gave the order to accused for the purpose of increasing the penalty for an offense "which he expected the accused to commit" and therefore the order was unlawful and accused cannot be found guilty of violating AW 64. On this ground the Board of Review is of the opinion that the record is legally insufficient to sustain the findings of guilty.

The Board of Review does not now hold that every order given by an officer to a soldier after a like order has been given by a non-commissioned officer to the soldier (and the soldier has refused to obey the same) constitutes an order given with the intention of increasing the penalty and is therefore void. On the contrary, the Board of Review recognizes the fact that probably in most instances such order of the superior officer would not be subject to the criticisms made of the order in the instant case. The facts and circumstances which surround the giving of the order are of great importance in determining its purpose. The circumstances and conditions under which Capt. Archer gave the order involved in this case, were such, in the opinion of the Board of Review, as to compel the conclusion that the order was given with the deliberate purpose of increasing the punishment which might be imposed upon accused. This conclusion is strengthened by Capt. Archer's obscure and uncertain testimony concerning the terms of the order itself and of the incidents surrounding the episode. The Board of Review considers it highly desirable that its instant opinion be read and considered with the limitation herein set forth.

6. The order which the evidence indicates was actually given contains also an inherent vice. The exact form of the order is indicated by the testimony of accused (R.29) which being uncontradicted is accepted by the Board of Review as being the order given by Capt. Archer to accused in the company orderly room on the morning of September 16, 1942. The same has been set forth above.

Capt. Archer's testimony relative to facts and circumstances surrounding the giving of the order heretofore has been adequately summarized.

First Sergeant Lambert Trefois, Co. B, 392nd Port Bn, Transportation Corps, testified he was in the orderly room of the company on the morning of 16 Sept 1942 when Capt. Archer read the 64th Article of War to accused and "told him to go out and push the roller", and accused after receiving the order "turned around and walked out of the room" (R.22, 23).

The testimony of Staff Sergeant Bradley has been set forth above.

The evidence of the defense consisted of accused's sworn testimony. A pertinent excerpt has been inserted above, and in addition accused stated that Capt. Archer did not read him AW 64; accused failed to push the roller because he figured the order was beyond company punishment; accused has been in the military service for three years and eleven days; Capt. Archer's order "to push the roller" was directed to accused and Private Abrams; accused willfully disobeyed this order from a superior officer; "the roller was pushed to level roads"; accused "helped build those rollers and the way he told me, they were built for company punishment; he said to me they were built for company punishment" (R.30); accused would draw a distinction between orders to do a job as an every day affair and one for company punishment; this order was given as company punishment (R.31); accused has received company punishment previously, but does not know about AW 104 (R.32).

The burden was on the prosecution to prove beyond a reasonable doubt every element of the offense. (M.C.M., sec.78, pg.62). The accused cannot be convicted of the offense of disobeying the order of a superior officer if the order was illegal. The validity of the order is the foundation of prosecution's case (M.C.M., sec.1348, pgs.148, 149), and failing on this issue the charge against accused must fail.

The function and authority of the Board of Review in considering the instant question involving the validity of the order is set forth in an approved holding as follows:

The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50^b). If any part of a finding of guilty ^{rests} on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference. (C.M.150828, Robles; C.M.150100, Bruch; C.M.150298, Johnson; C.M.151502, Gage; C.M.152797, Veins; C.M.154854, Wilson; C.M.156009, Green; C.M.206522, Young; C.M.207591, Nash et al.). The following has been quoted, with approval, by the Board of Review (C.M.197408, McCrimon; C.M.206522, Young; C.M.207591, Nash et al.):

'We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens' (Buntain v. State, 15 Tex. Appeals, 490)". (C.M.212505, Tipton).

The problem presented revolves about the opposing claims of Capt. Archer and the accused, which have been set forth in detail above. If the determination of the issue ^{depended} upon a resolving of conflict in testimony ~~in~~ an entirely different situation would exist than is actually presented by the record of trial. It was the duty of the court to weigh and evaluate the evidence and such action is no part of the duty of the Board of Review sitting in appellate review. It is however, the duty and right of the Board of Review to determine whether or not there is in the record, evidence either proving directly or forming a reasonable basis for the inference that the order was a valid one.

An order, itself, is the best evidence of its nature and purpose, and it may well be that it speaks with such unqualified force and cogency that the testimony of the interested persons possesses no juridical value. The Board of Review believes that

such is the situation in this case. The intrinsic nature of the order proclaims that it was an order of punishment, and it is the order, itself, which entirely negatives Capt. Archer's testimony and renders it mere argumentative conclusions. The accused was required to push the roller from 7:45 a.m., to 12 noon. He was then allowed 15 minutes for dinner. From 12:15 p.m., to 5:00 p.m., he was to push the roller, when he was allowed 15 minutes for supper and then until 9:00 p.m., he was to walk full pack. The underscored parts of the order bespeak punishment; they are not work detail requirements. The reduction in time for meals is punitive. Soldiers who are detailed for camp work are not penalized in that manner. The requirement to "to walk full pack" for 1 hour 45 minutes in the evening after the usual hours for policing duties are over, can have no possible connection with a camp detail. Such requirement is highly punitive.

Under this state of the evidence a finding that the order was given as a matter of company or camp detail would be clearly against the overwhelming weight of the evidence - so overwhelming in fact that there is no evidence to support it. The Board of Review is therefore acting entirely within the scope of its powers in concluding that the accused was given an order of punishment and not of work detail.

The order, being a punishment order, was given by Capt. Archer either under the authority of AW 104 or it was an arbitrary assumption of authority by him. Under such situation the well known rule as to presumptions and inferences is applicable:

"The presumption against illegality, and its equivalent expressions that there is no presumption against legality, or in favor of illegality, that there is a presumption in favor of legality, that facts consistent with legality are presumed to exist, or that where a situation is explainable on the basis of legality, it will be assumed that such is the true explanation, present a rule of administration that he who claims the existence of illegality must prove it.***" (22 Corpus Juris, sec.83, pg.147).

"The courts will not impute a guilty construction or inference to the facts when a construction or inference compatible with innocence arises therefrom with equal force and fairness. In fact, it is always the duty of a court to resolve the circumstances of evidence upon a

(134)

"theory of innocence rather than upon
a theory of guilt where it is possible
to do so." (Wharton's Criminal
Evidence, Vol.I, sec.72, pg.87).
(Underscoring supplied).

Accused had missed reveille formation (R.29) that morning. This was a "minor offense" under AW 104. (M.C.M., sec.106, pg.104). Capt. Archer had reason, in spite of his protestation otherwise, to inflict disciplinary punishment upon accused. The type of punishment - "to push the roller" - was such as is permissible under AW 104. It was in the nature of extra fatigue duty and may be used as punishment under the Article (SPJGA 220.69, Aug 19, 1942, Bul. JAG., Vol.I, No.3, pg.165). The application of the foregoing rule as to presumptions and inferences together with recognition of the circumstances under which the order was given make it logical and consistent with the facts of the case to conclude that Capt. Archer gave the order as disciplinary punishment under AW 104.

By virtue of AW 104, accused's company commander was authorized for "minor offenses" to:

"impose disciplinary punishments upon persons of his command without intervention of a court-martial, unless the accused demands trial by court-martial. **** (AW 104).

"The commanding officer, after ascertaining to his satisfaction, by such investigation as he deems necessary, that an offense cognizable by him under A.W. 104 has been committed by a member of his command, will notify such member of the nature of such offense as clearly and concisely as may be, and inform him that he proposes to impose punishment under A.W. 104 as to such offense unless trial by court-martial for the same is demanded." (M.C.M., 1928, par.107, pg.104).

236447

- 20 -

110

"**** With reference to each offense as to which no demand for trial by court-martial is made, the commanding officer may proceed to impose punishment. The accused will be notified of the punishment imposed as soon as practicable and at the same time will be informed of his right to appeal. ****"
 (M.C.M., 1928, par.107, pg.105).

"A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through proper channels, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. (A.W.104)
 An appeal not made within a reasonable time may be rejected by the 'next superior authority'.
 An appeal will be in writing through proper channels (see 107 as to appeal by indorsement), and will include a brief signed statement of the reasons for regarding the punishment as unjust or disproportionate. The immediate commanding officer of the accused will when necessary include with the appeal a copy of the record (see 109) in the case.****"
 (M.C.M., 1928, par.108, pg.105).

Captain Archer wholly failed to notify accused that disciplinary action under AW 104 was contemplated, before such action was taken. The evidence is clear that he ordered accused "to push the roller" for a specified period of time and also to "walk full pack" for an additional period. The order was explicit in this regard. Capt. Archer was also very careful, according to his testimony, to read AW 64 to accused, but remained silent as to the requirements of AW 104. Further, after having imposed the punishment on accused he failed to notify him of his right to appeal to superior authority if he believed the punishment was unjust. Accused was wholly ignorant of his rights under AW 104 (R.32) as his testimony clearly shows:

"Questions by defense:

- Q. While Captain Archer was talking to you, did he offer you the choice of a court-martial rather than accepting company punishment?
 A. He did not, sir, he said I would not get it.
 Q. Did he say anything about what you might do if you thought the punishment he was giving you was unjust?
 A. No, sir, he didn't."

236447

(136)

"Questions by law member:

Q. Do you know what to do in the case you think punishment is unjust? What is the procedure in case punishment is given to you that you believe unfair or unjust?

A. Go ahead and do it and report it afterwards, I believe, sir." (R.32).

The requirements of AW 104 as expounded by the Manual for Courts-Martial quoted above that the accused (a) be given the opportunity to demand trial by court-martial before imposition of punishment, and (b) be informed of his right to appeal to superior authority if he believes the punishment imposed is unjust, are mandatory, and the failure of the officer imposing the punishment to notify the accused of his rights nullifies the order of punishment and renders it illegal. (JAG. 250.3 - Jan 6, 1926, Dig. Ops. JAG. 1912-40, sec.462 (5), pg.370). The order "to push the roller" was therefore for this additional reason an illegal order and accused was under no duty to obey the same; and the Board of Review is of the opinion, on this further ground, that the record if legally insufficient to sustain the finding of guilty.

7. In addition to the foregoing the record reveals a situation, which in the opinion of the Board of Review, deserves comment. The accused was subjected to confinement for a period of four days on a bread and water diet in the "dungeon" at Haloland. It appears that this incarceration was arranged and executed by Major Low and Capt. Archer. The period of confinement evidently was to be determined at the whim, caprice, or personal discretion of Major Low. Such punishment, for confinement of such nature must be so considered, is not authorized under AW 104, and is in fact prohibited by the Articles of War. Even a court-martial cannot impose such a sentence after trial and a finding of guilty (AW 41; M.C.M., sec.102, pg.92). The only explanation offered for the imprisonment is that accused was "incorrigible", that is, "incorrigible" in the opinion of Capt. Archer. (Capt. Archer's testimony is anything but frank; it is evasive and equivocal; it creates the strong impression that he was endeavouring to shield some one).

During the period of this confinement accused was carried on the company morning report "for duty", although it is admitted he was not for duty. No mention of the restraint was shown on the charge sheet until after the trial, when the Adjutant inserted it as "pending investigation", a conclusion contrary to the evidence of record. The accused escaped from the confinement, and no charges were preferred against him for such escape, although the charges of the instant case were preferred two days after the escape. The reason for such failure to make mention of breaking confinement is obvious. This confinement was illegal.

In this connection it is interesting to note that the accused testified:

"When I broke out it was one afternoon, I'd say at about quarter to 2:00 -- I believe that was on a Saturday afternoon, I went to Colonel Whitcomb and told him the story. He told me that was the best thing I could have done, to break out. He told me that Captain Archer had no authority to put a man on bread and water unless with a signature of the commanding general,****. After that Colonel Whitcomb turned me over to Colonel Green, the provost marshal. I stayed down there from 10:30 that morning until 12 o'clock. Then Captain Archer called up and had us brought back to the company". (R.29)

No attempt was made to contradict or explain this testimony. In his review the staff judge advocate makes the following comment:

"The accused testified that after his escape from confinement he reported his escape to Colonel Whitcomb and that this officer encouraged the accused in his course of conduct. If this ^{statement} is true, Colonel Whitcomb is guilty of a serious indiscretion which will have far reaching deleterious effect upon the discipline of the command of which the accused was a member".

Apparently with the means available to determine the truth about this entire affair, the better practice would have been to have done so, so that criticism could be made where criticism was due. While it may be that Colonel Whitcomb could have handled the situation in a better manner, it is indicated that he took proper steps to place the accused where his discipline could be effected legally. So far as this record is concerned, if censure is due it would seem to be for the conduct of Major Low and Captain Archer.

8. In view of the errors pointed out above the question as to whether the plea in bar should have been sustained is not here considered, the Board of Review being of the opinion that it should reserve for future consideration in a proper case the determination as to whether illegal and unauthorized punishment may be pleaded in bar of trial. Under the British law such a plea will bar trial regardless of the seriousness of the offense. (Manual of Military Law, 1929, sec.36, chap. IV, pg.40). The question does not appear to have been passed upon in our practice since the enactment of AW 104. Prior to that time our practice appears to have been contrary to the British holdings. (Winthrop Military Law and Precedents (2d Ed. - reprint 1920) sec.411, pg.274). Suffice it here to say that the imposition

~~CONFIDENTIAL~~

(138)

of illegal punishment in any case seriously offends American sense of justice and cannot help but be deleterious to proper discipline.

9. For the reason stated above the Board of Review is of the opinion that the record of trial in this case is legally insufficient to support the findings and sentence.

R. Franklin Kite Judge Advocate
Alfredo Rodriguez Judge Advocate
O. Z. Gill Judge Advocate

236447

- 24 -

~~CONFIDENTIAL~~

110

CONFIDENTIAL

1st Ind.

15 JAN 1943

(139)

WAR DEPARTMENT, Office of the Judge Advocate General, European Theater of Operations, APO 871, U.S. Army.

TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of August 20, 1937 (Pub. No. 325, 75th Cong.), and as further amended by act of August 1, 1942, (Pub. Law No. 693, 77th Cong.) is the record of trial in the case of Private Morris L. Bartlett (6994476), Company B, 392nd Port Battalion, Transportation Corps, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review that the record of trial in this case is legally insufficient to support the findings and sentence. In my opinion the record clearly shows that the original order to "push the roller" given by a non-commissioned officer, pursuant to instructions of the company commander, was for punishment, and the subsequent order of the company commander, given after the refusal of accused to obey the non-commissioned officer, was of the same character and given for the same purpose, therefore, tainted with the same illegality, since admittedly in neither case was there any attempt made to comply with AW 104.

As to the illegality of the order on the ground that it was given for the purpose of increasing the punishment, there is, of course, no intention even to intimate that the mere fact that a commissioned officer repeats an order to a soldier, which order the soldier had previously refused to obey when given by a non-commissioned officer, is sufficient to establish such purpose. Obviously such is not the case in the great majority of instances. It is equally obvious that when such a purpose does exist the officer concerned rarely will admit it and thereby admit giving an illegal order. The purpose is determined by a sensible consideration of all the facts and circumstances disclosed by the evidence. Important among these, the evasiveness, equivocation, and lack of frankness of the officer often are indicative of his real purpose. Such, in my opinion, is this case.

The entire record reflects a rather deplorable example of maladministration of military discipline. I fully appreciate the need for a very high standard of discipline and of the difficulties of maintaining such a standard under existing conditions. I conceive it to be my duty to see to it that court-martial reviews in this theater be of such character as to furnish no interference with but to the contrary be helpful in the maintenance of a rigid but proper discipline. Beyond this we cannot and should not go. The rights of the individual, rights for which this war is being waged, must be considered, must be preserved. Discipline itself demands such action. That discipline is harsh is not the test. Often it must be, but that it is administered fairly, justly, legally is our concern. It should be the concern of every officer. This case does not meet that test. Accordingly I recommend that the findings and sentence be vacated, and

236447

CONFIDENTIAL

110

CONFIDENTIAL

(140)

that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinabove made should it meet your approval.
(ETO 110).


L. M. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

3 Incls:

- Incl. 1 - Record of Trial
- Incl. 2 - Opinion of Board of Review
- Incl. 3 - Form of Action

(Findings and sentence vacated by order of the Theater Commander -
see letter Hq. ETO, 11 Mar 1943 (ref. AG 250.4 EJA))

CONFIDENTIAL

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(141)

Board of Review.

ETO 121.

24 DEC 1942

U N I T E D S T A T E S

) U N I T E D S T A T E S A R M Y F O R C E S
: IN I C E L A N D .

v.

:

Private 1st Class Francis L. Shoupe (13009087) : Trial by G.C.M. convened at Camp
Private 1st Class John B. Ellis (13003928) : Curtis, Iceland, 25 September 1942.
Private 1st Class Joseph A. McDevitt (13007700) : Sentence: Vanderlip and Farlow,
Private John Saroka, Jr. (13007687) : charges withdrawn before trial:
Corporal Richard M. Thompson (14002335) : Burke, Hass, Loddo, Gullett, Hinson
Staff Sergeant John T. Burke (6057726) : Barker and Wilson, acquitted:
Staff Sergeant Harry B. Vanderlip (12003113) : Shoupe, Ellis, McDevitt, Saroka
Private Charles Farlow (13026845) : and Thompson, to be each reduced
Private Herman H. Hass (13026813) : to the grade of private, confined
Private Joseph C. Loddo (13006155) : at hard labor for six months and
(all of Co."A" 241st Quartermaster Battalion), : to forfeiture of so much of their
Private 1st Class Cornelius Wilson (6132959) : pay each month for a like period
Private 1st Class Victor L. Barker (6985736) : as is hereinafter set out.
Private John T. Gullett (14000856) : Prison Stockade.
Private James A. Hinson (14030464) :
(all of Co."B" 392nd Quartermaster Battalion).)

HOLDING by the BOARD OF REVIEW
RITER, VAN BEN SCHOTEN and IDE, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Staff Sergeant John T. Burke, Company A, 241st Quartermaster Battalion, Private First Class Francis L. Shoupe, Company A, 241st Quartermaster Battalion and Vanderlip, Harry B., Sergeant. Ellis John B., Private. Farlow, Charles, Private. Hass, Herman H., Private. Loddo, Joseph C, Private. McDevitt, Joseph A., Private. Saroka, John, Jr., Private. Thompson, Richard M., Private.

All the above, members of Company A, 241st Quartermaster Battalion.

235448

CONFIDENTIAL

121

(142)

Wilson, Cornelius, Private First Class.
 Barker, Victor L., Private.
 Gullett, John T., Private.
 Hinson, James A., Private.

All the above, members of Company B, 392nd Quartermaster Battalion.

acting jointly and in conjunction with each other and in pursuance of a common cause and intent, did, at Reykjavik, Iceland, on or about April 27, 1942, while acting as agent and custodian for the Government of the United States, feloniously embezzle by fraudulently converting to their own use and benefit and to the use and benefit of each of them, 31 parkas value \$11.99 each, total value \$371.69, the property of the United States furnished and intended for the military service thereof, intrusted to them and each of them by Colonel Matthew H. Jones, Base Quartermaster, U.S. Army.

The trial judge advocate announced that by direction of Major General Bonesteel, the appointing authority, the prosecution withdrew the charge and specification against Sergeant Harry B. Vanderlip and Private Charles Farlow, and would not pursue the same further at the present trial (R.3). Each of the others above named pleaded not guilty to said charge and specification. Staff Sergeant John T. Burke, Private Herman H. Hass, Private Joseph C. Loddo, Private First Class Cornelius Wilson, Private Victor L. Barker, Private John T. Gullett and Private James A. Hinson, were each acquitted of the charge and specification. Private First Class Francis L. Shoupe, Private First Class John B. Ellis, Private First Class Joseph A. McDevitt, Private John Saroka, Jr., and Corporal Richard M. Thompson were found, of the specification and of the charge, guilty except the words "acting jointly and in conjunction with each other and in pursuance of a common cause and intent" and "while acting as agent and custodian for the government of the United States, feloniously embezzle by fraudulently converting to their own use and benefit and to the use and benefit of each of them, 31 parkas" and "each, total value \$371.69" and "intrusted to them and each of them by Colonel Matthew H. Jones, Base Quartermaster, U. S. Army," substituting therefore, respectively, the words "knowingly and willfully apply to his own use and benefit" and "one parka", of the excepted words not guilty, of the substituted words guilty. Of the charge: Guilty. Each were sentenced as follows:

Private First Class Francis L. Shoupe, to be reduced to the grade of private, confined at hard labor for six months and to forfeit \$16.00 per month for a like period:

Private First Class John B. Ellis, to be reduced to the grade of private, confined at hard labor for six months and to forfeit \$29.00 per month for a like period:

Private First Class Joseph A. McDevitt, to be reduced to the grade of private, confined at hard labor for six months and to forfeit \$33.00 per month for a like period:

(143)

Private John Saroka, Jr., to be confined at hard labor for six months and to forfeit \$17.00 per month for a like period:

Corporal Richard M. Thompson, to be reduced to the grade of private, confined at hard labor for six months and to forfeit \$16.00 per month for a like period.

The reviewing authority approved the sentences and designated the U.S. Army Forces Prison Stockade as the place of confinement for each.

The result of the trial was promulgated in General Court-Martial Orders No.91, Headquarters, U. S. Army Forces, APO 860, c/o Postmaster, New York, N.Y., dated 6 November 1942.

3. The record fails to show that any investigation of the acts charged was at any time made. No statements of any persons purporting to have any knowledge of the facts alleged in the charge or any part thereof are found with the record of trial. The only attached papers are the report of the record of trial, of the officer appointed to investigate the charges herein, which discloses no testimony given by any witness, no witnesses required by the accused and that none of the accused made any statements but notwithstanding, he recommended that each be tried by a general court, which recommendation was also made by the Staff Judge Advocate. Although not shown by legal evidence herein, it rather vaguely appears that some parkas with other merchandize were stolen during the unloading of a ship in the harbor of Reykjavik, Iceland, by soldiers detailed for that purpose by Colonel Matthew H. Jones, Base Quartermaster, U. S. Army, of which details accused may have been members although not so shown and who some time later were each found to be in possession of a parka. The record consists very largely of the testimony of First Lieutenant Benjamin F. Allen, 812th Military Company, Assistant Provost Marshall, Camp Haggi, Iceland, read from admittedly (R.29) incomplete notes of unknown origin of an apparent investigation by Lieutenant Colonel Jesse P. Green, Provost Marshall, Headquarters, U. S. Army Forces, of alleged thefts and which notes were not offered nor admitted in evidence. Lieut. Allen was not the investigating officer under AW 70.

The evidence as to each of the accused found guilty is substantially as follows:

John B. Ellis: Before questioning Ellis, Lieut. Allen stated that he "warned him of his rights under the 24th Article of War, warned him against perjury, and swore him" (R.20). Ellis, sworn as a witness, said, he had made a statement orally to Lieut. Allen; that Lieut. Allen mentioned "perjury or something in regard to my being allowed to be quiet, but he also stated that in the event that I could give him enough information that he desired, that General Bonesteel gave him permission to send anyone back to the States who gave him enough information. In other words in another case - he remarks - of a court-martial, when he was in a training corps in a southern post, he said that over a few packs of cigarettes how a certain party had got a considerable amount of time in years and said as far as he knew right there, there probably wouldn't even be a trial. He said 'Just tell me'

(144)

what the story is and that's all there will be to it'." (R.23). Ellis never made an unsolicited statement (R.26). Lieut. Allen stated that the supply records (R.47, 106) showed Ellis had not been issued a parka but from other sources the Lieutenant found Ellis had one and on the Lieutenant's order (R.47) Ellis turned it over to him. The Lieutenant identified a parka (Exhibit B) by the name he had written in the sleeve as the one taken by him from Ellis (R.45).

Francis L. Shoupe: Lieut. Allen identified a parka (Exhibit D) by the name he had written in the sleeve, as a parka taken from Shoupe (R.57). On page 58 of the record the objection by Defense Counsel to the admission of the statement made by Shoupe to Lieut. Allen because made with belief that there would be a reward for making such statement, was sustained by the Law Member of the Court but he later overruled an objection by the defense counsel to a similar question (R.61). Lieutenant Allen testified:

Q. - "Lieutenant Allen, will you state to the court what statements Private Shoupe made to you? I refer to page 125"? (Apparently refers to page of notes).

A. - He stated: "I went down to the docks on or about the middle of April. Ellis told me about a box of parkas" --- (R.61). (Witness stopped on objection to reference to any of co-accused).

Q. - "Where did he get this parka, Lieutenant Allen?"

A. - "Down on the docks".

Q. - "Where was the parka?"

A. - "It was, he stated, it was in the box."

Q. - "And where was this box?"

A. - "Well, they loaded it on the trucks down on the docks, sir. That's his statement." (R.63).

Q. - "The box was taken from the docks and loaded onto a truck?"

A. - "According to this statement, yes." (Underscoring supplied).

Q. - "And what was done with this box of parkas?"

A. - "The box was taken off the truck and put in Private Shoupe's hut, and he stated the parkas were divided."

Q. - "And what was done with the parkas?"

A. - "The parkas, he stated, were given to Ellis, Saroka, McDevitt" --- (Objection made and sustained to mention of names of other accused).

Q. - "Did Private Shoupe know that these parkas were government property?"

A. - "Well, he stated: "I don't know anything about other government property that was reported stolen because I was working in the supply room at the time the parkas were stolen." (R.64).

Q. - "Lieutenant Allen, were there any other identification marks in these parkas other than the marks you stated you put in them?"

(145)

- A. - "I don't believe there was."
- Q. - "Lieutenant Allen, you made testimony regarding statements made by Private Shoupe to you. At that time you were very indefinite as to whether or not any statements regarding leniency were made to Private Shoupe. I wish you would think that over and in the light of your former testimony state whether or not any statement was made to Private Shoupe which would hold out hope of leniency in his case?"
- A. - "Well, I believe I did state to him that Colonel Green told me to tell him that if he would tell the whole story concerning the watches and parkas and all stuff that was stolen, then he would see to it that higher authorities knew about it, he would bring it to their attention." (R.109).

Joseph A. McDevitt: Lieut. Allen identified a parka (Exhibit C) by the name he had written in the sleeve, as a parka he had taken from McDevitt (R.49), and that on checking the supply records, he found that no parka had been issued to McDevitt. He told McDevitt to bring his parka to him.

- Q. - "What did you state to Private McDevitt when he turned this in to you?"
- A. - "Well, he turned it in to me and made the statement to me that--- first I had him called in and explained his rights"---
- Q. - "Will you explain to the court what you mean that you stated to Private McDevitt that you explained his rights to him?"
- A. - "I told Private McDevitt under the 24th Article of War he was not compelled to answer any questions which tended to incriminate or degrade him; I warned him of perjury, explained perjury to him, and told him if he told the whole truth that Colonel Green would bring it to the attention of the proper authorities." (R.50).
- Q. - "Did you make any statements to Private McDevitt other than those I have asked you prior to questioning him?"
- A. - "Well, I don't know what I might have said to him at that time." (R.96).

John Saroka, Jr: Lieut. Allen identified a parka (Exhibit F) by the name he had put in the sleeve as a parka brought in to him by Saroka (R.67). Lieutenant O'Callaghan, 241st Quartermaster Battalion gave evidence that the supply records do not show that a parka was issued to Saroka (R.41).

- Q. - "Prior to questioning Private Saroka, what statements did you (Lieutenant Allen) make to him?"
- A. - "I explained his rights under the 24th Article of War, explained perjury and warned him against perjury." (R.67).
- Q. - "What statements did Private Saroka make to you?"

CONFIDENTIAL

(146)

- A. - "He stated: I got the parka that I had from the docks when the Borinqueen was in. I got it out of a box that was sitting on the east end of the Main Quay. The box was broken open before I got my parka. I don't know who broke it open though. The box of parkas was just sitting there so I took one. I know that they were government property. I saw Ellis and"---.
- Q. - "How did it happen that you asked Private Saroka to turn in the parka to you?"
- A. - "Well, upon mentioning that he had the parka, then I told him to turn it in." (R.68).

Richard M. Thompson: Lieut. Allen identified a parka (Exhibit E) by the name he had put in the sleeve as a parka taken from Thompson (R.64). The company supply records (R.41) show no issue of a parka to Thompson. Lieut. Allen questioned Thompson when he took the parka from him:

- Q. - "What did you state to him prior to the questioning? I refer you to page 162".
- A. - "I explained his rights under the 24th Article of War, explained perjury, and warned him against perjury."
- Q. - "Did you make any promises to him?"
- A. - "I did not."
- Q. - "Did you make any statements to him?"
- A. - "Well, I don't remember."
- Q. - "Was there any question in your mind that the statements which he made were voluntary?"
- A. - "Yes, I think they were voluntary."
- Q. - "Did you give Private Thompson any hope of benefit or feeling that he would be exempt from trial by court-martial?"
- A. - "I don't believe I did." (R.65).
- Q. - "What statements did Private Thompson make to you?"
(Objection of defense counsel to the admission of such statements as not voluntarily made, was overruled.)
- A. - "He stated: I haven't had a parka issued to me. The parka I have I got from the Borinqueen, the second trip it made over here. A merchant marine gave it to me. He had three of them on the boat and there was about four or five of us around there, and he gave the parkas to us. I did not know that they were government property at that time. Sergeant Vanderlip got one of the parkas.*****"
- Q. - "Did he make any other statements to you Lieutenant Allen?"
- A. - "Yes, he stated: I did not get a parka at Langholz Dump. I know nothing about this." (R.66).

The objections by the defense counsel to the admission of the testimony of Lieut. Allen of the purported statements of the various accused were frequent and timely and the trial judge advocate stated in open court: "The prosecution is quite frank to admit that the only evidence I have and can offer in this case are the statements made by these men to Lieutenant Allen" (R.51). When the law member sustained the objections of defense

counsel to the admission of such testimony the trial judge advocate asked the court for assistance and requested a week's adjournment (R.56) after which the law member overruled new objections to the admission of such testimony and it was admitted. When asked why he explained the meaning of perjury when he examined accused, Lieut. Allen said he explained it to every man brought before him to make a statement (R.101).

- Q. - "Can a man perjure himself when he is not under oath?"
A. - "Well, I don't believe you could call it perjury."
Q. - "Were these men under oath?"
A. - "They were."
Q. - "All of them?"
A. - "Yes."
Q. - "Who swore them in?"
A. - "I did."
Q. - "On what authority?"
A. - "I was appointed investigating officer by Colonel Green."
Q. - "When?"
A. - "I don't recall the date."
Q. - "What sort of an order did Colonel Green give you - was it oral or written?"
A. - "I believe it was oral." (R.102).
Q. - "Did he appoint you an investigating officer or did he tell you to investigate the case of the thefts at the docks?"
A. - "He appointed me an investigating officer of that case; as I was on detached service with the Colonel, he had the authority to appoint me."
Q. - "In what capacity did he have authority to appoint an investigating officer?"
A. - "I don't know other than he was my commanding officer at that time."
Q. - "Do the men sign these statements?"
A. - "Well, I don't see the men's signature on these statements." (R.102).
Q. - "Did I understand you to say there was a shake-down inspection?"
A. - "There was."
Q. - "At the time of this inspection were any parkas found?"
A. - "I don't know whether there was any found or not." (R.107).
Q. - "Were any parkas picked up?"
A. - "I remember that other parkas were turned in the orderly room and then later sent back out. I don't know the circumstances of that." (R.107).
Q. - "Lieutenant Allen, at the beginning of the trial you made the statement which appears on the record, that you made a promise to all of these men that if they told the truth, Colonel Green would take it to the higher authorities; is that correct?"
A. - "I believe I told him that Colonel Green would see to it that higher authorities would know about it."

(148)

- Q. - "Did you tell that to all of the accused prior to making a statement?"
A. - "I believe I did."
Q. - "To every one of them?"
A. - "I believe so." (R.108).
Q. - "Lieutenant Allen, did you not read excerpts from that book which stated that certain men being held from that investigation should be awakened ^{half} hour/hour?"
A. - "I believe I did." (R.105).

At the end of the trial the law member ruled: "It is the ruling of the law member that the testimony of Lieut. Allen as to the statements made to him by the various accused are inadmissible" (R.117, 119).

Prosecution's witness First Lieutenant William H. Glanz explained the procedure of unloading ships, stating, "Every soldier is an agent of the government" (R.16) "and have custody and control over the goods on the ships while unloading" (R.13). Lieutenant-Colonel Jesse P. Green denied that investigating officers like Lieut. Allen are privileged to make any promises of leniency (R.111) and Sergeant Raymond N. Stofer, a clerk in the Base Quartermaster property office placed the value of an Alpaca lined parka at \$11.99 (R.110).

4. The five of the accused were convicted of having knowingly and willfully applied to their own use and benefit one parka, value \$11.99, property of the United States, furnished and intended for the military use thereof, as a lesser included offense to that charged.

The original charge was embezzlement which is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268; 1928 M.C.M. pg.173).

Misapplication is an appropriation not of the ownership of the property but of its use for the personal benefit of the offender (Winthrop, 1920 Reprint, pg.708).

Article of War 70, among other things requires that "no charge will be referred to a General Court-Martial for trial until after a thorough and impartial investigation thereof shall have been made". The papers accompanying the record herein show the proper reference of the charge for investigation on 15 July 1942 to Major Joseph McNamee, Ordnance Department together with his report of 4 August 1942, stating: "there was no testimony given by any witness," "no witnesses were required by the accused" and the accused "stated that they did not desire to make any statements." This was followed by the recommendation of Major McNamee "that each be tried by a general court". Dated 21 August 1942 is a "Summary of evidence and action of Staff Judge Advocate pursuant to AW 70 and par. 35 C, Manual for Courts-Martial" signed by the Staff Judge Advocate and attached to the record of trial. After listing the names of accused it consists only of a paragraph stating:

236448

CONFIDENTIAL

121

"The indicated evidence shows that all of the accused acted jointly by aiding and abetting each other and that each of the accused removed from a case or box 31 parkas or were found to be in possession of one or more of said parkas; that each of the accused converted to their own use and benefit one or more of the parkas; that each of the accused were acting as agents and custodians for the parkas for the purpose of removal of said parkas, a part of the cargo of a ship, from one point to another in the course of their duty and employment";

and a paragraph stating the charge and specification to be appropriate and the indicated evidence sufficient to support a finding of guilty of each of accused and recommending that the charges be referred to a general court-martial for trial.

There is in this record however, no evidence of any actual investigation; no witnesses were questioned; none were called; no statements of anyone at any time were taken by the investigating officer. Although he states in his report that he has "investigated the enclosed charges", his further statement that there was no testimony given by any witness, no witnesses were required by the accused and accused made no statements, together with the entire absence from the record and attached papers of anything to indicate upon what facts or circumstances the charges originated or were based, negatives any presumption even of compliance with AW 70.

"The provisions of AW 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can be legally referred for trial. A court-martial is without jurisdiction to try an accused upon charges referred to it for trial without having been first investigated in substantial compliance with the provisions of AW 70 and, in such a case, the court-martial proceedings are void ab initio".
(C.M.161728. Dig.Op., JAG.1912-1940, pg.292).

This record fails to show any substantial compliance with the requirements of AW 70 and the Board of Review is therefore of the opinion that there was no legal reference of the charge for trial, no jurisdiction obtained for trial and that the court-martial proceedings herein are void ab initio.

5. Assuming however, that the reference of this charge for trial was properly made, it would still remain necessary to prove that (a) that the accused applied to their own use the parkas in question; (b) that these parkas were the property of the United States and that they were furnished or intended for use in the military service thereof as alleged; (c) the value of the parkas in question and (d) the facts and circumstances indicating that the acts of the accused were willfully, knowingly and (wrongfully) done.

The evidence consisted principally of the reading by an assistant provost marshall of notes whose author and origin were not disclosed and which were not offered nor admitted in the trial as an

(150)

exhibit. The readings purported to be statements, admittedly incomplete and secured by the holding out of the hope of reward, admitted over the timely and repeated objections of defense counsel and ruled as inadmissible by the law member when the taking of testimony had been completed (R.117, 119).

A confession of guilt by accused is admissible against him when, and only when, it was freely and voluntarily made without having been induced by the expectation of any promised benefit or by the fear of any threatened injury, or by the exertion of any improper influence (22 C.J.S. 1425). Nor can an accused be convicted legally upon his unsupported confession. (1928 M.C.M. par.114, pg. 114.)

A confession must be voluntary and the onus to show that it was such is upon the prosecution in offering it (Winthrops Military Law & Precedents, Reprint, pg.328).

Considering all the testimony however, it is not shown anywhere that the parkas in question were the property of the United States, furnished and intended for use in the military service thereof; it is not shown that any parkas are missing from the property of the United States. It may be admitted that the accused had parkas which were likely used by them, but it is not anywhere shown that their possession and use of the parkas (Exhibits) was wrongful.

Failure to show that the property belonged to the government as alleged is fatal. (CM.192952, Scales; CM 207591, Nash et al; CM 208895, Zerkel).

Sergeant Raymond B. Stofer placed the value of an Alpaca lined parka at \$11.99 each. There is no testimony that the parkas in question, exhibits or otherwise, were alpaca lined; in fact no attempt was made to describe them in any manner.

When the testimony of Lieut. Allen is removed, as it properly was, from consideration of the court, nothing remains but the testimony that accused were not shown by the supply records, admittedly incomplete and in terrible condition, to have been issued a parks.

"Upon every criminal trial - military as well as civil - the burden is on the prosecution to establish guilt, not on the accused to establish his innocence. In the establishing of guilt, there are to be demonstrated three principal facts, viz: That the act charged as an offense was really committed; that the accused committed it; that he committed it with the requisite criminal intent." (Winthrops Military Law and Precedents, Reprint, pg.314; 1928 M.C.N. pg.62, par.78.)

121

236448 - 10 -

(151)

"When 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. Raziziez, 99 N.E. 557; CM 216004, Roberts, Miller).

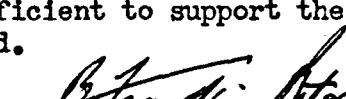
The record shows "the proceedings where the president consulted with the counsels for the accused and the trial judge advocate are withdrawn. The president stated in his remarks therein that it had nothing to do with the substance of the testimony. The subject of the discussion was Miscarriage of Justice" (R.120).

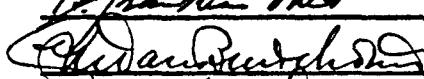
"Justice according to law, demands more than that accused be guilty - it demands that they be proved guilty." (CM 207591, Nash, Morris).

"We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens." (Buntain v State, 15 Tex. Appeals, 590) (Cf: CM 212505, Tipton.)

"The Board of Review in scrutinizing proof and the basis of inference does not weigh evidence or usurp the findings of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty on which the sentence is based. If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference." (CM 212505, Tipton).

These minimum requirements are not even approached herein and the Board of Review is therefore of the opinion that the evidence of record in this case is not legally sufficient to support the findings of guilty on which the sentences are based.


 Judge Advocate


 Judge Advocate


 Judge Advocate

236448

121

(152)

1st Ind.

26 DEC 1942

WAR DEPARTMENT, Office of Judge Advocate General, European Theater
of Operations, APO 871, U. S. Army.

TO: Commanding General, European Theater of Operations, U. S. Army,
APO 887.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$,
as amended by the act of August 20, 1937 (Pub. No. 325, 75th Cong.), and as
further amended by act of August 1, 1942 (Pub. No. 693, 77th Cong.), is the
record of trial in the case of:

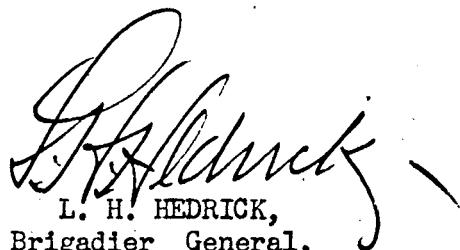
Private 1st Class Francis L. Shoupe, (13009087) , Co."A", 241st Q.M. Bn.
Private 1st Class John B. Ellis, (13003928) , Co."A", 241st Q.M. Bn.
Private 1st Class Joseph A. McDevitt, (13007700) , Co."A", 241st Q.M. Bn.
Private John Saroka, Jr., (13007687) , Co."A", 241st Q.M. Bn.
Corporal Richard M. Thompson, (14002335) , Co."A", 241st Q.M. Bn.

together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review and, for the
reasons stated therein, recommend that the findings and sentences be vacated,
and that all rights, privileges and property of which each of the accused
has been deprived by virtue of said sentences be restored.

3. Inclosed herewith is a form of action designed to carry into
effect the above recommendation should it meet with your approval.

(ETO 121).


L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

3 Incls:

- Incl. 1 - Record of Trial
- Incl. 2 - Opinion of Board of Review
- Incl. 3 - Form of Action

(Findings and sentence vacated by order of the Theater Commander -
see letter Hq. ETO, 10 Feb 1943 (ref. AG 250.4 EJA))

236448

CONFIDENTIAL

121

CONFIDENTIAL

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(153)

Board of Review.

19 DEC 1942

ETO 128.

UNITED STATES) UNITED STATES ARMY FORCES IN ICELAND
v.) Trial by G.C.M. convened at APO 1266
Tech. 5th Grade DONALD J. RINDFLEISCH) c/o Postmaster, New York, N.Y.,
(6872518), Company "D", 5th Engineers.) 4 Sept 1942. CHL six months and
) forfeiture \$36.50 per month for six
) months. Confinement at such place in
) the Eastern Defense Command as the
) Commanding General thereof may direct.

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

1. The record of trial in the case of Tech. 5th Grade Donald J. Rindfleisch has been examined in the Office of the Judge Advocate General for the European Theater of Operations and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review which submits this, its opinion, to the Judge Advocate General for the European Theater of Operations.

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

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

Specification: 1. In that Technician 5th Grade Donald J. Rindfleisch, Company "D", 5th Engineers, was at the British Y.M.C.A., Akureyri, Iceland on or about 2030 hours, July 26, 1942, drunk and disorderly in uniform under such circumstances as to bring discredit upon the military service.

CHARGE II: Violation of the 90th Article of War.

Specification: 1. (Found not guilty).

CONFIDENTIAL

(154)

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

Specification: 1. In that Technician 5th Grade Donald J. Rindfleisch, Company "D", 5th Engineers, did at South Camp, Akureyri, Iceland, on or about 2200 hours, July 26, 1942, willfully and without proper authority apply to his own use U.S. Army truck, Bedford model, No. 4445385, of the value of about \$1500.00, property of the United States, furnished and intended for the use thereof.

He pleaded guilty to Charge I and its Specification and later changed his plea to that of not guilty. He was found guilty of the Specification, except the words "British Y.M.C.A. 2030 hours" and "disorderly in uniform under such circumstances as to bring discredit upon the Military service" - of the excepted words "not guilty" - and "guilty" of the Charge. He pleaded not guilty to Charges II and III and the respective Specifications thereunder and was found "Not Guilty" of Charge II and the Specification thereunder and "Guilty" of Charge III and its Specification. He was sentenced to six months confinement at hard labor and forfeiture of \$48.00 per month for a like period.

The Reviewing Authority approved the sentence but remitted all forfeiture of pay adjudged in excess of \$36.50 per month for six months; confinement was directed at such place in the Eastern Defense Area as the Commanding General thereof may direct. The result of the trial was promulgated in General Court-Martial Order No. 81, Headquarters, U. S., Army Forces, APO 860, c/o Postmaster, New York, N.Y., dated September 29, 1942.

3. The Board of Review will confine its discussion to the evidence only offered to prove Charges I and III and the Specifications thereunder and the law applicable to each. Referring to Charge I, Specification 1, and eliminating the excepted words of which he was found not guilty, we find that accused was found guilty only of - "was at the Akureyri, Iceland, on or about July 26, 1942 - drunk". The evidence offered to prove this Charge and Specification, in pertinent part shows: That on 26 July 1942 accused was a T/5 on duty with Company "D", 5th Engineers, stationed at or near Akureyri, Iceland; that on that evening a dance was being held in the British Y.M.C.A. in Akureyri (R.7) at which only soldiers accompanying girls were admitted. Accused and a Private Smith, having no girls, gained entrance to the dance by means of a rear window (R.31). Lt. S. Bunker, Royal Engineers, testified that he attended the dance as duty officer and upon learning that accused and Private Smith had gained admission in an improper manner asked them to leave, which they refused to do; that accused was present when the "other man was very abusive to me and the British Army in general"; that accused was not himself actually abusive but was "egging the other man on" (R.5); that he, the witness, then ordered his Corporals to eject the two Americans (R.6) and that one of them put his arms around accused and carried him

out bodily' (R.23). Private Smith walked out, escorted by two Englishmen. Outside Private Smith became abusive towards Lt. Bunker (R.24) and demanded that he come outside and fight (R.6). Accused said to Private Smith, "He really means it. Lets go". When asked whether or not accused was drunk, Lt. Bunker replied "I don't think so".

Corporal G. Harris, Royal Engineers, who testified substantially the same as did Lt. Bunker, was silent upon the matter of accused's alleged drunkenness (R.7, 8).

Corporal John M. Perks, Company "D", 5th Engineers, - a witness for the prosecution when questioned regarding accused's sobriety testified as follows:-

- Q. Did you see accused on that night?
- A. Yes sir. He was brought into the guard room sir.
- Q. At that time was accused drunk?
- A. I don't know sir.
- Q. You mean to tell me you can't tell when a man is drunk?
- A. I could tell when a man had been drinking. It all depends on what you call drunk.
- Q. Will you tell the court whether or not the accused had been drinking?
- A. He had been drinking. (R.12).

Examination by the Court:

- Q. Corporal was the accused driving the truck?
- A. I could not say. I don't think so, because Private Hicks said---
- President: The witness will limit himself to official reports or matters that he knows about the circumstances.
- President: I am going to read a sentence from the Court-Martial Manual after which I want to ask the witness a question.
- "Any intoxicant which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties, is drunkenness within the meaning of the article."
- Q. You understand?
- A. Yes sir.
- Q. Was the accused drunk?
- A. Well, sir, I would say he was not drunk when I seen him.
- Q. Would you say that he had full exercise of his mental and physical faculties at the time you saw him about midnight or after midnight?
- A. Yes.sir. (R.13).

(156)

Private Harold J. Hicks a witness for the prosecution testified:

- Q. Did you talk to the accused on that night?
 A. No sir.
 Q. Was there anything in the actions of the accused that would indicate that he was drunk?
 A. No sir. (R.14, 15).

Captain Thomas J. Bowen a witness for the prosecution testified as follows:

- Q. Was the accused intoxicated on that night?
 A. I do not know. I did not see him (R.16).

Private 1st Class Jackson V. Leighty a witness for the prosecution testified:

- Q. Private Leighty, at any time in this argument with the British Officer, did the accused shake his fists at the British Officer? Take his coat off and fling it on the ground, or threaten to fight the British Officer?
 A. No sir. When he came out of the Y.M.C.A. he had a blouse on and fully buttoned.
 Q. Did the accused appear to be drunk?
 A. No sir. (R.20).

Sergeant Vincent J. Serbun, another witness for the prosecution, testified:

- Q. Was the accused drunk?
 A. I would not say so sir.
 Q. Then when Rindfleisch got up from this bench, did he get up in a threatening manner or do you believe he was preparing to leave the hall?
 A. He just slowly arose from his seat in the usual manner.
 Q. Did Rindfleisch offer resistance to this bodily removal from the Y.M.C.A.?
 A. No sir.
 Q. Would you say the accused was dressed as neatly as he is now?
 A. I would say he was dressed better sir. (P.24).

and upon cross-examination he testified as follows:

- Q. Was the accused drunk?
 A. I would not say he was drunk sir.
 Q. Was he under the influence of alcohol?
 A. I would say he knew what he was doing.
 Q. Do you think he was in possession of all his faculties?
 A. Yes sir. (R.25).

Upon examination by the Court the following questions were put to the witness and the following answers given:

President: I want to read a sentence from the Court-Martial Manual and then ask you some questions. You understand the meaning of the word "intoxicant"?

A. Yes sir.

President: Any intoxicant which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkeness .

Q. Do you understand the definition of drunkeness , Sergeant?

A. Yes sir.

Q. You feel that all his actions were clearly thought out or were his actions in a manner that was improper because of "feeling too good"?

A. No sir, he wasn't. (R.25, 26).

The accused, after having had his rights explained to him, took the stand under oath in his own behalf, and as regards his condition on the occasion in question testified:

Q. You claimed you had a young lady with you?

A. Yes sir.

Q. Were you drunk?

A. No sir.

Q. Were you drinking?

A. Yes sir. (R.28).

4. AW 96 - for violation of which accused was found guilty under Charge I, reads as follows:-

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court." (M.C.M.pg.224).

By exception the accused was found not guilty of being disorderly in uniform in a public place as charged in Charge I and the Specification thereunder, but guilty of being drunk at Akureyri. Without going into the question of whether or not this finding constitutes an offence cognizable under the Articles of War the Board of Review is of the opinion that there is not even a modicum of evidence to support it and that the record is insufficient to support the findings under Charge I, Specification 1.

5. The testimony relied upon to prove Charge III and the Specification thereunder is as follows:

(158)

Staff Sergt. Robert D. Trainer was on Military Police duty on the night of 26 July 1942. He saw the accused with a truck "and I told him to take the truck and go back to camp". Accused left and later came back to the dance and witness again told him to take the truck and go back to camp. Later he saw them driving around the town in the truck (R.9). Witness saw accused in the Government vehicle three times that night. He could not say whether accused was driving the truck or sitting behind the wheel (R.10). The third time he saw accused in the truck was near the theatre in Akureyri but did not know on which side of the truck accused was sitting (R.10-11).

Private John M. Perks testified that he was a member of accused's organization and was Corporal of the guard on the night in question. He directed the sentry to stop and arrest accused and Private Smith when they came back with the truck. He did not know how accused came into possession of the government vehicle (R.12). He did not ask him if he had a trip ticket. The accused was not a regularly assigned truck driver in this organization and the witness had never seen him drive a truck (R.13).

Private Harold Hicks, who was sentry on duty at the Main gate on the night the alleged offenses took place, testified: That accused and Private Smith came up the road at about 9:30 or 10 o'clock that evening and then disappeared. That at about 10:30 p.m., they came around the corner in the truck and witness called to them to halt but that they kept on going (R.14). That accused was not driving the truck at that time (R.15).

Captain Thomas J. Bowen testified that he was the commanding officer of accused's company; that on the night in question the vehicle did not have a proper trip ticket and that he did not know whether or not accused was a passenger in the truck. He identified the vehicle by an Issue and Receipt voucher (R.17) and fixed the value at \$750 at the time it was taken over from the British on about July 10, 1942 (R.19).

The accused took the stand in his own behalf, was sworn and testified as follows:

Early in the day he and Private Smith had purchased movie tickets. They went straight to the movies following their trouble at the dance. After 5 or 10 minutes in the movies they left and returned to camp. They were there only a few minutes and saw the truck. That Private Smith got behind the wheel (R.27) "and I followed him". That they then drove the truck over near the theatre, parked the truck and went into the theatre. Upon leaving the theatre they drove around the town then returned to camp, where they were put under arrest (R.28). That neither he nor Private Smith had procured a trip ticket. That he knew they were supposed to have one in order to leave camp. That he had never been a driver (R.29) and did not know how to drive a truck (R.31). That the M.P.s. told them to go "home" only once and that they returned to camp in about 20 minutes thereafter. He remembered running through sentry post No. 1 (R.30).

(159)

Charge III, Specification 1, is laid under AW 94, the pertinent part of which reads as follows:

"**** Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof.****"

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties.****"
(M.C.M. pg.224).

There is no denial on the part of accused that he and Private Smith took the truck without either of them having a trip ticket or authority so to do. Accused at least knew they "were supposed to have an order to leave camp". They ran through a sentry post without stopping after being ordered by the sentry to halt, and they used the car for their own convenience in going to a theatre and riding about the town.

The fact that accused did not drive the car is of no importance. He was present when the car was unlawfully taken; he aided and abetted in its taking by voluntarily becoming a passenger and by participating in its benefits. Under a statute, which prohibits the use of an automobile without authority, the word "use" includes use by a passenger and it is not necessary to constitute such use within the meaning of the Statute that there be active control or operation of the machine by one who rides therein. (42 C.J. par. 1505 , pg.1399).

It was sufficiently established that the truck was property of the United States furnished and intended for the use thereof. While the United States may not have acquired the absolute title to the truck from the British government (R.17, 18), yet it did hold lawful possession of same. This is an adequate property interest in the truck to sustain the charges (Winthrop's Military Law and Precedents, sec.1065, pg.686). The value of the truck was not clearly and properly established but the court was justified from the character of the property in inferring that it has some value (M.C.M.-1928, P.173).

For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings as involves a finding of guilty of Charge III, Specification 1, and the sentence as approved. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were

(160)

committed during the trial. The sentence as approved is within the maximum punishment permitted for this offence under the Table of Maximum Sentences.

B. Franklin Kite _____ Judge Advocate
Rodney W. Pendleton _____ Judge Advocate
O. J. Zell _____ Judge Advocate

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(161)

Board of Review.

ETO 132.

20 JAN 1943

U N I T E D S T A T E S) UNITED STATES ARMY FORCES
) IN ICELAND.
v.)
Private JOHN J. KELLY, (14000076), and) Trial by G.C.M., convened at
Private EDWARD F. HYDE, (6982099), both) Camp Curtis, Iceland, 26
of Company "B", 392nd Port Battalion,) September 1942. Sentence:
Transportation Corps.) Dishonorable discharge,
) forfeiture of all pay and
) allowances and confinement at
) hard labor for five years.
) United States Disciplinary
) Barracks.

HOLDING by the BOARD OF REVIEW
RITTER, VAN BENSCHOTEN and IDE, Judge Advocates.

1. The record of trial in the case of Privates John J. Kelly and Edward F. Hyde has been examined in the Office of the Judge Advocate General for the European Theater of Operations and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review which submits this, its opinion, to the Judge Advocate General for the European Theater of Operations.

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private JOHN J. KELLY, Company "B", 392nd Port Battalion Transportation Corps and Private EDWARD F. HYDE, Company "B", 392nd Port Battalion, Transportation Corps, acting jointly and in pursuance of a common cause and intent, did, at various times and dates between July 1 and August 31, 1942, at Port of Debarkation, U.S. Army Forces, APO 860, c/o Postmaster, New York, N.Y., feloniously embezzle by fraudulently converting to his own use and benefit subsistence stores and supplies as follows:

(162)

Pork Sausage - 6 cans @ \$.65	Sugar - 60 lbs. @ \$.05
Applesauce - 3 cans @ \$.31	Eggs - 12 doz. @ \$.35
Meat & Veg. Stew - 8 cans @ \$.31	Grapefruit - 60 lbs. @ \$.06
Sweet Corn - 8 cans @ \$.08	Coffee - 1 can @ \$3.23
Carrots, Dried - 2 cans @ \$.30	Graham Crackers - 36 boxes @ \$.10
Bacon - 2 parts @ \$3.36	Pineapple - 135 cans @ \$.14
Raisins - 1 part @ \$2.50	Cabbage Shreds - 10 lbs. @ \$.70

of the value of \$61.30, the property of the United States furnished and intended for the military service thereof, intrusted to them, the said Private JOHN J. KELLY and Private EDWARD F. HYDE by the Base Quartermaster, U.S. Army forces.

Specification 2: In that Private JOHN J. KELLY, Company "B", 392nd Port Battalion Transportation Corps and Private EDWARD F. HYDE, Company "B", 392nd Port Battalion, Transportation Corps, acting jointly and in pursuance of a common cause and intent did, at various times and dates between July 1 and August 31, 1942, at the Port of Debarkation, U.S. Army Forces, APO 860, c/o Postmaster, New York, N.Y., fraudulently and unlawfully sell and deliver to Adalsteinn Snaebjornsson, Heinrich Karlsson and divers other persons not authorized to purchase and receive the same subsistence stores and supplies as follows:

Pork Sausage - 6 cans @ \$.65	Sugar - 60 lbs. @ \$.05
Applesauce - 3 cans @ \$.31	Eggs - 12 doz. @ \$.35
Meat & Veg. Stew - 8 cans @ \$.31	Grapefruit - 60 lbs. @ \$.06
Sweet Corn - 8 cans @ \$.08	Coffee - 1 can @ \$3.23
Carrots, Dried - 2 cans @ \$.30	Graham Crackers - 36 boxes @ \$.10
Bacon - 2 parts @ \$3.36	Pineapple - 135 cans @ \$.14
Raisins - 1 part @ \$2.50	Cabbage Shreds - 10 lbs. @ \$.70

of the value of \$61.30, the property of the United States furnished and intended for the military service thereof, they the said Private JOHN J. KELLY and Private EDWARD F. HYDE not having the legal right and authority to sell and deliver the same.

They each pleaded not guilty to, and were found guilty of the Charge and Specifications. No evidence of previous convictions was introduced as to either of accused. They were sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentences but suspended the dishonorable discharge until the release of each accused, respectively, from confinement; designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement but directed that each accused be confined in the U.S. Army Forces Prison Stockade until further orders.

The result of the trial was promulgated in General Court-Martial Order No. 84, Headquarters, U. S. Army Forces (in Iceland), APO 860, c/o Postmaster, New York City, N.Y., dated 17 October 1942.

(163)

3. The evidence as far as pertinent to the first Specification shows: Both of accused were members of a wharfage detail engaged in unloading foodstuffs, property of the United States and intended for use in the military service thereof. Both of accused were checkers whose sole duty was to count the various cases of goods as they were loaded on the truck at the pier and furnish the truck drivers with the correct tally sheets to accompany the delivery of the goods at the warehouse. They were charged with having placed on certain trucks cases of goods not shown on the check sheet. The drivers paid them for such untallied cases of goods and would then make disposition of same on their own accounts. Accused retained the proceeds of sales. They were charged and convicted of the embezzlement of certain of these goods which were found by the police in the home of Adalsteinn Snaebjornsson, one of the truck drivers who claimed he purchased same from Private Hyde, one of the accused.

The evidence sufficiently proves that accused committed an offense with respect to the government goods involved; but the serious question in the case is whether that offense was embezzlement, of which they were convicted, or larceny.

"In Moore v. United States, 160 U.S. 268, the court defines embezzlement as 'the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking'." (CM.198485; Dig.Op. JAG., 1912-40, par.452(3), pg.335).

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship." (CM.211810, Houston, Jr.). (Cf: CM.211866, Karvajna and Hutton).

"Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark)." (M.C.M., 1928, pg.171).

CONFIDENTIAL

(164)

"Possession is the present right and power to absolutely control a thing and not only includes those things of which one has actual manual grasp, but also extends to those things that are in his house or on his land or in the actual manual care and keeping of his servants or agents.****" (M.C.M., 1928, par.149g, pg.172).

"1. Possession and custody - are in this branch of the law widely distinguishable. There can be no trespass against the custody; it is always against the possession, and it can be committed as well by the custodian as by any other person. For example, - 2. Servant - When a master's goods in possession come within the handling of the servant, the latter has in law no more than a custody of them, the possession remaining in the former. Therefore the servant may commit larceny of them; as, if a clerk in a store feloniously removes goods from it, this is larceny.****" (Bishop's New Criminal Law, sec.823).

"So where defendant, employed as a stevedore to unload nitrate owned by the government, from vessels and load it into cars for further shipment, after it was so loaded caused certain of the cars to be billed to private consumers, to whom he sold the contents, his offense was larceny, and not embezzlement." (Tredwell v U.S. (C.C.A. Va.1920) 266 F.350, certiorari denied (1920) 40 S. Ct. 587, 253, U.S. 496, 64 L. Ed. 1031).

In United States v. Holland (Fed. Case 15,378, U.S. District Court for the Southern District of New York, 1843) the charge was larceny on the high seas of foodstuffs, property of the owners of a certain merchant vessel on which defendant was steward and cook of the crew's mess. In that capacity, certain foodstuffs were delivered to him, some of which he sold to immigrant passengers to his own profit. The court - HELD - the owner is deemed to retain possession of the foodstuffs, and there may have been a constructive taking from him. The question for the jury is whether that taking was felonious. The verdict was guilty.

In the present case, the accused were not, it is true, domestic servants, but were nevertheless servants as that term is

used in legal parlance - one employed by the master in the master's business whom the master may direct in the details of his work. Accused were not in charge of unloading the ships or of any part thereof but were only subordinates employed on the temporary work of checking the number of cases of goods placed on each truck. Possession in this case lay in the Government (the master) and the servant's conversion of the articles constituted a trespass and their offense was larceny and not embezzlement. (Cf: CM.220398 (1942), Bul. JAG. Jan-June 1942, sec.452 (10), pg.22).

