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REVIEW

OPINIONS

CM ETO 5420

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BY ~~REGINALD C. MILLER, COL.~~ ^{CARL E. WILLIAMSON, LT.}

JAGC, EXEC. ON ^{ASST} ^{MAY} 20 FEB 54

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JAGC, EXEC. ON ^{ASST} ^{MAY} 20 FEB 54

Judge Advocate General's Department

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JAGC, ASST EXEC ON 20 MAY 54

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 15 (ETO)

including

CM ETO 5420 - CM ETO 5774

(1944-1945)

Office of The Judge Advocate General

Washington : 1946

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JAGC, ASST EXEC ON 20 MAY 54

CONTENTS OF VOLUME 15 B.R.(ETO)

<u>ETO No.</u>	<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
5420	284137	Smith	6 Jan 1945	1
5429	294789	Cameron, Rawls	24 Mar 1945	3
5437	291211	Rosenberg	24 Feb 1945	9
5445	302705	Dann	14 Apr 1945	17
5446	288128	Hoffmann	14 Apr 1945	29
5451	291296	Twiggs	2 Jan 1945	35
5453	302680	Day	28 Dec 1944	49
5456	283425	Winfield	28 Dec 1944	55
5458	282160	Bennett	3 Feb 1945	61
5459	288464	Kuse	12 Jan 1945	73
5464	288164	Hendry	29 Dec 1944	85
5465	289188	McBride	16 Jan 1945	91
5466	302625	Strickland	23 Apr 1945	103
5475	291862	Wappes	30 Dec 1944	109
5510	304993	Lynch	12 Jan 1945	117
5511	300033	Carter	10 Jan 1945	121
5513	298931	Sexton	12 Jan 1945	125
5531	300749	Davis	26 Feb 1945	129
5539	301154	Hufendick	21 Apr 1945	137
5546	302149	Roscher, Stapleton	14 May 1945	145
5555	290498	Slovik	6 Jan 1945	151
5558	291192	Corsino, DeBellis	10 Mar 1945	163
5561	287773	Holden, Spencer	11 Jan 1945	169
5565	287399	Fendorak	16 Jan 1945	185
5568	283889	Robertson	17 Jan 1945	195
5569	283703	Keele	25 Jan 1945	201
5584	293448	Yancy	16 Jan 1945	207
5593	293751	Jarvis	1 Mar 1945	229
5595	300101	Carbonaro	10 May 1945	235
5596	300806	Reynolds	6 Jan 1945	243
5607	286128	Baskin	15 Jan 1945	247
5608	284235	Gehm	9 Jan 1945	259
5609	293750	Blizard	5 Jan 1945	267
5633	287505	Gibson	12 Jan 1945	273
5641	300539	Houston	3 Feb 1945	279

<u>ETO No.</u>	<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
5642	289915	Ostberg, Kain	16 Feb 1945	285
5643	291216	Harris, Wilhite	22 Feb 1945	291
5646	291226	Sorola	20 Jan 1945	297
5659	308086	Maze	27 Apr 1945	303
5666	280850	Bowles, Burrell	3 Feb 1945	307
5740	294656	Gowins	27 Jan 1945	315
5741	283707	Kennedy, Dunning, Mulcahy	5 Feb 1945	321
5745	285992	Allen	5 Mar 1945	331
5764	294556	Lilly, Agnew, Lockett, Washington, Burns, Crawford, Fleming, Lewton, Moultrie, Oree	5 May 1945	341
5765	288771	Mack	30 Jan 1945	355
5766	294784	Dominick	12 Jan 1945	375
5767	300386	Palmer	15 Jan 1945	379
5770	280848	Kieffer	16 Jan 1945	385
5774	291019	Schiavello	20 Jan 1945	393

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(1)

BOARD OF REVIEW NO. 2

6 JAN 1945

CM ETO 5420

UNITED STATES)

v.)

Private CARL SMITH)
(35786876), 554th Quarter-)
master Railhead Company)

FIRST UNITED STATES ARMY

Trial by GCM, convened at Soumagne,
Belgium, 2 November 1944. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard
labor for five years. Eastern
Branch, United States Disciplinary
Barracks, Greenhaven, New York.

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BY CARLE WILLIAMSON, LTC
JAGC, EXEC. ON 20 MAY

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

2. With respect to Specification 1, Charge II, alleging assault with intent to do bodily harm by shooting with a dangerous weapon, to wit, a carbine, in violation of Article of War 93, the reviewing authority approved only so much of the findings of guilty as involves a finding of guilty of assault by accused by shooting, at the time and place and at the person alleged, with a dangerous weapon, to wit, a carbine. Thus, in effect, the reviewing authority declares that accused is guilty of assault without intent to do bodily harm in violation of Article of War 93. This action should have declared the findings approved in violation of Article of War 96, since the conduct of shooting with a dangerous weapon without intent to do bodily harm is lesser than and included in the offense charged and constitutes a violation of Article of War 96 (Dig.Op.JAG, 1912-1940, sec.451(8), p.313, CM 195931, Willis). Consideration of the staff judge advocate's review makes it manifest that the failure of the reviewing authority to so hold was due to an inadvertance.

Van Benschoten Judge Advocate

Hill Judge Advocate

Sleeper Judge Advocate

5420

CONFIDENTIAL

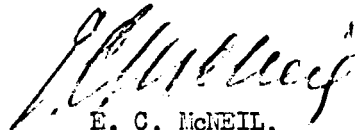
(2)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 6 JAN 1945 TO: Commanding
General, First United States Army, APO 230, U. S. Army.

1. In the case of Private CARL SMITH (35786876), 554th Quartermaster Railhead Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of all charges and specifications approved by the reviewing authority except Charge II as to which the record of trial is legally sufficient to support a finding of guilty of a violation of Article of War 96, and legally sufficient to support 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 CM ETO 5420. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5420).



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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

24 MAR 1945

CM ETO 5429

UNITED STATES)

2ND ARMORED DIVISION

v.)

Trial by GCM, convened at Headquarters 2nd Armored Division, 15 November 1944. Sentence as

Privates ELVIN CAMERON
(14026461) and CHARLES P.
RAWLS (14031715), both of
Reconnaissance Company,
66th Armored Regiment

to each accused: Dishonorable
discharge, total forfeitures
and confinement at hard labor
for life. United States Peni-
tentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, STEVENS and JULIAN, Judge Advocates

1. The record of trial in the case of the soldiers 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 were charged separately and, by direction of the appointing authority and with their consent, were tried together upon the following charges and specifications:

CAMERON

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Elvin Cameron, Reconnaissance Company, 66th Armored Regiment, did, at or near Beggendorf, Germany, on or about 13 October 1944, run away from his Company, which was then engaged with the enemy, and did not return thereto until on or about 18 October 1944.

(4)

RAWLS

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Charles P. Rawls, Reconnaissance Company, 66th Armored Regiment, did, at or near Beggendorf, Germany, on or about 13 October 1944, run away from his Company, which was then engaged with the enemy, and did not return thereto until on or about 17 October 1944.

Each accused pleaded not guilty and, all members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions of accused Cameron was introduced. Evidence was introduced of one previous conviction of accused Rawls by summary court for absence without leave for eight days in violation of the 61st Article of War. All members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry.

The reviewing authority, the Commanding General, 2nd Armored Division, as to each accused, approved the sentence and forwarded the record of trial pursuant to Article of War 48 with the recommendation that, if the sentence be confirmed, it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life. The confirming authority, the Commanding General, European Theater of Operations, as to each accused, approved only so much of the sentence as provided that accused be shot to death with musketry, but, owing to special circumstances and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$. The action of the confirming authority in commuting the sentences was taken under the provisions of Article of War 50.

3. The evidence for the prosecution was, in pertinent summary, as follows:

On 12 October 1944 the first platoon, Reconnaissance Company, 66th Armored Regiment, to which accused were assigned, was engaged northeast of Beggendorf, Germany, in the mission of holding a defensive line about 1000-1500 yards from the enemy (R5,6,8). On

that date accused Cameron was assigned to outpost duty at Outpost 3A of the platoon (R5-6,9-10), and performed guard duty there that night (R10); and on the following morning (13 October) accused Rawls was assigned to similar duty at the same outpost (R6-7,10), where both he and Cameron were scheduled to perform guard duty the night of the 13th (R10,13). Both accused were newly assigned to the company (R12). Apparently neither had ever performed outpost duty before (R13, 22-23), and neither was given specific orders or instructions with regard to such duty (R11-12,18,19,23). The members of the outpost acted "more or less as a team" (R12).

There were no friendly troops between Outpost 3A and the enemy (R8), whose shells were falling in its vicinity on 12 and 13 October (R9,15). The outpost was manned by between six and eight men (R9), who normally remained on outpost duty until relieved by higher headquarters (R7) and who performed actual guard duty in pairs and in two-hour shifts. Their duty while on guard was to listen for the approach of the enemy, fire upon him if necessary, and give warning in case of attack. The outpost consisted of a dug-out air raid shelter with its entrance facing the enemy. The guards' position was at this entrance, behind a machine gun. They were also protected by personal weapons and hand grenades (R9).

On the afternoon of 13 October each accused was present at the outpost. Conversation was overheard between them concerning "some girls they knew in Brunssum", Holland (R15), and Cameron was heard to tell Rawls "to go down and get seven packs of cigarettes" (R17). Thereafter the two accused "got the cigarettes and took off" towards the rear (R18). Their absence was noted about 2000 hours and reported to their platoon sergeant (R15-16). Because of their absence, which was without permission (R10,11,12,13) and continued for several days (R20-22), it was necessary to assign other men to perform their guard duty (R10,11). The platoon performed outpost duty for about two weeks after 13 October (R10).

Rawls surrendered himself to the first sergeant of his company on 17 October at the Service Company of the regiment, about 12-13 miles from the Reconnaissance Company area (R20-21). On 18 October the platoon sergeant discovered Cameron walking towards the platoon command post (R22).

4. After an explanation of their rights, each accused elected to remain silent (R23). No evidence was introduced for the defense.

(6)

5. The record is clear that at the time and place alleged each accused ran away from his company, then engaged with the enemy, that is, before the enemy (CM ETO 5475, Wappes, and authorities therein cited), and did not return thereto until the respectively alleged dates. Both elements of the offense in violation of Article of War 75 were fully established as to each accused (Ibid.; CM ETO 4967, Junior G. Jones; CM ETO 4820, Skovan; CM ETO 3948, Faulercio; CM ETO 5255, Duncan).

6. The charge sheets show the following: Cameron is 25 years of age and enlisted 15 October 1940 at Montgomery, Alabama. Rawls is 24 years of age and enlisted 28 December 1940 at Jackson, Mississippi. The service period of each is governed by the Service Extension Act of 1941. No prior service of accused Cameron is shown. Accused Rawls had no prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence as confirmed and commuted.

8. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). Confinement in a penitentiary is authorized when a sentence is imposed by way of commutation of a death sentence irrespective of the offense (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

[Signature] Judge Advocate

[Signature] Judge Advocate

[Signature] Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 24 MAR 1945 TO: Commanding
General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates ELVIN CAMERON (14026461) and CHARLES P. RAWLS (14031715), both of Reconnaissance Company, 66th Armored Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, you now have authority to order execution of the sentences.

2. Confinement in a penitentiary is authorized on commutation of a sentence of death whatever the offense of which the prisoner was convicted. However, a question of policy arises whether prisoners convicted of purely military offenses should be confined in a penitentiary.

By 1st Ind. 26 January 1945, in reply to a letter from me stating that there was no uniformity with reference to the place of confinement designated for soldiers convicted of desertion, and asking whether the War Department took any action to divert prisoners from the penitentiary to a military institution on arrival in the United States, The Judge Advocate General stated:

"1. * * * it has for some time been contrary to War Department policy to confine in a penitentiary, Federal reformatory, or other non-military correctional institution military prisoners convicted solely of war-time desertion unaccompanied by violence or other aggravating circumstances. This policy is still in effect (CM 256254), and is being implemented by the Military Justice Division and the Boards of Review in this office as to convictions imposed in the United States.

2. At the present time, this policy is not being implemented in this country with respect to sentences imposed overseas. The Correction Division, Adjutant General's Office, has advised this office that no change is now being made in the designated place of confinement of general prisoners who are convicted overseas of wartime desertion and are returned to this country to serve sentences in a pen-

(8)

itentiary, Federal reformatory, or other nonmilitary correctional institution. However, for your information, it is anticipated that paragraph 16, AR 600-375, 17 May 1943, will be amended to authorize either the officer exercising general court-martial jurisdiction over the port at which the prisoner debarks or the Commanding General of the Service Command to whose custody the prisoner is delivered to change the designated place of confinement where special circumstances warrant such a change. If and when such authority is conferred, this office will make every effort to have it used to remedy the situation you describe".

If any change is made in the designated place of confinement, it may be accomplished in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5429. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5429).



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

(Sentences as commuted ordered executed. GCMO 104, 102, ETO,
5 Apr 1945)

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(9)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

24 FEB 1945

CM ETO 5437

UNITED STATES

v.

Private JACOB ROSENBERG
(32343619), Company A,
121st Infantry

) 8TH INFANTRY DIVISION

) Trial by GCM, convened at APO 8,
) U. S. Army (France), 10 December
) 1944. Sentence: Dishonorable
) discharge, total forfeitures and
) confinement at hard labor for
) life. United States Penitentiary,
) Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Jacob (NMI)
Rosenberg, Company "A" One Hundred Twenty
First Infantry, did, in the vicinity of
Pleurduit, France, on or about 9 August
1944, desert the service of the United
States, by quitting his organization with
intent to avoid hazardous duty to wit:
engage in combat with the enemy, and did
remain absent in desertion until he was
apprehended on or about 11 September 1944.

He pleaded not guilty and, three-fourths of the members of the
court present at the time the vote was taken concurring, was

5437

CONFIDENTIAL

(10)

found guilty of the Specification except the word "apprehended", substituting therefor the words "returned to military control", of the excepted word not guilty, of the substituted words guilty, and of the Charge guilty. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. On or about 7 August 1944 Company A, 121st Infantry, came to the vicinity of Pleurtuit, France (R6,25). Its main objective was to capture the nearby city of Dinard (R19). On the morning of 8 August, the company commenced its attack (R7) and at about 1100 hours came under hostile fire when about 900 yards from the enemy (R10,11). The unit continued to receive hazardous fire for four days (R10). In the afternoon the unit "broke contact" with the enemy when two tanks entered the field and were fired on by antitank guns; the unit suffered casualties and withdrew behind a hedgerow while tanks cleared the field (R7). Accused's platoon leader testified that

"the situation was tactical and anyone that put his head up over the surface of the ground had a good chance of having it blown off both with direct fire, from 88s or small arms and machine gun fire" (R8).

Accused, who was present as a member of the weapons platoon of the company during the attack, did not manifest unusual fear or a desire to run away and gave indications that he knew what was happening (R6,10-11).

On the evening of 8 August accused assumed the duties of radio operator in the weapons platoon (R6,9). Such duties required him to stay with the platoon leader (R9). It was standard operating procedure in the company that the weapons platoon would carry extra ammunition and rations and that when the company commander directed the platoon leader to obtain rations, the latter would send a detail to the rear to pick them up from a jeep which obtained them from field trains and hauled

the rations "as far forward as it could get" (R8,11). Of the platoon of 31 men (R10), every available private, including the radioman, - "approximately a whole platoon" would be a member of this detail (R12,13), which was occasionally accompanied and supervised by one or two noncommissioned officers (R13-14).

About 0200 hours 9 August, the leader of the weapons platoon directed accused to arrange through a non-commissioned officer for a detail or "carrying party" for rations in accordance with the usual procedure (R8,13). He gave accused authority to be absent from the remainder of the company "until the rations were brought up", normally a period of about one or two hours (R8,9,11). Enemy fire at this time was "spasmodic", and although it was not received at the precise time when the platoon leader ordered accused as above mentioned, it was received both before and after that time (R11-12). The platoon leader testified that the last time he was aware of accused's presence was when the latter left as ordered, but witness did not see him again, nor was he with the platoon, until about 17 November at Befort, Luxembourg (R9,11,12). If someone with authority authorized accused "to go back farther to the rear", witness would not necessarily know about it but such authorization was not given, according to his knowledge. The detail returned about 0400 hours without accused (R9,12,13).

About 10 or 11 August accused spent the night at the company kitchen, near the field trains six or seven miles to the rear of Dinard. When the mess sergeant inquired "if he was going to stay back there", accused replied "he was going to hitch a ride up front to the company that day" and left (R14-15,16,17). Frequently men returned from the hospital and remained at the kitchen awaiting the call of the service company (to return them to their organizations). On a prior occasion accused came from the hospital to the kitchen en route to the company (R15,16). The mess sergeant did not see accused again, however, until he was in Befort, Luxembourg (R17). Extract copies of the morning reports of Company A for 24 September showed accused absent without leave from 9 August to 11 September 1944 (R20-21,23; Exs.A,B). (The charge sheet shows accused confined 11 September 1944 in stockade, St. James.)

4. After an explanation of his rights, accused elected to remain silent (R24). No evidence was introduced by the defense.

5. The evidence is clear and undisputed that at the time on 9 August when accused was sent with the detail to the rear for rations, after which he went to the company kitchen

CONFIDENTIAL

(12)

without authority, left and remained away until 11 September, his company was engaged in an attack on the city of Dinard, France, and was sustaining intermittent enemy fire, of which facts accused was well aware. It cannot be doubted that when he later absented himself without leave, by exceeding the limited authority of going to the ration point with his platoon, securing rations and immediately returning, he intended to avoid the hazardous duty of engaging in combat with the enemy. The only question for determination is whether the record contains substantial evidence that when he so absented himself without leave he quit his organization. The record does not indicate at what time or place after the detail left the company on the ration mission, accused left it. But the record shows

- (1) that the detail normally consisted of all available privates in the platoon and also, inferentially, that noncommissioned personnel accompanied the men;
- (2) that at some time either before or after reaching the rations point or at that point, accused without authority left the group and arrived a day or two later at the company kitchen, where he spent the night; and
- (3) that he left the kitchen and remained absent without leave until 11 September.

For accused, when his unauthorized absence began, his organization was the detail with which he was required to remain and which he was required to assist at all times and places while it was away from the company and engaged in its mission of securing rations therefor. It was in reality a detachment or portion of the company. In CM ETO 4165, Fecica, a specification alleging that accused quit his organization with intent identical with that here alleged was held to be sustained, on the assumption he had gone to "the aid station" 2500 yards to five miles to the rear of his company with proper authority, by proof he left the aid station without authority and proceeded further to the rear. In the instant case it does not appear precisely how far to the rear of the company the ration point was located but in the opinion of the Board of Review the answer to such question is immaterial as the organization which accused left was the ration detail which was virtually his platoon, as above indicated. In CM ETO 7189, Hendershot, proof that accused similarly left a ration detail at the ration point was held sufficient under a specification similar to that herein.

Defense counsel argued:

"The accused did not quit his post of hazardous duty. He was ordered from it. Since he was ordered from it the intention to avoid hazardous duty is not a reasonable presumption" (R26).

Such argument would be persuasive if the only absence shown by the evidence were the initially authorized absence of accused in company with other members of his detail, as the intent to avoid hazardous duty must concur in point of time with the quitting of accused's organization, i.e., absenting himself therefrom without leave (CM ETO 5958, Perry and Allen). As indicated, however, the record shows a subsequent absence from the detail which began without leave at some point during the execution of the detail's mission. By so absenting himself he quit his organization. The detail returned to the company in about two hours. His concurrent intent to avoid the hazardous duty of combat cannot be disputed. All the necessary elements of the offense charged were established (CM ETO 4165, Fecica; CM ETO 4701, Minnetto; CM ETO 5341, Hicks; CM ETO 5396, Nursement; CM ETO 7189, Hendershot). It is noted that if the Specification had used the words "place of duty" instead of, or in addition to, the word "organization", as authorized by Article of War 28 and as indicated in Form 14, Forms for Specification, (MCM, 1928, App.9, p.240), the problem considered herein would not have arisen.

6. The extract copies of the morning report of Company A, referred to above (end of par.3), each contain a certificate signed by the personnel officer, 121st Infantry Regiment, stating that the "foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said company" relating to accused. The copy, however, does not show any signature or initials and it thus does not appear that the original was authenticated by the proper officer, as required by par.42a, AR 345-400, 1 May 1944. It was pointed out in CM ETO 4756, Carmisciano, that the presumption that the personnel officer would have included such signature or initials if they appeared on the original and the presumption that the original was properly authenticated lead to contradictory factual conclusions and hence are of no assistance in determining the facts. But in the instant case the first mentioned presumption is negatived by the testimony of the personnel officer himself identifying each of Exhibits A and B as "an extract copy of the morning report for Company A, 121st Infantry" (R20). The unequivocal and unqualified testimony by the official custodian of the morning report that

5437

certain documents are extract copies thereof carries with it the clear implication of authenticity of the original morning report and aids the presumption in its favor, at the same time rebutting the contrary presumption arising from the qualifying words concerning signatures and initials in the personnel officer's certificates on the extract copies. The defense stated there was no objection to the exhibits and as no evidence was introduced to rebut the presumption of proper authentication of the original, the copies were properly received in evidence (CM ETO 5234, Stubinski).

7. The charge sheet shows that accused is 30 years of age and was inducted 26 May 1942 at Fort Jay, New York. He had no prior service.

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

9. The penalty for desertion in time of war is death or such other punishment the court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Malcolm

Judge Advocate

Edward L. Stevens, Jr.

Judge Advocate

CONFIDENTIAL

(15)

1st Ind.

War Department, Branch Office of The Judge Advocate General, with
the European Theater of Operations. 24 FEB 1945 TO: Com-
manding General, 8th Infantry Division, APO 8, U. S. Army.

1. In the case of Private JACOB ROSENBERG (32343619),
Company A, 121st Infantry, attention is invited to the foregoing
holding by the Board of Review that the record of trial is legally
sufficient to support the findings of guilty and the sentence,
which holding is hereby approved. Under the provisions of Arti-
cle of War 50 $\frac{1}{2}$, you now have authority to order execution of the
sentence.

2. When copies of the published order are forwarded to
this office, they should be accompanied by the foregoing holding
and this indorsement. The file number of the record in this of-
fice is CM ETO 5437. For convenience of reference, please place
that number in brackets at the end of the order: (CM ETO 5437).



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

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

14 APR 1945

CM ETO 5445

UNITED STATES)

v.)

Private EDWARD L. DANN
(35320087), Company I
501st Parachute Infantry

101st AIRBORNE DIVISION

) Trial by GCM, convened at Nijmegen,
) Holland, 9 November 1944. Sentence:
) Dishonorable discharge (suspended),
) total forfeitures and confinement
) at hard labor for three years and
) six months. Seine Disciplinary
) Training Center, Mortimer, Paris, France.

OPINION by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

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

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

CHARGE I: Violation of the 75th Article of War.

Specification: In that Private Edward L. Dann, Company "I", 3rd Battalion, 501st Parachute Infantry, did, while before the enemy, quit his post at Heteren, Holland, on or about 11 October, 1944, for the purpose of plundering and pillaging.

CHARGE II: Violation of the 89th Article of War.

Specification: In that * * * did, at Heteren, Holland, on or about 11 October 1944, willfully and unlawfully, and without having been ordered by his commanding officer so to do, destroy a safe, the property of Johannes B. Huls, A 60, Heteren, Holland, of the value of about fifty-six dollars, (\$56.00).

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

Specification: In that * * * did, at Heteren, Holland, on or about 11 October 1944, feloniously take, steal, and carry away thirty-four (34) ADEK Bicycle Factory Bonds bearing numbers 034, 022, 077, 021, 018, 074, 073, 072, 071, 050, 049, 028, 039, 040, 041, 080, 015, 016, 017, 024, 036, 037, 075, 042, 030, 043, 044, 045, 046, 019, 026, 023, 025, 014, issued 5 November 1918, value of about fifty-six dollars and sixty-two cents (R56.62) each, and having a total value of about nineteen hundred and twenty-five dollars, (\$1925.00), property of Johannes B. Huls, Heteren, Holland.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of Charges I and III and the specifications thereunder, guilty of the Specification of Charge II except the word "destroy", substituting therefor the words "open by force thereby damaging", of the excepted word not guilty, of the substituted words guilty and guilty of Charge II. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years at such place as the reviewing authority may direct. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge III as involved the finding of guilty of larceny of the bonds described therein of a substantial value not in excess of \$20.00, approved only so much of the sentence as provided for dishonorable discharge, forfeitures of all pay and allowances due or to become due, and confinement at hard labor for three years and six months, ordered the sentence executed as thus modified, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Seine Disciplinary Training Center, Mortimer, Paris, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Number 31, Headquarters 101st Airborne Division, Camp Mourmelon, Paris, France, 30 November 1944.

3. Evidence for the prosecution was, in pertinent summary, as

follows:

On 11 October 1944, accused was a member of the 3rd platoon, Company I, 3rd Battalion, 501st Parachute Infantry. Company I was in battalion reserve, about 500 yards from the line, held by two other companies of the battalion, and from several hundred to 1000 yards southwest of Heteren, Holland. Company I was on call in the event it was needed at the front line. It would have required about 30 minutes, after the receipt of orders, to move forward, and it was expected to be able to reach either flank within one hour (R7,22,23). The leader of accused's platoon testified that because of the alert situation "We kept all of our men close in" and that he at no time ordered any member of the platoon to go out to pillage and plunder. Certain members of the company were given permission to leave the area at certain times and it was common practice for men to go out to houses to obtain food. It was common knowledge that men also went into houses to pick up souvenirs (R20,22-23). Accused's company commander testified that he did not give permission to any man in his company to leave the company area to plunder or pillage (R7). (Upon being recalled by the court, this witness testified that on or about 11 October 1945 he gave permission to bazooka teams to leave the company sector in order to fire their weapons. Members of the company had been warned not to leave the area

"due to the tactical situation, not because of looting. * * * Permission to leave the company area was under the supervision of the platoon leaders. A few men under supervised control were able to leave".

Witness left the matter to the platoon leaders (R52-53)). On the morning in question at a battalion staff meeting the subject of looting and keeping men in their areas was raised (R48).

About noon on 11 October accused and another soldier were in a small bombed-out saloon or cafe in Heteren (R8-9,23,39). With an axe they pried the top off a heavy iron safe, which they found therein and which was in good condition previously. They removed therefrom ledgers, books, papers, bonds and a jewelry box containing a necklace (R9,12-16,18-19,25,27,37). In the house were some jars of cherries and a barrel of wine (R20). (A sergeant of accused's battalion testified, as a witness for the court, that he told the two men they were going to get into trouble trying to open a safe whereupon they said "if an officer came around they'd take off" (R51)). One of the soldiers took the box with him (R9).

Second Lieutenant Joseph E. Delaney, of accused's battalion, testified that at about 1330 hours on the day in question he discovered accused, with another soldier, preparing to leave the vicinity above mentioned, and took from him 34 ADEX (bicycle) factory bonds (Pros. Ex.A), face value 250 guilders, maturity value 500 guilders, payable

to bearer. Accused stated to the officer that he picked them up in the yard for souvenirs (R34,35-36,48). Lieutenant Delaney asked him what he was doing there and accused replied he had come to Heteren for food (R48). He told accused looting had come to a serious point and that he might get himself into considerable trouble and should remain in the company area. "Getting food was permissible, but he was overstepping the bounds by taking personal property" (R36). Because of the battalion staff discussion that morning with respect to looting, the officer wished accused to return to his area (R48). Neither accused nor his companion had a bazooka or ammunition therefore (R48-49). The companion had jars of fruit in his pockets (R49). The safe was no longer in a serviceable condition (R36).

Evidence was introduced to show ownership of the bonds and safe in Johannes B. Huls of Heteren, owner of the cafe where accused helped open the safe (R27-30). He also testified as follows as to their value: The safe was about one and one-half yards high and its condition was "perfectly all right". He paid 375 guilders for it 25 or 26 years before the trial. At the beginning of the war in 1940 he sold an inferior safe for 750 guilders (R27). Before D Day the value of each bond was 150 guilders (R31).

4. 2. For the defense, Private First Class Charles Galvin, of accused's company, testified that on the morning of 13 October 1944, he and accused went out and fired bazookas, that in a building he saw a safe (R41) and that there was nothing unusual about it (R42). The building appeared to have been hit by a mortar (R43).

b. Accused elected to take the stand in his own behalf and testified that he went "down there in the morning" to fire the bazooka. They knew fruit and beer were there so they returned to their organization and accused received permission from his squad leader to "go down there". He went there, saw papers and picked them up. A Private Smith was in the front of the house getting fruit and beer and accused also entered the house (R43). He was going to keep some of the papers for a souvenir. At this point Lieutenant Delaney saw him. He did not know whether this occurred on the 11th or 13th of October. His squad leader did not give him permission to enter the cafe and "blow a safe", to remove things from a safe or to pick up papers from the floor. Asked upon cross-examination if he was given permission to pillage or plunder, he replied "I don't know whether you call it plunder or not, but I was given permission to get fruit and beer" (R44). He did not have permission to get anything else. He denied opening or assisting in opening, a safe in Heteren. He denied seeing a safe or Private Gerhard O. Hoffmann there (R45). Galvin was not with him when he picked up the bonds off the ground. Accused substantially confirmed Lieutenant Delaney's version of the conversation with him and also identified the bonds (R47; Pros.Ex.A).

c. A motion by the defense, after all the evidence was in, for a finding of not guilty of the Specification of Charge I was overruled by the court (R54).

5. The record shows (R2) that the trial in this capital case commenced at 1030 hours on the same day on which the charges were served on accused. This fact necessitates careful consideration and determination of whether he was deprived of his right to a reasonable opportunity to prepare for trial or to the effective assistance of counsel and thereby deprived of due process of law under the Fifth Amendment to the Federal Constitution (CM ETO 4564, Woods, Jr., and authorities therein cited). The right to a reasonable opportunity to prepare for trial may be waived by accused either expressly or impliedly, and it has been held that where, as here, accused did not object to going to trial and made no motion for a continuance, and there was no indication that his substantial rights were prejudiced, he waived his right to a longer period of preparation. The constitutional right to the effective assistance of counsel is a personal right which may also be waived by accused (ibid). Had the court believed in toto his testimony, which consisted of clear denials and confession and avoidance, it might well have acquitted him of all charges and specifications. Accused was represented ably and energetically by defense counsel. The latter's argument upon his motion for a finding of not guilty of the Specification of Charge I (R54) demonstrates clear comprehension and accurate analysis of the allegations of that specification. In the opinion of the Board of Review, accused enjoyed the effective assistance of counsel and adequate time to prepare his defense and, by failing to object to trial or to move for a continuance, effectively waived any right he may have had to a longer period of preparation for trial (Cf: CM ETO 3475, Blackwell et al).

6. a. Specification, Charge I: It is alleged that accused "did, while before the enemy, quit his post at Heteren, Holland, * * * for the purpose of plundering and pillaging". Article of War 75 provides in pertinent part:

"Any * * * soldier, who, before the enemy,
* * * quits his post * * * to plunder or
pillage, * * * shall suffer death or such
other punishment as a court-martial may
direct".

The Specification states an offense in violation of Article of War 75 (CM ETO 3091, Murphy et al). Winthrop comments thus upon the offense:

" This offence, which, if permitted to be indulged in by troops, would convert legitimate warfare into mere marauding, and a disciplined military force into a band of stragglers and freebooters, is one of those which are regarded as the most immediately fatal to the discipline and morale of soldiers, and as calling in all cases for severe punishment. It has been stigmatized as a grave military crime in all the codes of Articles from a very early period.
* * * Repeatedly is the distinction pointed out

between the authorized taking of, or making requisition for, supplies or levying of contributions for the public use, in accordance with law or the custom of war, and the unauthorized and illicit appropriation of private property by officers, soldiers, or camp-followers.

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The term 'post' is evidently used here in the most general sense, but as referring to a point for the time fixed. * * * To constitute the offence there must exist the animus indicated in the Article - 'to,' i.e. in order to, 'plunder and pillage: this animus was expressed still more clearly in the early form by the words - 'to go in search of plunder.' It must be shown that the officer or soldier left the command with a view to the forcible seizing and appropriating of public or private property; and whether private property sought to be taken belonged to persons hostile or friendly can in no manner affect the legal character of the offence. The intent being complete, it is not essential that the property should actually be taken: that it is taken, however, will of course be the strongest evidence that the offender left his station for the purpose of taking it.

The offence is no less committed, though the quitting of the post, &c., is by a quasi authority" (Winthrop's Military Law & Precedents (Reprint, 1920) pp. 626-627) (Underscoring supplied).

"The word 'post' includes any place of duty, whether permanently or temporarily fixed. * * * the words 'quits his post,' as here used, import any unauthorized leaving of that place where the accused should be.

In proving this crime an intent to pillage or plunder must be shown. The words 'to pillage or plunder' must be properly paraphrased 'to seize and appropriate public or private property.'

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PROOF

- (a) That the accused left his post of duty.
- (b) That the intention of the accused in leaving was to seize and appropriate private or public property" (MCM, 1921, par. 425, VII, pp. 380-381) (Underscoring supplied).

The Code of Gustavus Adolphus (1621) prohibited unauthorized pillage (Winthrop's Military Law and Precedents, supra, Appendix III, pars. 92-94, p.912) and the British Articles of James II (1688) prohibited pillage and plunder prior to complete defeat of the enemy (Ibid., Appendix V, Art. XXIV, p.923). The British Articles of 1765, in effect in American prior to the American Revolution, rendered liable to the death penalty any officer or soldier "who, after Victory, shall quit his Commanding Officer, or Post, to plunder and pillage" (Ibid., Appendix VII, sec.XIII, Art. XIII, p.940). A modification of this British provision, apparently influenced by the older codes was adopted by the Provisional Congress of Massachusetts Bay, April 5, 1775, in the Massachusetts Articles of War, which condemned leaving post or colors "in time of an engagement, to go in search of plunder" (Ibid., Appendix VIII, Art.29th, p.950), and the first American Articles of War, enacted June 30, 1775, used identical language (Ibid., Appendix IX, Art.XXI, p.955). Section XIII, Article 13 of the American Articles, enacted September 20, 1776, reverted to the phraseology of Article XIII of the British Articles of 1765 (supra) (Ibid., Appendix X, p.966). In Article 52 of the American Articles of 1806 the provision appeared in its present form (Ibid., Appendix XII, p.981), in which it has since continued (See discussion of historical development of present Article of War 75 in CM ETO 1226, Muir).

The following authoritative description of the offense under consideration is pertinent:

"Pillaging and plundering.-- The act here made criminal involves, and is in substance an aggravated form of, the offense of 'quitting a guard, platoon, or division' described and made punishable by the 40th Article of War. It includes a willful abandonment of his post on the part of an officer or enlisted man with the intention of committing acts of pillage and plunder. 'The mischiefs produced or likely to be produced by this offense are many and obvious; among which may be numbered the diversion of the soldiery from the first and grand object, the pursuit and destruction of the enemy, for a trifling and pitiful gain; the dispersion often of the strength of an army to such wide and distant points as to render it impracticable for it to be collected again on a sudden emergency or need; and the easy extermination of the forces in this divided and isolated state. * * * The anticipation of any one of the results enumerated is sufficient to have induced the rulers or generals of ancient as well as modern armies to punish so dangerous an offense with the highest possible punishment" (Davis, A Treatise on the Military Law of the United States (3rd Ed. Revised, 1913), p.416).

(24)

The history of the statute, which may be considered along with its language in construing and interpreting it (CM ETO 1226, Muir, and authorities therein cited), as well as its language, are thoroughly consistent with the conclusion of the author. It is evident from the foregoing authorities that the word "quit" as used in Article of War 75 means "absent himself without authority". It has the same meaning in Article of War 28 (MCM, 1928, par.130a, p.142-143; Cf: CM ETO 5958, Perry and Allen). The above quoted authority shows that the offense involves an actual abandonment of his post by the offender with the specified intention.

The evidence herein shows that on the day in question, accused's company was in battalion reserve some 500 yards from the front line, which consisted of a dyke held by two other companies of the battalion. The company was located several hundred yards from Heteren, Holland, and was subject to orders to move to the front upon an hour's notice. It is elementary and beyond dispute that under these circumstances accused and his company were before the enemy (MCM, 1928, par.141, p.156; CM 126528 (1919), CM 128019 (1919), Dig.Op. JAG, 1912-1940, sec.433 (2), p.304; CM ETO 1404, Stack, and authorities therein cited). The only question for determination is whether there is in the record competent and substantial evidence that accused "quit his post" and if so whether he did so with the specific intent, entertained at the time of quitting (Cf: CM ETO 5958, Perry and Allen), to plunder and pillage, i.e., to seize and appropriate without authority public or private property.

The breaking open of the safe and removing of the bonds and other contents thereof by accused were fully proved here, and from this the court might infer his intent to plunder and pillage, but the burden was also on the prosecution to prove that accused without authority left the place where he should have been, permanently or temporarily (MCM, 1921, par.425, VII, pp.380,381). This element may be inferred from circumstantial evidence (CM ETO 527, Astrella). The evidence is clear that accused was neither ordered, nor granted permission, to leave his post or place of duty in order to plunder and pillage. It is equally clear, however, that members of the company were given permission to leave the company area at certain times and it was common practice for men to go out to houses in the town to obtain food and common knowledge that men went into houses to obtain souvenirs. Although permission to leave the company area was under the supervision of the platoon leaders, the leader of accused's platoon, when on the witness stand did not testify whether or not accused had permission to leave the company area. When Lieutenant Delaney discovered accused he specifically informed him that "getting food was permissible, but he was overstepping the bounds by taking personal property". He wished accused to return to his company area not because his absence was without leave but because he found him engaged in looting. Other members of his company were in the vicinity. Accused's testimony that his squad leader gave him permission to "go down there" stands uncontroverted. The circumstances above recapitulated are as consistent

(25)

with authorized absence as with the contrary. They are thus insufficient to support the inference of unauthorized absence and thus of guilt (CM ETO 4581, Ross, CM ETO 6232, Lynch and Bielaski; CM ETO 6397, Butler; and authorities therein cited). The prosecution failed in the proof of a vital element of its case under Charge I and its Specification, namely that accused quit his post.

It is obvious that the record may not be held legally sufficient to support findings of guilty of plundering and pillaging in violation of the laws of war under Article of War 96 (see: Annex to Hague Convention No. IV, Oct. 18, 1907, arts. 28, 47, Treaties Governing Land Warfare, TM 27-251, pp. 25, 31, Rules of Land Warfare, FM 27-10, par. 61, p. 14, par. 329, p. 83; 2 Wheaton's International Law - War (7th English Ed., 1944), pp. 217, 250, 340). The Specification did not allege plundering or pillaging but quitting his post for that purpose, an entirely separate and distinct offense. Accordingly, the Board of Review is of the opinion that the record is legally insufficient to support the findings of guilty of Charge I and its Specification.

b. Specification, Charge II: The evidence shows that the safe was "so far injured as to be useless for the purpose for which it was intended" and thus "destroyed" within the meaning of Article of War 89 (MCM, 1928, par. 147b, p. 161). The action of the court in substituting for the word "destroy" the words "open by force thereby damaging" is not materially inconsistent with, or more limited than, this evidence. The only evidence as to the value of the safe was the owner's testimony that its condition was "perfectly all right", that he paid 375 guilders for it 25 or 26 years ago and that he sold an inferior safe in 1940 for 750 guilders. There is no showing that the owner had expert knowledge of the value of safes, nor was the safe available for visual examination by the court. Under such circumstances there was a failure of proof that the safe had any value in excess of \$20 (CM 228742, Blanco, 16 B.R. 299 (1943); CM 237091, Williams, 23 B.R. 261 (1943); and authorities therein cited). The Table of maximum punishments prescribes no maximum limit for offenses in violation of Article of War 89 (MCM, 1928, par. 104c, p. 99). The most closely related offense for which a maximum limit is provided appears to be willfully destroying public property of a value of \$20 or less, for which the maximum punishment is dishonorable discharge, total forfeitures and confinement at hard labor for six months (Ibid., p. 100). The punishment for the offense proved should not exceed this limit.

c. Specification, Charge III: The court was warranted in inferring that the bonds had some "value not in excess of \$20.00" (CM ETO 4058, McConnell, and authorities therein cited). The record supports the finding of guilty of the larceny alleged, as modified by the reviewing authority. The maximum punishment for this offense includes confinement at hard labor for six months (MCM, 1928, par. 104c, p. 99).