The Board quotes and makes the basis of its decision the passage from the Manual for Courts-Martial, paragraph 149g, page 172 as follows:

"**** Where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession and the servant has the custody only and may commit larceny of them. A person, then, has the 'custody' of property, as distinguished from the 'possession', where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in the possession (i.e., constructive possession) of the property.****"

The present case falls squarely within the foregoing definition of "custody" as distinguished from "possession". The Board is therefore of the opinion that there exists, as to specification one, a fatal variance between the allegation of embezzlement and the proof of larceny, and that for this reason the record is legally insufficient to support the finding.

4. The second specification alleges accused, jointly and in pursuance of a common cause and intent, did fraudulently and unlawfully sell certain property (particularly described therein) of the United States furnished and intended for the military use thereof, to various persons not authorized to purchase such goods. The proof as shown by the record of trial is in substance as follows:

A stipulation, accepted by the court, that goods of the identical number and kind listed in the specification were found in the storeroom of the home of Adalsteinn Snaebjornsson, driver of vehicle No. R-626, by representatives of the Criminal Investigation Department of Reykjavik and a second stipulation that other certain goods not described in the specification and of a much smaller quantity and consisting of only two items, were similarly found in the home of Heinrich Karlsson, driver of vehicle No. R-2079, Reykjavik.

(166)

Heinrich Karlsson, driver of truck R-2079, was sworn as a witness for the prosecution and testified he bought some cases "from the accused" without knowing at first what they contained. "I noticed that the driver of the car which was ahead of me in this place was speaking with a soldier, who was checking, about there should be loaded more cases on the truck than is actually registered on the note and when it was my turn to be loaded, I asked the soldier if I could get something in the same way as the other one did to which the soldier answered 'Yes'." The witness identified both accused but knew only Kelly by name (R.7). He "spoke at first with one of them but I think later the other one arrived and wrote a bill out and received the money." He bought from the soldiers but once and paid the money to Kelly (R.10), and these were the same goods that were found in his home (R.8). Kelly got all the money. He asked the other man if he could get the cases and he said "that it was O.K".

Adalsteinn Snaebjornsson, driver of vehicle No. R-626, sworn as a witness for the prosecution stated that on the docks he had bought from the accused, Hyde, the goods which had been taken away from him by the police. He purchased goods possibly five times (R.11) and identified the various articles enumerated in the specification (R.12). He had no dealings with any other soldiers (R.13).

Second Lieutenant Francis T. Zober, sworn as a witness for the prosecution, identified both of accused as dock checkers and members of a detail of which he was in charge. A dock checker is supposed to make out three tickets - a cargo report - showing an accurate check on the stuff going on each truck. He keeps one ticket and gives two tickets to the driver. The tickets retained by the checker are collected from him every hour. At the depot the driver turns in one ticket when his vehicle is unloaded and has the other signed by the party receiving the property and then the driver returns the signed ticket to the dispatchers by whom it is then matched up with the one kept by the checker (R.15). During the night shift of August 20, 1942, witness learned that accused, Hyde, had asked one of the checkers "when certain sweet articles were coming out, such as canned cherries, pineapple and things of that nature, and that he had made 1000 kronur" (R.16). Witness then found a difference of four cases on the last load accused, Hyde, had checked (R.7). He said Hyde told him he had been doing this for about a month (R.18) and asked witness the penalty (R.19) for it. Accused Hyde also admitted to Lieutenant Penninga "He had made dealings with civilian truck drivers" and detailed the method of operation (R.21). Accused Kelly also told the witness the "very same story as Private Hyde"****(R.22).

(167)

Private First Class Virgil C. King sworn as a prosecution witness said on August 20, 1942, Hyde wanted him to assist in selling goods by pointing out certain boxes when they were unloading, like sweet stuff, foods, and said he made money the night before selling to the Icelanders (R.24).

At the conclusion of the testimony the prosecution announced: "The prosecution has no further testimony to offer. However, additional witnesses are available if the court desires them called who will confirm the testimony that has already been presented but the prosecution feels it would just be a repetition of what has already been testified to." (The president indicated that the court did not desire any witness called).

5. The allegation in Specification 2 of the period during which the accused effected these illegal sales of Government property - "between July 1 and August 31, 1942" - is unobjectionable and has been approved. (CM.130989 (1919), Dig. Ops. JAG, 1912-1940, sec.428(10), pg.297; Winthrop's Military Law and Precedents (Reprint, 1920) sec.197, pg.138). It is sufficiently certain "to advise the accused of the particular act of offense intended to be alleged, and enable him to plead a former conviction or acquittal if subsequently brought to trial on account of the same act."

6. The record shows, by stipulation, the value of the goods charged to have been sold and by inference that the merchandise was government property. The record also shows that the exact quantity, value and kind of merchandise which the accused are charged with selling is the exact quantity and kind found in the home of Adalsteinn Snaebjornsson (R.11, 12, 13, 14). There is also specific proof that Hyde effected delivery of the items of food-stuffs to Snaebjornsson which are described in Specification 2 and which were found in his house (R.11, 12). Proof is also complete that Snaebjornsson paid Hyde 90 Kronur for these goods (R.11). In the opinion of the Board of Review the record is legally sufficient to support the findings of guilty of Specification 2 as against the accused, Hyde. (M.C.M.,1928, par.150 1, pg.185).

7. The determination of the complicity of the accused Kelly, in the unlawful sale of the items described in Specification 2 presents an entirely different situation. The function and scope of authority of the Board of Review, sitting in an appellate capacity is indicated as follows:

"Convictions by a court-martial may rest on inferences but may not be based on conjecture. A scintilla of evidence - the 'slightest particle or trace', is not enough. There must be sufficient proof of every element of an offense to satisfy a reasonable man when guided by normal human experience and common sense

CONFIDENTIAL

(168)

"springing from such experience." (CM.223336(1942),
Bul. JAG., Vol. I, No. 3, sec. 422, pg. 159).

"In the discharge of its statutory function, the Board's duty is to follow the above principle not to weigh the evidence, not to substitute its opinion as to the guilt of accused for that of the court and the reviewing authority, not to let its sympathy for the unfortunate accused run away with its judgment, but solely to determine whether 'there is some substantial evidence tending to prove each element of each offense.'"
(CM.211586, Gerber).

In his indorsement on the holding of the Board of Review in CM 203511, Wedmore, the conclusions of which indorsement were approved by the President, the Judge Advocate General said:

"The court and the reviewing authority must be satisfied of the guilt of an accused beyond a reasonable doubt. However, the Board of Review and The Judge Advocate General in the examination of records of trial, except in cases which require approval or confirmation of the sentence by the President, do not weigh the testimony to determine whether the offense has been proved beyond a reasonable doubt, but must be satisfied that there is some substantial evidence tending to prove each element of each offense (CM 152797, Veins ****".)

"In the exercise of its judicial power of appellate review, the Board of Review treats the findings below as presumptively correct, and examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review, and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrative of justice. C.M.192609, Rehearing (1930)". (Dig.Ops. JAG., 1912-1940, sec.408(4), pg.259).

Under the above authorities it is therefore the duty and responsibility of the Board of Review to determine from the record whether there is some substantial evidence tending to prove that accused, Kelly, either actually participated with Hyde in the unlawful sale and delivery of Government property (described in Specification 2) to Snaebjornsson or that Hyde and Kelly were acting by a preconcerted arrangement in the illegal sale of Government property so that Hyde's sale and delivery of the

(169)

merchandise to Snaebjornsson was the joint act of both Hyde and Kelly.

Snaebjornsson testified as follows:

- "Q. Mr. Snaebjornsson, do you know the accused?
A. Yes.
Q. Would you tell me their names?
A. I don't know the names of each of them.
Q. How do you identify them?
A. I had dealings with the one who is sitting nearest to us. (Indicating).
Prosecution: The witness indicates Private Hyde.
Q. What dealings did you have with the accused that you identified? (Underscoring supplied).
A. I got from him the goods which had been taken from me by the police (R.11).

Q. Did you ask the soldiers to buy the goods or did they offer to sell them to you?
A. I asked the soldiers to sell the goods to me, but the soldiers were rather reluctant. I asked them twice and three times (R.12). (Underscoring supplied).

Q. Did you offer to pay the soldier for the goods?
A. We did not speak about that before he let me have the goods.
Q. Did you have any dealings with any other soldiers?
A. No.
Q. Did you have dealings with both soldiers sitting here? (Underscoring supplied).
A. The other dealings came to nothing.
Q. Were you going to buy something from the other soldier?
A. Yes, I intended to do so (R.13).

The "other soldier" referred to in the last question is clearly identified as Kelly by the foregoing interrogation.

Continuing the witness testified:

- "Q. Well, why did you not buy anything from him?
A. Because I was put in prison for seven days.
Q. Had this other soldier spoken to you about purchasing government goods?
A. He had just mentioned it. (Underscoring supplied).
Q. Did you at any later time buy anything from this soldier?

~~CONFIDENTIAL~~

(170)

"A. I haven't worked for the Army since.

Questions by defense:

Q. Who mentioned buying goods from the other soldier?

A. I did. (R.14).

While the answer to the second question of the last quoted colloquy is by no means clear-cut it reasonably implies that the witness and Kelly had conversed on the subject. The first question and answer clearly points out the reason why no goods were purchased by the witness direct from Kelly.

Again referring to Lieut. Penninga's testimony, as it bears upon Kelly's complicity in the sales to Snaebjornsson, we find the following:

"Q. What did you say to Private Hyde and what did he say to you after having been warned about the 24th Article of War?

A. He told me that he had made dealings with civilian truck drivers, and the methods of operation was that he was a checker checking the loads that these civilian trucks hauled. He would make out on the trucking cargo ticket a less number than the figure actually noted on the truck, and during the trips from the docks to the depot the driver would drop the surplus and use that to his own advantage and for this the price varied. I'm quite sure he told me that some of the time he wasn't paid and other times he did get paid for these surplus articles that these drivers did get.

Q. Did you have occasion to question Private Kelly?

A. Yes, I did.

Q. Before questioning him, what did you do?

A. I also warned him of his rights under the 24th Article of War.

Q. After having been warned of his rights under the 24th Article of War what did he say?

A. He told me the very same story as Private Hyde. as to the method of operation, in that he had also sold and given these numerous truck drivers more than what had been entered on the trucking cargo ticket. (R.21-22).
(Underscoring supplied).

While the goods sold to Karlsson are not identified in the specification, Karlsson's testimony may properly be considered as evidence of the preconcerted plan of the two accused. Karlsson testified as follows:

(171)

"Q. Will you tell the court the circumstances of buying those cases?

A. Yes, I noticed that the driver of the car which was ahead of me in this place was speaking with a soldier, who was checking, about there should be loaded more cases on the truck than is actually registered on the note, and when it was my turn to be loaded, I asked the soldier if I could get something in the same way as the other one did to which the soldier answered "Yes".

Q. Was this soldier one of these in court here?

A. Yes.

Q. Did you speak to both of them or just to one of them?

A. I spoke at first with one of them but I think later the other one arrived and wrote a bill out and received the money" (R.8).

(Underscoring supplied).

"Q. How much did you pay the soldier for these cases?

A. Twenty kronur. (Underscoring supplied).

"Q. Did you see these two soldiers for the first time in the Icelandic court?

A. No, I often seen them on the docks. (R.8).

"Q. To whom did you pay the twenty kronurs?

A. To Kelly.

"Questions by law member:

Q. Was there another man present?

A. Yes.

Q. What did the other man say to you?

A. I asked him if I could get the cases.

Q. And what did he say?

A. He said there was nothing in the way, that it was O.K., that I could get the other cases.

Questions by Captain Barrett:

Q. Did the other man receive any of this twenty kronur to your knowledge?

A. No, Kelly got all the money." (R.10).
(Underscoring supplied).

The Specification alleges that the offense was committed "between July 1 and August 31, 1942." The accused were confined in the U.S. Army Stockade on 20 Aug 1942. The charges were preferred 2 Sept 1942. Karlsson testified he was employed by the Government as a truck driver in August or September 1942 (R.7). Lieut. Zober testified that both accused were detailed as dock-checkers between

July 1 and August 20, 1942 (R.15), and that on August 20, he investigated Hyde's actions and discovered he had placed 164 cases of rations on a truck and had recorded only 160 cases on the cargo report and he then placed him under arrest (R.17). On August 20th Hyde admitted to Lieut. Zober he had been carrying on his illegal practices for about a month (R.18). Lieut. Penninga stated that on August 20th he interviewed both accused and they confessed their misconduct to him (R.21, 22). In this interview Kelly informed Lieut. Penninga "that he had sold and given these truck drivers more than what had been entered on the trucking cargo ticket" (R.22).

It was the particular function of the Court to weigh the evidence, determine the credibility of witnesses and resolve conflicts in the testimony. With the witnesses before it and the accused present in the court-room the court was certainly in a more advantageous position than is now occupied by the Board of Review in passing upon these matters. As shown by the authorities above quoted it is not the function of the Board of Review in such situation to substitute its own opinion for the conclusion of the Court, even though the Board of Review would have reached a conclusion differing from that of the court. The Board of Review is not a trier of facts; it is an authority created by Congress possessing powers of appellate review. Sitting in its appellate capacity, the Board of Review performs its full duty and responsibility by a careful and detailed examination of the record for the purpose of determining whether there is any substantial evidence to support the findings of the Court.

It is manifest that Snaebjornsson had some conversations with Kelly concerning the purchase of Government supplies; that in the sale to Karlsson both Hyde and Kelly participated, and that accused, Kelly, in his statement to Lieut. Penninga admitted the same method of unlawful operation as did Hyde. Further, the evidence establishes that both Hyde and Kelly were carrying on their illegal operations coincidently, and within the period alleged in the specification. Under this state of the record the Board of Review is of the opinion that there is substantial evidence to support the finding of Kelly's guilt under Specification 2, and that it is not authorized to replace such finding with its own interpretation of the evidence even should it be in conflict with those of the court.

8. For the reasons stated the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of the accused Hyde and Kelly as to Specification 1 but legally sufficient to support the findings of guilty of accused Hyde and Kelly as to Specification 2 and the sentence. The sentence

~~CONFIDENTIAL~~

(173)

is the maximum that can be imposed upon the accused. The court was legally constituted and no error injuriously affecting the substantial rights of accused were committed at the trial.

B. Franklin Riles Judge Advocate
Mr. Vandenburghe Judge Advocate
A. J. Rose Judge Advocate

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J.A.G.O., ETOUSA., APO 871, U.S. Army.

23 January 1943.

TO: Commanding General, ETOUSA., APO 887, U.S. Army.

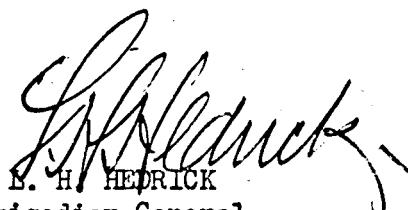
1. In the case of Private JOHN J. KELLY (14000076), and Private EDWARD F. HYDE (6982099), both of Company "B", 392nd Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review. The accused were charged with the violation of the 94th Article of War. Specification 1 charges the crime of embezzlement of certain described property of the United States furnished and intended for the military service thereof and intrusted to the accused. By Specification 2 the accused are charged with jointly and in pursuance of a common purpose and intent of fraudulently and knowingly selling and delivering property of the United States furnished and intended for the military service thereof without legal right or authority. The property involved was certain food stores and identical items are described in both specifications.

2. The record shows that both accused during the period between 1 July 1942 and 20 August 1942 were in a special detail engaged in unloading cargo from ships docked at Reykjavik, Iceland; said cargo consisting of military stores owned by the United States. The particular duties of accused required them to place on motor trucks certain items of the cargo. The trucks were driven by civilians who were Icelandic subjects. The particular items of merchandise described in the specifications were found in the home of one Snaebjornsson, a truck driver. He purchased same from the accused and it was admitted that it was government property. In loading the trucks it was the duty of the accused to set forth correctly on tally sheets the items of merchandise placed on the trucks. In this particular instance the accused placed the described merchandise on Snaebjornsson's truck without making record of same on the tally sheets. The relationship of the accused to the government and the performance of their duties in regard to unloading and distributing the cargo make it obvious that they were not guilty of embezzlement but were guilty of larceny. Hence, the prosecution's case failed as to Specification 1 because of a fatal variance, viz: embezzlement was charged and larceny was proved. As to Specification 2, and the Charge, the evidence sustains the findings.

3. The Board of Review therefore holds the record legally insufficient to support the findings of guilty of Specification 1 but legally sufficient to support the findings of guilty of both accused of Specification 2 and the Charge, and legally sufficient to support the sentences.

4. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty as the same pertains to Specification 1 be vacated.

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



E. H. HEDRICK
Brigadier General
Judge Advocate General
European Theater of Operations.

3 Incls:

- Incl. 1 - Record of Trial
- Incl. 2 - Opinion of Board of Review
- Incl. 3 - Form of Action

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In the Office of The Judge Advocate General
 for the
 European Theater of Operations
 APO 871.

Board of Review.

27 JAN 1943

ETO 134.

UNITED STATES)	UNITED STATES ARMY FORCES IN ICELAND.
)	v
Corp. PAUL B. STUMP	(13035599))	Trial by G.C.M., convened at
Pvt. JOSEPH E. HAYES	(33090588))	Camp Haggi, Iceland, 29 August
Pvt. FRED. L. GIBSON	(13016025))	1942. Charges against Howard W.
Pvt. WALTER SZWEDA	(36219826))	Morton withdrawn before trial;
Pfc. WALLACE C. HOWE	(14060601))	Nolle Prosequi entered, when
Pfc. LANDON C. JOHNSON	(13000977))	case rested in favor of Saylor
Pvt. JOHN P. KILPATRICK	(34161765))	W. Geissler, Clarence E. Martin
Pvt. CLARENCE E. MARTIN	(13010526))	and Frederick S. Tice; Acquitted.
Pvt. CHARLES F. MILLHORN	(33090769))	John L. Yuhas, <u>John W. Combs</u>
Pvt. CHESTER C. MITCHELL	(14052863))	(should be Charles W. Combs),
Pvt. HOWARD W. MORTON	(R-2468828))	Lowndes M. Taylor, William A.
Pvt. THOMAS R. ROBINSON	(13007633))	Hall, Joe D. Hambrick, James A.
Pfc. BELVIE D. SNOW	(13023873))	Hinson and Joseph R. Whaley;
Pfc. PATRICK F. SWINGLE	(13004959))	Sentence Disapproved as to
Pfc. LOWNDES M. TAYLOR	(13017100))	Patrick F. Swingle; Sentences:
Pfc. FREDERICK S. TICE	(20328811))	Paul B. Stump, Joseph E. Hayes,
Pfc. NOVIE WALKER	(33111566))	Walter Szweda, Novie Walker,
Pvt. ERNEST W. WOODRUFF	(7020364))	William E. Delaney, Fred L.
Pfc. WILLIS E. MAYBERRY	(33090242))	Gibson and Enoch C. Gaskill,
Pfc. CHARLEY W. COMBS	(33090768))	dishonorable discharge, total
Pvt. DONALD P. FOLK	(13026747))	forfeitures and confinement at
Pfc. ENOCH C. GASKILL	(13017744))	hard labor for three years, the
Pvt. SAYLOR W. GEISSLER	(13004505))	dishonorable discharge to be
Tech.5th Gde. VENCIL HAMILTON	(13015983))	suspended until release of each
All of Co. "A", 241st Quartermaster Bn.)	from confinement; Willis E.
Pfc. HOLCOMBE P. CAMPBELL, JR. (13018899)))	Mayberry, J.D. Hamby, Landon C.
Co. "A", 241st Quartermaster Bn. (Serv.))	Johnson, Charles F, Millhorn,
Pfc. ANDREW L. CHANDLER (6948422)))	John T. Gullett, James H. Gibson,
Co. "A", 241st Quartermaster Bn. on)	Holcombe P. Campbell, Jr., Edward
detached service with 11th Infantry.)	Puskoskie, dishonorable discharge,
Pvt. GLENN E. RICE (15059669)))	total forfeitures and six months
Battery "C", 46th Field Artillery Bn.)	confinement at hard labor, the
Pvt. EDWARD PUSKOSKIE (6881086)))	dishonorable discharge to be
824th Engineer (Avn.))	suspended until release of
)	each from confinement.

Pvt. JOSEPH T. McCULLOUGH	(350264465)	Confinement: Disciplinary
<u>Hq. & Hq. Co., 50th Signal Bn.</u>		Barracks, but to be held at
Pfc. CLARENCE W. PETERS	(17003909)	Prison Stockade until further
<u>Company "B", 50th Signal Bn.</u>		orders. Glenn E. Rice, Joseph
Pvt. JOHN L. YUHAS	(13007699)	T. McCullough, Clarence W.
<u>812th Military Police Company.</u>		Peters, Shirley R. Tudor,
Pvt. BERRY J. WOLF	(37055810)	Andrew L. Chandler, Donald P.
<u>Company "A", 50th Signal Bn.</u>		Folk, Vencil Hamilton, James
Pvt. SHIRLEY R. TUDOR	(15046292)	E. Harper, Wallace C. Howe,
<u>Co."A", 5th Quartermaster Bn.</u>		John P. Kilpatrick, Chester C.
Pvt. JAMES E. HARPER	(6669822)	Mitchell, Thomas R. Robinson,
<u>Co."A", 5th Quartermaster Bn.</u>		Belvie D. Snow, Ernest W.
Pvt. JOHN T. GULETT	(14000856)	Woodruff, Berry J. Wolf, John
<u>Co."B" 392nd Quartermaster Bn.</u>		P. Carbone, Alvin C. Chavis,
Pvt. JOHN P. CARBONE	(12007894)	Dan Moore and Alfredo Vitali,
Pvt. ALVIN C. CHAVIS	(14007505)	six months confinement at hard
Pvt. WILLIAM E. DELANEY	(15042874)	labor and forfeiture of two
Sgt. JAMES H. GIBSON	(6137669)	thirds pay per month for six
Tech.4th Gde. WILLIAM A. HALL	(11011850)	months; the confinement at hard
Cpl. JOE D. HAMBRICK	(7006755)	labor to be suspended during
Tech.5th Gde. J. D. HAMBY	(14003456)	good behavior. Suspension
Pvt. JAMES A. HINSON	(14030464)	revoked as to Dan Moore,
Tech.5th Gde. DAN MOORE	(13014037)	19 December 1942 by order of
Pvt. ALFREDO VITALI	(11007307)	the approving authority.
Pvt. JOSEPH R. WHALEY	(14000047)	
<u>All of Co."B", 392nd Quartermaster</u>		
<u>Bn. (Port).</u>		

HOLDING by the BOARD OF REVIEW
RITER, VAN BEN SCHOTEN and IDE, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined in the office of the Judge Advocate General for the European Theater of Operations and there found legally insufficient to support the findings and sentences. The record has now been examined by the Board of Review, which submits this, its opinion, to the Judge Advocate General for the European Theater of Operations.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Corporal Paul B. Stump, Company A, 241st Quartermaster Battalion, Privates Joseph E. Hayes, Company A, 241st Quartermaster Battalion, John T. Gullett, Company B, 392nd Quartermaster Battalion, Fred L. Gibson, Company A, 241st Quartermaster Battalion, Walter Szweda, Company A, 241st Quartermaster Battalion, Glenn E. Rice, Battery C, 46th Field Artillery Battalion, Edward Puskoskie, Co.B, 824th Engrs. (Avn), Joseph T. McCullough, Headquarters and Headquarters Company, 50th Signal Battalion, Private First Class Clarence W. Peters, Company B, 50th Signal Battalion and Private Shirley R. Tudor, Company A, 5th Quartermaster Battalion, Private John L. Yuhas, 812th Military Police Company, and

Campbell, Holcomb P., Private First Class.
 Chandler, Andrew L., Private First Class.
 Combs, Charles W., Private.
 Folk, Donald P., Private.
 Gaskill, Enoch C., Private.
 Geissler, Saylor W., Private.
 Hamilton, Vencil, Private First Class.
 Harper, James E., Private (this man a member of Co. A, 5th Q.M.).
 Howe, Wallace C., Private.
 Johnson, Lendon C., Private.
 Kilpatrick, John P., Private.
 Martin, Clarence E., Private.
 Millhorn, Charles F., Private.
 Mitchell, Chester C., Private.
 Morton, Howard W., Private.

Robinson, Thomas R., Private.
 Snow, Belvie D., Private.,
 Swingle, Patrick A., Private First Class.
 Taylor, Lowndes M., Private.
 Tice, Fredrick S., Private.
 Walker, Novie, Private First Class.
 Woodruff, Ernest W., Private.
 Mayberry, Willis E., Private.
 Wolf, Berry J., Private (This man a member of the 50th Signal Battalion)

All of the above, members of Company A,
 241st Quartermaster Battalion.

acting jointly and in conjunction with each other and in pursuance of a common cause and intent, did, at Reykjavik, Iceland, on or about April 27, 1942, while acting as agent and custodian for the Government of the United States, feloniously embezzle by fraudulently converting to their own use and benefit and to the use and benefit of each of

Carbone, John B., Private
 Chavis, Alvin C., Private
 Delaney, William E., Private
 Gibson, James H., Sergeant
 Hall, William A., Pvt.lcl
 Hambrick, Joe D., Corporal
 Hamby, J.D., Private.
 Hinson, James A., Private
 Moore, Dan, Private.
 Vitali, Alfredo, Private.
 Whaley, Joseph R., Private.

All of the above, members of Co. B, 392nd Quartermaster Bn.

them, 52 watches value \$11.50 each, 2 watches value \$20.00 each, 2 watches value \$14.95 each and 1 compass value \$23.65, total value \$691.35, the property of the United States furnished and intended for the military service thereof, intrusted to them and each of them by Colonel Matthew H. Jones, Base Quartermaster, U.S. Army.

The trial judge advocate announced that, by direction of Major General Bonesteel the appointing authority, the prosecution withdrew the charges and specification against Private Howard W. Morton and would not pursue the same further at the present trial (R5). Each of the other accused pleaded "Not guilty" to said charge and specification and, with the exception of those acquitted and against whom the charges were withdrawn, or in whose favor a nolle prosequi was entered (R189), were found guilty and sentenced, each, 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 (R.207). The reviewing authority modified the sentences of the various accused as shown in the heading of this review, approved same as modified, but suspended the execution of the dishonorable discharge until the soldiers' release from confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, but directed confinement in the U.S. Army Forces Prison Stockade until further orders.

The result of the trial was promulgated in General Court Martial Order No. 80, Headquarters U.S. Army Forces (in Iceland), dated 3 October 1942.

3. The record fails to show that any real investigation of the acts charged was at any time made. No statements of any persons purporting to have any knowledge of the facts alleged in the charge, or any part thereof, are found with the record of trial. The only documents attached showing the proceedings prior to trial are: (1) the charge sheet, (2) 1st. indorsement referring the charges to Major Joseph McNamee as investigating officer, dated 15 July 1942, (3) 2nd indorsement dated 20th August 1942 of the investigating officer, stating he had investigated the charges and (4) summary of evidence and action of Staff Judge Advocate, dated 21 August 1942.

It appears from the record that a wooden case containing, among other things, a compass and a quantity of watches, was shipped from the Frankford Arsenal (R.9); that (inferentially shown) this shipment was the property of the United States furnished and intended for the military service thereof; that some of this merchandise was stolen or was found missing during the unloading of a ship in the harbor of Reykjavik, Iceland, or shortly thereafter; that some of accused may have been members of details assisting in the unloading of ships, and that some of the articles were found in the possession of some of the accused. The record consists very largely of the testimony of First Lieutenant Benjamin F. Allen, 812 Military Police Company,

Assistant Provost Marshal, Camp Haggi, Iceland, who read from a folder entitled "Investigation of Thefts at the Docks" (R.42), but which was purportedly used for the purpose of refreshing the memory of witness. Many of these statements were read directly into the record by the trial judge advocate. According to this testimony, so read into the record, this folder was made up, at least in part, of unsworn statements of both accused and others taken at indefinite times by undisclosed persons under, possibly, improper circumstances (R.162). The court over-ruled the objection of the defense counsel "that the exhibits are answers to questions that were placed before the men to bring about confessions, that they do not show the full conditions under which these questions were asked, that it shows nothing about the restraint the accused may have been under previous to this questioning, that those exhibits are statements by men who are available for questioning, that there are questions that place the witness in a dilemma of answering 'Yes' or 'No', which would be admissions" (R.37, 38), first allowed them to be marked for identification only (R.25) and then admitted them as Prosecution Exhibits 17 to 50 respectively (R.40). It was not shown that these statements were taken by a stenographer (R.38) and these pages are not attached to the record as exhibits. Lieutenant Allen was not the investigating officer appointed herein in compliance with AW 70. Major McNamee, the regularly appointed investigating officer, was not a witness.

Article of War 70, among other things, requires that "no charge will be referred to a General Court-Martial until after a thorough and impartial investigation thereof shall have been made."

"A record of trial showed affirmatively that no investigation of the charges had been made prior to ^{the} trial. HELD: The provisions of AW 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred for trial. A court-martial is without jurisdiction to try an accused upon charges referred to it for trial without having been first investigated in substantial compliance with the provisions of AW 70 and, in such a case, the court-martial proceedings are void ab initio." (CM 161728 (1924). Dig. Ops. JAG., 1912-1940, sec.428(1), pg.292).

"While the investigation of charges required by AW 70 should be impartial,**** the matter is procedural in its nature and failure to comply literally with all the provisions of paragraphs 30-35, inclusive, M.C.M., 1928, will not defeat the jurisdiction of the court". (CM 206697 (1937), Dig. Ops. JAG., 1912-1940, sec.428(2), pg.293).

In several cases in which was involved the question of whether an investigation was a thorough and impartial one within the meaning of the 70th AW., it was held that the determination of whether or not there has been a thorough and impartial investigation is a question of fact primarily for the decision of the appointing authority and that in the absence of an abuse of discretion his determination is conclusive. (CM 182225, Keller; CM 183183, Cloybaugh; CM 183364, Jurkowski; CM 204275, (4-3-35).

Accused is entitled however, to be confronted by all available witnesses who testify. Evidence taken before an inspector, prior to preference of charges, may be read to accused at the investigation, and if he does not desire to cross-examine the witness who testified before the inspector they need not be called by the investigating officer. This form of investigation is consistent with AW 70 and paragraph 35a, M.C.M., 1928; (CM 185756 (1929), Dig. Ops. JAG., 1912-1940, sec.428(3), pg.293).

The papers attached to and accompanying the record of trial of this case show the proper reference of the charge for investigation to Major Joseph McNamee, Ordnance Department on 15 July 1942, together with his report thereon of 20 August 1942, apparently copied from a form for such reports stating he had complied with the various requirements but following with a paragraph reading "There was no testimony given by any witness except Privates Shirley R. Tudor, Company A, 5th Quartermaster Battalion, Berry J. Wolf, Company A, 50th Signal Battalion and Edward Puskoskie, 812th Military Police Company, who, having been warned of their rights and privileges, confessed to their activities in the conspiracy. No witnesses were required by the accused." Except for the three men named above, the accused stated they did not desire to make any statement.

No statements are attached hereto, no conspiracy is charged and the above statements amount to no more than an unsupported and unverified conclusion of the investigating officer.

A further paragraph also is inserted, viz:

"The following documents were read and explained to the accused and are attached hereto: ^{wrist} Shipping ticket #22150; Serial numbers of watches: OC-43382, OC-39393, OC-10688, OC-48278, OC-38639, OC-38482, OC-35960, OC-38190, OC-38751; Serial number of stop watch: 2234; Serial number of compass: M2 No.1516-1942."

There is little in the foregoing paragraph standing alone, as it does, that can be considered pertinent to the requirements of AW 70.

The only other attached paper is the "Summary of evidence and action of Staff Judge Advocate pursuant to AW 70 and par. 35c, Manual for Courts-Martial, dated 21 August 1942, listing the names of accused "charged jointly with embezzlement of 52 watches and 1 compass under the 94th AW", and followed by a paragraph reading:

"The indicated evidence shows that five of the accused broke open a box containing 52 watches and 1 compass and that each of the accused removed therefrom, or were found to be in possession of, one or more of the watches; that each of accused converted one or more of the watches to his own use and benefit; that each of the accused were acting as agents and custodians for the watches for the purpose of removal of said watches, a part of the cargo of a ship, from one point to another in the course of their duty and employment."

The foregoing is followed by a paragraph to the effect that "the charge is correct and the specification is appropriate thereto. The indicated evidence is sufficient to support a finding of guilty of each of the accused of the offense charged" and recommending that the charges be referred to a general court-martial for trial.

Neither the report of the investigating officer nor the attached papers show anything whatever in support of the charges herein or the connection of any of accused with the offense charged. The report of the investigating officer negatives the express statements therein and prevents any presumption of compliance with AW 70 and it further fails to provide the appointing authority with any information upon which to exercise his discretion. There was therefore no substantial compliance with the requirements of AW 70, and the Court acquired no jurisdiction to try the accused. (CM: ETO.121, Francis L. Shoupe et al.)

4. The evidence, as to each of the accused found guilty, was developed during the trial in substantially the same manner as is the following testimony in reference to Corporal Paul Stump (an accused) and Private John B. Ellis (a witness).

Captain Lewis Mark of 812th Military Police Company, a witness for the prosecution, testified over the objection of defense counsel, that one of the M.P's came in to the orderly room and delivered a compass to him and reported that he took it

from Corporal Stump (R.53). Immediately following the testimony of Captain Mark the following appears in the record of trial (R.55):

"Prosecution: The prosecution now desires to read from Prosecution Exhibit No.43. This is the testimony of Corporal Paul Stump, 241st Quartermaster Battalion, as taken by Lieutenant Colonel John Picarelli, at Camp Lambton Park, May 16, 1942.

"Defense: I object to the reading of this statement inasmuch as that piece of paper is an exhibit which has not as yet been entered in the court record as evidence but merely admitted as an exhibit.

"President: The court will be cleared and closed.

The court was closed, and, upon being opened, the law member made the following statement:

"Law Member: The objection is over-ruled. The statement may be introduced as evidence against the particular individual. Any other evidence referring to other accused will be disregarded by the court and will be stricken from the record."

The trial judge advocate read "from pages 138, 139 and 140 of this investigation, which is Prosecution Exhibit No. 43, with reference to Corporal Paul Stump." These questions and answers were given by Corporal Stump to Lieutenant Colonel John Picarelli at Camp Lambton Park, on May 16, 1942 (R.60).

- "Q. You never had them? Did you ever have a watch?
A. I had one watch.
Q. Where did you get it?
A. I got it down there where the rest of the boys was getting them.
Q. Where?
A. At the end of the pipes.
Q. Which pipes?
A. Pipes laid on the docks.
Q. That was--on the lumber pile?
A. No, sir.
Q. Did you ever see anybody getting a box of watches?
A. No, sir.
Q. Anybody ever tell you they hid some watches at the dock?
A. No, sir.

- "Q. You will admit you had one of those watches?
 A. Yes, sir.
 Q. You got it at the same place the other boys
 got watches; hidden in the pipes?
 A. Yes, sir."

Ellis, in a statement read from this "Report" was quoted as saying "something about they got Stump with something. Then when he come back Stump said that Szweda gave him a compass or something like that, but other than that nothing more was said" (R.61).

The trial judge advocate read into the record also from the same source, a statement of Howe that Stump gave him a watch (R.62) and Lieutenant Allen from the same source read a statement of Hayes that he gave a watch to Stump, after having gotten a watch from Stump (R.64). Lieutenant Allen also testifies he questioned Stump:

- "Q. Did you have occasion to interrogate Corporal Paul B. Stump? I refer you to page 136.
 A. I did.
 Q. Did you warn Corporal Stump of his rights under the 24th Article of War?
 A. I did.
 Q. Did you explain the meaning of perjury to Corporal Stump?
 A. Yes.
 Q. After having been warned of his rights what statements did Corporal Stump make to you concerning watches?
 A. He stated:
 'I didn't get any watches with Hayes. The watch he gave me is the ones that he himself got. I was standing by a crane on the docks when he gave them to me. I gave him the two watches that he gave me back to him, but I still had the one that I got.'
 Q. Who do you refer to as 'He' in this question and answer?
 A. Private Hayes. Corporal Stump further states:
 'I didn't have but one watch. I gave this watch to Wallace Howe--'
 Q. Did Corporal Stump in his statements to you give any indication of where he got these watches, or what he got the watches from?
 A. He indicated that he got the watch from a box which was on the docks.
 Q. Did he state what the approximate size of this box was?
 A. About the size of a five-gallon gasoline can" (R.68).

(186)

The trial judge advocate later read from this "Record" that Howe said he got a watch from Stump (R.95). The trial judge advocate, still reading from this "Report", has Szweda say "one corporal took it" (a compass) (R.99-100), and that Corporal Stump was the man (R.101).

Lieutenant Fitzhugh, a prosecution witness, of same organization as that to which Stump belongs, testified that its records showed no watch or compass was issued to Stump (R.106). A prosecution witness, Corporal Maurice P. King, testified that Stump gave him a compass while a search for it was being made, Stump saying that he got it from a soldier at the docks (R.157).

Beginning on page 60 of the record of trial is the following:

"The prosecution now desires to read from Prosecution Exhibit No. 23, the testimony of Private John B. Ellis, taken by Lieutenant Colonel John Picarelli, at Camp Curtis on May 23, 1942. Page 29, at Question No. 46.

Q. This fellow Szweda, have you ever observed him with any government property?

A. No sir. Szweda was a quiet fellow as far as in the hut--nothing irregular.

Q. Ever see him with any government watches?

A. No, sir.

Q. Ever hear him talk about it?

A. No, sir, can't say that I have. The other day when they had the shakedown, I heard him say something about somebody but didn't pay any attention.

Q. Didn't hear what he said?

A. No, sir, something about they got Stump with something. Then when he came back Stump said that Szweda gave him a compass or something like that, but other than that nothing more was said. Then later, the M.P's came and got it."

"Defense: If the court please, I object to most of the material being read. The Manual for Courts-Martial said that the actions and statements of a conspirator done or made after the common design is accomplished or abandoned, are not admissible against the others, except acts and statements in furtherance of an escape, in effect in Par.114-c. In other words, we are using here a statement made in regard to other people, and except where these statements directly concern the man himself, as what he may or may not have done, I object to this testimony being admitted."

"Prosecution: If it please the court I request that the members of the court take cognizance only of those portions that pertain to the individuals concerned and individuals with whom they were directly concerned."

"Defense: The defense requests that only those portions that directly refer to the man himself and not to other people and other things that may be said or done by other men be read."

"Prosecution: If it please the court, it is impossible to do that and make sense of the questions and answers."

"Law Member: At this particular time, the objection of the defense is overruled. John B. Ellis as mentioned, is not one of the accused and the court will disregard any reference except testimony relating to the one accused that makes a statement."

"Defense: What I would like to ask at this time is if in the future these other men who are accused-- whether their entire statement is to be read into the record?"

"Law Member: I don't know whether they are or not. The matter hasn't come up."

"President: Is Private Ellis available as a witness?"

"Prosecution: I do not know."

"President: If he is he should be brought here rather than bring some testimony from a sheet."

"Law Member: All items which refer directly to the individual accused will be stricken from the record and completely disregarded by the court."

"Defense: Private Ellis is available as a witness."

"Law Member: The whole of the testimony by Private Ellis will be stricken from the record."

Lieutenant Colonel Jesse E. Green, Infantry, Provost Marshal, a prosecution witness, testified as follows:

"Q. Colonel Green, I show you Prosecution Exhibit No.7. Do you identify it?

A. Yes, I identify this watch by the band and by the number--I would have to go to my record for that.

Q. Could you tell the court, sir, who that watch was taken from?

A. It was taken from Private McCullough of the 50th Signal Battalion.

Q. And when was this watch taken from him, sir?

A. Approximately, around the second week in May-- as I recall.

- "Defense: What is the number of that watch?
Prosecution: The number is Exhibit No. 7, the serial number is OC 38190.
Q. Colonel, did you get that watch from Private McCullough?
A. I do not know whether I got it from him personally or whether I got it from the Lieutenant in the 50th Signal Battalion. He admitted to me having the watch."

CROSS EXAMINATION.

- "Questions by defense:
Q. Are you sure you didn't get it from a man named Lafferty?
A. I believe I did get it from Lafferty.
Q. You did not then get it from Private McCullough?
A. It came from Private Lafferty, L-A-F-F-E-R-T-Y.
Q. Sir, did you ask any questions of Private McCullough?
A. Yes, I did.
Q. Can you state what those questions were?
A. Not without going to my records, other than a general statement, that, as I recall, of his admitting disposing of the watch to Private Lafferty. I would have to go to my records otherwise.
Q. Do you know the name of this man standing by me? (Indicating one of the accused).
A. I wouldn't be sure but I believe that's McCullough. I am not sure.
Q. That is correct, it is Private McCullough.
Will you refer to your notes, Colonel?
A. (The witness withdraws his notes)."

Defense: With permission of the court I would like to examine the notes of Colonel Green.

Prosecution: I object to the defense examining the witness's notes.

Law Member: The witness may be permitted to use his notes to refresh his memory. It is not necessary for the defense to read his notes also.

Witness: I might state that there was innumerable interviews with these witnesses and I personally interviewed Private McCullough. Whether these are the exact notes I took from him I don't know.

President: What was the question?

Defense: I would like to ascertain at this time, has this already been introduced into evidence? (To witness): Is that a statement made to you or to Colonel Picarelli?

(189)

"Prosecution: Again I object to the defense counsel looking at the witness' notes.

Questions by defense:

- Q. I doubt if the witness knows whether such notes have been introduced in evidence and I would like to ask him again the conditions under which the statements were made?
- A. Any statements that were made to Colonel Picarelli were made in my presence.
- Q. Where was this at--Lambton Park?
- A. Not to Colonel Picarelli.
- Q. Colonel, did you ask any questions of Private McCullough at Military Police Headquarters?
- A. Of that, I couldn't be sure, but it is my belief that I did. He was down there, I believe, before we got the watch from him and gave us certain information. It is my belief that he was interviewed at M.P. Headquarters, at Lambton Park, and at the Officers' Club of the 812th Military Police Company.
- Q. You made the statement that Private McCullough said that he knew it was a government watch--at the same time you qualified I remember?
- A. I don't believe I made that statement. I may have made the statement relative to a government watch, that he admitted having the watch.
- Q. The only statement that Private McCullough ever made is that he admitted that he had a certain watch. Is that correct?
- A. He admitted having had this watch.
- Q. Did he say that he knew it was a government watch?
- A. I don't recall that without going through these notes.
- Defense: If it please the court, I'd like to know at this time if these are the Colonel's own notes he is referring to?
- Law Member: Any notes taken at the meeting at which he was present, he may refer to, whether he actually took the notes down or not; but if he was not present at the time then he cannot refer to them. (To witness): If you were present at that meeting you may use the notes of the meeting to refresh your memory.
- Defense: No further questions." (R. 56,57,58).

5. A complete list of the witnesses for the prosecution together with the substance of their testimony is as follows:

Staff Sergeant Homer W. Wood, Section Storehouse Platoon, 72nd Ordnance Company, testified that small arms, weapons, etc., go through his depot which is the only Ordnance issue depot in Iceland. He identified a packing list sent from the Frankford arsenal which without further explanation was admitted in evidence as Exhibit 1, **134**

(190)

and a shipping ticket as Exhibit 2, and that the items were unloaded by "A" Company of the Quartermaster Battalion. He identified a shipping box (Exhibit 3) from Frankford Arsenal. He also identified ten wrist watches, a stop watch and a compass by numbers (Exhibits 4 to 14 inclusive); one of which watches is not shown and as to another watch, the number is different, than is shown on list attached to the report of investigating officer. He further declared that none of these watches had been received at the ordnance depot and that all were government property. He also stated the value of the property. (R.145-147).

Lieutenant Colonel John Picarelli, Inspector General's Department, Headquarters, I.B.C., identified a folder entitled "Investigation of Thefts at Docks" as testimony taken after each witness was "sworn" and had identified himself. He identified sheets purporting to show testimony or statements of 25 of the accused and of nine third-parties; each separately numbered from 17 to 50, inclusive, and later admitted as exhibits of the same numbers. (R.23-41).

Lieutenant B. F. Allen, 812th Military Police Company, Camp Haggi, "identified" exhibits 4 to 14 and read, over defense counsel's repeated objections, various statements from "Investigation of Thefts at Docks" of both accused and of third-parties. (R.42-52).

Captain Lewis Mark, 812th Military Police Company, testified to recovering a watch and compass (R.115-116).

Lieutenant Colonel Jesse E. Green, Provost Marshal, Camp Curtis, identified a watch, Exhibit 7, recovered from a third-party. (R.56).

The trial judge advocate then read to the court numerous excerpts from Prosecution Exhibits 17 to 50, purporting to be statements not only of some of accused but also of third-parties, (R.60-63; 98-103; 125-130; 131).

Lieutenant Francis T. Zober, 392nd Quartermaster Battalion, identified some of accused and stated that to his knowledge, no government wrist watch had been issued to them (R.92-96).

First Sergeant Leslie H. Hagen, 392nd Quartermaster Battalion, identified one accused (R.97).

Lieutenant Henry M. Fitzhugh, Company A, 241st Quartermaster Battalion, Quartermaster Corps, identified some of accused and testified he thought if watches had been issued to accused the company supply records would so indicate and that none were shown issued (R.104-108).

Lieutenant Thomas H. Turnbull, Company A, 241st Quartermaster Battalion, Bradford Camp, identified two of accused and stated that to his knowledge no watches or compasses were issued to them (R.109).

Captain Thomas B. Dart, 50th Signal Battalion, Camp Gibraltar, identified one of accused and denied issuing him a watch (R.110).

Captain Gene M. Rauvier, 50th Signal Battalion, identified one of accused and denied issuing a government watch or compass to him (R.111).

Captain Daniel W. Hutgeons, 50th Signal Battalion, identified one of accused and denied issuing to him a government watch or compass (R.112).

Captain Raymond J. Wilson, 46th Field Artillery Battalion, Camp King, identified one of accused and told of taking a watch, Exhibit 5, from him and his story of borrowing it from another accused (R.113-144).

Private Vernon Billett, Company "B", 392nd Quartermaster Battalion, whose statement under the name of Vernon Bullock is admitted as Exhibit 18 of the items from "Investigation of Thefts at Docks" (R.26) identified one of accused and told of witnessing the sale of a watch by such accused to another accused (R.117).

Lieutenant Lynn C. Lee, Engineers, Camp Tripoli, identified one of accused and stated that to his knowledge no watch or compass had been issued to him (R.119).

Lieutenant Wm. H. Glanz, Company B, 392nd Quartermaster Battalion (Port), testified that he was executive officer in the Water Transport Office and explained the procedure of unloading shipments; that the men working on these unloading details are agents of the government while so working, all done under the supervision of an officer (R.120-124).

Captain Edward R. Vader, Company "A", 5th Quartermaster Battalion, Camp Lambton Park, identified one of accused and stated that to his knowledge no watch or compass had been issued him (R.130).

6. (a). The Board of Review is of the opinion that the reading of these purported statements of accused (which statements included mention of other accused than the one making the statements) was highly prejudicial to the substantial rights of the accused and

(192)

that no ruling by the Law Member limiting the use of such statements could erase from the minds of the court, the effects of the continued repetition of such readings. While these statements were admitted in evidence, under a ruling that they should be considered only as against the accused making same, such formalism could not avoid the practical result of the statements upon the minds of the Court. Each statement was interlocked with references to other of the accused, and in the end they composed a matrix of hear-say evidence which must in some degree have influenced the court to the injury of accused.

(b). Equally objectionable was the ruling of the Law Member permitting witnesses to "refresh their memories" from these statements contained in the portfolio labelled "Investigation of Thefts at Docks." The reporter or stenographer who took the statements down in short-hand and who transcribed the same did not appear as a witness as to their authenticity. The record is entirely silent as to whether the statements were true and correct and whether they had been produced with accuracy and fidelity. The failure to authenticate such statements rendered their use "to refresh the memory" of witnesses prejudicial error. It is obvious that the witnesses had neither memory nor knowledge of the contents of the statements and their use to "refresh the memories" was a mere pretext, which was finally frankly abandoned when the Trial Judge Advocate simply read some of the statements into the record.

"A stenographer who took notes of the former testimony of a witness or the voluntary statements of accused, may testify by reading from his notes, or a transcript thereof, where he has no recollection of the testimony or statements apart from the notes or transcript, and a proper foundation is laid, establishing the accuracy of the notes, or of the notes and transcript, accordingly as the stenographer testifies from the notes or transcript. Also another person will not be permitted to read or testify from a transcript of a reporter's notes taken at a former trial, where the transcript is not vouched for by the reporter."(70 Corpus Juris, sec.768, pg.597). (Underscoring supplied).

"*** There would be error where, under the pretext of refreshing a witness's recollection, the prior testimony was introduced as evidence." (Rosenthal v. U.S. (C.C.A.8th).248 Fed. 684, 686; U.S. vs. Socony-Vacuum Oil Co, 310 U.S. 150,234; 84 Law Ed. 1129, 1174).

(193)

(c). The refusal of the Law Member to allow Defense Counsel to inspect the so-called "Report", which was used to "refresh the memory" of witnesses was clearly erroneous.

"Material used to refresh the recollection of a witness must be shown to opposing counsel upon demand, if the material is handed to the witness." (United States vs. Socony-Vacuum Oil Co., 310 U.S., 150, 232; 84 L. Ed. 1129, 1173).

While of itself, and taken alone, this error perhaps is not of sufficient gravity to require the setting aside of the findings, yet when it is cumulated with the other noted irregularities it becomes highly prejudicial to accused.

7. The serious question in this case is whether that offense of which the accused have been charged and convicted, was embezzlement or larceny.

The following passages from the Manual for Courts-Martial, defining and explaining larceny and embezzlement are pertinent:

a. Paragraph 149 g. 1928 M.C.M. on larceny:

"Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein (Clark)."

"**** the taking must be from the actual or constructive possession of the owner,****".

"**** where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession and the servant has the custody only and may commit larceny of them. A person then, has the 'custody' of property, as distinguished from the 'possession', where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e. constructive possession as distinguished from actual possession) of the property ****".

(194)

b. Paragraph 149h, 1928 M.C.M. on embezzlement:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come." (Moore v. U.S., 160 U.S. 268).

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship."

Eminent legal writers all concur in the view above expressed as to conversion by an agent, employee, workman or servant of his master's property:

a. Corpus Juris:

"Servant of Owner - (1) Chattels to which servant has access. A domestic servant, farm labourer, clerk in a store or office, /book-keeper or clerk in a bank, workman in a factory, brakeman on a railroad train, foreman of a railroad warehouse or clerk therein, hostler, drayman, stevedore, weigher or person employed in any other capacity as the servant of another, who feloniously takes and carries away the money or goods of his master, to which by reason of his employment he has access, is guilty of larceny and not of embezzlement; and the fact that the taker was the regular custodian, or was temporarily in charge of the building, or was the master's agent in charge of the office from which the thing stolen was taken, does not affect his guilt, for in none of these cases did he have any possessory rights in the things committed to his care." (36 Corpus Juris, sec.164, pg.784).

"(2). Chattels delivered to servant by master.
(a). In general. From the legal conception of a servant as one who performs labor under the immediate direction and control of a master, the principle proceeds that the possession of the chattels, with or concerning which the labor is performed, remains in the

(195)

"master, and the servant, being the mere custodian of such of them as come within his control, is guilty of larceny if he feloniously misappropriates them to his own use." (36 Corpus Juris, sec.165, pg.784).

"(bb). Chattels to be used. A servant to whom a master delivers materials to be incorporated in a structure in building which the servant is employed, or blue prints showing the work to be done, or coal for use in firing a boiler of which the servant has charge, or an animal to be used in ploughing the master's land, or a horse and wagon to be used in hauling goods, or hay and grain for use in feeding animals, acquires no possessory right in the chattels delivered to him, and is guilty of larceny if he feloniously converts them to his own use." 36 Corpus Juris 784-786. (Every clause in the above quotation is supported by cases cited in the foot notes.) (36 Corpus Juris, sec.167, pg.785).

b. Bishop's New Criminal Law, section 824:

"1. Possession and Custody - are in this branch of the law widely distinguishable. There can be no trespass against custody; it is always against the possession, and it can be committed as well by the custodian as by any other person. For example - *****"

"2. Servant - When a master's goods in possession come within the handling of the servant, the latter has in law no more than a custody of them, the possession remaining in the former. Therefore the servant may commit larceny of them; as, if a clerk in a store feloniously removes goods from it, this is larceny.****".

c. McClain on Criminal Law, section 556:

"Larceny by servant or mere custodian. - There is a well-recognized distinction between possession such as that of a bailee and mere custody as that of a servant, and the doctrine by which a bailee is held not guilty of larceny in misappropriating goods in his possession does not apply to the act of a servant in

(196)

"wrongfully converting or disposing of his master's property of which he has the mere custody. In such case there is a trespass, for the possession is in the master and not in the servant, and the servant may be guilty of larceny in the wrongful disposal of his master's property even though he has at the time under his entire control ***. A person who is engaged about the business of his employer, such as a clerk or salesman, is a servant within the doctrine of this section, and does not have possession of his master's property, but only the custody of it, and therefore is guilty of larceny in fraudulently misappropriating it. So one who is employed in general labor, having control of his employer's property for that purpose, is guilty of larceny in wrongfully taking such property *****".

d. Wharton on Criminal Law, section 1195:

"Larceny by servant having bare charge to convert to his own use. If a servant or other agent who has merely the care and oversight of the goods of his master - as the butler of plate, a messenger or runner of money or goods, a hostler of horses, the shepherd of sheep, and the like - convert such goods to his own use, without his master's consent, this is a larceny at common law; because the goods, at the time they are taken, are deemed in law to be in the possession of the master - the possession of the servant in such case being the possession of the master ***."

e. The following cases from the Federal courts are illustrative of the principle stated in the preceding quotation:

- (1) United States v. Strong. (2 Branch C.C.251, Fed. case 16,411, Circuit Court of the District of Columbia, 1821). Larceny of copper bolts, property of the United States. Defendant was a workman at the Washington Navy Yard, whose duty it was to drive copper bolts into the hull of a ship under construction. He carried to his home some of the bolts delivered to him for that purpose and offered to sell them. It was contended for the defense

that there was no trespass, but the Court told the jury that if it was satisfied by the evidence of accused's guilt, his offense was larceny.

- (2) United States v. Clew. (4 Wash.C.C.700, Fed. Case 14,819, Circuit Court for the Eastern District of Pennsylvania, 1827).
Larceny and embezzlement of two notes, property of the Bank of the United States. Defendant was captain of the watch and porter at the bank, and one of his duties was to carry notes from the safe to the note teller. He took two of the notes and passed them.
HELD, a conviction of larceny is proper if the jury believes the evidence. As to the indictment for embezzlement, there is no evidence on which the defendant can be convicted. The notes were not intrusted to the defendant to keep, but merely to carry from one part of the bank to another.
- (3) United States v. Holland. (Fed. Case 15,372, U.S. District Court for the Southern District of New York, 1843).
Larceny on the high seas of foodstuffs, property of the owners of a certain merchant vessel on which defendant was steward and cook of the crew's mess. In that capacity, certain foodstuffs were delivered to him, some of which he sold to immigrant passengers to his own profit.
HELD, the owner is deemed to retain possession of the foodstuffs, and there may have been a constructive taking from him. The question for the jury is whether that taking was felonious.
Verdict, guilty.
- (4) (1). United States v. Hutchinson (7 Pa.Law J.365, Fed. Case 15,432, U.S. District Court for the Eastern District of Pennsylvania, 1848).
Embezzlement. Defendant was clerk to the Treasury of the United States Mint at Philadelphia. He kept in the name of the Treasurer the books of the contingent fund of the mint, and kept the money of that fund in a closet within a larger safe. Defendant had the key to the outer door of the safe. He made way with some of the money of the fund.

(198)

HELD. The defendant's offense was larceny and not embezzlement. A servant has mere charge, not possession, as a butler of his master's plate, a shepherd of his sheep, or a shopboy of goods in a shop.

Though no report of a second trial is available to this Board, it is stated in note 1 to section 1199, Wharton's Criminal Law, that Hutchinson was subsequently tried for larceny and convicted.

- (5) Talbert v. United States. (42 App.D.C.1., Court of Appeals of the District of Columbia, 1914). Larceny of rings, property of Charles Schwartz. Schwartz, proprietor of a jewelery store, delivered certain rings to defendant, who did not return them. Defendant was told to take the rings out of the store to show to prospective customers. The trial court instructed the jury that, if defendant had possession as a salesman with authority to pass title, his offense was embezzlement; but, if he was a mere servant to exhibit the rings and then bring them back with the name of the customer for approval of the sale, his offense was larceny.
The Court of Appeals held the above instruction proper. If an article is delivered to a servant or agent with limited authority for a special purpose, and he appropriates it, his offense is larceny.
- (6) Tredwell v U.S. (C.C.A.Va.1920) 266 Fed. 350, certiorari denied (1920) 40 Sup.Ct.587, 253 U.S. 496, 64 L.Ed.1031).
***** So where the defendant, employed as a stevedore to unload nitrate owned by the government, from vessels and load it into cars for further shipment, after it was so loaded caused certain of the cars to be billed to private consumers, to whom he sold the contents, his offense was larceny, and not embezzlement.

f. Following are certain cases arising in the State Courts.

- (1) People v. Brenneaner (101 Misc.156.166 N.Y., Special Term 1917). Grand larceny of blue prints. Defendant was salesmanager of the Gurney Ball-Bearing Company of Jamestown, New York. Blue prints of its

bearings contained information of great value to it or to a competitor. Defendant, secretly intending to leave the company's service and to seek employment with a competitor, asked and obtained of Barringer (one of its engineers) a set of blue prints and carried them to New York. The court said (pg.806):

"In the case at bar the possession of the property taken was in the company. Barringer, a mere employee, to wit, the company's service engineer, had the care and custody of these prints. His possession was clearly the possession of his master, the company."

"The grand jury were well warranted in finding that when the defendant received these prints from Barringer he intended to appropriate them to his own use. They were delivered to him by another servant. His possession, acquired under such circumstances, was the possession of his master, the company, and when he took the property under such circumstances animo furandi, and thereafter appropriated them to his own use, he committed the crime of larceny as it existed at common law, and before the adoption of the Penal code."

"The learned counsel for the defendant urges that the defendant had access to these prints at all times, and that he was lawfully in possession thereof. 'Access' to the property certainly does not necessarily carry with it possession. The clerk in a store has access to the clothing on the shelves, and to the cash register, and to the property which it is his duty to sell, but if he appropriates it with felonious intent, it has never been doubted that he commits the crime of larceny at common law. So in the case at bar the defendant's access to these prints does not help him. These prints were in the possession of his master. Such possession as he got for the purpose of stealing them was his master's possession, and when he thereafter in fact carried out his original intent by taking them away and converting them to his own use, he committed the crime of larceny at common law."

(200)

- (2) Turner v. State. (124 Ala. 59, 27 South. 272). Larceny of money of James Bolling. Defendant was clerk in Bolling's store and slept in a room over it. The safe was opened at night and the money taken from it. Defendant had access to the safe at times. The court said (p.275):

" It did not appear that the money came into the possession of defendant as the agent of Bolling. The mere fact that he was employed by Bolling in the store, and had access at times to the safe where Bolling had deposited the money, did not divest Bolling of its possession, and consequently would not change the offense, if one was committed, to embezzlement. Holbrook v. State, 107 Ala. 154, 18 Sou. 176; Washington v. State, 106 Ala. 58, 17 Sou. 546."

- (3) State v. Jarvis. (63 N.C. 556, (1869)). Larceny of bacon. Defendant was servant to the owner of the bacon, and was left in charge of the owner's premises when the owner went away for a few days. During that time defendant took the bacon. The Court said (p.557): "The goods alleged in the indictment to have been stolen by the defendant belonged to the prosecutor, and had been in his actual possession. He intrusted them for a few days to the custody and care of the defendant, his servant. In contemplation of law, the goods were in the possession of the owner, and the taking of them by the defendant with the fraudulent purpose of converting them to his own use, was larceny, and the defendant was properly convicted. 2 East. P.C., 564, sec.14".

8. In the present case, the accused were not, it is true, domestic servants, but if they were soldiers detailed to the duty of unloading from ships government merchandise intended for use in the military service thereof, they were, nevertheless, servants as that term is used in legal parlance - one employed by the master in the master's business, whom the master may direct in the details of his work. Accused, if so detailed, were not in charge of unloading the ships or any part thereof, but were only subordinates employed on the temporary work of removing such merchandise from the ship, and/or unloading such merchandise from the ship on trucks, and since their control of the property was subject to the control of their

CONFIDENTIAL

(201)

superior officer, they had custody only of the property as distinguished from possession. Possession in this case lay in the government (the master), and the servant's conversion of the articles constituted a trespass and their offense was larceny and not embezzlement. (CM 220398 (1942), Bul. JAG., Jan-June 1942, sec.452(10), pg.22). ~~XXXXXXXXXXXXXXXXXXXXXX~~ The wrongful taking by a soldier of Government property to which he has access, is larceny and not embezzlement. (CM 211810, Houston (1939)). The Board quotes and makes the basis of its decision the passage from the Manual for Courts-Martial, paragraph 149g, page 172 as follows:

"**** Where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession and the servant has the custody only and may commit larceny of them. A person, then, has the 'custody' of property, as distinguished from the 'possession', where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in the possession (i.e. constructive possession of the property).

****"

Assuming that all of prosecution's purported evidence is admissible and that it is not subject to the objections hereinbefore set-forth (Par. 6(a), (b), (c), supra), the case against accused Stump, Hayes, Szweda, Walker, Delaney, Fred Gibson and Gaskill, falls within the definition of "custody" as distinguished from "possession". The Board of Review is therefore of the opinion that as to the above named seven accused there exists a fatal variance between the allegation of embezzlement and the proof of larceny, and that for this reason the record is legally insufficient to support the finding of guilty of said seven accused.

9. The Staff Judge Advocate in his review of the record of trial finds "the evidence sufficient to support the finding of guilty of each element of the charge" of the above named seven accused, but as to the remaining 27 accused he states, as his opinion, "the evidence is legally sufficient to support findings of guilty of the included offense of misappropriation of government property of the value of each article possessed by the respective accused." A careful and painstaking examination and analysis of the evidence in the record of trial fails to reveal any direct proof or proof of any facts upon which an inference may be based that any

CONFIDENTIAL

(202)

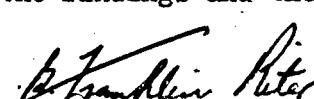
one of these 27 accused held "possession" of any property within the definition of the crime of embezzlement. As a consequence the prosecution failed to prove one of the vital elements of the offense alleged in the Specification, viz: "embezzlement."

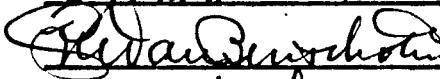
The proof failing to establish the commission of the crime of embezzlement by these 27 accused there remains for consideration the suggestion of the Staff Judge Advocate that the evidence will sustain a finding of guilty of a lesser included offense of "misappropriation of government property ." It is presumed that he has reference to the crime denounced by AW 94 as follows:

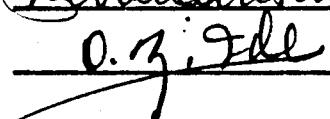
"Who steals, embezzles, knowingly and wilfully misappropriates *** any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States furnished or intended for the military service thereof ***" (Underscoring supplied).

The Board of Review does not deem it necessary to consider the question as to whether the offense described in the foregoing Article of War - "misappropriation of Government property" - is a lesser included offense of the crime of embezzlement, although it is strongly implied by CM 199841, Dig. Ops. JAG., 1912-1940, sec.452(18), pg.339, that it is not. When the prejudicial and erroneously admitted evidence (Par.6(a), (b), (c), supra) is excluded, as it should have been, there is no proof in the record that these accused committed any crime. The prosecution utterly failed to overcome the presumption of innocence with which each of the accused were clothed. (M.C.M. par.78, pg.62; Winthrop's Military Law and Precedents (Reprint, 1920) sec.479, pg.317).

10. For the reasons that there was no substantial compliance with the requirement of AW 70 with respect to investigation of the charges; that there was prejudicial and illegal evidence admitted at the trial; that there was a fatal variance between the allegations of the specification and such proof as was offered as to seven accused above named, and that as to the remaining 27 accused there was a total failure of proof of commission of any offense by them, the Board of Review is of the opinion that the record is legally insufficient to support the findings and the sentence.

 Franklin Riter Judge Advocate

 Edward Burroughs Judge Advocate

 O. Z. Ide Judge Advocate

CONFIDENTIAL

28 JAN 1943

(203)

1st Ind.

WAR DEPARTMENT, Office of Judge Advocate General, European Theater of Operations, U.S. Army.

TO: Commanding General, European Theater of Operations, U.S. Army,
APO 887.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of August 20, 1937 (Pub. No. 325, 75th Cong.), and the act of August 1, 1942 (Pub. No. 693, 77th Cong.), is the record of trial in the case of:

Stump, Paul B.,	(13035599), Corporal, Co.A, 241st Q.M. Bn.
Hayes, Joseph E.,	(33090588), Private, Co.A, 241st Q.M. Bn.
Gullett, John T.,	(14000856), Private, Co.B, 392nd Q.M. Bn.
Gibson, Fred L.,	(13016025), Private, Co.A, 241st Q.M. Bn.
Szweda, Walter.,	(36219826), Private, Co.A, 241st Q.M. Bn.
Rice, Glenn E.,	(15059669), Private, Bty.C, 46th F.A. Bn.
Puskoskie, (none) Edward,	(6881086), Private, 824th Eng. (Avn).
McCullough, Joseph T.,	(350264465), Private, Hq.& Hq.Co, 50th Sig. Bn.
Peters, Clarence W.,	(17003909), Pvt.lcl., Co.B, 50th Sig. Bn.
Tudor, Shirley R.,	(15046292), Private, Co.A, 5th Q.M. Bn.
Campbell, Holcombe P., Jr.,	(13018899), Pvt.lcl., Co.A, 241st Q.M. Bn.(Serv).
Chandler, Andrew L.,	(6948422), Pvt.lcl., Co.A, 241st Q.M. Bn.
Folk, Donald P.,	(13026747), Private, Co.A, 241st Q.M. Bn.
Gaskill, Enoch C.,	(13017744), Pvt.lcl., Co.A, 241st Q.M. Bn.
Hamilton, Vencil.,	(13015983), Tech.5th Gde., Co.A, 241st Q.M. Bn.
Harper, James E.,	(6669822), Private, Co.A, 5th Q.M. Bn.
Howe, Wallace, C.,	(14060601), Pvt.lcl., Co.A, 241st Q.M. Bn.
Johnson, Landon C.,	(13000977), Pvt.lcl., Co.A, 241st Q.M. Bn.
Kilpatrick, John P.,	(34161765), Private, Co.A, 241st Q.M. Bn.
Millhorn, Charles F.,	(33090769), Private, Co.A, 241st Q.M. Bn.
Mitchell, Chester C.,	(14052863), Private, Co.A, 241st Q.M. Bn.
Robinson, Thomas R.,	(13007633), Private, Co.A, 241st Q.M. Bn.
Snow, Belvie D.,	(13023873), Pvt.lcl., Co.A, 241st Q.M. Bn.
Walker, Novie.,	(33111566), Pvt.lcl., Co.A, 241st Q.M. Bn.
Woodruff, Ernest W.,	(7020364), Private, Co.A, 241st Q.M. Bn.
Mayberry, Willis E.,	(33090242), Pvt.lcl., Co.A, 241st Q.M. Bn.
Wolf, Berry J.,	(37055810), Private, Co.A, 50th Sig. Bn.
Carbone, John P.,	(12007894), Private, Co.B, 392nd Q.M. Bn.(Port).
Chavis, Alvin C.,	(14007505), Private, Co.B, 392nd Q.M. Bn.(Port).
Delaney, William E.,	(15042874), Private, Co.B, 392nd Q.M. Bn.(Port).
Gibson, James H.,	(6137669), Sergeant, Co.B, 392nd Q.M. Bn.(Port).
Hamby, J. D.,	(14003456), Tech.5th Gde., Co.B, 392nd Q.M. Bn.(Port).
Moore, Dan (none).,	(13014037), Tech.5th Gde., Co.B, 392nd Q.M. Bn.(Port).
Vitali, Alfredo (none).,	(11007307), Private, Co.B, 392nd Q.M. Bn. (Port).

together with the foregoing opinion of the Board of Review.

134

CONFIDENTIAL

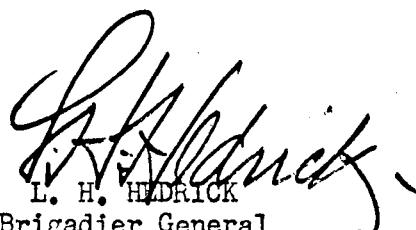
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(204)

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentences be vacated, and that all the rights, privileges and property of which each of the accused has been deprived by virtue of said sentences be restored.

3. Inclosed herewith is a form of action designed to carry into effect the above recommendation should it meet with your approval.

(ETO 134).



L. H. HEDRICK
Brigadier General
Judge Advocate General
European Theater of Operations.

3 Incls:

- Incl. 1 - Record of Trial.
- Incl. 2 - Opinion of Board of Review.
- Incl. 3 - Form of Action.

(Findings and sentence vacated by order of the Theater Commander -
see letter Hq. ETO, 10 Feb 1943 (ref. AG 250.4 EJA))

134

~~CONFIDENTIAL~~

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

(205)

Board of Review

ETO 139.

11 DEC 1942

U N I T E D S T A T E S) SERVICES OF SUPPLY, ETOUSA.

v.)
GEORGE McDANIELS (34292415)) TRIAL by G.C.M. convened at Victoria
Private, Co. "G", 28th) Barracks, Belfast, N.I., 2 November
Quartermaster Truck Regiment.) 1942. Dishonorable discharge,
) forfeiture of all pay and allowances
) and confinement for five years.
) Federal Reformatory.

HOLDING by the BOARD of REVIEW
RITTER, VAN BENSHOTEN and IDE, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private GEORGE McDANIELS, Company "G", 28th Quartermaster Regiment, did, at Antrim, Northern Ireland, on or about 30 September 1942, with intent to do him bodily harm, commit an assault upon Corporal Theodore B. Janusz by shooting him in the side of the body with a dangerous weapon, to-wit: 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 dishonorably discharged the service, to forfeiture of all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement but directed the execution of the sentence to be withheld and forwarded the record of trial for action under Article of War 50½.

3. On 30 September 1942, accused was a member of Company "G", 28th Quartermaster Truck Regiment stationed with Company "E" of the same regiment at Lough Road Camp about one mile from the town of Antrim, Northern Ireland. The record fails to disclose the origin of the circumstances giving rise to the Charge herein but about nine o'clock of the night of that day, Captain Edgar H. Frederic, commanding officer of the Company "G" with other officers and men of both Co. "E" and Co. "G"

(206)

were in the Mess Hall at the Camp where a picture show was about to begin. Right at the beginning of the show one of the men returned from town and said that one of the soldiers had been shot and that three other men were detained by the Military Police, one of which detained men had told "another colored soldier to 'Go back to camp and get the men' " (R.7,10). One of the men detained was Staff Sergeant Horton of Company "G" (R.10). Lieutenant Lehmann of the 28th Quartermaster Regiment and another officer proceeded towards Antrim in a jeep and on the edge of town came upon the body of a colored soldier. An M.P. Sergeant was standing near the body. Realizing the seriousness of the situation they decided to return to camp and lock the ammunition room in the Nissen hut occupied as the company commander's quarters (R.14). There was considerable excitement at camp, but the ammunition case was secured and the door locked. Just as the Lieutenant reached the door of the hut to leave, it was pushed open and three men ran past him. Some 12 or 15 men were present, who were "mumbling" such as, "Get the M.P.s", "Get Sergeant Horton back". The Lieutenant was threatened by one of the men, Corporal Baynem, that if he did not leave his life would be in danger. He told them to stay away from the ammunition but being "scared" as they all had rifles, he left them and went to tell Captain Frederic what was going on (R.15). He did not recognize any of the men other than Baynem. On the way to town, the Lieutenant heard several shots and while he was at the Military Police headquarters, someone came to the door and said another soldier had been shot (R.15). He found the wounded soldier, Janusz, in the cellar room of a civilian house at about 10:15 - 10:20, about five minutes after hearing the shots fired. The night was dark. When the Lieutenant returned to camp he found the door to the hut had been broken in and the ammunition case was gone (R.18).

Jimmie Lee Gay and Charles M. Willis, two soldiers of Company "G", 28th Quartermaster Regiment testified they were at the show in the mess hall "when a fellow comes in from town and says Jenkins got shot" and the boys went out and got their rifles and broke a door open in the officers quarters and Sergeant Baynem (Corporal Baynem) took the ammunition and they went towards town. On the way they met the Captain (Frederic) in a jeep and were told to go back to camp, everything was going to be all right and that Jenkins was in the hospital. However, one of them said for the Captain to go back but that they were all going to town. When they reached the bridge between the camp and the town of Antrim, they encountered white soldiers returning to their camp. Two white soldiers came along with two girls and were stopped and one of them was knocked down by one of the group. Later one white soldier came along by himself. He said he was a soldier, but was also stopped and knocked down by the same colored soldier. "The white soldier got up and was running when McDaniels shot him and said 'I got him - I got him' ". "We stayed around a little while and then went back to camp". Private Willis testified in part as follows:

- Q. You say you saw Guest get the white soldier and knock him down. Then what happened?
- A. After he got hit he got up and ran and McDaniels shot at him.
- Q. Where were you standing.
- A. I was there (Witness illustrates with hands) and Guest was out on the road. Guest knocked him down with his rifle and his rifle hit me on the chin and it got in my helmet strap.
- Q. Did you see McDaniels level down on him?
- A. Yes sir.
- Q. How far away from McDaniels were you when he fired that shot? Were you as far as from me to you? That is roughly about five feet.
- A. Yes sir. (R.32-33).

It was dark and other shots were fired up in the air but not at exactly this time (R.38). Private Gay's story was substantially the same:

- Q. Was McDaniels there at the time?
- A. Yes. Before we got to town the white soldier came along. We were on the bridge. Theodore Guest hit the soldier. McDaniels made two shots.
- Q. Was the soldier still on the ground?
- A. No he got up and started to run. McDaniels fired on him.
- Q. How far away from McDaniels were you? As far as from here to the end of this table? (Witness nods) (Court agrees distance to be approximately 10 feet).
- Q. What happened then?
- A. I ran back to camp. (R.26).

Corporal Theodore B. Janusz, a soldier, was given first aid at the hospital in Antrim at about 11:00 P.M., for a gun-shot wound received within an hour previous (R.43). By stipulation his statement (Exhibit A) was read in evidence. It was, in substance, to the effect that he had taken his girl home and was returning to camp when a group of about 20 negroes called him over as he neared the bridge. When he came over to their side of the road, one of them knocked him down with his rifle butt. He thought all of them carried rifles. He got up and ran and was two or three steps away from them when he was struck in the chest by a bullet. A second shot missed. He ran for some distance when he met a civilian policeman and was later taken to a hospital. One of the two girls with the two white soldiers who were stopped by the colored soldiers on the bridge was left when the two white soldiers and other girl ran away and was present when Janusz arrived. She said "One of the colored boys struck him on the face. He fell and the one behind the one that hit him fired two shots at him and said they would put one in me if I didn't get home". This was between a quarter and twenty past ten o'clock (R.19-20). The defense testimony was in substance, that it was "real dark" that night. None of defense witnesses were at the bridge when the shooting occurred.

CONFIDENTIAL

(208)

4. The direct and uncontroverted evidence amply supports the conclusion of the court that accused committed the offense charged. The evidence in fact ample to support a more serious charge. The court gave the accused the maximum penalty for the offense charged, but under the circumstances as shown, it is not excessive.

5. While the record of trial fails to show that accused was given the opportunity to be sworn as a witness or was informed of his right to make a statement to the court or that the trial judge advocate and defense counsel presented arguments, it is presumed that the usual and normal trial procedure was followed and that counsel fully performed their duty to the accused.

6. The court was legally constituted and had jurisdiction of the person and offense involved. 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.

7. Accused is 22 years of age. Pursuant to paragraph 5(d), General Order 37, ETOUSA, 9 September 1942 as amended by General Order 63, 4 December 1942, the execution of a sentence of dishonorable discharge may be ordered executed when the accused is sentenced to confinement of three years or more or for an offense which renders his retention in the service undesirable. A general prisoner may be returned to the United States for the serving of a sentence of three years or more. The designation of the Federal Reformatory, Chillicothe, Ohio, is correct.

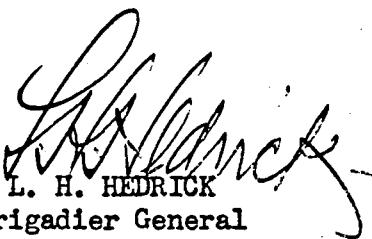
B. Franklin Ritz Judge Advocate
Peter J. D'Amato Judge Advocate
(On detached service) Judge Advocate

139

WAR DEPARTMENT, Office of The Judge Advocate General, European Theater
of Operations, APO 871, U. S. Army.
TO: Commanding General, Service of Supply, European Theater of
Operations, U. S. Army.

1. I concur in the foregoing holding of the Board of Review.
You now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded
to this office, they should be accompanied by the foregoing holding and
this indorsement. The file number of the record of this case in this
office is ETO 139. For convenience of reference please place that
number in brackets at the end of the published order as follows:
(ETO 139).



L. H. HEDRICK
Brigadier General
Judge Advocate General
European Theater of Operations.

CONFIDENTIAL

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(211)

Board of Review.

ETO 255.

19 FEB 1943

UNITED STATES)	SERVICES OF SUPPLY
)	EUROPEAN THEATER OF OPERATIONS.
V.)	Trial by G.C.M. convened at
Private DAVID COBB (34165248),) Cambridge, Cambridgeshire,	
Company C, 827th Engineer) England, 6 January 1943.	
Battalion (Aviation).) Sentence: To be hanged by	
	the neck until dead.

HOLDING of the BOARD OF REVIEW
RITER, VAN BEN SCHOTEN and IDE, Judge Advocates.

1. The record of trial in the case of the soldier named above, having been referred by the Commanding General, European Theater of Operations, the confirming authority, prior to his action thereon, and pursuant to the provisions of Article of War 46, to the Judge Advocate General in charge of the Office of The Judge Advocate General in the European Theater of Operations, who, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, has, with respect to this case, like powers and duties as The Judge Advocate General, and, to the end that the accused should have an independent review of the record of his trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Article of War 50 $\frac{1}{2}$, having been referred by the Judge Advocate General for the European Theater of Operations to the Board of Review for examination and review, has been examined by the Board of Review, which submits this, its opinion and holding thereon, to the Judge Advocate General for the European Theater of Operations.

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

CHARGE: Violation of the 92nd Article of War.

258068 Specification: In that Private David Cobb,
Company C, 827th Engineer Battalion
(Aviation) did at Company C, 827th
Engineer Battalion (Aviation) Guardhouse,

255

(212)

Ordnance Depot, Desborough, Northamptonshire, England, on 27 December 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, 2nd Lt Robert J. Cobner, 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.

The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The review of the evidence in the case, by the Assistant Staff Judge Advocate, is clear and comprehensive and is substantially adopted herein. The evidence shows that deceased, Lieutenant Cobner, was on duty as Officer of the Day for the period from 1600 hours 26 December until the same hour the following day. (R.6, 7, 19, 24, 29). That as such Officer of the Day he had guard mount at about 1530 hours on 26 December. The Sergeant of the Guard testified that accused was present at the time. (R.12). This fact, however, is denied by the accused. (R.42). The evidence further shows that Corporal William Mason, Jr., was Sergeant of the Guard (R.6) and had placed the accused at a stationary post at the guard-house (R.6). Private Samuel L. Jacobs was on guard at Post No.2, which was about ten feet in front of the guard-house (R.19).

Between 1000 and 1100 hours, 27 December 1942, Lieutenant Cobner came to the guard-house to have some beds moved and to have the premises policed. The accused told him that he was not going to stand post any longer for the reason that he had been on duty for four hours. While talking to the officer the accused was carrying his rifle across his shoulder in an improper manner. The deceased told him to act like a soldier, and while addressing an officer, to stand at attention (R.39, 48). The accused replied that he did not care as he had been restricted for six months (R.31-33). The deceased called a guard to arrest accused and to put him in the guard-house. When the guard walked towards Cobb, the accused brought his gun down to his waist, pointed it at the guard and halted him. The Sergeant of the Guard was then directed by the deceased to arrest accused, who pointed the gun at him and ordered him to halt (R.10, 22, 31-33). The accused said that he would not give his gun to anyone until he was properly relieved (R.39). When the Sergeant of the Guard failed to take the piece, deceased started towards Cobb to take the gun, and when within two or three steps, the accused shot him (R.10, 22, 31-33, 34-37, 39). The deceased fell to the ground and death was almost instantaneous, due to the fact that the bullet penetrated the heart (R.18). After the shot was fired, accused pointed the rifle at the Sergeant of the Guard and the others standing nearby and directed them to place the body of deceased in a jeep and take him to headquarters (R.11, 13). After the shooting, accused addressed the group and asked, - if there was anyone who didn't like what he had done (R.31-33, 49).

58068

The evidence shows the deceased made no threatening motion with his gun towards the accused prior to the time he was shot (R.11-12, 22, 34-37), and accused did not so contend at the trial of the case. All the witnesses, except accused, testifying on the subject, stated that Cobb did not call "halt" to deceased before he fired the shot (R.10, 23, 24, 39, 49).

The testimony of the accused is substantially as follows: He had been in the Army for one year, and had been taught that the proper way to relieve a guard was for the Sergeant or Corporal of the Guard to bring a relief (R.40). That he went on duty at midnight, 26 December 1942 and stood his post for five hours; he was relieved and again went on duty at 1000 hours the following day. That his post was at the guard-house. Lieutenant Cobner and the Sergeant of the Guard came to the guard-house at about 1130 hours. Accused asked the Sergeant of the Guard when he could get a relief so that he would not have to walk his post for so long and not receiving an answer, inquired of the deceased if there would be any possibility of being relieved from the post so as to go and eat before going on his next post. Lieutenant Cobner replied that it did not make any difference to him whether he got relieved or not, and that it was not his fault he had to walk guard around that post but that it was the fault of the men inside. Lieutenant Cobner then told the Sergeant of the Guard to take accused's rifle and put him in the guard-house. Cobb further testified that when the Sergeant of the Guard attempted to take his rifle he halted him and stated: "You can't give me an order where you can take that gun on this post, remember I am on guard." That the lieutenant then made a fast step towards him and he attempted to halt him. The last words of the deceased were: "Soldier, give me that gun." The accused testified that when deceased reached for the gun he shot him; he did not know Lieutenant Cobner was the Officer of the Day. The accused was relieved of his post about fifteen minutes after the shooting. He further testified that he had been on guard duty about twelve times (R.41-42). In answer to a question by the court, he testified that if he had known that Lieutenant Cobner was Officer of the Day he would have obeyed his order (R.46). The accused denied that Private Jacobs made any effort to take his gun or that he ever pointed the gun at him (R.44); he further denied that the deceased told him to carry his gun like a soldier. The accused admitted, however, that he knew that Corporal William Mason, Jr., was the Sergeant of the Guard. With reference to the shooting, accused stated that he tried to hit deceased in the hip in order to stop him. Upon inquiry by a member of the court as to why he did not give the Sergeant of the Guard his piece, he replied that he was supposed to be properly relieved. Later he testified that he was afraid to give it to him (R.46). He further stated that at no time did he ask the Sergeant or Corporal of the Guard to get the Officer of the Day (R.47). The accused, while on the witness stand was unable to quote or give the substance of any of the General Orders (R.46).

4.

"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 and Precedents, 1920 Reprint, pg. 673).

252068

CONFIDENTIAL

(214)

"Murder is the unlawful killing of a human being with malice aforethought." M.C.M. par.148, pg. 162).

"Murder, as defined at common law, is where a person of sound memory and discretion unlawfully and feloniously kills in any county of the realm, any reasonable creature, that is, any human being in rerum natura in the peace of the sovereign, with malice prepense or aforethought, either express or implied, that is, with deliberate intent or formed design so to do." (Wharton's Criminal Law, par. 419, pg. 626).

"**** A deliberate intent to kill must exist at the moment when the act of killing is perpetrated to render the homicide murder. Such intent may be inferred under the rule that everyone is presumed to intend the natural consequence of his act." (Wharton's Criminal Law, pg. 633).

"The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent essential to the commission of crime.**** In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstance of the killing as committed no defense appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law." (Winthrop's Military Law and Precedents, 1920 Reprint, pgs. 672-673).

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark).

758068

CONFIDENTIAL

"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 grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of 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 grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. (See 149d—Burglary)." (Par. 148a, M.C.M., pg. 163; 18 A L R 917; CM 221640 - Loper).

5. The facts in this case show that deceased was the Officer of the Day at the time of his death. This fact was known to all the guards, and it is reasonable to presume that it was known to the accused, he having requested relief as a guard from deceased. The testimony of the unbiased witnesses shows that accused was improperly holding his rifle; stated that he would not stand his post any longer, and refused to come to attention when directed to do so by Lieutenant Cobner. Based upon these facts, the officer felt justified in ordering the arrest of accused. He attempted to effect this purpose by directing the Corporal of the Guard, and upon his failure to do so, the Sergeant of the Guard, to relieve the accused of his rifle and place him in the guard-house. In both instances accused drew his rifle and halted the non-commissioned officers. In order to summarily deal with this insubordination, Lieutenant Cobner, as Officer of the Day, attempted to relieve Cobb of his rifle, and place him in the guard-house, when he was shot and killed by the accused. As a defense, accused attempts to portray for himself the character of a model soldier in the performance of his duties as a sentinel. His conduct does not sustain the character. According to his own statement he had previously been restricted for six months. The facts show that he was insubordinate to a superior officer. While stating that he did not know the Officer of the Day, he made no attempt to ascertain who was acting in such capacity. The record further discloses that accused drew his rifle on both the Corporal and Sergeant of the Guard whom he knew were acting in such capacities. While having acted as guard on twelve different occasions, accused "couldn't say" that he knew the General Orders, nor could he give the substance of any such orders. As such model soldier the accused defends his conduct on the ground that the deceased had issued an illegal order in that he had not been properly relieved as a guard; that the officer had no authority to take his gun, and that he was entitled to take the life of deceased in order to prevent the officer from carrying out his purpose. The

CONFIDENTIAL

accused stated upon examination by the court that he would have complied with the orders of Lieutenant Cobner if he had known that he was Officer of the Day.

The evidence plainly tends to show that accused felt that he had been wronged by the imposing on him of extra guard duty which feeling was aggravated by the failure of deceased to relieve him when requested to do so. In the course of events he perpetrated the crime, regardless of the consequences of such act and with a heartless and callous contempt for human life. In the opinion of the Board, the crime was murder.

6. The record and accompanying papers fail to show that the officer administering the oath to the accuser on his affidavit to the charges, was properly authorized to do so. His official character is shown as "Investigating Officer". Investigating officers, as such, have authority to administer oaths only with respect to matters in connection with investigations they are detailed to conduct (AW 114). It appears that Lieutenant Colonel Nealon, who administered the oath, was detailed to investigate the charges the day after the oath was administered. No objection was raised to this irregularity and it in no way prejudices any right of the accused (Dig.Ops.JAG., 1912-30, sec. 1267, and Dig.Ops. JAG. 1912-40, sec. 428(7)).

7. The court was legally constituted and had jurisdiction of the accused. The sentence is legal. 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 Ritter Judge Advocate.

D. David Burroughs Judge Advocate.

O. J. Gable Judge Advocate.

1st Ind.

WAR DEPARTMENT, Office of The Judge Advocate General, European Theater of Operations, A.P.O. 871, U.S. Army. 19 FEB 1943

TO: Commanding General, European Theater of Operations, U.S. Army. APO 887.

1. Herewith transmitted is the record of trial, together with the opinion of the Board of Review, in the case of Private DAVID COBB, (3165248), Company C, 827th Engineer Battalion (Aviation).

2. Upon trial by General Court-martial this soldier was found

255

guilty of murder in violation of Article of War 92. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial to you, for your action, under Article of War 48.

3. Prior to your actipn thereon, you referred the record to me under the provisions of Article of War 46, and, in order to expedite final action in the case, and more especially, to insure to the accused the independent and impartial examination of the record of trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Articles of War 48 and 50 $\frac{1}{2}$, under the provisions of the latter article and, before examination by me, I referred the record to the Board of Review for its examination and opinion. Normally, pursuant to instructions of The Judge Advocate General, action by the confirming authority (other than the President) is required, under the provisions of the third paragraph of Article of War 50 $\frac{1}{2}$, before the record is referred to the Board of Review and to me as Judge Advocate General for the European Theater of Operations. However, your reference of the record to me, prior to your action thereon, under the provisions of Article of War 46, which expressly authorizes such reference, since I, as Judge Advocate General for the European Theater of Operations, have, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, with respect to this case, like powers and duties as The Judge Advocate General, changes the normal situation indicated above. Under such circumstances, should I pass on the record under Article of War 46, in lieu of and as your staff judge advocate, and return the record for your action prior to its examination by the Board of Review, it would then be necessary, after your action, for the Board of Review and myself, as Judge Advocate General for the European Theater of Operations, to examine the record to determine its legal sufficiency. Such a procedure would deny the accused the independent review of the record by the Board of Review provided by Article of War 50 $\frac{1}{2}$, since the report of my examination and my recommendation under Article of War 46 would be a part of the file of the case when it reached the Board of Review. It would also place me in the anomalous position of acting as staff judge advocate under Article of War 46 before the review of the Board of Review and as Judge Advocate General of the European Theater of Operations after such review under Article of War 48 and 50 $\frac{1}{2}$. In my opinion, to follow such a procedure would deny the accused a substantial right given him by Articles of War 48 and 50 $\frac{1}{2}$. On the other hand, the procedure I have adopted denies the accused nothing, but to the contrary fully protects his rights. I am convinced this is the procedure The Judge Advocate General would follow on a reference to him, under Article of War 46, for the reason that, in such event, he would occupy the dual role of staff judge advocate and The Judge Advocate General, as he does when the President is the confirming authority, and would follow the procedure prescribed for the latter class of cases.

4. The Board of Review summarizes the evidence in the accompanying opinion and holds that the record is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I have carefully examined the record and concur in such holding of the Board of Review. The evidence shows a clear case of murder. It remains for consideration whether there were mitigating circumstances

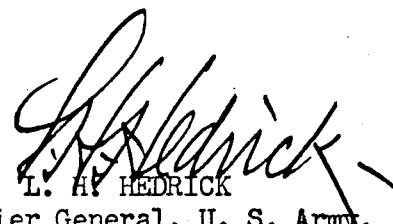
that would justify commutation of the sentence. In my opinion there were no mitigating circumstances but to the contrary the offense was aggravated by the conduct of accused. Displaying such a contemptuous defiance of authority, such a callous disregard for human life, his act shows a murderer at heart. Seeing his victim fall lifeless, he showed no spark of remorse, but rather the heartless defiance and ghoulish pride of a coldblooded braggart. By its selection of the extreme penalty, the court indicates a like view of the accused and his crime. As much as one must always regret the need for the imposition of the death penalty, to commute the judgment of the court in this case I fear would seriously jeopardize discipline. That deceased was the officer of the day, engaged in the proper performance of his duty, and the accused a member of the guard, is a factor that cannot be put aside. Accused's attempted excuse for his action is too weak to deserve consideration. When all the evidence is considered this excuse fails lamentably. Accordingly I recommend that the sentence be confirmed and ordered executed.

5. Without recommending such action it is my duty to point out to you that, in a case of this kind, you are authorized under the 51st Article of War, to suspend the sentence until the pleasure of the President be known, in which event, the record of trial, together with a copy of your order of suspension, should be immediately transmitted to the President.

You may also, of course, commute the sentence, and, as thus commuted, confirm it and order its execution.

6. Inclosed herewith are forms of action to accomplish any one of the foregoing alternatives, viz. -

- a. Confirming the sentence and ordering its execution.
- b. Commuting the sentence, and as thus commuted, confirming the same and ordering its execution.
- c. Suspending the sentence and forwarding it to the President for his action under the 51st Article of War.



L. H. HEDRICK
Brigadier General, U. S. Army,
Judge Advocate General,
European Theater of Operations.

5 Incls:

Record of trial.

Opinion of Board of Review.

Forms of Action (3)

(Sentence confirmed and ordered executed. GCMO 4, ETO, 1 Mar 1943)

258068

255

CONFIDENTIAL
In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(219)

Board of Review

18 Feb 1943

ETO 268.

FIFTH ARMY

UNITED STATES)
v.) Trial by G. C. M. convened at
Private RICHARD H. RICKS (33319911)) APO # 464, U.S. Army. Sentence:
Company "L", 22nd Quartermaster) dishonorable discharge, total for-
Truck Regiment.) feiture, and confinement at hard
labor for the term of his natural
life. Penitentiary.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOTEN and IDE, 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 Richard H. Ricks, Company "L", 22nd Quartermaster Truck Regiment did, at Oujda, French Morocco, on or about the seventeenth day of January, nineteen hundred and forty three, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one James T. Watkins, Technician Fourth Grade, 71st Signal Company, 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 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.

234992

CONFIDENTIAL

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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. The accused is a member of Company "L", 22nd Quartermaster Truck Regiment, stationed at Oujda, North Africa.

The evidence is fairly and accurately set forth in the review of the Staff Judge Advocate, a part of which is herein adopted:

"At about 8:45 P.M. on the evening of 17 January 1943 the accused came into the Cyrnos Bar, (R-5, R-10, R-22, R-27, R-32) which is situated about three city blocks from the camp of the accused's organization, Company "L", 22nd Quartermaster Truck Regiment (R-5). Seated at a table in the bar were Sergeants Scroggs and Watkins and Private Brown, all of the 71st Signal Company (R-21, R-26). Private Brown who was drunk (R-6, R-22) started an argument with the accused, calling him a nigger (R-6) a black son of a bitch (R-23) and a yellow bastard (R-27). The accused turned to Sergeant Abbott of his organization and said "Have you got a gun" and "This man called me a nigger and I don't like it". Sergeant Abbot sought to calm the accused and together with a white soldier prevented blows being struck (R-6, R-23, R-27). The accused left the bar (R-7, R-23). Not long thereafter he returned to the door of the bar and called Sergeant Abbott who went out to find him looking at a car parked in the street (R-7). Pointing to the car the accused, who had a rifle (R-7, R-18, R-24, R-27) said "There is the mother fucker that called me a nigger" and in response to Sergeant Abbott's advice to forget it said "No, I want to kill him." As he said this Sergeant Abbott grabbed the rifle trying to wrest it from the accused who opened and closed the bolt. When Sergeant Abbott looked around as the accused said "Look out, he is coming after me" the accused snatched the rifle from Sergeant Abbott's hand (R-7). As the deceased who had been sitting in the right front seat of the car came slowly toward them the accused backed up about ten feet, brought the rifle to his shoulder and fired. The deceased doubled up, staggered back toward the car and fell (R-7, R-24, R-27). The accused turned and went back toward camp (R-8). Sergeant Watkins was dead from a gunshot wound when examined a few minutes later by an officer of the Medical Corps (R-36). Sergeant

CONFIDENTIAL

234992

~~CONFIDENTIAL~~

(221)

Scroggs and Private Brown were in the rear seat of the car with Sergeant Watkins in the right front, all having gone out from the bar at the invitation of the driver, Private Gage (R-24, R-27).

The accused after having his rights properly explained to him took the stand under oath and testified in substance:

"that he carried the rifle to the bar because of fear of Arabs who had accosted him a week or ten days previously with a display of knives. Before entering the bar he hid the rifle in some nearby bushes. After the argument with Private Brown, during which Brown called the accused a black son of a bitch, the accused asked Sergeant Abbott if they had any rum. Then he went out of the bar and was talking to two Frenchmen when the car pulled up. He picked up his rifle as two or three men came out and got in the car. As Sergeant Abbott started him toward camp he heard someone say "I am going to get him", so he turned around and saw a man coming toward him from the car. "He fired at the tree to scare him and the gun went off before it got that high." Sergeant Watkins started back to the car and the accused went to camp without any knowledge that he might have hurt the man (R-48-53). The accused and Sergeant Abbott were good friends (R-56).

4. The 92nd Article of War declares:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct".

"Murder is the unlawful killing of a human being with malice aforethought." (MCM 1928 - Par. 148).

"Murder, as defined at common law, is where a person of a sound memory and discretion unlawfully and feloniously kills in any county of the realm, any reasonable creature, that is, any human being in rerum natura in the peace of the sovereign, with malice prepense or aforethought, either express or implied, that is, with deliberate intent or formed design so to do." (Wharton's Criminal Law, par. 419, pg. 625). "Unlawful" means without justification or excuse." (MCM 1928- Par.148).

~~CONFIDENTIAL~~

234992

CONFIDENTIAL

"Malice Aforethought. Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or ~~existing~~ existing with the act or omission by which death is caused: An intention to cause the death of, or grievous 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 grievous bodily harm is caused or not by a wish that it may not be caused; ***** (M.C.M. 1928, par. 148, pgs. 163-164).

5. The undisputed facts in this case show that accused entered the Cyrnos Bar at 20:45 o'clock where, without provocation or reason, he was maligned by an intoxicated white soldier, Private Brown, who was sitting at a table; that a Sergeant Abbott sought to calm Private Brown and accused and prevented blows being struck; that accused left the bar, returning in about 45 minutes with a loaded service rifle, looked into the bar and called Sergeant Abbott outside; that Private Brown, Sergeant Scroggs and Sergeant Watkins at that time were sitting in an automobile at the curb in front of the bar waiting for Private Gage, the driver, who had gone into the bar for sandwiches and who was going to drive them to their quarters; that when Sergeant Abbott came out of the bar accused was on the sidewalk near the car holding his rifle; and that Sergeant Watkins got out of the car and walked towards accused who backed up about 10 feet and shot Sergeant Watkins, who fell near the car and died almost instantly.

Regardless of whether accused told Sergeant Abbott "No, I want to kill him," which is denied, and regardless of whether the struggle over accused's rifle took place between accused and Sergeant Abbott, which was also denied by accused, the fact remains undisputed that accused shot and killed Sergeant Watkins who had just gotten

CONFIDENTIAL

out of the car in which Private Brown, with whom accused had recently quarrelled, was sitting. The night was dark and the deceased could not be identified by anyone as he left the car and came up on the sidewalk.

"**** A deliberate intent to kill must exist at the moment when the act of killing is perpetrated to render the homicide murder. Such intent may be inferred under the rule that everyone is presumed to intend the natural consequence of his act." (Wharton's Criminal Law, Pg. 633).

Whether the killing was accidental, as accused claims, or the result of a deliberate intent on the part of the accused, was a question of fact for the court to decide.

It was the duty of the court to resolve and reconcile all conflicts in the evidence and to judge of the credibility of the witnesses. It is no function of the Board of Review to act as a trier of facts. Even though the Board of Review disagreed with the conclusion of the court in the instant case (which it does not), as a tribunal of appellate review, it will not substitute its opinion for that of the court where there is substantial evidence to sustain the findings of the court (CM 211586, Gerber; CM 192609, Rehearing (1930), Dig. Ops. JAG, 1912-1940 sec 408 (2) pg. 259; CM 152797, Viens; CM 203511, Wedmore). Beyond peradventure, there is substantial evidence in the record which supports the finding that accused was guilty of murder.

6. The hearsay testimony (R8), referred to in the review of the staff judge advocate was properly admitted, it being a part of the res gestae, and, as such, falls within the exception to the hearsay rule (1 Wharton's Criminal Evidence, sec. 503, pg. 767).

7. Accused was convicted of murder under the 92nd Article of War:-

"Any person subject to military law who commits murder **** shall suffer death or life imprisonment as a court-martial may direct****".

The Court prescribed life imprisonment, and in addition sentenced accused (1) to be dishonorably discharged the service and (2) to forfeit all pay and allowances due, or to become due. These last two-mentioned elements of the sentence are not affirmatively prescribed by the statute as part of the penalty for the crime of murder when the Court elects to sentence the accused to life imprisonment. The question, therefore, arises as to whether the Court exceeded its authority in including them in the sentence.

It is unthinkable that penitentiary confinement for life should be imposed without permanently separating the convicted accused from the service; and the Manual for Courts-Martial (1928) provides that:-

"Upon conviction of an offense under Article of War 92, dishonorable discharge may legally be imposed with life imprisonment". (MCM, par. 103, pge 92).

234992₅₋

The following opinions of The Judge Advocate General elucidate the foregoing statement from the Manual for Courts-Martial:

"The power to impose a sentence of dishonorable discharge is implied from the power to impose a sentence of life imprisonment that is expressly granted by Article of War 92. But, in imposing a sentence of life imprisonment, the court should expressly add thereto a sentence of dishonorable discharge; as a sentence of dishonorable discharge is not implied from a sentence that imposes life imprisonment or any other punishment."

(JAG. 220 821, Jan. 21, 1919, Dig.Ops. JAG,1912-1930, sec. 1387, pg. 688).

"A court-martial has power to impose dishonorable discharge upon conviction of a violation of Article of War 92, but where the court has refrained from exercising such power and has not imposed dishonorable discharge as part of the sentence, such discharge is not to be implied. A court which imposes a sentence of life imprisonment should expressly add thereto a sentence of dishonorable discharge".

(JAG. 250-479, Jan. 21, 1919, Dig. Ops, Jag.1912-40, sec. 402 (4), pg. 250).

The above-quoted opinions are the only authorities available to the Board of Review which sustain the proposition that a dishonorable discharge may accompany a sentence of life imprisonment under Article of War 92. It will be noted, however, that the court must actually and expressly include dishonorable discharge in the sentence. It will not be implied from a sentence to life imprisonment only.

The Board of Review has made a painstaking search of the Acts of Congress in the endeavour to discover statutory authority which will sustain the opinions above cited; none have been found. Support for such conclusion must therefore be found elsewhere.

It has long been a custom and tradition in the military service that a soldier should never be confined in a penitentiary. A common felon should not wear the uniform of a soldier. The honor of the service dictates such policy. As a consequence, it is the generally accepted practice for a general court-martial to include in a sentence of penitentiary imprisonment the provision that the convicted accused be dishonorably discharged.

While Congress did not specifically direct that a soldier should be dishonorably discharged prior to incarcerating him in a penitentiary, it is most reasonable to suppose that it took cognizance of this well-recognized and established practice when it adopted the 92nd Article of War.

" Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government". (National Lead Co. vs. U.S. 252 U.S.140, 64 L.Ed.496; United States v. Bailey, 9 Pet. 238, 256,9L. Ed. 113,120).

It may be urged against the foregoing conclusion that a court, upon convicting an accused for an offense under the 92nd Article of War and sentencing him to life imprisonment in a penitentiary, may include dishonorable discharge in the sentence that other means are provided for separating accused from the service and, Congress, taking cognizance of such means, intentionally omitted the provision for dishonorable discharge. In connection with this argument, the provisions of Section VIII, A.R. 615-360, which authorizes the so-called "blue discharge," are relevant. This discharge is administrative in character. However, such discharge is not given as punishment, and its use is particularly prohibited "when the enlisted man is awaiting trial, or result of trial, or serving sentence adjudged by a general court-martial". It is apparent that this is not a substitute for, nor equivalent to, the sentence of "dishonorable discharge" imposed by a general court-martial, nor can it be used as a corrective for a defective court-martial sentence. Sec VIII, A.R. 615-360 therefore does not afford a means of ridding the service of a soldier who has been sentenced to life imprisonment. The presumption, under the authorities cited above, is that Congress had knowledge of the regulation and in particular the restriction that a "Section VIII discharge" would not be given a life convict. With this situation prevailing, there is substantial basis for the position that Congress did not consider such "blue discharge" as a proper or adequate administrative means to implement a court-martial sentence, and that it intended that a general court-martial should include the punishment of "dishonorable discharge" when prescribing the sentence of life imprisonment under the 92nd Article of War.

The Board of Review is therefore of the opinion that, in the instant case, it was proper to include in the sentence that the accused be dishonorably discharged, despite the fact that the 92nd Article of War is silent in this respect.

The part of the sentence involving total forfeiture of all pay and allowances due, or to become due, involves an entirely different situation. With reference to the construction and interpretation of penal statutes, Chief Justice Marshall in United States v. Wiltberger, 5 Wheat. 75, 94; 5 L. Ed. 37,42, announced a rule that is fundamental:

CONFIDENTIAL

(226)

"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).

Winthrop applies the foregoing principle to the Articles of War as follows:

"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 and Precedents, 2nd. ed., pg. 395).

The phraseology of the 92nd Article of War is obvious and clear with respect to the authority of a court to impose the punishment of life imprisonment. There is no basis for an implication that Congress intended, when it authorized life imprisonment, also to authorize the confiscation of the accused's property.

The 92nd Article of War is highly penal; it prescribes as punishment for the crimes therein denounced either death or life imprisonment - the two most severe criminal penalties.

The authorized sentences are mandatory with respect to either of the two designated punishments. The convicted accused "shall suffer death or imprisonment for life, as a court-martial may direct". The court is allowed an election, in selecting the penalty to be adjudged from the two stated in this statute, in order to make it fit the crime and the criminal, but when such election is made the discretionary power of the court is exhausted. The word "shall" contained in the statute is imperative (57 C.J., sec.5, pg.548; M.C.M. par. 103, pg 92).

234992 -

Inasmuch as the 92nd Article of War (1) is free from uncertainties and ambiguities in respect to the designation of life imprisonment as one of the punishments; (2) is mandatory within the limits of the two methods of punishment authorized - death and life imprisonment; and (3) is highly penal, it logically follows that the canon of "strict construction", as announced by Chief Justice Marshall, should be applied with full vigor. Such application results in the conclusion that no court has any right to read into the article the power to adjudge the additional penalty of total forfeitures.

From the date of the sentence the accused is no longer in a pay status; consequently, there will be no future pay or allowances. The penalty arises in applying the forfeitures to accrued pay and allowances. Such pay and allowances are the property of the accused. Within the field where Congress has granted the Court discretion in determining the punishment, the forfeiture of this "property" is recognized as a legitimate method of punishment. (Winthrop's Military Law and Precedents - Reprint 1920 - Pgs. 427,433). However, under the 92nd Article of War, where Congress has definitely prescribed the punishment - death or life imprisonment - and thereby left the court no discretion, it is unreasonable and illogical to believe that Congress impliedly authorized a court-martial to forfeit a man's property and thereby increased the penalty over and above that particularly prescribed by the statute.. Rather, logic and reason dictate that Congress did not intend that confiscation of accused's property should follow as part of his punishment.

In view of the foregoing, the Board of Review is of the opinion that the part of the sentence forfeiting all pay and allowances due, or to become due, to the accused is surplusage and void and should not be approved..

The sentence, however, is not void in toto, but is valid as to that part thereof extending to dishonorable discharge and to life imprisonment. The court had the undisputed power to impose these penalties. The sentence is separable and the void part must be disregarded. (United States v. Pridgeon, 153 U.S. 48, 38 L. Ed. 631; 16 C.J., sec. 1393, pg.1312; 24 C.J.S., sec. 1584, pg 112).

8. The court was legally constituted and had jurisdiction of the accused and 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 is legally sufficient to support the finding of guilty and that part of the sentence imposing dishonorable discharge and life

(228)

imprisonment, but legally insufficient to support that part of the sentence imposing total forfeiture of all pay and allowances due or to become due.

B. Franklin Atch _____ Judge Advocate

Walter Rauschert _____ Judge Advocate

O. G. J. de _____ Judge Advocate

- 10 -

234992

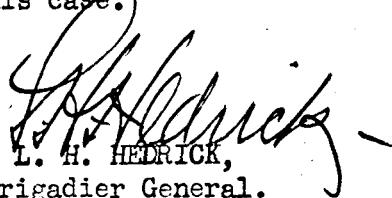
CONFIDENTIAL

1st Ind.

WAR DEPARTMENT, JAGO, ETOUSA, APO 871, 18 FEB 1947: Commanding General, Fifth Army, APO # 464.

1. In the case of Private RICHARD H. RICKS (33319911) Company "L", 22nd Quartermaster Truck Regiment, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated recommend that only so much of the sentence as involves dishonorable discharge and imprisonment for life be approved. Thereupon, you will have authority to order the execution of the sentence as thus modified.

2. A radiogram is being sent advising you of the foregoing holding and approval thereof. Please return the said holding and this indorsement, and, if you have not already done so, forward therewith five copies of the published order in this case.


L. H. HEIDRICK,
Brigadier General,

Judge Advocate General,
European Theater of Operations.

1 Incl:

Opinion of Board of Review.

234992



CONFIDENTIAL
In O~~O~~ne Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

(231)

Board of Review

ETO 292

23 FEB 1943

U N I T E D S T A T E S)	S E R V I C E S O F S U P P L Y)
v.)	E U R O P E A N T H E A T E R O F O P E R A T I O N S)
Private 1st Class SAMMIE MICKLES)	Trial by G.C.M., convened at Glasgow,
(34021930), 226th Q.M. Company,)	Scotlalnd, 29 December 1942. Sentence:
(Salv. Coll.).)	To be dishonorably discharged the service;
	total forfeiture of all pay and allowances
	due or to become due, and to be hanged
	by the neck until dead.

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

1. The record of trial in the case of the soldier named above, having been referred by the Commanding General, European Theater of Operations, the confirming authority, prior to his action thereon and pursuant to the provisions of Article of War 46, to the Judge Advocate General, in charge of the Office of The Judge Advocate General for the European Theater of Operations, who, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, has, with respect to this case, like powers and duties as The Judge Advocate General, and, to the end that the accused should have an independent review of the record of his trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Article of War 50 $\frac{1}{2}$, having been referred by the Judge Advocate General for the European Theater of Operations to the Board of Review for examination and review, has been examined by the Board of Review, which submits this, its opinion and holding thereon, to the Judge Advocate General for 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 First Class Sammie Mickles, 226th Q.M. Co., (Salv. Coll), did, at Glasgow, Scotland, on or about 18 November 1942, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Jan Ciapciak, a human being by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced.

292

He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due and to be hanged by the neck until dead, at such time and place as may meet the convenience of the reviewing authority. The reviewing authority approved the sentence except the words "at such time and place as may meet the convenience of the reviewing authority", the inclusion of which was disapproved.

3. The homicide involved in this case was committed on Argyle Street in Glasgow, Scotland, and the locus thereof was described by Mr. Frank Dow, a Detective Lieutenant of the Glasgow City Police (R.2, 3, 4). He submitted a sketch of the locus in support of his testimony which was admitted in evidence as Prosecution's Exhibit 1 (R.3), but same is not attached to the record of trial.

Argyle Street extends east and west. An elevated railroad bridge which has a width of about 165 feet crosses Argyle Street above the street level between Union and Hope Streets (R.3). Hope Street, which has a north and south direction, intersects Argyle Street about 45 ft. west of the bridge. Union Street is likewise a north and south street and it intersects Argyle Street about 32 ft. east of the bridge (R.3). The "Penny Arcade", an amusement place, is located on the south side of Argyle Street in near proximity and east of the bridge and adjoining it is an alley which runs southward from the south line of Argyle Street towards Midland Street (R.3). That part of Argyle Street under the railroad bridge is in partial darkness, but during the evening such part is illuminated to a certain extent (R.3). Underneath the bridge there are stores on each side of the street (R.4), and also stairways which lead to both the high and low levels of the Central Railroad Station which is located east of the railroad bridge (R.3) and is transpierced by the street (R.3).

4. Accused was on and prior to 18 Nov. 1942 a member of the 226th Q.M. Company (Salv. Coll) which was stationed at Camp Pollock, near Glasgow, Scotland (R.29). Between the hours of 7:30 p.m., and 8:00 p.m., on said date accused arrived at the "Penny Arcade". (R.32, 40, 50). He was then carrying a knife (R.32, 41) which had a blade about one inch wide and 5 inches long (R.32, 33, 40). It was not a folding knife, but a long, straight knife like a hunting knife (R.41). Between 8:00 p.m., and 9:00 p.m., accused while in the "Arcade" became involved in an argument with a civilian and displayed this knife (R.32, 41). The "Arcade" closed about 10:00 p.m. (R.31) and at that hour accused and Privates Percy Kraft and Leon Childs of the 226th Q.M. Company (Salv. Coll) were on the north side walk of Argyle Street about opposite the "Penny Arcade" (R.35). Childs was accompanied by a girl, Jean McLeod, alias Sheina McLeod (R.31, 78). When the "Arcade" closed these three soldiers and girl were joined by Private John Henry Bolds of the same detachment (R.31, 35). The four soldiers and the girl proceeded westward on the north side walk of Argyle Street (R.35) and walked under the railroad bridge (R.35).

Mrs. Mary McAlpine Wilkie, who knew Sheina McLeod (R.42, 78), was standing on the side-walk under the railroad bridge at 10:00 p.m., on 18 Nov. 1942 (R.42, 76) as the soldiers and Sheina McLeod approached from the east.

5. Jan Ciapciak, (hereinafter designated deceased), a Polish citizen, was a seaman and a member of the crew of "M.V. Batory" then lying at King George V dock in Glasgow Harbor (R.13). At 6:30 p.m., on 18 Nov. 1942, deceased and Marcin Edmond Stefanski, also a member of the crew of "M.V. Batory" (R.12), left their ship and proceeded to the "Grant Arms", a public house in Glasgow (R.75) where deceased and his companion each consumed eight drinks of some kind of intoxicating liquor (R.75). By 10:00 p.m., deceased was "feeling very good" but he neither showed signs of intoxication nor was he quarrelsome (R.75). The two seamen left the "Grant Arms" sometime after 10:00 p.m. (R.75) and proceeded in a westerly direction on the north side of Argyle Street. They encountered two or three unidentified American soldiers who were standing on the side walk under the railroad bridge. Mrs. Wilkie was also standing nearby (R.42, 76). As the deceased and Stefanski neared Mrs. Wilkie, Stefanski was walking about two paces in front of the deceased (R.14). When opposite Mrs. Wilkie deceased asked her for a cigarette (R.42, 45, 78). She informed him that she had none, but referred him to the unidentified American soldiers (R.42). At this moment, accused, Bolds, Childs, Kraft and Sheina McLeod joined Mrs. Wilkie (R.31, 42). Deceased then asked the four soldiers for a cigarette (R.42), and almost simultaneously grasped Sheina McLeod by the arm and attempted to pull her away (R.42). Miss McLeod appealed to Childs (R.42), and an argument arose between deceased and Childs (R.31, 42). Accused intervened in the melee that followed and "punched" deceased, and accused and deceased started to fight (R.42). Childs and Sheina McLeod left the scene of the altercation (R.31, 43). Deceased kicked one of the soldiers on the ankle (R.43, 54). At this point Bolds seized Stefanski (R.14, 25, 31, 37, 43) and the argument ceased (R.31, 43). Immediately thereafter Stefanski was removed from the scene of the fracas by a civilian (R.14, 21, 25, 37).

Accused and Bolds then walked eastward on Argyle Street (R.21, 23, 31). Accused informed Bolds he had been stabbed and asked him to go across the street to the alley adjoining the "Penny Arcade" with him (R.31). Reaching the alley, accused opened his blouse and shirt. Bolds struck a match (R.31) and looked at accused's wound (R.32, 33, 37). Accused said to Bolds that "nobody was going to stab me and get away with it" (R.32, 37), and further, "Come, we'll go across the street" (R.32). Accused and Bolds crossed the street and went under the railroad bridge where they encountered deceased (R.19, 32). Accused, after identifying deceased said nothing to him, but pulled his knife out of his pocket and stabbed him (R.19, 20, 32, 33, 43, 46). Deceased immediately fell to the ground (R.19, 22, 31) and after some civilian had attempted to revive him (R.19, 22), he was carried across the street by two civilians (R.14, 19, 24, 76) and as he lay unconscious was found by Constable William Crombie Campbell of the Glasgow Police.

CONFIDENTIAL

When Constable Campbell discovered a wound in the region of deceased's heart he called an ambulance and had deceased removed to a hospital (R.10, 11). Deceased was dead before he reached the hospital (R.59). Constable Campbell while on the stand identified accused as being one of four "other chaps" who stood near deceased as he lay on the ground (R.12). Stefanski identified deceased the next day at the morgue (R.15, 17, 64).

Bolds testified that immediately after accused stabbed deceased he (Bolds) and accused started "down the street" (probably meaning west) and accused wiped blood from the knife (R.32, 34). The Military Police arrived soon after and took accused, Bolds and Kraft into custody (R.32).

The post-mortem examination of deceased revealed that his death had been caused "from shock and hemorrhage following a penetrating wound of the chest with perforation of the pericardium, or heart sac, and aorta, or principal blood vessel of the body." (R.70).

A physical examination of accused made on 21 Nov. 1942, showed that he was suffering from a small, healing puncture wound about 3/16 of an inch in length on the right side of the upper part of the abdomen, (R.70) and it was the opinion of the medical examiner that "the condition of the wound is consistent with infliction a few days prior to the examination" (R.71).

6. The investigating officer was Lieutenant-Colonel Nicholas Biddle, I.G.D., Inspector General, Clyde Area Ports and the Northern District. He was a witness for the prosecution (R.47) and testified that, in the performance of his duties he interviewed accused on two occasions (R.48): 20 Nov. 1942 (R.47) and 22 Nov. 1942 (R.54).

Lieutenant-Colonel Biddle testified that prior to the first interview he warned accused of his rights under the 24th Article of War (R.47). The interview was in the form of interrogations propounded to accused and his answers thereto (R.50, 54). They were evidently taken down by a stenographic reporter and then transcribed or they may have been written directly by a typist who heard same. Lieutenant-Colonel Biddle stated: "After warning him of his rights, I proceeded to take testimony from him, I can't repeat all of the testimony" (R.48). The following colloquy between the trial judge advocate and the witness then ensued:

"Q - Would you, by referring to it, would it refresh your recollection any?

A - I can give you what you are driving at, my closing questions if that is what you want in regard to his rights.

Q - All I had in mind was the questions which you asked him and his answers to you.

A - All the questions? Oh heavens!

Q - Well, as nearly as you can, what did you ask him and what did he say to you?

A - Well, it is about 5 or 6 pages of testimony or more than that, and it is impossible for me to recall all my questions and his answers

~~CONFIDENTIAL~~

(235)

to all of the testimony I took from him on two occasions on two additional dates." (R.48)

At this point the Law Member interjected the following remark:
that

"Why not read/to the court?
Any objection from the defense?" (R.48).

Defense Counsel replied:

"I do impose (sic) this objection. Since the statement, --- I might ask this question. (To the court) May I ask a question for the purpose of the objection?" (R.48).

The Law Member gave his assent (R.48) and thereupon Defense Counsel asked the witness:

"Colonel, in the statement, you refer to, does the subject matter constitute confession in any nature?" (R.48).

The witness asked permission of the court to answer the question and upon receiving consent, replied:

"There were two confessions. On the first date, he made a statement, or rather under sworn testimony, and through a series of questions and answers through the testimony, he gave one story of how the stabbing occurred. In the presence of Bolds, on the second day of testimony, he changed his story to coincide with the testimony of Bolds." (R.48).

Thereupon Defense Counsel objected to the receipt of the interrogatories and answers in evidence for the reasons "first, that it in effect compelled the defendant or the accused to testify against himself at the trial, secondly, that no affirmative showing of the voluntary nature of the confession in either case or both cases has been made ***" (R.48). There then followed the following exchange:

"Prosecution: As to that first ground, I believe that the accused had been warned of his rights.

Law Member: It has been so stated by the Inspector General.

Prosecution: And as to whether or not there was any pressure brought to bear as to the answers to the questions, then that could be brought out.

Defense: The point is gentlemen, if I may
234995

292

mention, is that it has not been brought out yet so far as I can see in the record the purely voluntary nature of the confession.

Law Member: The court rules that that is exactly the matter presented for the attention of the counsel prior to the noon recess, where you were supposed to get together about the matters and papers to be brought here without further delay. You have a stipulation to admit these papers.

Prosecution: Moreover, the stipulation was for the counsel for the defense, that he had seen the names of the witnesses for the prosecution, their address, and their expected testimony on December 22, and subsequent to that.