7. The charge sheet shows that accused is 20 years of age and

(26)

was inducted 19 August 1941, at Cleveland, Ohio, to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and the Specification thereunder; legally sufficient to support the findings of guilty of Charge II and of only so much of the findings of guilty of the Specification thereunder as involves findings of guilty of destroying the safe described, of a value not in excess of \$20, under the circumstances alleged; legally sufficient to support the findings of guilty of Charge III and its Specification, as modified by the reviewing authority; and legally sufficient to support only so much of the sentence, as modified by the reviewing authority, as provides for dishonorable discharge, total forfeitures and confinement at hard labor for one year.

9. The designation of the Seine Disciplinary Training Center, Mortimer, Paris, France, as the place of confinement should be changed to the Loire Disciplinary Training Center, Le Mans, France (Ltr., Hq. European Theater of Operations, AG 252, Op TPM, 19 Dec. 1944, par.3).

Wm. H. Lee

Judge Advocate

Wm. F. Burrow

Judge Advocate

Edward E. Starnes, Jr.

Judge Advocate

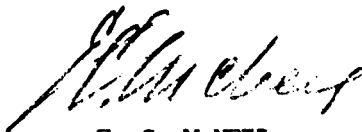
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 726; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private EDWARD L. DANN (35320067), Company I, 501st Parachute Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of Charge I and the Specification thereunder, the findings of guilty of the Specification under Charge II, except so much thereof as involves findings of guilty of destroying the safe described, of a value not in excess of \$20, under the circumstances alleged, be vacated, that so much of the sentence as exceeds dishonorable discharge, total forfeitures and confinement at hard labor for one year, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of those portions of the findings of guilty and sentence so vacated be restored.

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



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

3 Incls:

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

(Findings and sentence vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 141, ETO, 8 May 1945)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

14 APR 1945

CM ETO 5446

UNITED STATES)

v.)

Private GERHARD O. HOFFMANN
(36679125), Company I, 501st
Parachute Infantry)

101ST AIRBORNE DIVISION

Trial by GCM, convened at Nijmegen,
Holland, 9 November 1944. Sentence:
Dishonorable discharge (suspended),
total forfeitures and confinement
at hard labor for three years.
Seine Disciplinary Training Center,
Mortimer, Paris, France.

OPINION by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

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

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

CHARGE I: Violation of the 75th Article of War.

Specification: In that Private Gerhard O. Hoffmann, Company "I", 3rd Battalion, 501st Parachute Infantry, did, while before the enemy, quit his post at Heteren, Holland, on or about 11 October 1944, for the purpose of plundering and pillaging.

CHARGE II: Violation of the 89th Article of War.

Specification: In that * * *, did, at Heteren, Holland, on or about 11 October, 1944, willfully and unlawfully, and without having been ordered by his commanding officer so to do, destroy a safe, the property of Johannes B. Huls, A 60, Heteren, Holland, of the value of about fifty-six dollars, (\$56.00).

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and its Specification, guilty of the Specification of Charge II except the word "destroy", substituting therefor the words "open by force thereby damaging", of the excepted word not guilty, of the substituted words guilty and guilty of Charge II. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, 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 three years at such place as the reviewing authority may direct. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Seine Disciplinary Training Center, Mortimer, Paris, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Number 32, Headquarters 101st Airborne Division, Camp Mourmelon, France, 29 November 1944.

3. This case is companion to CM ETO 5445, Dann, in which the accused was a member of the same company (Company I, 3rd Battalion, 501st Parachute Infantry) as accused herein. The evidence with respect to the tactical situation of the company on 11 October 1944 was the same as that herein. Accused was the companion of Dann, who assisted him in prying the top from the safe involved in that case and in removing therefrom various articles, as set forth in the Board's opinion. Reference is made to said opinion for a statement of the evidence relative to accused herein which is substantially similar to the evidence herein. There was no testimony here that the men said they would leave the scene of the safe-opening if an officer came. The following was brought out in the trial of this case in addition to the evidence in the Dann case: The company commander of accused's company testified that he never ordered anyone in the company to destroy a safe (R7). Certain members of the company were ordered to leave the area on several occasions, including 11 October, on special details, such as anti-looting or contact patrols, especially at night (R8). Accused's platoon leader testified

"No permission was needed to leave the area so long as we knew where they were and we could get to them in a certain length of time. * * * We allowed our men to __ out to get things to supplement their 14-in-1 rations" (R9).

Witness received no instructions with respect to the propriety of taking food from houses, but "It was common practice to go and get food and small items". He left to the squad leaders the matter of permitting absence from the company area (R9), so that a squad leader might have given accused such permission without witness' knowledge. Witness himself did not give accused permission to leave the area. What the men were permitted to take and what they were not permitted to take was left to their individual judgment. "Small items of souvenir value they could take". It would have been improper for a man to take a radio or dresses from a house, although nothing was said regarding this (R10).

4. a. At the close of the prosecution's case the defense moved for findings of not guilty of both charges and specifications, on the grounds, among others that accused's identity as the culprit was not proved beyond a reasonable doubt. The court overruled the motion (R29).

b. Accused elected to remain silent (R34).

5. a. The record shows (R2) that, as in CM ETO 5445, Dann, the trial commenced on the same day on which the charges were served on accused. For the reasons stated and on the basis of the authorities cited, in paragraph 5 of the opinion in that case, the Board of Review is of the opinion that accused effectively waived his rights in the premises and due process of law was fully accorded to him.

b. Any question as to accused's identity was for the exclusive consideration of the court which determined it against accused in its findings of guilty. In view of the substantial evidence supporting the court's conclusion, the same will not be disturbed upon appellate review (CM ETO 3837, Bernard W. Smith; CM ETO 5584, Yancy).

6. a. Specification, Charge I: Accused and his company were clearly before the enemy (CM ETO 5445, Dann, and authorities therein cited). As in that case, the only question is whether there is competent substantial evidence that accused quit his post with the specific intent to plunder and pillage. As accused's participation in the destruction of the safe and in removing articles therefrom is established, the inquiry is simply whether he quit his post within the meaning of Article of War 75. The Board of Review held in the Dann case that the word "quit" means "absent himself without authority". There is no evidence in this case, not present in the Dann case, which requires a conclusion different from that reached therein. Although accused herein, unlike Dann, did not testify and hence did not introduce evidence that his squad leader gave him permission to go to the town, his platoon leader testified that

"No permission was needed to leave the area so long as we knew where they were and we could get to them in a certain length of time",

CONFIDENTIAL

that accused's squad leader might have given him such permission without witness' knowledge and that "It was common practice to go and get food and small items". The Board of Review is of the opinion, on the basis of the Dann case and its authorities, that the record herein does not contain substantial evidence that accused absented himself from his post or place of duty without authority and that it is therefore legally insufficient to support the findings of guilty of Charge I and its Specification.

b. Specification, Charge II: The evidence as to the value of the safe was the same as in CM ETO 5445, Dann. For the reasons stated in paragraph 6b of the opinion in that case, the Board of Review is of the opinion that there was a failure of proof that the safe had any value in excess of \$20 and that the maximum punishment for the offense proved is dishonorable discharge, total forfeitures and confinement at hard labor for six months.

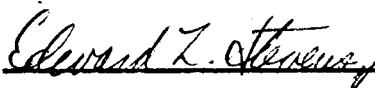
7. The charge sheet shows that accused is 22 years of age and was inducted in August 1943 at Chicago, Illinois, to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and the Specification thereunder; legally sufficient to support the findings of guilty of Charge II and of only so much of the findings of guilty of the Specification thereunder as involves findings of guilty of destroying the safe described, of a value not in excess of \$20, under the circumstances alleged; and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for six months.

9. The designation of the Seine Disciplinary Training Center, Mortimer, Paris, France, as the place of confinement should be changed to the Loire Disciplinary Training Center, Le Mans, France (Ltr., Hq. European Theater of Operations, AG 252, Op TPM, 19 Dec. 1944, par.3).

 Judge Advocate

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CONFIDENTIAL
- 4 -

5446

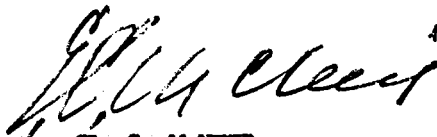
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War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 14 APR 1945 TO: Commanding
General, European Theater of Operations, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 726; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private GERHARD O. HOFFMANN (36679125), Company I, 501st Parachute Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of Charge I and the Specification thereunder, the findings of guilty of the Specification under Charge II, except so much thereof as involves findings of guilty of destroying the safe described, of a value not in excess of \$20, under the circumstances alleged, be vacated, that so much of the sentence as exceeds dishonorable discharge, total forfeitures and confinement at hard labor for six months, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of those portions of the findings and sentence so vacated be restored.

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



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

3 Incls:

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

(Findings and sentence vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 147, ETO, 8 May 1945)

CONFIDENTIAL

(35)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

CM ETO 5451

U N I T E D	S T A T E S	)	NORMANDY BASE SECTION, COMMUNICATIONS
		)	ZONE, EUROPEAN THEATER OF OPERATIONS
	v.)	
Private JAMES W. TWIGGS		)	Trial by GCM, convened at Omaha Beach
(38265086), Company F,		)	Section, France, 25 October 1944.
1323rd Engineer General		)	Sentence: To be hanged by the neck
Service Regiment		)	until dead.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War

Specification: In that Private James W. Twiggs, Company "F" 1323rd Engineer General Service Regiment, did, at Bellefontaine, $\frac{1}{4}$ MI N, T 7085, French Lambert, Zone 1, France, on or about 20 September 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one William D. Adams, a human being by shooting him with a rifle.

He pleaded not guilty and, all members of the court present at

5451

(36)

the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for ten days in violation of Article of War 61, and one by summary court for being found drunk on duty as a truck driver in violation of Article of War 85. All members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead.

The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50¹.

3. The evidence for the prosecution shows that about 1:00 pm, 20 September 1944 accused and a soldier named Adams (deceased) were engaged in a discussion in the bivouac area of Company F, 1323rd Engineer General Service Regiment, which was stationed in the vicinity of Bellefontaine, France (R7,12,17,30). Accused said that an illegitimate child bore the name of its father, but Adams maintained that the child took the name of its mother. Accused insisted that he was right because he (accused) was illegitimate and was named after his father but Adams said "it wasn't so". "The discussion led from one thing to another". When accused said that he (accused) had been in jail several times but had "never pulled time", Adams replied that "it was for plain things like stealing" and referred to accused as a thief. Accused "didn't like it", and said "When I was in there your mammy was in there". Adams appeared to become angry, told accused "he didn't play the dozens" and that he "didn't allow talk about his mother" who died in his arms (R7,13,17). The phrase "playing the dozens" was a very derogatory expression used by soldiers when talking about one's parents, especially one's mother (R11,13,37). Adams asked accused several times "to take it back" but accused refused to do so and said "Unless you say I didn't steal I mean it". The men separated and left the scene. About ten minutes later Adams returned armed with a carbine and asked Technician Fifth Grade Gus Alston of accused's organization if accused was in his tent. Alston, who knew accused was not in his tent, replied in the affirmative, thinking that Adams would "be cooled off" by the time he reached the tent. Adams went to the tent, did not find accused, and put the carbine down by his side. Accused then reappeared and Adams aimed his gun at him. When Technician Fifth Grade Lawrence L. Grant, 1323rd Engineer General Service Regiment, jumped between the two men, Adams said to him "Get back, anybody between this is dead". Adams then asked accused if the latter would retract his remark. Accused replied:

5451

CONFIDENTIAL

(37)

"I knew you had the gun. I saw you when I come from the motor pool. Give me the same chance as you've got and we'll shoot it out".

When Adams said that he "meant him to take it back or he'd empty 15 rounds in him", accused replied "You got the ups on me now; nothing to do but take it back". Adams thereupon "slung arms with his carbine" and walked away toward the orderly room with the remark that

"if he'd been in civilian life he'd have blowed his head off; he had been putting up 20 and 30 days for AWOL but he'd put up 20 years for him talking about his mother".

Accused went to his own tent. The entire argument lasted about 45 minutes and the two men finally separated about 2:00 pm (R7-8,10,13, 16-17).

About 5:00 pm the same day accused entered the company supply room where Staff Sergeant John H. Williams, supply sergeant, and Staff Sergeant Bernard Stevenson, of accused's company, were present. Accused wanted to clean his rifle but Williams replied that he was very busy and did not have time to look for the weapon. Accused remained about three minutes and left without his rifle (R18-19,25-26). He returned in about ten minutes, remained for about five minutes, did not ask for his rifle and again departed without the gun. He returned a third time and when he asked for his rifle Williams said that if accused wanted to clean it he could find it in the rack himself. Accused did so, found "the patches and oil" and left the supply room with his M-1 rifle. It was then about 5:30-5:45 pm (R19,22-24,26,28).

The defense stating that there was no objection thereto, a sketch of the company bivouac area was identified and admitted in evidence (R32-33; Pros.Ex.D).

Private John H. Neal of accused's company testified that about 5:30-5:45 pm he was standing in the area, heard a shot and saw Adams fall to the ground. Witness, who did not see accused fire the shot, was then about 60 feet from Adams and about 25 feet from accused's hut. At the time, Adams was carrying a five-gallon can of water in one hand and a bucket of water in the other. Witness did not see any weapon in the possession of Adams, who was going toward his tent from the "water point". Neal heard no conversation between accused and Adams before the shot was fired and would have been able to hear accused if he said anything to Adams. After the shot was fired witness

CONFIDENTIAL

5451

CONFIDENTIAL

(38)

saw accused carrying an M-1 rifle. When someone asked "'Who shot Adams?'" , accused said "'I did'" and walked toward the supply tent. Neal went to the place where deceased was lying on the ground and did not observe any weapon in that vicinity (R6,8-11; Pros.Ex.D).

Alston testified that about 5:40 pm he was lying on his cot in his hut looking at Adams who was carrying a bucket in one hand, a "GI" can in the other, but no weapon of any kind. Alston heard a shot but did not see who fired it and saw Adams fall to the ground. Witness was then about 25 feet from accused's hut and heard no conversation between accused and Adams. He could have heard accused if he said anything to Adams "unless on close conversation." Adams did not appear to be talking with anyone as he walked along. After the shot was fired, witness saw accused leave his hut. When witness asked "'Who shot that man?'" , accused replied "'I did'". Alston ran to Adams who "raised up and groaned one time" (R13-15; Pros.Ex.D).

First Lieutenant J. Julius Becker, commanding officer of accused's company, was at his command post when he heard a shot in the direction of the bivouac area which was about 300 yards distant. Becker ran toward the scene and on the way met Williams, the supply sergeant. Becker and Williams saw accused walking toward the supply tent in a "rather nonchalant fashion". He carried his rifle slung on his right shoulder and a clip of cartridges in his left hand. Becker took accused's rifle and ammunition and asked "if he had done the shooting". Accused replied "The son-of-a-bitch threatened me so I just plugged him". Becker ordered Williams to arrest accused. At the trial Becker identified a clip with seven rounds of .30 caliber ammunition and an M-1 rifle, .30 caliber, semi-automatic, number 2297582, as the ammunition and rifle which he took from accused. The defense stating there was no objection thereto, they were admitted in evidence (R20-21,29,30-32; Pros.Exs.A,B).

When First Lieutenant Vinson K. Robinson of accused's company heard the shot he ran to Adams who was still breathing when he was later placed in a jeep. He was taken to the dispensary where he was pronounced dead (R34-35). It was stipulated by accused, the prosecution and defense that if Major Clifton L. Reeder, Medical Corps, 1323rd Engineer General Service Regiment, were present in court he would testify that he was called to the aid station about 5:45 pm that day and that Adams was dead upon the latter's arrival at the station. Deceased had

"a gun shot wound of the anterior chest at the level of the 4th rib one inch lateral to the nipple with exit on the lateral surface of the upper third of the right arm" (R32; Pros.Ex.C).

After Adams was pronounced dead, Lieutenant Robinson went 5451

CONFIDENTIAL

to the hut which was occupied solely by accused and found therein, a "ruptured" .30 caliber shell which was identified by Robinson and admitted in evidence, the defense stating that there was no objection thereto (R35; Pros.Ex.E). Robinson also found in accused's hut a clip of armor-piercing .30 caliber ammunition similar to Pros.Ex.A (R35). Armor-piercing ammunition was never issued to the company (R37). He then went to the hut occupied by Adams, and a soldier named Hutchinson who gave Robinson a carbine and said that it was on Adam's bed. The carbine was not loaded and there was no clip in the weapon. Robinson searched the hut and Adams' clothing but found no ammunition (R35-37).

Rifles and ammunition were kept in the company supply room. There was a standing order that the men would keep their rifles clean at all times. They were authorized to take them from the supply room for this purpose and were to return them after the weapons were cleaned. Ammunition was issued to guards and the men were not permitted to keep ammunition in their tents. In certain cases ammunition was issued to men going on details in trucks (R23-25, 33-34, 37). The company commander, Lieutenant Becker, testified that rifles were inspected weekly (R33), but the supply sergeant, Williams, testified that they were inspected "about once a month", and that no rifle inspection was scheduled for the evening in question, the following day, or for the forthcoming week (R20).

At the trial, Becker identified a statement given by accused to one Major Rose in Decker's presence. Rose advised accused of his rights under Article of War 24 before the latter made the statement and no threats or promises were made (R37-38). After an examination of the statement in open court by the prosecution, defense and accused, two changes therein were made by agreement. The defense stating that there was no objection thereto, the statement, dated 21 September, was admitted in evidence (R39; Pros.Ex.F). The corrected statement was as follows:

"The beginning was an argument, it got to the point where it became the dozens. I thought it would be a fist fight. He walked off and said you still mean what you said, don't you? He went toward the motor pool and I went over by the dispatcher tent. When I got back I saw him coming from the motor pool with a carbine on his shoulder. I went back to the tent where they were cutting hair. When I got back he was there with his carbine and he pointed the gun at me and said 'Don't move or he will blow my heart out'. He told me to take back every word that I said about him. I told him to forget it and went on to my tent for awhile. I had already had my rifle from the supply, a bayonet and a clip of ammunition I found that I was going to clean. Adams was coming back

CONFIDENTIAL

(40)

by my tent, he said I still don't like what you said and I am going to get you. I put a clip in my rifle and told him he had gone far enough. I wasn't going to let him go to his tent knowing he had a gun. That is when I shot him. He was carrying a bucket of water. I went back to the supply room with my rifle and met Lt. Becker and gave him the rifle. John Neal, Gus Alston and James Mosely were standing by when we had the argument".

4. For the defense accused, after being advised of his rights (R39), testified that he had not engaged in any arguments with deceased prior to the occasion concerned (R45). He confirmed the prosecution's evidence that he at first argued with deceased about the proper name borne by an illegitimate child. The argument "went on and on" until deceased "said something about 30 days in the guardhouse". When accused said he (accused) had been in jail "lots of times" but "never did any time", deceased replied that if accused was in jail "it was for stealing". Accused said "Well, if I was there for stealing, your mother was there when I was there last time". When deceased asked him to retract the remark, accused asked if deceased meant what he said "about me stealing", and added that if he did, accused meant his remark about deceased's mother. After deceased "asked once more", and asked the men who stood there if they heard accused's remark, deceased went toward the motor pool. Accused went to the dispatcher's tent and then to the motor pool to obtain his field jacket. He saw deceased go behind the motor pool with a carbine over his shoulder and then returned to the scene of the argument. When he arrived, deceased, who was already there "raised * * * up" a rifle, told accused that unless he retracted "every word * * * he would shoot my heart out", and "made a few steps towards me". Grant stepped between the two men and accused, who "knew then he deceased was going to shoot me", retracted his remark about deceased's mother and went to his tent. Deceased went to his own tent with his rifle and accused later saw him without the weapon (R40).

As an order had been issued to clean rifles, accused later went twice to the supply tent to obtain his weapon. His purpose in securing the rifle was solely to clean it and he did not get it with the intention of shooting deceased (R40-41,43-44). He cleaned the rifle in his tent where he also had a clip of ammunition which he found on "1-B ammunition dump * * * area 5" (R41,43). He was going to turn in this ammunition as soon as he cleaned his weapon. He had already turned in "10 clips, 80 rounds" of ammunition which was issued to him (R45). Accused was cleaning his bayonet when he saw deceased coming from the "water point", carrying a bucket of water in one hand. Deceased did not carry another bucket in his other hand, which was free, and accused saw no weapon in his possession (R41-43). Deceased said "Twiggs, I still don't like what you said and I'm going to get you". Accused, who was then standing in front of his tent (R42) 5451

CONFIDENTIAL 6-

(41)

"reached and got my gun", told deceased he "had gone far enough", and shot deceased with his M-1 rifle when the latter was about 30 feet away (R41-42). "I was raising the gun when I finished talking" (R42). Accused first entertained the idea of shooting deceased when the latter said "I'm going to get you". After that it was a matter of seconds; soon as I could get the rifle loaded I shot" (R44).

Accused further testified that he shot deceased because the latter said "he was going to get me" and was on his way to his tent where accused knew deceased had his rifle. It "wouldn't take much time" for deceased to reach his tent. He knew deceased had previously taken his weapon to his tent, had not seen him leave the tent again with the gun, and knew that he had not turned it in to the supply room. Further, accused knew deceased meant to kill him "the first time but T5 Grant stopped him". He believed that deceased was on his way to his tent to get his rifle and that he was then going to kill accused with the weapon. Accused meant to shoot deceased and "figured then if I didn't kill him he would kill me" (R41,43-45). When deceased threatened him with his gun earlier in the day there was a clip in the weapon (R45).

5. "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.

* * *

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 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 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 indif-

5451

CONFIDENTIAL

(42)

ference 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" (MCM, 1928, par.148a, pp.162,163-164) (Underscoring supplied).

"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 [sic] existence of malice must be determined as a fact from all the evidence.

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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 CJ, sec.74, pp.1099-1101) (Underscoring supplied).

The evidence that accused shot and killed deceased was undisputed. Accused testified that he shot deceased because of a fear that deceased would kill him.

"Deadly weapon used by accused, the provocation must have been very great in order to reduce the crime in a homicide to that of voluntary manslaughter. 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. * * * Mere fear, apprehension, or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.652-655) (Underscoring supplied).

"A man may oppose force to force in defence of himself * * *. Only such amount of force, however, may be used as is reasonably proportionate to the danger. Killing in defence of the

5451

person will be justified where the circumstances are such as to warrant the conviction that danger to life or serious bodily harm is threatened and immediately impending" (Winthrop's Military Law and Precedents - Reprint, p.674) (Underscoring supplied).

"To justify or excuse a homicide on the ground of self-defense it is necessary to establish that the slayer was without fault in bringing on the difficulty, that is, that he was not the aggressor and did not provoke the conflict; that the accused believed at the time that he was in such immediate danger of losing his own life, or of receiving serious bodily harm, as rendered it necessary to take the life of his assailant to save himself therefrom; that the circumstances were such as to afford or warrant reasonable grounds for such belief in the mind of a man of ordinary reason and firmness; and that there was no other convenient or reasonable mode of escaping or retreating or declining the combat" (26 Am.Jur., sec.126, p.242).

"The right to kill in self-defense is founded in necessity, real or apparent. The right exists only in extremity, where no other practicable means to avoid the threatened harm are apparent to the person resorting to the right. If there was under the facts of the particular case at bar no real or apparent necessity for the killing, the defense completely fails, and the slayer will be deemed guilty of some grades of culpable homicide. In order successfully to assert self-defense as an excuse or justification for a homicide, the defendant must have been in imminent danger of death or great bodily harm at the time of committing the homicidal act, or must have had reasonable grounds for believing and did in good faith believe that he was in such peril and that the killing was necessary to avert such peril, and must have had no other reasonable means of avoiding death or injury - no avenue of escape - open to him.

*

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The homicidal act need not have been essential to the preservation of the slayer's life; it is sufficient if the danger threatened great bodily harm" (Ibid., sec.137, pp.249-250).

"It is the apparent and not the real or actual necessity of taking another's life to protect

(44)

oneself from death or great bodily harm at the hands of a person killed which controls the determination of the question whether the killing was justifiable or excusable as having been done in self-defense. Killing an assailant may be excusable, although it turns out afterward that there was no actual danger, if it is done under a reasonable apprehension of loss of life or great bodily harm, and danger appears so imminent at the moment of the assault as to present no alternative of escaping its consequences except by resistance " (Ibid., sec.138, p.251).

"What appears to be the prevailing rule in America asserts that the apprehension of danger and belief of necessity which will justify killing in self-defense must be a reasonable apprehension and belief, such as a reasonable man would, under the circumstances, have entertained" (Ibid., sec.140, p.253).

"There must generally be some act or demonstration on the part of the deceased which induced a reasonable belief on the part of the defendant that he was about to lose his life or suffer some great bodily harm. It is no sufficient that the deceased had the means at hand with which he could have inflicted the injury, if there was no act or demonstration which would indicate that he intended to do so. * * * Presenting, drawing, or attempting to draw such weapons furnishes, as a rule, such appearance of necessity. No one is bound to wait until an assailant 'gets the drop on him'" (Ibid., sec.142, p.255).

"Regardless of the difference of opinion respecting the abstract duty of one, when attacked, to retreat before ^{taking} the life of his assailant, the element of practicability is always to be considered. Increase or diminution of the risk to which the attack exposes him is the true criterion for determining his duty in this respect. No one contends that retreat must be attempted when to do so either will not diminish or will increase the peril. One must, according to the rule of many courts, retreat if it is reasonably apparent that he can do so without increasing his danger; but all courts agree that if the circumstances are such that one believes on reasonable grounds that his peril will be increased by retreating, beyond that to which he will be sub-

5451

jected if he stands and defends himself, he is justified in standing his ground and repelling force with force, even to the taking of the life of his assailant, if necessary, provided, of course, the attack is made upon him without his own provocation. * * * The view has even been taken that if it appears that the attack is made with the settled design and intention of taking the life of the accused or doing him great bodily harm, and that ultimate safety cannot be secured by retreat, the person assailed may advance upon and kill his assailant" (Ibid., sec.152, pp.261-262).

"Where from the nature of the attack, the assailed person believes, on reasonable grounds that he is in imminent danger of losing his life or of receiving great bodily harm from his assailant, he is not bound to retreat, but may stand his ground, and if necessary for his own protection may take the life of his adversary" (1 Wharton's Criminal Law, 12th Ed., footnote, p.834).

It was clearly established by the evidence, including accused's own testimony, that Adams was unarmed when accused fired the fatal bullet. Neal and Alston, the prosecution witnesses, both testified that deceased was carrying two buckets of water and accused said that he was carrying one. Accused testified that he was about 30 feet from deceased when he fired. It may clearly be inferred from the testimony of Neal and Alston and from an examination of Pros.Ex.D, that there was a greater distance between accused and the victim at that time. Accused testified that deceased called him by name, stated that he still did not like what accused said and that he was going "to get" accused, who replied that deceased "had gone far enough". Neither Neal nor Alston heard any conversation between the two men, and each testified that he would have been able to hear anything said by accused. Alston qualified his testimony in this respect by testifying that he could have heard a remark by accused "unless on close conversation".

The question of the credibility of witnesses, as well as the question of fact as to whether accused acted in self-defense, was for the sole determination of the court. If the findings of guilty are supported by competent, substantial evidence, the Board of Review will not disturb the findings on appellate review (CM ETC 3180, Porter). The Board is of the opinion not only that the findings of guilty of murder are supported by evidence of such character introduced by the prosecution, which showed that accused deliberately and without

(46)

justification shot and killed Adams without the slightest provocation on the part of the latter, but also that the claim of self-defense is thoroughly negatived by accused's own testi - mony. He admitted that he reached for his gun and fired almost immediately after deceased's alleged threat - "soon as I could get the rifle loaded I shot". Deceased was unarmed and an examination of Pros.Ex.D shows that he was, comparatively speaking, a considerable distance from his own tent at the time. Accused made no effort whatsoever to avoid the supposed danger to his own life by resorting to the obvious and practical solution of withdrawal and escape. Instead he stood by his tent, immediately seized his rifle and fired point blank at an unarmed victim who was then far removed from any means whereby he could inflict death or serious bodily injury upon accused. It is noted in passing that an examination of Adams' carbine disclosed that it was unloaded and that no clip was in the weapon. A search of his quarters and clothing failed to reveal the presence of any ammunition. Accused's use of the weapon in such a deadly manner was willful, deliberate and cold-blooded, and the evidence disclosed no circumstances "serving to mitigate, excuse, or justify the act". When he shot deceased, accused did not have the slightest cause to believe that he was then and there imminently in danger of losing his life or of incurring serious bodily harm, and that there was no alternative of escaping such danger except by shooting deceased at that moment. The requisite element of malice is, therefore, clearly inferable (supra). His claim that he acted in self-defense is not only entirely uncorroborated by the other evidence, which in fact clearly refuted the need for such action on his part, but is also completely negatived by his own testimony (CM ETO 1941, Battles; CM ETO 3120, Porter; CM ETO 3957, Barnecko; CM ETO 2103, Kern).

6. The charge sheet shows that accused is 24 years, eight months of age and that he was inducted to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92).

Wm. H. Hester Judge Advocate
Edward K. Morgan Judge Advocate
Edward L. Stearns Jr. Judge Advocate

5451

CONFIDENTIAL

(47)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. TO: Command-
ing General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private JAMES W. TWIGGS (38265086),
Company F, 1323rd Engineer General Service Regiment, attention is
invited to the foregoing holding by the Board of Review that the
record of trial is legally sufficient to support the findings of
guilty and the sentence, which holding is hereby approved. Under the
provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order
execution of the sentence.

2. When copies of the published order are forwarded to this
office, they should be accompanied by the foregoing holding, this
indorsement, and the record of trial which is delivered to you
herewith. The file number of the record in this office is CM ETO
5451. For convenience of reference, please place that number in
brackets at the end of the order: (CM ETO 5451).

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



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

1 Incl.
Record of Trial.

(Sentence ordered executed. GCMO 16, ETO, 13 Jan 1945)

CONFIDENTIAL

CONFIDENTIAL

(49)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

28 DEC 1944

CM ETO 5453

UNITED STATES)	THIRD UNITED STATES ARMY
v.)	
Captain WILLIS H. DAY)	Trial by GCM, convened at Nancy,
(O-923301), Headquarters)	France, 19 October 1944. Sentence:
1137th Engineer Combat)	To be dismissed the service.
Group)	

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain Willis H. Day, Headquarters 1137th Engineer Combat Group, was, at Toul, Meurthe-et-Moselle, France, on or about 19 September 1944, found drunk while on duty as Liaison Officer to XII Corps Headquarters.

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

CONFIDENTIAL

(50)

the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. Lieutenant Colonel George A. Morris, commanding officer of the 1137th Engineer Combat Group, the unit to which accused was assigned, testified that he had known accused intimately for five months as Assistant S-2 on his staff. On 19 September accused was also carrying out special duties as liaison officer to Headquarters XII Corps. At about 1900 hours that day, Colonel Morris visited his operations section to review the operations map and for information on the then existing situation. Accused, with several other officers and enlisted men, was present. Accused was somewhat unsteady on his feet, his speech was somewhat blurred and he was rather loud and boisterous; his conversation was partially incoherent. Witness requested accused, who had just returned from XII Corps Headquarters with an overlay covering the tactical situation then existing in the corps, to explain the situation, a simple and normal request but because of "excessive consumption of intoxicating liquor" accused could not satisfactorily perform this duty (R7,8). The information could have been vital at the time in view of a rumored enemy threat to an exposed flank of the combat group. In witness' opinion, accused was drunk and he issued orders to have him relieved at once as liaison officer to XII Corps Headquarters (R9). Accused's work as Assistant S-2 had been satisfactory. He had no particular schedule of operation as liaison officer and on the night in question (R11) the situation was such that his services would probably be required later that night (R12). In Colonel Morris' opinion, accused's failure to explain properly the overlay could not be attributed to lack of tactical training. A liaison officer is at all times subject to call and accused was on duty at the time in question (R13).

Major Ivan White, Jr., intelligence officer for the combat group who had known accused since 1 June 1944, was present on the evening of 19 September at the time accused was requested to explain the map. His testimony was similar to that of Colonel Morris and, in his opinion accused was drunk (R14-18). Ordinarily accused was very efficient (R19).

Lieutenant Colonel Charles W. Sherman, executive officer of the combat group, had known accused for about four months. On the evening in question, just as he was about to leave for corps headquarters, he was directed by Colonel Morris to replace accused as liaison officer, but although search was made he was unable to find accused until about ten o'clock the next morning when he advised

him of the change and asked accused to meet him at the visitors' motor park at about 1100 hours and to go there and wait for him. Sherman returned at 1120 hours and was unable to find accused. Later, at about 1430 hours, he found accused in a room adjacent to their "CP" headquarters, lying on the floor. He was unable to awaken him but saw him at 1800 hours when accused told him he had waited for a time at the motor park and then decided to go to the "CP". He denied drinking that day (20 September) but admitted that he had been drinking on the day before (R21-23). Similar testimony was given by Technical Sergeant William J. Weyerhauser, also present on the evening of 19 September. In his opinion, accused was then slightly inebriated (R25-26).

Private First Class Edward Casey, jeep driver for accused, testified that on a trip taking a half hour, back from corps to group on the afternoon of 19 September accused fell asleep in the jeep and that he left him asleep in the car when he parked it on arrival at 1500 hours. He saw accused again about 1930 hours the same evening at which time his walk was "sort of staggering", his conversation didn't make sense, liquor could be smelled on his breath and, in his opinion, accused was drunk (R27-28).

4. No witnesses were called by the defense. Accused, having been first advised of his rights as a witness, made an unsworn statement in which he stated that he tried to enlist after the outbreak of war but was rejected because of flat feet. In 1942 he was working on construction work for the district engineer, who had asked if he would like to go in the service as an officer, and he was given a commission direct from civil life. He had received but little military training. On the night in question, after delivering all papers and messages, with a couple of other liaison officers, he had gone to quarters and had a "couple of drinks and came back in an hour or so" (R33-34).

5. Under Article of War 85, it is necessary that accused be found drunk while actually on duty, meaning, of course, military duty, but every duty which an officer or soldier is legally required, by a superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty. "Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article" (MCM, 1928, par.145, pp.159-160). There is substantial evidence that accused, while on duty as liaison officer on the night of 19 September 1944, was sufficiently intoxicated to impair sensibly his physical and mental faculties.

6. The charge sheet shows that accused is 35 years and two months of age. He was commissioned a first lieutenant on 26 March 1943 in the Corps of Engineers at Camp Claiborne, Louisiana direct from civilian status.


CONFIDENTIAL

(52)

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

8. A sentence of dismissal from the service of an officer found drunk on duty in time of war is mandatory (AW 85).

 Judge Advocate

 Judge Advocate

 Judge Advocate

5453

CONFIDENTIAL

CONFIDENTIAL


(53)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. **28 DEC 1944** TO: Command-
ing General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Captain WILLIS H. DAY (O-923301), Headquarters 1137th Engineer Combat Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5453. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5453).


E. M. CANSLER
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 1, ETO, 3 Jan 1945)

CONFIDENTIAL

CONFIDENTIAL

(55)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

28 Dec 1944

CM ETO 5456

UNITED STATES)

v.)

First Lieutenant ROBERT W.
WINFIELD, JR. (O-1112526), Corps
of Engineers, Company A,
1303rd Engineer General Service
Regiment)

THIRD UNITED STATES ARMY

Trial by GCM, convened at Nancy,
France, 21 October 1944. Sentence:
Dismissal, total forfeitures and
confinement at hard labor for six
years. Eastern Branch, United
States Disciplinary Barracks, Green-
haven, New York.

HOLDING BY BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Robert W. Winfield, Junior, Company "A", 1303rd Engineer General Service Regiment, did, without proper leave absent himself from his organization at Folkingham Airdrome, Folkingham, Lincolnshire, England from about 10 June 1944 to about 13 June 1944.

ADDITIONAL CHARGE I: Violation of the 93rd Article of War.
(Finding of not guilty)

CONFIDENTIAL

(56)

Specifications 1-17 incl.: (Findings of not guilty)

AL

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

Specification: In that * * * did, at Folkingham Air-drome, Folkingham, Lincolnshire, England, on or about 3 May 1944, wrongfully take and withhold from the rightful possession of the owner thereof without his consent, a certain automobile, to wit, a truck, 1/4-ton, 4x4, United States Army Registration Number W-20469178, property of the United States Government of a value of more than \$50.00 (fifty dollars).

He pleaded and was found not guilty of Additional Charge I and all specifications thereunder, guilty of the (original) Charge and its Specification, and guilty of Additional Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for six years.

The reviewing authority, the Commanding General, Third United States Army, 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, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50¹/₂.

3. The undisputed evidence with reference to the offenses of which accused was found guilty was as follows:
Original Charge and Specification: (absence without leave from about 10 June to about 13 June 1944)

Before 10 June 1944, the troops of accused's organization, the 1303rd Engineer General Service Regiment, were "taken out from under" the command of Lieutenant Colonel Vincent I. Vanderburg, the regimental commander, and placed under the 8th District Headquarters, Engineer Section, of the 9th Troop Carrier Command, stationed at Grantham, England. Regimental personnel were split into small squads and platoons and stationed at about nine or ten airfields. They were under the jurisdiction of the officer in charge of the field, but as engineers working in liaison "with the colonel of the field", preparing troops to proceed to France by airplane from the various fields. They were "getting ready for the jump or push-off" and all were under restriction. The members of accused's unit, Company A, were stationed in platoons at each of the fields with a leader in command of each platoon. Accused commanded a platoon at Folkingham Air-drome, Folkingham, Lincolnshire, England, and was performing duties

5456

CONFIDENTIAL

(57)

I would be and that if anything important came up he was to come and get me. I had no intention of 'avoiding important duty' rather I did not want to miss it. There was nothing of importance to do at the Station as can be inferred by Capt Marshalls statement giving me permission to visit Ireland. Had I gone to Ireland there would have been no way of getting me back to Station 484 because of communication. I would have been able to get to the station from Grantham at anytime of the day or night.

/s/ Robert W. Winfield Jr.
/t/ ROBERT W. WINFIELD JR.
1ST LT C E O-1112526"

Additional Charge II and Specification: (wrongful taking and withholding from the owner without his consent a Government vehicle, property of the United States, of a value in excess of \$50.00).

On 3 May 1944, at Folkingham, England, accused told Sergeant Carlton C. Sands, 1303rd Engineer General Service Regiment, "to go out and get a jeep" and suggested the town of Lincoln as "a good place to go". Sands, accompanied by a Corporal Leroy and two other soldiers, drove to Lincoln "in a 6 x 6" where they found a "jeep" by the side of a road. The markings on the vehicle indicated that it belonged to either the "620th or 602nd ack ack". They took the vehicle without permission of the organization to which it belonged, and Leroy drove it to the vicinity of accused's area, where they left it in the woods. Sands entered the base and told accused that "if he wanted * * * the jeep, he would have to get it because I was afraid to take it through the gate" (R16). After accused went to the vehicle Leroy drove him into the area and the "jeep" was placed in accused's tent. It was painted, the old numbers were removed and new numbers were painted on the machine. For about two weeks it was used for official business only by members of the platoon until it was involved in an accident. It was thereafter disposed of by Leroy and another soldier in pursuance of orders issued by accused (R15-22).

On 29 June accused gave Major Mylius another typewritten statement after he (accused) was advised of his rights. The statement was identified by Major Mylius and, the defense stating that it had no objection thereto, was admitted in evidence (R69-70; Pros. Ex.4). Accused admitted therein that he ordered the men to take the "jeep", that all markings thereon were removed and that a fictitious United States registration number, furnished by accused to Leroy, was painted on the vehicle. The "jeep" was used on the post by accused

5456

-4-
CONFIDENTIAL

CONFIDENTIAL

(58)

in connection with the operation and maintenance of a marshalling area for airdrome troops. He was required to be available on short notice and was under the command of Captain Jack A. Marshall, Quartermaster Corps. On the afternoon of 10 June accused told Captain Marshall that an aircraft was leaving the field for Northern Ireland and that he had secured permission to make the trip. Marshall

"considered this permissable and granted him verbal permission to be absent from his duties for the purpose of this flight" (Stipulated testimony of Captain Jack A. Marshall (R141).