Law Member: Was not this paper exhibited to the counsel for the defense prior to this trial?

Defense: That is correct. Yes sir.

Law Member: Was that statement taken by the Inspector General exhibited to the counsel?

Defense: Yes sir, with the other papers. (R.49).

The court was closed, and upon being opened the president announced that the Law Member would give the decision of the court.

Law Member: The court was closed for the purpose of discussing and forming an opinion in regard to the objection by the defense. In consideration of the paragraph of our manual in regard to an accused, by making statements in an official investigation, and I find it on pages 116 and 117, we asked Colonel Biddle the following questions: Was there any hope of a reward held out, or any hope of same. Was there any fear of punishment or injury that you inspired by your investigation that might have had some effect on the accused? (R.49)

Witness: No sir.

Law Member: We consider the statement then admissible, and you may have the investigating officer read it. (R.49).

Q - (Continuing) Colonel, these questions and answers, the answers to the questions, were they purely voluntary on the part of the accused?

A - Yes sir.

Defense: Have these been marked as exhibits?

Prosecution: No, I was just going to bring that in.

Q - (Continuing) Colonel, I ask you to look at the papers you have, and tell us if that is, if it states the exact questions which you asked the accused, and his answers to those questions?

A - Both these statements are the exact questions and answers I asked the accused on November 20th.

Prosecution: I would like to offer those in evidence as Exhibits 3 and 4.

Defense: There is no objection to either of the purported exhibits.

Received in evidence Prosecution's Exhibits Nos. 3 and 4.

Q - Will you read these then, Colonel? (R.50 - 57)

Lieutenant-Colonel Biddle then proceeded to read into the record the interrogatories propounded to accused and his answers thereto (R.50 - 57 incl.). At the conclusion of the presentation of the questions and answers Defense Counsel moved that the same be expunged from the record:

"for the reason and upon the ground that it appears there from the exhibit there, that the statements made therein were not made from a purely voluntary basis, but upon a basis of question and answer to a superior officer, or an officer who had been enjoined by his superiors to conduct an inquiry. For the further reason, as with regard to Exhibit 4, that the sworn testimony/^{of}the said defendant, Sammie Mickles, in Exhibit 3, as read by the witness, ~~is~~ as follows:

"Q - Have you anything further to say, or anything further to give in this case?

A - No sir.

Q - Do you desire to submit a statement, sworn or unsworn in addition to this?

I move that the record be expunged and removed from this case." (R.58).

234995

- 7 -

292

(238)

The court closed and upon being reopened the Law Member announced:

"The court was closed, and the objection raised by the Defense Counsel discussed, and the entire court is of the opinion that the papers marked Prosecution Exhibit Number 3 and 4, being the testimony of the defendant to the Inspector General, Colonel Biddle, be admitted as the testimony of Colonel Biddle. (Underscoring supplied). The court further asks that defense counsel, if he has any further objections, may declare same at this time with the proviso that he point out line for line, and page for page in the court-martial manual where there is any contravention of a law for the admission of these papers as this testimony." (R.58).

Defense Counsel replied:

"I have no further objections." (R.58).

The Law Member responded:

"Well, the court calls your attention to the bottom of page 116 relative to the admission by the accused does not treat these papers as a confession, but only as an Inspector General's testimony." (Underscoring supplied). (R.58).

There is presented for consideration the serious question as to whether the objection of Defense Counsel in the first instance to the reading of the Exhibits into the record should have been sustained and upon over-ruling the objection whether the motion to strike the same from the record should have been granted. There are however, two incidental matters which should be first considered: (a) On page 58 of the record of trial the Law Member referred Defense Counsel to the "bottom of page 116 relative to the admission by the accused does not treat these papers as a confession, but only as an Inspector General's testimony." The cited passage from Manual for Courts-Martial reads as follows:

"b. Accused's admissions. - In many instances an accused has made statements which fall short of being acknowledgements of guilt, but which, nevertheless, constitute important admissions as to his connection or possible connection with the offense charged. Such statements are called 'admissions against interest' and are admissible in the evidence without any showing that they were voluntarily made. Should it, however, be shown that an admission against interest was procured

292

234995 - 8 -

by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either exclude or strike out and disregard all evidence of the statement. The following are examples of admissions against interest: A statement made after arrest by an accused charged with homicide in a dance hall, that he was in the hall when the homicide occurred; a statement made to a sheriff by an accused charged with desertion that he was 'tired of working for the Government and did not want to work for it any longer.'

The mere fact that the admission was made during an investigation of the charge does not make it inadmissible." (M.C.M., 1928, sec.114, pgs.116-117).

It is difficult at times to draw a distinction between a "confession" and an "admission against interest" but the applicable legal principles are well established.

" 'Admissions', in the law of evidence, have been defined as being concessions or voluntary acknowledgments made by a party of the existence of certain facts, and have been said to be direct or express, implied or indirect, or incidental, and either judicial or extra-judicial, the former being such admissions as appear in record in the proceedings of a court. More accurately regarded, they are statements by a party or some one identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary." **** 'Admissions' are distinguished from 'confessions' in that the latter term is used only in criminal cases and properly applies only to acknowledgments of guilt. (22 C.J., sec.323, pgs. 296, 297).

"Although it may be received in evidence, an admission by word or act of an inculpatory fact from which the jury may or may not infer guilt, but which falls short of being an acknowledgment of guilt is not a confession. Also an admission of one, but not of all, the essential elements of the crime is not a confession. (16 C.J., sec.1466, pg. 716).

"A confession is the admission of guilt by the defendant of all the necessary elements of the crime of which he is charged, including the

necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all of the elements of the crime. State v. Johnson, 95 Utah 572, 83 P. (2nd)1010; People v. Fowler, 178 Cal. 657, 174 P.892; State vs Carroll, 52 Wyo. 29, 69 P. (2nd)542; State vs. Stevens, 60 Mont. 390, 199 P.256." (State v. Masato Karumai, 126 P(2nd) 1047, 1052).

"A confession is an acknowledgment in express terms, by a party in a criminal case, of his guilt of the crime charged, while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt. In other words, an admission, as applied to criminal law, is something less than a confession, and is but an acknowledgement of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only to establish the ultimate fact of guilt. To the credibility of a confession of guilt, it is necessary there should be an *animus confitendi*, or intention to speak the truth as to the specific charge of guilt. Such intention, however, is not essential to attach credibility to admissions of particular facts, in themselves indifferent, but which go to make up a case on which guilt is assumed to rest." (2 Wharton's Criminal Evidence, sec. 580, pg.954).

"A confession is an acknowledgment, in express terms, by a party in a criminal case of the truth of the crime charged, while an admission relates to subordinate facts that do not constitute guilt in themselves. A confession is an acknowledgment of guilt; while an admission admits material facts but not guilt." (CM 141755 (1920), Dig. Ops. JAG., 1912-40, sec. 395(10), pg. 205).

Considering Prosecution's Exhibits 3 and 4 (the interrogations propounded accused by Lieutenant Colonel Biddle and accused's answers thereto) (R.50-58 incl.) in the light of the foregoing principles it is obvious that the Law Member was clearly in error in his ruling that the same were "admissions against interest." The examination of accused by Lieutenant Colonel Biddle was conducted in the endeavor to secure from him a truthful statement of the events which led to deceased's death. Accused's memory and conscience were searched by the examination and the information elicited from him revealed all of the elements of the crime for which he stood charged. His statements, although separately made in response to the several questions, produced in sum total a confession of his guilt. Prosecutions Exhibits 3 and 4 must therefore be considered as confessions and not merely admissions against interest, (b) By objection, timely made, Defense Counsel contended that the Prosecution had failed to show that the confessions were voluntarily made and were not secured either as a result of threats or compulsion or promises of favors or clemency. The rule governing admissions and confessions is stated thus.

234995

292

"It must appear that the confession was voluntary on the part of the accused. In the discretion of the court a prima facie showing to this effect may be required before evidence of the confession itself is received.. No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the special circumstances of each case. The following general principles are, however, applicable.

A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made.

The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior.

"Evidence that the accused stated that he made the confession freely without hope of reward or fear of punishment, etc., or evidence that the accused was warned just before he made the confession that his confession might be used against him or that he need not answer any questions that might tend to incriminate him is evidence, but not conclusive evidence, that the confession was voluntary." (H.C.M., 1928, sec.114a, pg.116).

"But the most familiar requisite to the admissibility of a confession is that it must have been voluntary; and the onus to show that it was such is upon the prosecution in offering it. A confession is, in a legal sense, 'voluntary' when it is not induced or materially influenced by hope of release or other benefit, or fear of punishment or injury, inspired by one in authority; or, more specifically, where it is not induced or influenced by words or acts, - such as promises, assurances, threats, harsh treatment, or the like,- on the part of an official or other person competent to effectuate what is promised, threatened, &c., or at least believed to be thus competent by the party confessing. And the reason of the rule is that where the confession is not thus voluntary, there is always ground to believe that it may not be true. Though confessions are in the majority of cases made to officials holding the party in confinement or arrest, the mere fact that he is in custody at the time of making the confession does not stamp it as involuntary."

"Winthrop's Military Law and Precedents, Reprint 1920, pg.328).

The record shows that Lieutenant Colonel Biddle warned accused of his rights under the 24th Article of War and explained them in detail to him (R.47, 50). There is an absence of any evidence in the record that the confessions were obtained as a result of hope or fear engendered in the accused by Lieutenant Colonel Biddle who asserted on the witness stand they were given voluntarily. The Defense did not elect to cross-examine him on this statement. Under this condition of the record the Board of Review is of the opinion that the Prosecution made a *prima facie* showing that the confessions were voluntary, and that their admission in evidence should not be denied on the claim that they were involuntary. (Cf: *Wilson v. United States*, 162 U.S., 613, 622, 623; 40 L. Ed. 1090, 1096).

7. Having determined that Prosecution's Exhibits 3 and 4 are in legal effect confessions and that they were voluntarily given by accused, there remains the question as to whether or not the typewritten questions and answers labeled respectively "Sworn testimony of Private Sammie Mickles" (Prosecution's Ex. 3; R.50) and "Additional Sworn Testimony by Sammie Mickles" (Prosecution's Ex. 4; R.54) were in such form as to be properly admitted in evidence (R.50). Neither of these exhibits were signed by accused. Lieutenant Colonel Biddle stated "it is impossible for me to recall all my questions and his answers to all of the testimony I took from him on two occasions or two additional dates" (R.48). Later, however, the Trial Judge Advocate asked him:

"Colonel, I ask you to look at the papers you have, and tell us if that is, if it states the exact questions you asked the accused, and his answers to those questions? (R.50).

Lieutenant Colonel Biddle replied:

"Both these statements are the exact questions and answers I asked the accused on November 20th"
(Underscoring supplied). (R.50).

It appears to the Board of Review that Lieutenant Colonel Biddle's statement last above given is a complete authentication of accused's confession and therefore distinguishes this case from CM: ETO 134, Stump et al, (decided 27 January 1943). In that case the Board of Review said:

"The reporter or stenographer who took the statements down in shorthand and who transcribed the same did not appear as a witness as to their authenticity. The record is entirely silent as to whether the statements were true and correct and whether they had been produced with accuracy and fidelity."

234995

292

In the Stump case the witness who was offered for the purpose of authenticating the alleged written confessions, (which were unsigned by accused and in question and answer form as in the instant case) did not

testify that the questions and answers contained in the purported confessions were the exact questions asked the accused by the witness or that the answers were the exact answers of accused. Neither was there authenticating testimony from the shorthand writer or typist who produced the typewritten transcriptions. This deficiency in proof was removed in the instant case by Lieutenant Colonel Biddle's express and unqualified statement that "both these statements are the exact questions and answers I asked the accused." The Board of Review is therefore of the opinion that the Prosecution's Exhibits 3 and 4 were admissible in evidence and that the court properly denied accused's motion to strike same from the record.

8. Prosecution's Exhibit 8 was the report of the post-mortem examination of the body of the deceased. Prosecution's Exhibit 9 was report of the medical examination of the accused. Both examinations were made by John Glaister, a Doctor of Medicine and inter alia Medical Examiner to the Crown. He was called as a witness and testified that the post-mortem examination was held in the City Mortuary at Glasgow; that deceased's death was produced by shock and hemorrhage resultant upon a wound on the left side of the chest which passed through the pleura of the right lung and the aorta; that he had made a written report on the examination which was true and correct (R.66, 67). The witness also testified that he had made a physical examination of accused and that he had prepared a true report thereof (R.67). The exhibits were identified by the witness as being prepared by him. Same were received in evidence and read into the record (R.67-71). Defense Counsel and the court cross-examined the witness extensively on the reports (R.71-74).

The post-mortem was held on 19 November 1942, and the report thereof was personally prepared by witness of 22 November 1942. The examination of accused was on 21 November 1942, and the report thereof, also personally prepared by witness on the same date.

Wigmore declares that "a past recollection ~~of a witness~~ recorded may be used, subject to the precautions for securing the adequacy of the recollection and the accuracy and the identity of the memorandum; as follows:

Art. 1. The memorandum must have been made when the matter was fairly fresh in the recollection; but the time depends on the circumstances of each case ---.

Art. 2. The witness must be able to say that he believed the memorandum correct at that time; either (1) by now remembering that belief*****

Art. 3. The witness must be qualified by personal observation of the matter recorded*****". (Wigmore, Code of Evidence, Rule 93, pg. 144).

Dr. Glaister made the examinations set forth in the respective reports, and testified that the reports were true and correct. The report on the death of deceased was prepared within 2 days of the post-mortem examination (Ex. 8) and the report on accused was prepared

on the same day as the physical examination of accused (Ex.9). The principle announced by Wigmore finds confirmation in 70 C.J. sec. 771, note 58, pg. 600: Republic Fire Ins. Co. v. Weide, 81 U.S. 308, 20 L. Ed. 894 (annotation); 3 Wharton's Criminal Evidence, sec. 1276, pg. 2143; 2 Wharton's Criminal Evidence, sec. 803, pg. 1384.

The court committed no error in admitting in evidence Prosecution's Exhibits 8 and 9.

9. Corporal Raymond Mayewski, Company E, 347th Engineers (Det) was sworn as an interpreter to interpret the testimony of the witness, Stefanski, a Pole (R12). The examination of Stefanski was conducted in the third person and in some instances it appears that the interpreter stated the substance of the witness's answers rather than literal translation thereof. In the course of the examination the interpreter admitted he was having difficulty in getting "the right phrase for him." (R.15). The Polish vice-consul was present in court and he was thereupon sworn as an assistant interpreter (R.16). Thereafter both the interpreter and assistant interpreter remained in the court room and assisted in the examination of the witness.

The fact that an interpreter uses the third person and states the substance of a witness's answers rather than translating them literally does not necessarily prejudice the rights of the accused. (CM 121582 (1918), Dig. Ops. JAG. 1912-40, par.473(2), pg. 396), although the better and recommended practice is for counsel to use the second person instead of the third person in addressing a witness.

"In our view the ideal way to examine a witness through an interpreter is to require the interpreter to be impersonal, and to require the attorneys to address no question nor remark to the interpreter. On the contrary, all questions should be directed to the witness in the second person. These questions should be repeated by the interpreter without any remarks of his own. The answer of the witness should be repeated literally by the interpreter in the first person, without any remarks of his own. That is to say, the interpreter should be a phonograph for the time being. This method, when followed, results in least confusion in the record. But it is often quite impracticable to enforce it. Some interpreters find it impossible to suspend their personality, and they talk of the witness in the third person. The attorneys often forgetfully address their questions to the interpreter, and then ask him what the witness said. It is a time when ... 'common sense' . . . is a great desideratum, and it needs to be well distributed and reasonably active in order to obtain the best results." Gregory v. Chicago, R.I. & P.R.Co., 124 N.W. 797, 800, 147 Iowa 715, Ann.Cas.1912B 723. (70 C22349931(a), pg. 495-496).

There was no objection by Defense Counsel as to the method of examination of the witness, Stefanski, through the interpreter, and since there is not even an implication in the record that the substance of the witness's testimony was not correctly presented to the court it is difficult to see how accused suffered any prejudice to his rights.

The presence of both interpreters in the court room at the same time was the equivalent of allowing two witnesses to be in the court room simultaneously. "An interpreter is a witness for the purpose indicated by the descriptive word." (Birmingham Rwy., Light and Power Co. v. Jung, 161 Alabama 461, 49 Southern 434, 440). The exclusion of witnesses from the court room is within the discretion of the court and its action "is not subject to review except in case of manifest abuse and prejudice to the party complaining." (64 C.J., sec.127, pg.118). In this instance the allowing of both interpreters in the court at the same time was within the discretionary powers of the court, and in the absence of direct showing that such action was prejudicial to the rights of accused the matter is not for consideration by the Board of Review.

10. Lieutenant Colonel John D. Boger (O-146652) Medical Corps was detailed to the court (SO No.16, 13 Dec 1942, Hq. SOS, ETOUSA). The record of trial shows that Lieut. Colonel John D. Roger (O-146652) M.C., was excused from attendance by verbal order of commanding officer. This is an obvious typographical error in the record. The officer who was designated as a member of the court and the officer who was excused from the trial are otherwise identified as the same person.

11. Considering the instant case on its merits, the fundamental and important question involved is obvious upon a reading of the record of trial: is the evidence legally sufficient to sustain the finding that accused was guilty of murder or does it only prove that accused was guilty of manslaughter, a lesser included offense?

Murder is defined thus:

"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.***" (M.C.M., sec.148, pg.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. pg.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.

(246)

CONFIDENTIAL

either express or implied." (Winthrop's Military Law & Precedents (2nd Ed.,) sec.1041, pg.672).

The important element of murder, to wit, "malice aforethought" has been analyzed by authorities as follows:

"The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent 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 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.) sec.1041, pg.673).

"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, pg.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, pg.640).

"Manslaughter is unlawful homicide without .

292

malice aforethought and is either voluntary or involuntary." (M.C.M., sec.149, pg.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 on some jurisdictions been made expressly to include a killing without malice in a sudden fray. 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, pg.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 the jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder or 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 accused, deceased, his friend Stefanski, Mrs. Wilkie, Sheina McLeod, Bolds, Childs and Kraft met under the railroad bridge. Deceased grasped Sheina McLeod by the arm and "tried to pull her away" (R.42). The McLeod woman appealed to Childs and an argument between Childs and deceased followed. It was at this point that accused entered the dispute and "punched" deceased. A fight between accused and deceased was the next episode in the course of events. It was of short duration, but during the fracas deceased kicked one of the soldiers on the ankle (R.43, 45). Bolds seized Stefanski, who was soon escorted from the scene of the disorder by other civilians, and the argument ceased (R.31, 43).

Beyond peradventure, accused bore a flesh wound on the upper right side of his abdomen and at the time of his physical examination (21 Nov.1942), the condition of the wound was consistent with its infliction a few days prior thereto (R.70), (Prosecution's Ex. 9). It was inflicted by some kind of a sharp instrument which pierced accused's blouse, shirt and undershirt (R.53, Prosecution's Ex.3). 292

Two wood chisels were removed from deceased's clothing at the morgue (R.62). The accused asserts that deceased stabbed him during the course of this fracas (R.55, 56, 57; Prosecution's Ex. 4). Bolds declares that accused, immediately at the conclusion of the fight, stated to him that he had been stabbed (R.31), and that at accused's request he (Bolds) went with accused to an alley where accused opened his clothes, and by the light of a match Bolds saw the wound (R.31, 32). The only fair and reasonable inference which can be drawn from this evidence is that accused was stabbed by the deceased by the use of one of the chisels during this personal conflict between the two men. There is no evidence in the record which contradicts this factual conclusion.

It also conclusively appears that the conflict between accused and deceased terminated, when Bolds seized Stefanski who was then taken away by other civilians. Stefanski states that "one of the boys grabbed him by the coat, and after they grabbed him by the coat, some civilians came up and took him under the arms and drug him away" (R.14). Broughton declares: "Well, as I was passing, I saw 3 soldiers and 2 civilians fighting, and that was the first thing I saw. It seems I saw some civilians get into a fight and some one stopped them, after that, there were 3 soldiers. They moved East, and the other 2 civilians, they moved West" (R.18, 19, 20, 21). Bolds testifies: "Then I went over there, I called over to one of the guys and pulled him out of the way. The argument ceased" (R.31). "It ceased, and we walked down the street" (R.37). The accused in his confession finally admitted that Bolds' version of the events is correct. Accused and deceased ceased fighting and immediately thereafter accused and Bolds crossed Argyle Street to an alley where accused showed Bolds his stab wound (R.55, Prosecution's Ex.4).

After the examination of accused's wound by Bolds, accused and Bolds recrossed to the North side-walk of Argyle Street and walked in a westerly direction to a point under the railroad bridge (R.19, 32) where accused discovered deceased. Without a word of warning accused stabbed deceased (R.19, 20, 32, 33, 43, 46) inflicting a mortal wound upon him.

It may be assumed that had accused stabbed deceased in the course of the initial mutual combat and the death of deceased had resulted, that accused would have been guilty of manslaughter and not of murder under the doctrine of CM: ETO 72, Farley and Jacobs (decided Nov.5, 1942). Under such assumption the necessary element of "malice afore-thought" so as to make the homicide murder would have been lacking. It would have been a killing upon sudden combat which operated "to create such passion as temporarily to unseat the judgment". The above assumption is probably more favorable to accused than a strict interpretation of the evidence justifies. The exceedingly short period of combat coupled with its sudden cessation certainly creates a reasonable inference that accused's deliberative mental processes and his power of reasoning had not been dethroned by his anger and passion. However, the Board of Review, makes such assumption in order to give the accused the benefit of the doubt. "If there is a reasonable doubt as to the guilt of an accused of a higher or lesser crime the court should convict him of the lesser."

(30 C.J., sec.558, pg.312; 23 C.J.S., sec.925, pg.206). Under this assumption accused's passion was aroused by deceased's act in stabbing him to the point where accused's powers of judgment and reasoning were temporarily dethroned. If this impairment of his deliberative faculties was operative when accused returned to the scene of the combat and administered the fatal blow to deceased, then accused was guilty of manslaughter - not murder. Stated oppositely, if accused's heat of passion had cooled when he stabbed deceased so that he was acting with deliberation and malice aforethought, then he was a murderer.

As has been demonstrated the evidence is uncontradicted that the initial combat ceased, and accused and Bolds crossed the street to the alley. It is also beyond dispute that accused knew he had been stabbed by accused before Bolds made an examination of the wound by the light of a match. Bolds states:

"Mickles came on down the street with me and he told me he was stabbed and he asked me to go across the street there." (R.31).****
"It ceased down, and we walked on down the street.**** Yes, That is when he told me he was stabbed." (R.37)

The applicable rule of law is stated thus:

"If before the homicide was committed, defendant's passion had cooled or if there was sufficient time between the provocation and the killing for his passion to cool, the killing will not be attributed to the heat of passion but to malice, and will be murder, although defendant's passion did not actually cool, and this principle is in some jurisdictions embodied in express statutory provisions. The question of cooling time does not arise where there is no adequate provocation, nor where the entire difficulty is one single transaction, nor where the killing is the result of reflection or deliberation, no matter how soon it follows the provocation. On the other hand, the killing need not follow immediately upon the provocation, and where an interval occurs, the question whether or not it is sufficient for cooling time must be determined by the circumstances attending each particular case. It is not necessary that the malice of defendant be shown by some act of hostility committed or threatened between the provocation and the killing. The exercise of thought, contrivance, and design in the mode of getting the weapon and replacing it immediately after the killing, or a temporary deviation of defendant's mind to some other

matter, or a reasonable time between the provocation and the killing, both indicate design and malice, rather than a killing in sudden heat." (29 C.J. sec. 133, pg. 1147)

"Where the fatal encounter did not immediately follow the provocation, and there is evidence of an outrage on defendant a short time before of sufficient moment to constitute adequate cause, the jury should be instructed to consider whether or not defendant had time to cool his passion before the killing, for if he had such time the act may have been the result of deliberation, which would be murder and not manslaughter, ****" (30 C.J. sec. 657, pg. 413)

"Cooling time dependent on circumstances. - Whether there has been cooling time is eminently a question of fact, varying with the particular case and with the condition of the party. There are some provocations which, with persons of even temperament, lose their power in a few moments; while there are others which rankle in the breast for days and even weeks, producing temporary insanity. Men's temperaments, also, vary greatly as to the duration of hot blood; and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal 'reasonable man,' but by that of the party to whom the malice is imputed. A man may be chargeable with negligence in not duly weighing circumstances which would have checked his passion, or which, when his passion was aroused, would have caused it more speedily to subside. But he is not chargeable with malice when he was acting wildly and in hot blood. Hence, whether there has been cooling time, so as to impute to the defendant malice, is to be decided not by an absolute rule, but by the conditions of each case." (1 Wharton's Criminal Law (12th Ed.) sec. 609, pg. 821).

From the foregoing statements of the principle of law involved, it will be seen that there are two methods of applying the doctrine of "cooling time":

- (a) The "Reasonable time" rule: if there is a sufficient period of time between the provocation and the killing for the accused to "cool his passions" the killing will be attributed to malice and will be murder, and the determination of this reasonable time is governed by the standard of an ordinary reasonable person.

- (b) The "dependent on circumstances" rule: "cooling time" is to be determined by the circumstances and conditions of each case whereby the question of malice is determined not by the standard of a "reasonable man", but by the standard of the accused thereby allowing consideration of the accused's individual temperament and of all of the circumstances involved in the killing.

The Board of Review is not required in this case to adopt one of these rules to the exclusion of the other. In fairness to the accused the Board of Review elects to consider the problem on the basis of both rules. Under either rule the questions as to whether there is a cooling time and as to whether or not the accused acted under heat of passion or with malice are essentially questions of fact within the exclusive and peculiar province of the court (See authorities cited supra).

- (a) The time element involved in the disorder is estimated by witnesses as follows:

WITNESS.	PAGE OF RECORD.	
Broughton	23,25,27.	Three to five minutes interval between departure of accused and Boldz to moment of stabbing deceased.
Wilkie	46	Fifteen or twenty minutes from time deceased asked Wilkie for cigarette to actual stabbing.
Stefanski	76	Five to eight minutes between time commencement of fight and time Stefanski learned of deceased's fall to ground.

As may be expected, there is some variance between the witnesses in their estimates of the time factor. However, it is manifest that the entire disorder must have occurred within the extreme limit of 20 or 25 minutes. The interval between the cessation of the initial combat between accused and deceased and the actual stabbing of deceased was probably not less than 5 minutes. The initial fight was of short duration and ended as suddenly as it commenced. Accused apparently knew instantly that he had been stabbed by deceased. He did not continue the fracas, but withdrew to examine his wound. Under such a situation the Board of Review cannot say that the Court was not justified in concluding that a sufficient period (although not proved with mathematical accuracy) elapsed within which a reasonable man would "cool his passions". A reference to decided cases in a question of this nature is not very helpful inasmuch as a question of fact for the Court is involved. However, a consideration of cases wherein the accused after adequate provocation by deceased, departed to secure a weapon and then returned and killed deceased, indicates that the Court in the instant case did not act

arbitrarily or without substantial evidence to support its conclusion:

Hawkins v. State, 25²⁰⁷ Ga., 71 Am.Dec. 166: Defendant went 250 yards.

Smith v. State, 103 Ala. 4, 15 South 843: Defendant went 100 yards.

People vs. Kerrigan, 147 N.Y. 210, 41 N.E. 494: Defendant was absent from five to fifteen minutes.

State v. Norris, 2 N.C. 429, 1 Am. Dec. 564: Defendant ran eighty yards and back.

State v. McCants, 28 S.C.L. 384: Defendant walked 225 yards.

People v. Fossetti, 95 Pac. (Cal. App.) 384: Defendant left room, procured pistol and returned.

In the foregoing cases the intervals of absence of the accused between the provocation and the killing were held sufficient "cooling time". Therefore, considering the time factor alone and applying to accused in the instant case the standard of an ordinary reasonable person, the Board of Review is of the opinion that there is substantial evidence in the record to sustain the conclusion that sufficient time elapsed to allow accused to "cool his passions" between the time when he was stabbed by deceased and the time when he returned and inflicted the mortal wound on deceased.

(b) The Board of Review, however, believes that when the evidence is examined within the purview of the "dependent circumstances" rule that the finding of the Court is on a particularly sound foundation. There is cogent evidence which strikingly reveals the accused's mental processes and the design and malice which motivated his conduct when he stabbed deceased.

1. In accused's confession (R.55, Prosecution's Ex. 4) the following appears:

- "Q. When you went back after showing Bolds where you had been stuck, what were you intending to do?
 A. I was intending to stick the fellow back.
 Q. Is that the reason you walked by him once and then back again?
 A. Yes sir.
 Q. When you saw him standing against the wall, was anyone holding him there?
 A. No sir.
 Q. You recognized the white man at this time as the white seaman in the blue raincoat as the man who stabbed you?
 A. Yes sir.
 Q. When you recognized him, how near were you to him?
 A. I was right up to him.
 Q. Did you say anything to him?
 A. No sir.

234995

- Q. What did you do?
 A. I just stuck him with my knife.
 Q. Was the knife in your hand?
 A. I walked up to him. I had my hands in my coat pockets and then pulled my knife out of my coat pocket and stabbed him.
 Q. Did he make any movement towards you before you stabbed him?
 A. When I walked up to him, he had one of his hands in his coat pocket, and one of his feet stuck out aways, and when I walked up to him, he pulled his foot back in and I stabbed him.
 Q. Did you realize when you stabbed him that it might kill him?
 A. No sir, I didn't.
 Q. What did you think it would do to him?
 A. Well sir, I wasn't thinking at the time.
 Q. You just wanted to stab him?
 A. I just wanted to let him know how it felt when he stabbed me." (R.55, 56). (Underscoring supplied).

The corpus delicti and the fact that accused killed deceased were established by substantial evidence independent of accused's confessions. The confessions are therefore particularly illuminating in determining accused's mental attitude at the exact moment he stabbed deceased. (M.C.M., par.114, pg. 115).

2. Bold's testimony shows that accused knew he had been stabbed almost at the moment the initial combat ended when accused asked Bold's to cross the street to the alley in order to examine his wound (R.31). At the time of the examination accused said to Bold's that "nobody was going to stab me and get away with it" (R.32, 37). Upon being asked as to whether accused was swearing and cursing when he said that, Bold's answered "No" (R.37). Bold's was also asked if accused yelled "real loud, or did he just say it in an ordinary voice?" Answer: "He just talked" (R.37). Bold's told accused that he had to get back to go on guard (R.33, 37). Accused said "Come over across the street now to get this taxi" (R.33, 37). The taxi stand was at the opposite end of the bridge (R.38) and it was necessary to pass under the bridge in order to reach it. Accused was walking next to the wall (R.37) and when opposite deceased he leaned over and identified deceased and stuck him with the knife (R.37). Bold's was asked: "Did Sammie appear to be awfully excited when he walked down there?" The answer was: "No, sir". Bold's did not stop but proceeded on ahead. When accused joined him a moment later he was wiping the blood off of the knife (R.33, 37). Earlier in the evening accused displayed the knife while in the "Penny Arcade" when he was engaged in an argument with a civilian (R.32, 41).

The foregoing does not create even an implication that accused was under the influence of anger or passion when he stabbed deceased. His actions and language bespeak no distraction, mental agitation, frenzy or anger. He was not excited nor did he speak in a loud voice - "He just talked". Accused's conduct did express, affirmatively a cold-blooded determination to secure revenge - "I intended to stick the fellow back",

"I just wanted to let him know how it felt when he stabbed me." After Bolds protested he must leave for guard duty accused induced him to return across the street with him on the pretext they would seek a taxi. Bolds asserts he was unaware that accused intended to make any attack. "I wasn't looking for anything to happen" (R.39).

The picture presented is that of accused deliberately and vindictively planning to secure his revenge upon deceased with a ruthless disregard of the consequences. His savage, barbaric impulses were aroused and he responded to the "law of the jungle". With premeditation and malicious cunning he sought to punish, in his own manner, the individual who had wronged him. There was no beclouding of his mental processes with anger or passion so that reason was dethroned. Rather his mentality was consciously at work, planning the act of violence which resulted in the death of deceased.

There is therefore not only substantial evidence in the record to support the finding that sufficient time elapsed between the cessation of accused's initial conflict with deceased and the stabbing of deceased to enable accused to cool his anger and passion, but also to prove affirmatively that accused acted with malice aforethought and deliberately planned the stabbing of deceased. After allowing accused the benefit of all reasonable doubts and giving him the advantage of the "mutual combat" rule to its full extent, the conclusion above stated appears to be irrefragable.

The Board of Review is therefore of the opinion that the record is legally sufficient to sustain the finding of guilty of murder.

12. Accused was convicted of murder under the 92nd Article of War - "Any person subject to military law who commits murder **** shall suffer death or imprisonment for life as a court-martial may direct***" The Court prescribed the death penalty and in addition sentenced accused (1) to be dishonorably discharged the service and (2) to forfeit all pay and allowances due or to become due. These last two mentioned elements of the sentence are not affirmatively prescribed by the statute as part of the penalty for the crime of murder when the Court elects to sentence the accused to death. The question, therefore, arises as to whether the Court exceeded its authority in including them in the sentence.

With reference to the construction and interpretation of penal statutes, Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat, 75, 94; 5 L. Ed. 37, 42, announced a rule that is fundamental:

"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. It is the legislature, not the court, which is

to define a crime, and order its punishment.***

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. To determine that a case is within the intention of a statute, its language must authorize us to say so." (5 Wheat 94; 5 L. Ed., pg. 42).

This rule has been elaborated by the following authorities:

"Criminal and penal statutes must be strictly construed; that is, they cannot be enlarged or extended by intendment, 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. **** 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. **** 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, pgs. 460-464).

"Whenever a statute creates an offense, and expressly provides a punishment, the statutory provisions must be followed strictly and

292

exactly, and only the statutory penalty may be imposed." (1 Wharton's Criminal Law, sec. 31, pg. 48).

The practical application of these principles is well demonstrated by the following decision of the Supreme Court of the United States:

Elliott, Collector, v. The East Pennsylvania Railroad Company, 99 U.S., 463, 25 L. Ed., 292:
 A Federal Revenue Act prescribed a penalty of \$1000 for default of any corporation in making a certain tax return or for failure to pay the tax. Plaintiff claimed that the defendant was liable for the \$1000 penalty and also for a 5% penalty and interest at 1% per month under another statute applicable to internal revenue taxes. The court held that inasmuch as Congress had declared specifically the penalty of \$1000, and no more, for failure to make the return or pay the tax that additional penalties from other general statutes would not be implied, saying: "Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced."

In authorizing the death sentence for offenses committed in violation of the 92nd Article of War, Congress used clear and unambiguous language. There are no qualifying words or phrases. There are no words capable of bearing more than one meaning. There is nothing to interpret or construe, and there is no basis for an implication that Congress intended, when the death sentence is applied, to authorize also the imposition of an additional punishment. "Shall suffer death" cannot be extended to read "Shall suffer death and also dishonorable discharge, and forfeiture of all pay and allowances due or to become due".

The 92nd Article of War is highly penal; it prescribes as punishment for the crimes therein denounced either death or life imprisonment - the two most severe criminal penalties.

The sentence is mandatory with respect to the two designated punishments. The convicted accused "shall suffer death or imprisonment for life, as a court-martial may direct." The court is allowed an election, in selecting the penalty to be adjudged from the two stated in this statute, in order to make it fit the crime and the criminal, but when such election is made the discretionary power of the court is exhausted.

The Manual for Courts-Martial confirms the conclusion that the penalties prescribed for violation of the 92nd Article of War are mandatory -- "either death or imprisonment for life is mandatory for murder and rape". (M.C.M. par. 103, pg. 93).

Inasmuch as the 92nd Article of War (1) is free from uncertainties and ambiguities with respect to the designation of death as one of the authorized punishments; (2) is mandatory within the limits of the two methods of punishment authorized - death and life imprisonment, and (3) is highly penal, it follows that the canon of "strict construction", as announced and supported by the authorities herein above set forth, should be applied with full vigor.

"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 and Precedents, (Reprint 1920), pg.395).

Death is the extreme penalty visited by the law upon malefactors. Both reason and conscience dictate the conclusion that Congress was satisfied justice would be vindicated when a convicted accused is executed. Such a death is a permanent and irrevocable termination of Military service and the concomitant right to future pay and allowances. It carries an ignominy and disgrace more cogent than that arising from a dishonorable discharge.

With regard to forfeiture of pay Winthrop writes:

"This, though in terms authorized as a punishment by the Article of War in one instance only -- viz. by Art. 101 in connection with suspension from command-- is in fact authorized, by the usage of the service, wherever the sentence is discretionary with the court, and in cases of soldiers, is the most frequent of all the military punishments. (Underscoring supplied). (Winthrop's Military Law & Precedents - Reprint, 1920, pg. 427).

As to dishonorable discharge the same author also notes:

"Dishonorable discharge, though not expressly required or authorized to be adjudged for any particular offense by the Articles of War, is indicated in general terms by Art. 4, as a penalty which courts-martial may award, and is recognized in the Army Regulations, (par. 1019), as a legal punishment for

CONFIDENTIAL

(258)

enlisted men: it may thus be imposed wherever the sentence rests in the discretion of the court. (Underscoring supplied). (Winthrop's Military Law & Precedents, reprint, 1920, pg.433).

The above quotations are applicable under the present Articles of War and Manual for Courts-Martial. Sentences of dishonorable discharge and total forfeitures are particularly applicable where the sentences are discretionary with the court but manifestly when Congress has prescribed the sentences there is no opportunity remaining for the exercise of discretion by the court. There is of course, a necessary exception in the case of the sentence of life imprisonment. It is unthinkable that penitentiary confinement for life should be imposed without permanently separating the convicted accused from the service. As a consequence, although Congress made no mention of dishonorable discharge in fixing the penalty for murder and rape under the 92nd Article of War, a court, in the event it determines upon life imprisonment, should accompany such sentence with dishonorable discharge. (M.C.M., par. 103, pg.92). (Cf.; Dig. Ops. JAG. 1912-30, sec. 1387, pg. 688; Dig.Ops. JAG., 1912-40, sec.402(4), pg.250)..

The Board of Review has heretofore held that, when a court sentences an accused to life imprisonment for violation of the 92nd Article of War, it is authorized to include the penalty of dishonorable discharge, but is not authorized to include the additional penalty of forfeiture of all of accused's pay and allowances, due or to become due. (CM. ETO. 268, Ricks (decided - February 1943)).

It is therefore the considered opinion of the Board of Review that the part of the sentence in the instant case forfeiting all pay and allowances due or to become due to the accused and of dishonorable discharge, is surplusage and void and should not be confirmed.

The sentence, however, is not void in toto but is valid as to that part thereof extending to the death sentence. The court had the undisputed power to impose the penalty of death. The sentence is therefore separable and the void part thereof must be disregarded (United States v. Pridgeon, 153 U.S. 48, 38 L. Ed. 631; 16 C.J., sec.. 3093, pg. 1312; 24 C.J.S., sec. 1584, pg. 112).

13. The accused is 23 years old. He was inducted into the military service on 13 March 1941.

14. The court was legally constituted. No errors injuriously

CONFIDENTIAL

(259)

affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence of death, but legally insufficient to support that part of the sentence requiring the dishonorable discharge of accused and the forfeiture of his pay and allowances due or to become due.

B. Franklin Kite Judge Advocate.

W. Van Dusen Judge Advocate.

O. J. Job Judge Advocate.

1st Ind.

WAR DEPARTMENT, JAGO, ETOUSA, APO 871; 23 FEB 1943 TO: Commanding General, ETOUSA, APO 887.

1. Herewith transmitted is the record of trial, together with the opinion of the Board of Review, in the case of Private First Class Sammie Mickles (34021930), 226th QM Company (Salv Coll).

2. Upon trial by general court-martial, this soldier was found guilty of the crime of murder in violation of the 92nd Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be hanged by the neck until dead, at such time and place as may meet the convenience of the reviewing authority. The reviewing authority approved the sentence except the words "at such time and place as may meet the convenience of the reviewing authority," the inclusion of which was disapproved, and forwarded the record of trial to you, for your action, under Article of War 48.

3. Prior to your action thereon, you referred the record to me under the provisions of Article of War 46, and, in order to expedite final action in the case, and more especially to insure to the accused the independent and impartial examination of the record of trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Articles of War 48 and 50 $\frac{1}{2}$, under the provisions of the latter article and, before examination by me, I referred the record to the Board of Review for its examination and opinion. Normally, pursuant to instructions of The Judge Advocate General, action by the confirming authority (other than the President) is required, under the provisions of the third paragraph of Article of War 50 $\frac{1}{2}$, before the record is

referred to the Board of Review and Assistant Judge Advocate General. However, your reference of the record to me, prior to your action thereon, under the provisions of Article of War 46, which expressly authorizes such reference, since I, as Assistant Judge Advocate General, have, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, with respect to this case, like powers and duties as The Judge Advocate General, changes the normal situation indicated above. Under such circumstances, should I pass on the record under Article of War 46, in lieu of and as your staff judge advocate, and return the record for your action prior to its examination by the Board of Review, it would then be necessary, after your action, for the Board of Review and myself, as Assistant Judge Advocate General, to examine the record to determine its legal sufficiency. Such a procedure would deny the accused the independent review of the record by the Board of Review, provided by Article of War 50 $\frac{1}{2}$, since the record of my examination and my recommendation under Article of War 46 would be part of the file of the case when it reached the Board of Review. It would also place me in the anomalous position of acting as staff judge advocate under Article of War 46 before the review by the Board of Review and as Assistant Judge Advocate General after such review under Articles of War 48 and 50 $\frac{1}{2}$. In my opinion, to follow such a procedure would deny the accused a substantial right given him by Articles of War 48 and 50 $\frac{1}{2}$. On the other hand, following the procedure I have adopted denies the accused nothing, but fully protects his rights. I am convinced this is the procedure The Judge Advocate General would follow on a reference to him, under Article of War 46, for the reason that, in such event, he would occupy the dual role of staff judge advocate and The Judge Advocate General, as he does when the President is the confirming authority, and would follow the procedure prescribed for the latter class of cases.

4. The Board of Review summarizes the evidence in the accompanying opinion and holds that the record is legally sufficient to support the findings and the death sentence and to warrant confirmation of such sentence, but legally insufficient to support that part of the sentence imposing dishonorable discharge and total forfeitures. I have carefully examined the record and concur in the opinion that the record is legally sufficient to support the findings and the death sentence and to warrant confirmation of such sentence.

5. Under the evidence in this case there is for determination the very important question as to whether accused was guilty of murder (carrying mandatory penalties of death or life imprisonment as the court may elect) or manslaughter (carrying a maximum sentence of dishonorable discharge, total forfeiture and penitentiary imprisonment for 10 years). This determination turns on whether the fatal blow was struck in the heat of passion; or whether after the initial fight accused's passion had cooled. The accused and deceased, one Jan Ciapciak, a Polish citizen and a merchant seaman, engaged in a fist-fight which was of short duration and was terminated by the intervention of bystanders. Accused was stabbed by deceased (who probably used a chisel which was discovered in his clothing after death) during this melee. The wound was but slight and amounted to no more than a small flesh wound.

234995

- 30 -

292

The evidence irrefutably establishes that accused was immediately aware of his injury. He left the scene of the fight, crossed the street with a soldier companion and examined the wound by the light of a match. Accused and his companion then recrossed the street and discovered deceased standing against a wall. Without speaking and without movement or word by deceased, accused stabbed deceased in the chest with a knife of the dirk type, the blade being about 5 inches in length, inflicting the injury from which deceased died prior to arrival at a hospital. The time between the termination of the initial combat and the fatal stabbing was between 5 and 10 minutes. The evidence negatives the idea that accused when he stabbed deceased acted under heat of anger and passion to the degree that his reason was dethroned. Rather it affirmatively appears that he acted with premeditation and malice aforethought, and was motivated by a spirit of revenge. The homicide was an exhibition of the "law of the jungle" - "eye for eye" and "tooth for tooth." The Board of Review has made a careful, painstaking examination of the evidence and the legal authorities, and its conclusion, in my opinion, is legally sound.

6. The court sentenced accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead "at such time and place as may meet the convenience of the reviewing authority." In approving the sentence the reviewing authority excepted therefrom the clause "at such time and place as may meet the convenience of the reviewing authority." This action was obviously proper and has my approval. The Board of Review holds that the part of the sentence imposing dishonorable discharge and forfeiture of pay and allowances due or to become due is void and of no legal effect, but that the death sentence is valid. Inasmuch as the illegal parts of the sentence are separable from the valid portion, the Board of Review concludes that the record is legally sufficient to sustain the sentence of death. I concur in this conclusion for the reasons contained in the opinion of the Board of Review, and inasmuch as the discussion of the question by the Board of Review is exhaustive I do not think it necessary to comment further.

7. The reviewing authority has expressed the belief "that the ends of justice will be attained by commuting so much of the sentence as provides for hanging to imprisonment for life" and recommends such commutation. In this recommendation I concur. In my opinion while the evidence shows no legal provocation for the act of accused, there did exist what may be termed a mitigating provocation sufficient to place the crime in that class where the ends of justice and the demands of discipline will be served by a sentence of dishonorable discharge, total forfeiture, and life imprisonment.

8. Without recommending such action it is my duty to point out to you that, in a case of this kind, you are authorized under the 51st Article of War to suspend the sentence until the pleasure of the President be known, in which event the record of trial, together with a copy of your order of suspension, should be

234995

- 31 -

292

(262)

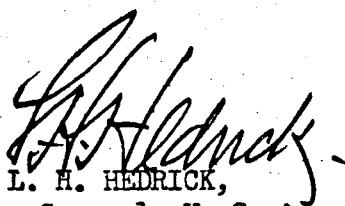
CONFIDENTIAL

immediately transmitted to the President.

9. Inclosed herewith are forms of action to accomplish any one of the following alternatives:

- a. Confirming the sentence and ordering its execution.
- b. Commuting the sentence, and as thus commuted, confirming the same and ordering its execution.
- c. Suspending the sentence and forwarding it to the President for his action under the 51st Article of War.

For the reasons stated above, I recommend commutation and, accordingly, that you sign form of action b.



L. H. HEDRICK,
Brigadier General, U. S. Army,
Judge Advocate General,
European Theater of Operations.

5 Incls:

- Record of trial.
- Opinion of Board of Review.
- Forms of action (3).

(Sentence commuted to dishonorable discharge, total forfeitures and confinement for life. As thus commuted, sentence confirmed and ordered executed. GCMO 3, ETO, 1 Mar 1943)

234995

292

CONFIDENTIAL

CONFIDENTIAL

(263)

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

Board of Review.

26 MAR 1943

ETO 314.

U N I T E D S T A T E S)	EASTERN DEFENSE AREA
v.)	UNITED STATES ARMY FORCES
	IN ICELAND.
Private JAMES C. MASON, (34010456),)	Trial by G.C.M., convened at
of Company "L", 118th Infantry.)	Camp Krossastadir, Iceland,
	30 October 1942. Sentence:
	Dishonorable discharge,
	forfeiture of all pay and
	allowances and confinement at
	hard labor for two years.
	United States Disciplinary
	Barracks.

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

1. The record of trial in the case of Private James C. Mason has been examined in the Office of the Judge Advocate General for the European Theater of Operations and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review which submits this, its opinion, to the Judge Advocate General for the European Theater of Operations.

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

CHARGE I: Violation of the 64th Article of War.

Specification: In that Private James C. Mason, Company "L", 118th Infantry, having received a lawful command from First Lieutenant James E. Work, Company "L", 118th Infantry, his superior officer, to continue his bayonet practice, did at Camp Fagriskogur, Akurejri, Iceland, on or about September 2, 1942, willfully disobey the same.

241103

CONFIDENTIAL

314

CONFIDENTIAL

(264)

CHARGE II: Violation of the 65th Article of War.

Specification 1: In that Private James C. Mason, Company "L", 118th Infantry, did, at Camp Fagriskogar, Akureyri, Iceland, on or about September 2, 1942, strike Sergeant Carroll A. Gainey, Company "L", 118th Infantry, a noncommissioned officer who was then in the execution of his office, by striking him on the leg with his bayonet.

Specification 2: In that Private James C. Mason, Company "L", 118th Infantry, did, at Camp Fagriskogur, Aukrejri, Iceland, on or about September 2, 1942, threaten to strike, Staff Sergeant John W. Ewings, Company "L", 118th Infantry, a noncommissioned officer on the arm with his bayonet, while said noncommissioned officer was in the execution of his office.

Specification 3: In that Private James C. Mason, Company "L", 118th Infantry, did at Camp Fagriskogur, Aukreyri, Iceland, on or about September 2, 1942, use the following insulting language toward Staff Sergeant John W. Ewings, Company "L", 118th Infantry, a noncommissioned officer who was then in the execution of his office, "Go fuck yourself, I won't do it", or words to that effect.

He pleaded not guilty to Charge I and its Specification, and Specification 2, Charge II; guilty to Specification 1 of Charge II and to Charge II; not guilty to Specification 3, Charge II as stated, guilty of the Specification if the words, "I won't do it" are stricken out. He was found guilty of all Charges and Specifications;; Specification 3 of Charge II by substitution and exception. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six years. The reviewing authority approved the sentence but suspended the dishonorable discharge until the release of accused from confinement; remitted four years of the sentence; and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and directed that accused be confined in the United States Prison Stockade until further notice.

The result of the trial was promulgated in General Court-Martial Order No. 5, Headquarters, Eastern Defense Area, U.S. Army Forces in Iceland, dated 12 January 1943.

241103

- 2 -
CONFIDENTIAL

314

3. The accused on 2 Sept 1942 was a member of Company "L", 118th Infantry stationed at Camp Fragriskogar, Akureyri, Iceland. On that date the platoon of which accused was a member was engaged in bayonet drill. Staff Sergeant John W. Ewings, Company "L", 118th Infantry gave the commands and Sergeant Carroll A. Gainey, Company "L", 118th Infantry was the guide and observer. He was directed by Ewings to correct errors and defects in performance of the men (R.5,6,7,8). Ewings gave the command "On guard to long thrust" (R.5,7). Gainey, in the performance of his duties, came to accused and observed that accused was leaning backwards (R.7). Gainey informed accused he was in a wrong position which accused denied (R.7). In order to demonstrate to accused his mistake Gainey touched the end of accused's bayonet and this threw him off his balance (R.6,7,8). Accused immediately upon regaining his balance struck Gainey on the leg with his bayonet (R.6,7,10) and cursed him (R.7). Ewings, seeing the disturbance, approached Gainey and accused (R.6,7). Accused then cursed Ewings (R.7,10) and swung at him (R.6). Ewings grabbed the gun and pulled it out of accused's hands (R.6,7), and ordered Gainey to take accused to Lieut. Work, accused's immediate commanding officer (R.6,7,9). Accused said: "I am not going any God-damn wheré" (R.6). Gainey put a clip of ammunition in his rifle (R.6,8) and said to accused, "Yes, you are" (R.6). Accused said to Gainey, two or three times: "I will kill you" (R.6). Gainey then escorted accused to Lieut. Work (R.7), who directed Gainey to take accused back to the platoon and go on with bayonet practice (R.7). Gainey ordered accused to return to his work but accused refused (R.7). Thereupon Lieut. Work ordered accused to go back to the platoon and to continue bayonet practice (R.7,9). Accused refused stating that he was not going, but would rather go under guard (R.7,9). Lieut. Work then placed him under guard (R.7).

4. During the course of presentation of evidence on behalf of the defense, defense counsel stated to the Court that accused wished to take the stand (R.10). The following colloquy occurred:

"President: Has the defense explained to you that you do not have to take the stand to make a sworn statement?

Accused: No Sir.

Defense: May I refresh his memory about that?

President: You understand that you may remain silent or make an unsworn statement, and that by making a unsworn statement, the court will consider it. But if you make a sworn statement, the trial judge advocate may ask questions leading out of the offense, or any member of the court, the answers which may prove whether or not you are guilty.

Defense: Could the defense ask the court to consider an inquiry into the sanity of the accused at this time?

President: Such a request may be brought up at any time. What is the basis for this request?

241103

- 3 - CONFIDENTIAL

314

CONFIDENTIAL

"Defense: I think the actions of the accused in court would render some questions as to his stability and judgement and all. Testimony that has been brought before the court would bear out the same thing I believe. I cannot mention his record or past actions.

President: The only evidence you have to offer at this time is the actions of the accused in court. Does the trial judge advocate have anything further to offer in connection with this.

Prosecution: No Sir.

The court was then closed and upon being opened, the members of the court, the personnel of the prosecution and defense, and the accused and the reporter resumed their seats.

President: The court has considered the motion of the defense, that the sanity of the accused be investigated. The court has determined that such an inquiry is necessary in the interest of justice. The trial judge advocate will report this matter to the appointing authority with a recommendation that the accused be examined by a Board of Officers in accordance with paragraph 35 MCM 1928, and that the officer or officer's conducting the examination be made available to this court as witnesses. This case will be continued at such time as the decisions of the appointing authority are determined." (R.10,11).

The Court thereupon on 30 Oct 1942 continued the case awaiting the decision of the appointing authority (R.12).

Thereafter on 12 Dec 1942 the court reconvened (R.12) and proceeded to consider the report of the Board of Officers appointed to investigate the sanity of the accused. The record is entirely silent as to any further action with respect to accused appearing as a witness on his own behalf (R.12). However, after members of the Board of Officers had been examined and their report admitted in evidence (R.15,16,17,18) the defense offered one witness (2nd Lt. De Lissovoy) who was examined by defense counsel. The prosecution declined to offer further evidence and waived its right of opening argument (R.18). The President of the Court then asked the defense if it had anything further to offer. Defense counsel replied: "The defense would like to make a closing statement." (R.18), and proceeded with his remarks (R.19) .

While the procedure followed by the Court with respect to accused's rights under M.C.M. par.76, p.61; par.120c, p.125; and par.121b, p.127, is not as complete or explicit as efficient and proper practice dictates, the President did make an explanation to

241103

- 4 -
CONFIDENTIAL

314

accused of his rights. Whether he understood the explanation is not made clear by the record. However, it is proper to presume the accused received from defense counsel explanation of his rights to testify or remain silent (M.C.M. sec.45e, p.35) and upon reconvening of Court, reconsidered his decision to testify and elected to remain silent. The failure of the Court to amplify its explanation to accused of his rights and to determine definitely whether he understood them specifically was a procedural irregularity at the most (CM 154354, Marion; CM 211976, Palmer). Inasmuch as full opportunity was afforded accused either to appear as his own witness or to make an unsworn statement either orally or in writing, no prejudice to his rights are observable.

5. The evidence is indisputable that Lieut. Work, accused's superior officer, gave him an order to return to the platoon and resume bayonet exercise (R.7,8,9). There is no doubt in the least that accused knew Lieut. Work was his superior officer; that he understood the order and deliberately refused to obey same. The order related to military duty and Lieut. Work was authorized to give it. Accused's conduct constituted a violation of the 64th Article of War (M.C.M. par.134b, p.148,149; CM 223336 (1942), Bul. JAG., Aug 1942, par.422, p.159; CM 220890 (1942), Bul. JAG., Jan-June 1942, par.422, p.18).

The Board of Review believes it should distinguish the facts in this case from those involved in two cases recently considered by it, viz: CM. ETO 108, Abrams and CM. ETO 110, Bartlett so that no misunderstanding will arise in the application of the rule announced in the last mentioned cases. In the Bartlett case the Board of Review said:

"The Board of Review does not now hold that every order given by an officer to a soldier after a like order has been given by a non-commissioned officer to the soldier (and the soldier has refused to obey the same) constitutes an order given with the intention of increasing the penalty and is therefore void. On the contrary, the Board of Review recognizes the fact that probably in most instances such order of the superior officer would not be subject to the criticisms made of the order in the instant case. The facts and circumstances which surround the giving of the order are of great importance in determining its purpose. The circumstances and conditions under which Capt. Archer gave the order in this case, were such, in the opinion of the Board of Review as to compel the conclusion that the order was given with the deliberate purpose of increasing the punishment which might be imposed upon accused.

241103

- 5 - CONFIDENTIAL

314

"This conclusion is strengthened by Capt. Archer's obscure and uncertain testimony concerning the terms of the order itself and of the incidents surrounding the episode. The Board of Review considers it highly desirable that its instant opinion be read and considered with the limitation herein set forth."

The accused in the present case was taken before Lieut. Work by Sergt. Gainey pursuant to orders of S/S Ewings. Gainey thereby became a guard over accused. The Lieutenant directed the guard, Gainey, to return accused to the platoon and continue the drill. Such order of the Lieutenant to the guard was the proper method of directing accused's actions rather than giving the order directly to accused. However, when accused flaunted Gainey's authority it was the duty of the Lieutenant to see that it was respected. It was then that the officer gave the direct order to accused which he deliberately disobeyed. The accused was with the Lieutenant and Gainey during the entire episode. He heard the Lieutenant's order to Gainey and he defied Gainey in the Lieutenant's presence. The facts themselves refute the idea that the Lieutenant gave the order to accused in order to increase the punishment to which accused would subject himself for his misconduct. Rather, they display proper disciplinary control by the officer over a recalcitrant soldier. The circumstances and conditions under which the order was given accused clearly distinguish the instant case from the Abrams and Bartlett cases.

In the opinion of the Board of Review the record is legally sufficient to sustain the finding of guilty of Charge I and its Specification.

6. Accused pleaded guilty to Specification¹ of Charge II. The evidence is succinct and convincing that accused struck Gainey with his bayonet while Gainey was properly engaged in instructing accused in its use. It was an assault upon a non-commissioned officer who was then in the execution of his office. There was no provocation for accused's act. Gainey's method of demonstrating to accused his faulty stance was an ordinary method of instruction. There is not even an implication that Gainey used unusual or extraordinary force. The Board of Review is of the opinion that the record is legally sufficient to sustain the finding of guilty of Specification 1, Charge II. (CM 211978, Riddle; CM 211996, Giddens; MCM. par.135a, p.149).

7. The evidence in support of Specification 2 of Charge II, viz: threatening to strike S/S Ewings, a non-commissioned officer while the latter was in the execution of his office, is sketchy. Ewings testified: "I ran down to where they were and tried to get hold of the rifle and he (meaning accused) swung at me". (Underscoring supplied) (R.6). Gainey testified: "Sergeant Ewings came up and

he (meaning accused) cursed him. Sergeant Ewings got the rifle away from him about that time, and told me to take him to Lieutenant Work" (R.7). Pvt. Vernon Johns, Co. "L", 118th Infantry, a witness for the prosecution was interrogated and testified as follows:

"Q - Did you see Private Mason hit Sergeant Gainey?
A - Yes Sir.
Q - Immediately after that did you see Private Mason attempt to strike Sergeant Ewings?
A - No Sir.
Q - He argued, but did not attempt to strike him?
A - No, Sir." (R.10).

The above is all of the evidence relevant to this particular issue. It is apparent there is a conflict in the testimony of Ewings and Johns, while Gainey states that accused cursed Ewings, but is silent as to whether accused threatened to strike Ewings. The gravamen of the offense charged is found in the phrase "Any soldier *** who attempts or threatens to strike or assault *** a non-commissioned officer while in the execution of his office" (AW 65).

"The part of the Article relating to assaults covers any unlawful violence against a warrant officer or a non-commissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward application." (MCM., par.135a, p.149).

There is a very definite distinction between threatening to strike a person and attempting to strike a person. The former offense stops short of the overt act - a physical demonstration of force; the latter stops short of actually inflicting the battery upon the victim.

"The term 'threat' is very broad and indefinite, including almost any kind of an expression of intention of one person to do an act against another. Ordinarily it signifies intention to do some sort of harm, and is a declaration of an intention or determination to injure another by the commission of some unlawful act. A 'threat' in criminal law is a menace or declaration of one's purpose or intention to work injury to the person, property, or rights of another, with a view to restraining a person's freedom of action." (62 C.J., sec.1, p.932).

241103

CONFIDENTIAL

"Threats may be communicated by signs or by actions as fully and thoroughly as by word of mouth." (Armstrong v. Vicksburg etc. R. Co., 16 Southern 468; 46 La. Ann, 1448).

"At common law, simple threats without intent thereby to influence the acts of the person threatened did not constitute a crime although sufficient to invoke security to keep the peace." (U.S. v. Mitzdorf, 252 Fed. 930, 937; 62 C.J., sec.2, p.932).