Marshall later investigated rumors that restriction to the base had been "lifted" and that passes were available. He discovered that the only personnel authorized to leave the base on other than official business "were 50% of the combat crews, who had been granted passes". He then specifically instructed accused to make sure that the personnel of the latter's platoon understood "we were still restricted" to the base. Accused replied that his platoon had been so informed. Shortly after 10:00 pm Marshall found accused had departed, "presumably on the plane ride". Accused was still absent on 11 June. Upon inquiry Marshall discovered that no aircraft left for Northern Ireland "in the last 24 hours" and that accused was not a passenger on any other aircraft which left the base. Accused was also absent on 12 and 13 June. On 13 June Lieutenant Colonel Vanderburg found accused in Grantham, England, and brought him to the officer in charge of service troops under the 9th Troop Carrier Command. He was placed in Captain Marshall's custody at 4:30 pm, 13 June. Grantham was about ten or 15 miles from the airfield at which accused was stationed (R8-14; Pros.Ex.1).

On 22 June Major Fred G. Mylius, 1303rd Engineer General Service Regiment, the officer who investigated the charges, interviewed accused and warned him of his rights. Accused first said that he preferred to remain silent but later decided that he wished to make a statement. He borrowed a typewriter, and later brought a typewritten statement to Major Mylius, dated 22 June. The statement was identified by Major Mylius at the trial and, the defense stated that there was no objection thereto. It was admitted in evidence as Pros.Ex.3 (R66-69). It was as follows:

"Having been informed by Major Mylius, Investigation Officer of my right to make no statement and of my right to make or submit a statement in any form subject to the risk of having such statement used against me, I desire to make the following sworn statement:

I informed Sgt Carlton C. Sands where

CONFIDENTIAL

5456

and his men "for the usual duties". After it was damaged in an accident which involved the death of a soldier, accused ordered Leroy "to dispose of it somehow if they could not get it into the Depot at Liverpool". The vehicle was finally "pulled * * * from the truck back of a bank on the Sheffield-Manchester road" (Pros. Ex.4).

4. No evidence was introduced by the defense and after being advised of his rights, accused elected to remain silent (R74-75).

5. With reference to the (original) Charge and Specification (absence without leave 10-13 June, 1944), the pleas of guilty are fully supported by the evidence. Accused and his platoon were in a status of restriction to the airdrome area on 10 June. Following his conversation with Captain Marshall about the proposed trip by air to Northern Ireland, the latter discovered that only a certain class of personnel, not including accused, was authorized to leave the base. He informed accused that "we were still restricted to the limits of the base", and directed him so to inform the personnel under his command. Accused replied that his man had already been apprised of this fact. He then violated the restriction and absented himself without leave for three days. The pleas of guilty are also fully sustained by the evidence with respect to the wrongful taking and withholding of the Government vehicle (Additional Charge II and Specification).

6. The charge sheet shows that accused is 23 years, nine months of age and that he entered extended active duty 31 March 1943 at Fort Belvoir, Virginia, for the duration of the present emergency plus six months. No prior service is shown.

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

8. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

Franklin E. [Signature] Judge Advocate
Edward K. [Signature] Judge Advocate
Edward L. [Signature] Judge Advocate

(60)

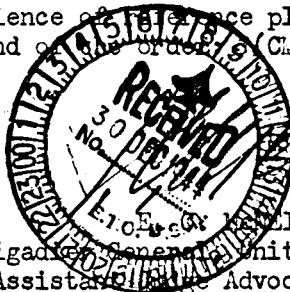
CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 28 DEC 1944 TO: Command-
ing General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of First Lieutenant ROBERT W. WINFIELD, JR.
(O-1112526), Corps of Engineers, Company A, 1303rd Engineer General
Service Regiment, attention is invited to the foregoing holding by
the Board of Review that the record of trial is legally sufficient
to support the findings of guilty and the sentence, which holding
is hereby approved. Under the provisions of Article of War 50¹/₂,
you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this
office, they should be accompanied by the foregoing holding and this
indorsement. The file number of the record of trial in this office
is CM ETO 5456. For convenience of reference please place that
number in brackets at the end of the order (CM ETO 5456).



Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 7, ETO, 7 Jan 1945)

CONFIDENTIAL

(61)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

3 FEB 1945

CM ETO 5458

U N I T E D	S T A T E S	)	IX AIR FORCE SERVICE COMMAND
)	
	v.	)	Trial by GCM, convened at APO
		)	149, U.S. Army (France), 24 October,
Private GEORGE L. BENNETT		)	14, 20 November 1944. Sentence:
(33578870), 2136th Engineer		)	Dishonorable discharge (suspended),
Aviation Fire Fighting Platoon,		)	total forfeitures, and confinement
IX Air Defense Command		)	at hard labor for three years. The
		)	Seine Disciplinary Training Center,
		)	Paris, France.

OPINION by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification: In that Private George L. Bennett, 2136th Engineer Aviation Fire Fighting Platoon, IX Air Defense Command did, without proper leave, absent himself from his command at AAF Station A-33N from about 1800 hours, 1 September 1944, to about 0900 hours, 2 September 1944. .

-1-
CONFIDENTIAL

5458

(62)

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

Specification: In that * * * did, at or near AAF Station A-33N on or about 1 September 1944, wrongfully take and use, without proper authority, a certain motor vehicle to-wit Dodge Truck 1 1/2 ton 6 x 6 Personnel Carrier, USA Registration Number 3317326-S, property of the United States of a value of more than \$50.00.

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

Specification 1: In that Pvt George L. Bennett, 2136th Engineer Aviation Fire Fighting Platoon, 1st Transport Group (Prov), then Pfc, 2136th Engineer Aviation Fire Fighting Platoon, IX Air Defense Command, did, at Hospital of Korn-er-Houet, Town of Colpo, Department of Morbihan, Brittany, France, on or about 2 September 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection, per os with Yvette Guenantin, by force and against her will.

Specification 2: In that * * * did, at Hospital of Korn-er-Houet, Town of Colpo, Department of Morbihan, Brittany, France, on or about 2 September 1944, with intent to commit a felony, viz. sodomy, against Yvette Guenantin, commit an assault upon Yvette Guenantin and Marie Mentec, by willfully and feloniously striking Yvette Guenantin on the chin with his fists.

He pleaded not guilty, and was found guilty of Charge I and Charge II and their respective specifications; guilty of Specification 1, Additional Charge; guilty of the Additional Charge as to Specification 1; guilty of Specification 2, Additional Charge, except the words "with intent to commit a felony, viz. sodomy, against Yvette Guenantin, commit an assault upon Yvette Guenantin and Marie Mentec, by willfully and feloniously striking Yvette Guenantin on the chin with his fists", substituting therefore the words "wrongfully strike Yvette Guenantin on the chin with his fists" of the excepted words not guilty, of the substituted words, guilty; and guilty of the Additional Charge as a violation of Article of War 96 with respect to Specification 2. Evidence was introduced of two previous convictions by summary court for failure to repair at the fixed time to the properly appointed place of assembly for guard duty and for absence without proper leave for about seven days, each in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing

authority may direct, for three years. The reviewing authority approved the sentence, ordered its execution, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Seine Disciplinary Training Center, Paris, France, as the place of confinement. The proceedings were published in General Court-Martial Order No. 158, Headquarters IX Air Force Service Command, APO 149, U.S. Army, 1 December 1944.

3. The only question for determination, presented by the record, is whether the membership of the court which tried accused "was in accordance with law with respect to * * * competency to sit on the court". The jurisdiction of this court and the validity of its judgment with respect to accused is conditional upon this "indispensable" requisite (MCM, 1928, par.7, p.7).

4. Major Starbuck Smith, Jr., was appointed law member of the court which tried accused, by Special Order No. 283, 12 October 1944, appointing the court. Subsequently, he sat as such member, during the trial of accused by that court, and participated in the hearing and determination of the case. Prior to the trial, on 3 October, acting on the charges in this case, Major Smith had prepared and signed the advice of the staff judge advocate, the instrument in which is embodied the advice given by the staff judge advocate to the appointing authority pursuant to Article of War 70. At page 3 of the record of the trial, the following colloquy appears:

"D C: The defense would like to inquire whether or not the law member may have been influenced or formed any opinion in this matter as a result of the fact of drafting the advice.

L M: The defense is correct in thinking that I drafted the advice sheet for the signature of Colonel Olmsted, the Staff Judge Advocate of the IX Air Force Service Command and to answer your question, I have not been prejudiced nor have I formed an opinion as to the guilt or innocence of the accused nor have I expressed such an opinion.

D C: We will accept the law member's statement.

TJA: What was that?

D C: We will accept the law member's statement.

(64)

TJA: Does the defense desire to challenge any member of the court for cause?

D C: The accused challenged Lieutenant Russell peremptorily.

TJA: Let the record show that Lt. Russell was challenged peremptorily and withdrew from the courtroom. Does the accused object to any member of the court now present?

D C: He does not.

The members of the court and the trial judge advocate were then sworn" (R3).

From the foregoing it appears that the defense did not challenge Major Smith's right to sit on the court during the trial. It also appears from the record that accused pleaded not guilty to the charges and specifications and interposed a defense. By reason of this latter fact the instant case may be distinguished from CM ETO 5349, Novak sustained on the record, where Major Smith also both wrote the advice of the staff judge advocate and sat at the trial as a member of the court, for in the Novak case accused pleaded guilty. There, the Assistant Judge Advocate General, in his report to the reviewing authority on the examination in this office of the record of trial pursuant to Article of War 50½, stated by way of pertinent opinion:

"3. The practice of having Major Starbuck Smith, the appointed law member, write the pre trial report in the office of the Staff Judge Advocate, should be stopped. Major Smith should have withdrawn from the court when the question was raised. In this case [Novak], his sitting was not considered prejudicial because of accused's plea of guilty".

5. The advice of the staff judge advocate, prepared and signed by Major Smith, attached to the record, incorporates a statement by him of the exact nature of his pre-trial activities in this case. He says therein:

"The attached charges have been referred to me for consideration and advice under the provisions of the 70th Article of War and par. 35b of the Manual for Courts-Martial (1928). I have carefully examined and considered the charges and accompanying papers, including the report of the investigation made in compliance with the 70th Article of War, and submit here-

with my report and recommendation".

By carefully examining the investigation made by an investigating officer pursuant to Article of War 70, the staff judge advocate necessarily reads statements, asserted facts, and records pertaining to an accused which may consist, both as to substance and form, of matter wholly incompetent as evidence on the trial. In the present case he learned of an absence without leave for two days in April 1943, which absence, under the law, could not be brought to the attention of the court. He also read statements of a hearsay nature which he could not have heard as a member of the court. To one versed in these procedural matters, it is obvious that the mind is consciously or unconsciously prejudiced and the judgment strengthened against an accused by what is read in the data accumulated by an investigating officer. It may be unfair to the court member in question to challenge the sincerity of the statement made by him that he had not been prejudiced against the accused as a result of his pre-trial efforts. But, as a general rule such efforts do lead to an opposite result. Particularly is this true of the trained legal mind possibly functioning with partisan zeal, committed to a degree by his recommendation that accused be tried, and later influenced, possibly, by pride of opinion.

Inherent in this situation is a clear violation of the principle of trial by a fair and impartial jury. This principle is as fundamental in military law as it is in civil law. The Manual for Courts-Martial, 1928, lists (par.58e, pp.45,46) the grounds of challenge for cause. It does not purport to cite all the grounds for such challenge. It says

"Among the grounds of challenge for cause are:

* * *

Sixth: That he [the challenged member] personally investigated an offense charged as member of a court of inquiry or otherwise.

Seventh: That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged.

Eighth: That he will act as reviewing authority or staff judge advocate on the case.

Ninth: Any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality. Examples: That he will be a witness for the defense; that he testified or submitted a written statement on the investigation of the charges, unless at the request of the accused; that he has officially expressed an opinion as to the mental condition of

CONFIDENTIAL

(66)

the accused; that he is a prosecutor as to any offense charged; that he had a direct personal interest in the result of the trial; that he is in any way closely related to the accused; that he participated in the trial of a closely related case; that he is decidedly hostile or friendly to the accused; that not having been present as a member when testimony on the merits was heard, or other important proceedings were had in the case, his sitting as a member will involve an appreciable risk of injury to the substantial right of an accused, which risk will not be avoided by a reading of the record. See in connection with this last example paragraph 38b and the fourth subparagraph of 38c". (Under-scoring supplied).

The Manual concludes this topic:

"Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party. A failure to sustain a challenge where good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused" (Ibid, par.58f, p.46).

Major Smith was disqualified from sitting as a member of the court within the letter and certainly within the spirit of this interdiction quoted from the Manual. First, it cannot be denied that he personally investigated the offense (Ibid., par.58e, Sixth). Whether an investigation is first hand or through the agency of others is a matter of degree of relationship with which the spirit of this section of the Manual is not concerned. Second, while action as reviewing authority or as staff judge advocate after the trial is specifically mentioned as a disqualifying function (Ibid., Eighth), there is certainly no degree of difference in the evil thus foreseen and specifically anticipated and that evil resulting as a result of similar functioning before the trial. Third, certainly this member of the court "submitted a written statement on the investigation of the charges", specifically mentioned as a disqualifying duty (Ibid., Ninth). And fourth, in his "advice" statement, Major Smith wrote:

"In my opinion, the charges are appropriate to the evidence, are sustained thereby and trial thereon by court-martial is warranted".

CONFIDENTIAL

(67)

This expressed opinion would seem to be disqualifying (Ibid., Seventh).

When the court, here, was being organized and the right of Major Smith was at issue, the Major stated

"I have not been prejudiced nor have I formed an opinion as to the ~~guilt~~ or innocence of the accused nor have I expressed such an opinion".

In CM 261181 the Board of Review held in effect:

"Accused were found guilty of assault with intent to commit robbery in violation of A.W. 93. The record showed that the law member of the court was also the Acting Staff Judge Advocate of the installation at which accused were tried. While functioning within the normal scope of his official duties as Acting Staff Judge Advocate, he had examined the charge sheet and the Investigating Officer's report pertaining to accused and also confessions made by the accused. Moreover, he had discussed the case with the Trial Judge Advocate who was then his assistant, prior to trial. The law member was challenged for cause by the defense counsel, but he averred under oath that he had formed no positive opinion and had expressed on opinion as to the innocence or guilt of the accused. The court refused to sustain the challenge. Held: The record is not legally sufficient to support the findings and sentence. The law member should have been excused, notwithstanding his contention that he had formed no opinion. In order properly to pass upon the correctness of the charges and specifications, it was necessary for him to make a careful study of the facts of the case. His mind, on the issue of guilt or innocence, could not help but be prejudiced against the accused and, even if it was not, the facts were such as to create a substantial doubt to that effect. It follows that the trial was not free from substantial doubt as to impartiality (MCM, 1928, par. 58e)" (Bull.Dig.Ops. Vol.III, No. 10, Oct.1944, sec.395(47), p.417).

In the present case, as noted, the defense did not challenge the law member. This is practically the only real point of difference between this case and that quoted above. However it

CONFIDENTIAL

(68)

does not appear from the record of trial that the defense was aware that the pre-trial advice of the staff judge advocate carried with it an expression of opinion that the charges were sustained by the evidence. In fact, it affirmatively appears that in refraining from challenging the law member for cause, the defense counsel expressly relied on the law member's unequivocal representation that he had not expressed an opinion.

In a reported case, not so fraught with the possibility of bias as that under consideration, where the president and law member of the court was the forwarding officer whose concurrence in the investigating officer's report was

"a routine expression of an opinion * * *
and did not amount to an opinion as to the
guilt of accused",

it was held that since the defense was made aware of these circumstances and refrained from challenging that the record was legally sufficient to sustain the findings of guilty and the sentence (Bull. Dig.Ops., JAG, Vol.I, 1942, p.15, CM 219582, Braden). The intimation is that an opposite result would have been reached had the defense not known these circumstances.

In a case very closely related, the forwarding officer who concurred in the recommendation of the investigating officer later sat as president and law member of the court which tried the accused.

"This disqualification was not disclosed at
the trial and there was nothing of record
to indicate that accused * * * waived his
right of challenge".

In this case it was held that on consideration of the record as a whole the failure to disclose this "disqualification" (so termed by the Board of Review) was prejudicial error (Dig.Ops.JAG, 1912-1940, sec.395 (47) p.233, CM 127588 (1929)).

How much greater is the need for protecting an accused from the possibility of bias flowing out of the pre-trial functioning of a staff judge advocate as compared with that of a mere forwarding officer. The latter, untrained in weighing evidence, in effect adopts and then forwards the opinion of the investigating officer. The staff judge advocate, on the other hand, submits his own, independent opinion.

The Manual for Courts-Martial specifically protects an accused whose rights are mistakenly or in ignorance waived. For

CONFIDENTIAL

(69)

instance, by specific provision of the Manual:

"A waiver of an objection does not operate as a consent where consent is required, and a mere failure to object does not amount to a waiver except as otherwise stated or indicated in this Manual" (MCM, 1928, par.126c p.137).

In CM 231469, Marcellino, the Board of Review commenting on this section of the Manual said:

"Although the defense may waive an objection to the admissibility of offered evidence, the attempted waiver is ineffective unless it clearly appears that the defense understood its right to object * * * had those rights been understood, the defense would not have permitted the introduction of hearsay documentary evidence directly contrary to the defense's theory of the case".

Even had counsel failed to object to Major Smith as a member of the court with full knowledge of all the facts, the Board of Review is of the opinion that the potential injury to accused was of so grave a character that the impropriety thus created would not have been waived. The Manual for Courts-Martial (par. 57a) provides that every member of the court shall, at the time the court organizes, disclose in open court every ground of challenge believed by him to exist, and (ibid., par.57b)

"if it appears from any such disclosure that a member is subject to challenge on any ground stated in clauses first to fifth of 58e [which includes the forming or expressing of a positive and definite opinion], and the fact is not disputed, such member will be excused forthwith".

This language is of the strongest protective quality. It calls for full disclosure and prompt action by the court in excusing the disqualified member. In fact it is not required that the defense object. It can not be said that in the instant case there was any ground for the "dispute" to which this last quoted section of the Manual refers. Under CM 261181 (supra) this law member should have disclosed his prior action and should have been excused without the necessity of a challenge by the defense.

CONFIDENTIAL

(70)

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

Frederick W. Schlotter Judge Advocate

John Bunnell Judge Advocate

Benjamin R. Sleeper Judge Advocate

CONFIDENTIAL

CONFIDENTIAL

(71)

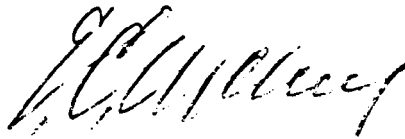
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War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 3 FEB 1945 TO: Command-
ing General, European Theater of Operations, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat.724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Private GEORGE L. BENNETT (33578870), 2136th Engineer Aviation Fire Fighting Platoon, IX Air Defense Command.

2. I concur in the opinion of the Board of Review and for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which he has been deprived by virtue of said findings and sentence so vacated be restored.

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



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

3 Incls:

- Incl. 1 - Record of Trial
- Incl. 2 - Form of action
- Incl. 3 - Draft GCMO

(Sentence confirmed by order of the Theater Commander 29 Mar 1945.
Findings and sentence vacated. GCMO 412, WD, 25 Aug 1945)

CONFIDENTIAL

CONFIDENTIAL

(73)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

12 JAN 1945

CM ETO 5459

UNITED STATES)

v.)

Captain ELMER C. KUSE
(O-1030053), 1262nd
Military Police Company
(Avn)

VIII FIGHTER COMMAND

) Trial by GCM convened at Army
) Air Forces Station F-341 (United
) Kingdom) 14 and 15 October 1944.
) Sentence: Dismissal, total forfeitures
) and confinement at hard labor for one
) year. The Eastern Branch, United
) States Disciplinary Barracks, Greenhaven,
) New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification 1: (Withdrawn)
Specification 2: (Withdrawn)
Specification 3: (Withdrawn)
Specification 4: (Withdrawn)
Specification 5: (Withdrawn)

Specification 6: In that Captain Elmer C. Kuse,
1262nd Military Police Company (Aviation),
AAF Station 238, APO 639, U.S. Army, being

5459

-1-
CONFIDENTIAL

(74)

indebted to Captain Richard G. Avent, Headquarters and Headquarters Squadron, AAF Station 238, APO 639, U.S. Army, in the sum of Twenty-three Pounds (£23-0-0) in English currency, having an equivalence in value in United States currency of approximately Ninety-two Dollars and Eighty-one Cents (\$92.81), said sum having been loaned to said Captain Elmer C. Kuse by said Captain Richard G. Avent on or about 15 July 1944, did, at AAF Station 238, APO 639, U.S. Army, on and after 31 July 1944, dishonorably fail and neglect to pay said debt.

Specification 7: In that * * * being indebted to 1st Lieutenant Edward J. Mallon, Jr., 47th Station Complement Squadron, AAF Station 238, APO 639, U.S. Army, in the sum of Twenty-two Pounds (£22-0-0) in English currency, having an equivalence in value in United States currency of approximately Eighty-eight Dollars and Seventy-seven Cents (\$88.77), said sum having been loaned to said Captain Elmer C. Kuse by said 1st Lieutenant Edward J. Mallon, Jr. on or about 10 June 1944 at AAF Station 238, APO 639, U.S. Army, said sum becoming due and payable on or about 2 July 1944, did, at AAF Station 238, APO 639, U.S. Army, on and after 2 July 1944, dishonorably fail and neglect to pay said debt.

Specification 8: (Disapproved by confirming authority)

Specification 9: In that * * * being indebted to Captain William H. Springstun, 2nd Replacement and Training Squadron, AAF Station 238, APO 639, U.S. Army, in the sum of Fifty Pounds (£50-0-0) in English currency, having an equivalence in value in United States currency of approximately Two Hundred and One Dollars and Seventy-five Cents (\$201.75), said sum having been loaned to said Captain Elmer C. Kuse by said Captain William H. Springstun, on or about 10 July 1944 at AAF Station 238, APO 639, U.S. Army, said sum becoming due and payable on or about 1 Aug. 1944, did, at AAF Station 238, APO 639, U.S. Army, on and after 1 Aug. 1944, dishonorably fail and neglect to pay said debt.

Specification 10: (Withdrawn)

5459

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

Specification 1: In that * * * being indebted to Master Sergeant Frank A. Soska, Headquarters and Headquarters Squadron, AAF Station 238, APO 639, U.S. Army, in the sum of Five Pounds (£5-0-0) in English currency, having an equivalence in value in United States currency of approximately Twenty Dollars and Eighteen Cents (\$20.18), said sum having been loaned to said Captain Elmer C. Kuse by said Master Sergeant Frank A. Soska on or about 25 July, 1944 at AAF Station 238, APO 639, U.S. Army, said sum becoming due and payable on or about 1 August 1944, did, at AAF Station 238, APO 639, U.S. Army on and after 1 August 1944, dishonorably fail and neglect to pay said debt.

Specification 2: In that * * * being indebted to First Sergeant Robert P. Glisson, 1262nd Military Police Company (Aviation), AAF Station 238, APO 639, U.S. Army, in the sum of Nine Pounds Ten Shillings Sixpence (£9-10-6d) in English currency, having an equivalence in value in United States currency of approximately Thirty-eight Dollars and Forty-four Cents (\$38.44), said sum having been loaned to said Captain Elmer C. Kuse by said First Sergeant Robert P. Glisson over a period from 18 June 1944 to about 21 September 1944 at AAF Station 238, APO 639, U.S. Army, said sum becoming due and payable on or about 21 September 1944, did, at AAF Station 238, APO 639, U.S. Army on and after 21 September 1944, dishonorably fail and neglect to pay said debt.

Specification 3: In that * * * being indebted to Corporal William J. Adams, 2nd Replacement and Training Squadron, AAF Station 238, APO 639, U.S. Army, in the sum of Twenty Pounds (£20-0-0) in English currency, having an equivalence in value in United States currency of approximately Eighty Dollars and Seventy Cents (\$80.70), said sum having been loaned to said Captain Elmer C. Kuse by said Corporal William J. Adams over a period from about 3 August 1944 to about 17 August 1944 at AAF Station 238, APO 639, U.S. Army, said

5459

(76)

sum becoming due and payable on or about 1 September 1944, did, at AAF Station 238, APO 639, U.S. Army on and after 1 September 1944, dishonorably fail and neglect to pay said debt.

Specification 4: (Finding of not guilty)

Specification 5: (Finding of not guilty)

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

Specification: In that * * * did, at Army Air Forces Station 238, APO 639, U.S. Army, on or about 28 September 1944, wrongfully and unlawfully attempt to prevent the preferring of court-martial charges against him and endeavor to obstruct the due administration of justice by making the following statements to Colonel Coates, Air Corps, Commanding Officer, of Army Air Forces Station 238, APO 639, U.S. Army, when and where said Colonel Coates, Air Corps, as aforesaid, was in the execution of his office; to wit: - "If all this is brought out it will involve other high ranking officers on this station", "Particularly, Colonel, it involves you", "I have information to the effect that two soldiers now in confinement at the station guardhouse have observed you in bed with a woman", "I must defend myself inasmuch as everything that can be, is being collected against me as to the charges being preferred against me", or words to that effect, and making the following statements to 1st Lieutenant Mitchell E. Panzer, Headquarters and Headquarters Squadron, Army Air Forces Station 238, APO 639, U.S. Army, appointed by Colonel Coates, Air Corps, as aforesaid, to investigate the activities of Captain Elmer C. Kuse, to wit: "I am not particularly worried, because if the Colonel decides to prefer charges, I'll tell a few things I know involving the Colonel and a number of other officers that will bust things wide open", or words to that effect, thereby seeking to persuade Colonel Coates, Air Corps, Commanding Officer, as aforesaid, to quash the investigation into the activities of Captain Elmer C. Kuse, when and where said Captain Elmer C. Kuse, 1262nd Military Police Company (Aviation) had been placed in arrest in quarters and relieved as Commanding Officer of the 1262nd Military Police Company (Aviation).

5459

He pleaded not guilty, and was found not guilty of Specification 4 and 5, Charge II, and guilty of all other Specifications and all charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding Officer of the VIII Fighter Command, 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, disapproved the finding of guilty of Specification 8 of Charge I, confirmed the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution will be presented as to each specification in numerical order. Accused was commanding officer of the 1262nd Military Police Company stationed at Army Air Force Station 238 (North Ireland) as well as Provost Marshal of the station, on 23 September 1944, and had been so assigned for some months (R12, 21,36). On 25 September, Colonel Philip D. Coates, Commanding Officer of the station relieved him from both duties. Accused had been informed on 23 September that charges against him were being prepared by Lieutenant Panzer, station legal officer (R13).

Specification 6, Charge I

Captain Richard G. Avent, Air Corps, was at Station 238 on 15 July 1944 about which time accused borrowed a total of £33 from him over a period of a week, agreeing to repay him before pay day which was 31 July (R25). £10 of this was later repaid out of £20 accused received from Sergeant Adams in the latter part of August and only after repeated requests for the money, (R26,88) leaving £23 still unpaid (R26).

Specification 7, Charge I

First Lieutenant Edward J. Mallon, Jr., 47th Station Complement Squadron, was also assigned at Station 238 in the summer of 1944, when on 10 June accused asked him for and received a loan of £17 and on the next day asked for and received an additional £5. Nothing was said at the time about repayment but about 25 July Mallon asked accused for his money as he was expecting to leave the station 1 August. Accused said he didn't have any money at that time. He was asked for the money several times thereafter with no results (R29) claiming he was "always broke". The debt remains unpaid (R30).

Specification 9, Charge I

Captain William H. Springstun, 2nd Replacement Training Squadron, Station 238, testified that on 10 July 1944 accused borrowed

(78)

£50 from him and was told that repayment within the next couple of paydays would be all right. Springstun did not remember accused saying what he wanted the money for or telling him that he was financially involved (R90). He asked accused for the money some two months later, saying he needed it and accused although not denying the debt, simply answered that he didn't have the money. He made no arrangements to pay and still owes the entire amount (R24).

Specification 1, Charge II

Master Sergeant Frank A. Soska was on duty at Station 238 on 25 July, when accused stopped him on the street and asked for a loan of £5. Soska borrowed the money and gave it to him (R35,36). By request he went to accused's office to be repaid the money but it was never received (R37-38).

Specification 2, Charge II

First Sergeant Robert P. Glisson was a member of accused's company on duty at Station 238. By request he got accused's "PX" rations and loaned him various sums, together aggregating £9-10-6d over the period from 18 June to 21 September 1944. These requests were made during duty hours (R41). The amount is still unpaid (R42).

Specification 3, Charge II

Sergeant William J. Adams, 2nd Replacement and Training Squadron, was on duty at Station 238 on 17 August 1944 when accused asked to borrow £5 of him. Accused said "he had a little party over [in Machinery] there the night before last and he told the woman he would be over there to pay it". About three or four days later he said he owed one of the boys in his organization and he wanted £10. When asked about repayment, he said he expected a letter from home shortly. He had a pair of dice that were "hot" and he would like to get even in a game. Altogether Adams loaned accused £20 and although asked for it many times, accused never paid it (R47-48). Adams was selling whiskey on the station and accused several times took him out to buy it (R51) and was paid a commission on it at the time. This £20 was over and above any commissions due accused (R52-53).

Specification, Additional Charge

On 28 September accused requested of Colonel Coates permission to call a member of the Royal Ulster Constabulary in connection with the defense of charges then pending against him (R13,91). The next day accused advised Colonel Coates that the day before he had caused a civilian's house near the station to be raided by the "R.U.C.", finding there considerable liquor and government property apparently from the Post Exchange; that this property was ostensibly for black market sale on the station and if these facts were brought to light it would involve many of the high ranking officers on the station (R13).

3459

When asked for particulars, accused was slow to answer but when pressed said, "Particularly, Colonel, it pertains to you". He then stated the allegations against the Colonel pertained to another incident, being information secured from two prisoners in his custody who, had while working in the vicinity of the Colonel's quarters accused claimed, looked in and saw him with a woman in his rooms. Accused left to get their names and when he returned, the Colonel requested him, in the presence of several other officers, to repeat his statements which accused then declined to do, and stated he would prefer to give the information to higher headquarters. Accused was then informed that an additional Charge would be preferred against him and that he would remain in arrest in quarters (R13-14). No charges were ever made by accused against the Colonel (R15) and accused did not request that the charges against himself be withdrawn (R16,20).

4. Accused being advised of his rights as such, became the only witness for the defense. He testified that he owed Captain Avent. They were gambling and he borrowed from Avent in small amounts and agreed to repay him next payday. By then however he had some returned checks coming in given by him to cover losses in gambling beginning several months previous (R54) and he was getting what money he could to cover them (R55). On 7 July he gave Lieutenant Whitworth £10, on 31 July £51-11-7 and on 31 August £35 to deposit against such checks (R56). He had borrowed £33 from Avent and repaid £10 (R57,65) after repeated requests, with £10 of the £20 he secured from Sergeant Adams (R88). He testified that he told Avent the financial situation he was in and also that he wired his father for money and wrote his wife (R57) asking her to cash some war bonds. The loan from his father was refused and no reply came from his wife (R58).

He admitted owing the debt to Mallon and to Springstun. He owed Springstun £10 and on 7 July borrowed £40 more to apply on these checks and "at that time I explained the situation to" Springstun saying that he didn't know when he could pay the money back (R58). He testified that he borrowed £5 from Sergeant Soska to give to Sergeant O'Brian and he still owed Soska the £5. He denied that he ever borrowed any money from Sergeant Glisson or that Glisson ever secured any post exchange rations for him (R60,66-67).

He admitted going to Balamena with Adams to get whiskey (R62) but denied Adams paid him a commission on it (R70). He testified that Adams gave him £20 when he asked Adams "What am I getting out of this deal" (trips for whiskey) (R71) but that he took the money for use as evidence in performance of his duties as Base Provost Marshal (R62) though he had no witness to being given the money, did not mark it for identification (R82) and used £10 of it to repay Captain Avent (R68,88) and just used up, spent the other £10 (R68).

CONFIDENTIAL

(80)

He testified he called on Colonel Coates on 28 September and explained to him the results of a raid (R63). Since being relieved of his command, he had been given various items of information, including some things about the Colonel. He asked Colonel Coates' permission the night before to have the raid made; "PX" supplies, whiskey and various items of government property were found. Colonel Coates stated, "it seems to me as though you are trying to make counter charges against charges I have made against you", and insisted on accused telling him the story and demanded the names of his informants. His attitude dumbfounded accused who asked permission to go to his quarters for the names, during which time he decided to withhold the "names of these boys and I wanted to protect them if possible". When he returned the Colonel was waiting with several officers whom he told he wanted as witnesses to "an allegation against me which I consider as blackmail" and directed accused to repeat his allegations before the witnesses or withdraw it. Accused then stated he would keep the information to be given to higher command, was dismissed and later in the day was placed in arrest (R13-14, 63-64). Accused did not request that charges against himself be dropped (R64). He was informed in July something about Colonel Coates but didn't investigate it and didn't mention it to the Colonel until after he was relieved of his command 25 September (R73). This information was secured from two prisoners (R74) by Sergeant O'Brian and passed on by him to accused (R76). The day before accused saw Colonel Coates, he told Lieutenant Panzer "if all this thing is investigated and I have to tell everything that has been going on here it is going to blow the roof off the place" but he denied knowing at the time that Panzer was the "T.J.A." at the station preparing the charges against him (R75). He had heard that Sergeant Adams was going to see the Colonel about the £20 he claimed accused owed him and he went to Colonel Coates and "explained to him I thought Sergeant Adams had got wind of me checking up on him and these other people on this deal and they had cooked up an idea where they could put the skids under me and discredit anything I could say about the situation they were in" (R76). He gave Lieutenant Whitworth £196-11-7 to cover his outstanding checks without knowing what his obligations were (R79-80) but he believes they were in excess of the amount raised. None of his September pay was applied on his obligations but he paid a civilian friend some money borrowed and a few other small bills and has some money left. He had never asked for a statement (R86) and could not even approximate what his bank balance was (R80). He admitted that his difficulties arose through gambling (R89).

5. "If an officer or a soldier by his conduct in incurring private indebtedness or by his attitude toward it or his creditor thereafter reflects discredit upon the service to which he belongs, he should be brought to trial for his misconduct" (MCM, 1928, par.152b, p.188).

Accused had borrowed from Captain Avent on 15 July promising to repay him by 31 July and though repeated requests for the money were thereafter made to him but £10 was never repaid. Accused

5459

CONFIDENTIAL

(81)

must have known at the time he borrowed the money that he would be unable to repay it for an indefinite time. His indebtedness to Lieutenant Mallon, although acknowledged by accused remained entirely unpaid and repeated request for payment over a period of months were met by the indifferent answer of accused that he was "broke". He borrowed a considerable sum from Captain Springstun, also at a time when he knew he would be unable to repay it, and when after two months the lender stated he needed the money, accused indifferently answered only by saying he had no money. While "unless failure or neglect to pay a debt involves evasion or indifference to just obligations, there is no offense cognizable under the Articles of War" (CM 240754, Raquet; CM 207212, Thompson), accused herein obtained the loans without disclosing his financial situation to be involved, met repeated requests for repayment with complete indifference toward his admitted obligations and failed to apply any of his September pay on these debts though at the time of the trial he still had money. Accused's failure to pay the debts mentioned in Specifications 6, 7 and 9, Charge I under the circumstances and in the manner shown by the record of trial clearly becomes conduct discreditable both to accused and to the service in which he is an officer.

The borrowing of \$5 from Sergeant Soska, an enlisted man whom accused knew had to borrow the money before he could lend it, together with accused's indifferent failure to repay the loan, and his denial of the debt to Sergeant Glisson, an enlisted man and First Sergeant of accused's own company (Specifications 1 and 2, Charge II), surely falls in the class of "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentlemen, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms" (MCM, 1928 par.151, p.186). While accused acknowledged receiving \$20 from Sergeant Adams, an enlisted man, he not only failed to repay the money but, while claiming he took it in his capacity of Provost Marshal only as evidence against Adams, used the money personally. Much more than mere failure to pay these debts was involved and the offenses were properly charged under Article of War 95 (Ibid., par.151, p.186). The explanation by accused of his conduct resulting in the additional Charge and Specification being filed against him, falls far short of exonerating him. If he actually had any hint of misconduct on the part of Colonel Coates, he until he himself was removed as Provost Marshal did nothing about it. He then informed the officer investigating the charges against him that if and when he (accused) told all he knew it would blow the roof off the place. He failed to file any charges against Colonel Coates or in any way to substantiate his verbal threats which had the appearance at least of an attempt to discourage the proceedings against him. Accused's actions and statements were certainly "to the prejudice of good order and military discipline".

CONFIDENTIAL

5459

CONFIDENTIAL

(82)

6. The charge sheet shows accused to be 28 years old. He served as an enlisted man in the Cavalry 1937-1942 and entered on extended active duty 30 May 1942.

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

8. Conviction of an offense under Article of War 96 is punishable at the discretion of the court. A sentence of dismissal is mandatory upon conviction of an officer under Article of War 95. Designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is proper (AW 42; Cir.210, WD, Sept. 14, 1943, sec.IV, as amended).

Edward D. Schuler Judge Advocate

John L. Hammett Judge Advocate

Benjamin R. Sleeper Judge Advocate

CONFIDENTIAL

5459

CONFIDENTIAL

(83)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 12 JAN 1945 TO: Command-
ing General, European Theater of Operations. APO 887, US. Army.

1. In the case of Captain ELMER C. KUSE (O-1030053), 1262nd
Military Police Company (Avn), attention is invited to the foregoing
holding by the Board of Review that the record of trial is legally suf-
ficient to support the findings of guilty and the sentence, which hold-
ing is hereby approved. Under the provisions of Article of War 50¹/₂,
you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this
office, they should be accompanied by the foregoing holding and this
indorsement. The file number of the record in this office is CM ETO
5459. For convenience of reference, please place that number in
brackets at the end of the order (CM ETO 5459).



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

(Sentence ordered executed. GCMO 19, ETO, 20 Jan 1945)

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(85)

BOARD OF REVIEW NO. 1

29 DEC 1944

CM ETO 5464

UNITED STATES

v.

Private EARL E. HENDRY
(39567133), 1194th Military
Police Company (Aviation),
358th Fighter Group

XIX TACTICAL AIR COMMAND

Trial by GCM, convened at Officers' Club, Hotel de Haute Mere Dieu, Chalons-sur-Marne, France, 9, 10, 11, 20 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

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

Specification 1: In that Private Earl E. Hendry, 1194th Military Police Company, (Avn), XIX Tactical Air Command, did, at Boucey, France, on or about 23 August 1944, unlawfully enter the dwelling of Marie Pichard Veuve Halleu, with intent to commit a criminal offense, to wit, rape, therein.

Specification 2: In that * * * did, at Boucey, France, on or about 23 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Marie Pichard Veuve Halleu, by willfully and feloniously striking her in the face with a carbine, by forcibly squeezing her neck with his hands, and by stripping a night dress from her body.

5464

CONFIDENTIAL

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * * was at Boucey, France,
on or about 23 August 1944, drunk in uniform in
a public place, to wit, the streets of Boucey,
France.

He pleaded not guilty to Charge I and its specifications, guilty to Charge II and its Specification and was found guilty of both charges and their respective 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 15 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The only question requiring consideration in the instant case is whether the evidence is legally sufficient to support the findings that it was accused who unlawfully entered the dwelling house of Madame Marie Hellen and assaulted her with the intent to commit rape upon her. No evidence was presented by the defense in denial of prosecution's evidence. Therefore, no issue of fact arose in the case. The court by its findings concluded it was the accused who committed the crimes. The duty of the Board of Review, sitting in appellate review, is to examine the record of trial for the purpose of determining whether there is substantial, competent evidence to support this finding of the trial court. It will apply the following principles:

"Convictions by courts-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 springing from such experience" (CM 223336 (1942), Bull.JAG, Aug 1942, Vol.I. No.3, sec.422, pp.159,162).

"In the exercise of its judicial power of appellate review, under A.W. 50½, the Board of Review treats the findings below as presumptively correct, and attentively 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 frustration of justice" (CM 192609, Hilms, 2 E.R. 19,30).

"The weighing of the evidence and determining of its sufficiency, the judging of credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate facts were functions committed to the court as a fact-finding tribunal. Its conclusions are final and conclusively binding on the Board of Review where the same are supported by substantial competent evidence" (CM ETO 895, Fred Davis et al).

The Board of Review (sitting in the European Theater of Operations) has scrupulously observed the foregoing principles (CM ETO 106, Orbon; CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 422, Green; CM ETO 492, Lewis; CM ETO 804, Ogletree et al).