"An attempt to commit a crime consists of three elements: (1) The intent to commit the crime; (2) performance of some act toward the commission of the crime; and (3) the failure to consummate its commission. It is sometimes said that it is compounded of two elements: (1) The intent to commit it; and (2) a direct, ineffectual act done towards its commission; but it is obvious that the second element in the latter statement includes the second and third elements in the former. A failure to consummate the crime is as much an element of an attempt to commit it as the intent and the performance of an overt act toward its commission. The elements necessary to constitute an attempt must coexist. No degree of intent will of itself suffice to constitute an indictable attempt to commit a crime, no matter how evil or malignant it may be; nor can an act alone constitute an attempt, no matter how well adapted it may be to effect a criminal result, unless coupled with an intent." (16 C.J., sec.92, p.113).

"In order that there may be an attempt to commit a crime, whether statutory or at common law, there must be some overt act in part execution of the intent to commit the crime, but which falls short of the completed crime, the difference between attempt and commission being that the act or step fails to produce the result intended. *****
No definite rule, applicable to all cases, can be laid down as to what constitute an overt act or acts tending to accomplish a particular crime. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom. It is well settled, however, that something more than

241103

"mere preparation or planning is essential. The accused must take at least one step beyond preparation, by doing something directly moving toward and bringing him nearer the crime he intends to commit. *****
The act relied upon need not be an act which is ordinarily a part of the criminal transaction itself, but may be one which, although somewhat remote, leads up to it.

Mere words are insufficient except in certain cases. *****

The term 'act', however, is to be liberally construed, and whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt.

No violence, or wrongfulness except in the purpose need be present, and it has been held that the act need not possess any element of an assault. *****"

(16 C.J., sec.93, p.113-114-115).

"To convict one of an attempt to commit a crime it is necessary to show that the overt act was done with the specific intent to commit that particular crime. Such intent is essential.***"
(16 C.J., sec.94, p.115).

It is therefore manifest that the 65th Article of War creates an offense non-existent at Common Law by making it criminal for a soldier to threaten to strike a non-commissioned officer. Congress intended thereby to protect non-commissioned officers from threatened violence of a soldier which did not amount to an attempt. Mere application of profane or obscene epithets to a non-commissioned officer does not constitute a threat because the Article specifically and separately condemns the use of "threatening or insulting language". When the accused "cursed" Ewings and "argued" with him he was not making a threat. He was using "insulting language" but he is not charged with that offense. However, he did something more - he "swung" at Ewings. The record does not reveal whether accused used his fists or his rifle. From this aspect of the evidence it would appear that accused's conduct passed into the domain of an "attempt". However, the fact that accused also made an attempt to strike Ewings does not deny the fact that the applying of profane or obscene language to Ewings plus the attempt to strike might easily constitute a most serious threat. While the dividing line between threats and attempts is a fine one depending almost entirely upon the commission of an overt act by accused in order to constitute the latter offense, it does not by any means follow that because an attempt is proved that such proof erases evidence that might also

241103

CONFIDENTIAL

prove a threat. Care and discrimination must be used in applying this doctrine. Proof of a threat only cannot sustain a conviction for an attempt. However, the proof of an attempt may include within its ambit, evidence that will sustain a charge of making a threat. This is essentially a question of fact for the Court. While the evidence in this case is not as specific or sharply hewn as could have been developed by a few well chosen additional questions, there is sufficient evidence to sustain the Court's finding. Beyond that conclusion the Board of Review will not venture; otherwise it would be substituting its judgment and discretion for that of the Court.

The Board of Review is of the opinion that the record is legally sufficient to support the finding of guilty of Specification 2 of Charge II.

8. Specification 3 of Charge II charges accused under the 65th Article of War of using the following insulting language towards Ewings: "Go fuck yourself, I won't do it". (hereinafter designated "language charged"). The proof without contradiction shows that accused used the words: "I am not going no God-damn where" (hereinafter designated "language proved"). Such was Ewings testimony (R.6), and the Court found, by exception and substitution, that accused was guilty of using the "language proved" and not guilty of using the "language charged". There is, therefore, an apparent variance between the allegation and the proof, and the question is whether it is fatal to the finding.

"When certain abusive, insulting and vulgar language was alleged to have been used, and the proof showed the language substantially by showing language having the same sense, there is no material variance." (Benson v. State, 68 Alabama 544). (Cf: 18 C.J., sec.27, p.1225;)

"In a charge of slander 'a failure to prove all the words alleged' does not constitute a fatal variance, provided sufficient of the precise words alleged are proved so as to constitute a cause of action; the proof need not correspond in every minute particular with the words ^{as} laid, provided the identity of the charge is substantially made out.***" (37 C.J., sec.447, p.65).

"When the indictment avers words spoken as **** in the common law offense of oral blasphemy, it is enough if there is a substantial accordance between the words as laid and the words ^{as}/proved. Any portion of the words laid, complete in itself and constituting an indictable offense, will sustain the indictment. But any variance of the sense will be fatal." (2 Wharton's Criminal Evidence, sec.1082, p.1897).

The gravamen of the offense laid under Specification 3 of Charge II, is the use of insulting language to Staff Sergeant Ewings of the United States Army while in the execution of his office. The "language proved" was literally different from the "language charged". The variance in the words, themselves, is extreme and radical. No phrase or clause of the "language charged" was proved. In substance and meaning the departure is wider. The language alleged in the Specification was pregnant with personal insult to Ewings. It bespoke disdain and scorn of his authority and contempt of him as an individual. It is vulgar and obscene and is the language of the gutter. The "language proved" is expressive of a determination to disobey Ewing's order. It was profane, provocative, and recalcitrant but carries no allusion, innuendo or implication casting aspersions on Ewings as an individual nor of his office. There is "no substantial accordance between the words as laid and the words as proved." The sense of the "language proved" is far different from the sense of the "language charged".

The situation in the instant case is well illustrated in CM 126116 (reported in Dig. Ops. JAG., 1912-1930, par.1521, p.752). In the cited case the language actually proved to have been used by the accused towards his superior officer and that laid in the Specification (which was charged to have constituted disrespectful behavior towards his superior officer under AW 63) was obscene and vulgar. The language alleged was in substance the same as the "language charged" in the instant case omitting the sentence: "I won't do it". The language proved was: "Good men, good ----". The Board of Review held that there was a fatal variance inasmuch as the language proved was "entirely consistent with respect," whereas the language charged was highly disrespectful to the officer.

The Board of Review is of the opinion that the record is legally insufficient to sustain the finding of guilty, by exception and substitution of Specification 3 of Charge II.

9. The question of accused's mental responsibility for the offenses charged was placed in issue in a timely and proper manner by Defense Counsel. The Court's response and action was in keeping

241103

CONFIDENTIAL

with expeditious and prompt administration of justice. The Court recessed after making its recommendation to the appointing authority for the appointment of a Board of Officers to examine accused for his sanity in accordance with par.35c, MCM 1928. (see paragraph 4, supra). Thereafter a Board was appointed and made an examination and investigation of accused. Upon the reconvening of the Court, the report of the Board, upon agreement of the Trial Judge Advocate and Defense Counsel (R.15,16) was admitted in evidence and was duly considered by the Court. Pertinent excerpts from the report (which is dated 1 Dec 1942) are as follows:

"Brief Medical History: This 25 year old Private, with 1-10/12's years of service, has a family history showing no insanity, epilepsy, cancer or tuberculosis. Father and mother both evidently below average intelligence and two sisters of higher intelligence than patient."

"Social History: In Reform School from 1933 to 1937 for general misconduct, no crimes. A.W.O.L. twice in Zone of Interior. Statement of several soldiers and one officer, who knew this soldier during maneuvers in Zone of Interior, was that this Private had struck several non-commissioned officers during that time."

"Mental Status: Attitude and General Behavior: According to observation of attendants, this soldier has been getting along well since his admission to the hospital. He has not shown any special aptitude or abilities. No evidence of suicidal or homicidal tendencies. Appetite has been good and he sleeps well.
Dress is untidy, shows no interest in neatness of self or habits. Does not appear to have been trained in any special lines of neatness.
Posture is fair. Seems relaxed at times, but when under stress he becomes quite agitated but no show of abnormal emotionalism.
Facial expression is appropriate.
Attitude - friendly and cooperative.
General mood - calm.
Motor activity - normal."

"Emotional Reaction: Mood is appropriate to ideas, but probably is not as concerned about his present circumstances as he might be. Has difficulty in starting new things. Thinks he has a hot temper. Likes the evening better than morning. Says people tease him a lot. Has a good appetite and sleeps well. Thinks that life is worth living."

241103

"Mental Trend: No obsessions, compulsions or feelings of unreality. No delusions or persecutory trends.

No ideas of reference.
No hallucinations."

"Summary: This patient is one who has not been endowed with a high intelligence and has an I.Q. of somewhere around 70, with a mental age of approximately $12\frac{1}{2}$ years. His reaction time is slow especially under stress. This would account for his inability to think of the consequences or of the moral obligation in a circumstance where his first impulse would be to strike someone for something that has perturbed him. In other words he would not think of the consequences or of another's rights until after several minutes of thought trying to solve the problem. There is no evidence of psychosis. This soldier is well aware of his situation, realizes his misdeed, has gotten into the same sort of difficulty before. Spent four years in Reform School. If he is guilty of a misdemeanor, his mental status is and has been normal and, therefore, he should draw proper punishment. However, the soldier does have below average intelligence, and individuals of his intelligence level react to abusiveness and quips more violently than individuals of higher intelligence groups.

Findings: After careful examination of the patient and all records pertaining to the case, the Board finds:

1. That the diagnosis is: Mental deficiency, moron, mental age $12\frac{1}{2}$ yrs. James
2. That mental condition of Private/C. Mason was the same at the time of his offense as at the time of the examination."

The members of the Board were Carl H. Fortune, Major, M.C., President and Louis M. Foltz, 1st Lieut., M.C., Recorder. The Report was approved by S. S. Zintek, Lt. Colonel, M.C., Commanding. At the request of the Court, both Major Fortune and 1st Lieutenant Foltz appeared as witnesses. The relevant part of Major Fortune's testimony is as follows:

CONFIDENTIAL

- "Q. Major, have you had occasion to examine the accused for sanity?
A. I did Sir.
Q. What were your findings?
A. We found him to be sane, but of low mentality.
Q. Do you think he is capable of distinguishing right from wrong?
A. Yes Sir." (R.14).

"Questions by the defense:

- Q. What would you say his mental age is?
A. His mental age is twelve and one half years. Intelligence about seventy.
Q. Would he be classed as a moron?
A. Yes. He is below average in intelligence. The army requires, under AR 105 a mental ability of above 10 years. So, he is near the lower level to meet army requirements.
Q. Do you think this man is responsible for his actions while excited?
A. He is responsible for his actions, but the actions will be more violent than that of a person of higher intelligence. (R.14).

- "Q. Is there anything in your examination of the accused that would lead you to believe that he lacks mental capacity to understand the nature, in general, of the proceedings of the court?
A. Sir, his intelligence is below the normal level. I believe he should be able to understand the proceedings of the court.
Q. Do you feel that the accused is intelligent enough to conduct or cooperate in his defense?
A. I do believe he would be able to conduct his own defense with someone to help him." (R.16).

1st Lieutenant Foltz testified in pertinent part as follows:

- "Q. Do you feel that the accused knows right from wrong?
A. Yes Sir." (R.15).

- "Q. Your statement that the accused knows right from wrong, do you think that it should be classified to any particular extent?
A. Yes, the average mental patient knows right from wrong and are responsible for their acts. Individuals who have low mental deficiencies possibly know right from wrong. But because their low understanding, it is not normal. They are not aware to particular circumstances and most times react unfavorably.

241103

- "Q. Do you feel that a moron is responsible for his actions?
- A. Sir, I think it would have to be judged by the circumstances under which the act took place. In other words, if there was proper time for an individual to think out his act and mediate upon it, I think he would be responsible. (Underscoring supplied). (R.16).

At the conclusion of the testimony of Major Fortune and 1st Lieutenant Foltz the Court was closed and upon being opened the President announced that the Court had voted on the question as to whether or not the accused was sane, and that all members concurring, it had found him sane (R.17).

Attached to the record of trial is a written recommendation of the five members of the Court who participated throughout the trial as follows:

- "1. Although the court found Pvt James C. Mason, 34010456, Co L, 118th Infantry sane, they do not feel that his mental qualifications are sufficient to make him a satisfactory line soldier. They do not believe that the punishment of this man will serve any useful purpose either to the individual or the government. However, they do not feel that he should be assigned to a combat unit and that this assignment was to a certain extent responsible for his actions. The court feels that, had proper administrative procedure been enforced, this man would have been assigned to a Labor Battalion and would never have committed the offense of which he was found guilty.
- "2. It is recommended that the accused be returned to the United States, that the sentence as imposed by the court be suspended and that he be assigned for duty in a service command for labor at one of the posts or cantonments."

The Board of Review is of the opinion that the issue of the mental condition of the accused was properly determined by the court and that the mental responsibility of the accused is established by the record.

(278)

For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II and Specifications 1 and 2 thereof, but legally insufficient to support the findings, by substitutions and exceptions, of guilty of Specification 3 of Charge II, and is legally sufficient to support the sentence. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial.

(DISSENTING OPINION)

Judge Advocate

Rudolf Ryckebus Judge Advocate
O. J. J. D. Judge Advocate

241103

- 16 -
CONFIDENTIAL

314

CONFIDENTIAL

(279)

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

Board of Review.

ETO 314.

26 MAR 1943

U N I T E D S T A T E S)

EASTERN DEFENSE AREA
UNITED STATES ARMY FORCES
IN ICELAND.

v.)

Private JAMES C. MASON (34010456)
of Company "L", 118th Infantry.)

Trial by G.C.M., convened at
Camp Krossastadir, Iceland,
30 October 1942. Sentence:
Dishonorable discharge,
forfeiture of all pay and
allowances and confinement at
hard labor for two years. United
States Disciplinary Barracks.

DISSENTING OPINION by RITER, Judge Advocate

1. If the accused's mental responsibility for his acts were sustained by the record of trial, I would be in accord with the views of the majority of the Board of Review in regard to the legal sufficiency of the record to sustain the finding of guilty of Charge I and its Specification and of Charge II and Specifications 1 and 2 thereof. I agree, also, that the record is legally insufficient to support the finding of guilty, by substitutions and exceptions, of Specification 3 of Charge II. I am unable, however, to agree with the majority of the Board of Review that the issue of accused's mental responsibility was properly determined by the Court, and for this reason I must dissent from the conclusion that the record is legally sufficient to support the sentence.

2. The majority opinion fairly and completely summarizes the evidence before the Court on the issue of accused's mental responsibility, and the Court's action thereon. Such summary is adopted for the purposes of this opinion.

3. There are two separate rules to measure a person's legal responsibility for his acts. The first is designated the "right and wrong" theory and the same has been adopted by the great majority of the States. The other is designated "irresistible impulse" theory. The rules have been announced by the courts in variable

~~CONFIDENTIAL~~

language but the following statements may be accepted as fully comprehending and differentiating between the two rules:

"The general test of responsibility for crime may be stated to be the capacity to understand the nature and consequences of the act charged and the ability to distinguish between right and wrong as to such act. Some of the courts hold that this is the only test of responsibility, while others, as shown infra § 61, hold that a man may be irresponsible because of an insane, irresistible impulse, although he knew that the act was wrong.

While accused should apprehend the nature and quality of his act in order to be guilty, it is not essential to guilt that his mental condition be such as to enable him to realize the fullest extent of his act, and it has been said that the test is not whether accused knew the gravity or seriousness of the act he committed, but whether he knew the nature and quality of the act, and whether he knew that it was wrong. Some courts hold that knowledge of the nature and quality of the act refers to its physical nature and quality, and that knowledge that it is wrong refers to its moral side.

In determining whether accused has the capacity to distinguish between right and wrong, the inquiry must be addressed to his capacity in respect of the particular act involved, and the knowledge that the act is wrong should be a knowledge that it is wrong according to generally accepted moral standards, not knowledge that it is wrong according to accused's own individual standards, nor knowledge merely that the act is contrary to law, although there is authority supporting the view that knowledge that the act is punishable under the laws of the state is sufficient to support conviction. There is authority expressly condemning the rule of responsibility based on capacity to 'distinguish' between right and wrong, and stating that the true test lies in the capacity to 'choose' between right and wrong, or in other words, that the test of 'irresponsible impulse' discussed infra § 61 is the only true test of criminal responsibility."

(22 C.J.S., sec.59, p.124, 125).

241103

CONFIDENTIAL

"An 'irresistible impulse,' as the term is used in the criminal law, may be defined as an impulse growing out of some mental disease affecting the volition as distinguished from the perceptive powers, so that the person affected, while able to understand the nature and consequences of his act and to perceive that it is wrong, is unable, because of such mental disease, to resist the impulse to do it. This class of mental infirmity or insanity should be distinguished from emotional or moral insanity, considered infra in §§ 62 and 63 respectively.

There is a conflict of the authorities as to whether or not one knowing the nature and quality of his act and also knowing that it is wrong, but who is unable to control his conduct, may properly be considered criminally responsible. In some jurisdictions the courts, when insanity is relied on as a defense, do not limit the test of responsibility to the mere capacity to distinguish between right and wrong either generally or as to the particular act, but go further than this and recognize that a person may know the nature and quality of an act which he does, and that it is wrong or contrary to law, and yet do the act under the influence of an insane irresistible impulse; and it is held in these jurisdictions that, although there may have been a capacity to distinguish between right and wrong as to the particular act, still the party is not responsible if the jury find that by reason of duress of mental disease he had so far lost the power to choose between right and wrong as not to be able to avoid doing the act, so that his free agency was at the time destroyed. It has been said that the insanity which absolves one from responsibility for acts otherwise criminal must be of a character causing the act and irresistibly compelling it, and it has been held that irresistible impulse affords the only true test of criminal responsibility, that mere ability to distinguish right from wrong is not the correct test where the defense of insanity is interposed, and that the degree of insanity which will relieve one from responsibility for crime must be such as to create in his mind an uncontrollable influence robbing him of the power to choose between right and wrong; but even in jurisdictions following the rule of irresistible impulse, such impulse

241103

- 3 - CONFIDENTIAL

314

CONFIDENTIAL

"must, to afford a defense, be insane in character, resulting from a diseased mind, and an alleged irresistible influence arising not from disease but from depravity or temper is insufficient to absolve its victim from criminal responsibility, as shown infra § 62. It has been said that in determining whether accused suffered from an insane and uncontrollable impulse, the court should apply a general test applicable to the hypothetical average man, and not one gauged to the temperament of the particular accused, although such rule would seem open to the objection that, if the subject is in law insane, he is not an average man and, therefore, should not be tested by the standards of the average man but rather by standards applicable to reveal the sanity or insanity of the particular accused under investigation.

In other jurisdictions the courts have repudiated the rule of irresistible impulse, in some cases constrained by statutes expressly excluding such defense, and in others by statutes impliedly excluding such defense by a statutory definition of insanity or insane persons which leaves no room for the doctrine of irresistible impulse, and in jurisdictions taking this view, whether under statutory constraint or merely under the influence of judicial reasoning, an irresistible impulse, even though it is claimed to have been an insane impulse, does not exempt one from responsibility for crime, where his mental capacity was such that he had a knowledge of right and wrong as to the particular act. Even in these jurisdictions, however, where the irresistible impulse is the result of mental disease sufficient to override reason and judgment, and to obliterate the sense of right and wrong, it is a defense, for this brings the case within the knowledge of right and wrong test. There are authorities to the effect that the irresistible or uncontrollable impulse doctrine is unavailable unless such impulse springs from a mental disease or defect existing to such a high degree as to overmaster the will from delusion, or to overwhelm the reason, judgment, and conscience so as to obliterate the sense of right and wrong."

(22 C.J.S., sec.61, p.126,127,128).

241103

- 4 - CONFIDENTIAL

314

CONFIDENTIAL

(283)

Reference is also made to 1 Wharton's Criminal Law sec.52, p.72, 73; sec.53, p.74,75; and 29 C.J., sec.13 and 14, p.1052,1053,1054, for further discussion of the two rules for the determination of a person's sanity.

4. Concomitant with the division of the authorities on the basic definition of legal insanity is also the sharp cleavage existing with respect to the question of burden of proof. In a number of jurisdictions the defense has the burden of establishing the insanity of the accused at the time of the commission of the offense. (16 C.J., sec.1002, p.531,532; 22 C.J.S., sec.576, p.888). In other jurisdictions the prosecution has the burden of proving beyond a reasonable doubt the sanity of the accused. While in the absence of any evidence on the subject, or in absence of evidence raising a reasonable doubt as to sanity the presumption of sanity makes a *prima facie* case and satisfies the burden of proof, making it unnecessary for the prosecution to introduce evidence in chief of the defendant's sanity. Whenever the question of accused's sanity is put in issue by facts coming from either side which raises a doubt as to the accused's sanity then it devolves upon the prosecution to establish his sanity. (16 C.J., sec.1002, p.532; 22 C.J.S., sec.576, p.888).

The United States Supreme Court has adopted the latter rule. In *Davis v. United States*, 160 U.S. 469, 484, 485, 486; 40 L.Ed. 499, 504, 505, Mr. Justice Harlan declared the rule to be as follows:

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not include beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt

241103

- 5 - **CONFIDENTIAL**

314

~~CONFIDENTIAL~~

"cannot be said to have been proved beyond a reasonable doubt--his will and his acts cannot be held to have joined in perpetrating the murder charged--if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?"(40 L.Ed., p.505,506).

5. In respect to the test to be applied in determining the question of the sanity or insanity of an accused the United States Supreme Court has elected to follow the "irresistible impulse" rule. The study commences with the case of Mutual Life Ins. Co. v. Terry, 82 U.S. 580, 21 L. Ed. 236, where the following language was used:

"That form of insanity called impulsive insanity, by which the person is irresistibly impelled to the commission of an act, is recognized by writers, on this subject. It is sometimes accompanied by delusions, and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. We speak of the impulses of persons of unsound mind. They are manifested in every form; breaking of windows, destruction of furniture, tearing of clothes, firing of houses, assaults, murders, and suicides. The cases are to be carefully distinguished from those where persons in the possession of their reasoning faculties are impelled by passion, merely, in the same direction."

241103
314~~CONFIDENTIAL~~

CONFIDENTIAL

(285)

"We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is lieable." (21 L. Ed., p.241, 242.)

In Charter Oak Life Ins. Co. v. Rodel, 95 U.S. 232, 24 L. Ed. 433 stated:

"This charge is in the very words of the charge sanctioned and approved by this court in the case of Ins. Co. v. Terry, 15 Wall, 580, 21 L. Ed., 236, including an explanatory clause of the opinion of the court in that case. We see no reason to modify the views expressed by us on that occasion. We think, therefore, that there was no error in the charge as given. It follows that the judge properly refused the request to charge that the plaintiff could not recover if the insured knew that the act which he committed would result in death, and deliberately did it for that purpose. Such knowledge and deliberation are entirely consistent with his being, in the language of the charge, impelled by an insane impulse, which the reason that was left him did not enable him to resist; and are, therefore, not conclusive as to his responsibility or power to control his actions." (24 L. Ed., p.435-436).

The court in Life Ins. Co. v. Broughton, 109 U.S., 121, 27 L. Ed. 878, followed the Terry and Rodel cases:

CONFIDENTIAL

"These instructions are in exact accordance with the adjudications in the cases of Terry and Rodel; and upon consideration we are unanimously of opinion that the rule so established is sounder in principle, as well as simpler in application, than that which makes the effect of the act of self-destruction, upon the interests of those for whose benefit the policy was made, to depend upon the very subtle and difficult question how far any exercise of the will can be attributed to a man who is so unsound of mind that, while he foresees the physical consequences which will directly result from his act, he cannot understand its moral nature and character, nor in any just sense be said to know what it is that he is doing." (27 L. Ed., p.882).

The Court in the Connecticut Mutual Life Insurance Co. v. Akens, 150 U.S. 468, 37 L. Ed. 1148, reaffirmed the doctrine of the foregoing cases that if the assured "was impelled to the act by an insane impulse, which the reason that was left did not enable him to resist", he was legally insane.

The opinion in Davis v. United States, 165 U.S., 373, 41 L. Ed., 750, was written on appeal after the second trial. The judgment on the first trial had been reversed by the Court on the question of burden of proof (Davis v. U.S. supra). On the second trial the lower court's instructions concerning the test for insanity contained the following:

"The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control." (41 L.Ed., p.754).

The Supreme Court approved the instruction.

In Ritter v. Mutual Life Ins. Co., 169 U.S., 139, 42 L.Ed., 693, the Court held that the instructions of the Court in respect to insanity included, in substance, the element of "irresistible

CONFIDENTIAL

"impulse" and thereby affirmed the doctrine.

Hotema v. United States, 186 U.S., 413, 46 L. Ed., 1225 involved a charge of murder. The defense was insanity and the trial court instructed the jury that the defendant could not be punished if his brain was "diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and control of his mental faculties were impaired so that the act done was an irresistible and uncontrollable impulse with him", but that the defendant could be punished if "he did not perform the act because he was controlled by irresistible or uncontrollable impulses." (Underscoring supplied). The defendant's counsel objected to the quoted part of the instruction, on the ground that he claimed that defendant was actuated by a delusion and that there was no evidence in the record to show that the defendant acted under an "irresistible impulse." The court said:

"As there is no portion of the evidence returned in the bill of exceptions, we are unable to judge whether there was any which would justify or which did justify, the court in submitting the question of irresistible impulse to the jury. If there had been evidence on that subject, the submission of the question was certainly as fair to the defendant as he could ask. We decide nothing further than that." (Under-scoring supplied).

6. The foregoing pronouncements of legal authorities and the decisions of the Federal Supreme Court create a background against which the provision of the Manual for Courts-Martial with respect to mental responsibility should be read. The Manual has defined mental irresponsibility 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

CONFIDENTIAL

"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. ****."

(Capitals and underscoring supplied).
(M.C.M., par.78, p.63),

Obviously, the Manual has adopted the rule of the first Davis case cited afore with respect to the burden of proof. It has placed on the prosecution the duty of proving the sanity of the accused beyond a reasonable doubt. Failing to remove all reasonable doubt as to the accused's mental responsibility for his conduct the prosecution's case must fail.

The determination of the question as to whether the "irresistible impulse" rule prevails in the administration of military justice resolves itself into an interpretation of the above quoted declaration from the Manual. The Manual's definition of mental irresponsibility commences with the statement that "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 then there is added the significant phrase "and to adhere to the right". It, therefore, appears that before an accused, on trial before a Court-Martial can be adjudged responsible for his acts, in a case where his sanity is in issue, that the prosecution must prove beyond a reasonable doubt that (1) the accused was able to distinguish between right and wrong and (2) he is able to adhere to the right. If there exists in the minds of the court a reasonable doubt as to the accused's mental capacity to distinguish between right and wrong it must find accused insane. Likewise if a reasonable doubt exists as to accused's ability to adhere to the right, even though he be able to distinguish between right and wrong, the Court must find him insane. Both elements must be proved beyond a reasonable doubt before an accused may be held responsible for his acts. The ability to distinguish between right and wrong is not sufficient. Although accused may possess capacity to know that his action is wrong he must possess power to refrain from the performance of the wrongful act and "adhere to the right". This construction is both reasonable and logical in view of the presence of the word: "both" (following the word "charged") as an introduction to the first prepositional phrase: "to distinguish right from wrong" and the use of the conjunctive "and" to connect

241103

CONFIDENTIAL

CONFIDENTIAL

the first prepositional phrase with the second one: "to adhere to the right."

7. Having concluded that the Manual's test for insanity is a compound of two elements of proof, which the prosecution must sustain beyond a reasonable doubt, a subsidiary question arises as to whether the phrase "and to adhere to the right" is an equivalent method of expression of the "irresistible impulse" rule as approved by the United States Supreme Court. Webster's New International Dictionary (2nd Ed.) defines "adhere": "to stick fast or cleave; *** to become joined or united; to hold, be attached, or devoted, to remain fixed, either by personal union or by conformity of faith, principle, opinion or practice." Synonyms are: "stick, cling, cleave or hold". Bouvier's Law Dictionary shows that the participle "adhering" is derived from the Latin adhaerere, meaning "to cling". Allowing the verbal phrase "to adhere" its usual and ordinary meaning, it seems, beyond doubt, that the Manual is referring to an accused's mental ability to remain conformable to or loyal to principles of right conduct, when it speaks of his ability "to adhere to the right". If a person possesses the ability to "cling" or "cleave" to the ideas and principles of right conduct he certainly "adheres" to it, and by adhering to it he reacts as a normal law abiding person does under a similar situation - he refrains from committing a wrongful act. Oppositely, if, with conscious knowledge that his conduct is wrong, but because his brain is diseased he cannot refrain from committing a wrongful act - then he certainly acts under an "irresistible impulse".

It therefore appears that the Manual has adopted the "irresistible impulse" test for insanity in the administration of military justice.

Such conclusion is confirmed by Winthrop:

"Insanity is a disease so perverting the reason or moral sense or both as to render a person not accountable for his acts.

To constitute a defence on the ground of insanity it may be made to appear, on the one hand either that the accused, in committing the offence, did not, from mental derangement, comprehend the nature of what he was doing, or did not know that he was doing wrong; or, on the other hand, that, though aware of the nature and consequence of his act, as well as of its wrongfulness or its illegality, he was prompted by such an uncontrollable impulse as not to be a free agent." (Underscoring supplied). (Winthrop's Military Law and Precedents, 2nd Ed, Reprint 1920, p.294).

241103
314

CONFIDENTIAL

8. The function and authority of the Board of Review, sitting in appellate review in the instant case, is a relevant consideration:

"In the discharge of its statutory function, the Board's duty is *****, not to weigh the evidence, not to substitute its opinion as to the guilt of accused for that of the court and the reviewing authority, not to let its sympathy for the unfortunate accused run away with its judgment, but solely to determine whether 'there is some substantial evidence tending to prove each element of each offense.' " (CM 211586, Gerber).

"In his indorsement on the holding of the Board of Review in CM 203511, Wedmore, the conclusions of which indorsement were approved by the President, the Judge Advocate General said: 'The court and the reviewing authority must be satisfied of the guilt of an accused beyond a reasonable doubt. However, the Board of Review and The Judge Advocate General in the examination of records of trial, except in cases which require approval or confirmation of the sentence by the President, do not weigh the testimony to determine whether the offense has been proved beyond a reasonable doubt, but must be satisfied that there is some substantial evidence tending to prove each element of each offense (CM 152797, Veins)*****' "

"In the exercise of its judicial power of appellate review, the Board of Review treats the findings below as presumptively correct and examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review, and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrating of justice. CM 192609, Rehearing (1930)." (Dig. Ops. JAG., 1912-1940, sec.408(4), p.259).

Under the above authorities it is the duty and responsibility of the Board of Review to determine from the record whether there is some substantial evidence tending to prove that accused was sane

241103

314

CONFIDENTIAL

within the rule governing mental responsibility laid down in the Manual for Courts-Martial. The Report of the Board, convened under the provision of par. 35c, MCM. 1928, found accused free from obsessions, compulsions, feelings of unreality, delusions, persecutory trends, ideas of reference and hallucinations. He presented no evidence of psychosis. Both members of the Board personally testified that accused, in their opinion, was capable of distinguishing right from wrong. The senior member of the board expressed the opinion that he was sane. The Report further declares: "If he is guilty of a misdemeanor, his mental status is and has been normal, and, therefore, he should draw proper punishment."

9. Were the foregoing facts the complete evidence as to accused's mental condition, the finding of the Court on the question of sanity would be sustained without contradiction or doubt. However, the Report of the Board and the testimony of its members present other facts which cannot be ignored by the Board of Review.

10. The authority and duty of the Court in passing upon the issue of accused's sanity is a pertinent consideration. The following decisions of the Board of Review are authoritative on the subject:

"In a prosecution for involuntary manslaughter the defense raised the point that the accused was not of sufficient intelligence to exercise the care that the circumstances required, and, therefore, could not be guilty of criminal negligence. The division psychiatrist testified that he had examined the accused, and that the latter was 'a degenerate of a low grade mind, and would be classed as a moron,' a person next above the grade of imbeciles. Assuming, what is by no means clear, that a person possessing the grade of intelligence thus described is incapable of crime, or of gross negligence, the court was not bound to accept as facts what the psychiatrist said. The accused was himself a witness and gave a very clear and intelligible account of the shooting. The court had an opportunity to hear and observe him and was justified in forming its own conclusions as to his mental capacity. The court would not have been open to adverse criticism if it had acquitted him, but its finding of guilty is warranted by the evidence. CM 125265 (1918). (Dig. Ops. JAG., 1912-1940, par. 395(36), p.225).

241103

CONFIDENTIAL

"A board of medical officers reported that the accused was not wholly responsible for the wrongful act of which he was accused, and that he did not have the necessary criminal mind to commit the act charged. This report was substantiated by the testimony of a member of the board. The evidence introduced by the prosecution did not tend to refute the finding of the board, but rather tended to substantiate its correctness. It is the function of the court to consider the report of the board and accord to it that weight and credence to which, in the judgment of the court, it may be entitled; and, since the report of the board supported by other evidence was unimpeached by the prosecution, it was *prima facie* proof of mental derangement and the court could not entirely disregard such evidence. (CM 116694.) By the introduction of this evidence a reasonable doubt was raised as to the mental capacity of the accused to commit the wrongful act charged, and it was incumbent upon the prosecution to prove that the accused was capable of entertaining the necessary intent. Such proof failing, the findings should be set aside. CM 128252 (1918)." (Dig. Ops. JAG., 1912-1940, par. 395(36), p.225-226).

"Where the question of accused's mental capacity at the time of the commission of the alleged offenses becomes an issue in the trial, the report of the medical board must be responsive to that issue. CM 135243 (1919)." (Dig. Ops. JAG., 1912-1940, par. 395(36), p.226).

"Where there was no substantial evidence of insanity, the presumption of sanity contemplated in paragraph 63 and 112, M.C.M., was operative, and it was not necessary to introduce in evidence the finding of a medical board appointed on request of defense counsel in order to enable the court to dispose of the question of the mental condition of the accused. The court is empowered to constitute itself the judge of the extent to which the burden of inquiring into mental condition is imposed upon it. CM 193543 (1930)." (Dig. Ops. JAG., 1912-1940, par. 395(36), p.227).

241103

- 14 -

314

CONFIDENTIAL

CONFIDENTIAL

"Where upon trial for murder (A.W. 92) insanity was raised as a defense and the findings of a medical board and testimony of medical witnesses supported this contention, it was held that while this evidence may not be disregarded it was not binding upon the court nor upon the Board of Review when there is other evidence, including testimony of a medical officer, which negatives several of the basic premises of the medical board and witnesses in support thereof. The Board of Review found the record of trial legally sufficient to support the findings of guilty and the sentence. CM 204790 (1936)." (Dig.Ops.JAG., 1912-1940m par.395(36), p.227).

The Report of the psychiatric board states accused "is not endowed with a high intelligence, and has an I.Q. of somewhere around 70, with a mental age of approximately $12\frac{1}{2}$ years. His reaction time is slow especially under stress. This would account for his inability to think of the consequences or of the moral obligation in a circumstance where his first impulse would be to strike some one for something that had perturbed him.. In other words he would not think of the consequences or of another's rights until several minutes of thought trying to solve the problem, **** However, the soldier does have below average intelligence, and individuals of his intelligence level react to abusiveness and quips more violently than individuals of higher intelligence groups." (Underscoring supplied). The Board by its findings diagnosed accused's case as one of "Mental deficiency, moron, mental age $12\frac{1}{2}$ years" (Underscoring supplied) and stated that accused's mental condition "was the same at the time of his offense as at the time of the examination."

Major Fortune's testimony confirmed the report and stated that the "army requires, under AR 105, a mental ability above ten years, so he is near the lower level to meet army requirements; that he is responsible for his actions, but the actions will be more violent than of a person of higher intelligence" (R.14) and that he believed accused "should be able to understand the proceedings of the court", and that "he would be able to conduct his own defense with some one to help him" (R.16).

1st Lieutenant Foltz agreed that accused knew right from wrong, but qualified this statement by stating: "Individuals who have low mental deficiencies possibly know right from wrong. But because of their low understanding, it is not normal. They are not aware to particular circumstances and most times react unfavorably." (R.16). He was asked the question: "Do you feel that a moron is

241103

CONFIDENTIAL

responsible for his actions?" His answer was: "Sir, I think it would have to be judged by circumstances under which the act took place. In other words, if there were a proper time for an individual to think out his act and meditate upon it, I think he would be responsible." (Underscoring supplied) (R.16).

Manifestly the evidence as above set forth presents the accused as a low class moron - a mental deficient - with a mental age of approximately $12\frac{1}{2}$ years and whose reaction time is slow. When irritated or annoyed his mental processes do not permit him to visualize the results of his actions upon other persons or things nor sense the result of his actions. "His first impulse would be to strike someone for something that perturbed him". His reactions are more violent than those of individuals of higher intelligence. His action in striking Gainey with his bayonet is exactly the type of anti-social conduct as would be expected. Opposed to this evidence is the statements of the medical experts who conclude that he was "sane"; was suffering from no psychosis at the time of the commission of the offenses for which he is charged and was able to distinguish between right and wrong.

It is plainly apparent that immediately following an episode that annoys or affronts him, accused has no power of control over his actions and no ability "to think of the consequences or of the moral obligation" involved in his conduct. It is only after lapse of time he is able to think of such consequences or of other persons rights. Accused is a feeble-minded person whose acts of violence cannot be controlled by himself on the occasion and at the time of conflict or disagreement. Is not this mental defect the exact type indicated by M.C.M., par.78, p.63 with respect to mental responsibility? The answer must be in the affirmative. His actions are the result of "uncontrollable impulse", and for the period immediately involved in a conflict he cannot "adhere to the right".

11. The writer of this opinion is keenly aware of the fact that it is not the function of the Board of Review nor is it authorized to venture into the field of the psychiatrist and attempt to differentiate between an "insane" person and a "feeble-minded" subject. The experts declare that accused is not "insane", but the record of trial shows that he is a mental deficient who reacts violently, at times, because of his inability to "adhere to the right" and thereby control his impulses. In determining the mental responsibility of a person to be punished for his crimes the law considers feeble minded persons or persons suffering from original mental defects in the same class as persons suffering from insanity, disease of the mind or delusion.

"Feeble minded person is subject to the same general rules of criminal responsibility as an insane person". (22 C.J.S., sec.56, p.120).

241103
314

"As insane persons, may be mentioned *** persons afflicted with idiocy or amentia, the former being congenital, the latter consisting of a loss of mental power and mania". (1 Wharton's Criminal Law (12th Ed) sec.62, p.88).

"**** We observe that, upon principle, the rule as-to the burden of proof in criminal cases cannot be materially different, where the defense is insanity, disease of the mind or delusion, from the rule obtaining where the defense is an original defect and want of capacity. (Davis v. United States, 160 U.S., 468, 40 L.Ed., 499, 504).

In this connection, it should be noted that the excerpt from the Manual for Courts-Martial above quoted uses the terms of "mental responsibility", "mentally responsible", "mental defect, disease, or derangement." These are words of wider connotation than the terms "insanity" and "insane". They embrace all forms of mental affliction, impairment and deficiency.

12. In the administration of military justice it, therefore, may be concluded that the responsibility of a feeble minded subject, such as accused, is determined by the application of the same rules as are applied to a person who is suffering from disease of the mind, viz: insanity. In the instant case there is presented unequivocal evidence that in spite of the fact that accused was able to distinguish right from wrong he committed the acts charged under "uncontrollable impulses", which did not permit him "to adhere to the right". The test for mental responsibility as specified in the Manual was, therefore, not met. One of the basic elements in the proof is missing - the ability to "adhere to the right". The proof shows that the accused is not a person "in the possession of (his) reasoning faculties (who was) impelled by passion, merely" (Mutual Life Ins. Co. v. Terry, supra) in the commission of the offenses, but that he committed the offenses charged as a direct consequence of original, inherent defects in his mentality which did not enable him to "adhere to the right".

13. This conclusion is consistent with the testimony of the experts and their report, wherein they declare accused has the power to distinguish between right and wrong and that he was sane. Such evidence sustains the first element of "mental responsibility" as stated in the Manual, to wit, the power to distinguish between right and wrong. The statement that he was sane is a conclusion of the experts resulting from the fulfilment of this first element of the test, and were this element the only basis of measuring mental responsibility there would have been nothing for the Board of Review to consider on this aspect of the case. However, both the experts and the Court mistakenly ignored the second element, to wit, the

~~CONFIDENTIAL~~

ability to "adhere to the right", in drawings their conclusions. Not only is there no substantial evidence to prove accused's ability to "adhere to right" but affirmatively it is shown that he wholly lacked such ability when annoyed, irritated or disturbed in his social relationships. The prosecution failed to sustain the burden of proof imposed upon it to prove the mental responsibility of accused beyond a reasonable doubt.

For the foregoing reasons I am of the opinion that the Court committed prejudicial error in finding that accused was mentally, and therefore legally, responsible for the offenses committed by him.

14. Although the record is legally sufficient to support the findings of guilty of all the Charges and Specifications except Specification 3 of Charge II and is also legally sufficient to support the sentence, had the accused been mentally responsible for his actions, it is my considered opinion that because accused's mental irresponsibility is affirmatively established by the evidence, that the record is legally insufficient to support the findings and the sentence.

B. F. M. Ritter _____ Judge Advocate.

241103

CONFIDENTIAL

(297)

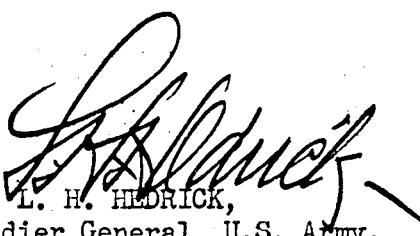
1st Ind.

WD, ETO Branch - JAGO.

26 Mar 1943

TO: Commanding General, Eastern Defense Area, APO 612.

1. In the case of Private James C. Mason (34010456), Company L, 118th Infantry, your attention is invited to the copy of the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty by substitutions and exceptions of Specification 3 of Charge II, but legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II and Specifications 1 and 2 thereof, and legally sufficient to support the sentence, which holding, for the reasons therein stated, is hereby approved. Since the offense involved in Specification 3 of Charge II and the findings on such Specification is of a minor nature, involves no moral turpitude, and does not affect the civil status of the accused; and since the record has been found legally sufficient to support the sentence, under the policy directed by the Secretary of War in his approval of the opinion of The Judge Advocate General of 13 April 1923 (250.404 Review 4-19-23), no further action in this case is required.



L. H. HEDRICK,
Brigadier General, U.S. Army,
Judge Advocate General,
European Theater of Operations.

241103

CONFIDENTIAL

314

CONFIDENTIAL

(299)

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

Board of Review.

31 MAR 1943

ETO 339.

U N I T E D S T A T E S)	29TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at APO 29, U.S. Army, 10 March 1943. Sentence:
2nd Lt. LEE W. GAGE (O-1283752) Company C, 115th Infantry.)	To be dismissed the service; to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for five years.

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

1. The record of trial in the case of the officer named above, having been referred by the Commanding General, European Theater of Operations, the confirming authority, prior to his action thereon, and pursuant to the provisions of Article of War 46, to the Judge Advocate General in charge of the branch of The Judge Advocate General's Office for the European Theater of Operations, who, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, has, with respect to this case, like powers and duties as The Judge Advocate General, and, to the end that the accused should have an independent review of the record of his trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Article of War 50 $\frac{1}{2}$, having been referred by the Judge Advocate General for the European Theater of Operations to the Board of Review for examination and review, has been examined by the Board of Review, which submits this, its opinion and holding thereon, to the Judge Advocate General for the European Theater of Operations.

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

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

339

237825
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CONFIDENTIAL

CONFIDENTIAL

(300)

Specification: In that 2nd Lt. Lee W. Gage, Company "C", 115th Infantry, did on train between Reading and Basingstoke, England, on or about 5 March 1943, commit the crime of sodomy, by feloniously and against the order of nature, having carnal connection by mouth, with 1st Sergeant William Cox.

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

Specification: In that 2nd Lt. Lee W. Gage, Company "C", 115th Infantry was at Basingstoke, England, on or about 5 March 1943, in a public place, to wit, the railroad station at Basingstoke, England, disorderly while in uniform.

He pleaded not guilty to and was found guilty of both Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to confinement at hard labor at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

PROSECUTION'S EVIDENCE

3. The testimony of 1st Sergeant William Cox, Company "C", 115th Infantry, summarizes as follows:

The accused was, at the time of the commission of the offenses charged, a 2nd Lieutenant of Infantry and was on duty at Tidworth Barracks, England, serving with Company "C", 115th Infantry. On 5th March 1943, accused together with several enlisted men of his organization were in Oxford on pass. They had spent the previous night at the American Red Cross Club. The accused and First Sergeant William Cox had breakfast together at the same club at 9:30 - 9:45 a.m., 5 March 1943 (R.7). After breakfast they went to a hairdresser and had a shave and then went into a store where accused purchased some phonograph records. At about 11:30 a.m., they went into "Whites", a public house, where they were joined by other members of their Company and all had something to drink. Accused left the "pub" at 1:55 p.m., and Sgt. Cox met him a short time later when they went to a restaurant for lunch. Later they met two girls on a street corner by arrangements previously made (R.8). Accused, Cox, Sergeant Horner, Corporal Morris, Corporal Schonfield and others, making a party of 10 or 11 men from Company "C", 115th Infantry, left Oxford at 5:45 p.m., by train. As they were changing trains at Reading, accused fell attempting to board the connecting train and was left behind. Cox, Horner and Morris left the train at West Reading and returned to the station and found accused sitting on a bench (R.9).

The three enlisted men then went to a nearby tea-room, where they had tea and sandwiches while accused waited outside. Accused was bemoaning the fact that in his fall he had broken the records he was carrying. Accused, Cox, Horner and Morris boarded the next train which left Reading at 8:37 p.m., and accused together with the three enlisted men named occupied a compartment in a railway car by themselves. It was one of the usual enclosed English compartments with the two seats facing each other. A door opened from the compartment on to an aisle. Horner and Morris sat on one seat while accused and Cox sat opposite them (R.10). Horner and Morris went to sleep. Accused said: "I am going to sleep" and laid his head on the lap of Cox, who leaned back and rested his head on the cushion on the back of the seat (R.10, 13). There was enough room on the seat to allow accused to recline in another position than the one he assumed (R.17). A short time later, according to Cox, accused said, "Sergeant, are you asleep?" To which Cox answered "hmm". A short time later accused asked the same question, which Cox answered in the same manner (R.10). Cox then testified as follows:

"*** a short while after that I felt his hand on my leg, he started rubbing my privates, I had a good idea of what was coming. I had a good idea of what was to happen, so I put my foot on the seat where Sergeant Horner and Corporal Morris was, I wanted them to see what was going on. After a while he unbuttoned the fly of my pants and took my penus out and I kicked Sergeant Horner in the head to wake him up, by the time I awakened him he had it in his mouth. As soon as Sergeant Horner was awake I knocked Lieutenant Gage aside and pushed him to the floor.

Q. What was the state of your emotions?

A. Sir, when that happened I was pretty mad.

Q. Tell the court why you wanted to get Sergeant Horner's attention?

A. I had sense enough in my own mind to know that in the army that it is an officer's word against an enlisted man's and that an officer's word goes further, I had to have some witness or proof to show what was going on, if Sergeant Horner or no one else had been in there I would done the same thing, I had them there and I got him awake.

Q. How did you awaken him?

A. I kicked him.

Q. You threw Lieutenant Gage to the floor?

A. Yes.

Q. What did he do?

CONFIDENTIAL

(302)

- A. He just laid there.
 Q. Did he say anything?
 A. He never said a word, when the train stopped I said come on Lieutenant, get up, you are coming with me and he said 'I am drunk'. I saw two Pfc's and I said you better get an MP or something and I dragged him out on the platform and he laid there, just after this the Lieutenant started to walk off and I grabbed him by the arm, we had quite a tussle and he swung at me and I hit him back and knocked him down and I sat on him and kept him there until the Sergeant from RTO came." (R.10, 11).

In the disturbance on the station platform accused struck at Cox first. Upon the arrival of the RTO, Sergeant Cox, in the presence of accused, reported the occurrence on the railway train, but accused remained silent (R.12). The RTO Sergeant escorted accused, Cox, Horner and Morris to the office; where Cox repeated his story in the presence of accused. The Military Police were called (R.12). In walking from the station platform to the RTO office it was necessary for the party to descend a stairway, pass under the tracks and ascend other stairs. Accused appeared to walk "all right". In the RTO office accused walked around the room, mumbling to himself. Upon being directed to sit down by both the RTO sergeant and Cox he laid down on a bench and remained silent (R.12).

The accused was not drunk when he boarded the train at Reading. Accused and Cox consumed intoxicating liquor in Oxford and also on the train from Oxford to Reading (R.15). After boarding the train at Reading each of the party including accused had at least three drinks of liquor. Accused had been with Company C, 115th Infantry for about 6 months (R.17). Cox had suspected accused of moral weakness, and for this reason Cox did not stop the obvious intent of accused to commit the offense of sodomy (R.16).

Upon cross-examination by a member of the Court Cox testified affirmatively that accused put witness's penis in his mouth (R.17).

The testimony of Staff Sergeant Eldridge M. Horner, Company C, 115th Infantry was in substance as follows:

Witness first met accused and Cox on the platform at Reading on late afternoon of 5 March 1943. The three of them together with Morris entered a compartment on a railway train at Reading (R.20). Accused had been drinking (R.23). Accused and Cox had a bottle (R.24). Accused and Cox sat in one seat and witness and Morris in opposite seat facing the first named. Accused laid his head on Cox's leg and

asked that the light be extinguished (R.20). There was a light in the ceiling of the compartment. "It wasn't very bright but light enough to see in the compartment" (R.24). "It was a dim light but I could read by it" (R.25). Witness laid down on his seat on his left side with his back to accused and Cox and fell asleep (R.20). He was awakened by Cox hitting him on back of his head. Cox was pointing down to his lap (R.20). Witness saw accused with Cox's penis in his mouth (R.21,23,26). Cox then pushed accused to floor. Accused was not drunk, but "he might have been feeling good." The train was nearing Basingstoke. Accused stood up and Cox pulled him from train when it stopped. Accused said "what is going on here?" and started to walk away, Cox grabbed him and accused swung at Cox (R.21). Cox hit accused, knocked him down and sat on him. Accused received a black eye as a result of the blow administered by Cox. Cox asked "two of the boys" to get an M.P. An RTO sergeant came up; took the party into custody and escorted the accused and the three soldiers to the RTO office. The party had to walk down steps, under the tracks and up steps to get there. Accused was not drunk and walked by himself. Upon reaching the office accused laid down on a bench. There was no conversation (R.22).

T/3 Wesley Wangstad, Transportation Corps, RTO, Basingstoke testified in relevant part as follows:

At about 9:30 p.m., 5 March 1943 on the central platform of the railway station at Basingstoke, witness found Cox sitting on accused's chest and holding him to the floor. He thought Cox was intoxicated and pulled him off of accused. Cox was not intoxicated, but infuriated. Accused got up off the floor and said: "I am drunk, where the hell am I? I got to get a train" - or words to that effect, and started to walk off (R.28). He did not stagger, but walked straight. Witness was holding Cox, but when released, Cox followed accused and struck at him (R.28, 30). Accused ducked and witness parted the men (R.28, 30). Cox then said to witness: "Sergeant, I put this officer under arrest." Witness took the party composed of accused, Cox, Horner and Morris to RTO office (R.28). Accused was not sloppy drunk. He knew he had lost his watch (R.28, 32). He walked by himself to the office and upon arriving there laid down on a bench (R.29). Cox stood over accused calling him a sodomist. Cox had been drinking but was not drunk. He was infuriated. Accused made no response to the epithets (R.29, 32). The company commander arrived about 4 a.m., on 6 March 1943 (R.29).

1st Lieutenant Frank B. Bowen testified he had been commanding Co. C., 115th Infantry since 5 November 1942. Accused, Cox and Horner belonged to his company. About 12:30 a.m., 6 March 1943 witness, then at Tidworth Barracks, talked to Cox on the telephone. Cox was in Basingstoke. Witness drove in a weapon-carrier to Basingstoke arriving at RTO office about 4 a.m., (R.35, 36). Accused was asleep on a bench. Cox, Horner and Morris were also asleep. After listening to the stories of Cox and Horner, witness

CONFIDENTIAL

(304)

awakened accused and Morris and took the entire party to Tidworth. Accused got up and walked in a manner that was all right and had no difficulty. Cox showed no evidence of drink and was in possession of his faculties. When awakened, accused said to witness: "What are you doing here and what happened" or words to that effect. There was no conversation on the way back to the post (R.36). It was not because of accused's condition that witness did not question him, but because he felt that whatever accused would have to say would make no difference and that he might possibly deny the offence (R.37).

DEFENSE'S EVIDENCE.

4. After his rights were explained to him the accused appeared as a witness in his own behalf. His version of events is as follows:

Accused and Cox were guests at the Red Cross Service Club at Oxford, England, on the night of 4-5 March 1943, arising at 9:30 a.m., on the last mentioned date. They went to a hairdressers and then visited two shops and witness purchased phonograph records and needles. Upon the opening of the public houses, accused and Cox went to Whites where they ordered two scotch whiskeys (R.39). Private Wood suggested the purchase of a quart of whiskey. Accused and Cox each contributed a pound towards purchase of same. Accused remained in the public house until 2 p.m., consuming at least 10 drinks with enlisted men (R.40, 46). Cox and accused had dates with two girls and accused went to a corner and waited for them until about 2:05 p.m., previously informing Cox of his intention. He returned to Whites and learned that Cox and Wood had departed taking with them accused's coat and phonograph records. Accused joined the two soldiers at another place (which he describes as being up-stairs) (R.40). Leaving that place accused met a young woman who informed him that the two previous mentioned girls were looking for him (R.41). Soon thereafter another girl, "known by accused" came up the street and asked him to accompany her to meet her mother (R.41, 46). After visiting with her about 10 minutes he went to the Service Club, secured his gas mask and toilet articles and went to the railway station (R.41). He arrived at the station at 5:15 p.m., and boarded a train which departed at 5:50 p.m. In the company, composed of about 10 enlisted men and accused, were Wood and Cox. The train was crowded and accused, Wood and Cox stood in the aisle of a railway car near the latrine. Accused and Cox had a fifth of whiskey between them (R.46). Three times accused and the two soldiers went into the latrine to drink whiskey. Finally, they stood in the aisle and had three or four drinks each. Accused had a total of six or seven straight drinks (R.47). It was very warm and accused was made "almost sick" (R.41, 46). He did not remember getting off of the train, but did recall trying to board the train at Reading for Basingstoke (R.41). He fell and broke the records. He remembered sitting somewhere and that "they" came back to him. Accused declared he had no memory of .

boarding the train the second time or entering the compartment nor did he remember being hit on the head. He did recall being hit on the ear and asking "What happened." He did not discover his blackened eye until awakening in the RTO office in Basingstoke. According to accused he nearly fell out of the truck in riding from Basingstoke to Tidworth (R.42). Previously, at a dance he had lost all consciousness (R.42, 43) after drinking. Accused will be 28 years old in May 1943. He volunteered for military service in the regular army and was graduated from O.C.S. on 15 May 1942 (R.44). Accused had never been involved in abnormal sex practices of the nature with which he was charged and had never thought of them. He had no memory of events from the time he boarded the train until he received the lick on the head, which brought him back to consciousness. He did not know how the incident occurred (R.45). The witnesses, who were enlisted men, bore no ill will towards accused as far as he knew. His commanding officer, Lieutenant Bowen, had criticised him and other officers for spending too much time with the enlisted men (R.48).

5. Three fellow officers appeared as character witnesses for accused testifying he was a "perfect gentleman" and "normal in his habits" (R.50); "as a gentleman *** nothing but good" could be said about him; "as an officer he was a good officer"; "as a room-mate *** he is a good friend" (R.51); as an officer, room-mate and gentleman, "one of the best, there was nothing to indicate otherwise" (R.53).

Pfc. McLane, Co.C, 115th Infantry, appeared as a defense witness. The Court allowed him to testify of an incident whereby he received permission from accused to remain in quarters while he was ill, and Cox, as 1st Sergeant, informed him: "I am the man to tell you when you are to stay in or not." (R.54).

PROSECUTION'S REBUTTAL

6. On rebuttal the prosecution produced the following witnesses, who testified as stated:

Corporal Alton M. Morris, Co.C., 115th Infantry: He was in the railway car compartment on the trip from Reading with accused, Cox and Horner. Witness and Horner sat in one seat and accused and Cox were in the other. With respect to accused's condition of sobriety, "he looked alright to me, I wouldn't swear he was drinking or not". Witness was on platform at Reading when there was a "rumpus"; he went for an RTO and when they arrived accused was on his feet and appeared "alright". He went to the RTO office under his own power (R.55). No one lead or carried him (R.56). Witness saw Cox holding accused on the ground (R.55). Witness found accused's watch on the station platform and upon arrival at RTO office accused asked about it and witness informed him that he had it. There was a woman on the station platform when accused was on the

339

(306)

ground. Witness was in the group that returned to the Reading station after accused missed train. Accused talked freely, consciously and coherently about the broken records, his failure to board the train and "what a nice bunch of guys we were for coming back." (R.57). The train was moving when accused attempted to board it. Witness met accused at Oxford station for the first time (R.58).

Pfc. William Bromwell, Co.C., 115th Infantry was on the train from Reading to Basingstoke on evening of 5 March 1943 and occupied a compartment other than that occupied by accused. Upon reaching Basingstoke, Cox asked witness to get an M.P. He secured the RTO Sergeant and returned to station platform. Accused walked "alright" to RTO office (R.59). He did not see Cox strike or hit accused but saw accused strike at Cox (R.59, 60). Witness had seen drunken men, and knows they stagger and do not talk clearly. The accused at the RTO office "knew what he was doing" (R.60).

Pfc. Albert L. Lewis, Co.C., 115th Infantry was in the railway car compartment next to that occupied by accused on the trip from Reading to Basingstoke on evening of 5 March 1943. Bromwell was with him. On the station platform witness saw accused strike Cox (R.61, 62) who yelled to get an M.P. Witness ran to get one and when he returned accused was lying on the platform and Cox was sitting on him (R.61, 63). When the party went to the RTO office accused was walking like a sober man (R.62). On examination by the court, witness could not "say for sure" whether accused actually hit Cox (R.63).

7. The crime of sodomy, as denounced by the 93rd Article of War, includes carnal knowledge per os (MCM, par.149k, p.177; Glover v. States, 101NE 629, 45 LRA (NS) 473; CM 187221, Summerall; CM 192609, Hulme; CM 209651, Palmer and Morrell). To establish the offense, actual penetration of the penis of one of the parties into the mouth of the other must be proved (MCM, par.149k, p.177, 58 C.J. par.5, p.790), and both parties may be liable as principals, where both consented to the act (MCM par.149k, p.177; 58 C.J., par.7, p.790). Conviction of one of the parties may be had upon the testimony of the other party, alone, if believed by the court. (Caminetti v. United States, 242 U.S., 470, 495, 61 L. Ed., 442, 457; CM 192609, Hulme).

With respect to the offense alleged in Charge I and its Specification, viz: sodomy per os, the prosecution abundantly sustained the burden of proving that accused committed the crime. The testimony of Cox regarding the actual penetration is corroborated by Horner. Both testified that the unnatural, carnal connection was consummated. It was a particular function of the Court to weigh

the evidence and to determine its truth or falsity. Cox and Horner appeared before the Court and it had opportunity to judge of their good faith and the absence of pre-arrangement or conspiracy on their part to involve the accused officer in a heinous, revolting offense. By its finding of guilty the Court accepted the testimony of Cox and Horner and concluded they were worthy of belief.

In this type of case, requiring confirmation under AW 48, the Board of Review may weigh the evidence, judge of the credibility of witnesses and reach their own conclusions on controverted questions of fact (CM 153479 (1922), Dig. Ops. JAG., 1912-1940, sec.407(5), p.258; CM 203511, Wedmore). For this reason the testimony of witnesses has been set forth herein above in detail. The Board of Review has carefully analysed and weighed the evidence and can discover no reason to differ from the conclusion of the Court.

However, there is a question which deserves consideration. It is manifest that the defense was seeking by proof of accused's extreme intoxication to exculpate accused from punishment or at least to mitigate the enormity of his offense. Accused denied all memory of the events in the railway carriage and attempted to ascribe his loss of memory to his liberal indulgence in intoxicants. Defense counsel presumably had some idea that evidence of extreme intoxication of accused might be useful to him as a defense but it is evident from the record that he did not appreciate the technique in the use of such evidence.

(1) - Evidence of intoxication of an accused to the degree that he is rendered physically helpless and wholly incapable of committing the criminal acts is most relevant and competent evidence. It goes directly to the issue of fact as to whether accused actually committed the crime alleged. It is probative evidence, intended to establish the ultimate fact that accused did not commit the act or acts charged. A man may be in such drunken state that he is rendered wholly incapacitated to perform the acts constituting the offense. Such evidence traverses the prosecution's proof of the factum of the crime and creates an issue of fact which the Court must resolve. If it finds accused was intoxicated to such degree that he was in a stupor or physically disabled from performing the criminal acts it will thereby find that he did not commit the crime and acquit him. In the instant case, it is obvious that the defense's evidence did not even approach the threshold of such defense. Proof that accused was in such intoxicated state that upon recovering sobriety he had no memory of his conduct during his inebriety is certainly not proof that his intoxication was of that severity as to disable him from committing the crime. Therefore, this use of

the evidence of accused's intoxication must be dismissed.

(2) - Ordinarily evidence of intoxication as a defense is relevant and material in those cases where proof of specific intent is a necessary element of the crime. As examples: in a charge of larceny there must be proof of specific intent of accused to deprive the owner of his property permanently. In a charge of burglary the prosecution must establish the specific intent of accused to commit a felony when he broke and entered the dwelling house. If an accused is intoxicated to the degree that he was incapable of forming a specific intent (a question of fact for the Court) then the prosecution fails in proof of a vital element of its case. However, sodomy is an offense which does not require proof of specific intent (People v. Hall, 16 N.Y. Sup. (2nd) 328, 172 Miscel. 930; People v. Brown, 77 Pac.(2nd) (Cal.) 880). The voluntary intoxication of accused cannot therefore be considered as defensive evidence.

"It is a well settled general rule of the common law, and also generally followed under the statute, that voluntary drunkenness of an accused at the time a crime was committed is no defense; and that despite his voluntary drunkenness at the time one may, subject to qualifications hereinafter pointed out, be guilty of any crime, such as assault, burglary, illegal possession of intoxicating liquor, larceny, rape, or assault with intent to rape. If a person voluntary drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible, whatever may be the degree of his intoxication or the condition of his mind.
***** The effect of drunkenness on the mind and on men's actions when under the full influence of liquor are facts known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences. It can make no difference, where no specific intent is necessary, that the intoxication was so extreme that accused was unconscious of what he was doing and had no capacity to distinguish between right and wrong, and,

CONFIDENTIAL

(309)

although there may be no actual criminal intent, the law will, by construction, supply the same, except in cases where a specific intent is requisite. Accused may be entirely unconscious of what he does and yet be responsible; he may be incapable of express malice, but the law may imply malice from the absence of provocation and from other circumstances under which the act is done." (22 C.J.S., sec.66, p.130-131; 16 C.J., sec.81, p.104-5-6).

(3) - When the evidence of accused's intoxication is subjected to analysis, it is wholly unconvincing that accused was inebriated even to the degree that he described, to-wit, that he could remember no incidents in the railway carriage. His exclamations to Cox after being removed from the train, "I am drunk" (R.11); "What is going on here" (R.21); "I am drunk where the hell am I, I got to get a train" (R.27) create the impression that they were self-serving statements prompted by accused's knowledge that he was facing a serious charge. The evidence of his condition prior to and at the time of his boarding the train at Reading, while showing some degree of intoxication, is not convincing that he was drunk to the degree that he was in a stupor or mentally incapacitated. After his tussle with Cox he was able to walk to the RTO office at Basingstoke without assistance. He knew that his watch had been lost. Considering the evidence of intoxication in the light most favorable to accused, the Board of Review, concludes that it affords no basis either as a defense or in mitigation.

In the opinion of the Board of Review the record is legally sufficient to sustain the finding of guilty of Charge I and its Specification.

8. Article of War 95 provides:

"Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

"The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." (Winthrop).

339

237825

CONFIDENTIAL

(310)

"There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not every one is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standard of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness."

"This article includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman;****" (M.C.M., 1928, sec.151, p.186).

The Specification of Charge II alleges that accused was "disorderly" while in uniform in a public place, to-wit, the railroad station at Basingstoke, England". It charges an offense under the 95th Article of War (M.C.M., 1928, Appendix 2, p.253). It is to be noted, however, that accused is not charged with being drunk or "drunk and disorderly" but simply "disorderly". If the events on the station platform be the sole basis of determining accused's guilt there is much that may be said in favor of the proposition that accused was not guilty of conspicuous disorderly conduct, (CM 196426 (1931), Dig. Ops, JAG., 1912-1940, par.453(11), p.343), but was simply endeavouring to free himself from an unprovoked assault by Cox. However, such view of the evidence distorts the actualities of the case, and affords no explanation of either accused's or Cox's conduct. There can be no doubt but what evidence of the events occurring on the railway train immediately preceding its arrival at Basingstoke, although involving a distinct and separate offense, is relevant, competent and admissible on the issue under Charge II and its Specification. (6 C.J.S., sec.116c, p.978, 979; 16 C.J., sec.1139, p.590; 1 Wharton's Criminal Evidence, sec.255, p.307). Such evidence serves to explain the motives and reasons for Cox detaining accused and for accused's effort to prevent such detention, which in turn produced the disorderly conduct with which accused is charged. The explanation of events on the station platform is discovered in the occurrences in the railway carriage. The events

339

237825

- 12 -

CONFIDENTIAL

CONFIDENTIAL

(311)

of the two locus are in truth one continuous transaction. Accused had aroused Cox's animosity and contempt by his act of perversion. Cox resolved to bring him to account and to that end dragged him from the carriage on to a public railway platform. When accused attempted to depart he was knocked down by Cox who sat upon him to hold him in restraint until arrival of military police. Viewed in this light there is substantial evidence in the record to sustain the finding that accused was guilty of disorderly conduct.

There is no specific testimony that accused was in uniform on the occasion of the platform disorder. The testimony of T/3 Wangstad, the RTO officer at Basingstoke, distinguishes between the acts of "Lieutenant" Gage and "Sergeant" Cox and the "other soldiers" (R.27, 28, 29) and he identified the accused in the court room (R.27). Furthermore, the accused on cross-examination stated he carried a gas-mask and a "short coat" (R.41) and admitted he was the only officer in Whites public house drinking with soldiers. The accused was an officer on duty with American troops in England (R.27) where the wearing of the service uniform is mandatory while absent on pass along civilians (ETO, GO 28, 1c(3), 8-18-42). From this evidence it may be inferred that accused was in uniform at the time of his melee with Cox on the station platform (CM 121825 (1918); CM 121984 (1918); CM 122254 (1918), reported in Dig. Ops, JAG., 1912-1940, par.453(11), p.342,343).

In the opinion of the Board of Review the record is legally sufficient to sustain the finding of guilty of Charge II and its Specification.

9. The accused is 28 years old. He enlisted 21 May 1941 in the regular army. He was graduated from O.C.S. on 15 May 1942 and was on that date commissioned a 2nd Lieutenant, AUS. He was assigned to the 115th Infantry on 22 Sept 1942.

10. The court was legally constituted. No errors injuriously 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 finding of guilty of Charge I and its Specification and Charge II and its Specification and the sentence. Dismissal is authorized upon a conviction of a violation of the 93rd Article of War and is mandatory upon a conviction of a violation of the 95th Article of War.

J. Franklin Kite Judge Advocate

R. D. Sutherland Judge Advocate

(ABSENT ON LEAVE) Judge Advocate

237825

339

- 13 - **CONFIDENTIAL**

CONFIDENTIAL

(312)

1st Ind.

WD, ETO Branch - JAGO.

31 MAR 1943

TO: Commanding General, European Theater of Operations, APO 887,
U.S. Army.

1. Herewith transmitted the record of trial, together with the opinion of the Board of Review in the case of 2nd Lt. Lee W. Gage (0-1283752), Company C, 115th Infantry (AUS).

2. Upon trial this officer was found guilty of sodomy in violation of Article of War 93, and of conduct unbecoming an officer and a gentleman in violation of Article of War 95. He was sentenced to be dismissed the service to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Prior to your action thereon, you referred the record to me under the provisions of Article of War 46, and, in order to expedite final action in the case, and more especially to insure to the accused the independent and impartial examination of the record of trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Articles of War 48 and 50 $\frac{1}{2}$, under the provisions of the latter article and, before examination by me, I referred the record to the Board of Review for its examination and opinion. Normally, pursuant to instructions of The Judge Advocate General, action by the confirming authority (other than the President) is required, under the provisions of the third paragraph of Article of War 50 $\frac{1}{2}$, before the record is referred to the Board of Review and myself for review as to its legal sufficiency. However, your reference of the record to me, prior to your action thereon, under the provisions of Article of War 46, which expressly authorizes such reference, since I, as an Assistant Judge Advocate General in charge of the branch of the office of The Judge Advocate General for this Theater, have, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, with respect to this case, like powers and duties as The Judge Advocate General, changes the normal situation indicated above. Under such circumstances, should I pass on the record under Article of War 46, in lieu of and as your staff judge advocate, and return the record for your action prior to its examination by the Board of Review, it would then be necessary, after your action, for the Board of Review and myself, in my capacity in charge of this branch office, to examine the record to determine its legal sufficiency. Such a procedure would deny the accused the independent review of the record by the Board of Review, provided by Article of War 50 $\frac{1}{2}$, since the report of my examination and my recommendation under Article of War 46 would be a part of the file of

237325

339

CONFIDENTIAL

CONFIDENTIAL

(313)

the case when it reached the Board of Review. It would also place me in the anomalous position of acting as staff judge advocate under Article of War 46 before the review of the Board of Review and as Judge Advocate General for this theater after such review under Articles of War 48 and 50 $\frac{1}{2}$. In my opinion, to follow such a procedure would deny the accused a substantial right given him by Articles of War 48 and 50 $\frac{1}{2}$. On the other hand, following the procedure I have adopted denies the accused nothing, but fully protects his rights. I am convinced this is the procedure The Judge Advocate General would follow on a reference to him, under Article of War 46, for the reason that, in such event, he would occupy the dual role of staff judge advocate and The Judge Advocate General, as he does when the President is the confirming authority and would follow the procedure prescribed for the latter class of cases. In my opinion the full protection of the rights of the accused vouchsafed to him under the Articles of War requires this procedure.

4. The Board of Review summarizes the evidence in the accompanying opinion and holds that the record is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I have carefully examined the record and concur in the opinion and holding.

5. a. The proof as to the Specification of Charge I unquestionably shows the commission of the detestable crime of sodomy, committed by a commissioned officer upon an enlisted man, in the presence of two other enlisted men. No denial of the acts alleged is made by accused, his only comment thereon being that he did not remember, a defense which the court apparently did not believe and which does not square with the conduct and actions of accused before, during and after the commission of the offense. Guilt of the Specification having been established, guilt of the Charge follows as a matter of course.

b. As to Charge II, the acts charged in the Specification constitute, under the circumstances, conduct unbecoming an officer and a gentleman. In a condition whether feigned or real, which necessitated that he be dragged from the train by an enlisted man, then lying on the platform of a public railway station, wrestling in a public place with, and having to be overcome and held down by an enlisted man, presents a picture of misconduct amply sufficient to sustain the finding of guilty of the offense charged.

6. Dismissal and confinement at hard labor for five years is none too severe a sentence for such detestable and ungentlemanly conduct. I accordingly recommend that the sentence be confirmed

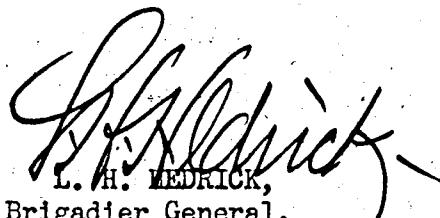
37325

339

CONFIDENTIAL

(314)

and ordered executed. Inclosed herewith is a form of action confirming the sentence and directing that it be carried into execution.



L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

2 Incl:

Form of action.
Opinion Board of Review.

(Sentence confirmed and ordered executed. GCMO 5, ETO, 6 Apr 1943)

237825

339

CONFIDENTIAL

(315)

In the Office of The Judge Advocate General
for the
European Theater of Operations
APO 871

Board of Review.

ETO 364.

31 MAR 1943

U N I T E D S T A T E S	HEADQUARTERS VIII AIR FORCE
v.	Trial by G.C.M., convened at
First Lieutenant CURTIS H. HOWE, (O-885550), A.C., 326 Bombardment	AAF Station 101, APO 634,
Squadron, 92nd Bombardment Group	23 February 1943. Sentence:
(H) AC., 11th Combat Crew,	Dismissal.
Replacement Center.	

OPINION of the BOARD OF REVIEW
RITER, VAN BENSHOTEN and IDE, Judge Advocates.

1. The record of trial in the case of the officer named above, having been referred by the Commanding General, European Theater of Operations, the confirming authority, prior to his action thereon, and pursuant to the provisions of Article of War 46, to the Assistant Judge Advocate General in charge of the branch of The Judge Advocate General's Office for the European Theater of Operations, who, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, has, with respect to this case, like powers and duties as The Judge Advocate General, and to the end that the accused should have an independant review of the record of his trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Article of War 50 $\frac{1}{2}$, and having been referred by him to the Board of Review for examination and review, has been examined by the Board of Review, which submits this, its opinion and holding thereon, to him as Judge Advocate General, European Theater of Operations.

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

CHARGE: Violation of the 61st Article of War.

CONFIDENTIAL

(316)

Specification: In that 1st Lt. Curtis H. Howe, 326th Bombardment Squadron, 11th Combat Crew Replacement Center did without proper leave, absent himself from his post and duties at the 326th Bombardment Squadron, 11th Combat Crew Replacement Center, AAF Station 112, APO 634, from about 1400 hours January 12, 1943 to about 1800 hours January 28, 1943.

He 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, confined to hard labor for six months and to forfeit 91.67 per month for a like period." The approving authority approved only so much of the sentence as involved dismissal and forwarded the record of trial for action under Article of War 48.

3. The facts are not disputed. Accused was assistant flying control officer at his station which was not a tactical group (R.10). On January 10, 1943, accused asked his immediate superior, Flying Officer Eric G. Rees, for a 24 hour pass saying he had to have a medical examination in London. He was told that so far as flying control was concerned he could have a pass and could leave early that afternoon with the understanding that he was to return about two o'clock on the afternoon of January 12th (R.9). On January 13th accused called Flying Officer Rees by telephone and apologized for being late stating he had been delayed with the medical interview. He had no excuse for the Wednesday absence, but attempted to tell of extenuating circumstances for his absence when Rees refused to listen, saying the matter was out of his hands and that Colonel Smith had been inquiring for accused. Accused then promised to return that night and to see Colonel Smith (R.10). Nothing more was heard from accused and he did not return to his station that night. On January 28th two military police officers were in the Hyde Park Club when accused came in and asked for "Adele" (she was the manager of the club (R.13)) and on being informed that she was not in, asked that she be told that Lieutenant Curtis H. Howe called. When the military police officers heard this name, they asked accused for his identification card and took him to the military police camp. Accused had a bruised eye and a swollen nose which he said he received in a fight and for which he had been to the dispensary (R.12). Four stipulations, which the trial judge advocate "stated ----- had been agreed ----- were read as follows": The first stipulation was to the effect that Captain Patton, the Adjutant of the 326th Bombardment Squadron, 11th C.C.R.C., Station 112, if present would testify that at no time between the 12th and 29th of January 1943 did he give accused permission to be absent from his post and duties and that if present he would identify the sheet of paper now produced as a "true extract of the morning orders of the 326 Bombardment Squadron". "It is further stipulated

234996

- 2 -

CONFIDENTIAL

334

CONFIDENTIAL

(317)

that from 12th to 29th January 1943, accused received no permission for absence from his post and duties" (R.8). The second stipulation agrees that "accused was absent from his post and duties without the authority of anyone competent to give leave from 1400 hours on January 12th to 1800 hours January 28" (R.8). Stipulation three was to the effect that the Squadron Commander of 326th Bombardment Squadron "present in court", if sworn would testify that from January 12th 1943 to the latter part of the month he was Squadron Commander of the 326th Bombardment Squadron and that "at no time did he give permission to accused to be absent from his squadron" (R.8). The fourth stipulation was to the effect that Lieutenant Robert S. Jerue took accused into custody on January 29th at the headquarters of the London Base Command and brought him back to his Squadron (R.13). On page 8 of the record also appears the following without other remark or explanation: "Prosecution Exhibit 1 (extract of morning report) was then accepted as evidence by the court."

Major Nathan S. Rubin, Medical Corps, testified he had, in his capacity in the Medical Corps, seen accused twice, once in November 1942 and again on January 12th 1943 and that accused was to return on the afternoon of January 12th but that he did not return then or at any time since (R.14). Carlisle E. McKee, Captain, Medical Corps, testified that accused reported to the 7th General Dispensary on January 28th in reference to a possible broken nose but that an X-ray failed to disclose any fracture (R.15).

Accused made an unsworn statement to the court. In substance he states that he had had January 11th as a day off and on the 12th went to the office of Major Rubin and was to return in the afternoon for examination. In the meantime, he went to lunch with a married lady he had known for some ten months who told him her husband had questioned her about her going around with an Air Force officer whom he understood had been transferred to the United States Army. She said she had admitted to her husband that she had been going around with accused and asked accused to "contact" him. Accused called the husband and he also saw the lady on the 13th when she told accused she was five months pregnant and her husband was threatening divorce proceedings in which he intended to name accused as co-respondent. Accused, who also was married, saw the husband at various times, almost daily, following this and stayed on in London attempting to reach a settlement. He was threatened and on one occasion badly beaten by the husband following various accusations. Accused stated "as far as that goes, that is the absence," that he was very upset; that he was in a muddle and did not know which way to turn, and that he knew he was doing wrong but didn't realize it was so serious. Accused further stated that he had joined the R.C.A.F., in September 1940, spent eleven months in Service Flying Training School and had served in Canada, and that in November 1942, by his own request, he was transferred to the United States Army. He further stated "I knew I would be punished and I knew I was doing wrong. I am not going to

234996

- 3 - **CONFIDENTIAL**

364

CONFIDENTIAL

(318)

say I didn't, but it looked to me I was going to get it one way or the other and I didn't want to have all this mess and lose my wife and get stuck with someone else's. It was just a mess" (R.18). "----- I kept trying to reach some sort of an agreement. One day he was going to divorce her and the next day he wasn't -----". "The beating the man handed me is what really settled the matter. He got rid of his spleen and that was that." He had not called his commanding officer to ask for an extention of leave because he didn't think he would get it (R.19).

4. The accused admits and the evidence of record shows the accused guilty of the offense charged. His unsworn statement presents prima facie, an explanation of his absence and the urgent attention which his own personal affairs seemed to him to require. It is not convincing and does not excuse his offense.

5. The record shows an unusual number of irregularities of form and procedure but none it is believed affects the legal sufficiency of the record nor prejudicial to accused (AW 37):

(a) There is no cross-examination of the witness, Captain McKee, and the record fails to indicate that he was offered to the defense for cross-examination (R.15). Cross-examination of a witness as to facts relevant to the issue is a matter of right not of discretion. (Wharton's Criminal Evidence, p.216).

(b) With the exception of Lieutenant Colonel Breedlove, the officers promoted between the date of their appointment to the court and the date of trial, are referred to by their prior titles, with footnotes indicating their promotions. The better practice is to give them their current titles and attach to the record of trial a certificate of their promotion or to add a notation to the effect that they had been promoted since their appointment to the court. Lieutenant Colonel Breedlove, however, is referred to as "Lt. Col.", with no explanation of promotion or otherwise. He is however, satisfactorily identified as the Major Breedlove appointed to the court by his serial number and branch designation.

(c) The accused's plea of guilty was received but the record does not indicate that the meaning and effect thereof had been explained to him. However, the record would indicate that the plea was advisedly made and all the statements of accused were consistent with the plea. Failure to explain a plea of guilty is not fatal, (CM 210941, Williams) and it may be assumed that defense counsel performed his duty.

(d) Four stipulations are read into the record by the trial judge advocate but with the exception of the first one, there is no express indication that the defense agreed to them. Each of these stipulations should have been agreed to in open court by accused personally and by his counsel. However, defense counsel initialed the record at the end thereof indicating assent thereto.

234996

364

CONFIDENTIAL

(319)

(e) The sentence given provides dismissal, confinement at hard labor for six months and also forfeiture of \$91.67 per month for a like period. As pay stops on separation from the service it is evident that so far as the forfeiture is concerned this sentence is a nullity. The sentence, however, is not wholly void but is valid as to that part thereof extending to dismissal and confinement at hard labor for six months. The void part must be disregarded (CM ETO 292 - Mickles) as the reviewing authority has done in approving the sentence.

6. Accused is 41 years old. He was ordered to active duty 24 November 1942 and assigned to the 11th C.C.R.E. Bomber Command 27 November 1942. No prior service of accused in the armed forces of the United States is shown.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized.

B. Franklin Ritter Judge Advocate

W. G. Buntington Judge Advocate

(ABSENT ON LEAVE) Judge Advocate

364

234996-

CONFIDENTIAL

(320)

1st Ind.

WD, ETO Branch - JAGO.

31 MAR 1943

TO: Commanding General, European Theater of Operations,
APO 887, U.S. Army.

1. Herewith transmitted is the record of trial, together with the opinion of the Board of Review, in the case of First Lieutenant Curtis H. Howe, O-885550, 326th Bombardment Squadron, 92nd Bombardment Group (H) AC, 11th Combat Crew Replacement Center.

2. Upon trial by general court-martial this officer was found guilty of absence without leave in violation of the 61st Article of War. He was sentenced to dismissal from the service, confinement at hard labor for six months and to forfeit \$91.67 per month for a like period. The reviewing authority approved only so much of the sentence as involves dismissal and forwarded the record of trial for action under Article of War 48.

3. Prior to your action thereon, you referred the record to me under the provisions of Article of War 46, and, in order to expedite final action in the case, and more especially to insure to the accused the independent and impartial examination of the record of trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Articles of War 48 and 50 $\frac{1}{2}$, under the provisions of the latter article and, before examination by me, I referred the record to the Board of Review for its examination and opinion. [Normally, pursuant to instructions of The Judge Advocate General, action by the confirming authority (other than the President) is required, under the provisions of the third paragraph of Article of War 50 $\frac{1}{2}$, before the record is referred to the Board of Review. However, your reference of the record to me, prior to your action thereon, under the provisions of Article of War 46, which expressly authorizes such reference, since I, as an Assistant Judge Advocate General, have, under the provisions of the last paragraph of Article of War 50 $\frac{1}{2}$, with respect to this case, like powers and duties as The Judge Advocate General, changes the normal situation indicated above. Under such circumstances, should I pass on the record under Article of War 46, in lieu of and as your staff judge advocate, and return the record for your action prior to its examination by the Board of Review, it would then be necessary, after your action, for the Board of Review to examine the record to determine its legal sufficiency. Such a procedure would deny the accused the independent review of the record by the Board of Review, provided by Article of War 50 $\frac{1}{2}$, since the report of my examination and my recommendation under Article of War 46 would be a part of the file of the case when it reached the Board of Review. It would also place me in the anomalous position of acting as staff judge advocate under Article of War 46 before the review of the Board of Review and as Judge

234996

- 6 -

CONFIDENTIAL

364

(321)

Advocate General, European Theater of Operations, after such review, under Articles of War 48 and 50½. In my opinion, to follow such a procedure would deny the accused a substantial right given him by Articles of War 48 and 50½. On the other hand, following the procedure I have adopted denies the accused nothing, but fully protects his rights. I am convinced this is the procedure The Judge Advocate General would follow on a reference to him, under Article of War 46, for the reason that in such event, he would occupy the dual role of staff judge advocate and The Judge Advocate General, as he does when the President is the confirming authority and would follow the procedure prescribed for the latter class of cases. In my opinion the full protection of the rights of the accused vouchsafed to him under the Articles of War requires this procedure.

4. The Board of Review summarizes the evidence in the accompanying opinion and holds that the record is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I have carefully examined the record and concur in the opinion and holding.

5. On the matter of clemency this case has given me some concern. Absenteeism is divided into four classes:

- Absent without leave under AW 61.
- Such absence coupled with intent to shirk some duty under AW 96.
- Such absence, coupled with intent to shirk hazardous duty or important service under AW 28. (A type of desertion).
- Desertion.

Bare absence without leave, as charged in this case, generally is considered the least serious of these offenses, and in normal times one, unless aggravated, which scarcely justifies as drastic punishment as dismissal. However, war conditions necessarily increase the seriousness of all unauthorized absences. Under the Articles of War desertion at once becomes a capital offense. The President has removed the limits on punishment for absence without leave in violation of AW 61, when committed by enlisted men. No limits ever existed in the case of officers. So that at this time all unauthorized absences, other than desertion, are punishable by any punishment a court-martial may fix, except death.

It is obvious that for an officer to be absent without leave is a most serious infraction of discipline. To treat it lightly in time of war would be ruinous of discipline, and would jeopardize our war effort. Punishment must be drastic in any case of unauthorized absence in time of war, and more drastic in the case of officers.

CONFIDENTIAL

(322)

In the instant case, the guilt is admitted and clearly proven. An attempt at mitigation was made by the accused in an unsworn statement. Concerning this there is in the review of the Staff Judge Advocate the following comment:

"The unsworn statement of accused presents a plausible explanation of the reasons motivating him in his offense, and tend to show that he was under strong emotional pressure to take time off for his own personal affairs."

Even so, this furnishes no excuse. I have studied this statement carefully. In my opinion it does not ring true. It lacks frankness. It gives me the impression that it is made up of half truths, - one of the worst forms of evasion. The fact that it was unsworn is itself of moment when considering mitigation. It causes it to appear that accused did not care to be questioned on his explanation. In other words, that he did not wish to lay all his cards on the table. This indicates a trait of character undesirable in an officer. // The accused states that "the beating the man handed me is what really settled the matter. He got rid of his spleen and that was that." The "beating" occurred on the 24th but accused was still absent without leave on the evening of the 28th, when he was apprehended. How much longer his absence would have continued is problematical. // Rather than mitigating, to my mind, his statement tends to aggravate. Such also seems to have been the view of the court.

The accused stated that he had never seen the Articles of War or had them read to him, and did not realise the seriousness of the offense. While ignorance of the law as to purely military offenses may be taken into consideration in the case of a recruit, for obvious reasons this does not apply in the case of officers. Even though accused had been in our service less than two months, according to his own statement he joined the Royal Canadian Air Force in September, 1940, and was commissioned in February, 1941. His service has been continuous. An officer owes the duty to keep himself informed. That burden is not on the Army. // Nor is there merit in his appeal that he now believes he was ill-advised by his counsel "especially when advised to plead 'guilty' ". Obviously the proof of guilt was very easy. His plea of guilty was unimportant. It also appears that the character of his service has been poor; that he is badly involved in debt; and it is indicated that in one instance he passed a bad check. //

The need for officer material is great, but this must be weighed with the requirements of discipline. Viewed from all angles the latter, in my opinion, weigh heaviest in this case; and I am also constrained to agree with the staff judge advocate that "the accused is not a credit to the service".

364

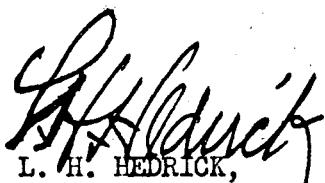
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CONFIDENTIAL

CONFIDENTIAL

(323)

6. For the foregoing reasons I am of the opinion that sufficient clemency already has been given in this case; and I accordingly recommend that the sentence, as approved by the reviewing authority, be confirmed. I inclose a form of action designed to confirm the sentence and carry it into execution should such action meet with your approval.


L. H. HEDRICK,
Brigadier General, U.S. Army,
Judge Advocate General,
European Theater of Operations.

(Sentence as approved by convening authority confirmed and ordered executed. GCMQ 6, ETO, 6 Apr 1943)



CONFIDENTIAL

(325)

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

Board of Review.

29 MAY 1943

ETO 393.

UNITED STATES) SOUTHERN BASE SECTION, SERVICES
v.) OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Technician 4th Grade PAUL R. CATON) Trial by G.C.M., convened at Tidworth,
(32131286), 3rd Station Hospital,) Wiltshire, England, 15 March 1943.
APO 505, and Technician 5th Grade) Sentences at to each: Dishonorable
MORRIS R. FIKES (37104608), 3rd) discharge, total forfeitures and
Station Hospital, APO 505.) confinement at hard labor for three
years, the dishonorable discharge
to be suspended until release of each
from confinement. Confinement:
Disciplinary Training Center No. 1,
Shepton Mallet, Somerset, England.

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 in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient in part 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. The accused were tried upon the following Charges and Specifications:

CHARGE I: Violation of the 83rd Article of War.
Specification: In that Technician Fourth Grade
Paul R. Caton and Technician Fifth Grade
Morris R. Fikes, both of 3rd Station Hospital,
did at or near Salisbury, Wiltshire, England,
on or about 9 January 1943, while acting jointly
and in pursuance of a common purpose, through
neglect suffer an ambulance, No. 719144, military
property belonging to the United States, to be
damaged in the amount of \$100.00 by driving the
same in a negligent and reckless manner.

393

~~CONFIDENTIAL~~

(326)

CHARGE II: Violation of the 96th Article of War.
Specification: In that Technician Fourth Grade

Paul R. Caton and Technician Fifth Grade
Morris R. Fikes, both of 3rd Station Hospital,
did at Tidworth, Hants, England, on or about
9 January 1943, while acting jointly and in
pursuance of a common purpose, wrongfully and
without lawful permission or authority take and
use an ambulance, No. 719144, the property of
the United States and of the value of more than
fifty dollars (\$50.00).

CHARGE III: Violation of the 93rd Article of War.
Specification: In that Technician Fourth Grade

Paul R. Caton and Technician Fifth Grade
Morris R. Fikes, both of 3rd Station Hospital,
did near Salisbury, Wiltshire, England, on or
about 9 January 1943, while acting jointly and
in pursuance of a common purpose, feloniously
and unlawfully kill Private William Pitson of
the British Army by driving a United States Army
ambulance in a grossly negligent and reckless
manner to wit, to the right of the center of
the highway, and at night with only one light,
into a British motor vehicle in which the said
Private Pitson was riding.

Each accused pleaded not guilty to and was found guilty of all Specifications and Charges. No evidence of previous convictions was introduced. They were sentenced, each, to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years at such place as the reviewing authority may direct. The reviewing authority approved the sentence as to each accused but suspended the execution of the 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 result of the trial was promulgated in General Court-Martial Order No. 8, Headquarters, Southern Base Section, Services of Supply, European Theater of Operations, United States Army, APO 519, dated 3 April 1943.

3. The evidence of witnesses for the prosecution and of witnesses called by the court, shows that on 9 January 1943, about 7:30 P.M., Private W. Davies, A.T.S., (British) met the accused Caton at a noncommissioned officers' bar at Tidworth, England. There they had a drink and a dance. Private Davies, (female), who had come to Tidworth from Salisbury, did not return to Salisbury on the last bus which left about 9:25 P.M. Caton promised that he would obtain transportation to Salisbury for her, and said that he would "go to the

office and ask permission" (R.3-4). On the evening of 9 January 1943, Technician 4th Grade Samuel W. Hess, was on duty in the dispatch office as a dispatcher and transportation sergeant for the 3rd Station Hospital, and was in charge of dispatching all vehicles of the hospital (R.1,20). On that evening, Caton asked Hess for permission to take vehicle to Salisbury. Hess testified that he told Caton that he was not authorized to grant him permission, and that Caton should see Captain Becker, the transportation officer. Hess did not see the accused Fikes (R.1,7,20). Private John H. Lewis, on duty with Hess in the transportation office, testified that Hess told Caton that "he could have an ambulance as long as he could find a driver and he (Hess) didn't know anything about it" (R.7). Hess denied making any such statement (R.2).

On 7 January 1943, ambulance No. 719144, property of the United States, was assigned for military use at the 3rd Station Hospital (R.17-18). Permission for the use of vehicles was granted only by the dispatch office (R.2), and it was required that trip tickets be issued at that office even if permission for the use of a vehicle came from higher authority (R.19). Only Hess or Captain Becker, the transportation officer, could have authorized the use of ambulance No. 719144 on 9 January 1943. No ambulance would be dispatched unless a call came from the admission and disposition office, or unless Captain Becker or the commanding officer granted permission (R.18). Hess did not dispatch a vehicle to either of the accused on the evening of 9 January 1943 (R.1). A trip ticket was not issued for ambulance No. 719144 on that evening, nor was it dispatched or its use then authorized (R.18-19). About 12:30 o'clock, as the result of a telephone call, Hess found that ambulance No. 719144 was missing (R.19). The vehicle had been parked in front of the transportation office, and could have been driven away without the knowledge of Hess. (R.20-21).

According to Private Davies, Caton had difficulty in obtaining a driver. He got Fikes to drive for him. She did not know where the vehicle was first obtained as it was too dark (R.4). After the ambulance was obtained, Caton and Fikes entered "an office". Private Davies "understood Sergeant Caton to say that he would take the risk" during his conversation with Fikes (R.6,23,25). Private Davies with Fikes and Caton then left in the vehicle for Salisbury (R.4,6,24). Private Davies sat in the front seat with Fikes who was driving. After they reached Amesbury, Private Davies sat in the rear of the ambulance with Caton, and Fikes drove on, sitting alone in the front seat (R.5,23-25). On the way to Amesbury, according to Private Davies, Fikes had driven carefully, seemed like a competent driver, handled the vehicle in a proper manner and drove on the correct side of the road (R.5,25). About three miles beyond Amesbury there was a collision with another vehicle. Private Davies and Caton then got out of the ambulance. About four occupants of the other vehicle were injured, one seriously. Fikes was injured and had blood on his face.

(R.4,24-25). As Private Davies was riding in the rear of the vehicle at the time of the accident, she could not see the road, and did not know in what manner Fikes was driving. The ambulance "did not seem to be going at a terrific rate though" (R.5,25).

Driver Clifford Cochram, (British), 63rd Troop Carrying Unit, Royal Army Service Corps, was, on 9 January 1943, detailed to take a vehicle from Salisbury to Bulford. He left Salisbury about 2300 hours, and, after travelling two miles, noticed a bright light coming towards him (R.26). He did not know what the one light was, and thought it might be a motorcycle (R.28). Cochram slowed up to about fifteen miles per hour, changed to third gear, and pulled well over to his own side of the road. The light was about six yards away when he realized it was a vehicle which had no offside light (R.26-28). The next thing Cochram knew, an American ambulance struck his vehicle on its offside mudguard, and then struck the bodywork. Cochram was stunned, lost the control of his car and the steering wheel was ripped out of his hands. Prior to the accident, the American ambulance was about two feet over on Cochram's side of the "white line" (R.26-27). Prior to the collision Cochram had applied his brakes but did not blow his horn (R.28). When he left Salisbury, Cochram had checked the two side lights and one headlight on his vehicle and found them to be in good working order (R.28). He had been driving for five years, and had had no accidents (R.27). He wore glasses to correct short-sightedness, and could see "perfectly clearly" with them. Cochram was wearing glasses at the time of the accident (R.28).

Driver C. M. Pearse, 253rd Troop Carrying Unit, Royal Army Service Corps, was riding in the front seat with Cochram at the time of the accident. They were driving on the correct side of the road and in a normal manner. A single light approached about 100 yards away. "We had assumed this light to be a motorcycle but in actual fact it was an American ambulance. He hit us and we came to a standstill ***". Asked by the prosecution how far the American ambulance was over the center line of the road just prior to the impact, Pearse stated "Actually we could not see it until it was on us, but from the mere fact that it did hit us *** we were on the correct side" (R.29-31). When the accident occurred, the British vehicle had just passed over the crest of a hill, was in third gear, and was travelling at 15 miles per hour. The night was wet and it was "drizzling" when they left Salisbury. Pearse thought it was drizzling after the accident. The wind shield wiper on the British vehicle was operating (R.30).

At the place where the accident occurred, the road was straight but towards Amesbury there was a "very slight bend" (R.8). The road was 22 feet wide and the width of the British vehicle was 7 feet 7 inches at its widest point. There was ample room for the two vehicles to pass (R.11). A white line divided the road (R.13). After the accident the wheel marks of the British vehicle were plainly visible. They "were right in against the grass verge thirty (30) yards prior to the accident and it came to rest at the time of the collision with the wheels still hard against the grass verge. At no time was that vehicle away from the grass verge leading up to the *** or at the collision" (R.11,13,27,31).

There was no indication of tire marks made by the American ambulance (R.11,13). An inspection of the American vehicle after the accident disclosed that its number was 719144 (R.32), and that then "it had not any offside light" (Ex."C"). The American vehicle was damaged "from the front off mudguard back from the driver's cab to the body". The cab was badly damaged and the windshield was smashed (R.9,11,32). The British vehicle had been struck on its offside mudguard (R.11,26) which was partly ripped off (R.11). An expert witness was of the opinion that the cost of repairing the American ambulance would be about 100 pounds (R.36).

The visibility on the evening in question "was not good but was not exceptionally bad". In the opinion of one witness, with lights "visibility at two hundred yards would have been adequate" (R.32). Another witness testified it was rather dark, and that there was a very slight rain (R.12). A third witness testified that the atmosphere was "rather heavily laden" (Ex."C").

As a result of the accident, Fikes and three or four occupants of the British vehicle, including the deceased, Pitson, were injured. They were taken to the hospital by a civilian in a private car (R.24, 37-39, 45-46; Ex."A"). Before leaving the scene of the accident, Fikes was asked by an English soldier how the accident had occurred. Fikes replied that he "could not see a thing" (R.36; Ex."C"). Pitson died at 4:30 A.M., 10 January 1943 (Ex."A"). When given medical treatment Fikes did not appear to be intoxicated (Ex."A"). At the time of the accident, Pitson, the deceased, was sitting in the front seat on the right-hand side of the British vehicle. The seats were installed with a center row of seats and a row of seats on either side of the truck running lengthwise. He was knocked unconscious (R.45-47).

The switch system on the American ambulance was inspected by the regular driver of the vehicle on 7 and 8 January 1943, but not on 9 January. The vehicle was, at 5:30 P.M., as far as the driver knew, "in good shape". With reference to the ignition system, "there is a little button by the headlight switch, *** as you turn it on at any time and the lighting switch is pulled out on the same thing". If the headlights were turned on, the sidelights would automatically come on (R.21-22).

4. The evidence for the defense shows that the American ambulance was received 7 January 1943 (Pros.Ex."B"). The lights were checked and it was found to be in good operating condition. If the headlight was turned on the side-lights would be lighted. On a dark night without fog, the running light could be seen from five to six hundred feet. Fikes was a licensed driver (R.40).

Captain Edwin C. Miller, MAC., testified that he had known Caton since April 1942, that at first he was a cook, and that Caton had done an "excellent job" when he was in charge of subsistence. Caton never gave a moment's trouble and Captain Miller could not recall that he had

ever been late at formation. Fikes had also been under the captain's supervision for about two months. His work had been very satisfactory. (R.42).

First Lieutenant John T. Scarborough, Chaplain, had known the accused for about 11 months. They were very dependable, reliable and courteous (R.43).

Accused, after being advised of their rights, elected to remain silent (R.44).

5. With reference to Charge II and the Specification thereunder (wrongfully and without authority taking and using the vehicle alleged while acting jointly and in pursuance of a common purpose), the Board of Review is of the opinion that the evidence is legally sufficient to sustain the findings of guilty as to each accused. Caton asked Hess for permission to drive a vehicle to Salisbury. His request was refused and Caton was told that he would have to see Captain Becker, the transportation officer. However, in spite of this refusal, Caton wrongfully took the ambulance. After having had some difficulty in getting a driver, and finally obtaining Fikes, the ambulance was driven away without authority. Contrary to regular orders, no trip ticket was secured from the dispatch office. Permission to use the vehicle was not granted by Hess, Captain Becker or by higher or other competent authority. The court was entitled to disbelieve, as apparently it did, the testimony of Private Lewis to the effect that Hess told Caton that he could have an ambulance if he could find a driver and if Hess knew nothing about it, and to believe the testimony of Hess who denied having made the statement.

The finding by the court that Fikes was also guilty of the offense alleged in this Specification is supported by the evidence. Private Davies heard Caton tell Fikes that he (Caton) "would take the risk", indicating that Fikes knew that the contemplated use of the vehicle was unauthorized. In addition, Fikes was a licensed driver and it may be justifiably assumed that he knew it would be necessary to secure permission for the use of any vehicle, and to follow the usual procedure of obtaining a trip ticket from the dispatch office. It was also evident that as licensed driver, Fikes should have been especially careful to ascertain whether such a trip ticket had been obtained because of the unusual circumstances of the request to drive and of taking the vehicle. Although there was no evidence as to the value of the ambulance, considering the type of vehicle concerned, the assumption that its value was in excess of \$50 as alleged, is fully warranted.

6. With reference to Charge III and the Specification thereunder, (offense of manslaughter while acting jointly and in pursuance of a common purpose), the evidence shows that on the evening in question, visibility "was not good but was not exceptionally bad". It was dark. The atmosphere was "rather heavily laden", and there was a very slight rain. Cochram, the driver of the British vehicle, observed a bright

light approaching. Not knowing whether it was a motorcycle or automobile, he changed to third gear, slowed up to about fifteen miles per hour and pulled well over on his own side of the road. He did not realize that it was an automobile until the light was about six yards away. The offside light of the vehicle was not burning. The American ambulance was about two feet over on the wrong side of the white line, and struck the British vehicle on the latter's offside mudguard. After the accident occurred, the tire marks of the British vehicle were plainly seen against the grass verge for a distance of thirty yards before coming to the place of collision, thus showing that Cochram was well over "on his own side" of the road when the accident occurred. The witness who inspected the American ambulance after the collision, then found that "it had not any offside light". He asked Fikes how the accident happened and Fikes replied that he "could not see a thing". (Underscoring supplied).

The offense charged is that of involuntary manslaughter.

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law". (par.149a, M.C.M., pp.165-166).

"The degree of negligence necessary to be shown in a prosecution for involuntary manslaughter, based upon an unintentional killing by a motor vehicle, is more than is required on the trial of an issue of negligence in a civil action. The general rule is that negligence, to become criminal, must necessarily be reckless or wanton and of such a character as to show an utter disregard of the safety of others under circumstances likely to cause injuries". (Blashfield, Cyclopedic of Automobile Law and Practice, Vol.8, pp.108-109).

"***. At common law, one causing death by negligent driving is not criminally responsible unless the negligence is so great that the law imputes a criminal intent. A motor vehicle is not a deadly or inherently dangerous instrumentality, so as to impose liability for mere carelessness in its use or operation, and the degree of negligence necessary to support a conviction is such recklessness

(332)

or carelessness as is incompatible with a proper regard for human life. It is sufficient, however, if it reasonably appears that death or great bodily harm was likely to result from the driver's consent. (conduct)". (sec.1380, 42 C.J., pp.1356-1357). (Underscoring supplied).

It is alleged in the Specification that the death of Pitson occurred because the ambulance was driven "in a grossly negligent and reckless manner to-wit, to the right of the center of the highway and at night with only one light ***". In view of the fact that Fikes was driving the ambulance in inclement weather without his offside light, that he admitted he could not see a thing, that the ambulance was about two feet over the white dividing line immediately prior to the collision; that the British vehicle, when struck, was being driven about fifteen miles per hour in third gear at a slow speed along the edge of the grass verge, well within its own side of the road, and that the ambulance hit the British vehicle at the latter's offside mudguard, it is the opinion of the Board of Review that the evidence is legally sufficient to reasonably justify the finding by the court that the vehicle was driven in the manner alleged, and that Fikes was, as a consequence, guilty of involuntary manslaughter.

The question remaining for consideration is whether or not the evidence was legally sufficient to sustain the findings that Caton was also guilty of this offense. It was clearly established by the evidence that Caton took the ambulance for his own purposes. It was indicated that Fikes, who agreed to operate the vehicle, did so with knowledge that its use was unauthorized as Caton told him that he, Caton, "would take the risk". Although the unauthorized taking was primarily for Caton's benefit, both accused were knowingly engaged in a wrongful, joint enterprise.

With reference to cases involving civil liability arising as the result of an automobile collision, the fact that the accused were engaged in a joint enterprise, materially affects the liability of an occupant of a vehicle for the negligence of the operator of that vehicle.

"Where persons are associated together in the execution of a common purpose and undertaking, it has been held that each is the agent of the others in carrying out their plans, so that the negligence of one is attributable to the others." (sec. 5.158 Berry Automobiles, 7th Ed., Vol.5, p.206).

"One who is riding in a motor vehicle who is neither the owner nor the person actually operating it is not liable for injuries occasioned by its negligent operation where he is exercising no control over it or of the

driver, and where there has been no act or omission upon his part constituting negligence. Where, however, the occupant and the driver are engaged in a joint enterprise, the occupant is equally liable with the driver for the negligence of the driver." (sec.886, 42 C.J., p.1123). (Underscoring supplied).

"Two boys who borrow an automobile and take two girls riding are engaged in a joint enterprise, in which each has equal control over the operation of the vehicle, and the wantonness of the driver in colliding with a buggy and killing one of its occupants is imputable to his associate, who at the time of the accident is riding in the rear seat of the automobile." (Howard v. Zimmerman, 120 Kan. 77, 242 Pac. 131, footnote 21a, 42 C.J., p.1123).

"Where house guest of automobile owner unlawfully appropriated automobile, despite warning not to touch it, and induced other house guests to ride with him, other guests were not his 'guests' in the automobile, but were 'joint tort-feasors' in appropriating the automobile, and automobile was in their 'joint possession' so as to make them liable for resulting injuries.- Jones v. Kasper, 33 N.E.2d, 816". (sec.886, 1942 Annotations, C.J., p.3939).

"The joint possession of automobile by one unlawfully in possession and others whom he induced to ride with him warranted inference of 'joint control', and hence cross-relationship of 'principal' and 'agent' existed among the occupants and nondriving occupants were chargeable with driver's negligence.- Jones v. Kasper, 33 N.E.2d 816". (sec.886, 1942 Annotations, C.J., p.3939).

This principle equally applies in cases involving criminal offenses:

"It has been held that a person may commit the offense of reckless driving, although not actually in control of the car at the time of the alleged violation". (sec.1270, 42 C.J., p.1323.)

(334)

"Where several persons agreed to take an automobile without consent of the owner for a ride on a public highway, and the machine was operated recklessly, they were held guilty of reckless driving, it being of no consequence which particular one was at the steering wheel at the time." (State v. Davis, 88 S.C. 229, 70 S.E. 811, footnote 81a, 42 C.J., p.1323). (Under-scoring supplied).

As the element of intent is not involved in the offense of involuntary manslaughter under consideration, but that of negligence only, the negligence of Fikes may be imputed to Caton, not on the basis of principal and agent nor of master and servant, but because Caton and Fikes were joint venturers in a joint enterprise.

There is a further and different basis on which the evidence is legally sufficient to sustain the findings that Caton, as well as Fikes, was responsible for the death of Pitson:

"One who participates in or is responsible for the reckless operation of a motor vehicle may be guilty of the offense, although not actually in control of the car." (sec.1273, 42 C.J., p.1323). (Underscoring supplied).

Caton, without authorization, took the vehicle exclusively for his own purposes, and controlled its destination. Also, he was the superior in rank of Fikes who, as a licensed driver, apparently volunteered to operate the vehicle purely as a favor to Caton, who assured Fikes that he would take the risk. Under such circumstances, Caton was chargeable with responsibility for the operation of the ambulance, which responsibility entailed among other things the duty of seeing that it was properly driven. Caton's failure to perform this duty, coupled with the negligent driving of Fikes, caused Pitson's death. It is not known whether the court based its findings of Caton's guilt upon the basis of a joint enterprise or upon the theory last mentioned. Under either view, the evidence is legally sufficient to sustain the findings that Caton was guilty of Charge III and of the Specification thereunder.

7. With reference to Charge I and Specification thereunder, it is alleged in substance that the accused, while acting jointly and in pursuance of a common purpose, through neglect suffered the ambulance to be damaged in the amount of \$100 by driving the same in a negligent and reckless manner. The evidence is legally sufficient to sustain the findings that Fikes was guilty of this offense.

The 83rd Article of War provides, in pertinent part, that:

"Any person subject to military law who *** through neglect, suffers to be *** damaged, *** any military property belonging to the United States shall *** suffer such punishment as a court-martial may direct."

Neglect is defined as follows:

"To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or to perform some work, duty or act". (Bouvier's Law Dictionary, Unabridged, Rawle's Third Revision, Vol.2, p.2312). (Underscoring supplied).

In paragraph 143, M.C.M., p.158, it is stated that the "*** neglectful sufferance specified by the Article may consist in *** permitting it to be *** injured by other persons". As has been previously stated herein, for the reasons indicated, Caton was charged with the responsibility of seeing that the vehicle was properly driven, and of exercising such supervisory control as to ensure this fact. He omitted to perform that duty. As a result, he in fact permitted the ambulance to be damaged by the reprehensible driving of another person, namely, Fikes.

Similarly, the findings as to Caton's guilt of this offense are also legally sustainable upon the aforementioned basis that both he and Fikes were engaged in a joint enterprise, and that the negligence of Fikes, which resulted in the damage to the ambulance, was, therefore, attributable to Caton. Under either theory the evidence was legally sufficient, as to Caton, to sustain the findings of guilty of Charge I and of the Specification thereunder.

It was properly established by the evidence that the amount of the damage to the vehicle was about £100, a sum substantially in excess of that alleged.

8. The offense of wrongfully and without lawful permission or authority, taking and using the ambulance is an offense similar to larceny, and the same punishment may be imposed therefor. (par.7, Military Justice Bulletin, J.A.G.O., 6 May 1942). As the value of the vehicle was in excess of \$50, each accused could have been sentenced to confinement at hard labor for five years, upon being found guilty of the commission of this offense alone. The sentence as to each accused is legal.

9. Lieutenant Armstrong, 254th Troop Carrying Company, Royal Army Service Corps, a witness for the prosecution, testified, that he took a statement from Driver W. F. Platt, a passenger in the British vehicle. Platt, at the time of the trial was overseas at an unknown station.

The defense stated that it had no objection to the introduction of the statement and it was admitted in evidence by the court, not for the purpose of proving the truth of the statement but "just merely as a witness may testify that such statement was made". (R.36-37; Ex."C"). Although the statement was clearly inadmissible as such, in view of the manner in which it was accepted in evidence by the court with the consent of the defense, it may be considered that the prosecution and defense in fact stipulated that Platt, if present as a witness, would testify in accordance with the admitted statement.

10. When the prosecution rested its case, the defense moved for findings of not guilty on all Charges and Specifications, principally on the ground of insufficiency of proof. The court deferred action on the motion and properly directed the prosecution to recall certain witnesses, to ~~recall~~ other witnesses, and to produce certain documents (R.15). Thereupon the court adjourned. The court reconvened and after introducing further evidence, the prosecution again rested. The defense renewed its motion for a finding of not guilty, and the court, after recalling one of the witnesses for the prosecution, denied the motion (R.37-39).

The action of the court in directing the prosecution to produce the required evidence after the prosecution had rested its case was proper. (M.C.M., pars.75a, 12la, pp.58,126). Its denial of the motion by the defense was similarly justified as the evidence then before the court was sufficiently substantial in character to warrant the court's consideration when making its ultimate findings.

11. An examination of the Charge Sheet with respect to Fikes, shows that the case was referred to trial on 8 February 1943 to Captain Edwin E. Miller, N.A.C., 3rd Station Hospital, trial judge advocate of the general court-martial appointed by paragraph 6, Special Orders No.42, Headquarters, Southern Base Section, SOS, 11 February 1943. Thus, the case was referred for trial to a court which had not then been appointed. A new court was appointed by paragraph 15, Special Orders No. 55, Headquarters, Southern Base Section, SOS, 24 February 1943. It was provided therein that all cases "heretofore referred for trial by general court-martial appointed by paragraph 6, S.O. 42, this headquarters, 11 February 1943, on which arraignments have/been had are referred to this court-martial for trial". The same situation exists with respect to the Charges against Caton. Also, in the first indorsement on the Caton charge sheet, the rank of the commanding officer who referred the case for trial is omitted.

In CM 211218, Fleming, the case was referred for trial on 23 November to a court appointed 25 November, two days later. It was held that the irregularity was not fatal as it had been previously decided that if a court to which a case had not been referred tries it, the reviewing authority may ratify the court's action in so doing and act upon the sentence. (Dig. Ops. JAG., 1912-1930, Supp. VII, sec.1318).

Accordingly, the irregularities herein mentioned are immaterial.

12. In addition to the other comments of the staff judge advocate upon the defects contained in the record of trial, it is noted that the monetary amount of damage to the ambulance is alleged in the Specification of Charge I in lieu of the value of the vehicle itself. (Form No. 67, M.C.M., p.247). The variation from the form specification is immaterial.

The omission of the word "willfully" from the Specification of Charge III was proper:

"'Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. The word 'willfully', *** in the ordinary sense in which it is used in statutes, means not merely 'voluntarily', but with a bad purpose. *** It is frequently understood, *** as signifying an evil intent without justifiable excuse.'" ***. (Potter v. United States, 155 U.S. 438, 446; 39 Law Ed. 214, 217). (Underscoring supplied).

The offense alleged in the Specification of Charge III was involuntary manslaughter. The homicide involved in an involuntary manslaughter is unintentionally caused by an accused. In view of the foregoing definitions, the omission in the Specification of the word "willfully" was proper.

13. An examination of the papers accompanying the record of trial discloses that when the charges against Caton were investigated, he was not charged with manslaughter in violation of the 93rd Article of War. Subsequently, on 22 January 1943, the staff judge advocate, Headquarters, Services of Supply, European Theater of Operations, in his report to the Commanding General, Services of Supply, European Theater of Operations on charges preliminary to trial, recommended that Caton be additionally charged with the offense of manslaughter. No further investigation was made or directed, and accused Caton was tried, without objection by the defense, for this offense.

The additional offense alleged was indicated by the facts disclosed in the report of investigation. A new investigation would show the same state of facts revealed in the original investigation. Such a procedure would be futile, and would not in any way affect or safeguard the rights of accused. Accordingly, the fact that Caton was tried upon the Additional Charge without a further investigation thereof, did not injuriously affect his substantial rights, and did not constitute fatal error (CM 220625 - Gentry; CM ETO 106 - Orbon). The defense

did not object to trial upon a charge and specification which were unsupported by the oath of the accuser. The trial of Caton upon the Additional Charge of manslaughter in the absence of such an affidavit did not injuriously affect his substantial rights. (CM ETO 106 - Orbon; par.31, M.C.M., p.21).

14. Attached to the record of trial are three recommendations for clemency, one submitted by defense counsel, one by two witnesses for accused, and one signed by all the members of the court.

15. For the reasons stated the Board of Review is of the opinion that as to each accused, the record of trial is legally sufficient to support the findings of guilty of all Charges and of the Specifications thereunder, and to support the sentence. The court was legally constituted and no errors injuriously affecting the substantial rights of accused were committed at the trial.

Franklin H. Judge Advocate

William Brewster Judge Advocate

Wood W. Kargus Judge Advocate

In the Office of The Judge Advocate General
 for the
 European Theater of Operations
 APO 871

Board of Review.

ETO 397.

16 APR 1943

U N I T E D S T A T E S) EASTERN BASE SECTION, SERVICES
	OF SUPPLY,
v.) EUROPEAN THEATER OF OPERATIONS.
Private CHARLES A. SHAFFER (32387560),	
Headquarters Company Detachment,	
846th Engineer Aviation Battalion.	
Trial by G.C.M., convened at	
Cambridge, Cambridgeshire,	
England, 4 March 1943. Sentence:	
Dishonorable discharge and	
confinement at hard labor for	
seven years. Federal Reformatory,	
Chillicothe, Ohio.	

HOLDING by the BOARD OF REVIEW
 RITER, VAN BEN SCHOTEN and ENGLISH, 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 CHARLES A. SHAFFER Headquarters Company Detachment, 846th Engineer Aviation Battalion, did, at Tiptree, Essex County, England, on or about 7, February, 1943, forcibly and feloniously, against her will, have carnal knowledge of ROSE E. PREEN, of No. 6, Ireland Villas, Bull Lane, Tiptree, Essex County, England.

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.

337

The reviewing authority approved only so much of the sentence as provided for dishonorable discharge and confinement at hard labor for 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 50 $\frac{1}{2}$. The approved sentence is legal (CM ETO 268, Ricks).

3. There is but little dispute as to the facts. Mrs. Rose E. Preen, the mother of a child and apparently a mature woman (she gives her age as 31 years in her signed statement to the police at their investigation) though her age was not disclosed at the trial, was employed and lived with her mother in the village of Tiptree (R.8). At about 10:00 P.M., on the night of 7 February 1943, she was returning home from a visit to her sister, ^{when} she met three soldiers and two sailors. In passing them one soldier said "goodnight" to her. She did not answer, but hearing footsteps behind her, looked and saw a soldier following her. She started to run but he caught her by the arm, and said he would like to get acquainted and put his arm around her waist. She told him twice to go back and struggled and screamed "and he must have given me a blow and I was knocked out" (R.6). She states that when she regained consciousness she found herself in a garden about a quarter of a mile from her home (R.11). She was lying on the ground. Her undergarments were by her feet. An American soldier was kneeling by her and she had a bruise around her eye and three front teeth had been knocked out (R.7). The soldier lifted her over the hedge, they exchanged "goodnights" and she walked home. Her mother was upstairs in bed so she went to bed. Mrs. Preen didn't go to work the next morning (R.8). That morning she complained to the police and turned over to them the coat she was wearing the night in question as well as the shoes and underclothes (R.9). She was also examined by the doctor on the morning of 8th February 1943, being brought to his office by the police. He found that she had fairly extensive bruises on the right eye and the central, upper and lateral teeth were knocked out. There were no bones broken. She had been struck hard, once above the eye and once above the mouth (R.12). The doctor found no bruises elsewhere on her body, but there was some swelling of her private parts and inside a "white substance which I believed to be a seminal fluid". A swab was taken from the vagina and given to the police (R.13). "The woman was very distressed but could speak well." She walked into the surgery and walked home with her sister. The doctor was of the personal opinion that the woman was not rendered unconscious by the injuries but was probably dazed by the blows. He further gave his opinion that if she had struggled with all her force there would have been bruising of the thighs which she did not have (R.13). The spots on her coat and knickers were not there before she met the soldier (R.11).

Accused made a signed statement admitted in evidence (R.25) as Exhibit 8, in which he states he met a woman whom he later found out was Mrs. Rose Preen, of 6 Ireland Villas, Bull Lane, Tiptree, on the night in question after leaving the Ship Public House, Tiptree, where he had spent the evening drinking, and turned around and followed her. That upon catching up with her she did not want anything to do with him in any circumstances, but he grabbed and assaulted her. This took place on the road. He then picked her up and lifted her over the hedge into a garden, put his overcoat on the ground and forced her to lie down. She pleaded with him and tried to scream and he prevented her from so doing. He "removed her knickers and committed the sexual act which was entirely against her will." He then lifted her over the hedge back on the road. In accused's statement, he further declares that after the commission of the offense he offered to make retribution to Mrs. Preen for what he had done and at that time acquired her name and address.

Accused accompanied the police officers and his commanding officer to the spot where he committed the alleged offense and pointed out the spot (R.26).

Accused at his own request was sworn as a witness and in his testimony varies the story but little. He states that when he left the public house, "I saw this woman coming towards us. I was on my way home at the time, and I followed her." Mrs. Preen bit his finger and screamed when he put her arm around her and "that is when I first hit her, I think." He denies that she was unconscious at any time but states that "she talked perfectly sensible and she was pleading." "There were three civilians, I think, that walked past while she was screaming and they made no attempt to help her. She made no more attempts to struggle then. I walked down a piece and put her over the fence and took my coat off and layed it on the ground for her to lay on. She layed down and took her knickers off and layed down again. I can't say whether she enjoyed the thing or not but I do know there was no instances of struggle whatsoever made. She was in the customary position and I know she had been in the act before and it was complete in every way. The stains on the clothing were done by her own hands and if there was blood, it was by her hands" (R.29). Dr. James Davidson, of the London Police Laboratory, testified the stains found on the clothing of accused and the spots on the overcoat and knickers were blood of the "A" type and that the vaginal swab taken from the woman showed presence of seminal fluid (R.21).

4. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM. 1928, p.165). The act of intercourse is admitted by the accused. That the act was accomplished by force and without the consent of the woman is substantially shown by the admissions of accused and by the physical condition of the woman.

The only real conflict is in the testimony of Mrs. Preen that she was knocked unconscious by the blows in the face and the testimony of accused that she did not lose consciousness. This is a question

237826

337

(342)

of fact for the trial court to pass upon which it has done and the Board of Review is not inclined to question its decision thereon even if it had such right which it does not (CM 192609, Rehearing 1930; Dig. Ops. JAG., 1912-1940, sec.407(2), p.259; CM ETO 82 McKenzie). The disputed testimony can have at most but little effect for if she were unconscious, she could not be presumed to have consented to the taking of any liberties with her person during such time and if she were not unconscious during this time, the testimony shows she was likely dazed and suffering from the effects of the blows and she might well have been apprehensive of further harm.

Accused in his statement introduced in evidence at the trial and by his own testimony identified Mrs. Preen as the woman assaulted and raped by him. He thereby identified himself as the "American soldier" (R.6) who accosted the victim. Mrs. Preen also identified accused as he sat in court as the soldier who struck her and raped her. (R.11).

5. The record is replete with leading questions and hearsay testimony, none of which, however, prejudice any substantial right of accused. In fact, the greater part of the hearsay testimony was elicited by defense counsel and was favorable to accused. The facts amply support the findings of the court. The sentence of the court under the 92nd Article of War upon conviction of the crime of rape committed in war-time must be either death or life imprisonment.

6. Defense counsel objected to the introduction of accused's statement (Exs. 7 and 8) in evidence, on the ground that the civil and military officers obtaining the statement failed to inform accused at the time he gave the statement of the penalties which must be imposed by the Court should he be found guilty of rape under AW 92 (R.24, 25). Accused was warned that he was "not obliged to answer *** but the answers will be taken down in writing and put in evidence against him" (R.15); that "he need not answer any questions that would incriminate him" (R.18) and AW 24 was read him (Ex.7 and R.24). The court admitted the statement in evidence and overruled the objection. The statement was equivalent to a confession. The Court must therefore, have satisfied itself that it was voluntary in the sense it was not obtained by coercion or by promise of leniency or exculpation. (MCM, par.114, p.116). No suggestion or implication that it was involuntary is disclosed by the record and whether the statement was voluntary was the real test as to its admissibility.

7. There is no requirement of law that a suspect or accused shall be informed as to the penalty or penalties which might be imposed upon him as a condition precedent to rendering his confession admissible in evidence in the event he is brought to trial for the commission of an offense indigenous to the facts disclosed by the confession. There was no error in overruling objections of defense counsel.

237826

397

8. Attached to the record of trial is a petition signed by some 300 residents of the Parish of Tiptree, of the age of 18 years and upwards, asking for a very material reduction in the sentence imposed, also several individual letters, including one from the complaining witness, to the same effect. This apparently spontaneous appeal, headed by the local clergyman, appears to be directed, not so much towards the findings of the court as towards the severity of the sentence which the court was compelled to give. This condition has been alleviated by the action of the reviewing authority in reducing the sentence to seven years confinement at hard labor.

9. The court was legally constituted and had jurisdiction of the person and offense involved. 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 finding of guilty and the sentence.

10. Accused is 25 years of age. Pursuant to paragraph 5(c), General Order 37, ETOUSA, 9 September 1942, as amended 4 December 1942, the execution of a sentence of dishonorable discharge may be ordered executed when the accused is sentenced to confinement of three years or more or for an offense which renders his retention in the service undesirable. Rape is such an offense. The approved sentence is for seven years. 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 rape. The designation of the Federal Reformatory, Chillicothe, Ohio, is correct.

D. Franklin Hart Judge Advocate

C. M. Vandervort Judge Advocate

George D. Burgess Judge Advocate

397

237826

~~CONFIDENTIAL~~

(344)

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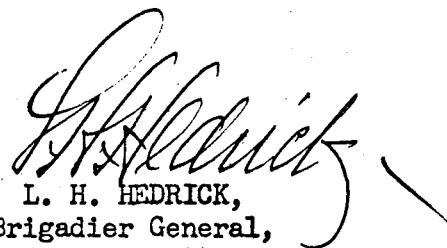
WD., ETO Branch - JAGO.

16 APR 1943

TO: Commanding Officer, Eastern Base Section, APO 517, U.S. Army.

1. In the case of Private Charles A. Shaffer, (32387560), Headquarters Company Detachment, 846th Engineer Aviation Battalion, I concur in the foregoing holding of the Board of Review. You now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial which is herewith returned, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is ETO 397. For convenience of reference please place that number in brackets at the end of the published order as follows:
(ETO 397).


L. H. HEDRICK,
Brigadier General,
Judge Advocate General,
European Theater of Operations.

(345)

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

Board of Review.

ETO 422.

10 MAY 1943

UNITED STATES v.	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
Private First Class WILLARD GREEN (NMI), (34072287), Company "A", 383rd Engineer Battalion (Separate).	Trial by G.C.M., convened at Burton-on-Trent, England, 5 March 1943. Sentence: Dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life. 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 92nd Article of War.
 Specification: In that Willard Green (NMI), Private First Class, 383rd Engineer Battalion (Separate) did, at Egginton Camp, Derbyshire, England, on or about 5 February, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Wilfred R. O'Connell, Private First Class, Company C, 131st Quartermaster Reg. (Truck), a human being by shooting him with a rifle.

CHARGE II: Violation of the 93rd Article of War.
 Specification: In that Willard Green (NMI), Private First Class, 383rd Engineer Battalion (Separate) did, at Egginton Camp, Derbyshire, England, on or about 5 February, 1943, with intent to do him bodily harm, commit an assault upon Philip H. Brown, Company C, 131st Quartermaster Reg. (Truck), by shooting him in the left hand, with a dangerous weapon ~~30-0627~~ a rifle.

422

CONFIDENTIAL

(346)

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

The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. On 5 Feb 1943 the accused was a member of Co. A, 383rd Engineer Battalion (R.116,128) which was stationed at Camp Egginton, England (R.116). Also stationed at the same camp was Co. C, 131st Q.M. Regiment (R.38,64,111). The deceased, Pfc. Wilfred R. O'Connell (31157042), was on said date a member of the latter organization (Pros. Ex. B), (R.7,26,64,89).

Camp Egginton was located within the town of Hilton (R.18,19, 64,81,90,111). The principal ingress and egress of the Camp is at Post No. 2. There is no gate, but two posts stand upright at the entrance (R.31,106,121). The camp is at least partially surrounded by a barbed wire fence (R.20). A public bus line operates between the town of Hilton and Derby, England. The Hilton terminus of the bus line is located on a public street, adjacent to the camp. Upon departing from a bus (arrived at Hilton) a passenger gains entrance to the camp by walking a distance on the public street in the direction of the camp and then at right angles turning the corner of a brick building. From the building corner to the camp entrance is between 7 and 9 yards (R.8,90,101)..

At 10 P.M., on 5 February 1943, accused was posted on guard at Post 2 (the entrance to the camp) (R.132,144). He was armed with a Garand rifle, M-1, bearing number 735729 (R.23,87,118,123,149). The sentry relieved by him delivered to him a clip of 8 cartridges, which he inserted in his rifle (R.125,148). The rifle is automatic. When the clip is inserted in it and pressure is released the first cartridge slips into the chamber. The safety is then put on (R.148).

During the evening 5 February 1943, the deceased was at the "Rose and Crown", a public house, in Derby (R.97) and two hours prior to reaching the camp, he was "pretty well drunk" (R.97,109). When he left he was in a highly intoxicated condition (R.53,65,109), but gained passage on the bus arriving at Hilton at 11 P.M., (R.7,65,109). He slept during the trip from Derby to Hilton, and was not boisterous or disorderly (R.110,113). When the bus arrived at Hilton, deceased was in a helpless condition and required assistance to leave the bus (R.65,113). Corporal James E. Sheets, Corporal Vincent Prats, Corporal Ernest P. Montella, Pfc. Steven M. Hersey, Pvt. Philip H. Brown and Pvt. Mack B. Brunson, all of Co. C, 131st Q.M. Regiment,

237827

422

were also on pass on the evening of 5 February 1943 (R.6,42,53,66,82, 90,109). They were fellow passengers of deceased on the bus (R.6,19,39,109). Brown and Hersey, recognizing deceased's intoxicated condition, after he left the bus, undertook to escort him to his barracks within the camp (R.7,38,39,109,113). Brown walked on the right of deceased and placed his left arm around him to support him. Brown's left hand rested at about deceased's left shoulder blade (R.14,39,52,56,115). Hersey was on deceased's left side with his right arm about deceased's back (R.69). Deceased's condition was such that he required assistance in walking (R.65,103,113). The trio proceeded along the public street from the bus (R.20,66,101). Deceased remained between Brown and Hersey and they were partly dragging him (R.39,69,103). He became sick and when by a certain fence on the street he stopped and vomited (R.20,21,38,53,66,90,101). Upon reaching the corner, the trio turned in the direction of the camp entrance and stopped about 7 or 8 ft from the end of the building (R.28,39,43,56,102) and about 20 or 30 ft from the camp entrance (R.8,70,90,101). Deceased was mumbling (R.40,44,45,51,69,75,91) but was not noisy or boisterous (R.54,84,97,106). He was not able to stand alone and was supported by Brown and Hersey (R.39,76).

At the time deceased, Brown and Hersey arrived at the corner of the building, there was a crowd of approximately 20 or 30 soldiers about the camp entrance, who had also traveled on the bus from Derby to Hilton and who were seeking to enter the camp. They had been halted by accused who demanded they exhibit their passes (R.7,9,21,22,39,68,81,85,91,101,111). Many of the soldiers were using flash-lights (R.27,48,54,78,85,89,114,136) inasmuch as it was dark. A certain amount of confusion existed, but there was no disorder (R.9,43,86,96,110).

Some of the soldiers indicated their impatience and displeasure over being delayed by directing to accused remarks of the following nature: "To hell with that noise", "damn those orders" (R.131). Some of the men passed through the entrance without showing their passes to accused (R.68,69,92,131). This was the first occasion upon which soldiers had been compelled to show their passes on either leaving or entering the camp (R.31,36,42,66,82,96,98).

4. The events occurring after arrival of deceased, Brown and Hersey at the corner of the building are described by the Prosecution's witnesses as follows:

Corporal Ernest P. Montella, Co. C, 131st Q.M. Reg:

Deceased, Hersey and Brown were standing 6 or 7 yards from the group of soldiers at the entrance (R.7,33). They were behind the witness (R.7) who, with the guard (accused) was facing the camp. The crowd of soldiers was, for the most part, standing between accused and the camp entrance, and he (accused) had his back to the men coming in from the street. He held his rifle at port arms. Witness heard no

422

237827

CONFIDENTIAL

CONFIDENTIAL

(348)

conversation between deceased, Brown and Hersey (R.10) nor did he hear deceased say anything to accused (R.22). Accused turned around and faced the trio. Witness was within a few feet of accused, but nearer to deceased (R.11). Accused stepped towards deceased and told him to "shut up" or he would shoot him, and continued to walk towards deceased (R.16,17,23). Witness (simultaneously with accused) faced about and walked towards accused and said: "I'll take charge of that man". In response to witness, accused said: "Better get him out of here" (R.17,25). When accused turned around he lowered his rifle from port-arms to a horizontal position about level with his hips (R.12,16). After first halting, the three soldiers did not move (R.29). Accused did not call "halt" (R.16,18). The rifle was pointed in the direction of deceased, Brown and Hersey (R.16,24). There was no one between accused and deceased, Brown and Hersey (R.32). At this instant deceased said: "I'd sooner be dead to the way I feel now". (R.13,17,25). Witness heard no response from accused, who immediately shot in direction of deceased. The end of the barrel of accused's rifle was about 2 or 3 yards from deceased when accused fired (R.26). There were two shots (R.13,17,25) discharged rapidly (R.25). Hersey jumped back and deceased fell to the ground towards left. Witness heard accused's weapon explode and no one else in the vicinity had a weapon (R.34). Witness did not notice Brown's actions. Brown was on deceased's right (R.14,23). Witness stood next to accused and about 3 yards from deceased (R.27). Witness headed for orderly room (R.15,24). Brown came in a few minutes later with his hand bleeding (R.15,27). Witness thereafter saw deceased stretched out on floor of dispensary (R.15). Witness identified accused as the guard at the camp entrance the night of 5 February 1943 (R.35). There was no rain (R.15) and it was not a cloudy night (R.25).

Private Philip H. Brown, Co. C, 131st Q.M. Reg: Witness, deceased and Hersey stopped at the corner of the building about 20 ft from the crowd at the camp entrance and about 8 ft out from the building (R.39,43,56). Witness was on deceased's right (R.39,52). The crowd of soldiers were around the guard, who was facing towards the camp (R.39). Deceased started to mumble something. "It was all jumbled up", but such mumbling was not directed at the guard but it was loud enough for the guard to hear (R.40,44). The sentry turned around and walked over towards the three men. He had his rifle pointed at them and told them to shut up or he would shoot. He came within five feet of deceased, who said: "Well, go ahead and shoot. I can't feel any worse" (R.40,47,48). The guard then shot. There was no one else in the vicinity in the possession of a weapon. Two shots were fired (R.41,54,55,58) in rapid succession. Witness next remembers arriving at the orderly room. From the time the guard turned around to the time he fired witness states was four or five minutes. Deceased was making no disturbance. No one ordered "halt" (R.43). After stopping at the point 8 ft from the corner of the building neither witness, deceased nor Hersey advanced (R.44,57). Deceased did not call the guard any names (R.44) and there was no

237827

422

CONFIDENTIAL

(349)

argument between him and guard, but deceased was mumbling. Witness did not hear Corporal Montella speak to guard (R.45) but did remember that Montella was present (R.47). The guard was armed with an automatic rifle, but witness was not sure guard had a flash-light (R.48). Deceased's mumbling must have annoyed accused to some extent (R.51). It was not raining (R.52). When shots were fired, witness was on deceased's right side and had his left arm around him. Deceased's right arm was around witness's neck and over his shoulder (R.52,56). Witness was wounded in the left hand (R.56). There is a bullet hole in the hand between thumb and first finger. The hand was treated that night at the Derby infirmary (R.56). One bullet went through deceased and witness's left hand and witness does not know where other bullet went. Witness saw deceased at the "medics" when he was brought in and laid on floor and witness saw the wound in him (R.59). Before the two shots were fired there was no hole in witness's left hand but after shots were fired there was a hole in it (R.60).

Pfc. Steven M. Hersey, Co. C, 131st Q.M. Reg: When witness, deceased and Brown came around the corner of the building three or four steps, a guard was facing away from the camp and facing them (R.65,67,73). The guard was about the middle of the street and was armed with a rifle which was pointed at the trio. The guard was accused (identifying him in court) (R.68,70). He held the gun at his side parallel with the ground (R.65,67,73). Montella said he would take charge of the three soldiers, and the guard said something to him. Deceased was mumbling to Brown (R.74). Brown told accused he had a drunk man and asked permission to take him through the gate (R.65,73). The guard told deceased to shut up or he would shoot (R.68,70). Montella was standing on the left of the guard facing the trio. Witness was on deceased's left side. Deceased was not mumbling to the guard. There was no argument (R.69,74,75). The three soldiers had stopped about 6 ft from the guard. Witness did not hear guard order "halt" (R.74). Deceased could not step forward (R.79). Deceased then said: "I would rather be dead than the way I feel" (R.65,70). The guard replied: "Do you think I am kidding?" and then shot him (R.65,70,76). Two shots were fired. It was fast fire (R.70) from the guard's rifle (R.76). Deceased was lying on the ground making funny noises when he breathed. The guard fired the two shots. The guard's rifle was the only one at the gate and there was no one else armed with a rifle (R.71,72). There was another guard at the gate (R.71), but he didn't have a rifle as far as witness could see (R.72). After deceased was on the ground one of the soldiers got permission from the guard to carry him up to the medics, and witness helped the other soldier to carry deceased to the infirmary (R.72).

Corporal Vincent Prats, Co. C, 131st Q.M. Reg: When witness arrived at camp entrance he saw two fellows holding a third one up. Witness went to the gate. There was a gang of fellows standing around the guard and the guard was checking passes. Witness held out his pass to the guard when the guard looking towards camp said: "Who is popping off?" and brought his gun from port-arms and threw a cartridge into the chamber. The guard then went to checking passes 422

237827

- 5 -

CONFIDENTIAL

(350)

again. Witness proceeded through gate about 20 ft when he heard some shots - 2 or 3 in rapid succession. Witness went to orderly room to turn in pass and Pvt. Brown came in (R.82,83,86). There was no noise (R.85) and no argument at the camp entrance (R.86). Accused was armed with a Garand rifle (R.87). It was a dark night, but not raining. The sentry was a colored soldier (R.89).

Pvt. Mack B. Brunson, Co. C, 131st Q.M. Reg: Witness identified accused in court as the guard at the camp entrance on the night deceased was shot (R.90,104). There was a crowd of soldiers about the gate. Some were showing their passes and some were just walking through. The guard called one fellow, Reynolds, back and he came back and showed his pass, but the guard never looked at it. He "threwed" up his head and said "Go on" (R.91). The guard was facing the camp. Witness heard guard's gun click. Witness was standing on left of guard - 2 or 3 ft from him. The guard turned around and faced deceased, Brown and Hersey (R.91,103,104). Deceased was mumbling (R.105). Montella stepped up and said "I'll take charge of these three men and take them in". The guard did not reply to Montella (R.91,96). Deceased murmured something and the guard said: "Shut up or I'll shoot". Deceased said: "Go ahead and shoot, I'd rather be dead than the way I am now." The guard said: "You think I am kidding" and then he fired - fired two shots (R.91,95,96). A fellow from the 156th Infantry rushed over and said to the sentry: "Please let us take him through the gate. The man is dying". The guard had his gun pointed towards deceased, replying: "You ain't taking him no place". Then a Corporal or a Sergeant said: "Go on, let him take him through". Then this fellow (referring to the soldier from the 156th Infantry) and witness picked him up and carried him through the gate. He was taken to the orderly room and Pfc. Ross helped the rest of the way to the medics (R.90,91,106).

Upon further examination witness was not certain whether Montella said: "I'll take charge of these three men and take them in" prior or subsequent to the guard saying: "Shut up or I'll shoot" (R.92). At this time the guard was mad. He was angry (R.92). Witness never heard anything said that was insulting about accused, nor did he hear any one call "halt". He heard two shots and did not see any one else with a rifle in that vicinity. Witness was standing 2 or 3 ft from guard on his left when he fired and saw fire from muzzle of rifle (R.93,94,104). The rifle looked like a Garand automatic (R.94). It was a Garand because a Springfield couldn't fire two shots as fast as these were fired.

There was a lot of talking going on that night about the gate, but there were no arguments and no trouble (R.96). There was nothing occurring that would warrant anyone getting mad. Brown was not making any racket. As far as witness knew deceased, Brown and Hersey were quiet. The guard appeared to be mad at somebody before he came on guard. Nothing occurred in witness's presence to make

422

237827

- 6 -

CONFIDENTIAL

guard mad (R.98). It was the way accused told deceased "to shut up or I'll shoot you" that made witness think he was mad. (R.100). Neither deceased, Brown nor Hersey created any disturbance; they were not any louder than the rest of the men (R.105). Brown, who was holding up deceased, had a bullet hole through his left hand (R.106,107). It had been raining that night but it was not raining when shooting occurred (R.107).

T/5 James E. Sheets, Co. C, 131st Q.M. Reg: Witness walked with deceased, Brown and Hersey from bus arriving at Hilton to camp entrance, and he left them as they rounded the corner (R.110,115). There was a crowd of soldiers around the gate. Witness in the court room identified accused as being the guard at the gate on night 5 February 1943 (R.110). The soldiers were all talking and mumbling (R.111). Witness was with deceased in Derby, but there had been no fights or trouble. When deceased arrived at gate he did not conduct himself in an insulting manner towards the guard (R.112), nor could deceased's voice be heard over the noise of the crowd (R.114). Witness left deceased, Brown and Hersey at the gate and went on through (R.113). Witness was 10 or 15 yards within gate when he heard shooting (R.114). There were at least two shots fired (R.115).

Sergeant William Hill, Co. A, 383rd Eng. Bn: Accused was on guard at Post 2, Camp Egginton on night 5 February 1943 (R.116). Witness was at guard house on that night acting as Provost Sergeant (R.117). Pfc. Edward Dean was acting as Corporal of the Guard. He came down to guard house and informed witness that accused had shot a soldier down at the gate. Witness went to gate and picked up empty cartridge and accused voluntarily gave him another from his pocket. Witness was ordered by O.D. to take accused off guard and put another guard on post. Witness took accused to dispensary and gave him a "shake-down". Then accused was examined by doctor. Then witness took accused to guard house. Witness took accused's rifle from him (R.117,122,123) and put it under lock and key (R.118). (Witness identified a rifle produced in court as the rifle delivered to him by accused on night of shooting. It was received in evidence as Prosecution's Ex."A"). It is a Garand M-1 (R.117,118,119). The rifle had not been cleaned (R.120). Witness formerly had acted as Sergeant of the Guard (R.120). At that time there was a special order requiring all passes to be examined by guard at Post 2 at Camp Egginton, but such order was dropped (R.121).

Witness asked accused why he did it. Accused replied that he was only carrying out his duties. Witness also asked accused if he did not know it was a soldier coming through the gate. Accused said: "No, I didn't know whether it was a soldier or not, although he had on a soldiers' clothes", because, he said "spies dress as American soldiers sometimes". Accused also stated he asked "the fellow" to halt but he didn't do it (R.123). There was only one guard on the gate that night and that was accused. Some days passes are checked

CONFIDENTIAL

(352)

on Post 2 and some days they are not checked (R.124). The sentry's gun is supposed to be loaded with live ammunition as soon as he goes on post. The guard is given one clip - 8 rounds - by the preceding sentry (R.125).

When investigation was held the witness was present. Accused stated that O.D. told accused to check passes. O.D. did not deny the statement although it was made in his presence (R.126,127) at the investigation.

Pfc. Edward N. Dean, Co. A, 383rd Eng. Bn: Witness was acting Corporal of the Guard on night of 5 February 1943. About 10:30 P.M., witness approached accused (who was on guard at the gate) who informed witness that O.D. had told him to check all passes coming in (R.128,134). There was a pretty good crowd of soldiers coming in and witness and accused stopped them and were checking their passes (R.128). The soldiers, who had been drinking, were making a lot of noise and swearing. They "ganged" around witness while he was checking passes (R.128,131). Suddenly witness heard two shots and turned around and saw a soldier lying on the ground. Witness left and notified Provost Sergeant Hill who was at the guard house, and then went to officers quarters and notified Lieut. Moody, the Provost Marshall. The O.D. had not informed witness that passes were to be checked (R.128,129). While witness was with accused at an earlier time the crowd of soldiers pressed around them, and at that time witness heard accused call "halt" several times, but at time of shooting witness was 15 or 20 ft from accused (R.130,133) and the wind was blowing and rain was falling and witness did not hear accused say anything (R.130,136). Accused had a flash-light. Witness was not armed; had neither rifle nor pistol. Accused was behind witness at his post and inside the gate facing the camp (R.131). Accused seemed to be in his normal state of mind and was not unusually tense or excited nor was there anything unusual in his attitude (R.132). Witness did not know of any other rifle in vicinity than the one held by accused. After the shooting, witness went over to where deceased was lying. Accused was standing at port-arms. Accused was sober (R.133). Witness was busy checking passes so he did not see the actual shooting, but he heard two shots in rapid succession (R.134).

5. Captain Thomas Moffet, M.C., General Depot G-18, was presented as a witness for the prosecution. At about 11:15 P.M., on 5 February 1943, the witness was notified that a man had been shot at the gate, and he went immediately to the dispensary. He found two men; one of them was dead and the other was shot in the hand. The dead man was the deceased. Witness examined deceased and found a penetrating wound in the right 6th interspace about 3 inches to the right of the sternum and the point of exit was in the lumbar area. The point of entrance of the bullet was clean, round and approximately a centimeter in width. The point of exit was a large lacerating wound. In the

422

237327

opinion of the witness the wound was caused by a bullet (R.61,62). The penetrating wound was the cause of deceased's death and there was no other wound on his body (R.63).

Brown had received a penetrating wound which had entered the left palm and the point of exit was the ulnar surface of the left wrist. The point of entrance was clean cut and round and the point of exit was large and lacerated in character. In the opinion of witness the wound in Brown's hand could have been caused by the same bullet which passed through deceased (R.63,64).

There was also introduced in evidence as Prosecution's Ex."B", without objection from the defense, the report of the autopsy of deceased dated 10 February 1943 signed by First Lieutenant Norman J. Sweet, M.C., and countersigned by Major Allan Palmer, M.C., (R.176). Pertinent excerpts from the report are as follows:

" CLINICAL DIAGNOSIS

Gun shot wound, penetrating, calibre .30, point of entrance: 5 centimeters to right of xiphoid process."

" PATHOLOGICAL DIAGNOSIS (PRESUMPTIVE)

Gun shot wound of thorax penetrating: right 6th interspace, right pleural cavity, right diaphragm, right lobe of liver, aorta, spleen, vertebral column, left kidney, left lumbar muscles; laceration right upper arm; massive hemoperitoneum".

" GROSS EXAMINATION

The course of the missile follows. The site of entry is marked by a spherical, clean cut hole six millimeters in diameter surrounded by an area of hemorrhagic discoloration 3 millimeters in thickness. This orifice is located five centimeters to the right of the tip of the xiphoid process, and immediately overlies the sixth right interspace. The latter is likewise perforated. The bullet then passed through the right pleural cavity at the level of the costo-phrenic sinus, penetrating the diaphragm, completely traversing the substance of the right lobe of the liver and fragmenting the aorta just distal to the superior mesenteric artery. The line of passage of the bullet up to this point makes an angle of approximately thirty degrees with the horizontal. A small fragment of the medial aspect of the spleen has been torn away. From this point the bullet was apparently deflected along the left lateral aspect of the vertebral column, leaving jagged spicules of bone, and nearly completely pulverizing the left kidney. The left lumbar muscles were finally penetrated and exit from the body was made through an orifice 3 centimeters in diameter just cephalad to the left posterior superior spine."

422

237827

(354)

6. The witnesses presented by the defense testified as follows:

Sergeant William Hill, Co. A, 383rd Eng. Bn., testified that after shooting occurred he had conversations with accused. At the gate witness said to accused: "Green, why did you do it?" and accused replied: "I am just carrying out my duty. Sergeant I know you're against me". Witness answered: "I'm not against you, Green, but you shouldn't act too hasty". Later, at the guard house accused slept in the same room with witness, and they engaged in conversation. Accused said: "I know you are against me". Witness told him he shouldn't have an itchy trigger finger like that, and then accused said: "I told the fellow to halt, and he wouldn't halt, and I told him to halt again, and he said, "Go on shoot you black mother-fucker", and then accused said: "That is when I pulled the trigger". Witness replied: "Well, you know how the white boys are at the gate. They don't want us colored boys on guard no how. We have to take it and like it. There is nothing that can be done" (R.138). Hill further testified that accused was "one of the best guards we got"; that the O.D. and Sergeant of the Guard never had any complaints to make about accused; that he always carried out his orders; and he had never known accused to fire a weapon while on duty (R.140); that he was a good soldier. Upon examination by a member of the court, the witness further testified that accused had stated that he said "halt" to soldiers coming through the gate; that since the incident accused had repeatedly declared: "I told the soldier to halt three times". He just said it to the white soldiers but he didn't tell what group of soldiers, and he didn't tell which one of the soldiers called him the obscene name (R.142).

The accused, after having his rights explained to him, was sworn and testified on his own behalf as follows: that he went on guard duty at Camp Egginton at 10 P.M., on 5 February 1943. The O.D., came by and asked if the last bus had come from Derby, and if accused had had any trouble. Upon being informed in the negative accused then asked the O.D: "Is it necessary to check the passes?" and he said: "Yes, check them all". The O.D. was Lieutenant Porter. Then Corporal Dean came to the post and accused informed him that the O.D. said to get the passes. A bunch of soldiers appeared and Dean stood behind accused, and stopped soldiers that accused could not catch. This soldier comes along, and accused told him three times to halt. The second time accused called "halt" the soldier said: "You, black mother-fucker". Accused "halted" him the third time. Accused "didn't see him like he stopped walking, so I just shot him". Accused was standing at his post at the gate. This man "come from the direction of the bus" (R.144) and accused first saw him when he first came around the building. Did not know deceased and had never seen him before (R.146,150). He was about six feet away from accused. It was raining and the wind was blowing hard at the time. Accused had his gun at port-arms when he called "halt" the first time. He was then shining his flash-light in the soldiers face. The man "Kept on walking". Then accused "halted" him the second time and

the soldier must have heard because he called accused the vile name. This did not make accused angry (R.146,147), but the soldier kept on approaching and accused called "halt" the third time. Accused turned the light off and then shot him (R.146,147). Accused did not see the soldier with any one (R.145), nor did he see a man on each side of him nor behind him. When accused challenged the soldier there was no one around (R.145,146). Accused brought his rifle to his hip, parallel with the ground and pointed it in the direction of the soldier. He was not trying to aim at deceased but just pointed it towards him. Accused did not see the soldier but after telling him for the third time to halt, and hearing footsteps approaching he put his hand on the trigger and pulled it (R.147,158). Accused thought he fired but one shot but there were two rounds used. The Sergeant picked up one shell and the witness gave him the other shell. He did not know when he pulled trigger how many shots he had fired. He put a clip of eight cartridges into rifle when he went on guard at 10 P.M. The safety was on, but he took it off after the third challenge (R.148). Accused did not know whether he had hit target or not, but he put flash-light on when two other fellows come around and picked up the soldier (R.149).

Cross-examination of accused.

Deceased was about 8 yards from accused when first challenged (R.151). Corporal Dean was standing back of accused about 15 or 20 yards during early part of the night, but did not know if he were there when he fired the shots. Dean was checking passes of men who got by accused (R.153,155). Accused called "halt" to all of those men, but some went by and Dean caught them. All of the men whose passes accused checked, stopped about eight feet away and accused could see their passes by use of the flash-light. (The trial judge advocate asked accused to read a piece of paper from a distance of eight feet and received no reply from accused. Accused explained that he put his flash-light directly on the passes and that the flash-light was a "spot-light" (R.154).) When this soldier came around the corner of the house accused threw a flash-light on him and "halted him". He was not drunk and was walking like soldiers usually walk (R.156). It was sprinkling and the wind was blowing against accused - against accused's back (R.156). The following colloquy occurred:

"Q. You called halt the first time. Do you think the fellow heard you.

A. He should hear me. I hollered loud enough for him to hear me.

Q. You think he heard you?

A. Yes.

Q. You do. Then will you tell us why, on direct examination, you said you didn't think he heard you?

A. (No answer).

422

(356)

- Q. When Captain MacLeod asked you the question, you said you didn't think this fellow heard you the first time.
- A. I said he didn't hear me the first time?
- Q. When Captain MacLeod asked you the question, you said that you didn't think that he heard you the first time.
- A. Well, I said that is why I don't think he heard me the first time.
- Q. You don't think he heard you the first time. You just told me you think he did hear you the first time.
- A. He didn't hear me the first time.
- Q. He didn't hear you the first time?
- A. No.
- Q. What makes you think that?
- A. Well, if he heard me, he would have stopped.
- Q. He would have stopped?
- A. Yes. " (R.156-157).

Accused then testified deceased was approximately eight yards from accused when he challenged the second time (R.157). At that time deceased called him "a black mother-fucker". Accused challenged deceased for a third time; and put the flash-light out. Deceased kept advancing and when he was about 8 ft from accused the latter fired in direction of deceased (R.158), although he was not certain he was going to hit him and did not want to kill him. Accused did not shoot back into camp because he might hit somebody and he didn't shoot into the sky because he did not think of it (R.159). Before accused fired the two shots there was only one man coming towards him. There was no one else near him. The fellow lay on the ground after the shots were fired. Then two fellows came from the direction of the bus (R.160). They came to the gate and accused turned his flash-light on them and halted them and asked for their passes. They saw deceased on the ground, and took him in. Accused challenged the two men when they were about six feet distant from him

"Q. Let me bring you back again to where the first man was coming up and came into the entry; the very first time you challenged that man, he was about as far away from you as those peanut cans are now. Is that right? When the 2 men came up after the shooting, you challenged them the first time when they were about this far away from you. (Indicating approximately 6 feet) Is that right?

- A. That's right.
- Q. Well, why was it that you let these 2 men get so close to you?
- A. What do you mean so close?

E.

422

237327

- Q. Suppose they hadn't stopped when you halted them the first time, they would have been much closer the second time, wouldn't they?
- A. I wouldn't let them get that close up I would have backed back myself.
- Q. You would have backed back yourself? Why didn't you back up on the time previous when this other...
- A. (Interposing) If I would back off him, I would back up against the post.
- Q. What was the difference between the 2 men?
- A. Because I was... That is the post there, (Indicating) and I was standing right on that side. You couldn't walk around the post. There was barbed wire.
- Q. Why couldn't you have walked around the other side where there was no barbed wire?
- A. Why didn't I walk around the side where there wasn't the barbed wire? If I came on that side, I would have been outside the post." (R.162-163).

Accused had been called "Mother fucker" lots of times and didn't mind and didn't care anything about it. It is a bad word but fellows have a habit of using that kind of words (R.163). He does not know Pvt. Brown and didn't pay any attention to the soldier with the bandaged wrist who was in the court-room (R.164). Accused did not think it right to kill a man "unless you have to". "I was carrying out orders. I couldn't see whether it was a soldier or a spy" (R.164). So far as accused knew there was only one man who came around the corner. There could have been more than one but he did not look. Accused didn't know whether the man was drunk or sober because he never had "been amongst drunken soldiers". He did not call "halt" a fourth time, although deceased did not hear him the first time, because "you're not supposed to halt no fourth time. You challenge three times. If they don't halt the third time, I fire". The O.D. did not tell him that. Accused did not see any other flash-lights while he was playing his flash-light on the one soldier (R.165). When he pointed rifle at deceased he wasn't aiming to hit or kill him. He didn't aim at the person. He pointed the rifle in the direction he heard footsteps to scare the person approaching (R.166). There was no one around when the man approached. All of the soldiers had passed and gone back to camp. There was one man walking alone. Witness did not turn the flash-light on after he had fired the shots because he didn't figure he had hit the man (R.167) and didn't call the Corporal of the Guard (R.169). Accused did not know why he did not turn on his flash-light or did not call the Corporal of the Guard. He didn't know whether he was afraid the lone man was going to come up to him and strike him (R.170).

423

237327

CONFIDENTIAL

(358)

Redirect examination of accused.

Accused has never shot anyone before; has never been in jail; has not been arrested and has not been convicted of a crime. He is not prejudiced against white people. If he hadn't fired his gun or fired it up in the air he would probably have been taken off his post and put in the stockade. After calling halt three times a sentry must fire his gun. Accused did not fire because the man called him a bad name (R.173). This was the first occasion at Hilton Barracks that accused ever used a rifle (R.174).

7. The defense indicated a desire to stipulate with regard to the information as to the army intelligence test as shown on form 20 and declared that the army score shows 47 (R.175). The trial judge advocate stated to the court that the investigating officer had examined form 20 and reported that according to the army qualifications test accused's score is 47. Prosecution was willing to stipulate to that fact (R.176). Defense counsel suggested that the Court could take judicial notice of the fact that a person scoring under 50 was a moron. After a member of the Court (Capt. Wood) stated that there is no regulation as to feeble mindedness, the Law Member ruled that the matter would not be further considered. Thereupon the defense counsel withdrew his offer to stipulate, stating: "The court has had the opportunity to view the witness" (R.176). There was no suggestion or demand that accused be examined as to his sanity.

8. The charge sheet does not show that a copy of same was served, on accused. AW 70 in pertinent part provides:

"*** The trial judge advocate will cause to be served upon ^{the} accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on charges furnished the accused as hereinbefore provided.
***"

The defense made no motion for a continuance, but proceeded to trial without indicating that the charges had not been served on accused. The record of trial was examined and initialed by defense counsel pursuant to par. 45b, M.C.M. The failure to serve copy of the charges did not impinge upon the jurisdiction of the Court, as it is not "an essential proceeding". (Winthrop's Military Law and Precedents (Reprint) p.157). Inasmuch as accused did not ask for a continuance; did not even suggest that copy of the charges had not been served upon him, and proceeded to trial without objection, it will be presumed that such service was properly made although evidence of service is not shown by the record. It does not appear that this irregularity in any respect injuriously affected any rights of accused (AW 37).

422

237327 - 14 - CONFIDENTIAL

9. Sergeant William Hill, 383rd Eng. Bn., appeared as a witness for the prosecution (R.116). Thereafter he was called as a defense witness (R.137). Defense counsel proceeded to interrogate him as to statements made by accused after the homicide (a) at the entrance to the camp and (b) in the witness's room after accused had been placed in arrest. In substance, accused asserted to Hill (Hill so testified) that he had shot deceased in the performance of his duty; that he told deceased to halt "and he wouldn't halt and I told him to halt again and he said 'Go on shoot you black mother-fucker' and that is when I pulled the trigger" (R.138). This evidence, produced by the defense, contained an admission by accused against interest that he shot deceased. In this respect it was clearly admissible, without showing its voluntary character (M.C.M., par.114b, p.116). Accused's statements insofar as they are exculpatory were not part of the res gestae (M.C.M., par.115, p.118); were self-serving declarations and were inadmissible in evidence, (1 Wharton's Criminal Evidence, par.505, p.788). However, since Hill's testimony was invited by defense counsel, any unfavorable reaction it had upon accused does not constitute prejudicial error. (24 C.J.S., sec.1843, p.695).

10. Accused is positively identified as the soldier who was on sentry duty at Post 2 of Camp Egginton at the time deceased, Brown and Hersey approached the entrance of the Camp on the night of 5 February 1943. The evidence is clear and indisputable that it was accused who shot and killed deceased at the time and place alleged in the Specification of Charge I. Therefore, the homicide and accused's connection therewith are irrefragably established.

11. By Charge I and its Specification accused is charged with the murder of deceased. The record of trial presents a fundamental question:

"Is the evidence legally sufficient to sustain the finding that accused was guilty of murder or does it prove that accused was only guilty of manslaughter, a lesser included offense?"

The problem should be considered in three aspects: (a) did the accused at the time he shot deceased act under such provocation, anger or heat of passion as to dethrone his powers of reasoning, judgment and deliberation and thereby negative the necessary element of murder, to-wit, malice aforethought? (b) did the asservation by accused that he did not intend to kill accused when he discharged his rifle at him reduce the grade of his offense from murder to manslaughter? (c) is there evidence of a well grounded belief of accused when he fired of imminent danger as would reduce the homicide to manslaughter? Murder is defined thus:

422

CONFIDENTIAL

(360)

"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.***" (M.C.M., 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) sec.1041, p.672).

The important element of murder, to wit, "malice aforethought" has been analysed by authorities as follows:

"The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent 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

237827

- 16 -

CONFIDENTIAL

422

CONFIDENTIAL

(361)

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) sec.1041, p.673).

"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". (M.C.M., sec.149, 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 on some jurisdictions been made expressly to include a killing without malice in a sudden fray. 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

422

237327

CONFIDENTIAL

(362)

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).

Considering all of the testimony in the case - that of the defense as well as that of the prosecution - it is impossible to discover any evidence of mutual combat between accused and deceased. Such idea is positively negatived and is not worthy of further discussion.

(a) A homicide committed under such provocation or disturbance as to displace the accused's powers of reasoning, judgment and discretion with anger, passion, fright or other mental and emotional derangement is manslaughter - not murder. Malice aforethought or premeditation ordinarily do not coexist in the human mental processes with anger, passion or fright, and it is the presence of malice aforethought which steps up a homicide from manslaughter to murder. (CM ETO 72, Jacobs and Farley; CM ETO 82, McKenzie).

The prosecution's evidence of the events immediately preceding the homicide summarizes as follows:

A group of 20 to 25 soldiers, passengers on the bus arriving from Derby crowded about the camp entrance. Accused had demanded that they exhibit their passes. There was loud talk and some profanity. Deceased, Brown and Hersey were late in arriving and were at the rear of the crowd of soldiers. The deceased was in a condition of helpless intoxication under the care of Brown and Hersey. He had his arms about their necks and they in turn had their arms and hands at his back. They "dragged him" and it was necessary to support him to prevent him from falling to the ground. He required assistance in walking. He was sick and vomited after leaving the bus but prior to reaching the corner. His talk was a "mumble", which could not be understood even by his escorts. The trio halted when they arrived at the corner, standing on a line parallel with and about 7 or 8 ft from the end of the building. Deceased continued to mumble, but was neither noisy nor boisterous and until accused turned and faced him, he said nothing to accused. His mumbling was not directed at accused, but was obviously the diffuseness of a drunken man. Brown and Hersey were not disorderly or noisy nor did they direct any remarks to accused. Accused had been facing the camp with his rifle at port-arms. He faced about and simultaneously threw a cartridge into the chamber. He approached the trio. Brown informed accused that they had a drunken man, and asked permission to take him through the gate. Corporal Montella approached and said: "I'll take charge of that man". Accused

237327

replied: "Better get him out of here." Accused, upon facing about brought his Garand M-1 rifle from port-arms to a horizontal position about level with his hips and had it pointed at deceased, Brown and Hersey. The end of the barrel of the rifle was 2 or 3 yards from the three soldiers. The deceased then murmured something and accused replied: "Shut up, or I'll shoot". Deceased said: "Go ahead and shoot, I'd rather be dead than the way I am now" or "I would rather be dead than the way I feel". Accused retorted: "Do you think I am kidding?" and then discharged the rifle. Two shots were fired in rapid succession. Deceased fell to the ground. Accused did not at any time order deceased, Brown or Hersey to halt. A soldier from the 156th Infantry rushed over to the sentry and said: "Please let us take him through the gate. The man is dying". Accused continued to point his gun towards deceased, now prone on the ground, and replied: "You ain't taking him no place." A Sergeant or Corporal intervened with: "Go on, let him take him through". Thereupon deceased was carried through the entrance to the orderly room. One of prosecution's witnesses (Brunson) testified that accused appeared to be "mad at somebody" before he came on duty, but nothing occurred in the witness's presence to make the guard "mad". Another witness for the prosecution (Dean) testified that accused appeared to be in his normal state of mind; was not tense or excited nor was there anything unusual in his attitude. The other witnesses for the prosecution made no mention of anything unusual in accused's emotional or mental condition.

The accused's version of the events is as follows:

He was directed by the O.D. to check all passes; such direction being given accused immediately prior to the arrival of the bus at Hilton. Soon thereafter a crowd of 20 or 30 soldiers arrived on the bus and presented themselves to accused for entrance to the camp. He demanded they exhibit their passes. Corp. Dean appeared and, standing in the rear of accused and nearest the entrance, assisted in checking the passes. He stopped those soldiers whose passes had not been examined by accused. The deceased came around the corner. Accused turned his flash-light on him and ordered him to halt but deceased continued to advance. Accused called "halt" the second time and deceased said: "You, black mother-fucker". Accused "halted" him a third time but accused "didn't see him like he stopped walking". Accused turned off his flash-light and then shot deceased. Two cartridges were discharged from the rifle. Accused was not angry because of the vile epithet applied to him by deceased, because he "had been called 'Mother-fucker' lots of times and didn't mind or didn't care anything about it". He didn't fire because he had been called a bad name. As far as accused knew there was only one man who came around the corner. There could have been more than one, but he did not look and he didn't know whether or not deceased was drunk because he "had not been around drunken soldiers". He did not call halt a fourth time, although deceased did not hear the first time, because "you're not supposed to halt no fourth time. You challenge

237327

423

CONFIDENTIAL

(364)

three times. If they don't halt the third time, I fire". The O.D. did not tell him to do that. When he pointed his rifle at deceased he wasn't aiming to hit or kill him. He didn't aim at him. He pointed his rifle in the direction he heard footsteps to scare the person approaching. He didn't turn his flash-light on nor call the Corporal of the Guard after shooting because he didn't figure he had hit the man.

The function of the Court was to judge the credibility of witnesses, weigh the evidence before it and reconcile conflicts therein. It heard and saw the witnesses and made its finding and thereby determined that accused acted with premeditation and malice aforethought. The Board of Review, sitting in appellate review, treats the finding of the Court as presumptively correct and its duty is to determine if such finding is supported by substantial evidence. (CM ETO 132, Kelly and Hyde; CM 203511, Wedmore; CM 223336 (1942) Bul. JAG., Vol.I, No.3, sec.422, p.159).

The evidence presented by the prosecution, standing alone, is highly convincing that accused when he discharged his rifle at deceased was not acting under heat of passion, anger or fright nor suffering from mental or emotional derangement or disorder. One witness (Brunson) was impressed with the idea that accused was "mad" because of the manner in which he told deceased "to shut up or I'll shoot you", and that he must have been "mad" when he came on duty. However:

"Mere anger, in and of itself, is not sufficient, but must be of such a character as to prevent the individual from cool reflection and the control of his actions. Such passion must be produced by due and adequate provocation, and be such that would cause an ordinary man to act upon the impulse of the moment, engendered by such passion and without due reflection and the formation of a determined purpose".
(1 Wharton's Criminal Law, sec.426, p.647).

Another witness for the prosecution denied accused was tense or excited or there was anything unusual in his attitude. The remainder of the witnesses were silent on the subject of accused's mental and emotional reactions.

It is manifest that accused, himself, corroborated a vital element of the prosecution's case. After asserting that deceased applied an obscene epithet to him upon being "halted" the second time, accused declared that he had been called such epithets "lots of times and didn't care about it", and that he did not fire because deceased had called him a bad name. In response to the question as to why he did not "halt" deceased a fourth time, although deceased did not hear his command the first time, he replied: "you're not supposed to halt no fourth time. You challenge three times. If they don't halt the third time, I fire".

422

237327

- 20 - **CONFIDENTIAL**

Accused disclaimed all anger because he was called a vile name (the "bad name" incident was clearly disproved by the prosecution's evidence and it was most probably a creation of accused's imagination) and offered as the sole explanation for his act the alleged fact that deceased failed or refused to halt after having received the order three times. Deceased was "mumbling" and may have been heard by accused, but it is a striking fact that accused makes no mention of it and does not charge deceased with such conduct. The accused, described his mental and emotional condition at the time he shot deceased in such manner as to confirm the prosecution's evidence that he was not acting under provocation and was free from anger or passion.

There is therefore no evidence in the record that accused shot deceased under the spell or urge of anger, passion or other mental or emotional derangement, but oppositely it affirmatively appears that accused was acting entirely free from such influences and deliberately and with malice aforethought shot deceased. "If they don't halt the third time, I fire". In the opinion of the Board of Review the Court could not have reached a conclusion other than it did.

(b) Accused insisted that when he pointed his rifle at deceased he did not intend to hit or kill him; that he didn't aim at deceased and that he only pointed his rifle in the direction he heard footsteps in order to scare the person approaching.

By its finding the Court expressed its disbelief of accused's explanation of the killing and such conclusion is binding on the Board of Review. The Board of Review is however, in complete agreement with the finding of the Court. Accused's contention in this respect was entirely futile. It is neither a defense nor a matter in mitigation.

"Mere use of deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does cause death, the law presumes malice from the act". (1 Wharton's Criminal Law (12th Ed.), sec.426, p.655).

"A specific intent to kill does not enter into the definition of murder at common law or under statutes declaratory thereof; it is sufficient if the unlawful killing is with malice aforethought either express or implied, and a homicide may be malicious, and hence may be murder, although there was no actual design to take life. If an unlawful act, dangerous to, and indicating disregard of, human life, causes the death of another, the perpetrator is

428

237327

(366)

guilty of murder, although he did not intend to kill. Thus, if an assault was made upon deceased, not with the design of killing him, but of inflicting great bodily harm upon him, it is murder if his death is caused thereby; and it is murder where death results from an assault or other unlawful act, intentionally done in such a manner as was likely to cause death or serious bodily harm, even though there may have been no actual intent to cause death or great bodily harm, but the injury intended must be such as involves serious consequences, either in endangering life or leading to great bodily harm, and death or great bodily harm must have been a reasonable or probable consequence of the act." (29 Corpus Juris, sec.69, p.1095-1096).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its existence of malice must be determined as a fact from all the evidence.

In order that an implication of malice may arise from the use of a deadly weapon it must appear that its use was willful or intentional, or deliberate. This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use, or that it was used in such a manner that the natural, ordinary, and probable result would be to take life."

(29 Corpus Juris, sec.74, p.1099-1161).

Accused's testimony clearly shows that he shot the deceased (who he declares was alone) as he came "around the corner" because he failed or refused to heed the warnings to halt. He deliberately pointed his rifle at him and fired. He sought neither to shoot at the ground nor above the deceased, but held the rifle with the level of his hip and horizontal to the ground and discharged it. It was in "a manner that the natural, ordinary and probable result would be to take the life" of the soldier, who was the deceased. This was certainly

substantial evidence from which to infer that accused's use of the deadly weapon "was willful or intentional or deliberate" and it cries aloud the fact that accused acted with malice aforethought.

(c) Well grounded belief of danger may reduce a homicide from murder to manslaughter, "but, in order to accomplish this, the fear must be such as a reasonable man would entertain under the circumstances of the homicide. Mere fear, apprehension or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent." "Danger must be present, active and imminent to constitute a reasonable belief of danger." (1 Wharton's Criminal Law, sec.426, p.655).

Accused testified that he did not know whether the lone man (meaning the deceased) was going to come up to him and strike him (R.170). Sergt. Hill in his testimony given as a witness for the prosecution testified that accused stated to him after the homicide: "No, I didn't know whether it was a soldier or not, although he had on soldiers' clothes", because, he said, "spies dress as American soldiers sometimes" (R.122). This is the total evidence from or on behalf of accused which gives any indication as to whether he entertained any belief of imminent danger. Accused is specific in his testimony that he saw only deceased. He declares he saw neither Brown nor Hersey, and did not know whether deceased was drunk or not. The defense's evidence, therefore, fails to prove (a) that accused had any belief that he was in imminent danger or (b) that there was in fact any present, active danger.

When, however, the prosecution's evidence is considered in connection with accused's sketchy testimony on this point, there is substantial evidence that not only danger did not exist but also that accused did not entertain the belief that he was in danger. At the time accused approached deceased there yet remained near him a number of soldiers seeking entrance to the camp. The acting Corporal of the Guard (Dean) was in close proximity. Deceased was intoxicated to the degree that he was physically helpless and was under the care of Brown and Hersey. The trio, after reaching the corner of the building, advanced no further. Brown asked for accused's permission to take deceased through the entrance, explaining that he was drunk. Accused gave no warning, but approached deceased and ordered him to "shut up", threatening to shoot him. Deceased last words: "Go ahead and shoot. I'd rather be dead than the way I feel" were not a threat, but the complaint of an inebriated man. Accused then discharged two bullets into deceased. Any contention that accused was actuated by fear is therefore, without shadow or substance, and is considered by the Board of Review only because it falls within the ambit of the general discussion.

12. There is another aspect of the case which in the opinion of the Board of Review requires some consideration. Accused testified that the O.D. (Lieut. Porter) directed him to check all passes of

(368)

soldiers returning to camp that evening. Such testimony is not contradicted and it received a certain amount of corroboration through the evidence of Sergt. Hill (R.126,127) who, without objection from the prosecution, testified that at an investigation of the homicide, accused asserted that he was checking the passes on the evening of 5 February 1943 under orders of the O.D.; that Lieut. Porter was present at the investigation when accused made such assertion, but did not deny it. Lieut. Porter was not introduced as a witness by either the prosecution or defense. The Hill testimony on this point should have been excluded by the Law Member had timely objection been made by the trial judge advocate, as it is clearly hearsay and inadmissible, but it is in the record for what it is worth. It is therefore, assumed for the purpose of this discussion, that the O.D., did give such order to accused and that accused was acting under such order and authority when he stopped the returning soldiers and demanded that they exhibit their passes. According to the defense's theory accused ordered deceased three times to halt as he approached the entrance for the purpose of checking his pass. Deceased refused or failed to comply with either of the three commands and as a result accused shot him in the performance of his duty. The difficulty with this contention is that it is not consistent with the facts of the case. Granted as a major premise that accused received orders to check all passes of the returning soldiers, the evidence fails to support the remaining necessary elements to make the defense valid.

"That the act charged as an offence was done in obedience to the order--verbal or written --of a military superior, is, in general, a good defence at military law.
 The act, however, must have been duly done-- must not have been either wanton or in excess of the authority or discretion conferred by the order. Thus an officer or soldier ordered to suppress a mutiny or disorder or to make an arrest, a guard ordered to keep in custody a prisoner, or a sentinel ordered to prevent persons from passing his post, will not be justified in taking life or in resorting to extreme violence, where the object of the order can be effectually accomplished by more moderate and customary means: otherwise where the forcible resistance of the party, his persistence in disregarding warnings, his sudden flight, etc., render it impracticable to seize or stop him without extreme violence or the use of a deadly weapon." (Winthrop's Military Law and Precedents, (Reprint), p.296).

422

CONFIDENTIAL

(369)

"A homicide done in the proper performance of a legal duty is justifiable. Thus, executing a person pursuant to a legal sentence of death; killing in suppressing a mutiny or in preventing the escape of a prisoner where no other possible means are adequate; killing an enemy in battle; and killing to prevent the commission of a felony attempted by force or surprise, such as murder, burglary, or arson, are cases of justifiable homicide. The general rule is that the acts of a subordinate officer or soldier, done in good faith and without malice in compliance with his supposed duty, or of superior orders, are justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal. (Wharton on Homicide)." (M.C.M., par.148, p.162-163).

There is not only substantial evidence to support the conclusion that accused did not give deceased timely warning, but also the quantity and quality of the evidence is such that the Court could not have found otherwise than it did. Such finding is conclusive on the Board of Review. On this basis the accused approached deceased (who was helplessly intoxicated and was then supported by Brown and Hersey) ordered him to "shut up" and threatened to shoot him. Upon deceased answering "Go ahead and shoot. I would rather be dead than the way I feel", accused replied: "Do you think I am kidding?" He then shot deceased. There was no attempt by accused to check deceased's pass pursuant to his orders from the O.D. No demand was made on either the deceased or his companions to produce their passes. Brown had asked for permission to take deceased into camp explaining deceased was drunk. Montella as superior N.C.O. present had informed accused: "I'll take charge of that man". In the face of this situation, accused discharged his rifle at deceased. Accused's contention is, therefore, destroyed by the facts of the case.

If the issue be premised upon accused's statement that three times he gave deceased the warning to halt; that deceased continued to approach even after the third command and that he shot deceased because he failed or refused to heed the warning, there is, nevertheless, no comfort for the accused. There is substantial evidence in the record from which the Court was fully justified in concluding that accused resorted to extreme violence when he might have carried out his orders to check deceased's pass by more moderate and customary means. This was essentially a question of fact within the exclusive province of the Court, and inasmuch as its finding is sustained by substantial evidence it is accepted by the Board of Review as final. The contention ~~is~~ of accused that he killed deceased in the performance of a duty imposed upon him by the Officer of the day does not possess

237327

(370)

even a modicum of merit.

13. The record clearly and emphatically establishes beyond a reasonable doubt accused's guilt of the murder of deceased. The homicide was cruel, ruthless, and premeditated without a shadow of excuse or pretense in mitigation. Accused exhibited his brutal, savage nature in his preliminary approach to deceased, in the act of killing and in his subsequent attitude with reference to deceased's body, "You ain't taking him no place". The Board of Review is of the opinion that the record is legally sufficient to support the finding of murder.

14. Charge II and its Specification charges accused with committing an assault upon Pvt. Philip H. Brown with intent to do him bodily harm by shooting him in the left hand with a dangerous weapon, to wit, a rifle. Certain of the facts and circumstances connected with the actual shooting of O'Connell by accused are relevant in considering the assault committed by accused on Brown. They are hereinbefore set forth in detail and repetition thereof is unnecessary. It is sufficient to summarize the ultimate facts giving rise to the charge.

Brown and Hersey were the escorts of deceased, O'Connell, on the night of 5 February 1943. They took cognizance of the latter's extreme intoxication when he dismounted from the bus arriving in Hilton from Derby and attempted to assist him to reach his barracks. Hersey was on deceased's left side with his right arm about deceased. Brown was on deceased's right side with his left arm about deceased. The palm of Brown's hand rested approximately on deceased's left shoulder-blade. The three soldiers stood in this pose parallel with the end of the building but 7 or 8 ft therefrom. There is no evidence that accused knew Brown personally or that he had ever had any contact with him. This was their first meeting. It is manifest, however, that accused saw Brown and Hersey supporting and holding deceased when he discharged his rifle in their direction. The bullet from accused's rifle, which killed O'Connell, passed through his body and upon its exit, struck Brown's left hand, penetrated it, and inflicted a serious and painful wound which may leave permanent, partial impairment. The 93rd Article of War denounces the offense as follows:

"Any person subject to military law who commits **** assault with intent to do bodily harm with a dangerous weapon, instrument or other thing **** shall be punished as a court-martial may direct."

The Manual for Courts-Martial discusses the offense as follows:

"This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended. Where the accused acts in reckless disregard for the safety of others it is not a defense that he did not have in mind the particular person injured. Proof.- (a) That the accused assaulted a certain person, as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person." (M.C.M., par.149n, p.180).

The assault with which accused is charged is within the group ordinarily classified as "aggravated or other heinous assaults." Its distinguishing element is the presence of the specific intent to inflict bodily harm which must be proved beyond a reasonable doubt. A failure in proof of this element cannot be supplied by evidence that the injury was inflicted. Specific intent requires factual proof; it cannot be implied. However, specific intent may be inferred from surrounding facts and circumstances, and such inferences constitute factual proof.

"Under statutes of this character the intent to inflict an injury, of the kind described by the particular statute, is an essential element of the offense, and the absence of such intent cannot be supplied by the mere fact that the injury is inflicted, although an inference of the intent may be justified from the occasioning of the injury, or the character of the injury, or of the implement employed, or the other circumstances attending the assault. There need not be a specific intent to assault the prosecuting witness, or to inflict the particular kind of injury which resulted; therefore mistake in the identity of the person assaulted affords no excuse." (5 C.J., sec.216, p.739; 6 C.J.S., sec.79(2), p.937).

"The intent to injure another by discharging a loaded gun at him is at least an intent to inflict great bodily injury, and that a party's aim is not true does not change the intent, if it is the purpose and intent to injure." (6 C.J.S., sec.79(2), p.938). 422

237827

CONFIDENTIAL

(372)

Had the deceased, O'Connell, not died, then beyond all peradventure, accused would have been guilty of assaulting him with intent to inflict bodily harm with a dangerous weapon. Accused aimed and discharged his rifle at deceased after threatening to shoot him and after Brown asked permission to take him into camp and Montella stated he would take care of him. These facts together with other circumstances, obvious upon inspection of the record, supply a substantial basis from which the specific intent by accused to inflict bodily harm upon O'Connell may be inferred.

However, accused is charged with assaulting Brown with intent to inflict bodily harm - not the deceased O'Connell. Will the evidence support the Charge and Specification? Brown was grievously wounded by the same bullet that killed O'Connell. The identical circumstances therefore surrounded the wounding of Brown as enveloped the murdering of O'Connell.

It may be true that accused did not contemplate that he would kill O'Connell and wound Brown by the use of the same bullet. The law very wisely does not indulge in abstract or abstruse considerations in transactions of this kind. It deals with practical everyday problems of human relationship and must of necessity adapt itself to same. An accused committing an offense of this nature need not have intended to do only the precise thing which actually followed his assault (People v. Howard, 179 Michigan 478, 146 N.W. 315; People v. Miller, 91 Michigan 639, 52 N.W. 65; People v. Kalinki, 123 Michigan 110, 81 N.W. 923; Lambert v. State, 80 Nebraska 562, 114 N.W. 775).