The victim was unable to identify her assailant who unlawfully broke into and entered her dwelling house and assaulted her. As a consequence, proof of his identity is dependent upon relevant facts and circumstances surrounding the commission of the offenses - circumstantial evidence as it is ordinarily designated, but which properly speaking is evidence intrinsic in the factum of the crime. The Board of Review has heretofore considered the legal rules applicable to such proof in CM ETO 2686, Brinson and Smith; CM ETO 3200, Price; and CM ETO 3837, Bernard Smith. Reference is made to said holdings for a detailed discussion of the problem. The Board of Review herein confirms the principles therein enunciated, and applies the same to the facts proved in this case.

The evidence upon which the court based its finding that accused was the malefactor is cogently stated by the Staff Judge Advocate in his review as follows:

- "1. That accused on the night in question was in Boucey at a cafe drinking, and that he left about the time of the crime in the direction of his camp, which was also in the direction of Mme Helleu's house. [R72,86; Pros.Ex.B]
2. That accused was seen shortly after the time of the crime at another civilian house and that at that time he had blood on one of his hands. [R50,51,118,119,125; Pros.Ex.B]
3. That the day following the crime, accused requested several other enlisted men to go with him to the house (mentioned in 2 above) to determine whether he could be identified by any of the women there. [R51,59,74,77; Pros.Ex.B]
4. That prior to investigation the accused went to one of his company officers and said that he was 'in hot water' concerning the incident. [R26]

CONFIDENTIAL

5. That accused at first denied, then admitted he had been wearing his clothes that were stained on the night of 23 August 1944. [R24-27,32,42,44,83]

6. That the fountain pen top, bearing the initials 'EH', which are also the initials of the accused and which was identified as his property, was found in the house in which the offense was committed, immediately after the commission of the offense. Its presence there was not explained. [R63,68,73; Pros. Ex.A]

7. That accused made an explanation of the stains on his clothes which was not substantiated by fact. [R26,27,32,48,83] "

(Trial record references have been supplied to the above quotation).

The foregoing facts form a convincing and substantial body of evidence identifying accused as the assailant. The following quotation is particularly appropriate:

"With this evidence before the court, it was its province and duty to evaluate it, judge of the credibility of witnesses, and reach a determination whether accused was the man who committed the atrocious crime. The evidence identifying him as the culprit was substantial and its reliability and trustworthiness are unimpeached. Under such circumstances the findings of the court will be accepted as conclusive and final up on appellate review" (CM ETO 3375, Tarpley).

The Board of Review is of the opinion that the record of trial contains competent, substantial evidence which supports the court's finding that accused unlawfully entered Madame Helleu's dwelling and assaulted her with intent to commit rape.

4. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of accused's guilt of housebreaking (Charge I, Specification 1) (CM ETO 78, Watts; CM ETO 3754, Gillenwaters; CM ETO 4589, Powell et al); of assault with intent to commit rape (Charge I, Specification 2) (CM ETO 4203, Barker and Hood, and authorities therein

CONFIDENTIAL

cited); and of drunkenness in uniform in a public place (Charge II and Specification) (CM ETO 2533, Moffit) and legally sufficient to support the sentence.

5. The charge sheet shows that accused is 19 years, 11 months of age, and was inducted 23 March 1943 to serve for the duration of the war plus six months. He had no prior service.

6. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455) and for the crime of housebreaking by Article of War 42 and sections 22-1801 (6:55) and 24-401 (6:401), District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused is authorized (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4) and 3b). Confinement of accused in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is permissible but not advisable. (Cf: CM ETO 3362, Shackleford)

Frank E. [illegible] Judge Advocate
Edward L. [illegible] Judge Advocate
Edward L. [illegible] Judge Advocate

CONFIDENTIAL

(90)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 DEC 1944 TO: Commanding General, XIX Tactical Air Command, APO 141, U. S. Army.

1. In the case of Private EARL E. HENDRY (39567133), 1194th Military Police Company (Aviation), 358th Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455) and for the crime of house-breaking by Article of War 42 and sections 22-1801 (6:55) and 24-401 (6:401), District of Columbia Code. The United States Penitentiary, Lewisburg, Pennsylvania, should ordinarily be designated as the place of confinement for an accused found guilty of the above offenses when he is either over 31 years of age or the sentence includes confinement in excess of ten years (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4) and 3b). The authority cited by the Staff Judge Advocate in his review in support of his designation of place of confinement is inapplicable. Accused was found guilty of committing two of the most serious crimes denounced both by civil and military law. His confinement should be in the penitentiary. I therefore recommend that by supplemental action (to be returned to this office for attachment to the record of trial) you change the place of confinement to United States Penitentiary, Lewisburg, Pennsylvania.

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 CM ETO 5464. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5464).



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

5464

CONFIDENTIAL

(91)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

16 JAN 1945

CM ETO 5465

UNITED STATES

v.

First Lieutenant GRADY E.
McBRIDE, JR. (O-1295477),
Company K, 117th Infantry

30TH INFANTRY DIVISION

Trial by GCM, convened at Heerlen,
Holland, 30 September 1944. Sen-
tence: Dismissal, total forfeitures
and confinement at hard labor for one
year. Eastern Branch, United States
Disciplinary Barracks, Greenhaven,
New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

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

Specification: In that First Lieutenant Grady E. McBride, Jr., Company "K", 117th Infantry, about two miles north of Domfront, France, on or about 14 August 1944, in command as leader of the third platoon, while before the enemy, was drunk and unfit for military duty, endangering the safety of his platoon.

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

CONFIDENTIAL

5465

CONFIDENTIAL

(92)

Specification: In that * * * having received a lawful order from Lieutenant Colonel Samuel T. McDowell, to sit down and remain at a designated spot until a receipt of further orders, the said Lieutenant Colonel Samuel T. McDowell being within the execution of his office,, did near Domfront, France, on or about 14 August. 1944,, fail to obey the same.

He pleaded not guilty to and was found guilty of both charges and specifications. No evidence of previous convictions was introduced. He was sentence 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 one year. The reviewing authority, the Commanding General, 30th Infantry Division, 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, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The prosecution's evidence, which was undisputed, was substantially as follows:

On 14 August 1944, in the vicinity of Domfront, France, (R7), the Third Battalion, 117th Infantry was "getting ready to push up through a draw, through which ran a small river or creek" (R8), and was in range of enemy mortar, artillery and small arms fire. After its commanding officer, Lieutenant Colonel Samuel T. McDowell (R6), had given "attack orders" to his officers, a company commander reported that one of his lieutenants was drunk and "he did not want him in his company while we were in contact with the enemy". McDowell investigated and found accused "in that condition". He was "talking in a loud and vociferous voice", was "very unsteady" (R7), "definitely under the influence of whiskey" (R8) and "saying in a loud voice what he would do to the enemy" (R9). When McDowell called to him there was a fence between them and "he fell over the fence in my direction". McDowell told him, "a man in his condition had no business trying to lead troops and for him to come with me" (R7). McDowell conducted him to the place where the attack orders had been given and told him "to sit right there until further orders from me" (R7). Accused sat down (R8). McDowell continued giving attack orders and then

"got Lt Kessler, my liaison officer and told him to take Lt McBride back to the C.P. I took him to the place where I

5465

had left Lt McBride and he was not there.
His equipment was there but he had left" (R7).

McDowell looked for him, but, not finding him, went on with his company commander "between five and nine hundred yards" where they "contacted the enemy" (R7).

First Lieutenant Samuel Kessler, Company K, 117th Infantry (R9), testified that he was ordered by McDowell to get Lt. McBride and carry him back to the Regiment. When he received the order he

"turned to Lt McBride and told him I was not ready to go back right then but would be in a few minutes. I stayed there with the Colonel for about ten minutes and then looked for Lt McBride and could not find him" (R10).

He so reported to McDowell and "went back to the Regiment". He returned to the Third Battalion in about an hour and a half when McDowell said to look for Lt McBride and take him back to the Regiment". Kessler then

"went back to where I had seen Lt McBride first and I looked for him and could not find him until I looked over a hedge-row fence and saw him lying on the ground sleeping" (R10).

Accused was about 12 yards from the place where Kessler was to "pick him up" (R11). Kessler awoke the accused and noticed he "was a little better after the nap but prior to that time he was drunk" (R10).

Second Lieutenant Clyde H. Burch, 30th Signal Company, the investigating officer, explained to accused his rights under Article of War 24. Accused voluntarily signed a statement which was offered and received in evidence without objection (R12-13; Pros.Ex.1), reading as follows:

"I the undersigned, after being duly sworn and advised of my rights under the 24th Article of War by Lt. Burch, the Investigating Officer, who read and explained said article to me, make the following statement:

On or about July 15, 1944, I was knocked out by shell fire near St. Lo, France. I reported to the Battalion Surgeon and was sent to the

5465

CONFIDENTIAL

(94)

105th Collecting Station. After about five days stay i was sent to the 618th, Clearing Station where I stayed for about two weeks. At the end of this time I was returned to duty thru the 105th Med Bn to the Rear-Eschelon, Thirtieth Inf. Division. I here asked WO Pearse to have me reclassified. Mr. Pearse told me that it would be necessary for me to speak to the Regimental Commander about this so I went to the Service Company 117th Inf. with intent to see the Regt. Commander. At that time there was a German Counter-attack being repulsed in that sector. I got into a foxhole and stayed there for some time and returned to the Rear Eschelon on the Mail truck. That day I asked Captain Buckley if Reclassification couldn't be carried on without my returning to the forward Echelon. Capt Buckley replied that he would take care of it. On the morning of August 13, 1944, Captain Royalty, Regimental Adjutant, came to the rear eschelon and told me that the Regimental Commander wanted to see me at the 105th Med Bn, where he was then a patient. I reported to him and was ordered to report to my company and take charge of my platoon. I returned to the rear eschelon gathered my equipment and that afternoon went with Capt. Royalty to the regimental c.p. and from there rejoined my company, and took charge of my platoon. I spent the night with my platoon and the next morning entrucked with the Company and proceeded to a point where we detrucked about two miles north of Domfront. On the way to Domfront one of the men in my platoon had a canteen full of wither calvados or cognac. I took approximately five or six drinks. I had no intention of making myself drunk but thought that a few drinks would settle my nerves sufficiently to carry thru with the coming action. when we reached our detrucking point I realized that I was in no condition to lead the platoon and turhed the platoon over to the platoon Sgt. and instructed him to disperse the platoon in an joining field as I could hear Artillery falling to our right and knew that the artillery would take too many casualties if they had observation on our detrucking point. I sat down and in a few minutes was told that the

5465

-4-

CONFIDENTIAL

CONFIDENTIAL

(95)

Battalion Commander wanted to see me. I immediately started to follow the runner to the Battalion Cmdr, but do not remember falling over a wire. I reported to the Bn Cmdr and was told by him to sit down along side a building. I do not remember the Bn Cmdr ordering me to remain where I sat until further orders. After sitting there for a few minutes I became sick and went behind the building to vomit. After finishing I sat down behind the building and fell asleep and slept until Lt. Kessler came by and carried me in his jeep to the Regt C.P. On arrival at the Command Post Col. Johnston told me to sit down under a tree which I did. And remained there until Major Patterson came by and told me to follow him to the Regimental Aid Station, which was in the adjoining field. I gathered my equipment and followed the Major part of the way. At that time Artillery fire fell in the field then occupied by the aid station and I ran some distance up the road to another field. I slept there for about three hours and was returning to the Aid station when I met Capt Royalty who told me to report to Hq Co., I did this and spent the night there and returned to the rear Eschelon the next day, where I have been in confinement since. I do not remember being examined by Capt. Mathwig on the date specified in his statement.

s/ Grady E. McBride Jr.
t/ GRADY E. MC BRIDE, jr
2nd Lt. Infantry
Co K, 117th Inf."

4. After receiving an explanation of his rights (R13-14), accused testified that he had been in the 30th Division as a commissioned officer since 16 October 1942. Prior thereto he was a personnel clerk in the First Division, Battalion Sergeant Major for two years and then went to Officer Candidate School. When he landed in France with the 30th Infantry Division, he was Third Platoon leader in Company K until he^{was} sent back for battle exhaustion. He had led "eight or so" patrols in enemy territory (R14) under fire and did not lose any of his men. On 14 August 1944 he obtained five or six drinks from "one of the men in a truck", either cognac or calvados, and it made him sick. He remembered Lieutenant Colonel McDowell's telling him to sit down and sat down as directed, but then became sick and vomited "at the rear of the house". He "fell asleep there and stayed there until Lt Kessler picked me up". It was approximately 15 yards from where he was told to stay to where Kessler found him. He described his treatment for battle exhaustion after he was "knocked out" by the concussion of an artillery shell on 15 July (R15). When he thereafter returned to his organization he was physically fit, but "not mental".

5465

CONFIDENTIAL

(96)

fit" (R16).

Cross-examined by the prosecution, he testified he understood that the duty of a platoon leader in combat is to lead his platoon (R16).

Major Vivion F. Lowell, 105th Medical Battalion, related the circumstances of accused's admission to the Clearing Station on 16 July as a case of combat exhaustion and his return to duty on 1 August, when he seemed a normal individual and ready for duty (R16-17). First Sergeant Walter F. Simmons, Company K, 117th Infantry, was with accused on one night patrol and the general opinion of him in his company was that he "was an excellent soldier and demanded strict discipline at all times" (R18).

Lieutenant Colonel William H. Nicholas, Division Chaplain, 30th Infantry Division, from his knowledge of accused

"would say his character was exemplary and above reproach, but regarding his ability as an officer, I could not say because I don't know" (R19).

Captain James N. Wray, Headquarters, 120th Infantry, was the regimental adjutant during the winter of 1942 and 1943 when the regiment was in Camp Blanding, Florida. Accused was then assistant personnel officer and "was a very efficient man. I never knew of anything unsatisfactory about his work at all" (R20). Accused's 66-1 card was offered and received in evidence, without objection, with the understanding it would be withdrawn at the close of the trial (R20; Def.Ex.A). Eight entries regarding accused's work with various organizations from 13 November 1943 to 30 June 1944 showed seven characterized as excellent and one satisfactory.

5. With reference to Charge I and Specification, the gravamen of the offense alleged is that accused

"in command as leader of the third platoon, while before the enemy, was drunk and unfit for military duty, endangering the safety of his platoon".

It was clearly and conclusively established by accused's own testimony as well as by the prosecution's evidence that he was drunk and unfit for duty while before the enemy at the time and place alleged. He testified that he "realized that I was in no condition to lead the platoon and turned the platoon over to the platoon Sgt. * * *". There was no evidence showing that the safety of the platoon was endangered by his conduct. It has repeatedly been held that such conduct by an officer will support a conviction under Article of War 96 (CM 227651, Hess; CM 228053, Peterson, 16 B.R. 59; CM 228585, Howard, 16 B.R. 267;

CM 230026, Bullard, 17 B.R.279; CM 233766, Nicholl, 20 B.R. 121; CM ETO 580, Gorman; CM ETO 439, Nicholson), but, in view of the language of the Specification and the circumstances shown by the evidence, the question is presented whether or not the record of trial supports a finding of guilty of "conduct unbecoming an officer and a gentleman" under the 95th Article of War.

"'Conduct unbecoming an officer and a gentleman' may thus be defined to be:— Action or behavior in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; Or action or behaviour 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's Military Law and Precedents - Reprint, p.713).

There is no difficulty in condemning accused's conduct as "dishonoring or otherwise disgracing the individual as an officer", but does it "seriously compromise his character and standing as a gentleman"?

'Acts indeed which are discreditable to the officer can scarcely fail to involve the reputation of the individual as a gentleman; but there may be acts which, in the estimate of a court-martial, may be unbecoming to an accused party in the one capacity without being necessarily unbecoming to him in the other. We have seen that to except, from a conviction upon a charge of 'Conduct unbecoming an officer and a gentleman', the words--'and a gentleman', and find the accused guilty of conduct unbecoming an officer only, would be quite unauthorized, the latter not being an offence specifically known to the military law. To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it 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.

It is to be observed that while the act charged

(98)

will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history. It may equally well have originated in some private transaction of the party, (as a member of civil society or as a man of business,) which, while impeaching his personal honor, has involved such notoriety or publicity, or led to such just complaint to superior military authority, as to have seriously compromised his character and position as an officer of the army and brought scandal or reproach upon the service.* * *

The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by the fact that a conviction of the same must necessarily entail the penalty of dismissal. The Article in the fewest words declares that a member of the army who misconducts himself as described is unworthy to abide in the military service of the United States. The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behaviour complained of, or rather his worthiness, morally, to remain in it after and in view of such behaviour, is perhaps the most reliable test of his amenability to trial and punishment under this Article" (Winthrop's Military Law and Precedents - Reprint, pp.711-713).

It has long been recognized that proof of

"Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiar shameful conduct or disgraceful exhibition of himself by the accused" (Winthrop's Military Law and Precedents - Reprint, p.717)

will sustain a charge of "conduct unbecoming an officer and a gentleman" (CM ETO 3303, Croucher; CM 229228, Griffin, 17 B.R. 85; CM 227651, Hess, supra; CM ETO 1197, Carr).

In the instant case, it was not charged that accused's conduct included "drunkenness of a gross character", nor did the evidence show that his drunkenness could properly be so described. He himself recognized he "was in no condition to lead his platoon", turned over his command to the platoon sergeant, followed his battalion commander as requested, sat down where he was ordered to, walked 12 to 15 yards and fell asleep. He was not seen by anyone thereafter, as far as the evidence shows, until an hour and a half later, when Kessler found him and observed he was "a little better after the nap".

In CM 207887, Lowry (1937), 8 B.R. 377, Dig.Ops., JAG, 1912-1940, sec.453 (11), p.343, accused was charged with being drunk in uniform, in violation of Article of War 95. Although he had consumed only six ounces of liquor in two hours, the evidence established he was drunk, rather than suffering from "diabetic coma" as contended by the defense. There was no disorder on his part, no responsible display of drunkenness and his last conscious act was to retire to a secluded room at the officers' club (where by reason of a disturbance incident to another matter he was observed by other officers and members of their families). It was held that his offense was a violation of Article of War 96 rather than of Article of War 95 as charged.

In the case of Howard, supra, the evidence showed that accused, an officer, was drunk, his speech was not clear, his breath bore the odor of alcohol and he fell asleep while sitting in his car. This occurred in the presence of enlisted men. The Board of Review said: "His drunkenness was not of extreme degree. Violation of Article of War 96 is established".

In the Hess case, supra, the evidence showed that accused, charged under three specifications for violation of Article of War 95, was drunk and disorderly in uniform in a public place, to wit, the Rialto Bar, at Colon, Republic of Panama, where both military personnel and civilians were present. A witness testified that accused was "very drunk" and that his speech was difficult to understand. His trousers were lowered and he was publicly engaged in pulling his shirt tail down. At first he refused to leave the premises and tried to enter into an argument with members of the military police as he was being taken outside. He refused to be driven home in an official car placed at his disposal, and then engaged in an argument with a sailor as the result of which the two men were forcibly separated. He was also drunk in uniform in a public place, to wit, Kresch's Bar, on the same date in the same city, where he argued with another sailor and a half dozen soldiers and sailors joined in the quarrel. A Panamanian policeman, who forcibly separated accused and a sailor, requested that he be removed from the town. Witnesses testified that accused was "very drunk", that his speech was thick and hard to understand, and that he had difficulty in standing. His sleeves were rolled up, his shirt was hanging outside his trousers, and his tie was unfastened. While the court found accused in each of these instances guilty of a violation of Article of War 95, the Board of Review stated:

"The Board of Review believes the drunkenness of accused at the Kresch's and Rialto Bars (Specifications 1 and 3, Charge I) was undoubtedly discreditable but that the proof falls short of demonstrating that it was of such aggravated degree as to justify a characterization of gross. The disorderly conduct of accused at the Rialto Bar, though discreditable, was hardly of a conspicuous character".

CONFIDENTIAL

(100)

and held the evidence legally sufficient to support only so much of such findings of guilty under Charge I as involved violation of Article of War 96.

However, in cases where the evidence has been held sufficient to support findings of guilty under Article of War 95, involving the drunkenness of an officer in the presence of military inferiors, there has been present evidence of that "drunkenness of a gross character" to which Winthrop refers, conduct which offends "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"
(Winthrop's Military Law and Precedents.- Reprint, pp.711,712).

Examples of such conduct by officers are: An assault upon a superior officer and other highly reprehensible acts and language, while drunk (CM 227651, Hess); addressing argumentative, vulgar, demeaning and intimidating remarks to a sentinel, coupled with gross drunkenness and conspicuous indecorum and lawlessness of a disgraceful nature (CM 229228, Griffin, 17 B.R. 85); while in a highly intoxicated condition and under proper escort of noncommissioned officers, acting disorderly and becoming embroiled in fights with one of the escort, a staff sergeant who was performing his duty (CM ETO 3303, Croucher and cases therein cited); and halting, insulting and assaulting British civilians while in a drunken condition (CM ETO 1197, Carr).

In accordance with the foregoing decisions and quotations, it is the opinion of the Board of Review that the conduct of accused in this instance was neither alleged nor shown to be accompanied by such unseemly behavior, violence or disorder as can properly be deemed a violation of Article of War 95 and that the record of trial is legally sufficient to support only a finding of guilty of violation of Article of War 96 (Cf: CM ETO 4184, Heil).

6. With reference to Charge II and its Specification it was clearly and conclusively established alike by accused's own testimony and the prosecution's evidence that he failed to obey a lawful order of his superior officer at the time and place alleged (CM ETO 1388, Madden). He was given a direct order to sit at a certain place until he received further orders. He indicated that he understood, but almost immediately thereafter moved away and placed himself where he could not be found a few minutes later.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of accused's guilt of Charge II and its Specification.

5465

CONFIDENTIAL

(101)

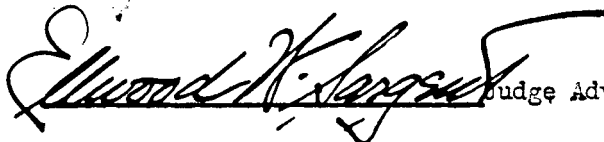
7. The charge sheet shows that accused is 22 years and nine months of age. He was commissioned a second lieutenant, Army of the United States, 5 October 1942, at Fort Benning, Georgia and was promoted to first lieutenant 24 May 1943. He served as an enlisted man, in the grades of private, corporal, sergeant and staff sergeant, until he was commissioned.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, 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 only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence.

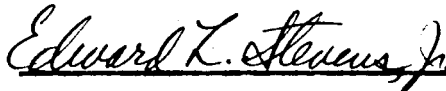
9. Dismissal is authorized upon conviction of a violation of Article of War 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).



Judge Advocate



Judge Advocate



Judge Advocate

CONFIDENTIAL

5465

CONFIDENTIAL

(102)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 16 JAN 1945 TO: Command-
ing General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of First Lieutenant **GEADY E. McBRIDE, JR.**
(O-1295477), Company K, 117th Infantry, 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 Charge I and its Specification as involves findings of
guilty of the Specification in violation of Article of War 96,
legally sufficient to support the findings of guilty of Charge II
and its Specification, and legally sufficient to support the sentence.
Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority
to order execution of the sentence.

2. When copies of the published order are forwarded to this
office, they should be accompanied by the foregoing holding and
this indorsement. The file number of the record in this office is
CM ETO 5465. For convenience of reference please place that number
in brackets at the end of the order: (CM ETO 5465).



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

(Findings disapproved in part in accordance with recommendation
of Assistant Judge Advocate General. Sentence ordered executed.
GCMO 24, ETO, 21 Jan 1945)

(103)

Branch Office of The Judge Advocate General
With the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

23 APR 1945

CM ETO 5466

UNITED STATES

v.

Private FRANCIS M. STRICKLAND
(36056140), Company C, 81st
Tank Battalion

) 5TH ARMORED DIVISION

) Trial by GCM, convened at Malmedy,
Belgium, 14 November 1944. Sentence:
) Dishonorable discharge, (suspended),
) total forfeitures and confinement at
) hard labor for 10 years. Loire
) Disciplinary Training Center, Le Mans,
) France.

OPINION by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Francis M. Strickland, Company C, 81st Tank Battalion, being on guard and posted as a sentinel at a road block in the vicinity of Gilsdorf, Luxembourg, on or about 29 September 1944, did leave his post before he was regularly relieved.

CONFIDENTIAL

(104)

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for 2 days, in violation of Article of War 61, and one by summary court-martial for being drunk in uniform in a public place, in violation of Article of War 96. Two-thirds of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but suspended the dishonorable discharge until the seldier's release from confinement, ordered the sentence executed as thus modified, and designated the Seine Disciplinary Training Center, Paris, France, as the place of confinement. The proceedings were published by General Court-Martial Order No. 45, Headquarters, 5th Armored Division, APO 255, U. S. Army, 12 December 1944.

3. The evidence for the prosecution shows that on 29 September 1944 accused was a member of a tank crew of Company C, 81st Tank Battalion which organization was located in the vicinity of Gilsdorf, Luxembourg (R7,8,11,12). On this date accused and the members of his crew with their tank were posted as a road block to defend against any enemy attack. The tank was situated at the back of a building, described as a house and barn, to cover the road running parallel with a nearby river. Both the road and river at this point were spanned by a bridge (R9,14-16). There was another tank and crew some 150 to 200 yards distant charged with this same duty. The procedure in effect with respect to the operating of the "roadblock", was that one tank crew alternated with the other, each being detailed for a 48 hour tour of duty at a time (R9). Orders were given to the crew prohibiting them from entering buildings in the neighborhood or from visiting the nearby town (R13). However, the men were permitted to walk in the area between their position and that of the other tank but they were required to remain within the area between the tanks (R9). Accused was present when these orders were given (R13,16). No orders were issued as to where the members of the crew could sleep. The men erected a "tarp" beside the tank and all the members of the crew, with the exception of accused, slept underneath this covering (R15, 16). Although there was no actual firing at the time the tank was stationed as a road block, contact with the enemy was "very possible" (R10). A part of accused's company, located some distance away, was under small arms, mortar and artillery fire (R10). At approximately 0930 hours, 29 September 1944, accused was missing. The sergeant in charge of the crew made a search throughout the area, including the adjacent building, but accused was not found. Although the sergeant entered the barn in his search he did not call out at that time and he did not see accused (R8,14). At about 1300 hours on this date accused was seen riding in a civilian truck going in a direction away from the enemy lines (R17,18) and during the afternoon of the same day

he was seen at a cafe in a nearby village, located about a mile or a mile and a half from his post, where he tried to buy something to drink from the proprietress of this establishment but was unable to do so. The following morning he had again appeared at this cafe (R12,21-22; Ex.A). He was absent from about 1000 hours 29 September 1944 until about 0930 hours 30 September 1944 (R13,17), and had no authority or permission to leave the area or to visit the town (R13).

4. After an explanation of his rights, accused elected to be sworn and testified in substance as follows:

He was a member of the tank crew composing the road block on 29 September 1944 and received instructions to the effect that the men posted at the road block could move about in the vicinity of the tank (R8,19). He left the area of his tank at about 10 o'clock on the 29th and went to a cafe nearby to buy some bread and coffee, while the other members of his crew remained at the outpost. The cafe was located a distance of about 200 or 250 yards from and in sight of his tank. Being unable to acquire any food at the cafe he went to a nearby bakery and made an effort to buy some bread but was told that he would have to return early the next morning. He remained by the nearby river during the afternoon and returned to the tank at about 2030 hours that night. He slept in the hayloft of the barn near the tank and arose early the next morning to go to the bakery for bread. He returned to his post and joined the members of his tank crew at about 0930 hours, 30 September 1944 (R20-22). Although he was absent from 9:30 am until 8:30 pm on the 29th, there were five men in the crew and they had so divided or arranged their time for duty that it was not his time to stand watch. Only one man had to perform guard duty during each day. He performed his tour of duty on the afternoon of the first day that they were stationed in that vicinity (R20-22).

5. Article of War 86 provides punishment for a sentinel who leaves his post before he is regularly relieved. The specification herein charges that accused:

"being on guard and posted as a sentinel
did leave his post before he was regularly
relieved" (Underscoring supplied).

Competent uncontradicted evidence shows that accused and 4 other soldiers, comprising a tank crew, were detailed as members of an outpost guard on the date and at the place alleged. At approximately 0930 hours 29 September 1944 accused left his place of duty before he was regularly relieved and remained away all that day and until about 0930 hours, 30 September 1944. At the time of his absence the record shows that accused was not on post or actively on watch but was a member of the tank crew on duty as a road block and restricted to an area between his tank and the neighboring tank about 150 yards distant. The vital question for decision therefore

(106)

is whether the evidence warranted the court in finding that at the time accused left the area of his tank, he was posted as a sentinel, within the meaning of the 86th Article of War. The word "sentinel" is defined as "one who watches or guards; to observe and give notice of danger" (Webster's New International Dictionary, 2nd Ed. Unabridged, p.2280). The modern military definition of a sentinel is as follows:

"A soldier assigned to duty as a member of a guard to keep watch, maintain order, protect persons or property against surprise or warn of enemy attack" (TM 20-205, WD, 18 Jan 1944, Dictionary of United States Army Terms, p.248) (Underscoring supplied).

The foregoing definitions confirm the conclusion that a sentinel is a soldier of the guard who is actively on watch and thus in a position to give immediate notice of any imminent danger. Unless and until accused was on his tour of duty of active watch in contrast with his position in reserve status as above indicated, he was not posted as a sentinel within the meaning of Article of War 86 (CM ETO 5255, Duncan and authorities cited therein). The digest of this case published by the Branch Office NATO shows that the accused was armed and walking a post; he was actually a sentinel. The technical distinction between a "sentinel" and "watchman" has been abolished and declared to be "no longer of concern" (Bull. JAG, March 1944, Vol.III, No. 2, sec.444, p.99). The status of accused was considerably different from that of a member of an interior guard inasmuch as the tank crew herein was in a front line position ready for combat, if the enemy appeared. While on the outpost the men made a determination among themselves as to who would alternately assume the duty of the active watch. Accused testified that he "took the first guard" and this evidence is not contradicted. His status was thus in reserve and to be available to assist the members of his crew, if needed. Although accused was not on active watch duty he had no permission or authority to leave the guard area. Such conduct on his part, under the circumstances of the case, manifestly constitutes a violation of Article of War 96, and is a serious military offense - a disorder and neglect to the prejudice of good order and military discipline (CM ETO 1057, Redmond; CM ETO 2212, Coldiron and authorities cited therein). The designation of a wrong Article of War is not ordinarily material in military law provided the offense alleged and proved is one denounced by the Articles of War and of which courts-martial have jurisdiction (MCM, 1928, par.28, p.18, CM ETO 1057, Redmond; CM ETO 2005, Wilkins and Williams and authorities cited therein).

The limitations upon punishments for absence without leave from guard (among other places) in violation of that article are not now operative (Executive Order 9267, November 9, 1942 (sec.I, Bull.57, WD, Nov.19, 1942) MCM, 1928, par.104c, p.97 Note). The only limitation on the maximum permissible punishment is that the death penalty may not be imposed inasmuch as the offense involves a violation of the 96th

Article of War (CM ETO 1920, Horton; CM ETO 5255, Duncan, supra).

6. A copy of the Charge was served on accused the day before the trial. This practice is not approved except in those rare cases where it is required by military necessity. Where an accused was denied a reasonable opportunity to prepare for trial and his substantial rights were injuriously affected thereby, it was held by the Board of Review that he was deprived of liberty and property without due process of law, and that the findings of guilty and the sentence were invalid (CM ETO 4564, Woods). In the instant case accused did not object to going to trial and did not move for a continuance. Before receiving pleas to the general issue the prosecution asked accused if he wished to make any special pleas. Defense counsel replied that accused did not (R6). There is no indication in the record of trial that accused was in fact denied the right to a reasonable opportunity to prepare for trial, or that any of his substantial rights were injuriously affected by the commencement of the trial on the day following the service of the Charge (CM ETO 3937, Bigrow; CM ETO 5179, Hamlin).

7. The charge sheet shows that accused is 34 years of age and was inducted 9 March 1942. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. Except as herein noted, 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 only so much of the findings of guilty as involves findings that accused, being on outpost guard at the time and place alleged, did leave the guard area before he was regularly relieved, in violation of Article of War 96, and legally sufficient to support the sentence.

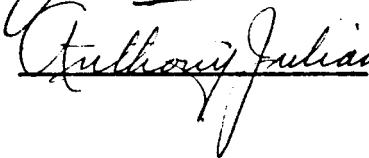
9. The designation of the Seine Disciplinary Training Center, Paris, France is no longer authorized. The proper place of confinement is the Loire Disciplinary Training Center, Le Mans, France (Ltr., Hq. European Theater of Operations, AG 252, Op.TPM, 19 Dec.1944, par.3).

(ON LEAVE)

Judge Advocate



Judge Advocate



Judge Advocate

CONFIDENTIAL

(108)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. **23 APR 1945** 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 20 August 1937 (50 Stat.724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Private FRANCIS M. STRICKLAND (36056140), Company C, 81st Tank Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involves findings that accused, being on outpost guard at the time and place alleged, did leave the guard area before he was regularly relieved, in violation of Article of War 96, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz: conviction of leaving his post as a sentinel before he was regularly relieved, so vacated, be restored.

3. The place of confinement should be changed to the Loire Disciplinary Training Center, Le Mans, France (ltr., Hq. European Theater of Operations, AG 252 Op TPM, 19 Dec.1944, par.3). This may be done in the published court-martial order.

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



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

3 Incls:

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

(Findings disapproved in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 169, ETO, 20 May 1945)

CONFIDENTIAL

(109)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

30 DEC 1944

CM ETO 5475

UNITED STATES

v.

Second Lieutenant EDWARD L.
WAPPES (O-1317581), Company
I, 39th Infantry

) 9TH INFANTRY DIVISION

) Trial by GCM, convened at Camp
) d'Elsenborn, Belgium, 29 October 1944.
) Sentence: To be dismissed the service,
) to forfeit all pay and allowances due
) or to become due and to be confined
) at hard labor for 20 years. Eastern
) Branch, United States Disciplinary
) Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that 2nd Lieutenant EDWARD L. WAPPES, 39th Infantry, Platoon Leader, Company "I", 39th Infantry, being present with his platoon, while it was engaged with the enemy, did, near Hurtgen, Germany, on or about 10 October 1944, shamefully abandon his platoon and seek safety in the rear, and did fail to rejoin it until the engagement was concluded.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge

5475

- 1 -
CONFIDENTIAL

(110)

and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority, the Commanding General, 9th Infantry Division, 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, although he declared the punishment inadequate for an officer convicted of so shamefully abandoning his troops in the presence of the enemy and seeking his own safety at the rear in cowardly disregard of his duty as an officer, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. Prosecution's evidence summarizes as follows:

On 10 October 1944 accused was the leader of the second platoon of Company I, 39th Infantry. Captain Anthony V. Danna was the company commander. The company on the morning of said date was actively engaged with the enemy in the vicinity of Hurtgen, Germany (R5,6). The first and third platoons had suffered heavy casualties and their personnel had been reduced to approximately five or six men each. The second platoon, commanded by accused, was practically intact (R6,9). Two unidentified platoons were on the left of a road and the first, second and third platoons of Company I were on the right thereof. Between the unidentified platoons and the platoons of Company I was an open field transversed by the road upon which the enemy "zeroed" its fire. In attempting to reach the two unidentified platoons five men of Company I had been lost (R6). With this situation confronting the company commander, he consulted with the battalion commander who indicated that he would send two or three tanks to the assistance of the company (R6). Their mission was to throw fire across the field under cover of which the first, second and third platoons of Company I were to cross to the field (R7).

After his consultation with the battalion commander, Captain Danna called his platoon leaders into conference. The accused was present (R6). The company commander issued the following oral instructions:

"As soon as you see the tanks come up, have the men all ready for the attack and I'll let you know when to jump off. These tanks will throw some covering fire and we'll get across this open field. You have to be very careful because two platoons are across the way already and we have to be very careful about firing during the attack. We don't want to hit any of our men" (R7).

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5475

"You will know when the tanks come through. They will have to go through the 2nd Platoon area. As soon as they jump off, they will throw down covering fire and that will enable us to get through this wire fence and open field. Stand by and I will tell you when to jump off. You will have to keep your ears open on account of possible shooting at that time" (R17).

Because accused's platoon was the only one of the three attacking platoons which was intact, "he was to make the main effort" (R6). At the time these instructions were given, accused's platoon was about 25 yards distant from the place of conference. Some of the members thereof were not ten feet from the command post (R9). Accused returned to his platoon (R12) and informed Staff Sergeant J. T. Ragan, platoon sergeant, that "when the tanks moved up we would move up across the road into this town" (R11).

The tanks arrived at the scene of action within an hour after the platoon leaders' conference (R10) and the officer in command thereof signaled to Captain Danna that he was ready to attack. The company commander directed the first and third platoons to make ready to "jump off", and upon learning that the second platoon was not in position on the right flank of the movement he sent a runner to that platoon. As a result of the report of the runner, Captain Danna went to the second platoon and discovered that accused was absent (R8,11,16). He also found that the platoon was leaderless and had received no orders. He thereupon reorganized the platoon for attack and gave it orders for its movement (R7). The platoon then moved forward (R11). At that time "the enemy was more or less, exchanging shot for shot" with the company (R17).

"Whenever we picked out a machine gun position, the Jerries would open up and try to stop us. Our tanks tried to cover us. We were trying to get to the wood-mill to enable us to drive the Germans out of there * * * At the time that we were moving across the road and the open field the Jerry artillery was quiet, but, after we got across the road, they started to fire on us" (R17) * * * "We finally got across this open field here and tangled up with the Jerries" (R7).

Captain Danna did not give accused authority to be absent from his platoon (R7). He did not see him subsequent to the platoon leaders' conference until after the attack and the company was relieved and "pulled back into a reserve position" (R8,9). Accused did not return to his platoon during the engagement and the platoon went into the attack without him (R11).

Technician Fifth Grade Eugene K. Albright, Company I, 39th Infantry, between noon and 2 pm on the 10th of October 1944, proceeded by 5475

(112)

vehicle from the rear to a forward position of the company to secure a load of material. He encountered accused on the road walking towards the rear, informed him that he (Albright) would be returning in a few minutes and offered accused transportation upon the rearward journey. Albright returned within the period of thirty minutes. Accused boarded Albright's vehicle and rode to the company kitchen. When Albright first encountered accused, the latter was from two and one-half to three miles from the company command post (R13,14).

4. The accused presented no evidence in defense, but, after he was warned of his rights, elected to make an unsworn statement as follows:

"On October 10, at approximately 1300 hours, I was called to the Company Forward C.P. and told that the Company was about to make an attack. They were to attempt to cross a road and go to the relief of the 1st and 3rd Platoons of that Company, that had been there the night before and had either been either almost totally captured or killed. There was, actually, only one squad left of the two Platoons. Preceding the attack, I was told, we would have three tanks and that they would try to fire into some of the buildings across the road and that, immediately after the tanks arrived, I would lead the attack because I had the bulk of the Company in my Platoon, the 2nd Platoon. I tried to get other information but was unsuccessful. I returned to my Platoon and told my Platoon Sergeant and the men what I had been told. There was nothing left to do after we got ready but wait for the tanks to show up. After a while of this waiting, I got pretty worried about the situation as one Platoon of "K" Company had been ordered just previously to go to the relief of these men and they decided that they couldn't do this without excessive casualties. I became rather restless waiting around and started to move around in the general area and I turned and talked with the Company on my right and to the rear. The tanks didn't show up for some time because they had to work their way up as best they could out of the woods on account of the mud there. They had to clear their own way up to the Company. I decided that I would go up, too, when they came up to where we were. About one hour later, one tank showed up, but, as we were supposed to have three, I decided that they were still to come up. The next thing I knew I heard firing from one tank. I knew that we either had one tank and were only to get one tank or else some more had showed up and I had failed to hear them coming through to the Company. I came up to within two hundred yards of where my Platoon was and neither my Company nor my Platoon was in sight. The Jerries started with some heavy artillery firing and the Company was making its attack. There was a little neck in the woods and a

5475

CONFIDENTIAL

large, open field and then another neck of woods and we had to go across all this. Where this enemy artillery barrage was falling there was nothing but small dugouts filled with artillery observers and one small building and I decided to go into this small building and take cover for the time being, but the shelling kept up its intensity. I began to wonder then where the Company was. The firing kept up until I became nervous and shaky and there was no one to show me the way as to where the Company had gone. As this shelling kept on and on, I knew that it was only a matter of time before I would get hit and I pulled out of that area. I made two attempts to get back into the Company and all the time my condition was getting worse. I felt that I was getting shaken to pieces from that artillery fire and I decided to stay where I was that afternoon and return in the morning. When morning came the artillery barrage was still going on and went on that night. I made three more attempts that morning with the same result. That is all I have to say" (R15,16).

5. (a) The Specification upon which accused was arraigned and tried charges that he

"being present with his platoon, while it was engaged with the enemy, did, * * * shamefully abandon his platoon and seek safety in the rear, and did fail to rejoin it until the engagement was concluded". (Underscoring supplied).

These allegations state an offense under the 75th Article of War which may be alleged as follows:

"Wappes * * * being present with his platoon, while it was before the enemy, did run away from his platoon and did not return, etc."

The phrase "engaged with the enemy" is properly construed as an allegation of place as well as time. It is identical in meaning with "before the enemy". The phrase "shamefully abandon his platoon and seek safety in the rear" is equivalent to the allegation "did run away from his platoon" (CM ETO 1249, Marchetti; CM ETO 1404, Stack; CM ETO 1408, Saraceno; CM ETO 3722, Skamfer; CM ETO 1663, Ison).

(b) The Specification further alleges that accused did shamefully abandon his platoon and seek safety in the rear and "did fail to rejoin it until the engagement was concluded".

CONFIDENTIAL

(114)

The evidence shows that accused was placed in arrest and never did rejoin his platoon (R8,11). However the allegation as to accused's return to his platoon is surplusage and is wholly immaterial. It did not require proof.

"It is the fact that accused departed from the place where duty required him to be when his unit was 'before the enemy' that constitutes the offense. (CM ETO 1404, Stack; CM ETO 1249, Marchetti)" (CM ETO 1659, Lee).

See also: CM ETO 1404, Stack, supra; CM ETO 1663, Ison, supra.

6. The prosecution's evidence, which is not contradicted, showed that Company I, 39th Infantry, on 10 October 1944 was actively engaged with the enemy in the proximity of Hurtgen, Germany. It was under shell fire and had experienced heavy casualties. The first and third platoons had been reduced to mere cadres. The second platoon, under the command of accused, contained a substantial part of the company personnel. The success of the attack depended primarily on its participation therein. In the forward movement the assistance of tanks was ordered so that a covering fire might be provided by them for the company as it advanced across an open space which had proved a particularly dangerous area. The company commander explained to the platoon commanders, including accused, the tactics of the movement upon the arrival of the tanks and particularly admonished them to be on the alert. At the critical moment after the tanks had arrived and their commander signaled that he was ready for the attack and the first and third platoons were ordered to be ready for the advance, the commander of Company I, Captain Danna, discovered that the second platoon was back of the line of departure and was leaderless. Accused had disappeared. The evidence proves positively that he had gone to the rear leaving no one in command of his platoon, notwithstanding his knowledge of the vital role it was to play in the action. The company commander went to the second platoon, reorganized it and thus permitted the advance to be made as originally contemplated. The accused returned to the company kitchen in the rear and did not participate in the attack.

This short recital of the events exhibits the accused as a coward who, with a callous, selfish disregard of his obligations as an officer in the Army of the United States, deserted his fellow soldiers at the critical moment of battle. No clearer case of misbehavior before the enemy has come before the Board of Review. All of the elements of such offense were proved by substantial, uncontradicted evidence. Accused's unsworn statement served to corroborate the case against him and certainly contained no facts that can either exculpate him from his guilt or lessen the perfidy of his conduct. His precious heritage as a citizen of a free nation obviously possesses no value for

5475

CONFIDENTIAL

CONFIDENTIAL

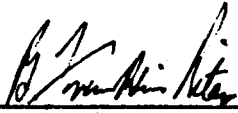
(115)

him when his own physical safety is a paramount consideration. While on the occasion of this tragic episode he wore the uniform of a soldier of the Republic, it was a mere bodily cover for him. The record contains an abundance of evidence of accused's guilt of the charge upon which he was arraigned and tried (CM ETO 4783, Duff, and authorities therein cited; CM ETO 5179, Hamlin).

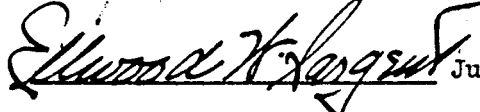
7. The charge sheet shows that the accused is 31 years and 11 months of age and that he was commissioned a second lieutenant, Army of the United States, 17 April 1943. He was inducted into the military service 18 February 1941 at Fort Snelling, Minnesota, and served as an enlisted man until 17 April 1943.

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

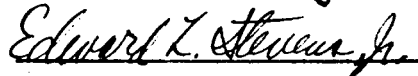
9. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir. 210, WD, 14 Sep. 1943, sec.VI, as amended).



Judge Advocate



Judge Advocate



Judge Advocate

CONFIDENTIAL

5475

CONFIDENTIAL

(116)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. **30 DEC 1944** TO: Command-
ing General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant EDWARD L. WAPPES
(O-1317581), Company I, 39th Infantry, attention is invited to the
foregoing holding by the Board of Review that the record of trial
is legally sufficient to support the findings of guilty and the sen-
tence, which holding is hereby approved. Under the provisions of
Article of War 50¹/₂, you now have authority to order execution of
the sentence.

2. When copies of the published order are forwarded to
this office, they should be accompanied by the foregoing holding
and this indorsement. The file number of the record in this office
is CM ETO 5475. For convenience of reference please place that
number in brackets at the end of the order: (CM ETO 5475).



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

(Sentence ordered executed. GCMO 8, ETO, 7 Jan 1945)

CONFIDENTIAL

(117)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

12 JAN 1945

CM ETO 5510

UNITED STATES)

v.)

Private JAMES P. LYNCH
(31408512), Company E,
143rd Infantry)

36TH INFANTRY DIVISION

Trail by GCM, convened at Headquarters
36th Infantry Division, APO 36, US.
Army, (France), 9 December 1944. Sentence:
Dishonorable discharge, total forfeitures
and confinement at hard labor for life.
Eastern Branch, United States Disciplinary
Barracks, Greenhaven, New York

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, 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 64th Article of War.

Specification: In that Pvt. James P. Lynch, Company "E", 143rd Infantry, having received a lawful command from 1st Lt. Herman L. Tepp, Hq 143rd Infantry, his superior officer, to return to his company, which was then actively engaged with the enemy did near La Corcieux, France, on or about 25 November 1944 willfully disobey the same.

He pleaded not guilty and two-thirds of the court present when the vote was taken concurring was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service,

-1-
CONFIDENTIAL

5510

CONFIDENTIAL

(118)

to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence for the prosecution shows that on 25 November 1944, Company E, 143rd Infantry, was engaged in attacking the enemy. Lieutenant Herman L. Tepp, assistant adjutant of the regiment, testified that he was charged with the official duty of returning men to their units. At Le Corcieux, France, some 12 to 20 kilometers to the rear of his company, witness talked to accused regarding his absence from his company and gave him a direct order to "return to your company and fight" (R6,7). Accused refused to obey the command, stating that he could not go back, explaining that he had just returned from the hospital through channels. Accused was on duty status. He indicated that he clearly understood the meaning of the order and the effect of his refusal to obey the same (R7).

4. After his rights as a witness were explained, accused elected to make an unsworn statement through defense counsel wherein he stated that he sailed for overseas on 1 July 1944 and was assigned to Company E, 143rd Infantry, on the 24th of September following. He joined the company, while engaged in combat, on the latter date. He was awarded the combat Infantryman's badge. On 26 October 1944 he was admitted to the clearing house of the 111th Medical Battalion, for the purpose of receiving teeth, because most of his upper teeth had been extracted, at Camp Blanding, Florida, in January 1944. He was not fitted with plates until early in November of this year and during the entire period that he was without teeth, it was necessary for accused to eat soft foods. He managed fairly well, until engaged in combat, when the majority of the food was "K" rations, which he was unable to eat. Accused further stated that:

"I became so weak that I could not keep up with my company and reported back through proper channels for dental plates. When I was returned to duty I was not in physical condition to fight; having been there about a month I knew I could not keep up with my men" (R8).

There was also introduced in evidence a certified copy of an extract of the admission and disposition sheet of the 111th Medical Battalion, dated 26 October 1944, showing accused suffering from dental prosthesis (Ex.A) and a psychiatric report showing accused was diagnosed as suffering from "psychoneurosis, mixed, chronic, mild", as of 26 November 1944 (Ex.B).

5. Competent uncontradicted evidence establishes that accused

5510

CONFIDENTIAL

while on a duty status, was given a direct order by his superior officer to return to his company which was then actively engaged with the enemy and that accused disobeyed the same, on the date and under the circumstances alleged. His unsworn statement inferentially admitted his commission of the offense alleged. Clearly, from the evidence shown the court could justifiably find that the disobedience was willful, as charged. Except by inference the testimony fails to identify the accused as such and the evidence, other than accused's unsworn statement, does not directly show that accused is in the military service of the United States. However his plea to the general issue and his statement disclosing his army service, plus the charge sheet, which is part of the record of trial, (CM ETO 1704, Renfrow), supplied the deficiencies indicated (Winthrop's Military Law and Precedents, Reprint 1920, p.276; MCM, 1928, par.64a, p.50). The record is far from satisfactory in content and completeness, although technically legally sufficient to support the findings of guilty and the sentence. The prosecution produced only one witness who did not identify accused and gave but brief and sketchy testimony. The accused, who is charged with a capital offense, is entitled to have all the available evidence for and against him duly presented to the court so that it may impose a just sentence and that appropriate authorities will be furnished a basis for the exercise of clemency if warranted (CM ETO 5004, Scheck).

The accused's unsworn statement and defense exhibits A and B in support thereof do not constitute a legal defense but are matters appropriate for consideration in mitigation and extenuation of the offense charged (MCM, 1928, pars.76,87b, pp.61,74).

6. The charge sheet shows that accused is 29 years of age. He was inducted, without prior service, at New Haven, Connecticut, on 9 December 1943.

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

8. The offense of willful disobedience of a lawful order of a superior officer is punishable by death or such other punishment as a court martial may direct (AW 64). The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, Sec.VI, as amended).

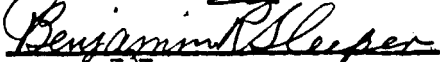


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Judge Advocate

CONFIDENTIAL

(120)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 12 JAN 1945 TO: Command-
ing General, 36th Infantry Division, APO 36, U.S. Army.

1. In the case of Private JAMES P. LYNCH (1408512), Company
E, 143rd Infantry, attention is invited to the foregoing holding
by the Board of Review that the record of trial is legally sufficient
to support the findings of guilty and the sentence, which holding
is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$,
you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this
office, they should be accompanied by the foregoing holding and this
indorsement. The file number of the record in this office is CM
ETO 5510. For convenience of reference please place that number
in brackets at the end of the order: (CM ETO 5510).



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

5510

CONFIDENTIAL

CONFIDENTIAL

(121)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

10 JAN 1945

CM ETO 5511

UNITED STATES)

36TH INFANTRY DIVISION

v.)

Private JOSEPH A. H. CARTER
(33612402), Company C, 143rd
Infantry.)

) Trial by GCM, convened at Headquarters,
) 36th Infantry Division, APO 36, U.S.
) Army (France), 9 December 1944. Sen-
) tence: Dishonorable discharge, total
) forfeitures and confinement at hard
) labor for life. Eastern Branch, United
) States Disciplinary Barracks, Greenhaven,
) New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, 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 64th Article of War.

Specification: In that Private Joseph A. H. Carter, Company C, 143rd Infantry, having received a lawful command from Major Robert L. O'Brien, Jr, 143rd Infantry, his superior officer, to return to his company, Company C, 143rd Infantry, which was then engaged with the enemy, did, in the vicinity of Ste Marie aux Mines, France, on or about 29 November 1944, willfully disobey the same.

He pleaded not guilty and two-thirds of the members of the court

CONFIDENTIAL

5511

CONFIDENTIAL

present when the vote was taken concurring was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence; designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution consisted solely of the testimony of Major Robert L. O'Brien, Adjutant of the 143rd Infantry Regiment. He testified that on 29 November 1944 the 143rd Infantry was engaged with the enemy in the vicinity of Ste. Marie aux Mines, France. On that day, accused was brought to the S-1 Section by Division Military Police. Major O'Brien talked with him in his office and ordered him to return to his unit which was then engaged with the enemy. Accused "definitely refused to obey my order and stated that he would not obey the order". Witness did not remember that accused indicated in any way the reason for his disobedience. Upon accused's refusal to obey the order, he was confined in the Division stockade (R6,7).

4. The defense introduced into evidence a document dated 30 November 1944, headed "Psychiatric Report in Disciplinary Cases" signed by Major Walter S. Ford, Division Psychiatrist, which stated that accused was suffering from "psychoneurosis, anxiety state, mild". After being advised of his rights as a witness, accused elected to make an unsworn statement through his counsel as follows:

"I was inducted on the 16th of November 1943 at New Cumberland, Pennsylvania and received 17 weeks basic training at Camp Blanding, Florida, sailing for overseas in the latter part of June 1944. After serving in a replacement depot in Italy and in Southern France, I was assigned to C Company of the 143rd Infantry on the 25th of September. I served continuously and honorably with C Company of the 143rd until the 22nd of November 1944. At this time I became extremely nervous under fire and realized I could no longer continue. I left my organization and turned in to the MP'S" (R8).

5. The evidence shows that accused received a lawful command from his superior officer and that he willfully disobeyed such command. Although it was shown that he was suffering on 30 November from

5511

CONFIDENTIAL

psychoneurosis, anxiety state, mild, and although he stated that he had become extremely nervous and "could no longer continue", the rather meager evidence as to his mental condition does not indicate that such condition was sufficiently aggravated to constitute a legal defense to the offense alleged. The unsworn statement of accused admits the alleged offense. The court therefore properly convicted accused of willfully disobeying the order given him by Major O'Brien, his superior officer, a violation of Article of War 64 (CM ETO 4453, Boller).

6. The charge sheet shows that accused is 22 years of age and was inducted at Sunbury, Pennsylvania, on 26 October 1943. No prior service is shown.

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

8. Willful disobedience of the order of a superior officer is punishable by death or such other punishment as a court-martial may direct (AW 64). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is proper (AW 42; Cir.210, WD, 14 September 1943, Sec.VI, as amended).

Richard Davidson Judge Advocate

John Tammitt Judge Advocate

Benjamin R. Sleeper Judge Advocate

CONFIDENTIAL

(124)


1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 JAN 1945 TO: Commanding General, 36th Infantry Division, APO 36, U.S. Army.

1. In the case of Private JOSEPH A. H. CARTER (33612402), Company "C", 143rd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. This accused, who is 22 years of age, was inducted on October 26, 1943 and joined the 36th Division on September 25, 1944, was brought to trial for a capital offense, before a court composed of five officers, - one major, one captain, one first lieutenant, and two second lieutenants; seventeen members of the court were excused; one witness was heard who was not asked if he knew the accused, who did not remember what accused said but was positive that he refused to obey the order and was thereupon sent to the stockade. On the next day accused was found to be suffering from "Psychoneurosis, anxiety, mild". He was sentenced to life imprisonment. The record contains no evidence showing aggravation, - the tactical situation is not described nor the conduct of the accused at the time he disobeyed the order. The sentence is more severe than is usually adjudged in like cases.

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 CM ETO 5511. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5511).


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

5511

-1-

CONFIDENTIAL

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(125)

BOARD OF REVIEW NO. 2

12 Jan 1945

CM ETO 5513

UNITED STATES

v.

Private First Class JAMES W.
SEXTON, (20810140), Company
K, 141st Infantry

) 36TH INFANTRY DIVISION

) Tried by GCM, convened at Head-
) quarters 36th Infantry Division,
) (France), 9 December 1944. Sen-
) tence: Dishonorable discharge,
) total forfeitures and confinement
) at hard labor for life. Eastern
) Branch, United States Disciplinary
) Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO.2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private First Class James W. Sexton, Company K, 141st Infantry did, at vicinity of Herplemont, France, on or about 8 October 1944, run away from his company, which was then engaged with the enemy, and did not return thereto until on or about 23 October 1944.

Specification 2: In that * * * did, at vicinity of Biffontaine, France, on or about 4 November 1944, run away from his company, which was then engaged with the enemy, and did not return thereto until on or about 12 November 1944.

5513

CONFIDENTIAL

He pleaded not guilty and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. Without objection by the defense, the prosecution introduced an extract copy of the morning reports of Company K, 141st Infantry, evidencing the fact that accused absented himself without leave from his organization from 8 October 1944 to 23 October 1944 and from 4 November 1944 to 12 November 1944 (R5; Pros. Ex.1).

First Lieutenant Donald F. Schwarzkopf, Executive Officer, Company K, 141st Infantry, testified that on 8 October 1944 the company was in the vicinity of Herplemont, (France). To the best of his recollection, the company was attacking and was subjected to enemy fire on that day. He further testified that on or about 4 November 1944 the company was attacking in the region of Biffontaine, (France). The company was receiving enemy fire around that date. He stated that, as of the time of trial, Company K had been in the line 117 days, that he joined the company on or about 1 October 1944, and that ever since that date the company had either been in the line or in reserve positions. When in reserve positions, the company was subject to call at a moment's notice and was within artillery fire on the line although not necessarily engaged with the enemy (R6,7).

4. After having been advised of his rights as a witness, accused elected to make an unsworn statement. In his statement, he recited that he was inducted 25 November 1940 and, upon induction, was assigned to Service Company, 144th Infantry Regiment, 36th Infantry Division. The regiment was detached from the 36th Division at the outbreak of the war and assigned to coastal duty. He remained with the regiment and served with it for approximately three years. During this entire time his duty was either that of cook or truck driver. He came overseas on 25 April 1944 and, on 29 June 1944, was assigned to Company K, 141st Infantry Regiment, 36th Infantry Division. Upon being assigned to that company, despite his prior assignments as truck driver or cook and his lack of previous training with mortars, he was assigned as ammunition bearer in the mortar section. Company K was out of the line after his assignment thereto and he participated in no fighting in Italy. He landed with the company in southern France "on D-day" and remained with it from that date until about 8 October 1944 (R8,9).

CONFIDENTIAL

CONFIDENTIAL

(127)

5. The prosecution showed, through the testimony of Lieutenant Schwarzkopf, that on 8 October and on 4 November, 1944, accused's company was either actively attacking the enemy or was in reserve positions subject to call and within the range of enemy artillery fire. It thus appears that, on those dates, the company was "before the enemy" within the meaning of that phrase as used in Article of War 75 (CM ETO 1404, Stack; Winthrop's Military Laws and Precedents, Reprint, 1920, pp.623,624; Dig.Opns, JAG, 1912-40, sec.433(2), p.303). It was further shown through the introduction of an extract copy of the company morning reports, that accused absented himself without leave from his company on the dates alleged. The evidence thus supports the inference that accused was before the enemy on the dates alleged and shows that he absented himself from his company without permission on those dates. This conduct constitutes misbehavior before the enemy in violation of Article of War 75 (CM ETO 1663, Ison; CM ETO 1659, Lee; CM ETO 2582, Keyes; CM ETO 3828, Carpenter). The evidence adduced although it is meager and fails to give the picture as to the company's operations and the circumstances under which the accused absented himself, supplies the minimum requirements and thus supports the court's finding that accused was guilty of the offenses alleged.

6. The charge sheet shows that accused is twenty-three years of age and was inducted at Fort Worth, Texas, on 25 November 1940. No prior service is shown.

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

8. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (A.R. 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement is proper (A.R. 42; Cir.210, WD, 14 September 1943, sec.VI, as amended).

Edward B. Schott Judge Advocate

John Tommitt Judge Advocate

Benjamin R. Sleeper Judge Advocate

5513

(CONFIDENTIAL)

(128)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. **12 JAN 1945** TO: Command-
ing General, 36th Infantry Division, APO 36, U. S. Army.

1. In the case of Private First Class JAMES W. SEXTON (20810140), Company K, 141st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. The prosecution called but one witness who did not identify the accused and testified that he had not been with the company long enough to observe his performance of duty prior to the offense. It is fairly apparent that he did not know the accused. The record is therefore bare of any eye witness testimony of the circumstances which warrant the sentence of life imprisonment.

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 CM ETO 5513. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5513).



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

5513

CONFIDENTIAL

(129)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

26 FEB 1945

CM ETO 5531

U N I T E D	S T A T E S	)	ADVANCE SECTION, COMMUNICATIONS ZONE
		)	EUROPEAN THEATER OF OPERATIONS.
	v.)	
Private First Class CHARLIE		)	Trial by GCM, convened at Vottem,
J. DAVIS (34069427), Company		)	Belgium, 8 December 1944. Sentence:
C, 95th Engineer General		)	Dishonorable discharge (suspended),
Service Regiment.		)	total forfeitures and confinement
		)	at hard labor for five years. Loire
		)	Disciplinary Training Center, Le
		)	Mans, France.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private First Class Charlie J. Davis, Company C, 95th Engineer General Service Regiment, being on guard and posted as a sentinel, at or near Liege, Belgium, on or about 4 November 1944, was found sleeping upon his post.

CONFIDENTIAL

(130)

He pleaded not guilty and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification, except the word "found", of the excepted word not guilty and of the Charge guilty. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, 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 ordered it executed, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published by General Court-Martial Orders No.143, Headquarters Advance Section Communications Zone, European Theater of Operations, APO 113, U. S. Army, 21 December 1944.

3. The evidence for the prosecution is as follows:

On 4 November 1944, accused was a member of the guard, 95th Engineer General Service Regiment, at Liege, Belgium (R5). His tour on post was from 0300 to 0600 hours at Post No. 5 (R5,6), which was located at the regimental supply office (R5). The special orders for the sentry at this post, embodied in Change Number 1, General Orders No. 7 of the regiment an extract copy of which was admitted in evidence without objection by the defense, were as follows:

- "1. My post is number 5. It is at the entrance to RSO on 30 Rue de St. Marie. From Reveille to Recall, I will remain at the outer entrance to RSO and from Recall to Reveille, I will keep the outer door to RSO closed, and will remain in the hallway between the inner and outer entrance to RSO.
2. I will not allow any persons, civilians or military, to congregate or loiter near my post, and I will not allow any civilians to enter Army vehicles parked near my post.
3. After Recall I will not allow any Army personnel to enter RSO storage area unless accompanied by RSO personnel, and I will not allow any civilians to enter RSO storage area" (R8; Ex.D).

There is no evidence that accused had either seen or been instructed

(131)

in these special orders, but he was instructed by the corporal of the guard, upon being posted, "to allow no one to enter the RSO, and to allow only those civilians who showed proper identification to enter" (R5).

During accused's tour of duty, at about 0545, the officer of the day inspected the guard (R6). His testimony on direct examination as to the occurrences involved in the Charge and Specification is brief and may be quoted in full:

"I inspected the guard about 0545 hours, the morning of 4 November, 1944. I went to post number 5, inside the RSO. I did not see the guard on his post, so I went to the double doors, and knocked. There was no answer, so I pounded on the doors with great force. I pushed against the door, and at first it did not give; I pushed against it again with more force, and I broke a small stick the accused had put in between the handles of the double doors to keep them shut. The guard was not in the corridor, so I walked to the end of the corridor. Just inside the second door is a stove, and the guard was just getting to his feet when I entered. He looked as though he had been sleeping. His eyes were red, and he could not speak coherently. I noticed his rifle standing up against the wall. I asked him if he had been asleep and he said the he had not been asleep at that time, but had been asleep previously" (R6).

On cross-examination, the witness further stated that accused's eyes were drowsy and that "the position he had been in was lying down". He admitted that he did not see accused sleeping but stated that on his arrival at Post No. 5, he made sufficient noise to be heard within the building. Accused's statement that he had previously been sleeping was made in response to a question asked by the officer of the day, without warning to accused that any answer he made might be used against him (R7).

A voluntary sworn statement made by accused to the investigating officer was admitted in evidence without objection by the defense (R7,8; Ex.C). In it he denied that he was asleep when the officer of the day entered, but admitted that he told him he had been asleep before the officer arrived. He also stated that he heard the officer of the day knock on the door but that he had leaned his rifle

CONFIDENTIAL

(132)

against the wall and was fixing the fire and before he could get to the door, the officer entered. He permitted him to enter because he recognized him as officer of the day (Ex.C).

4. Accused, having been advised of his rights as a witness, elected to remain silent and no evidence was presented in his behalf (R9).

5. Inasmuch as the record of trial contains no evidence that anyone actually saw the accused asleep on his post, the question is naturally raised whether the evidence presented is legally sufficient to justify the court's finding of guilty of the offense. The prosecution's evidence relative to sleeping consists of the following elements:

- a. The failure of the accused to challenge the officer of the day or to respond to his forceful pounding on the door, despite the fact that the limits of the post were sufficiently narrow to enable an alert sentinel to hear such activity.
- b. The fact that when the officer of the day first observed the accused, the latter was just arising from a "lying down" position with red and drowsy eyes and was unable to speak coherently.
- c. The fact that accused's rifle was standing against the wall.
- d. The admission of the accused that he had been sleeping prior to the time the officer of the day inspected the post.

Taken collectively, it is considered that these elements are adequate to support the court's finding that the accused was asleep during his tour of duty as sentinel. The statement of the accused that he had been sleeping, since it admits only one element of the offense with which he is charged, was in law an admission against interest rather than a confession and hence admissible in evidence without regard to whether it was voluntary (CM ETO 4945, Montoya, p.8, and authorities therein cited). This admission by the accused when considered along with the testimony of the officer of the day as to the condition and circumstances under which he found him, gives rise to a proper and reasonable inference that the accused had been sleeping in the place in which he was found and that his sleeping had terminated shortly before the arrival of the officer of the day. The case is distinguishable from CM 195562, Stover, 2 BR 259, and CM 220886, Wright, 13 BR 95. In both these cases, the evidence was held insufficient to sustain the finding that accused was asleep on post. Neither decision

(133)

proceeded on the theory that it was necessary that the accused actually be found sleeping, but both held that evidence consisting entirely of testimony as to the difficulty encountered in finding accused on his relatively extensive post and as to his generally sleepy appearance when finally found was insufficient in probative effect to furnish a foundation of substantial evidence for a finding that he was asleep. In the present case, the prosecution's evidence is obviously far stronger than in the Stover and Wright cases. In addition to the accused's admission that he had been sleeping, the additional circumstances necessary to show that such sleeping occurred during accused's tour as sentinel are of greater probative force. Thus, the limits of his post were small, thereby increasing the significance of his failure to respond to the officer of the day's knocking upon the door, and the evidence of his sleepy condition on rising from a recumbent position is clearer and stronger than similar evidence in the Stover and Wright cases appears to have been. Altogether, therefore, the circumstances are sufficiently strong to justify approval of the finding that accused was asleep (CM ETO 3634, Pritchard and Herrera).

Accused's instructions required him to stand guard at the outer entrance to the RSO between reveille and recall and in the hallway between the inner and outer entrance between recall and reveille. It is necessary to determine whether the place in which he was asleep was on or off his post, since, if the latter is the case, finding of guilty cannot be sustained. The Manual for Courts-Martial, 1928, (pars. 146a,c, pp.160,161) contains the following provisions relative to the matter of what constitutes a sentinel's post from this point of view:

"A sentinel's post is not limited to an imaginary line, but includes, according to orders or circumstances, such contiguous area within which he may walk as may be necessary for the protection of property committed to his charge or for the discharge of such other duties as may be required by general or special orders. The sentinel who goes anywhere within such area for the discharge of his duties does not leave his post, but if found drunk or sleeping within such area he may be convicted of a violation of this article".

"The offense of leaving a post is not committed when a sentinel goes an immaterial distance from the point, path, area, or object which was prescribed as his post".

The Board of Review (sitting in Washington) has held that the test to

CONFIDENTIAL

(134)

be applied in ascertaining whether a sentinel has left his post is to determine whether he has so far removed himself from his normal position or area of duty as to be unable adequately to perform a substantial part of his duties (CM 225356, Herndon, 14 BR 249, 251). In the application of this test to the present case, some difficulty is encountered in the failure of the record to show clearly whether the events involved occurred before or after reveille, the importance of this question arising out of the fact that both the duties and the station of the sentinel varied accordingly. However, both the time of the inspection by the officer of the day (0545) and his testimony to the effect that on such inspection he went "to Post No. 5, inside the RSO" are sufficient to justify a reasonable and proper inference that the events in the case occurred before reveille and that accused, therefore, was supposed to be stationed in the hallway between the inner and outer entrance to the RSO. According to the instructions of the corporal of the guard, accused's duties at this time were "to allow no one to enter the RSO and to allow only those civilians who showed proper identification to enter". The scope of these instructions further supports the inference that the events occurred before reveille. Accused was found in a part of the building whose exact location with respect to his post does not appear, but which, according to his own statement made to the investigating officer, was within earshot of the doorway near which he was required to take his post. Since the only duty with which the record shows him charged was to prevent the entrance of unauthorized personnel, the court was warranted in inferring that had he been alert, he could have performed a substantial part of his duties as sentinel from the place in which he was found. He was therefore on his post within the meaning of Article of War 86.

There remains for comment the question of the propriety of the court's action in excepting the word "found" from the Specification and in finding accused not guilty of the excepted word. The court was obviously motivated in this action by the fact that the record fails to disclose that anyone actually saw (or found) accused sleeping. In the opinion of the Board of Review, no harm was done. While the expression "found sleeping upon his post" is used in both Article of War 86 and in the form of specification thereunder provided in Appendix 4 of the Manual for Courts-Martial, it is plain that the offense denounced by the Article of War is the act of sleeping on post rather than apprehension in the act, and the exception of the word "found" from the Specification is therefore immaterial.

6. The charge sheet shows that accused is 24 years 11 months of age and was inducted 24 February 1942 to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial

rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for sleeping upon post in time of war is death or such other punishment as the court-martial may direct (AW 86). The designation of the Loire Disciplinary Training Center, Le Mans, France, is authorized (Letter, AG, 252, Op TPM, Hq ETO, 19 December 1944, Subject: Designation of Place of Confinement).

B. Franklin Ritz

Judge Advocate

Malcolm C. Sherman

Judge Advocate

Edward L. Stevens, Jr.

Judge Advocate

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(137)

BOARD OF REVIEW NO. 1

21 APR 1945

CM ETO 5539

UNITED STATES

v.

Private ALBERT L. HUFENDICK
(37371117), 1470th Quarter-
master Truck Company

) SEINE SECTION, COMMUNICATIONS ZONE,
) EUROPEAN THEATER OF OPERATIONS.

) Trial by GCM, convened at Paris, France,
) 16 November 1944. Sentence: Dishonor-
) able discharge, total forfeitures and
) confinement at hard labor for ten years.
) Eastern Branch, United States Disciplin-
) ary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, 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 96th Article of War.

Specification: In that Private Albert L. Hufendick, 1470th Quartermaster Truck Company, European Theater of Operations, United States Army, did, at Paris, France, on or about 3 October 1944, willfully and wrongfully dispose of approximately two hundred twenty-five (225) gallons of gasoline, property of the United States and furnished and intended for the military service thereof, by selling the same to one Gaston Ferdinand Naze.

He pleaded not guilty and was found guilty of the Specification except the words "two hundred twenty-five (225)" and substituting therefor the words "one hundred ten (110)", of the excepted words not guilty of the substituted words guilty and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined

at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. a. The Specification in the instant case is based upon Form 112, Appendix 4, Manual for Courts-Martial, 1928, page 252, but contains no allegation of the value of the property sold. However, in alleging the offense of wrongfully and knowingly selling or disposing of Government property under the ninth paragraph of the 94th Article of War the value of the property is not an element of the offense. The gravamen of the crime is the sale or disposition, wrongfully and knowingly, of Government property furnished or intended for the military service (Donegan v. United States, (CCA 2nd 1922) 287 Fed. 641, 646, cert.den. 260 U.S. 751, 67 L.Ed. 495 (1923); United States v. Barber (DC Florida 1923) 289 Fed. 523, 524; Brown v. United States, (CCA 8th 1906) 146 Fed. 975, 977; Cf. Browers v. United States, (CCA 8th 1906) 148 Fed. 379). The laying of it under a charge alleging violation of the 96th Article of War did not change the nature of the offense alleged (MCM, 1928, par. 152c, p. 188; CM ETO 3118, Prophet; CM 118656 (1918), CM 147387 (1921), CM 151005 (1922); Dig. Ops. JAG 1912-1940, sec. 394(2), pp. 197, 198).

b. Prosecution's evidence is substantial that accused sold to the person alleged at least 110 gallons of gasoline, property of the United States furnished and intended for the military service thereof. The record is legally sufficient to sustain the findings of guilty of the offense charged as a crime under the 94th Article of War (CM 214637, Bullington et al (1940), 10 B.R. 371, 374; CM ETO 6232, Lynch et al).

c. No market value of the gasoline was alleged or proved at the time and place of sale. The question arises whether there is any legal method provided whereby the court and Board of Review may take judicial notice of the value of property of the type of gasoline, which is owned by the United States, furnished and intended for the military service, in the absence of allegations and proof of such fact. Such value is necessary in determining the punishment which may legally be imposed upon a guilty accused (AW 45; MCM, 1928, par. 104c, p. 100). The court and the Board of Review are authorized to take judicial notice of

"Price of articles issued or used in the Military Establishment when published to the Army in orders, bulletins, or price lists" (MCM, 1928, par. 125, p. 135).

Consistent with such provisions of the Manual for Courts-Martial it has been held that the court may take judicial notice of Army price lists to establish the value

"of government articles of a distinctive character made specially for use in the military service and not having a market value in their manufactured form" (CM 194353, Hyden and Swift, (1931), 2 B.R. 133, 135).

Within the classification of such property are Army overcoats (CM 194353, Hyden and Swift, *supra*); a .45 caliber revolver and holster issued by the Government (CM 235445, Mature (1943) 22 B.R. 75); olive drab blouse, trousers, wool shirt and belt (CM ETO 952, Mosser); rayon stockings (CM ETO 4300, Kondrik); Army motor vehicles (CM ETO 393, Caton and Fikes; CM ETO 4701, Minnetto; CM ETO 5666, Bowles and Burrell; CM ETO 6342, Smith; CM ETO 7000, Skinner). However, it has been determined that

"except as to distinctive articles of Government issue or other chattels, which because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value" (CM 217207, Barker (1941), 11 B.R. 229, 230).

Included within the general classification of such personal property are photographic exposure meters (CM ETO 217207, Barker, *supra*); watches and cameras (CM 208002, Gilbert (1937), 8 B.R. 389; CM 208481, Ragsdale (1937), 9 B.R. 13); commercial drawing sets (CM 209131, Jacobs (1938), 9 B.R. 69); boots (CM 212983, Diksworth (1940), 10 B.R. 265); articles of civilian clothing not Government issue (CM 213765, Krueger and Mann (1940), 10 B.R. 283).

With respect to gasoline furnished to the American Army in the European Theater of Operations certain facts have been for a considerable period of time past and now are open and notorious. All of such gasoline is procured from the British Minister of Fuel under "Reciprocal Aid" based on the Act of Congress approved 11 March 1941 (c.11, 55 Stat. 31; 18 USCA secs. 411-419), commonly known as the "Lend-Lease" Act. No other gasoline is available to or used by the American forces. In France no commercial sources of supply of gasoline to these forces exist and there is no value established in commercial markets which are open to the American Army. Distribution and marketing of gasoline upon a commercial basis such as prevailed during the pre-war years have ceased to exist in France. The prices of gasoline furnished to the American Army are fixed and determined by the British Minister of Fuel and such prices are used by the Quartermaster, European Theater of Operations, in his quarter-annual reports to the Quartermaster General, Washington, D. C., under the "Lend-Lease" Act. Such reports (excluding such products as are consumed by the Army Air Forces) are made on Form O.F.D. No. RA-3. There are no other prices of gasoline recognized

CONFIDENTIAL

(140)

officially by the United States in the theater. The facts here stated are not secret and are within the general knowledge of the American military personnel. They are distinctive and peculiar to the theater. It is the belief of the Board of Review (sitting in the European Theater of Operations) that the principles governing judicial notice of property values as declared in the holdings of the Board of Review (sitting in Washington) above cited do not contemplate the peculiar and abnormal condition which has existed for a considerable time past and is now existing in the theater with respect to gasoline. Although gasoline is a commodity which ordinarily possesses a value on the open market and hence under the established principles of the Board of Review (sitting in Washington) must be proved as any other fact, gasoline in the European Theater of Operations possesses no established market value. Therefore, it is necessary to discover whether there exists any other legal basis for determination of its value. If such basis exists it will represent a second exception to the general rule governing the method of proof of value of articles subject to theft and allied offenses.

The Manual for Courts-Martial, 1928, provides in pertinent part:

"The principal matters of which a court-martial may take judicial notice are as follows * * * general facts and laws of nature, including their ordinary operations and effects * * *" (par.125, p. 134-135). (Underscoring supplied).

It is submitted that the condition with respect to the procurement, distribution and use of gasoline and the value to be allocated to same within the European Theater of Operations is a general fact concerning which the military courts and Board of Review may take judicial notice. A condition exists and has existed for some months past in the theater which finds no counterpart in continental United States. The military exigencies and demands and the diplomatic agreements between the United States and Great Britain with respect to the procurement and distribution of gasoline have served to make the facts pertaining thereto matters of general knowledge of which military judicial tribunals sitting within the theater may take notice without proof (Brown v. Piper, 91 U.S. 37, 23 L.Ed. 200 (1875); United States v. Rio Grande Dan and I. Co., 174 U.S. 690, 43 L.Ed.1136 (1899); Miller v. Oregon, 208 U.S. 412, 52 L.Ed. 551 (1908)). It is not necessary to plead facts of which a court may take judicial notice (Wilkins v. United States, (CCA 3rd, 1899) 96 Fed. 837, 841; 20 Am. Jur., sec. 25, p.54). This conclusion is further supported and made necessary by economic and industrial conditions prevailing in France which make it impossible to establish a fair market value of gasoline by any ordinary or usual methods of proof recognized by Federal civil courts and by courts-martial. The principal civilian gasoline market (excluding distribution by the French government) is commonly designated as a "black market", i.e. illicit dealings in gasoline which in the vast majority of instances has been stolen from the United States armed forces. Its prices bear no legitimate relation-

(141)

ship to peace-time gasoline prices or to the intrinsic worth of the product. Exorbitant demands are made by the sellers and are met by the consumers. Under such circumstances the rationale of the theory of "market value" of property does not exist.

The price of gasoline furnished to the American forces, fixed and determined by the British Minister of Fuel, will operate more favorably to an accused than prices based on so-called "market value" of gasoline in civilian markets. The lack of unlimited supply for general civilian consumption, coupled with illicit transactions in the commodity, has produced a chaotic condition under which the determination of a "market value" as that value is understood according to normal peace-time standards is impossible. Where there is no legitimate market, there is no determinable market value.

For the foregoing reasons, the Board of Review concludes that the American military courts and the Board of Review sitting in the European Theater of Operations are entitled to take Judicial notice of the price of gasoline as reported in the quarter-annual reports of the Quartermaster, European Theater of Operations, to the Quartermaster General for the relevant period.

4. By reference to the quarter-annual report above described of the Quartermaster, European Theater of Operations to the Quartermaster General for the period 1 October to 31 December 1944, it is seen that both 73 and 80 octane petrol (gasoline) is valued at .1934 cents per Imperial gallon. The price per United States gallon will be 5/6 of the price per Imperial gallon (Webster's New International Dictionary (2nd Ed.), p.1029). Therefore the gallon value of the gasoline involved in this case on 3 October 1944 was .16117 cents and the total value of the gasoline sold by accused (110 gallons at .16117 cents per gallon) was \$17.73.


5. The charge sheet shows that accused is 24 years three months of age. He was inducted 8 July 1942 at Jefferson Barracks, Missouri, to serve for the duration of the war plus six months. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and offense. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification as involves a finding that accused did willfully and wrongfully dispose of approximately 110 gallons of gasoline, property of the United States furnished and intended for the military service thereof of a total value of \$17.73 by selling the same to one Gaston Ferdinand Naze, and legally sufficient to support only so much of the sentence as involves dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.

5539

(142)

7. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, was properly designated as the place of confinement (AN 42).