"It is not essential to a conviction for the offense charged that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated. Peo. v. Miller, 91 Mich. 639, 52 N.W. 65.

But where the injury proved is the natural and necessary consequence of the deliberate and inexcusable act of the accused, the inference is that it was the result contemplated by him when the assault was committed, and may be sufficient evidence of the specific intent which is essential to a conviction."

(Murphey v. State, 43 Nebr. 34, 41, 61 N.W. 491.) (5 Corpus Juris, p.739).

The intent on accused's part to inflict bodily harm on deceased, exhibited by accused's deliberate, malicious killing of deceased included within its scope the intent to do bodily harm to any person

237327

- 28 - **CONFIDENTIAL**

422

(373)

who was or came within the range of the bullets fired by accused at deceased. Accused displayed "a reckless disregard for the safety of others". Such conduct supplies the proof that accused intended to inflict bodily harm on Brown. The law does not require proof that accused intended that the bullet which killed O'Connell should also have wounded Brown. The requirements are satisfied by the proof that accused intended to inflict bodily harm on deceased and in the execution of such intent Brown was wounded. The specific intent to do bodily harm to O'Connell followed the bullet through his body into Brown's hand. (Cf: CM 221640, Loper).

The Board of Review is of the opinion that the record is legally sufficient to sustain the finding of guilty of Charge II and its Specification.

15. 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 be come 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.

16. Accused is of the age of 24 years. He has been sentenced to confinement for life as punishment for an act "recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of general application within the continental United States", 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).

237327

CONFIDENTIAL

(374)

17. 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 Ritter Judge Advocate

S. H. Vandervechten Judge Advocate

Ellwood Kilgore Judge Advocate

422

237827

- 30 -

CONFIDENTIAL

CONFIDENTIAL

(375)

1st Ind.

WD, Branch Office TJAG with ETOUSA. **10 MAY 1943** TO: Commanding General, Western Base Section, SOS, ETOUSA.

1. In the case of Pfc. WILLARD GREEN (NMI), (34072287), Company A, 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 the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 422. For convenience of reference please place that number in brackets at the end of the order: (ETO 422).



L. H. HEDRICK,

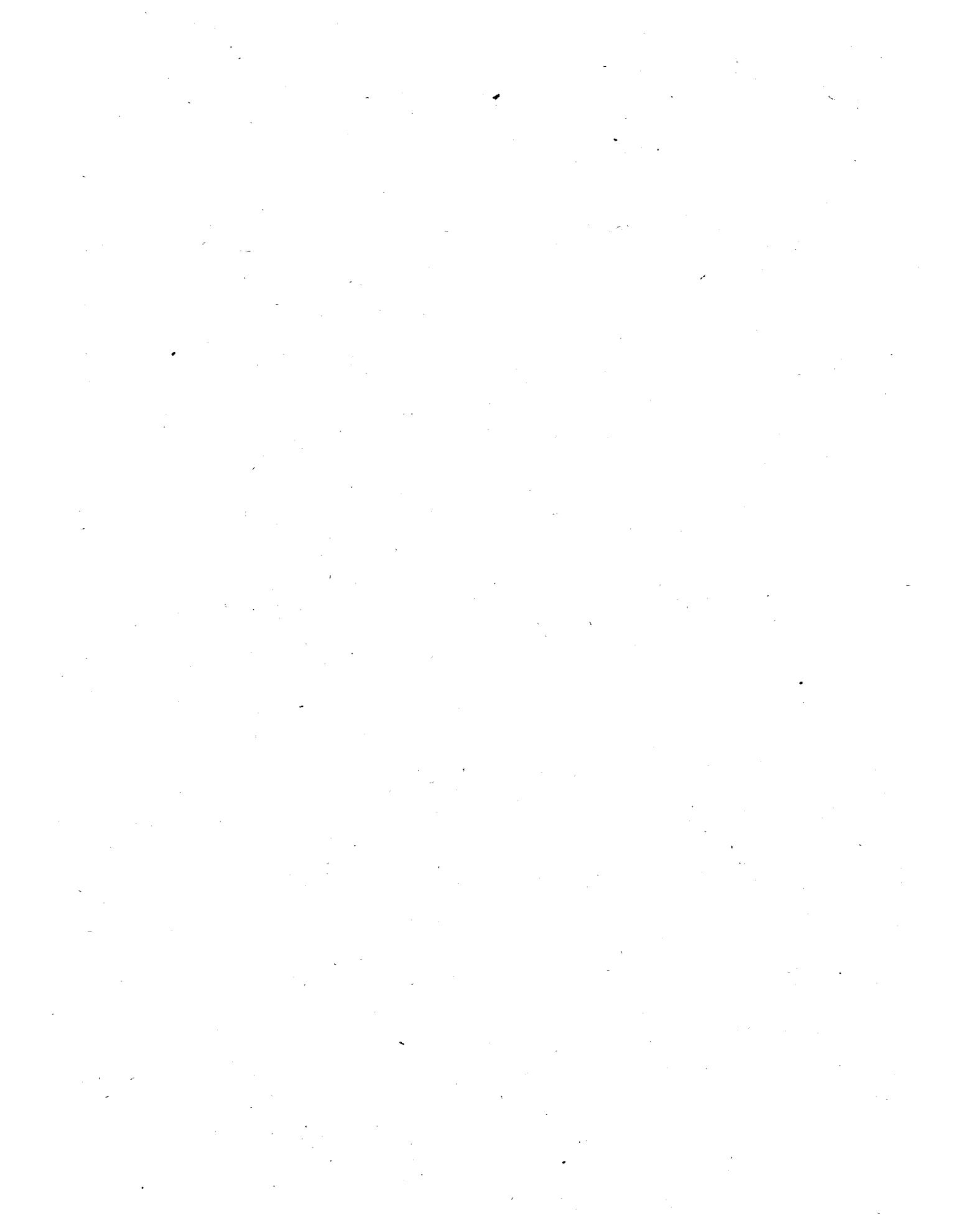
Brigadier General,

Assistant Judge Advocate General,

Branch Office with the European Theater of Operations

1 Incl:

Opinion of Board of Review.



~~CONFIDENTIAL~~

(377)

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

Board of Review.

ETO 438.

5 JUN 1943

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, SERVICES
v.)	OF SUPPLY, EUROPEAN THEATER OF
Private HAROLD ADOLPHUS SMITH (14045090), alias HAROLD A. SMITH, alias HARRY ADOLPHUS SMITH, alias HAROLD ALVIN SMITH, Headquarters and Headquarters Company, First Tank Destroyer Group.)	OPERATIONS.
)	Trial by G.C.M., convened at Bristol, England, 12 March 1943. Sentence: To be hanged by the neck until dead.

HOLDING 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 by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private Harold Adolphus Smith, Headquarters and Headquarters Company, First Tank Destroyer Group, did, at Chisledon Camp, "E" Company, 116th Infantry, near Swindon, Wilts, England, on or about January 9, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Harry M. Jenkins, Company "E", 116th Infantry, a human being by shooting him with a pistol.

258016

CONFIDENTIAL

CHARGE II: Violation of the 69th Article of War.
Specification: In that Private Harold Adolphus Smith, Headquarters and Headquarters Company, First Tank Destroyer Group, having been placed in confinement in the stockade at Chiseldon Camp, Wilts, England, did, at Chiseldon Camp, Wilts, England, on or about December 31, 1942, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification and was found guilty of both of the Charges and their Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead.

The reviewing authority, the Commanding Officer, Southern Base Section, S.O.S., ETOUSA, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, withheld the order directing the execution thereof, and forwarded the record pursuant to Article of War 50 $\frac{1}{2}$.

3. On 31 December 1942, the accused together with Harry L. English, a general prisoner, escaped from confinement in the guardhouse at Chisledon Camp, Wilts, England, and together went to London (R.65). They remained in London about a week when running short of money, accused, alone, left London on Friday morning, 8 January 1943, telling English he would return to camp to collect some moneys owing to him (R.67). Accused reached Swindon about 11:45 P.M., the night of 8 January 1943 and immediately went to Chisledon Camp six miles from Swindon, he claims, to rejoin his unit (Prosecution's Exhibit "O", statement of accused). He arrived at the kitchen of the camp about 2:00 A.M., of Saturday morning, 9 April 1943, and was given a sandwich by two members of a guard detail (Corporal Amos R. Buchanan and Pfc. Richard B. Payne) from Company "E", 116th Infantry, who took him to their barracks where he spent the night (R.18,24). Accused remained in or about such barracks until approximately 3:30 in the afternoon of the same day. Men coming into the barracks from guard duty dropped their pistols "in the nearest convenient spot" (R.21). During the day accused took, without authority, a U.S. Army .45 caliber pistol, holster, web belt and three clips of ammunition. This equipment he strapped about his waist, under his overcoat and walked out of the barracks about four o'clock in the afternoon, checking the clip in the pistol as he went (Prosecution's Exhibit "O"). He was not drunk (R.18,25).

The story as told by accused in his sworn statement (Prosecution's Exhibit "O") made 11 January 1943, two days after the shooting, was substantially corroborated by witnesses at the trial and is as follows:

258010

CONFIDENTIAL

"Statement of Pvt. Harold Adolphus Smith, taken at
33 Davies Street, London W.1, at 9:30 A.M., on
date below.

Jan. 11th 1943.

Private Harry Adolphus Smith, it is my duty to inform you of your rights at this time. It is your privilege to remain silent. Anything you may say may be used either for or against you in the event that this investigation results in a trial. Do you thoroughly understand your rights. If so sign below.

(Signature) Harold Adolphus Smith.
I, Private Harry Adolphus Smith, ASM 14045090,
Hq. Hq.Co. 1st Tank Destroyer Group, APO #302
having been duly warned do hereby make the following statement entirely of my own free will without threat or promise of reward.

At about 5:00 P.M. on Friday, Jan 1st 1943 I went A.W.O.L. from my unit and went to London. I had just been paid and had about £15. I rented a room at the Royal Hotel, Russell Square, London.

(At bottom of page - Signature) Harold Adolphus Smith.
Private Harry English, 894th Tank Destroyer Bn.
whom I met on the train coming to London, also stayed in my room, #5077, at the Royal Hotel. He was also A.W.O.L. from his outfit.

On the following day, Saturday, I went around London, sight seeing and going to the movies. Private English was with me for a short while. He later left to meet a girl friend. I do not know her name but I recall that she was in room #2053 at the Royal Hotel. On Saturday night, Jan 2nd, English engaged room #1001 at the Royal Hotel. We both stayed in that room.

English and I kept room #1001 until Thursday, Jan. 7th 1943. I did not see much of English as he was with his girl friend most of the time. At about 3:30 P.M., on Thursday, English introduced me

(At bottom of page - Signature) Harold Adolphus Smith.
to a British Merchant seaman who invited us to his home. His name was "Pete". I do not know his address as we went to his house by taxi. English and I both stayed at Pete's house for the night. At about 1:00 P.M. on Friday, Jan. 8th 1943, English and I left Pete's house. English went to Victoria and I went to Paddington Station to get a train and return to my unit. English had a date with a girl in Victoria. He told me he would meet me in Swindon the following day.

258070

CONFIDENTIAL

(380)

I caught the 9:20 P.M. train from Paddington Station, Friday night. I arrived in Swindon at about 11:45 the same night. I immediately went to Chilsedon camp, 6 miles from Swindon, to rejoin my unit. I found my organization had moved out. I saw a light in one of the camp kitchens so

(At bottom of page - Signature) Harold Adolphus Smith. I entered and asked for something to eat. A guard, armed with a pistol, was on duty in the kitchen. There was no cook around so the guard gave me a cheese sandwich. He grumbled quite a bit about me asking for something to eat after hours. Another guard who was present in the kitchen went to the barracks and made arrangements for me to sleep there. I, and the guard who gave me the sandwich, followed the other guard to the barracks. I slept there in a bunk pointed out by the guard who had gone ahead to make arrangements. I got up the next morning at about 7:00 A.M. I did not eat any breakfast. (I very seldom eat breakfast) I hung around the barracks until about noon when I went to the mess hall for dinner. After dinner I went back to the

(At bottom of page - Signature) Harold Adolphus Smith. squad room where I had slept. At about 2:00 P.M. that day, Saturday, Jan. 9th 1943, while in the squadroom I saw a U.S. Army .45 cal. automatic pistol, holster, webb belt and 3 full clips of ammunition. The pistol was laying on top of a bunk. I strapped the belt and pistol around my blouse, under my overcoat, and walked out of the barracks, at about 4:00 P.M. While in the corridor I checked the clip in the pistol. Finding it was full I pushed it back in the pistol. I always wanted to have an automatic so I took the gun from the squadroom intending to keep it as a souvenir. I had no intention of using the gun or shooting anybody. After checking the clip in the corridor, I started walking toward the mess hall. Just as I got outside the barracks I met

(At bottom of page - Signature) Harold Adolphus Smith. a guard armed with a pistol. He looked like the guard who had given me the sandwich in the kitchen the night before. When I was about six feet away from the guard I said to him "Hiya Bud". When I got about even with him and just as we were passing each other, the guard turned to me and said, "What the hell did you say". I stopped

258670

and replied "I just said hiya Bud". The guard said "What do you mean by that". I replied "Just Hiya Bud". When I said that the guard took a step toward me and at the same time bringing his right hand back toward his holster. I did not know whether he was going to hit me or draw his pistol and shoot me. At this time the guard and I were about four feet from each other. As the guard made the motion

(At bottom of page - Signature) Harold Adolphus Smith. toward his holster I immediately drew my pistol from under my unbuttoned overcoat with my right hand. All in the same motion I pumped a cartridge into the chamber with my left hand and fired point blank at the guards stomach from the hip position. When the first shot hit the guard he spun around to the right until his back was toward me. I then fired one or more shots (I can't remember the number) into the guard's back. As I was shooting the guard was falling to the ground. After I had finished firing at the guard at my feet, I remained there for a few moments standing over him with the pistol still in my hand. At this time I saw an unarmed soldier come out of the barracks and run toward me with clenched fists. I fired two shots over his

(At bottom of page - Signature) Harold Adolphus Smith. head to scare him. He turned around and ran back into the barracks. I then holstered my pistol and ran away from the scene of the shooting. I ran out of the camp, along the Ogburne - Marlborough road. I caught a bus at Ogburne at about 4:30 p.m. and went to Marlborough, about four miles away. I arrived at Marlborough at about 5:00 P.M. on Jan. 9th 1943, the day of the shooting. I remained around Marlborough until about midnight at which time I caught a train for London. I arrived at Paddington Station, London, at about 4:00 A.M. Sunday, Jan. 10th 1943. As the tubes were closed I took a taxi and went to Euston Station where I sat in a chair at the Y.M.C.A. Restrooms. Sunday morning at about 8:00 A.M., Private English came to the Restrooms.

(At bottom of page - Signature) Harold Adolphus Smith. We talked a while and I told him my outfit had moved. I did not tell him anything about me shooting a guard in Chiseldon. I did however show him the pistol I was carrying. He asked

158070

CONFIDENTIAL

(382)

me to loan it to him. I did so at about 8:05 A.M. He went out with the pistol and returned about 15 minutes later and gave it back to me. English then left me saying he would meet me in the Restrooms that night. After English left I also went out of the Restrooms and walked around London. I returned to the Y.M.C.A. at Euston Station late Sunday afternoon and remained there. I slept in one of the chairs. At about 2:30 A.M. on Monday Jan 11th 1943 I was awakened by a uniformed London policeman. He took my pistol away from me and escorted me

(At bottom of page - Signature) Harold Adolphus Smith. to a police station. I was later turned over to the U.S. Military Police and put in jail. I know the number of the pistol I stole from the barracks in Chiseldon and which I used in shooting the guard is 515525. I have memorized this number. I drank no liquor on the day of the shooting. I have read my statement of 9 pages and 6 lines and it is all true.

(Signed) Harold Adolphus Smith.

This statement taken by W. R. Dalton, I.D. - O.P.M.G. in the presence of Agent J. A. Langevin, I.D. - O.P.M.G.

I have been duly sworn by Lt. Richard M. McGuiness and I swear that the statement I have given consisting of nine (9) pages and six (6) lines Is the truth.

(Signed) Harold Adolphus Smith
Richard M. McGuiness
1st Lt. C.M.P.

Witness: Summary Court.

(Signed) Jas. A. Langevin,
Agent I.D. O.P.M.G.

In front of the barracks, Private Harry M. Jenkins, Company "E", 116th Infantry, was on guard at about 4:00 P.M., on 9 January 1943, armed with a pistol (R.22,58 -59, Prosecution's Exhibit "O"). Private Leroy K. Reed, Company "E", 116th Infantry, who was inside a barracks, heard shots and a cry for help and on running from the barracks, he reached the spot where Jenkins was lying in the street within "about 30 seconds" from the time he heard the shots (R.63). On being asked what was wrong, Jenkins pointed to accused, who was standing nearby, and said "that corporal shot me" (R.57). Jenkins had on his overcoat, helmet and leggings, with a pistol in his holster buckled around his waist. When Reed looked, accused was getting a pistol out of his

250070

overcoat pocket. Reed started running and two shots were fired at him (R.58,59; - Prosecution's Exhibit "O") as he ran around the barracks and into the mess hall where he reported to Lieutenant Knight that Jenkins had been shot. Accused then fled along a road leading past the camp where he was seen about 4:20 P.M., on Saturday, 9 January 1943 by a British civilian who identified him in court during the trial (R.40-46; Prosecution's Exhibit "O").

Jenkins was brought into the Swindon hospital about 4:30 PM, on Saturday, January 9th, suffering from shock and gunshot wounds (R.31). One wound was in the left side of the back, one in the left arm, one in the left thigh and one in the right thigh. "Two bullets in his body". "Probably one went through" (R.32). A bullet was removed from the right abdominal wall, apparently being the one entering the left side of the back (R.33) and, in the opinion of Dr. Lichtenstein it was the cause of Jenkins death (R.35) which occurred the next evening. Dr. Lichtenstein identified the bullet removed from Jenkins body (Prosecution's Exhibit "D") and described it as rather short and thick and not a rifle bullet (R.34).

Lt. William B. Williams, commander of "E" company of which deceased, Jenkins, was a member, was with Jenkins in the hospital (R.10). Jenkins told him "that the soldier who had been at the camp for several hours and had come in the night before had shot him", and said there had been no conversation between them before or at the time of the shooting. He said he was shot first in the back. At the time, Jenkins was very sick and weak and was laboring for his breath (R.11).

Lt. Williams identified the jacket worn by Jenkins (Prosecution's Exhibit "I") by the hole above the belt in the back and the bloodstains inside around the hole, and also identified various other articles of Jenkins clothing produced at the trial as exhibits (R.52,53).

James Watson, a London police sergeant, found accused in an armchair in the Y.M.C.A., rest room at Euston station, London, about 3 o'clock in the morning of 11 January 1943. He was lying in the chair in his shirt sleeves, asleep. His coat and jacket were on the back of the chair and a web-belt with pistol in a holster was under his back. The pistol was a Colt, number 515525, with a magazine in it, which pistol Police Sergeant Watson identified as Prosecution's Exhibit "F" herein (R.48). The magazine in the gun was full and there were two clips in the clip-pouch on the belt, one with five cartridges in it and one empty (R.49). "The accused was much surprised and went with me very quiet and sullen" (R.50). The officer took accused's identity card from him at the time he picked him up (Prosecution's Exhibit "G"; R.51).

By stipulation the post mortem examination of deceased was "entered as evidence and marked Prosecution Exhibit "L" (R.54). Also by stipulation, the report of the gunsmith and ballistics expert, Prosecution's Exhibit "H", was admitted in evidence. In this report

(384)

the ballistic expert finds that the bullet "found in Jenkins stomach" could not have been fired from any other weapon "than the .45 Colt Automatic numbered 515525", and that this pistol "is in working order and is not liable to accidental discharge" (R.51).

Lt. Wallace R. Dalton, C.M.P., Prison Officer, Detention Barracks, London Base Command, as a prosecution witness, stated he and Lt. Langevin of the Provost Marshal General's Detachment, questioned accused after he was delivered to them by the London police (R.73), and that he wrote accused's statement as it was dictated by accused (R.74), each page of which was then signed by accused (R.76) and witnessed by Lt. Langevin and Lt. McGuiness (Prosecution's Exhibit "O"). Lt. Dalton was present also when a statement was made by Private (Harry L.) English (Prosecution's Exhibit "N") (R.78), and he testified that the statement was freely given and that no physical force was used to obtain the statement (R.79).

Defense counsel announced "the rights of the accused as a witness have been explained to him and he elects to remain silent" (R.94).

4. The accused is named in the Charges and Specifications as "Harold Adolphus Smith", but his serial number is not set forth therein. An MRU card, attached to the record of trial, refers to "Harold Alvin Smith", serial number 14045090, who was born at La Grange, Georgia, on 4 January 1923, and who completed 8 years of grammar school and 3 years of high-school education in said town. Prosecution's Exhibit "G" is the identification card taken from accused (R.51) (W.D., AGO form No.65-4, March 21, 1942) of one "Harold A. Smith" whose serial number is given as 14045090. Prosecution's Exhibit "O" is the "Statement of Harold Adolphus Smith ***" but who is described in the body of the statement as "Private Harry Adolphus Smith, ASM, 14045090, Hq., Hq.Co, 1st Tank Destroyer Group, APO #302". By certificate of correction the date as to age, pay and service of a certain "Harold A. Smith, 14045090, Headquarters and Headquarters Company, First Tank Destroyer Group", is made part of the record of trial. His age is therein shown as 20 years. The soldier who faced the court was positively identified as the individual who shot deceased (R.17,20,23,25,40,47,57). While these irregularities in connection with the name of accused may be the source of confusion, there is no doubt that the soldier whose name appears with variations in the several records and documents above described is the identical individual who fatally shot the deceased, Jenkins, and further there is no doubt concerning the identity of the individual who was brought to trial charged with murder of deceased. The record of trial clearly shows that the person named in the charge sheet and the person who sat in court charged with the crime is one and the same person. It is further conclusively established that the person whose record is shown on the MRU card, the person who signed Prosecution's Exhibit "O", the person from whom the identification card

258070

was taken (Prosecution's Exhibit "G") and the person whose record of age, service and pay is shown, is one and the same person, and that this person is the person tried for the offenses set forth in the charge sheet. For convenience and in order to obviate mistakes in the future the Board of Review in the caption of this holding designates accused by his several names.

The defense counsel in his argument (R.95) declared: "First, in consideration of the youth of the accused; born 23 March 1926, age, 17 tomorrow, I believe ***. At the age of 14 he made his debut into the society of the world, principally the United States Army ***". The MRU card states the date of accused's birth as January 24, 1923, and the record of age, service and pay states his age to be 20 years. However, the W.D. identification card gives the date of birth as January 4, 1922. The Board of Review believes that the date of birth as shown by the MRU card is correct for the following reason: It may properly be assumed that accused entered school in his sixth year. He was in school for 11 years and worked a year in a restaurant making him approximately 18 years old when he enlisted on 4 February 1941 and therefore approximately 20 years old when the crime was committed. If he was born 24 January 1923, he was 19 years 11 months and 15 days old on 9 January 1943. It is apparent that if the birth date of March 23, 1926 is correct, accused must have entered school at the age of about 2 years 8 months - an absurd assumption, for he would have been only 14 years 8 months and 11 days old when he enlisted after 11 years in school and a year's employment in a restaurant. There is no indication on the MRU card that parental consent for enlistment was obtained.

5.(a) - It is noted that the effect of the plea of guilty made by the accused to Charge II and its Specification was not explained to him but it is presumed that defense counsel performed their duty and that accused knew the effect of such a plea (M.C.M., par.45b, p.35).

(b) - The admission of Prosecution's Exhibit "A" in evidence was objected to by defense counsel, first that it was hearsay and later that it was "presumption, not hearsay". It was read to the court by the trial judge advocate and the law member ruled that its acceptance would be "withheld until further evidence is presented" (R.12). It consists of a letter dated 5 February 1943 to which are attached three indorsements identifying accused, deceased and the pistol involved. It was not later mentioned nor formally received as evidence, but this letter and these indorsements are attached as exhibits to the record and appear to be a report of the loss of two pistols. One pistol numbered 515525, was recovered from accused by Sgt. James Watson of the London Police at the time he took accused into custody (R.48). The indorsements give the names and organization of both accused and deceased. All of the facts set forth in the letter and indorsements are otherwise shown by the record. While their admissibility was extremely doubtful, accused could not possibly be prejudiced by the use made of same.

(c) - Prosecution's Exhibits "B" and "C", photos of barrack buildings which were near the scene of the shooting, were received by the court (R.30) as evidence over the objections of defense counsel that same were not properly identified (R.28). The photos, while not taken by the witness, Payne, were identified by him as correct representations of the barracks and surrounding area, with which he was obviously familiar. This verification was sufficient (22 C.J., sec.1124, p.921), and the ruling of the court was correct.

(d) - Prosecution's Exhibit "E", "the history of the illness of the accident" to deceased was presumably made by Mr. Schofield, "Surgeon to the Hospital", whose signature thereto was identified by Dr. Hugo Lichtenstein and thereupon "accepted" by the court in evidence (R.36) without objection of defense counsel. This statement was clearly hearsay, but its contents were proved by other competent testimony. The rights of accused could not have been materially affected thereby. Its admission was harmless error.

(e) - Prosecution's Exhibit "M", a photograph of the situs of the homicide, was accepted by the court, without objection from defense counsel. The witness, Reed, identified it as correctly representing the street upon which accused stood, immediately after the homicide, although Reed was not the photographer (R.57). The evidence of identification was adequate, and the admission of the photo was proper. (See 5(d), supra).

(f) - Prosecution's Exhibit "N" (R.68) is a signed statement made under oath by Harry L. English, a witness, on 13 January 1943, two days after the arrest of himself and accused. On 13 March 1943 while English was on the witness-stand as a witness for the prosecution the record of trial shows that during his examination by the trial judge advocate the following occurred:

"Q. Did you and Smith plan to return to the States?

A. I planned that a long time ago, sir.

Q. How?

A. I was thinking of going back to the States by a boat if I could make it.

Q. Did Smith know anything of those plans?

A. No sir.

Q. Did you ever tell him anything about that?

A. No sir.

Q. Did Smith ever return to London?

A. Not that I know of, sir.

Q. You stated Smith went to collect some money from men who owed him. Was he going to return to you?

A. He was supposed to meet me the next morning at Euston Station.

Q. How were you going to get the money?

A. He was supposed to come back there to meet me. That was all.

Q. Did he meet you?

A. No sir.

Q. Did Smith get the guns?

A. I don't know sir.

Q. Did he hand you any gun?

A. No sir.

TRIAL JUDGE ADVOCATE: I have a statement here, made by the witness, which is in conflict with his testimony. I wish to enter it in evidence as Exhibit "N". (Trial Judge Advocate here reads the statement to the court) I offer this in evidence, to be marked and attached to the record.

LAW MEMBER: Accepted.

Q. Did you hear that statement? (the statement just read by the Trial Judge Advocate).

A. Yes sir.

Q. Was anything wrong with it?

A. Yes sir.

Q. Tell the court.

A. That statement was put under the third degree.

Q. Explain.

A. I was put under the third degree, while one officer made out the statement.

Q. Who was the officer?

A. I know it was a Lieutenant of the U.S.Army. He was a private agent of the F.B.I. He was working for the Provost Marshal's Office.

Q. Could you identify that man if you saw him?

A. Yes.

Q. Can you describe him?

A. He is short; has a little mustache, he is light, he is medium built.

(2nd Lieutenant Wallace R. Dalton, C.M.P., was here brought into the courtroom and faced the witness)

Q. Is this that officer? (indicating 2nd Lt. Wallace R. Dalton)

A. Yes sir.

(Lt. Dalton excused and retired from court room)." (R.68-69).

The trial judge advocate in presenting Exhibit "N" did not affirmatively assert that he had been surprised or entrapped by English's testimony. That surprise or entrapment of counsel, forms an exception to the rule which prohibits the impeachment of one's own witness is acknowledged by practically all authorities:

"**** A witness who unexpectedly gives testimony at variance with statement made to a party or counsel before ^{the} trial may properly have called to his attention his former statements in order to refresh his memory and move him to speak the

250070

(388)

truth by probing his conscience, thus inducing him to correct his testimony or explain the apparent inconsistency, or to enable the party calling him in some way to neutralize 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).

There must be actual, not feigned surprise. Counsel must have an honest belief as to what the testimony of the witness will be. The fact that he has been informed that a witness will testify to certain matters is no basis for claim of surprise by the failure of the witness to do so. (People v. Reynolds, 48 Cal. App. 688, 192 Pac. 343, 345; Wiese v. State, 47 Okl. Cr. 59, 287 Pac. 1099, 1102; Jeens v. Wrightsville & T.R.Co., 144 Ga. 48; 85 S.E. 1055, 1056; State v. Treseder, 66 Utah 543, 244 Pac. 654,656). "A party cannot claim to be surprised by the testimony of a witness when he has failed to make inquiry as to what the testimony will be before calling the witness to the stand" (Sullivan v. United States, 28 Fed (2nd) 147, 149; 3 Wharton's Criminal Evidence, sec.1394, p.2280). In the instant case, the trial judge advocate had before him the statement of the witness, English, (Prosecution's Exhibit "N") made on 13 January 1943 to officers of the Provost Marshal General's Department upon which he was entitled to rely when he placed English on the stand. The statement was made during an official investigation by proper officers. (70 C.J., sec.1226, p.1032). He was not required to express his surprise in formal language, when English testified in contradiction to his prior statement. His production of Prosecution's Exhibit "N" indicated his surprise better than words. It is manifest the trial judge advocate was caught off his guard, and that his surprise was in good faith and not feigned.

English's testimony on the stand conflicted with his prior statement in two important particulars: (1) in his statement English testified that one of the purposes accused had in mind in returning to camp was to obtain pistols for accused and English. "Just before he left me Friday morning he said he wouldn't stop at nothing in getting the pistols. He said: 'I won't stop at nothing'. We had talked about him getting the guns when we were together on Thursday. He said that 'the only way we can get them is from the MP post but I'll have to knock out one of the guards to get his first. Then I'll call out the sergeant of the guard and have him come down to get his'" (Prosecution's Ex."N"). Opposed to this declaration, English testified on the stand that accused returned to camp "to get some money from fellows that owed it to him", and upon being asked: "Was there anything else he was leaving you for?" he answered "No,sir" (R.67); (2) in his statement English further declared accused "told me that he had met a British seaman named Charlie and who would get us back to the States and we thought the guns would help us." He also stated that one of the things he had in mind in breaking out of the stockade was going back to the States (Prosecution's Ex."N"). In his testimony English denied

that accused had any knowledge of the plan to return by boat to the States and that he (English) had never told accused about such plans.

A further prerequisite for the admission of evidence in impeachment of one's own witness is that the testimony of the witness while on the stand must be affirmative and hostile, prejudicial or injurious to the party by whom the witness was called. (Sneed v. United States, 298 Fed. 911, 915; Randazzo v. United States, 300 Fed. 794, 797; Arine v. United States, 10 Fed. (2nd) 778; 3 Wharton's Criminal Evidence, sec.1393, p.2279). The fact that accused planned to obtain fire-arms even at the cost of violence with the ulterior purpose of using same as a means of returning to the United States certainly furnishes evidence that accused's shooting of deceased was the result of a deliberate, premeditated plan and that he was prepared to use violent means should any attempt be made to thwart his purpose. Manifestly English's testimony on the witness-stand which denied the rearrangement between himself and accused and had for its purpose the exculpation of accused from participation in the plan to obtain fire-arms for the purpose of aiding them in their intended desertion was not only affirmative evidence, but also highly injurious and prejudicial to the prosecution's case. The second condition to the introduction of impeaching evidence was therefore met.

The trial judge advocate called attention of the witness to his prior contradictory statement. English did not deny giving the prior statement but asserted it had been obtained under compulsion. Under these circumstances the admission of the prior statement in evidence was proper. (3 Wharton's Criminal Evidence, sec.1392, p.2278; M.C.M., par.124b, p.134).

Prosecution's Exhibit "N" was admissible only for the purpose of inducing English "to refresh his memory and move him to speak the truth by probing his conscience". It was not original substantive evidence in aid of the establishment of prosecution's case against accused. (70 C.J., sec.1236, p.1042, note 86). For the latter purpose it was hearsay and inadmissible, but for the limited purpose indicated, its use was unobjectionable. An explanation to the Court by the Law Member of the purpose for which Prosecution's Exhibit "N" was admitted would have been proper (State v. Willette, 46 Montana 326, 127, Pac.1013) but the absence of such explanation was not error. It may be properly assumed, in the absence of objection by the defense or evidence to the contrary, that the Court confined its use to its legitimate purpose (Winthrop's Military Law and Precedents (Reprint) p.514).

(g) - The court admitted in evidence the accused's written confession (Prosecution's Ex. "O") after hearing uncontradicted evidence as to its voluntary nature (R.73,74,75,76,80,81,82,83). There is not a suggestion that it was obtained through the exercise of force, compulsion or violence or because of promises of leniency. Neither was there any objection by defense to its admission. "A confession of accused which was reduced to writing by another person and was read

258010

over to or by accused, **** and which was signed or otherwise admitted by him to be correct is as much his written confession as one prepared entirely by his own hand would be, and when made freely and voluntarily, it is admissible against him over objections that it was not written by him *** or that it is not accurate, or that it does not recite his exact words, or that it is hearsay, or that it deprives him of the right to confront the witnesses against him." (16 C.J., sec.1508, p.732). The written confession was clearly admissible.

(h) - A written statement (Defense Ex. 1) made by Harry L. English on 5 March 1943, a time just prior to this trial, of these happenings, which occurred nearly two months earlier, was offered by the defense counsel while English was on the witness stand for cross-examination (R.70). On objection by the trial judge advocate, the court properly refused to accept it in evidence. The best evidence must be produced of which the case is susceptible, and it may happen that oral testimony may be the original and best evidence as to a fact or facts when a statement of the same exists in writing.

"Thus where certain facts within the knowledge of the writer, and material to the issue of the case on trial, have been recited in a ***** communication or other writing, the primary and best evidence of such facts will be not the writing but the personal declaration of the same, under oath and subject to cross-examination, by the writer, and if he can be obtained as a witness, the written statement should not be received." (Winthrop's Military Law & Precedents, p.322).

This same statement was later "accepted" in evidence as Defense Exhibit 1 (R.83) over the objection of the trial judge advocate. Defense counsel then immediately requested the court, "due to the incompetency of the witness, that all testimony as given by Private Harry L. English, be removed from the record of this case" (R.83). On refusal of this request by the court, defense counsel asked that Defense Exhibit 1 and all testimony of Private English "be admitted to the record but not as evidence". The admission of the Exhibit was the result of the persistent solicitation of the defense itself. Therefore, if any error were committed it was self-invited by accused's counsel and cannot constitute error prejudicial to accused (24 C.J.S., sec.1843, p.695).

The motion of defense counsel to exclude English's testimony and that same "be removed from the record of this case" "due to the incompetency of the witness" was an anomalous motion which is unknown to legal procedure. Contradictions in the testimony given by English on the stand with his prior statement to the officers of the Provost Marshal General's Department (Prosecution's Exhibit "N") and with his

258070

statement given on 5 March 1943 (Defense's Exhibit 1) and between the statements inter se go to the weight of the evidence and credibility of the witness. Consideration of same was a function of the court. Such conflicts did not affect his competency as a witness (70 C.J., sec.108, p.82). The ruling of the court denying the motion was correct.

(i) - Accused states in his confession (Prosecution's Exhibit "O") that there was some conversation between him and deceased and that he shot Jenkins the first time from the front when Jenkins made a motion "to hit me or draw his pistol and shoot me". Lt. Williams testified as to a conversation with deceased in the hospital sometime during the day following the shooting wherein Jenkins said there had been no conversation between him and accused before the shooting and that "he was shot first in the back" (R.11). No objection to the admission of this testimony was made by defense counsel and in the opinion of the Board of Review it is admissible as a dying declaration of deceased.

"Under indictments for murder and manslaughter, the law recognizes an exception to the rule rejecting hearsay, by allowing the dying declarations of the victim of the crime, in regard to the circumstances which have induced his present condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who has heard them. It is necessary, however, to the competency of testimony of this character - and it must be proved as preliminary to the proof of the declaration - that the person whose words are repeated by the witness should have been in extremis and under a sense of impending death, i.e. in the belief that he is about or soon to die, though it is not necessary that he should himself state that he speaks under this impression, provided the fact is otherwise shown." (Winthrop's Military Law & Precedents (Reprint), p.326; M.C.M., par.148, p.164). (Underscoring supplied).

"*** It is no objection to their admissibility that they were brought out in answer to leading questions, or upon urgent solicitations addressed to him by any person or persons ***" (M.C.M., par.148, p.164).

It was the duty of the Court, as a preliminary issue, to determine if deceased made the declaration under such conditions as to entitle it to admission in evidence. It is manifest that deceased was in extremis when he made the statement to Lt. Williams. He died soon

CONFIDENTIAL

(392)

thereafter. He also made the statement freely and voluntarily. Is there evidence that he had abandoned all hope of recovering from the injury inflicted by accused and was under the firm conviction that his death was inevitable and near at hand? "He made no statement to Lieut. Williams that he thought he would die" or any statement of that nature (R.10), but "he was obviously weak and laboring for his breath". He failed to answer one or two questions which were asked him (R.11). He was operated on about 8:30 P.M., on the night (Saturday) of the shooting. His case was dangerous at that time (R.33,37). His condition deteriorated the next morning and he was dangerously ill. He died at 8:30 on Sunday night, 10 January 1943 (R.35). Dr. Lichtenstein, who assisted in performing the operation on deceased was asked: "Did Jenkins at any time appear to believe he was dying?" His response was: "No, I can't say that from experience. Only I can say that many people who are in such a bad condition as Jenkins was are thinking of dying. Sometimes they express their thoughts and say it, but he never said something like that in my presence" (R.38). It must be candidly admitted that the evidence in respect to deceased's mental attitude towards his approaching demise is extremely sketchy but the fact that a person feared death must ordinarily be proved by circumstantial evidence. The circumstances in this case supported by Dr. Lichtenstein's statement warrant an inference that the deceased knew of his approaching death and realized it was inevitable when he made the statement to Lieut. Williams. (CM 228571 (1943) Bul. JAG., Jan. 1943, Vol.II, No.1, par.395, p.9).

(j) - By stipulation (Prosecution's Ex."H"; R.51) it was agreed that Robert ~~xx~~ Churchill, gunsmith and ballistic expert would testify, if in court, substantially in accordance with a written report attached to said stipulation and accepted by the court. By said report Mr. Churchill, testifying as an expert, declared that three certain bullets had been fired from a .45 Colt automatic pistol #515525 - being the pistol taken from accused at Paddington Station, London, by Police Sergeant James Watson (R.48). The witness further expressed the opinion that the bullets could have been fired from no other pistol. The bullet taken from deceased's body was handled by several persons. There was no positive identification of it, or of the other two bullets described in the ballistic report, and no proof that the bullets examined by Mr. Churchill were in fact the bullets which his report represents them to be (R.33,34,36,51,53,76; Prosecution's Ex."D"; Prosecution's Ex."H"). However, such imperfection in the evidence affects only the weight of Mr. Churchill's opinion, and does not have any bearing on its admissibility. Such expert evidence being admissible, it was for the Court to weigh and evaluate it in view of the lack of certainty in the identification of the bullets tested by the expert. (2 Wharton's Criminal Evidence (11th Ed.) sec.992, p.1737; 22 C.J., sec.823, p.731).

(k) - The Court requested and secured accused's service record prior to making its findings (R.100). This was irregular (M.C.M., par.79, pp.65,66). A copy of the service record is attached to the record of trial and it reveals accused was sentenced to restriction of one month at hard labor and forfeiture of \$13.00 for like period by a special court-martial on 27 May 1941 for loitering on post. The irregularity of securing the service record which included an "outlawed" prior conviction, cannot have prejudiced accused's rights in the face of the evidence of his guilt (AW 37).

(l) - The President of the Court usurped authority (AW 31) by ruling on a number of interlocutory questions (R.14,16,60,61,62,70,94). However, neither the accused nor any member of the Court objected to such practice or the President's rulings. On their merits the rulings were either correct or pertained to immaterial matters. Consequently no prejudice to rights of accused resulted from this irregular procedure.

(m) - The witness, Reed, testified that upon reaching deceased, as he lay upon the ground after being shot, that the witness asked deceased what was wrong with him. The deceased pointed to the accused (who was standing near the tree at the parking area) and said "that corporal shot me" (R.57). This declaration of deceased was clearly part of the res gestae and was properly admissible in evidence. (M.C.M., par.115b, p.118; CM 193895 (1930), Dig.Ops.JAG., 1912-1940, par.395(24), p,216).

6. The court properly overruled a motion of defense counsel (R.91) to change the charge against accused "from a violation of the 92nd Article of War to a violation of the 93rd Article of War" for reasons (if any) very vaguely outlined but suggesting the hope of inducing the court to reduce the charge to manslaughter. Such a change was properly left by the court to be considered when it deliberated on its findings. (CM: ETO 439, Nicholson).

Independent of such procedural detail the evidence of the prosecution at this stage of the trial clearly established the crime of murder and not manslaughter. There was no evidence that accused had acted under the influence of anger or heat of passion provoked by deceased. Contrawise there was substantial evidence that accused shot deceased wantonly and with malice aforethought. The denial of the motion was not only proper but the granting of same would have been gross error. (CM: ETO 72, Jacobs and Farley; CM: ETO 82, McKenzie).

7. "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." (Wintrop's Military Law & Precedents, p.672; 1928 M.C.M., par.148, p.162; Wharton's Cr. Law, par.419, p.625).

(394)

"**** A deliberate intent to kill must exist at the moment when the act of killing is perpetrated to render the homicide murder. Such intent may be inferred under the rule that everyone is presumed to intend the natural consequence of his act."(1 Wharton's Cr. Law, 12th Ed., sec.420, p.633).

"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 grievous bodily harm to, any person, whether such person is the person actually killed or not (except when the 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 grievous bodily harm is caused or not or by a wish that it may not be caused; ****." (1928 M.C.M., par.148a, p.163; 18 ALR 917).

Deceased was a sentry on duty. Accused, with his stolen gun, apparently impatient to try it out and without the aid or instigation of others, deliberately, in cold blood at a distance of only four to six feet, and without warning, shot deceased fatally in the back and then as deceased was falling, accused fired additional shots, "I can't remember the number", into the deceased's body. The homicide was wanton, deliberate, malicious and cruel. All of the elements constituting the crime of murder were established beyond any doubt. The findings of the court are not only supported by substantial evidence, but are also the only findings which could be honestly and consistently made from the evidence. (CM 221640, Loper; CM ETO 255, Cobb; CM ETO 268, Ricks; CM ETO 292, Mickles; CM ETO 422, Green). There are no mitigating or extenuating circumstances in connection with the killing.

The Theater Judge Advocate in his review of the record of trial pertinently and appropriately comments: "Under the circumstances of this case, a bullet fired into the back could not have been fired in self-defense. The accused, an escapee from confinement, having wrongfully possessed himself of a weapon which he greatly desired and being about to depart from the scene of such taking, found himself confronted by a representative of lawful authority. The accused was a trained soldier of almost two years experience. With a blast of gunfire he removed what must have seemed a possible obstacle to his continued freedom of action and possession of the weapon he coveted, warded off pursuit with further fire, and continued his flight. The killing was not in any degree, attributable to frailty of youth. It was an act of cold savagery."

CONFIDENTIAL

(395)

8. Accused pleaded guilty to Charge II and its Specification. Independent of such plea the evidence fully establishes his guilt thereof.

9. Accused is 20 years of age. He completed eight years in grammar school and three years in high school and has had approximately two years of army service. Attached to the record of trial is a clemency plea based upon the youth of accused only, signed by five of the seven members of the court who were present during the entire proceedings, and by the prosecution and defense counsel.

10. The court was legally constituted and had jurisdiction of the accused and the offenses charged. The sentence is legal. 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.

B Franklin Ritter

Judge Advocate

Richard Beardsley

Judge Advocate

Ellwood V. Longstreet

Judge Advocate

258-70
CONFIDENTIAL

CONFIDENTIAL

(396)

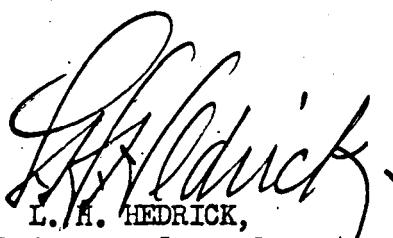
1st Ind.

WD, Branch Office TJAG., with ETOUSA. 11 JUN 1943
General, ETO, U. S. Army, APO 887.

1. In the case of Private HAROLD ADOLPHUS SMITH (14045090), Headquarters and Headquarters Company, First Tank Destroyer Group, attention is invited to the foregoing holding by the Board of Review, that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. The recommendation for clemency by members of the court is not easily understood. A death sentence requires a unanimous vote, hence each member must have voted for it in this case. But the death sentence was not mandatory; and the youth of accused, the ground for the recommendation, was known at the time. For members voluntarily to vote for a death sentence and then immediately to recommend that someone else commute it smacks of a lack of courage of their convictions. Such a recommendation must fail to impress.

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 438. For convenience of reference please place that number in brackets at the end of the order: (ETO 438).


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


Incl:

Holding of Board of Review.

(Sentence ordered executed. GCMO 9, ETO, 16 Jun 1943)

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CONFIDENTIAL

CONFIDENTIAL

(397)

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

Board of Review.

ETO 439.

18 MAY 1943

U N I T E D S T A T E S)	HEADQUARTERS, VIII BOMBER COMMAND.
v.)	Trial by G.C.M., convened at
Second Lieutenant THOMAS W.)	AAF Station 123, APO 634;
NICHOLSON (O-885402), A.C., 68th)	18 March 1943.
Bombardment Squadron, 44th)	Sentence: Dismissal.
Bombardment Group (H), AAF.)	

HOLDING of the BOARD OF REVIEW
RITER, VAN BENSHOTEN 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 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 Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

Specification 3: In that 2nd Lieut. Thomas W.

Nicholson, A.C., 68th Bombardment Squadron,
44th Bombardment Group (H) AAF, was, at Norwich,
England, on or about 19 February 1943, in a
public place to-wit, Sampson Hercules Dance
Hall, drunk and disorderly while in uniform.

He pleaded not guilty to the Charge and to the Specifications thereunder. He was found not guilty of Specifications 1 and 2, guilty of Specification 3, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, Commanding General, VIII Bomber Command, APO 634, approved the sentence and forwarded the record of trial for action

236450

439

CONFIDENTIAL

(398)

under Article of War 48. The confirming authority, Commanding General, European Theater of Operations, approved only so much of the finding of guilty of the Charge and Specification 3 thereunder as involves a finding of guilty of Specification 3 in violation of the 96th Article of War, confirmed the sentence and, pursuant to Article of War 50¹, withheld the order directing the execution thereof.

3. The evidence for the prosecution pertaining to the Specification of which accused was found guilty (Specification 3), shows that the Sampson Hercules Dance Hall, a small public dance hall, is situated in Norwich, England. "All sorts" of people were at the hall on the evening of 19 February 1943 (R.11). About 9:30 P.M., on that evening, Corporal Chester H. Koronkiewicz, a military policeman on duty at the hall, was asked by the bar tender to remove a sergeant who was drunk in the lobby. Accused approached Koronkiewicz and told him that he had no right to lock up the sergeant, that if Koronkiewicz did so, he would have to lock up accused as well (R.11,14,16,18). Sergeant William R. Richardson, also on duty as a military policeman, asked accused for his name and for that of his commanding officer. Accused replied "that his father was his Commanding Officer, and that he was a bastard". This reference by accused was not made in a joking manner (R.18-19). Accused then went toward the dance floor, seized a lady by the arm and asked her to dance with him. Accused asked her if she liked him. The woman replied in the negative and accused let her go (R.14,16). Accused then proceeded to the dance floor, "caused an unnecessary disturbance", and "broke up the dance several times" (R.14). Several people joined in a dance called the Conga. During the course of the dance, someone hit accused on the head and he fell down. He rose and rejoined the dance. The floor of the hall was very slippery. Accused's conduct was then "not too noticeable" (R.7-8, 18-19).

When the band stopped playing, Corporal Koronkiewicz noticed accused arguing with two noncommissioned officers about dancing with a girl. Koronkiewicz went out on the floor and was told by one of these noncommissioned officers that it was all right, that accused could dance with her. Koronkiewicz then told Lieutenant William F. Lucke, Assistant Provost Marshal, about accused. Pursuant to Lieutenant Lucke's instructions, Koronkiewicz went to accused who was at the bar, and told him that Lieutenant Lucke wished to see him. Accused replied: "Who the hell is he? Tell Lt. Lucke to go fuck himself and if he wants to talk to me he should come over here instead of my going to him". Accused then called Koronkiewicz a son of a bitch and a bastard, and said if he did not like it, Koronkiewicz could come outside with him. Several women were present but accused "seemed to disregard them". He said that "he did not give a fuck about the Military Police". Accused "kept pushing himself through the crowd and using profane language". Koronkiewicz "said O.K" in response to accused's request to go outside, in order that he might bring accused to the lobby to see Lieutenant Lucke. However, accused "dragged" him outside. Accused then took

236450

439

off his blouse, but Koronkiewicz refused to go into the alley with him (R.14-17, 20). When Koronkiewicz and accused were talking at the bar, "quite a few people heard the language, although the band was playing" (R.15).

When Lieutenant Lucke and Private Harold B. Hendricks, another member of the military police, joined accused and Koronkiewicz outside the hall, accused had removed his blouse. His fists were in a fighting position. He insisted that he desired to "have it out" in the alley with Koronkiewicz, and offered to fight the military police one at a time (R.15-16, 20-21). Accused addressed Lieutenant Lucke in a loud tone of voice. He said that "he knew we had some record of him", that he would return to town and would get twice as drunk as he was then, and would cause more disturbance. Accused further stated that he hoped action would be taken on his record, that such action would result in his being put out of the army, that it would be necessary to send him back to the States, and that he hoped to get out of the army regardless of his rank. Accused said that he would give himself a bad record in order that he would be returned to the United States (R.15, 20-21).

With reference to the alleged drunkenness of accused, Corporal Chester F. Schmidt, a military policeman, testified that on the evening in question, accused definitely had been drinking but was not intoxicated. He was wandering about alone, was somewhat dishevelled and his uniform was not neat. Accused did not stagger and seemed to have control of himself. Schmidt was not close enough to accused to know whether the latter was under the influence of liquor (R.7-9).

According to Private Frederick M. Robar, another member of the military police, accused was in his uniform and "looked all right" when he saw him. He had been drinking and was "feeling good", but Robar could not say that he was drunk (R.11-12).

In the opinion of Corporal Koronkiewicz and Private Hendricks, accused was drunk. As has been previously stated, the language addressed by accused to Koronkiewicz at the bar was, according to Koronkiewicz, heard by several persons although the band was then playing. Accused was acting in a normal and logical manner at the bar when first approached by Koronkiewicz (R.15-17).

Lieutenant Lucke testified that from his actions it appeared that accused had had quite a bit to drink. He wanted to pick a fight with the military police, and talked in a loud tone of voice. The lieutenant was not close enough to smell accused's breath (R.20).

4. For the defense, First Lieutenant John J. Finch testified that he saw accused on the dance floor. He did not see him dance the Conga, nor did he see any one "break up the Conga line" on the evening of February 19. Lieutenant Finch saw accused about 10:30 P.M. when

236450

438

CONFIDENTIAL

(400)

the dance ended, and later at a hotel. Accused wore his blouse and there was nothing unusual about his appearance. He did not consider that accused was drunk (R.26-28).

First Lieutenant Louis V. Girard had known accused "pretty well" since April 1941, and had trained with him in the Royal Canadian Air Force. Accused was a "very good man" and was one of the few who completed the course. He had a good personality, and had not been in any trouble about which the witness had any knowledge (R.28-29).

It was stipulated that the character of accused was excellent during the 19 months he served with the Royal Canadian Air Force (R.29).

Upon being advised of his rights, accused elected to make an unsworn statement. After two years of college he volunteered for the Air Corps at the age of 18, but could not join as he was too young. He went to Canada, joined the Royal Canadian Air Force, and for three months received training for aircraftsman 2nd class. He then spent six weeks at a school studying to be a pilot. After 12 weeks at an elementary flying school he was graduated in the AFTS ranking 15th in a class of 70. Upon completing his training he received his wings, and was promoted from aircraftsman to Sergeant-Pilot. Upon reaching England, he taught navigation for five months and then spent three or four months at another station. He received a promotion, transferred to the American Air Force and was sent to the VIII Bomber Command. He received tactical training at Bovingdon, and obtained his co-pilot rating after forty hours on a B-17. He obtained a grade of 99% out of a possible 100% and was "checked out" as a co-pilot on a B-17. He was then transferred to the 44th Bombardment Group where he expected to fly B-17's. The members of the 44th Bombardment Group were flying B-24's on operational missions, and accused had no experience with these machines. The only time he could go up was when he could get a ride. He "was confined". (R.29-30).

On 19 February 1943, accused went to town, had three or four drinks at a hotel, went to the Sampson Hercules Dance Hall, had another drink, and then went up to the dance floor. He saw a girl whom he knew, and touched but did not grab her arm as she passed. He asked her for a dance and his request was refused. "Then an MP came at me. I was mad". The military policeman said that another military policeman wished to see accused in the lobby. Accused, who did not consider that he had done anything out of the ordinary, became angry again and had a few words with the soldier. He went outside with the military police, and Lieutenant Lucke came out to join them. Accused then was angry and "wanted to do something about it". He told Lieutenant Lucke that he would return to the hotel to get his hat and coat.

Accused went to town for the following reasons: he came to the 44th Bombardment Group to be part of a combat crew. He considered

236450

433

himself a co-pilot on combat status. The 44th Group had B-24's and were conducting operational missions. Accused had to learn to fly a B-24. He could fly only when he could get a ride. He sat around the officers' club, took an occasional course in aircraft recognition, and did not do much. He was interested at first and asked as many questions as possible. "All this brought down my morale". He did not desire to sit around the club after having been trained to fly. Accused did not believe that he had done anything wrong (R.30-31).

5. The evidence is legally sufficient to establish that accused was, at the place and time alleged in Specification 3 of the Charge, drunk and disorderly in uniform in a public place, to wit, the Sampson Hercules Dance Hall, where both military personnel and civilians were present. The question arises as to whether the behavior alleged was of such an aggravated nature as to amount to conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. In Winthrop's Military Law and Precedents it is stated that the word "unbecoming" as used in Article of War 95 "*** is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety *** but morally unbefitting and unworthy". (Reprint p.711). The conduct contemplated by Article of War 95:

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

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

Two witnesses for the prosecution testified in substance that although accused had been drinking, they could not say that he was drunk. One of these witnesses observed that accused did not stagger, and that he appeared to have control of himself. Accused "looked all right" to the other witness although he was apparently "feeling good". A third witness testified that accused definitely had been drinking, that he talked in a loud tone of voice, and that he wanted to fight.

236450

Two other witnesses for the prosecution testified that accused was drunk. A witness for the defense was of the opinion that accused was not drunk. Accused himself informed Lieutenant Lucke and the military police that he would return to town and get twice as drunk as he was at that time.

The findings indicate that the court believed the evidence sufficient to establish that the accused was drunk as alleged. Considering all the circumstances of the case, the Board of Review is of the same opinion. The Board believes, however, that although the drunkenness of accused was undoubtedly discreditable, the proof falls short of demonstrating that it was in fact of such an aggravated degree as to justify a characterization of gross.

With respect to the alleged disorderly conduct of accused, there is no doubt that accused addressed highly reprehensible language to his military inferiors. Whether such language was heard by persons other than those directly involved is questionable. The bare statement of Corporal Koronkiewicz, that "quite a few people heard the language, although the band was playing" was unsupported by any other evidence which would establish how the witness knew such to be the fact. The statement appeared to be merely a conclusion by the witness. Although accused, when he left the hall, "kept pushing himself through the crowd and using profane language", there was no evidence that his conduct was observed or that his language was heard, by persons other than Koronkiewicz.

Accused fell on the floor while dancing the Conga with a group of people. The evidence shows that the fall was in all probability the result of the slippery condition of the floor, or of a blow on his head, which blow was apparently accidental. The conduct of accused was then "not too noticeable". Corporal Koronkiewicz testified that accused "caused an unnecessary disturbance" on the floor and "broke up the dance several times". There was no evidence as to the nature or seriousness of the disturbance, the manner in which accused broke up the dance, or the degree of his misconduct.

The use of the offensive language by accused toward his military inferiors was entirely unjustified in law or in fact. It was abusive, profane, highly reprehensible and undoubtedly prejudicial to good order and military discipline within the meaning of Article of War 96. The Board of Review is of the opinion that the utterances did not so far transgress military canons of fairness and decency as to demonstrate that accused is morally unfit to continue as an officer. It was not of such a character as to transcend the line of demarcation between conduct violative of Article of War 96 and the more reprehensible conduct considered to be violative of the 95th Article of War.

236450 - 6 -

Accordingly, considering all the circumstances of the case, the Board of Review is of the opinion that the evidence as to the alleged drunkenness and disorderly conduct of accused, is legally sufficient to support only so much of the finding of guilty of the Charge as involves a violation of Article of War 96.

6. At the close of the case for the prosecution, the defense moved "for a plea of not guilty on grounds insufficiency of proof of Guilty, and also to substitute AW.96 for AW.95". The court in closed session denied "the motion of the Defense to dismiss the Charge 95th Article of War, and so stated", and deferred its action on the motion to substitute the 96th Article of War for Article of War 95 (R.21). After closing arguments had been made by the prosecution and by the defense, the court denied the motion to substitute the 96th Article of War for Article of War 95 (R.31).

In view of the evidence which had been introduced by the prosecution, the court was clearly warranted in denying what was in fact a motion for a finding of not guilty. The court was, as a matter of procedure, after the closing arguments, entitled then to deny the motion to substitute Article of War 96, to sit in closed session at the termination of the evidence, to reach its findings in the usual manner, and, in effect, to allow such findings to reflect its denial of the motion.

7. Attached to the record of trial is a recommendation for clemency signed by the two individual counsel introduced by accused, and by the regularly appointed defense counsel. Because of the accused's "excellent record of prior service, conduct and training", they recommend that accused be not dismissed from the service. This recommendation was approved by all members of the court who were present during the trial.

8. The accused is 21 years of age. He was commissioned a second lieutenant, Air Corps, 13 October 1942, upon transfer from the Canadian Armed Forces to the Armed Forces of the United States. On 16 January 1943, he was assigned to the 44th Bombardment Group (H) AAF, from the 326th Bombardment Squadron.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. He was found not guilty of Specifications 1 and 2 of the Charge. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 3 and of the Charge as involves findings of guilty of this Specification in violation of Article of War 96, legally sufficient to support the sentence, and warrants the action

236450

- 7 - CONFIDENTIAL

433

~~CONFIDENTIAL~~

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taken by the confirming authority. Dismissal is authorized upon conviction of violation of Article of War 96.

B. Franklin Atty Judge Advocate

Edward W. Nichols Judge Advocate

Ellwood V. Ferguson Judge Advocate

R. J. D. 1

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- 8 -

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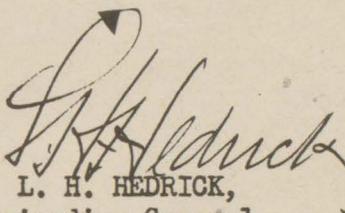
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1st Ind.

WD, Branch Office TJAG with ETOUSA. 18 MAY 1943 TO: Commanding General,
ETO, U.S. Army, APO 887.

1. In the case of Second Lieutenant THOMAS W. NICHOLSON (O-885402), Air Corps, 68th Bombardment Squadron, 44th Bombardment Group (H) AAF, attention is invited to the foregoing holding by the Board of Review, that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 3 and of the Charge as involves findings of guilty of this Specification in violation of Article of War 96, legally sufficient to support the sentence and to warrant the action taken by the confirming authority, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 439. For convenience of reference please place that number in brackets at the end of the order: (ETO 439).



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

Incl:

(Holding of Board of Review.

(Sentence ~~ordered~~²⁰ executed. GCMO 8, ETO, 28 May 1943)

REGRADED UNCLASSIFIED

BY AUTHORITY OF JAGC

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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JAGC, EXEC. ON 26 FEB 1952