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CONFIDENTIAL

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(143)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 21 APR 1945 TO: Commanding General, Seine Section, Communications Zone, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private ALBERT L. HUFENDICK (37371117), 1470th Quartermaster Truck Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support so much of the findings of guilty of the Specification as involves a finding that accused did willfully and wrongfully dispose of approximately 110 gallons of gasoline, property of the United States furnished and intended for the military service thereof of a total value of \$17.73 by selling the same to one Gaston Ferdinand Naze and legally sufficient to support only so much of the sentence as involves dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, you now have authority to order execution of the reduced sentence.

2. It is obvious that no gravity is added to an offense merely by alleging it to be a violation of Article of War 96. The specification states a violation of Article of War 94 and for that offense the President has prescribed a maximum limit of punishment by which all in the military service are bound.

It is equally obvious that government gasoline has a substantial and ascertainable value. It is one of the critical articles of supply in this theater. The armies which were stalled at the Siegfried line last fall for lack of gasoline would have paid any price for it. Thousands of trucks on the Red Ball Highway and hundreds of transport planes were engaged for months in a mighty effort to get it to the front. Those soldiers, who like this accused, were recreant to their duty and sold the gasoline entrusted to them for personal gain, were guilty of a treacherous offense against the Army and their country, straining every effort against a determined enemy. Courts-martial are courts of justice, it is true, but they are also disciplinary agents of the military commanders. Congress intended them to so function. To say that because no value was alleged, conviction can be upheld only for property of some value less than \$20.00, ignores common sense, the realities facing our armies in Europe, and the knowledge of every common soldier, particularly this accused who sold it for \$1.00 per gallon. Although not necessary to the result reached in this case, I fully approve the principles stated.

3. In view of the reduction of the period of confinement, I recommend that the Loire Disciplinary Training Center, Le Mans, France (Ltr, Hq. European Theater of Operations, AG 252 Op. TPM, 19 Dec. 1944, par.3) be designated as the place of confinement of accused and that the dishonorable discharge be suspended until the soldier's release from confinement. If you concur in such recommendation, supplemental action should be forwarded to this office for attachment to the record of trial.

5539

CONFIDENTIAL

(144)

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5539. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5539).



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

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(145)

BOARD OF REVIEW NO. 1

14 MAY 1945

CM ETO 5546

UNITED STATES

v.

Private First Class GUY D.
ROSCHER (39100167), 1813th
Ordnance S and M Company
(Avn) and Private JOHN S.
STAPLETON (32754469), De-
tachment A, 2210th Quarter-
master Truck Company (Avn),
both of Team B, 312th Service
Group

) XIX TACTICAL AIR COMMAND

) Trial by GCM, convened at Chalons-
) Sur-Marne, France, 6-8 November
) 1944. Sentence as to STAPLETON:
) Dishonorable discharge, total for-
) feitures and confinement at hard
) labor for 15 years. Eastern Branch,
) United States Disciplinary Barracks,
) Greenhaven, New York. Sentence as to
) ROSCHER: Dishonorable discharge
) (suspended), total forfeitures and
) confinement at hard labor for five
) years. Seine Disciplinary Train-
) ing Center, Paris, France.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

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

2. In the case of Private First Class Roscher, the execution of the dishonorable discharge was suspended and the proceedings published in General Court-Martial Orders No. 61, Headquarters XIX Tactical Air Command, APO 141, U. S. Army, dated 1 December 1944.

3. No purpose would be served by summarizing the evidence in the record of trial. All vital issues were seriously controverted, with the prosecution and defense presenting strikingly different accounts of the events transpiring on the evening of 18 July 1944. The issues thus created were for resolution by the court which was able to evaluate the credibility of the witnesses at first hand.

4. With respect to Charge I, alleging violation of the 64th Article of War by each accused, the questions presented whether

CONFIDENTIAL

5546

(146)

First Lieutenant Jackson was "in the execution of his office" at the time of the assaults by accused. The Manual for Courts-Martial, 1928, states:

"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" (par.134a, p.148).

The quoted authority is entitled to special emphasis where the offenses occurred in an active theater of operations and an officer is almost constantly on duty (Cf: CM ETO 9423, Carr). It does not, however, necessarily follow therefrom that an officer will be considered as acting "in the execution of his office" at a time when he was under the influence of intoxicants to the degree that he received punishment under the 104th Article of War for drunken and disorderly conduct (R17-18). Although Lieutenant Jackson testified that he "wasn't drunk but * * * was under the influence of alcohol" (R13), his acceptance of punishment under the 104th Article of War and the competent evidence set forth below leads unerringly to the conclusion that he was thoroughly intoxicated on the night in question.

First Lieutenant (then second lieutenant) Robert A. Kipley, Company C, 158th Engineer Combat Battalion, who after receiving a report of the incident came to the scene to investigate, testified on cross-examination as follows:

- "Q. What would you say as to Lt. Jackson's condition?
 A. I would say he had been drinking that night.
 Q. Would you say he was under the influence of liquor?
 A. Yes.
 Q. No question in your mind about that?
 A. No.
- * * *
- Q. Did Lt. Jackson have some difficulty in driving the jeep as he left you?
 A. Yes; he couldn't seem to turn the jeep around.
 Q. Did you have any hesitation in giving him orders that night?
 A. Lt. Jackson? No, sir, I didn't have any hesitation.

(147)

- Q. Were you a 2nd Lieutenant at that time?
 A. Yes, sir.
 Q. Was he a 1st Lieutenant?
 A. He was.
 Q. Was it because of his condition that you felt you should give him orders in spite of his rank?
 A. Yes, sir, and because I was more or less annoyed at the fact I had to leave my job and come back to the spot where men were causing trouble" (R79-80).

Private Thomas E. Tripp, Company B, 158th Engineer Combat Battalion, testified that at the conclusion of the incident, after both accused had been disarmed, he and Lieutenant Kipley heard a shot down the road and they

"went down and hollered 'Halt!'" and he asked us to come up and I found out it was Lt. Jackson and he was driving with one hand and had a pistol in the other" (R75).

About 0830 hours on 19 July 1944 Captain Franklin L. Young, Roscher's commanding officer, First Lieutenant Leonard K. Kukoski, Stapleton's commanding officer, and a Captain Greathouse, "executive officer of the squadron", spoke with Lieutenant Jackson in Jackson's tent regarding the events of the previous night. Lieutenant Jackson was still under the influence of liquor and said he had been "so damn drunk" that he didn't know what had happened. He said that a shot had been fired during the fracas but he didn't know who had fired it (R151-153).

The Board of Review is of the opinion that an officer so flagrantly unfit to perform his duties as was Lieutenant Jackson on the night of 18 July was not "in the execution of his office" within the meaning of the 64th Article of War, and the record of trial is legally insufficient to support the findings of guilty as to each accused in violation of said Article (Cf: CM 218883, Long, 12 B. R. 167 (1942); CM 211978, Riddle, 10 B. R. 179 (1939)). The record is legally sufficient to support findings of guilty of the lesser included offenses of assault and assault and battery upon Lieutenant Jackson in violation of the 96th Article of War (CM 218883, Long, supra).

5. The charge sheet shows the following with respect to the service of accused: Stapleton is 19 years 10 months of age and was inducted 17 March 1943 at Camden, New Jersey, to serve for the duration of the war plus six months. Roscher is 22 years 11 months of age and was inducted 19 August 1942 at Monterey, California, to serve for the duration of the war plus six months. Neither had prior service.

5546

(148)

6. The court was legally constituted and had jurisdiction of the persons and offenses. Except as indicated herein, no errors injuriously affecting the substantial rights of either accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as to the specifications of Charge I as to each accused as involves findings of the lesser included offenses of assault as to accused Roscher, and assault and assault and battery as to accused Stapleton, in violation of the 96th Article of War and to support findings of guilty as to the remaining charges and specifications and the sentence as to each accused.

7. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of accused Stapleton is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended). The place of confinement as to accused Roscher should be changed to the Loire Disciplinary Training Center, Le Mans, France (Ltr. Hq. European Theater of Operations, AG 252. Op. THM, 19 Dec.1944, par.3).

Wm. F. Sullivan Judge Advocate

Wm. F. Sullivan Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(149)

1st Ind. _____

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 14 MAY 1945 TO: Com-
manding General, XIX Tactical Air Command, APO 141, U. S. Army.

1. In the case of Private First Class GUY D. ROSCHER (39100167), 1813th Ordnance S and M Company (Avn), and Private JOHN S. STAPLETON (32754469), Detachment A, 2210th Quartermaster Truck Company (Avn), both of Team B, 312th Service Group, 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 as to the specifications of Charge I as to each accused as involves findings of the lesser included offenses of assault as to accused Roscher, and assault and assault and battery as to accused Stapleton, in violation of the 96th Article of War and to support findings of guilty as to the remaining charges and specifications and the sentence as to each accused, which holding is hereby approved. It is recommended that the finding of guilty of Specification 1, Charge I as to accused Stapleton be disapproved because of possible duplicity. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Although the court resolved the conflicting testimony in the instant case by deciding that accused were guilty of unprovoked assaults upon various members of Lieutenant Jackson's party and French civilians, a careful study of the record of trial gives strong support to the inference that the fracas grew out of a drunken brawl between Lieutenant Jackson's party and accused. While both accused merit punishment and accused Stapleton's subsequent acts, which form the basis of the additional charges against him, furnish convincing testimony that he should be separated from the service, the relative "whitewashing" given Lieutenant Jackson is the type of inequality of treatment as to officers and enlisted personnel which may well serve to cast discredit upon military justice. Substantial evidence in the record of trial shows that Lieutenant Jackson should have been tried by court-martial. His flagrant disregard of his responsibilities as an officer in an active combat zone was a discredit to the service, and there seems little doubt that the offenses would not have been committed if Lieutenant Jackson had been in fit condition to perform his duty and if his companion, Lieutenant Knight, had not been "out cold" in the jeep. I therefore recommend that the term of confinement of accused Stapleton be reduced to five years.

3. The conduct of the trial judge advocate was not calculated to reflect credit on the administration of military justice. The trial judge advocate is charged with a duty to the military service. Tactics which would have been discreditable in a civil criminal.

(150)

court cannot be considered as a proper pattern for a trial judge advocate to follow in a court-martial (see, e.g., R.140).

4. The place of confinement of accused Roscher should be changed to the Loire Disciplinary Training Center, Le Mans, France. This may be done by supplemental action.

5. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5546. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5546).



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

CONFIDENTIAL

(151)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

6 JAN 1945

CM ETO 5555

U N I T E D	S T A T E S	)	28TH INFANTRY DIVISION
)	
	v.	)	Trial by GCM, convened at Rotgen,
		)	Germany, 11 November 1944. Sentence:
Private EDDIE D. SLOVIK		)	To be shot to death with musketry.
(36896415), Company G, 109th)	
Infantry)	

HOLDING BY BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, 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 Charge and specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Eddie D. Slovik, Company G, 109th Infantry did, at or near Elbeuf, France, on or about 25 August 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and to shirk important service, to wit: action against the enemy, and did remain absent in desertion until he was delivered to United States military authorities by Canadian military authorities at or near Brussels, Belgium, on or about 4 October 1944.

5555

CONFIDENTIAL

Specification 2: In that * * * did, at or near Rocherath, Belgium, on or about 8 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and to shirk important service, to wit: action against the enemy, and did remain absent in desertion until he surrendered himself at or near Rocherath, Belgium, on or about 9 October 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications thereunder. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority, the Commanding General, 28th Infantry Division, approved only so much of the sentence as provided that accused be shot to death with musketry and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, as approved, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Uncontradicted evidence for the prosecution showed substantially the following:

Sometime after 25 July 1944 accused came overseas from Fort George G. Meade, Maryland, as a member of a group of replacements (R8). The group proceeded via England to Omaha Beach, France, thence to "a couple of different places" and thereafter to the Third Replacement Depot (France), where accused was assigned to the 28 Infantry Division. On 25 August the group went to the division headquarters and accused, together with 14 other replacements, was assigned to Company G, 109th Infantry (R8-9,10; Pros.Exs.1,2,3). At division headquarters an officer gave the group, including accused, an orientation lecture (R9,10,11) and ammunition was issued to them (R9). According to the testimony of one of their number, Private George W. Thompson, it was a matter of common knowledge and general conversation among the members of the group as to what company they were to join, where the company was and whether or not it was engaged in combat (R10). Witness explained that the members of the group "didn't know what to expect and didn't come to any definite conclusion about where we were going", but "had a pretty strong suspicion" that the division was engaged with the enemy. They did not know definitely what Company G was doing but "just imagined that it was fighting" (R9).

5555

CONFIDENTIAL

(153)

On the same day, 25 August, according to Thompson's testimony, the group entrucked at division headquarters for Company G, then located at Elbeuf, France (R9,10). (Elbeuf is approximately 80 miles west-northwest of Paris). En route, the replacements including accused, "saw some damage, some burned out vehicles and shelled places", but saw no action (R10,11). After proceeding for about two or three hours they stopped at what apparently was a rest area, left their packs, and continued on the trucks to the outskirts of Elbeuf, where they detrucked. After moving along the edge of the city they reached an open lot where they "dug in" at about 2300 hours. Thompson saw accused with the group at this time. Between 2300 and 2330 hours the replacements, including accused, entered the city of Elbeuf to join Company G (R9,10). There were "a lot of troop movements and shelling" and

"it took quite a while because there was a lot of confusion. We moved around some but stayed close together so none of us would get lost" (R10).

Thompson knew accused was at Elbeuf with the group about 0100 hours 26 August because he knew and recognized accused's voice. This was the last time he "saw" him, however, and so far as he knew, accused was not present for duty with his company at any time thereafter (R11). The company remained at Elbeuf on 26 August until Canadian troops "took over" and it then proceeded through Paris, Belgium and Luxembourg to the Siegfried line (R10). During this movement occasional enemy action was encountered and up until the time of trial the company was engaged generally in fighting and campaigning in the invasion (R11).

Captain Ralph O. Grotte, company commander of Company G, 109th Infantry, testified that at the time of trial 11 November he had been in command thereof for a month and a half and that accused physically joined Company G on 8 October when it was reorganizing and not in contact with the enemy. Accused "had been absent without leave and had been returned to me through the battalion". Witness never granted accused permission to be absent (R13), and no permission was requested. Accused was never present with the company for duty except on 8 October for one or two hours (R14). On that day a battalion sergeant major brought him to the company command post where witness assigned him to the 4th platoon, turned him over to the platoon leader and forbade him to leave the company area unless he had permission from witness. The platoon leader conducted accused to his platoon and introduced him to his squad leader (R13). Thereafter accused came to witness and inquired of him if could be tried for being absent without leave. Grotte told him he would find out and caused him to be placed in arrest and returned to his platoon area, where Grotte directed him to stay. About an hour later accused witness "If I leave now will it be desertion?" and witness replied that it would be. Accused left and thereafter he was not seen in

-2-
CONFIDENTIAL

5555

the company nor was he present with the company for duty. On 8 October accused did not request permission to be absent, nor did witness grant him the same. Since the time Grotte assumed command, the company campaigned generally and both before and after 8 October engaged in fighting, during which it attacked the enemy on one occasion (R14).

About 0830 hours 9 October accused came to the Military Government Detachment, 112th Infantry, which since the preceding day was located at Rocherath, Belgium, handed a cook a green slip of paper containing handwriting and stated that he, accused, had made a confession. The cook informed his "commanding officer", Second Lieutenant Thomas F. Griffin, of the matter when the latter returned to the detachment about 1100 hours. Griffin thereupon telephoned the S-1 of the 109th Infantry and requested that someone call for accused (R14-16). About 1230-1245 hours a sergeant arrived (R15) and drove accused to the orderly room of the 109th Infantry, where he handed the green slip of paper to the temporary military police officer, First Lieutenant Wayne L. Hurd. The latter testified that he read the slip and directed the sergeant to deliver accused to the military police for temporary custody. Hurd then delivered the slip first to the adjutant and then to Lieutenant Colonel Ross C. Henbest. Subsequently on the same day accused signed the slip in the presence of Hurd and Henbest, both of whom also signed the same (R12; Pros.Ex.4). The green slip of paper, a U.S. Army Post Exchange flower order form, with writing in ink on each side thereof, was admitted in evidence as Pros.Ex.4. The defense stated it had no objections to the admission of the exhibit (R12) which reads as follows:

[Handprinted in ink]

"I Pvt. Eddie D. Slovik #36896415 confess to the Desertion of the United States Army. At the time of my Desertion we were in Albuff in France. I come to Albuff as a Replacement. They were shilling the town and we were told to dig in for the night. The flowing morning they were shilling us again. I was so scared nerves and trembling that at the time the other Replacements moved out I couldn't move. I stayed their in my fox hole till it was quite and I was able to move. I then walked in town. Not seeing any of our Troops so I stayed over night at a French hospital. The next morning I turned myself over to the Canadian Provost Corp. After being with them six weeks I was turned over to American M.P. They turned me lose. I told my commanding officer my story. I said that if I had to go out their again I'd run away. He said their was nothing he could do for me so I ran away again AND ILL RUN AWAY

5555

CONFIDENTIAL

(155)

AGAIN IF I HAVE TO GO OUT THEIR.

Signed Pvt. Eddie D. Slovik [handwritten]
A.S.N. 36896415".

[Reverse side, on printed form, handwritten in ink]:

"Rocherath, Belgium
Oct 11, 1944*

This statement is made in the presence of
Lt. Col Ross C. Henbest 0237158 and 1st Lt
Wayne Hurd, O-463853

I have been told that this statement can
be held against me and that I made it of my
own free will and that I do not have to make
it.

Signed:*
Eddie D. Slovik

Above statement was signed in the presence
of the undersigned:

/s/ Ross C. Henbest
Ross C. Henbest *
Lt Col, Infantry

/s/ Wayne L. Hurd
Wayne L. Hurd *
1st. Lt. Inf"*(Pros.Ex.4).

*Handprinted.

Hurd testified "Everything that appears on the green slip of paper
was made very clear to the defendant" (R12).

4. After full explanation of his rights to testify, make
an unsworn statement or remain silent, accused elected to remain
silent. The defense introduced no evidence (R16).

5. Specification 1 of the Charge as originally drafted charged
in part that accused absented himself without leave

"with intent to avoid hazardous duty, to wit:
action against the enemy, and did remain absent
in desertion until he surrendered himself to
the 507th MP Battalion at or near Brussels,
Belgium".

Acting on behalf of the appointing authority, the Staff Judge Advocate,
28th Infantry Division, subsequent to the investigation under the
70th Article of War, amended the above quoted portion of the Specification
to read as follows:

"with intent to avoid hazardous duty and to shirk

5555

-5-
CONFIDENTIAL

CONFIDENTIAL

(156)

important service, to wit: action against the enemy, and did remain absent in desertion until he was delivered to United States military authorities by Canadian military authorities at or near Brussels, Belgium, on or about 4 October 1944".

Specification 2 of the Charge as originally drafted charged in part that accused absented himself without leave

"with intent to avoid hazardous duty, to wit: action against the enemy, and did remain absent in desertion until he surrendered himself to military authorities at or near", etc.

The Staff Judge Advocate, subsequent to the investigation under the 70th Article of War, amended the above quoted portion of the Specification to read as follows:

"with intent to avoid hazardous duty and to shirk important service, to wit: action against the enemy, and did remain absent in desertion until he surrendered himself at or near", etc.

Paragraph 34, Manual of Courts-Martial, 1928, page 22 reads in part:

"Action by officer exercising court-martial jurisdiction.-

*

*

*

the charges may be redrafted over the signature thereon, provided the redraft does not involve any substantial change or include any person, offense, or matter not fairly included in the charges as received"

The addition to each Specification of the words "and to shirk important service" amounted essentially to no more than an additional description and characterization of the essential object which accused was charged with intending to avoid, namely, "action against the enemy". It added nothing that was not fairly inferable from the specifications as a whole as originally drafted. The alteration from the allegation of surrender to a military police organization to that of delivery by Canadian military authorities to United States military authorities (Specification 1) and the elimination of the words "to military authorities" following the words "surrendered himself" (Specification 2) were not substantial modifications. As the offense of desertion is complete when the person absents himself without authority from his place of service with the requisite intent (MCM, 1928, par.67, p.52; par.130a, p.142), and since the maximum punishment for desertion however terminated is now death (AW 58; E.O. 9048, 3 Feb. 1942, (sec. IV, Bull.6, WD, 9 Feb 1942, MCM, 1928, par.104c, p.97, note)), the

5555

CONFIDENTIAL

manner of termination is not material (Cf: CM ETO 2473, Cantwell). In view of the foregoing it is concluded that the redraft involved no substantial change and did not include any offense or matter not fairly included in the charges as received.

The pleading of both specific intents under Article of War 28 in one specification was proper and left the prosecution free to prove either or both of the intents alleged (CM ETO 2432, Durie; CM ETO 2481, Newton; CM ETO 3234, Gray), and in any event, as above inferred, it seems clear that the hazardous duty alleged, to wit: action against the enemy, necessarily involved important service.

6. The question for determination is whether the record contains substantial competent evidence of each of the four elements of each offense charged, namely:

- (1) that accused absented himself or remained absent without leave from his place of service, as alleged;
- (2) that his unit "was under orders or anticipated orders involving either (a) hazardous duty or (b) some important service" (MCM, 1921, par409, p.344);
- (3) that notice of such orders and of imminent hazardous duty or important service was actually brought home to him; and
- (4) that at the time he absented himself he entertained the specific intent to avoid hazardous duty or shirk important service (CM ETO 2368, Lybrand and authorities therein cited; CM ETO 3234, Gray).

(a) As to Specification 1:

(1) That accused absented himself without leave at sometime on the night of 25-26 August 1944 is established by the testimony of one of the other replacements in his group that accused was with the group when it joined Company G, 109th Infantry, at the city of Elbeuf, France, but was not present with them after about 0100 hours 26 August. The company commander testified that accused did not physically join the company until 8 October and that he had no permission to be absent prior to that date. In his voluntary confession accused stated that he was separated from his unit on the night in question, spent the night at a French hospital, surrendered to the "Canadian Provost Corp" on the following morning, passed six weeks with them and was then turned over to "American M.P.". The fact that the record does not show clearly that accused was physically present with his company at the time he absented himself does not constitute an essential variance from the allegation that he absented himself without leave from his organization, as he was under military control of divisional or regimental officers and under orders to join his company (CM NATO 5555

CONFIDENTIAL

(158)

1259 (1944), Bull. JAG, Vol.III, No.1, Jan 1944, sec.385, pp.7-8). He was not effectively returned to military control until his delivery to the United States Military authorities (AR615-300, 25 Mar 1944, par.14; SPJGA 251.22, Sept 2, 1942, Bull. JAG, Vol.I, No.4, Sept 1942, AR 345-155, p.251; SPJGA 1943/19359, 31 Dec 1943, Bull. JAG, Vol.III, No.1, Jan.1944, sec.419 (2), p.9). The lack of proof of the allegation that accused was delivered "at or near Brussels, Belgium", is immaterial as is also the lack of specific proof that this occurred on or about 4 October (251.19, Jan 9, 1919, Dig.Op.JAG, 1912-1940, sec.416 (14) p.271; CM ETO 2473, Cantwell; Cf: CM ETO 2444, Warner).

(2) The evidence is not clear whether or not when accused so absented himself he had become attached to Company G or was still a member of the group of 15 replacements engaged in the process of joining Company G. Assuming the latter in accused's favor, the evidence leaves no doubt that his unit, the group, was under orders to join Company G, which on the day following the group's arrival, proceeded from its station near Elbeuf through France, Belgium and Luxembourg to the Siegfried Line, encountering enemy action en route, as was reasonably to be anticipated. It is thus evident that both the orders mentioned and future orders to be anticipated with respect to Company G's movements involved the hazardous duty and important service of action against the enemy.

(3) Accused was a member of a group of replacements which had come together from the United States, through England, to France and there to a replacement depot where they were assigned to the 28th Infantry division. At division headquarters accused and the other members of the group heard an orientation lecture and were issued ammunition. En route to the company to which accused and the others were assigned they saw no current enemy action but saw the unmistakable effects of past enemy action - "some damage, some burned out vehicles and shelled places". The group, including accused, stopped and left their packs at a rest area and continued on to the vicinity of the company to which they had been assigned, where they "dug in". When the group, which according to some prosecution testimony still included accused, proceeded to join Company G, there were "a lot of troop movements and shelling". In accused's confession he stated "They were shilling the town" when the group "dug in" and again the following morning.

Notice of the orders and anticipated orders involving the hazardous duty and important service of action against the enemy could hardly have been more forcefully brought home to accused, who obviously knew what was in store for him and the others and who, according to his own statement, "was so scared nerves and trembling that at the time the other Replacements moved out", he "couldn't move".

(4) Accused absented himself without leave on 25 or 26 August and his group either joined or were about to join Company

5555

CONFIDENTIAL

G under the circumstances above described. He remained absent until 8 October, at which time the company was reorganizing and was not in contact with the enemy. The company commenced its forward movement sometime on 26 August, less than a day after the commencement of accused's unauthorized absence, and, as stated, encountered expected enemy action on its course through France and Belgium. Accused's absence was calculated to and did result in his avoidance of the hazardous duty and shirking of the important service of action against the enemy. At the trial accused offered no explanation of his absence. Even apart from his confession, the foregoing evidence supports an inference of intent on accused's part at the time of absenting himself to avoid such duty and to shirk such service. His confession specifically states that he confesses "to the Desertion of the United States Army" at "Albuff" and that he told his commanding officer "that if I had to go out their again I'd run away". His commanding officer testified that when accused came to the company on 8 October he asked if he could be tried by court-martial for absence without leave. The confession and this evidence remove any reasonable doubt, if any exist, that accused's intention, when he absented himself without leave on 25 or 26 August 1944, was to avoid the hazardous duty and important service of action against the enemy.

The Board of Review is of the opinion that the evidence convincingly establishes all elements of the offense alleged in Specification 1 of the Charge and fully supports the court's findings of guilty thereof (CM ETO 3473 Cantwell; CM ETO 2368, Lybrand; CM ETO 4743, Gotschall; CM ETO 5117 DeFrank; CM ETO 5293, Killen and authorities cited in those cases).

(b) As to Specification 2:

(1) The testimony of Captain Grotte, company commander of Company G, establishes that accused absented himself on 8 October after being present with the company for only one or two hours, and that he neither requested nor was granted permission to leave. He remained absent until about 0830 hours 9 October when he surrendered to the Military Government Detachment, 112th Infantry, at Rocherath, Belgium. It is reasonable inferable from the evidence that Company G was located at or near that place, as alleged, when accused absented himself.

(2) At the time accused absented himself, his company, according to the testimony of its commanding officer, "was reorganizing" and although not then in contact with the enemy, it thereafter engaged in close contact and fighting therewith. Thompson testified that the company proceeded from Belgium through Luxembourg to the Seigfried Line and that the 109th Infantry encountered occasional enemy action en route. The company on 8 October was obviously under orders or at least anticipated orders involving the hazardous duty and important service of action against the enemy.

CONFIDENTIAL

(160)

(3) When accused came to Company G on 8 October, he knew that it had advanced from Elbeuf, France, to the vicinity of Rocherath, Belgium. At the company command post he was assigned and physically conducted to the 4th platoon and introduced to his squad leader. Accused knew that he was at that point an integral part of a fighting organization which in all likelihood would not remain static but would press forward against the enemy. The evidence points unmistakably to the conclusion that notice of the orders or anticipated orders involving the hazardous duty and important service of action against the enemy was directly brought home to accused before he absented himself without leave on 8 October.

(4) Shortly after coming to Company G on 8 October, accused asked if he could be tried for absence without leave. Having in mind the facts and circumstances mentioned in (3), supra, and after being placed in arrest by his company commander, accused asked him "If I leave now will it be desertion?" and received an affirmative answer, after which he left the company, wrote out and signed his confession and surrendered the following day to the Military Government Detachment, 112th Infantry. Coincidentally with his surrender he delivered his confession to military authorities and later affirmed and signed the statement in the presence thereof. In the confession accused stated that he told his commanding officer his story and

"said that if I had to go out their agains
Id run away. He said their was nothing
he could do for me so I ran away again.
AND ILL RUN AWAY AGAIN IF I HAVE TO GO
OUT THEIR".

This evidence leads inevitably to the conclusion that accused deliberately absented himself on 8 October with the intent of deserting the military service so that he would be tried by court-martial and incarcerated and thus avoid the hazardous duty and shirk the important service of action against the enemy.

The Board of Review is again of the opinion that the evidence convincingly establishes all elements of the offense alleged in Specification 2 of the Charge and fully supports the court's findings of guilty thereof (CM ETO 2473, Cantwell; CM ETO 2368, Lybrand; CM ETO 4743, Gotschall; CM ETO 5117 DeFrank; CM ETO 5293, Killen; and authorities cited in those cases).

7. Careful and painstaking examination of the record of trial reveals that accused was accorded fully due process of law as provided by the Articles of War (Cf: United States ex rel Innes v. Hiatt 141 Fed. (2nd) 664; CM ETO 2297 Johnson and Loper), and fails to show any action, or ruling by the trial court which prejudiced in any degree the substantial rights of accused. Eleven days elapsed between the service of charges upon him and the date of trial (R5), at which defense counsel specifically stated that accused was "ready

to proceed with the trial at this time" (R7). The voluntariness of his confession is attested by the evident fact that he himself wrote it on the flower order form and signed it wholly on his own initiative before submitting it to military authorities. Under the circumstances it constituted a particularly credible and damning piece of evidence, as accused obviously intended it should be. In view of the clear evidence of accused's guilt of each Specification, the presence of leading questions in the record of trial may not be deemed to have injuriously affected his substantial rights (CM ETO 4820, Skovan). There is nothing in the record of trial to indicate that accused was other than sane and responsible for his acts either at the times of the offenses or at the time of trial. The statement of the division neuropsychiatrist dated 26 October 1944, and contained in the accompanying papers, is an affirmative indication of accused's sanity and responsibility at those times.

8. The charge sheet shows that accused is 24 years eight months of age and was inducted at Detroit, Michigan, 3 January 1944 and subsequent service as follows:

"assigned D-59 Inf Tng Bn, Cp Wolters,
Tex 31 Jan 44; attached GFRD #1 Ft
Meade Md 11 July 44; attached to GFRS
14 Aug 44; attached to 3rd Replacement
Depot 19 Aug 44; assigned to Co G, 109
Inf"

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

10. The penalty for desertion committed in time of war is death or such other punishment as the court-martial may direct (AW 58).

B. J. Franklin Rety Judge Advocate
Edward W. Hergsen Judge Advocate
Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

(162)

1st Ind.

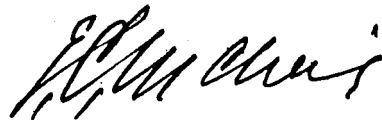
War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. **6 JAN 1945** TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private EDDIE D. SLOVAK (36896415), Company G, 109th Infantry, attention is invited to the foregoing holding by 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 execution of the sentence.

2. This is the first death sentence for desertion which has reached me for examination. It is probably the first of the kind in the American Army for over eighty years, - there were none in World War I. In this case, the extreme penalty of death appears warranted. This soldier had performed no front line duty. He did not intend to. He deserted from his group of fifteen when about to join the infantry company to which he had been assigned. His subsequent conduct shows a deliberate plan to secure trial and incarceration in a safe place. The sentence adjudged was more severe than he had anticipated, but the imposition of a less severe sentence would only have accomplished the accused's purpose of securing his incarceration and consequent freedom from the dangers which so many of our armed forces are required to face daily. His unfavorable civilian record indicates that he is not a worthy subject of clemency.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 5555. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5555).

4. Should the sentence as imposed by the court and confirmed by you be carried into execution, it is requested that a full copy of the proceedings be forwarded to this office in order that its files may be complete.



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

1 Incl:
Record of Trial

(Sentence ordered executed. GCMO 27, ETO, 23 Jan 1945)

5555

CONFIDENTIAL

(163)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

10 MAR 1945

CM ETO 5558

UNITED STATES)

v.)

Sergeant LEONARD F. CORSINO
(32902117) and Private First
Class VITO L. DeBELLIS
(35601143), both of Company
B, 121st Infantry)

8TH INFANTRY DIVISION

) Trial by GCM, convened at Head-
) quarters, 8th Infantry Division,
) APO 8, U.S. Army, 13 December
) 1944. Sentence: Dishonorable
) discharge, total forfeitures,
) and confinement at hard labor for
) life. Eastern Branch, United States
) Disciplinary Barracks, Greenhaven,
) New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

CORSINO

CHARGE: Violation of the 64th Article of War.

Specification: In that Sergeant Leonard F. Corsino, Company "B", One Hundred and Twenty First Infantry, having received a lawful command from Captain James H. Godfrey, his superior officer, to return to your organization Company B, did, in the vicinity of Hurtgen, Germany, on or about 24 November 1944, willfully disobey the same.

5558

(164)

DeBELLIS

CHARGE: Violation of the 64th Article of War.

Specification: In that Private First Class Vito L. DeBellis, Company "B", One Hundred and Twenty First Infantry, having received a lawful command from Captain James H. Godfrey, his superior officer, to return to your organization Company B or C, did, in the vicinity of Hurtgen, Germany, on or about 24 November 1944, willfully disobey the same.

Each accused pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the respective Charge and Specification against him. No evidence of previous convictions was introduced as to either accused. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. For the prosecution, Captain James H. Godfrey testified that he was a Battalion Adjutant of the 121st Infantry and that in addition, regimental headquarters had given him "the responsibility of handling stragglers, told me it would be my duty to appoint a straggler officer and round them up and return them to their outfits" (R6,9). On 23 November Lieutenant Vater, straggler officer, brought the two accused to him at the battalion command post which was located at that time southwest of Hurtgen, in the Hurtgen Forrest (R6,7). After talking with them, he told them to return to their organization. They refused to do so and he accordingly placed them under armed guard. Later that day Technical Sergeant Jack C. Booth, platoon sergeant, Company B, 121st Infantry,

"was sent back to the Battalion CP to search for stragglers from Company B and he came into the CP and spoke to me and asked if I would release them, the two men, and he would take them back to the company and give them another try" (R7).

Captain Godfrey acceded to this request and permitted the accused to accompany the sergeant. On the following day, 24 Novem-

ber 1944, the two accused were again brought to Captain Godfrey by Lieutenant Vater, Captain Godfrey again talked with the accused, asked them if the Articles of War had ever been read to them, and then "brought them to a fire to get warmed up and leave them with their thoughts for a while". Some two hours later, he returned, talked with them again and then ordered them "To return to their organization, Company, immediately" (R8). Each accused stated that he would not go back and refused to obey the order (R8,10). Captain Godfrey asked them if they understood what they had done in refusing to go back and each replied in the affirmative (R8). He was wearing his insignia of grade at the time he gave the order and stated that he was certain that each accused realized that he was an officer (R10). After their refusal to obey, accused were sent to regimental headquarters (R8).

Technical Sergeant Jack C. Booth, Company B, 121st Infantry testified that the accused had been members of his platoon since July 1944, and were assigned to the machine gun section (R10,12). On 22 November 1944 the machine gun section was attached to the first platoon, Company B, and the platoon was in a forward position with the machine gun positions "in the line". The platoon command post was about 100 yards behind the gun positions and the mortar section about 200 yards behind the command post (R10,11,12). On the day the two accused came back to the platoon command post, said they were sick, and requested permission to go to the aid station (R10,13). As Sergeant Booth had only about five men left in the machine gun section, permission was denied. On the following day, he was sent to the battalion command post to pick up stragglers and, upon arrival, found the two accused there under armed guard. He told Captain Godfrey that "if he would give them back to me I would carry them back to the front lines" Receiving permission, he took the accused back as far as the mortar section and told them to stay there until he sent for them. Later in the afternoon he sent a runner to bring the men forward but accused did not return with the runner. The sergeant did not see the accused after that time until the day of trial (R11).

4. After being advised of his rights as a witness, each accused elected to remain silent. The defense introduced no evidence.

5. It was clearly established that each accused received a lawful command from his superior officer and that each disobeyed such command. Further, under the circumstances here shown, there can be no question that such disobedience was willful. The evidence is thus amply sufficient to support the court's findings that each accused was guilty of the offense alleged (CM ETO 4453, Boller; CM ETO 5167, Caparatta).

6. The charge sheet shows that accused Corsino is 19 years of age and was inducted at "AFIS GCP NYC" on 4 May 1943 and that accused DeBellis is 21 years of age and was inducted at Akron, Ohio, on 1 February 1943. No prior service by either accused is shown.

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

8. The designation of the Eastern Branch, United States, Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

Edward Brundage Judge Advocate

Wm. W. Warrick Judge Advocate

Benjamin R. Sleeper Judge Advocate

(167)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 MAR 1945 TO: Commanding General, 8th Infantry Division, APO 8, U.S. Army.

1. In the case of Sergeant LEONARD F. CORSINO (32902117) and Private First Class VITO L. DeBELLIS (35601143) both of Company B, 121st Infantry, attention is invited to the foregoing holding by 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 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5558. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5558).



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

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(169)

BOARD OF REVIEW NO. 1

11 JAN 1945

CM ETO 5561

UNITED STATES

v.

Privates MERVIN HOLDEN
(38226564), and ELWOOD J.
SPENCER (33739343), both
of 646th Quartermaster Truck
Company

NINTH UNITED STATES ARMY

Trial by GCM, convened at APO 339,
U. S. Army (Belgium), 14-15 November
1944. Sentence as to each accused:
To be hanged by the neck until dead.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

1. The record of trial in the case of the soldiers 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 were arraigned separately and tried together upon the following charges and specifications:

HOLDEN

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Mervin Holden, 646th Quartermaster Truck Company, did, at Namur, Belgium, on or about 24 October 1944, forcibly and feloniously, against her will, have carnal knowledge of H. Tillieux Ep Deremince.

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

Specification: In that * * * did, at Namur, Belgium, on or about 24 October 1944, wrongfully commit an assault upon Emile Deremince by threatening to do him bodily harm with a dangerous weapon to wit, a knife.

5561

CONFIDENTIAL

CONFIDENTIAL

(170)

SPENCER

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Elwood J. Spencer, 646th Quartermaster Truck Company, did, at Namur, Belgium, on or about 24 October 1944, forcibly and feloniously, against her will, have carnal knowledge of H. Tillieux Ep Deremince.

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

Specification 1: In that * * * did, at Namur, Belgium, on or about 24 October 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with H. Tillieux Ep Deremince.

Specification 2: In that * * * did, at Namur, Belgium, on or about 24 October 1944, wrongfully commit an assault upon Emile Deremince by threatening to do him bodily harm with a dangerous weapon to wit, a knife.

Each accused pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications preferred against him. Evidence was introduced against accused Holden of one previous conviction by special court-martial for failing to obey the lawful command of a superior officer in violation of Article of War 96, and evidence was introduced against accused Spencer of one previous conviction by special court-martial for refusing to go on guard in violation of Article of War 96. All members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Ninth United States Army, approved each of the sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed each of the sentences and withheld the order directing execution thereof pursuant to Article of War 50 $\frac{1}{2}$.

3: The evidence for the prosecution showed that on 24 October 1944 Emile Deremince, an accountant, and his wife Henriette Tillieu Ep Deremince, lived at 44 Rue Lucien Nameche, Namur, Belgium (R7,35-36). Madame Deremince was 51 years of age (R32) and had one son (R52). It was agreed by the prosecution and defense that the "mulatto" referred to in the testimony was accused Spencer, and the "negro", accused Holden. Spencer was light in color and Holden was dark (R87). Spencer was smaller than Holden who was "very tall" (R18). It was stipulated that

CONFIDENTIAL

5561

four pictures, Pros. Exs. A,B,C,D, were true representations of the interior of the Deremince home and they were admitted in evidence (R6,54). About 11 pm 24 October, someone rang the Deremince door bell and when Deremince asked who was there the reply was "Police!". When he asked "Why?" someone again answered "Police!". Deremince then asked "But why?", and received the same reply. Someone struck the door and Deremince opened it. Accused Spencer immediately entered with his right hand in his pocket "as though he had a weapon", and was followed by Holden who held a knife in his hand. Deremince asked what they wanted but Spencer roughly pushed him aside and muttered something (R7-8,21,36-37). Both accused had been drinking, "mostly the mulatto", who was unsteady on his feet, and their breaths smelled of alcohol (R9,51). Spencer searched all the rooms on the bottom floor while Holden "held" the Dereminces in their kitchen. Accused then made the Dereminces go to the second floor and when the husband told them that the people who lived there were away, they attempted to open the locked doors and pounded on them (R9,37). The four people then went to the third floor where Spencer searched all of the rooms, after which they went to the attic. Each accused was holding a "dagger" with a blade about six inches long. They held the daggers in front of them and made the Dereminces precede them as they climbed the stairs (R8-9,22,37-38). When they reached the attic (Pros. Ex.A) Spencer went into a room and urinated while Holden was "holding" the Dereminces "in respect with his knife" on the landing. Spencer then went to the couple and Holden entered the room and urinated (R9-10,23,38). Spencer, who had a knife in his hand, then tried to push Deremince into the attic and at the same time motioned Holden to force Madame Deremince into another attic room. When Holden pushed her she screamed and said "No, no, I don't want to" and returned to the landing. Spencer said something to Holden who approached Deremince, and Spencer went to the woman. He shook her and seized her by the neck, "hurting her face". When Deremince attempted to intervene, Holden, who had a knife, put it back in his belt, seized the husband by the throat, shook him and pushed him against the wall. Deremince with both hands seized Holden by the wrists, started to pull, and Holden released his grasp. Deremince did not strike Holden as the former thought "There are 2 men against me and there isn't anything I can do" (R10-11,23,31-32,38-39). The woman, who thought the men "intended to kill us", put her hand on Spencer's face, said "you are not bad, you are good", and told him American officers had come to the house (R20,32). She then ran down the stairs but Spencer caught her at the landing between the attic and the next floor below (Pros. Ex.B). He hit her, seized her by the hand and "the shock of his knife" caused a stone in her ring to fall out. She screamed a second time. A "large, flat diamond ring with an empty hole in the center" was identified by the woman and admitted in evidence (R11-12,24,32,39; Pros. Ex.E). Spencer held the woman against a corner of the wall on the landing, put his knife at her throat, placed his hand under her dress and attempted to raise it. Deremince, who was on the landing above with Holden, shouted "For God's sake don't let him do it". She replied "There's nothing I can do. He has his knife against me". Spencer attempted to insert his penis in her person but "did not succeed" (R12-14,20,24,31,39,53). She testified that

(172)

"from then on I did not resist any more as I was very confused" (R13). Spencer then brought her back to the landing on the third floor where her husband was with Holden (Pros. Ex.A). Spencer attempted to take her into one of the rooms and threatened her with his knife. Still threatening her with the weapon, pulling her by the wrist and then pushing her in the back, he forced her to enter a room on the second floor (Pros. Ex.C). Deremince could not see his wife from this point on and Holden, who remained with him on the upper floor, "held me in respect with his knife" (R14-15,39-42). Spencer took the woman into the bedroom of a Monsieur Massart who was not home. The two accused and the Dereminces were the only people in the house that evening (R17-18; Pros. Ex.D).

Spencer pushed the woman to a sitting position on the edge of the bed and then pushed her on her back (R27,32). She was "more dead than alive" and testified that she believed he opened her legs (R26). She had been menstruating for five days but "it was over at that time" (R25-26,32). He then attempted to have intercourse with her but did not succeed. He then placed his penis in the woman's mouth, not "very far in", and she closed her lips on it but he immediately removed it as "there was no reaction on my part". He "replaced himself in a position to resume the act", and she "moaned for I was very tired due to the weight of his body against mine". At "the end" he finally inserted his penis in her private parts. He indulged in intercourse with her but "as he was drunk it lasted a long time". Because he was drunk he "could not penetrate easily". Penetration was slight, "But there was penetration, certainly". He used no lubricant or contraceptive (R15-16, 24-25).

After the act was completed Spencer rose from the bed, put his knife at her back, pushed her out of the room in front of him, and then "seemed to order Holden more by motioning than with words" to come down with her husband. When Holden indicated that Deremince was to go down stairs the latter did so. Each accused held his knife in his hand. When Deremince descended his wife said to Spencer "Now go to bed, how leave us alone". Spencer motioned to Holden to take the woman into the bedroom and the latter did so. Spencer then placed himself at the entrance to the stairs, one foot on the bannister, held his knife in his left hand, his right hand in his pocket "as though indicating he had a weapon", and repeatedly told Deremince the latter was a German. Deremince told him that he was not a German but a Belgian. He took out his identity card and Spencer thrust his knife at it (R16,26,40-42).

Holden, who held his knife in his hand, pushed Madame Deremince on the bed, inserted his penis in her person and indulged in intercourse with her. He "was not as drunk as the mulatto and he was more adroit in his purpose. He took me by the sides and succeeded" (R16-17,26-27,32). After the act was completed they left the bedroom and the woman, on rejoining her husband on the landing, said to accused "Now leave us alone, now go to bed". Both accused and the Dereminces descended the stairs and when they reached the ground floor Spencer

5561

ordered the husband to go to the kitchen. Each accused was then holding his knife in his hand. The woman opened the door and accused left about 12:20 am 25 October. She "was glad to see them go" (R18, 21,42). After their departure she "took hygienic precautions" because of a fear of pregnancy (R34,50). At the trial both Dereminces identified each accused (R18,52).

Madame Deremince further testified that each accused had a knife in his possession when he was alone with her (R23), and that she did not resist either accused during the sexual act because she was terrified (R16-17,19,28). "I can only swear to the fact that there was sexual intercourse and that I allowed them to do so" (R27). She was not friendly to either accused but was "very cold. I admit being terrified. I did not do anything to prevent them but I did not do anything to assist them" (R26,28). "They had their knives on us all the time" (R33). She was afraid

"he would kill me for, when we were standing on the landing and they had attempted to push my husband into one room and myself into another room and I attempted to yell out and resisted, they threatened to strangle my husband" (R31).

She did not kiss either accused in the bedroom, derived no sexual pleasure from either act of intercourse (R20,28); and did not scratch or bite either accused (R33). Prior to the arrival of accused, she had removed her "pants" and had put on slippers. When the sexual acts occurred she was wearing a dress, petticoat and apron, under which were a corset, shirt and brassiere (R19). Her clothes were not removed during the acts of intercourse nor were they torn (R19,27). Neither her husband nor any other person (outside the bedroom) could see into the bedroom while she was therein (R20). After accused left the house she became very ill and she and her husband were "completely despaired by what had happened" (R28). She was physically examined by an "American doctor" about 4 pm the following day (25 October). Her skin was not broken and although she received a blow on the cheek there was no tear or scratch. Blue marks appeared on her body about three days later (R33-34). Her husband left at 8:30 o'clock the morning following the incident to report the matter to "the American Major" (R28-29,33), as people were not "allowed out" after 10:30 pm (R29-30). Although the Dereminces had a telephone they did not use it that evening because they did not know the telephone number of the "Ameridan police", and her husband did not want to discuss the matter with the Belgian police (R33).

It was stipulated by each accused, the prosecution and defense, that if Captain J.C. Brown, Medical Corps, U.S. Army, were present in court and sworn as a witness he would testify as follows:

CONFIDENTIAL

(174)

"25, October 1944

I have this date, examined Mme. Deremince, age 50 yrs, who claims to have been raped by an American colored soldier, 24 October 1944. There was no evidence of bruises on her body except for slight swelling of left side of neck. Due to her age and the fact that she is married and has borne children, it is not possible to be positive of rape by Medical examination, so long after it has occurred.

[signed] J C Brown, Capt. MC.
50th Field Hosp." (R34-35;
Def. Ex.B).

It was also stipulated by each accused, the prosecution and defense that if Madame Mathilde Delleuse Ep Bodart were present in court and sworn as a witness she would testify as follows:

"I live at 46 Rue Lucien Nameche, Namur, Belgium, which is next door to the house of Monsieur and Madame Emile Deremince. The stairway of M. Deremince's house is on the side of his house next to the house in which I live, and my bedroom being next to his stairway, I can hear the sound of footsteps on the stairway. Sometimes I also hear doors closing but I seldom hear any voices or conversation from M. Deremince's house. On the night of 24 October 1944 a little before twelve, at which time I was in bed but I had not gone to sleep, I heard the sound of footsteps ascending the stairs at M. Deremince's house, getting louder as they approached the upper part of the house. A few minutes later I heard loud sounds of footsteps of more than one person descending the stairway of that house, much louder and quicker than usual. At about the same time I could hear voices but I could not understand what was being said. However, just as the sound of the loud footsteps stopped, I heard the voice of a woman cry out in French, 'Au secours' (which in English means 'help'). I know that this was just a few minutes after twelve because I had heard the clock in my room strike twelve shortly before I heard this cry. I do not ordinarily hear any talking or unusual noises from M. Deremince's house around midnight" (R43-44; Pros. Ex.F).

On 26 October Agent Obed T. Kilgore, Criminal Investigation Division, took a statement from each accused after he warned each of his rights. Each statement was in Kilgore's handwriting and was read and signed by the accused who made it. No threats or promises of reward were made by Kilgore who identified each statement at the trial and the signatures of each accused thereon. The defense stating there was no

objection thereto, they were admitted in evidence only as against the accused who made each statement (R45-49B; Pros. Exs.G,H). As each accused testified at the trial in substantial accord with his statement, the contents thereof are not set forth herein. Holden stated that on 25 October the Dereminces identified both him and Spencer "in a line up with some other soldiers" (Pros. Ex.G). Spencer stated that Deremince pointed to both him and Holden when they were in the "line-up" and that a "woman pointed to me but I did not recognize her" (Pros. Ex.H).

4. For the defense, accused Spencer, after being advised of of his rights (R55), testified that he was in Namur on a detail the evening of 24 October. He and Holden went to several taverns and had three or four drinks. Spencer had a "strong" drink of cognac, a drink of gin and one of wine. Although he and Holden were "feeling pretty good" they were not drunk. Witness was able to control himself, remembered everything he did that evening, and the liquor he drank did not in any way influence his actions (R56,64,71,81,83-84). He denied that he told Kilgore he was "pretty high and drunk" (R71; Pros.Ex.H). Both accused then looked for a "whorehouse" and decided to stop at one house (the Deremince home (R76)) "because the lights were on". Spencer knocked at the door and when the "lady" opened it he asked her if he and Holden could enter. She said something in French, opened the door a little wider and they walked in the house. Spencer then asked her if "there was mademoiselles in the house" and she replied "'Mademoiselles'", pointed upstairs and said "'partee'", which word he did not understand. He and Holden did not search the rooms on the ground floor but went to the next floor, accompanied by the woman, and "looked into" the three rooms thereon. Witness saw no one else in the house at that time (R57-58, 64-65,67,78,81). He did not have a knife or weapon of any kind that evening. Holden had an English knife about 12 inches long, but it was in a holster when they entered the house (R58-59,65). They did not go to any other floors (R59,65). Witness then passed by the woman and asked "'Zig-Zig'" and she replied "'No'". He then felt her private parts and she smiled. As "she acted as though she liked it", he walked over to a door and motioned to her to enter. "If she hadn't acted like she liked it I would have gone out of the house, sir. Some people say no when they don't really mean no". The woman then "came up the stairs" and entered the room with him (R60, 67,70,78-80). The room ^{was} on the second floor and when shown the room in the foreground on Pros. Ex.D, witness testified that he recognized it, and that "the bed was like that one there" (R66). He had no knife in his possession at the time (R60,67) nor was Holden's knife displayed (R69). Neither accused attempted to push the woman into one of the rooms on the floor above, and her husband was not then present (R68-69). The woman sat on the bed, pulled up her dress, lay cross-wise on the bed and she and Spencer indulged in sexual intercourse, which was voluntary on her part, and during which she seized him by the neck and kissed his jaw. She inserted his penis in her person and he had no difficulty in penetration. He did not

CONFIDENTIAL

(176)

push her on the bed, use any force or threats, and did not place his penis in her mouth (R60-61,70,84,86). He was in the room about five minutes (R61,70).

After the act was completed he left her in the room, and upon emerging saw Holden standing with the woman's husband. Holden held his hand on his knife which was inside his mackinaw. When Holden entered the bedroom he handed Spencer the knife, and neither accused said anything to the other. Witness put the knife in his mackinaw pocket (R61,71-73,80). This was the first occasion on which he saw Deremince (R62,80). Deremince was a rather small man and Spencer, who weighed about 145 pounds and was five feet ten inches in height, did not think the former "would try to do anything". Accordingly, he put the knife in his pocket (R73,112). He walked over to the bedroom door and saw Holden and the woman lying cross-wise on the bed. She was not offering any resistance and did not cry out (R61-63). Witness returned to where Deremince was standing and smoked a cigarette (R61). Deremince made no effort to enter the bedroom (R62) and he and Spencer did not say anything to each other. Witness had no idea why Deremince was there, "just thought about it, and forgot about it" (R73-74). He did not strike the husband, touch him with the knife or accuse him of being a German (R63). He saw no slip of paper or a card (Deremince's identity card) (R112). Witness denied that he told Kilgore he "stood in front of the man holding the knife". Instead, he told the agent he "stood in front of the man with the knife in my pocket" (R72; Pros. Ex.H). About five minutes later Holden and the woman came out of the room, and she was "slightly smiling". Spencer gave Holden the knife and the latter put it in his scabbard. Both accused followed the Dereminces downstairs where the husband went toward the rear of the house, but witness did not know why he did so. The woman opened the door and both accused left (R63,74-75). When they departed she said something in French but witness did not understand it (R85).

Spencer further testified that Madame Deremince did not scream while they were in the house. He and Holden arrived about 10:45-pm and left about an hour later (R82). Witness had intercourse with the woman about ten minutes after his arrival and he and Holden each consumed about five minutes in sexual pleasure. When asked to account for the remaining 40 minutes, witness testified "Well, sir, we looked into those rooms there" (R83). The only word the woman uttered while Spencer was in the house was the word "no" (R86). Witness was last paid on 30 September and had that evening some "Holland" and German money, and about 200 francs in Belgian currency. He paid for the six or eight drinks which he and Holden consumed between the two of them. They then went to look for a "whorehouse" (R111-112). Witness paid nothing for the act of intercourse (R80).

Holden, after being advised of his rights (R55), testified that he and Spencer went to some taverns in Namur on the evening question and had "3 or 4 drinks". They "felt pretty good" (R87-88,97) but witness clearly remembered the events of the evening (R104).

5561

Holden had no money and Spencer paid for the drinks (R109-110). They then looked for a "whorehouse" (R88,104,110), went to three or four places "but we didn't have any luck" (R96). Spencer suggested they go to one house (the Deremince house) as the lights were on (R105), and they knocked on the door. A woman opened the door and they entered. Neither accused used the word "police". Holden had an "English made knife", with an overall length of about 12 inches, in a belt around his waist under his mackinaw. He did not display the knife when they entered the house and Spencer did not have a knife that evening (R88-89,96). Spencer asked "about mademoiselles" and when the woman "pointed upstairs on the second floor", both accused and the woman went there. No other man was then present and only the gray-haired woman was visible at the time (R89,97-99,104-105). Witness could not recall whether they went above the second floor but as far as he could remember, they went to the second floor only (R98-99). Spencer then asked the woman for "'Zig-Zig'" and she replied "'no'". Spencer then felt of her private parts while "she was standing there in the corner", and when he beckoned to her to enter the bedroom she did so. Witness remained on the same floor (R89-90,95,99-100,102-103). Although Holden's testimony was conflicting as to whether he first saw Deremince after Spencer and the woman entered the bedroom, or while Spencer was feeling her person, he finally testified that he first saw the husband when Spencer was feeling the woman's private parts. At that time Deremince appeared for the first time from downstairs and tried to push Holden aside because, as witness "reckoned", the former wanted to reach his wife. Holden, who still did not have his knife in his hand, pushed him back and Deremince made no further effort (R91,95,99-100,102-103,109). Witness did not try to push either the man or his wife into a room nor did Spencer endeavor to push Deremince into a room (R99). When the woman said "no" to Spencer, the latter did not push her against the wall or take out his penis. That part of witness' statement to Kilgore to the effect that Spencer did push the woman and expose his private parts was untrue. "You tell them something and then they write down what they want to on those papers" (R101-102,106).

Holden did not see Spencer indulging in intercourse with the woman (R90,94). During this interval which was about five minutes, witness and Deremince stood outside the room in the hallway without speaking to each other (R103,105). When Spencer came out of the room he said to witness, "'go ahead * * * give me the knife'". The knife was then in witness' scabbard under his mackinaw "and couldn't be seen". He did not know why Spencer wanted the knife but gave it to him "and that's the only time the knife was seen in the house" (R91,103). Spencer's testimony that Holden had the knife in his hand when the former came out of the bedroom was untrue (R99). When witness entered the bedroom Spencer was holding the knife in his hand (R106). The woman, who was standing in the door, reentered the room and lay across the bed. She "had her dress up" and her "pants" were off. Witness did not push her on the bed. She inserted his penis in her person and they indulged in sexual intercourse. She did not resist, cry out, scratch or bite him, but "helped me to have intercourse with her". He accomplished penetration without difficulty, and she had her arms around his back (R92-93,107). When witness and the woman left the room Spencer, who was smoking and holding the knife in his pocket "with the handle part in his hand" "and the other part up on his arm", gave Holden the knife. Witness put it in his scabbard and both accused and the Dereminces went downstairs (R93-94,106-107). The

CONFIDENTIAL

(178)

woman opened the door and accused departed (R95).

Holden further testified that he did not at any time see Spencer brandishing or pointing a knife at the woman or her husband or striking either of them (R94). Accused were in the house about 20 or 30 minutes and witness spent five minutes with the woman in the bedroom. He did not urinate in the house (R95-96, 110). He was six feet one inch in height, and when "The Lieutenant at the MP's had me weighed, he said 210. He wrote on the paper 210". Deremince was about five feet four inches in height and was slender. His wife was about as large as her husband and about the same height (R107-108).

5. The testimony of the Dereminces indicated that both accused had been drinking, especially Spencer who was unsteady on his feet, and that their breaths smelled of alcohol. Madame Deremince testified that Spencer "could not penetrate easily" because he was drunk. Spencer testified that although he had been drinking he was not drunk, was able to control himself, and that his drinking did not in any way influence his actions that evening. Holden also testified that although he had been drinking he clearly recalled the events of the evening. The question of intoxication and the effect thereof upon the general criminal intent involved in the offenses alleged, were issues of fact for the sole determination of the court. Such determination against each accused, reflected in the findings of guilty, will not be disturbed upon appellate review as it was fully supported by evidence of a competent and substantial character (CM ETO 3475, Blackwell, et al).

Before the testimony of the initial witness for the prosecution, Madame Deremince, was concluded, the defense moved for a finding of not guilty of rape with reference to each accused. The motion was denied (R20-21), and was not renewed at the conclusion of the evidence. As the prosecution's case had not been completed when the motion was made the motion was obviously not in order (MCM, 1928, par. 71d, p. 56). As will be subsequently shown herein, the Board of Review is of the opinion that all findings of guilty were supported by evidence of a substantial and competent character. No error was committed by the denial of the motion (CM ETO 1414, Elia).

6. "Rape is the unlawful carnal knowledge of a woman by force and without her consent.

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Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par. 148b, p. 165).

5561

"The force. The force implied in the term 'rape' may be of any sort, if sufficient to overcome resistance. * * * It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threats of killing or of grievous bodily harm or other injury * * *".

"Non-consent. Absence of free will, or non-consent, on the part of the female, may consist and appear * * * in her yielding through reasonable fear of death or extreme injury impending or threatened; * * * in the fact that her will has been constrained, or her passive acquiescence obtained, by * * * other controlling means or influence" (Winthrop's Military Law and Precedents - Reprint - pp.677-678) (Underscoring supplied).

"Acquiescence through fear not consent. Consent, however reluctant, negatives rape; but when the woman is insensible through fright or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (1 Wharton's Criminal Law, 12th Ed., sec. 701, p.942) (Underscoring supplied).

"The victim of the rape did not expressly testify that she resisted accused to the extent of her ability, that her resistance was overcome by force or prevented by fear, or that she did not consent to the intercourse. The circumstances to which she testified, however, fully justify the inference that she did not in fact consent, that accused had carnal knowledge of her by force, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. Such being the facts, rape was committed" CM 227809, (Bull. JAG, Vol.I, No.7, Dec.1942, sec.450(9), p.363-364) (Underscoring supplied).

"The extent and character of the resistance required of a woman to establish her lack of consent depend upon the circumstances and relative strength of the parties, and not upon the presence or absence of bruises or other physical injuries"(CM 236801 (1943), 23 BR 129, Bull.JAG, Vol.II, No. 8, Aug.1943, sec. 450, p.310).

"An actual force used by the accused sufficient to create an apprehension of death in the mind of the victim need not be proved. If a less degree of force is used, but coupled with threats to kill or to inflict bodily harm, in fear of which she involuntarily submits, the intimidation practiced will be regarded as constructive force" 5561 (Underhill's Criminal Evidence, 4th Ed., sec.675, pp.1272-1273).

(180)

"Carnal knowledge of the female with her consent is not rape, provided she is above the age of consent, or is capable in the eyes of the law of giving consent, or her consent is not extorted by threats and fear of immediate bodily harm.

*** There is a difference between consent and submission; every consent involves submission, but it by no means follows that a mere submission involves consent" (52 CJ, sec.26, pp.1016,1017) (Underscoring supplied).

No question of the identify of either accused is involved in the instant case. Madame Deremince testified that penetration was accomplished by each accused, and Holden and Spencer each testified that he penetrated her person without difficulty. Although the woman testified that Spencer penetrated her slightly, she further testified "But there was penetration, certainly". Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge (MCM, 1928, par.148b, p.165).

The only question presented for consideration is one of fact, namely, whether the woman consented to each act of intercourse. The gist of the testimony of each accused was that she submitted voluntarily to the act and fully cooperated therein, although she did say "no" when Spencer first broached her in the hallway. Holden testified that Deremince at that time pushed Holden in an apparent attempt to reach his wife, and Holden pushed him back. Each accused testified that the husband made no effort to enter the bedroom during the respective acts of intercourse. He merely stood by idly and made no comment. Spencer, in his pre-trial statement, admitted that he stood in front of Deremince holding "the knife" when Holden entered the bedroom with the woman.

The Dereminces testified that when the door was opened in response to repeated assertions that the "police" were outside, both accused entered. Holden had his knife in his hand and Spencer, who had his hand in his pocket "as though he had a weapon", roughly pushed Deremince aside. Thereafter, each accused held a "dagger" in his hand and forced the husband and wife to accompany them on a search of all floors in the house. After accused tried unsuccessfully to force Deremince and his wife into separate attic rooms, during which time the woman screamed, Spencer seized the woman by the neck and shook her. Holden took her husband by the throat and forced him against the wall. When the woman tried to escape, Spencer caught her on the landing below, hit her, pushed her against the wall, put his knife at her throat and his hand under her dress. The "shock of his knife" caused a stone in her ring to fall out. When her husband, who was on the landing above, shouted "For God's sake don't let him do it", she replied that she was powerless as Spencer had his knife against her. At this time he unsuccessfully attempted to insert his penis in her person. Threatening her with his knife, pulling her by the wrist, and then pushing her in her back, he forced her to enter the second floor bedroom where he pushed her on the bed. He inserted his penis in her mouth and eventually penetrated her private parts with difficulty because he was drunk. During

5561

this interval Holden guarded the husband on the upper landing and held him "in respect with his knife". When Spencer left the room with the woman, Deremince was forced to accompany Holden to the second floor. Each accused then had his knife in his hand at that time. Holden then entered the bedroom, pushed the woman on the bed and engaged in the sexual act with her. Spencer, in his turn, held Deremince under guard with his knife, accused him of being a German, and thrust his knife at his identity card.

The victim testified in substance that although she did not assist either accused in the sexual act, she did not resist him because she was terrified by the preceding actions of both accused and by the fact they "had their knives on us all the time". She feared she would be killed as they had attempted to push her and her husband into separate rooms and had threatened to strangle her husband. During the act with Spencer, she was "more dead than alive".

The testimony of the victim and her husband was corroborated by the stipulated testimony of Madame Bodart who lived next door. Shortly before midnight she heard loud footsteps of persons ascending and descending the Deremince stairway, and the voice of a woman who shouted in French "'Au secours'" (help). Their testimony was further corroborated by the fact that a complaint was filed the following morning by Deremince with the United States military authorities. Although the fact that complaint was made was shown only by the testimony of the victim, it was further evidenced by the fact that each accused was subsequently identified in a "line-up with some other soldiers" by the Dereminces, and by the fact the woman was later examined by an officer in the Medical Corps of the United States Army. He found a slight swelling on the left side of the victim's neck.

When the testimony of the victim concerning her lack of resistance during the two attacks upon her person, is measured against the background of the force, violence and threatening conduct exhibited by both accused, it becomes abundantly evident that each act of intercourse was against her will, and that her testimony concerning her fear of death and great bodily harm possessed genuine substance and worth. The evidence is substantial and convincing that her passive conduct at the time of each sexual act was the direct and consequential result of physical violence visited upon her by accused, and the fear engendered in her of additional violence, physical injury to her person, and possible death. The Board of Review is of the opinion that as to each accused the findings of guilty of rape were supported by evidence of the most convincing character (CM ETO 3740, Sanders, et al; CM ETO 3141, Whitfield; CM ETO 4017, Pennyfeather; CM ETO 4309, McGann; CM ETO, 5170, Rudesal and Biles).

The Board of Review is of the further opinion that the findings of the court that each accused was guilty of rape, were not only fully justified by the evidence concerning his own sexual contact with the woman, but also by the evidence with regard to his actions during the time that his companion engaged in sexual intercourse with the victim.

CONFIDENTIAL

(182)

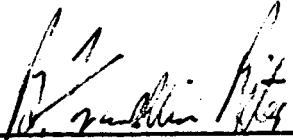
Aside from their previous behavior upon entering the house and their prior assaults upon the victim and her husband, each accused guarded Deremince with a drawn knife while the other attacked his wife in the bedroom. Each accused aided and abetted the other in obtaining sexual intercourse. The evidence clearly showed that both accused were engaged in a wrongful joint venture to obtain sexual intercourse by any means whatsoever. It is abundantly evident that they aided and abetted each other in the accomplishment of this purpose. One who aids and abets the commission of rape by another person is chargeable as a principal whether or not the aider or abettor engaged in sexual intercourse with the victim (CM ETO 3740, Sanders, et al; CM ETO 3859, Watson and Wimberly).

7. The evidence fully sustained the findings of guilty of an assault by each accused upon Deremince by threatening to do him bodily harm with a dangerous weapon, to wit, a knife, in violation of Article of War 96 (Spec., Chg. II - Holden; Spec.2, Chg.II - Spencer). The evidence also clearly sustained the findings of guilty of sodomy per os with reference to accused Spencer (Spec.1, Chg.II). The fact that the offense was laid under Article of War 96 is not material (CM ETO 2905, Chapman).

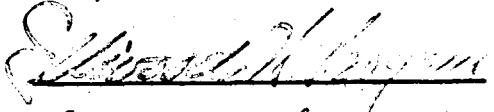
8. The charge sheets show that accused Holden is 24 years of age and was inducted at Shreveport, Louisiana, 24 September 1942, and that accused Spencer is 19 years 11 months of age and was inducted 6 April 1943. Both accused were inducted to serve for the duration of the war plus six months and neither had any prior service.

9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. 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 and the sentence.

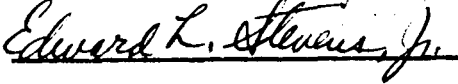
10. The penalty for rape is death or life imprisonment as the court-martial may direct (CM 92).



Judge Advocate



Judge Advocate



Judge Advocate

5561

CONFIDENTIAL

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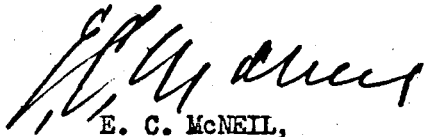
(183)

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 11 JAN 1945 TO: Command-
ing General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates MERVIN HOLDEN (38226564), and EDWOOD J. SPENCER (33739343), both of 646th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that as to each accused the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 5561. For convenience of reference, please place that number in brackets at the end of the orders: (CM ETO 5561).

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



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

1 Incl.
Record of Trial.

(Sentences ordered executed. GCMO 20, 21, ETO, 20 Jan 1945)

(185)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

16 JAN 1945

CM ETO 5565

UNITED STATES)

v.)

Private JOHN M. FENDORAK
(32705413), Company A,
1st Engineer Combat
Battalion

1ST INFANTRY DIVISION

Trial by GCM, convened at Herve, Liege,
Belgium, 29 November 1944. Sentence:
To be shot to death with musketry.

HOLDING by BOARD OF REVIEW NO. 1
RITTER, SARGENT and STEVENS, 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John M. Fendorak, Company A, 1st Engineer Combat Battalion, did, at Mons, Brabant, Belgium, on or about 6 September 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at Brussels, Brabant, Belgium, on or about 28 October 1944.

5565

(186)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions: two by special courts-martial for willfully disobeying the order of a superior officer and a noncommissioned officer to work in kitchen and for absence without leave from his organization for 34 days, respectively, and one by summary court for failing to obey a lawful order of a superior officer first to obtain permission before leaving company bivouac area. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 1st Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50¹/₂.

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

Accused came as a replacement to Company A, 1st Engineer Combat Battalion, in England in April or May 1944 (R11,16), from which time up to and including 6 September, the date of the alleged offense, he continued as a basic private in that company (R5,9,11,14). On that date he was a member of the first squad of the second platoon (R6,9), with duties of a miscellaneous character (R9).

On 2 and 3 September the company proceeded through a road block which was surrounded by the enemy, by-passed the enemy units and captured between 300 and 400 Germans in the vicinity of Maubeuge, Belgium (R7,11). The company continued in constant pursuit of the enemy until it "laid off for a day or two" in the vicinity of Mons (Hainaut), Belgium, where it was stationed on 6 September, to await additional supplies of gasoline without which it was unable to resume its movement (R6,9).

First Lieutenant Valerie W. Kosorek, platoon leader of the second platoon (accused's platoon) (R5-6) testified that on or about 6 September his platoon was attached to the 16th Infantry Regiment, which was engaged in a fire fight "just across the river" from Company A when the latter was engaged near Maubeuge, and that early on the morning of 6 September his platoon was alerted to move out to join Company I, 16th Infantry, the assault company leading the attack of the regiment. The mission of the platoon was to precede the company, fill all craters and clear the terrain of all obstructions and obstacles which would hinder the advance of mechanized units (R6,7). Sergeant Rocco Covelli, accused's squad leader (R8-9), testified that on the afternoon or evening of 5 September official information and instructions concerning the impending movement were received by the squad, and that he called the roll of the squad, made sure that all its members, including accused, were present and instructed the members

(187)

not to leave the boundaries of the area because they were alerted to move out at a moment's notice (R10,13). Both Covelli and Corporal Samuel W. McFalls, another member of accused's squad, testified that the members of the squad knew that they were attached to the assault company of the 16th Infantry and consequently that they were going to engage in hazardous work and hazardous details in the near future (R11,13,14-15). McFalls testified with respect to their information and knowledge as follows:

"It was handed down from the lieutenants to the squad leaders and from the squad leaders to the men that we were to move at any time".

Accused had that information (R15). On 5 September

"they were told they were to go with 'I' Company. * * * We were called out there and the men were told we would probably move on short notice with the 16th Combat Team".

Accused was present to hear this information (R16-17).

"We all knew that we were alerted to move probably at short notice; whenever the 16th Infantry was ready to move that we were going right with them. We knew that" (R15).

"They knew that as a combat platoon, when the infantry moves out, we go with the assault company in an assault battalion and clear all obstacles and anything that might hold up the infantry. * * * They know, and in fact we usually are all the time under artillery, mortar fire, and lots of times plenty of small-arms fire in our jobs" (R15).

The men knew that in so moving they were going to engage with the enemy (R15). Covelli testified that the platoon had been attached to assault companies prior to this time and that the duties and hazards of members of an engineer combat unit when attached to an assault infantry company were common knowledge among the men in his organization (R11).

On the morning of 6 September Covelli noted accused's absence from breakfast roll call (R9), searched for him at his sleeping quarters, discovered he was not there, took the squad to chow, returned and made "a good thorough search" for him, but accused was nowhere in the vicinity (R10). The fruitless character of

(188)

the search was confirmed by the testimony of McFalls, who participated therein (R14).

Lieutenant Kosorek testified that on that morning he went to obtain information as to the place and time of the movement of his platoon to join I Company, 16th Infantry. He was to contact the platoon and move it out upon his return. When he arrived back and prepared for this movement, accused's absence was reported to him by the platoon sergeant (R7). After Kosorek moved the platoon out, he returned to Mons and caused the platoon squad leaders to search for accused in the immediate area. Although he spent between an hour and an hour and a half, he could not find accused (R6-7). McFalls testified that accused was not present when the platoon moved out (R15). Covelli testified he made further searches for accused, both before leaving the area early in the afternoon (6 September) and after leaving the area upon his return to the same, but was unable to find him (R12). Both Lieutenant Kosorek and Covelli testified that accused was absent without permission, during the whole period from 6 September to 28 October (R7-8,11,12).

Kosorek testified that after leaving Mons

"we kept right on the heels of the Germans until we entered the forest south of Aachen, and there we worked day and night clearing roads so that tanks could go through, and we worked under artillery, mortar and machine-gun fire. Two men were wounded" (R8).

McFalls' testimony substantially confirmed the above and showed that the unit moved to the Siegfried Line, blasted through the "dragons' teeth", broke through obstacles and reached Stolberg, Germany (R16).

With respect to oral statements made by accused prior to 6 September, Covelli testified

"many a time he made remarks that he disliked the army and disliked the work we were doing, and at times when he was doing hard work he said he was going to get out of the army, out of the outfit, and stay away from it, get out of combat, he didn't like it and stay away from it" (R12).

Accused also stated, according to witness,

"That he would rather take a sentence of a few years and stay away from combat, and the war would probably be over by then, and he would go home" (R13).

He made these statements one or two weeks prior to 6 September and many other times before that (R13). McFalls testified

"I heard him say, he will be———up until he gets out of the army on occasions, and on other occasions I heard him say he will keep —— up until he gets 5 or 10 years and get a break on the sentence and he would get back to the states, and some of us guys don't know when we will ever get back" (R16).

He made such statements on several occasions "on the Caumont sector when we were on a defensive position on the Aure (river)" (R16). Witness never heard accused state specifically, however, that he would leave the company either not to return or in order to avoid going into combat with the company (R17).

Staff Sergeant Robert H. Howells, 295th Military Police Company, stationed in Brussels, Brabant, Belgium, (R17), testified that on 28 October he apprehended accused in Brussels. Questioning and a search of accused's person revealed that he had no pass. "He gave the wrong organization" - "The 9th A.T. Ground Group, APO No.6" - and informed witness he was with a Lieutenant Golday whom he was to meet at 2100 hours 29 October. Witness offered to endeavor to locate the officer and requested another military policeman to try to do so (R18) in order to determine if he had travel orders for accused. The latter, however, refused to go to see the officer because, he stated, at 0600 hours 29 October he (accused) was to return to Germany "and he didn't wish to go, he would rather be in jail". He was in uniform at the time of his apprehension (R19).

4. No evidence was introduced by the defense. After a reasonably full explanation of his rights to remain silent, make an unsworn statement or take the stand as a witness, accused elected to make the following unsworn statement through his defense counsel, which was read to the court and attached to the record as Def.Ex.1 (R20):

"At the time I left, the company was not in combat. I did not leave in order to avoid hazardous duty. The time I left I had no intention of staying away, and if I stayed away longer than I expected, at no time did I intend not to return. I wore my military uniform at all times".

5. The question for determination is whether the record contains substantial competent evidence of each of the four elements of the offense charged, namely:

- (a) that accused absented himself without leave, as alleged;

(190)

- (b) that his unit was under orders or anticipated orders involving hazardous duty;
- (c) that notice of such orders and of imminent hazardous duty was actually brought home to him; and
- (d) that at the time he absented himself he entertained the specific intent to avoid hazardous duty (CM ETO 5555, Slovik, and authorities therein cited).

(a) Accused's absence without leave from his organization, the second platoon of Company A, 1st Engineer Combat Battalion, at Mons, from 6 September to 28 October when he was apprehended at Brussels, is convincingly established by the testimony of his platoon leader, his squad leader, another member of his squad and the member of the military police who apprehended him.

(b) The testimony of the first three witnesses above mentioned shows beyond doubt that at the time accused absented himself his platoon was already alerted to join Company I, the assault company of the 16th Infantry, and that the platoon's mission was to precede the company, under enemy fire if need be, and clear its way of obstacles in the path of its pursuit of the enemy. The hazardous nature of the duty of participating in this combat mission as a basic private is beyond question.

(c) Notice of the alert orders and of the imminent hazardous combat duty involved in their performance is established by testimony of accused's squad leader and the other member of his squad that all members of the squad, including accused, were specifically informed of the impending mission and restricted to their immediate area because of its imminence and the probability of its active inception at a moment's notice. The hazardous nature of the duties required for the fulfillment of this combat mission was a matter of common knowledge among squad members largely because of the fact that the platoon had already served with assault infantry companies. Accused had been a member of Company A since April or May 1944 and it would be unreasonable to infer otherwise than that he was fully cognizant of the dangers involved. The testimony of McFalls, the other squad member, is particularly illuminating on this point.

(d) On the afternoon of the day on which accused absented himself, according to his squad leader, the platoon left its area to join the assault company. Thereafter, with the 16th Infantry, according to the testimony of the platoon leader and squad member it pursued the Germans through the Siegfried line into Germany, encountered enemy fire and suffered casualties. Accused's absence was calculated to avoid and did avoid this hazardous combat duty. Accused's statements, as to which the squad leader and squad member testified,

5565

(191)

leave no reasonable doubt that his deliberate purpose in leaving his unit was to be court-martialed and incarcerated for the duration of the war and thereby avoid combat duty. They show plainly that he disliked the Army and the work he was doing in it and wished to "get out of combat" and "stay away from it". His hope was that he would be confined but would "get a break on the sentence" so that he could be released when the danger of the loathed combat activity was past. His attempt to conceal the true identity of his organization and his open avowal of preference for jail to returning to Germany, when apprehended, complete the picture of his contemptible attitude toward the military service and his relation thereto and, combined with the other evidence mentioned, brand him as a deserter of the most flagrant type.

In view of this convincing body of evidence the court very properly refused to be impressed by the evidence that accused was in uniform when apprehended, by his unsworn statement denying the intent with which he was charged or by the argument of his counsel (R21) that accused's statement of dislike for the Army and his other statements did not indicate an intent to desert. The court's determination of the question of intent adversely to accused, as shown in its findings of guilty, was the only conclusion it could reasonably have reached. In the opinion of the Board of Review all elements of the offense charged were proved beyond peradventure (CM ETO 5555, Slovik, and authorities therein cited).

6. a. As in the last cited case, in view of the clear evidence of accused's guilt of all elements of the offense charged, the presence of leading questions in the record of trial may not be deemed to have injuriously affected his substantial rights (CM ETO 4820, Skovan).

b. The Specification alleged the place of desertion as "Mons, Brabant, Belgium". The record of trial shows that accused's organization was stationed at "Mons, Belgium" at the time of his desertion (R6, 9). Inquiry discloses that Mons is in Hainaut, Belgium. The variance was not of sufficient seriousness to affect injuriously accused's substantial rights within the purview of Article of War 37. Moreover, the place of desertion was not of the essence of the offense (CM 186501 (1929), CM 199270 (1932), Dig.Ops. JAG, 1912-1940, sec.416 (10), p.270).

c. Careful and painstaking examination of the record of trial herein reveals that accused was fully accorded due process of law as provided by the Articles of War and fails to disclose any action or ruling by the court ^{which} prejudiced his substantial rights in any degree (CM ETO 5555, Slovik, and authorities therein cited). There is nothing in the record of trial to indicate that accused was other than sane

(192)

and responsible for his acts either at the time of the offense or at the time of trial. That he was mentally normal at the time of the offense is indicated in the report of psychiatric examination ^{of accused}, dated 16 November 1944, and contained in the accompanying papers. The Petition in Clemency, signed by three members of the court and attached to the record of trial, states that he "presented a neat, soldierly, and dignified appearance and cooperative attitude during the course of the trial". No reason is apparent why the findings of the court should be disturbed upon appellate review.

7. The charge sheet shows that accused is 25 years seven months of age and was inducted 4 January 1943 at New York, for the Corps of Engineers, to serve for the duration of the war plus six months. He had no prior service.

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

9. The penalty for desertion committed in time of war is death or such other punishment as the court-martial may direct (AW 58).

B. C. Smith Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Edward L. Stevens Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 JAN 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private JOHN W. FENDORAK (32705413), Company A, 1st Engineer Combat Battalion, attention is invited to the foregoing holding by 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 execution of the sentence.

2. The case is similar to that of Private EDDIE D. SLOVIK (CM ETO 5555), the record in which the Board of Review, with my approval, recently held legally sufficient to support, the extreme penalty of death. Although this soldier, unlike Slovik, had performed combat engineer service with one of our justly famous infantry divisions, nevertheless, his conduct like that of Slovik, shows a deliberate plan to secure trial and incarceration in a safe place to continue for such time as might be necessary to insure his freedom from combat duty in the present conflict. The imposition of any sentence less severe than death, considering, as he evidently did, the possibilities of its reduction to a comparatively short term of confinement, would only have accomplished his clear purpose of securing his incarceration and freedom from dangers which other soldiers must face daily. The Petition in Clemency signed by three members of the court appears not to render the foregoing comments any less appropriate. Neither the petition nor the record of trial contains any suggestion that accused was suffering from combat fatigue or from any other ailment.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 5565. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5565).

4. Should the sentence as imposed by the court and confirmed by you be carried into execution, it is requested that a full copy of the proceedings be forwarded to this office in order that its files may be complete.



E. C. McNEILL,
Brigadier General, United States Army,

CONFIDENTIAL

(195)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

17 JAN 1945

CM ETO 5568

UNITED STATES	)	35TH INFANTRY DIVISION
)	
v.	)	Trial by GCM, convened at Oriocourt,
	)	France, 7 December 1944. Sentence:
Private First Class WILLIAM	)	Dishonorable discharge, total for-
R. ROBERTSON (37070397),	)	feitures and confinement at hard
Company L, 137th Infantry	)	labor for life. United States
	)	Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private First Class William R. Robertson, Company L, 137th Infantry, did, in the vicinity of St. Remi-mant, France on or about 11 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to his organization at or near Champenoux, France on or about 20 September 1944.

Specification 2: In that * * * did, in the vicinity of Aboncourt, France on or about 9 October 1944, desert the service of the United States by absenting himself without proper leave from

5568

CONFIDENTIAL -

CONFIDENTIAL

(196)

his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to his organization at or near Aboncourt, France on or about 14 October 1944.

He pleaded not guilty and, all the members of the court present when the vote was taken concurring, was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by summary court, for being drunk and disorderly in uniform in a public place, in violation of Article of War 96. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence for the prosecution, both oral and by morning report, shows that on 11 September 1944, accused, a member of Company I, 137th Infantry, absented himself, without authority, from his organization at St. Remimant, France (R7,8; Pros. Ex.A). On 20 September 1944 he returned to his company which was then located near Champenoux, France (R9; Pros. Exs. A,B). Between the dates above indicated, his organization moved from their fixed positions into an open area, crossed the Moselle River, advanced against and attacked the enemy (R8,9,10). Accused did not cross the open area or the river with his company while attacking the enemy (R9,14). He knew the mission of his organization for 10 September 1944, as all the members of the company, including accused, had been advised of the general direction of their advance and of the fact that they were ordered to attack the enemy (R8,14). Accused's company and his squad was fired upon by the enemy during the attack but accused was not present and did not participate in the assault (R8,9,10). The prosecution's evidence further shows that on 9 October 1944, while the 137th Infantry was stationed near Aboncourt, France, accused again absented himself, without proper leave, from his organization and remained absent until he surrendered to the military police, on 14 October 1944 (R10,11,12; Pros. Exs.A,B). Between the two latter dates, accused's organization "attacked Fossieux", a French city occupied and held by the enemy. Accused did not take part in this advance and attack (R10,11). On the night of 8 October 1944, preceding the assault on the following day, accused occupied a foxhole with his staff sergeant, who testified that he heard some shells but "I don't think there was any hitting in". All the men of the company, including accused, had knowledge

5568

(197)

of the order to "mount tanks and attack" Fossieux, on the morning of 9 October 1944 (R10,11; Pros. Ex.B). In the pre-trial investigation accused made a voluntary statement, wherein he admitted the commission of the offenses charged, stating that they were being shelled and he "just couldn't stand it any more" and that he "can't stand artillery fire" (R13; Pros. Ex.B).

4. After his rights as a witness were fully explained by the court, accused elected to make an unsworn statement, through counsel. He stated that after his induction in February of 1941, he was assigned to the 35th Division, 137th Infantry, and that he had been with this organization since that date. He trained with this division, came overseas and fought with it. He stated that he stayed under enemy fire a number of times with his company. "On those occasions, when in poor physical and mental condition, he has been forced to leave, as was necessitated on the 11th of September and the 9th of October". He regrets that he has shown a tendency to leave under artillery fire, adding that such has been his experience ever since coming into combat (R14).

5. Competent substantial evidence establishes the commission, by accused, of both offenses on the dates and under the circumstances, alleged. On 11 September 1944 accused's company crossed the Moselle River and attacked the enemy. On 9 October 1944 his organization attacked Fossieux. Accused was not present with his unit during either engagement, but was absent intentionally, avoiding the hazards of combat with the enemy. He admitted both absences and the fact that he had knowledge of the attacks on the dates alleged in each specification. A soldier who quits his organization or place of duty "with the intent to avoid hazardous duty or shirk important service" is declared by law to be deemed a deserter (AW 28). All elements of the offense charged are thus established (CM ETO 1400, Johnston; CM ETO 1406, Pettapiece; CM ETO 3473, Ayllon; CM ETO 4686, Lorek).

6. Accused is 27 years of age. He was inducted into the army at Camp Robinson, Arkansas on 18 February 1944. No prior service is shown.

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

8. The offense of desertion in time of war is punishable as a court-martial may direct (AW 58). The designation of United

(198)

States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is authorized (AW 42; Cir.229, WD, 8 June 1944, sec.II, par.1b(4), 3(b)).

Ernest Smockdin Judge Advocate

John Hummell Judge Advocate

Benjamin K. Sleeper Judge Advocate

5568

CONFIDENTIAL

(199)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 17 JAN 1945 TO: Com-
manding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private First Class WILLIAM R. ROBERTSON (37070397), Company L, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5568. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5568).



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

5568

CONFIDENTIAL

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(201)

BOARD OF REVIEW NO. 2

25 JAN 1945

CM ETO 5569

UNITED STATES }

v.

Private AUDREY W. KEELE
(20725591), Company G,
137th Infantry

35TH INFANTRY DIVISION

Trial by GCM, convened at Oricourt
and St. Jean Rohrbach, France, 7, 16
December 1944. Sentence: Dishonorable
discharge, total forfeitures and con-
finement at hard labor for 20 years.
United States Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

Specification: In that Private Audrey W. Keele,
Company G, 137th Infantry, did, without proper
leave, absent himself from his station at La
Meuffe, France from about 2 September 1944, to
about 17 October 1944.

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

Specification: In that * * * for the purpose of ob-
taining payment of a claim against the United
States, by presenting to W M Pinney Jr., Major,
Finance Department, Finance Officer at 83rd
Replacement Battalion, APO 873, U S Army,
France, an officer of the United States duly
authorized to pay such claims did, at 83rd

CONFIDENTIAL

(202)

Replacement Battalion, APO 873, U S Army, France, on or about 12 October 1944, make and use a certain paper to wit: Record of Current Service, which said

My present grade is Technical Sergeant,
I have over eight (8) years service,
I have authorized a Class "N" deduction of six dollars and eighty cents (\$6.80) from my pay,

I was last paid to include 30 June 1944,
I have received no partial payments since date of last payment,

I am not indebted to the United States in any amount,

I have lost no time under the 107th Article of War,

as he, the said Private Audrey W Keele, then knew contained a statement that was false and fraudulent, which statement was false and fraudulent in that

His present grade is Private,

He has four years (4) and eleven months (11) service,

He has authorized a Class "N" deduction of seven dollars and ten cents (\$7.10),

He was last paid to include 31 July 1943,

He has received partial payments in the amount of ten dollars (\$10.00) for the months of March 1944, April 1944, May 1944, and June 1944,

He is indebted to the United States in the amount of one hundred seventy-two dollars and sixty-seven cents (\$172.67) for court-martial fines and other charges,

He has lost one hundred and fourteen (14) days time under the 107th Article of War, and was then known by the said Private Audrey W. Keele, to be false and fraudulent and by means thereof did fraudulently obtain from the said Finance Officer the sum of approximately three hundred fifty-eight dollars and twenty cents (\$358.20).

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for seven days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may

direct, for the term of his natural life. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. It was shown by competent evidence that accused was absent without leave from his station at La Meuffe, France, from about 2 September until 17 October 1944, in violation of Article of War 61 (Charge I, Specification).

On 12 October 1944, at Toul, France, accused, as an incoming casual at APO 873, United States Army, without a permanent service record, filled out and signed a "Temporary Statement of Service". This was filed by accused with the 83rd Replacement Battalion at that address, and one of the purposes was to secure pay for accused while in that organization (R8,9; Pros.Exs.B,C). On this statement, accused was paid \$341.10 (Pros.Ex.B) (or \$358.20) by the organization finance office (R9,10). In this statement, accused represented that his grade was that of technical sergeant with over eight years' service, that he had authorized a Class "N" deduction of \$6.80 and was last paid to 30 June 1944. This statement was made out on a mimeographed form. Accused did not fill in any answers in the blank spaces thereon which pertained to any partial payments received, any indebtedness to the United States for court-martial fines and time lost under Article of War 107 (R8-10; Pros.Exs.B,C). The prosecution offered in evidence the service record of accused (R11,12). This was received over the objection of the defense (R12,13) and from it the personnel officer of accused's organization (R7,11) testified that, on 12 October 1944, accused's grade was that of private, that he had had slightly over five years of service, that his Class "N" deduction was \$7.10 on 12 October, that he had been last paid in full on 31 July 1943, that he had received partial payments in the months of March, April, May and June 1944 of \$10.00 each month and that accused was (at the time of the trial) in debt to the United States for "time lost", "for an overpayment". The amount of this indebtedness had not been computed by the personnel officer and was not stated by him in his testimony (R13,14).

4. Accused, advised of his rights, made an unsworn statement in which he stated that he was 26 years old; that he had enlisted in the National Guard on 23 December 1940; and had spent his entire period of service with the 137th Infantry. He said that he had participated in the battle of St. Lo, and that shortly after that his brother, who had served with him in the same organization for the same length of time, had been killed. Accused claimed to have been shaken by the loss of this brother and also by the reported death of another brother in the South Pacific. When his unit moved on from St. Lo, he had been selected to remain behind on a guard for the duffel bags. Brooding over all of this, he went "AWOL", but turned himself in to the military police on 20 September 1944 and was returned to his organization through replacement channels after two or three weeks (R15,16).

(204)

5. The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of the Specification, Charge I, as involves a finding that accused absented himself from his station from about 2 September 1944 to about 12 October 1944, in violation of Article of War 61. The prosecution's evidence showed that accused was an "incoming casual" at APO 873, United States Army, on 12 October. That is the date on which and the place at which it was alleged (Specification, Charge II) and proved he presented his "Temporary Statement of Service". Furthermore, accused in his unsworn statement said that he surrendered himself, was returned to military control on 20 September 1944 and was returned to his organization through replacement channels, which contention is not wholly inconsistent with the known facts. Absence without leave is terminated upon return to military control.

With respect to Charge II and its Specification, the prosecution failed to show the amount of money which accused fraudulently obtained from the United States. Without deciding that accused's service record was incompetent to prove the allegations in support of which it was offered and received in evidence, the entries therein, taken by themselves, were meaningless to show accused's debtor and creditor status. The personnel officer failed to compute the amount of money owed by accused for time lost, for payments on account or for overpayments. He failed to specify the amount of money owed by the United States, or by accused, on 12 October 1944. He said that accused was overpaid; he did not know the exact amount. It is uncertain whether he meant accused was indebted to the United States on October 12 or after being paid this \$341.10. The record is bare of any specific evidence on this important point.

Furthermore, there is nothing in Prosecution Exhibit C (the sworn application for back pay) that shows that accused made, as alleged, the following fraudulent representations:

- a. That he had received no partial payments since last paid.
- b. That he was indebted to the United States in any amount.
- c. That he had lost no time under Article of War 107.

This exhibit shows that accused was silent and made no representations as to these facts. The statement was accepted in this incompleated state.

There is one material, false representation which accused actually made in this application. He represented his "present grade" (on 12 October) as "T/Sgt". It was proved by competent evidence that he was not a technical sergeant, but only a private. Prosecution's Exhibit A (extract copy of morning report of accused's organization), properly received in evidence, shows that accused was a private at least

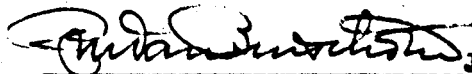
from 2 September 1944 until and including at least 12 October 1944. This covered part of the period for which accused was asking the pay of a technical sergeant. The pay which accused received on or about 12 October 1944 was necessarily computed on the basis of that due a technical sergeant and accordingly he received a greater sum than he was entitled to receive as a private. Accused was thus proved to have defrauded the United States in violation of Article of War 94. The exact amount was not shown, however. There was no evidence that the amount of this fraud exceeded in value the sum of \$20.00.

6. For the foregoing reasons, the record of trial is, in the opinion of the Board of Review, legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding that accused absented himself, as otherwise alleged in the Specification, from on or about 2 September 1944 until on or about 12 October 1944, in violation of Article of War 61; legally sufficient to support only so much of the Specification of Charge II as involves a finding that accused did fraudulently obtain from the said finance officer a sum of money not exceeding \$20.00, legally sufficient to support the finding of guilty of Charge II; and legally sufficient to support the sentence.

7. The charge sheet shows accused to be 26 years of age. He enlisted 2 November 1939 and was at that time assigned to the 137th Infantry.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused, other than as mentioned, 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, modified as stated above, and the sentence, providing the place of confinement is other than a penitentiary.

9. Penitentiary confinement is not authorized for the offense of absence without leave in violation of Article of War 61. Since the amount of money fraudulently obtained, in violation of Article of War 94, did not exceed \$20.00, confinement for over one year is not authorized as punishment for that offense (MCM, 1928, par.104c, p.100). Penitentiary confinement is therefore not proper (AW 42; Dig.Op.JAG, 1912-1940, sec.399(4), p.247, CM 152605 (1922)).

 Judge Advocate

(SICK IN QUARTERS) Judge Advocate

 Judge Advocate

5569

CONFIDENTIAL

(206)


1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. **25 JAN 1945** TO: Commanding
General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private AUDREY W. KEELE (20725591), Company G, 137th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification modified to terminate the absence about 12 October 1944, legally sufficient to support only so much of the Specification of Charge II as involves a finding that accused did fraudulently obtain from the said finance officer a sum not exceeding \$20.00 and legally sufficient to support the finding of guilty of Charge II and to support the sentence.

2. None of the offenses of which accused was convicted were offenses for which penitentiary confinement is authorized. Penitentiary confinement is therefore illegal (AW 42). The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. Supplemental action in accordance with the foregoing holding should be forwarded to this office to be attached to the record of trial.

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 CM ETO 5569. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5569).


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

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(207)

BOARD OF REVIEW NO. 1

16 JAN 1945

CM ETO 5584

UNITED STATES	)	NORMANDY BASE SECTION, COMMUNICATIONS
	)	ZONE, EUROPEAN THEATER OF OPERATIONS
v.)	
Private WAITERS YANCY	)	Trial by GCM, convened at Cherbourg,
(37499079), 1511th Engineer	)	Department of Manche, France, 7, 9
Water Supply Company	)	November 1944. Sentence: To be
	)	hanged by the neck until dead.

HOLDING by BOARD OF REVIEW NO. 1
RITTER, SARGENT and STEVENS, 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 1: In that Private Waiters Yancy, 1511th Engineer Water Supply Company, did at Hameau-Pigeon, France, on or about 1 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Marie R. Osouf.

Specification 2: In that * * * did at Hameau-Pigeon, France, on or about 1 August 1944, with malice aforethought, willfully, deliberately, feloniously unlawfully and with premeditation kill one Auguste Lebarillier, a human being, by shooting him with a rifle.

5584

CONFIDENTIAL

CONFIDENTIAL

(208)

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

Specification 1: In that * * * did at Hameau-Pigeon, France, on or about 1 August 1944, with intent to do him bodily harm, commit an assault upon Auguste Mace, by shooting him with a dangerous weapon, to-wit: a rifle.

Specification 2: In that * * * did at Hameau-Pigeon, France, on or about 1 August 1944, with intent to do him bodily harm, commit an assault upon Xavier M. Hebert, by shooting him with a dangerous weapon, to-wit: a rifle.

Specification 3: In that * * * did at Hameau-Pigeon, France, on or about 1 August 1944, with intent to do bodily harm, commit an assault upon Renee Jeanne Clementine Hebert, by hitting her on the head and face with his fists and helmet.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and all specifications thereunder. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding Officer, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Evidence for the prosecution, which was uncontradicted, was substantially as follows:

(a) On 1 August 1944, accused was a member of the 1511th Engineer Water Supply Company, then bivouacked at Bricquebec, Department of Manche, France (R6-7,28,30). About 8:45 French time (2245 hours American time) when it was dusk, two colored American soldiers (the "smaller" later identified as accused and the "taller" as Private (Robert L.) Skinner of accused's company) came to the house of Monsieur Xavier Hebert and his wife, Renee Jeanne Clementine, in the village of Hameau-Pigeon, Quettetot, Department of Manche (about four miles from the camp) (R12,14,24).

5584

CONFIDENTIAL

CONFIDENTIAL

(209)

In the employ of the Heberts were a maid, Marie Osouf (hereinafter referred to as Marie), and also a hired hand, Auguste Lebarillier, who at the time of the soldiers' arrival was working with Hebert about 80 meters away in a field (R12,14-15, 24). The two soldiers, who did not appear to have been drinking at the time, asked Madame Hebert and Marie for cider and when the women hesitated, the soldiers insisted, whereupon Madame Hebert sent Marie to bring some from a cider shed about 50 meters from the house. Marie returned with cider and the soldiers were given four or five glasses thereof, which they drank. Thereupon they went down the road but returned almost immediately and asked for more cider. Madame Hebert protested that there was no more, but upon their insistence Marie again went back to bring more of the drink (R12,24,26). The taller of the two soldiers followed Marie when she left (R12,24), and the other (accused) aimed his carbine at Madame Hebert, who called to Marie. The latter shouted as the taller soldier pursued her, caught her in the (cider) "cellar" and dragged her into the yard (R13,24).

Madame Hebert asked a neighbor to open her door to give her refuge, but the neighbor refused. Thereupon Madame Hebert passed by the small soldier (accused) who made a movement to strike her, whereupon she took his carbine in her hand and fled, pursued by him. Overtaking her in a "few yards", he threw her down on the ground and dealt her four or five blows on the head with his helmet and fists. She relinquished the carbine and, leaving her wooden shoes, took refuge at the home of Auguste Mace, about 50 meters from the Hebert home. During this time she was calling for help. The soldier pursued her to the middle of the Mace yard and when Mace opened the door she entered the house. Just as Mace was about to shut the door, the soldier fired a shot from his carbine, wounding Mace in the right arm. The latter immediately shut the door and stayed with Madame Hebert in the corridor awaiting developments (R13, 20,23).

Meanwhile, Monsieur Hebert testified, he heard the cries of his wife and Marie and with Lebarillier hastened from the nearby field toward the Mace home. When they reached the railing or wall of the Mace yard, four shots were fired at them, "two against me, two against Lebarillier", from the direction of a hedge about seven or eight meters from them (R15-16; Pros. Ex.A). Lebarillier, who was shot first, entered the yard and fell at a point 20 - 30 meters away. (The evidence showed he was shot in the abdomen (R17,29,44-45)). Two bullets struck Hebert in the back as he turned from the direction from which the first shots came, to enter the Mace courtyard, whereupon he fell and dragged

5584

CONFIDENTIAL

5584

CONFIDENTIAL

(210)

himself near a heap of wood in the yard. Then "the nigger /whom he identified as accused/ took his rifle by the small end", struck him several blows on the head and broke Hebert's arm, and the "rifle" fell into three pieces (R16-17,19).

Marie testified that when the larger soldier dragged her from the "cellar" to the yard, he released her and she fled in the direction of the Mace farm (R24,26; Pros. Ex.B). En route she saw "the little one", whom she identified as accused, striking Hebert. Then "the small one left Mr. Lebarillier", advanced at Marie and struck her with the stock of his "rifle", causing her to fall. The two soldiers proceeded to take her "into a little field where there are apple trees and they raped me" (R25). Before entering the apple orchard, accused drew a knife and showed it to her with a threatening gesture (R26). She sustained wounds on the head and shoulder. The taller soldier had intercourse with her first, during which time accused looked through the gate to the field, holding the "rifle" of the other. When the taller one finished with Marie, accused took his place and the other soldier took the "rifle". Accused put his private parts into Marie's private parts. Neither soldier paid her anything for the intercourse and she had seen neither of them before that day (R25). She resisted during the intercourse "a little when the first one took me". Accused, however, she did not resist at all. Asked why she ceased resistance, she replied "Because when I had received the blow with the stock of the rifle I was completely out of control". She was fully conscious during the two acts of intercourse. At no time did either soldier aim the "rifle" at her (R26). On redirect examination she testified as follows:

- "Q. Did you desire to have intercourse with either of the soldiers?
- A. No.
- Q. Did you realize fully what was going on during these two acts of intercourse?
- A. Yes.
- Q. Was either the availability of a rifle or the previous threatening gesture with a knife involved in your failure to resist the act by either of the two soldiers?
- A. The threatening gesture with the knife.
- Q. Did you honestly feel that if you had resisted you may have been injured either by the use of a knife or the use of a rifle?
- A. Yes" (R27).

5584

CONFIDENTIAL

CONFIDENTIAL

(211)

Marie was in the orchard with the two soldiers between seven and ten minutes. They released her when they were finished with her and she arrived in about a minute at the home of a neighbor, Madame Laisne, whom she informed of what happened (R25,27). She remained there for an hour or an hour and a half, after which she was taken in an ambulance to "the American hospital" (R25).

Meanwhile, Mace and his brother brought Lebarillier, who was lying near a heap of wood in the courtyard, and Hebert into his house, and then proceeded to the bivouac area of the 4th Special Service Company, about two kilometers distant, where they reported the incidents (R17,20-21,28). The first sergeant of the company took a detail of three enlisted men with him to the Mace house, where they administered first aid to both Hebert, who "had been shot and hit over the head with some instrument", and Lebarillier, who was "shot through the stomach". The girl (Marie) had a wound on the head and was "pretty groggy" (R21,28-29). Hebert, Lebarillier and Marie were taken early the next morning (2 August) to the 101st Evacuation Hospital, then stationed at St. Sauveur, France (R17,26,44,45,46,47). Major Joseph D. Whalen, Medical Corps, of that hospital, testified that he attended Lebarillier there and described his condition as follows:

"he had a great deal of pain and he was complaining of pain in his abdomen. The officers in charge of the shock room at that time was administering blood and plasma. Upon examination he showed a gunshot wound in the left upper quadrant and a wound of exit in the right flank. I decided that the patient had a perforation of the bowels and should be operated on. * * * the bullet, of the wound of entrance through the left upper quadrant blew a hole the size of a silver dollar out of his stomach and put about three or four perforations in the transverse colon. * * * The transverse colon had become gangrenous as a result of multiple perforations and interference with the blood supply" (R44).

Witness operated upon the patient, after which his condition was

"Very poor, he was distended continually, had a great deal of pain because of hydrochloric acid in his stomach which gives excruciating pain. The man was in shock and he remained in shock until * * * early in the morning of the third.

5584

CONFIDENTIAL

CONFIDENTIAL

(212)

I saw the man, I believe it was around twelve or one o'clock in the morning and at that time I gave him up as done" (R45).

Witness last saw him when he was in a coma and "it was just a matter of fifteen minutes to an hour or two till he went out". Witness was not present when the victim died (R45). Hebert testified that both he and Lebarillier remained in the hospital for three days but that he never saw him alive after the day (2 August) following the first night (R17). The undertaker testified to placing Lebarillier's corpse in a coffin on 4 August (R48) and Mace testified he attended the funeral on Saturday, 5 August (R21). Hebert testified that, prior to the time the shots were fired on 1 August, Lebarillier was in perfect health (R17).

Captain Ralph R. Jardine, Medical Corps, also of 101st Evacuation Hospital, examined Marie Osouf early in the morning of 2 August and

"observed a nineteen year old white girl who had a laceration of the forehead, a bruise on her face. Upon closer examination she was found to have a depressed fracture of the frontal bone. She also had a wound of the right shoulder" (R47).

He treated her for her injuries (R48).

Captain Robert A. Dionne, of the same hospital (R45), performed a vaginal examination upon Marie two or three days after her admission to the hospital (2 August). He testified

"The examination revealed normal peritoneum in the introitus, just below the hymen was injected considerably. The hymen had a small laceration laterally on each side. It appeared to be recent. On digital examination I could only introduce one finger into the vagina. The examination otherwise was negative" (R46).

Her hymen was about average size, "if there is an average". As a result of his examination, he was of the opinion that Marie had forceful intercourse shortly before (R46). Marie remained at the hospital until 7 August (R25,48). It was five weeks before she was able to return to work. Her health was very good before the attack upon her occurred (R25).

CONFIDENTIAL

(b) The evidence as to accused's identity as the soldier involved was as follows: He was seen leaving his camp before 1800 hours 1 August (R7). Madame Hebert testified that it was dusk when the two soldiers came to her home (R14), and that she could identify accused (whom she described as the smaller of the two) "When he is alone, but not among others" (R13,14). Monsieur Hebert testified that he did not see and could not identify the man who shot Lebarillier and himself because "it was dark", even though he was first facing in the man's direction (R18-19). However, he positively identified accused as the soldier who struck him with his gun on the head and arm in the courtyard immediately after the shooting (R17,19). Mace testified that in the dark he "saw that it was a black soldier" who pursued Madame Hebert at a distance of about six or seven meters to witness' house and shot him in the right arm, but did not see his face and could not identify him. When Mace closed the door, the soldier was about five or six meters distant (R22-23). The soldier was about one meter and 60 centimeters (about five feet two and one half inches) in height and was rather thin (R23-24). Marie positively identified accused as the small soldier about whom she testified (R25). Accused was recognized by a guard as one of two soldiers who returned to his company's bivouac area about 0015 hours 2 August (R7-8,9-11).

The following exhibits and testimony concerning them, bearing upon accused's identity as the perpetrator of the offenses charged, were introduced in evidence, the defense stating it had no objection to the exhibits (R36-37):

Pros. Ex. C: Photograph of .30 caliber ammunition consisting of one live shell, four empty shells found in the vicinity of the shooting, a fired slug found inside the Mace house, (R33,36,39-40) and three empty shells found among accused's personal effects in his pockets (R40). All bore the same mark on the back of the case: "EC-43". It was discovered, after a check of about 1500 troops in the vicinity, that the only unit using such a marking on its ammunition was the "1511th Water Supply Company", accused's company (R37,40).

Pros. Ex. D: Photograph of seven pieces of wooden carbine stock, found in the vicinity of the alleged crime (R29, 35-36). On one of the pieces appeared the initials "FY" (R35). A "showdown" inspection in ranks of members of accused's company revealed that the only soldier whose rifle was missing was Staff Sergeant Harney, company supply sergeant (R30-31,32,34). Accused worked in the stock room with Harney (R33).

Pros. Ex. E: Photograph of fatigue clothes together with barrel, operating mechanism and wood splinters from the stock of a carbine, found wrapped together at a garbage pit near the bivouac area of accused's company on 3 August. On the trousers

CONFIDENTIAL

(214)

the name "Yancy" was written in indelible pencil or ink (R31,32,34,36). Pros. Exs. C, D and E, all U. S. Army Signal Corps photographs, were authenticated by Captain Henry Rollman, Corps of Military Police, Assistant Provost Marshal, Headquarters XII Corps, who testified he was present when the photographs were taken. The subjects thereof were lost at a later time during rapid movement of his unit. He testified that these photographs were accurate, fair exhibits of what they purported to be (R33,36,40,43).

On 3 August accused was arrested and taken to the office of Captain Rollman (R31-32), who after warning him as to his rights, assisted by Staff Sergeant John V. Nesfield, Military Police Platoon, XII Corps, questioned accused concerning the objects pictured in Pros. Ex. E. Accused admitted the clothing was his but stated that it was stolen. Thereafter a bloodstained jacket was found in accused's duffle bag in his tent, as to which he offered no explanation (R34-35,36,40). He also at first denied ownership or knowledge of the carbine parts (R37). Subsequently he admitted he was at Hameau-Pigeon on the night of 1 August and "admitted exactly what had taken place" (R38,40). He identified Private Skinner as having been with him that night (R37,41). He "finally" admitted that he received a cut on his thumb by a tooth bite "from the woman that he had attacked" (R38). He also

"told us how he committed the shooting and what happened to his rifle during the course of the incident and he stated when he returned to camp his own rifle, all he had left was the butt, the steel part of the rifle, that he thrown the wooden stock away and that he walked into the supply tent where he was billeted with the supply sergeant and in the darkness picked up this carbine rifle hanging on a nail" (R41).

This was Sergeant Harney's carbine (R37).

"He took the stock from that rifle and put it on his own rifle and the barrel remaining from the rifle he picked on the nail, he put that in his OD trousers and OD shirt and threw it in the garbage pit" (R42).

A stenographer was present and took notes of accused's statements (R41). No inducement was offered for the purpose of persuading accused to make a statement (R43).

CONFIDENTIAL

CONFIDENTIAL

(215)

4. For the defense, Captain Herbert T. Schmale, Medical Corps, 298th General Hospital, testified that since July 1944 he was assigned as psychiatrist with that hospital and was a member and recorder of the mental board of three officers which examined accused on 3 October 1944 (B51). A report of proceedings of the board and a carbon copy thereof were identified by witness and the carbon copy was admitted in evidence, without objection by the prosecution, as Def. Ex. L. The report summarized accused's past history and contained the following:

"In relating the present incident the soldier states that he had been drinking a great deal of cider and that when his partner (Skinner) went after the maid he attempted to rape the older woman but she ran away. When he saw four men running toward the scene he shot at them 'because I thought they were going to harm me'. He then hit the younger woman when she attempted to run away from Skinner and then stood guard until Skinner was through after which he raped her".

The "summary of examinations" was as follows:

"This soldier was examined and observed on the wards of the 298th General Hospital from 18 September 1944 to 3 October 1944. General physical and laboratory examinations disclose no significant abnormality. Psychometric examination gives the soldier's average mental age as of 9 years and 8 months.

Psychiatric examination shows the soldier to be cooperative, frank, and responding to questions readily. In general his examination corroborated the findings on mental test, mainly a dull mentality. In mood the soldier was mildly depressed, somewhat apprehensive, but showing normal variations. He presented a general picture of an insecure, immature, emotionally unstable individual without evidence of mental disease. Repeated discussions of the alleged offenses disclosed the soldier had a good memory for the incidents and that although he may have been intoxicated at the time he was not suffering from any mental derangement at the time of these offenses".

CONFIDENTIAL

5584

(216)

The findings of the board were thus recorded:

- "a. The board unanimously agreed that Private Waiters Yancy, 37499079, did not suffer from any mental derangement, abnormality, or defect at the time of the commission of the offenses charged which would absolve him of responsibility for his actions at that time.
- b. The board further finds unanimously that Private Waiters Yancy, 37499079, is not so mentally defective, abnormal, or deranged at present to be unable to cooperate intelligently in his defense" (Def. Ex.1).

Witness talked with accused when he appeared before the board. He also talked to Private Skinner, who was at the hospital at the same time and was charged with the commission of a part of the offenses with which accused was charged (see CM ETO 5363, Skinner). He tested accused for his intellectual level (R52). Accused showed no viciousness but was cooperative and submissive. Skinner's attitude, on the other hand, was more arrogant and flippant. He refused to cooperate in a psychometric examination to determine his intelligence. In witness' opinion, he had more aggressiveness than accused and a higher intellectual level. Witness agreed with the "general picture" presented by accused as set forth in Def. Ex. I. Although accused's mental age of nine years eight months was determined by psychometric examination conducted by specifically trained personnel, the board members made an approximate examination which agreed with that finding (R53). The report of details of the incidents of the night of 1 August in Def. Ex. 1 was substantially as given to the board by accused. On the basis of his observation of accused, witness believed, without any serious question in his mind, that accused was capable of distinguishing right from wrong (R54).

5. After full explanation of his rights to testify in his own behalf, to make an unsworn statement and to remain silent, accused elected to remain silent (R55).

6. Accused's identity as the smaller of the two colored American soldiers who came to the Hebert home on the evening of 1 August is clearly established by the testimony of the Heberts and Marie Osouf, the victims of his alleged offenses. Marie positively identified him as one of her assailants. Monsieur Hebert could not positively identify him as the person who shot him and Lebarillier, but his testimony was clear that directly

following the shooting accused violently struck him on the head and arm with the stock of his weapon. Madame Hebert was positive in her identification of accused as the soldier who assaulted her, shot at her when she entered the Mace house and wounded Mace in the arm. Cartridges of the same caliber and marking found in the vicinity of the shooting and upon accused's person (Pros. Ex.C), splintered pieces of a carbine stock (Pros. Ex.D) and the bundle of accused's fatigue clothes containing other parts of the carbine (Pros. Ex.E), together with accused's admissions concerning his presence at the scene of the crimes, his complicity with Skinner, "how he committed the shooting", the substitution of Harney's rifle stock, accused's attempted suppression of evidence, and the bite in his thumb - all constitute a body of evidence which points unerringly to his identity as the perpetrator of the offenses charged. In view of this uncontroverted evidence, the Board of Review will not upon appellate review disturb the findings that it was accused who committed the offenses charged (CM ETO 3200, Price; CM ETO 5363, Skinner; and authorities cited in those cases).

7. (a) Rape of Marie Osouf (Specification 1, Charge I):

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

The offense may be committed on a female of any age.

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par.148b, p.165).

"where the act of intercourse is accomplished after the female yields through fear caused by threats of great bodily injury, there is

(218)

constructive force, and the act is rape, actual physical force or actual physical resistance not being required in such cases, even where the female is capable of consenting. It has been held that, where the female yields through fear, the offense is rape, whether or not the apprehension of bodily harm is reasonable, although there is also authority that the threats must create a reasonable apprehension of great bodily harm, and that the threat must be accompanied by a demonstration of brutal force or a dangerous weapon, or by an apparent power of execution" (52 CJ, sec.32, p.1024) (Underscoring supplied).

"Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape. * * * Nor is it necessary that there should be force enough to create 'reasonable apprehension of death.' But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance of all resistance" (1 Wharton's Criminal Law, 12th Ed., sec.701, pp.942-943) (Underscoring supplied).

Penetration by accused of the private parts of the victim, Marie Osouf, is established by her own clear testimony, corroborated by that of Captain Dionne that the introitus was congested and the hymen freshly lacerated, and his conclusion from his examination that she had recently suffered forceful sexual intercourse. That accused's penetration was effected by force and fear and without the victim's consent is fully established by her testimony that she did not desire to have intercourse with either accused or his companion Skinner, and that her failure to resist accused, who was the second to engage in intercourse with her, was the result of fear that he would harm her with his knife or rifle. (As was clearly brought out in the trial of Skinner, the record of which the Board of Review recently held legally sufficient (CM ETO 5363, Skinner), both soldiers had visited brutal violence upon her.) Accused had threatened her with his knife. Captain Jardine's testimony as to the laceration on her forehead, the bruise on her face, her fractured skull and her wounded shoulder corroborate the brutality of the attack upon her. She had been reduced to a state of

unwilling submission through fear of death or great bodily injury at the hands of accused and his companion. The Board of Review is of the opinion that all elements of the crime of rape were convincingly established (CM ETO 5363, Skinner; CM ETO 5561, Holden and Spencer; and authorities cited and quoted in those cases).

(b) Murder of Auguste Lebarillier (Specification 2, Charge I):

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.

* * *

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. * * * 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 * * * 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" (MCM 1928, par.148a, pp.162,163-164) (Underscoring supplied).

The following principles of law are particularly applicable in the instant case:

"Merely use of a 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, pp.654-655) (Underscoring supplied).

"An intention to kill * * * may be inferred from the acts of the accused, or may be founded on a manifest or reckless disregard for the safety of human life. Thus an intention to kill may be inferred from the willful use of a deadly weapon" (40 CJS, sec. 44, p.905) (Underscoring supplied).

"Reckless disregard of human life may be equivalent of specific intent to kill.— Looney v. State, 153 S.E. 372, 41 Ga. App. 495— Chambliss v. State, 139 S.E. 80, 37 Ga. App. 124" (Ibid., fn.67, p.944) (Underscoring supplied).

"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 circumstances 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, 2d Ed., Reprint 1920, p.673).

"The rule, as applicable to military cases, is similarly stated in the manual of Military law, p.71, as follows - * * * On a charge of murder the law presumes malice from the act of killing, and throws on the prisoner the burden of disproving the malice or justifying or extenuating the act!" (Ibid., fn.55, p.673) (Underscoring supplied).

"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 inferable from the circumstances. The law presumes that one intended the natural and probable consequences of his act and the requisite intent to kill may be inferred from such acts. It may be inferred or presumed as a fact from the surrounding circumstances, such as the

acts and conduct of accused, the nature of the instrument used in making the assault, the manner of its use, from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result, or from a total or reckless disregard of human life" (40 CJS, sec.79b, pp.943-944) (Under-scoring supplied).

The testimony of Monsieur Hebert, together with other evidence above discussed as to accused's identity, establishes that (prior to the rape of Marie Osouf) as Hebert and Auguste Lebarillier were hastening to the aid of the women and as they approached the Mace home, accused fired four shots from a distance of seven or eight meters. That one of these bullets entered Lebarillier's abdomen and was the cause of his death two or three days thereafter is clearly established by the testimony of Hebert, Major Whalen and the undertaker. The only explanation of the killing offered by the defense is contained in the report of the board which examined accused (Def. Ex.1), as follows: "When he [accused] saw four men running toward the scene he shot at them 'because I thought they were going to harm me'". There is not the slightest evidence in the record to justify the inference that accused acted in self-defense. Hebert and Lebarillier, who were unarmed, were hurrying to the assistance of the distressed women. The evidence points convincingly to the conclusion that accused deliberately and cold-bloodedly fired at the two men for the purpose of killing or disabling them so that he and his companion might accomplish their ulterior purpose of obtaining sexual intercourse from one or both of the women without interference from those who were naturally and obviously attempting to protect them. In any event, the court was fully justified in finding that accused used his weapon in a manner which is "likely to, and does, cause death", in which case "the law presumes malice from the act". The court was also warranted in inferring an intent to kill on accused's part "founded on a manifest or reckless disregard for the safety of human life". The findings of guilty of murder are supported by competent substantial evidence of a convincing character and will not be disturbed by the Board of Review upon appellate review (CM ETO 5451, Twiggs; and authorities therein cited; CM ETO 4149, Lewis).

(c) Assaults with intent to do bodily harm with a dangerous weapon upon Auguste Mace and Xavier M. Hebert (Specifications 1 and 2, Charge II):

Two of the four shots fired by accused, as described in (b) above, struck Monsieur Hebert in the back, causing him to fall. When the detail arrived from the Special Service

(222)

company he was given first aid and he was later taken to the hospital where he stayed for three days.

"Weapons, etc., are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm. * * * Proof. - (a) That the accused assaulted a certain person with a certain weapon * * *; and (b) the facts and circumstances of the case indicating that such weapon * * * was used in a manner likely to produce death or great bodily harm" (MCM, 1928, par.149g, p.180).

The court was fully justified in inferring from the evidence of the shooting that accused intended to inflict bodily harm upon Hebert (CM ETO 4203, Barker and Hood; CM ETO 4269, Lovelace; CM ETO 3859, Watson and Wimberly). The court was equally justified in inferring an intent to inflict bodily harm upon Mace from the evidence that accused fired in his direction as Madame Hebert entered the door of the Mace house. Even if the court believed accused intended to shoot only Madame Hebert and wounded Mace by mistake it properly found accused guilty. As in the case of assault with intent to do bodily harm (without a weapon)

"Where the accused acts in reckless disregard of the safety of others it is not a defense that he did not have in mind the particular person injured" (MCM, 1928, par.149g, p.180).

(See also 6 CJS, sec. 71, p.925, fn.27; sec.77b, pp.932-933). The court was warranted in believing that accused acted in reckless disregard of the safety of others when he shot at Madame Hebert when she was near the door of Mace's house and in doing so wounded Mace (authorities cited supra).

(d) Assault with intent to do bodily harm upon Madame (Renee) Hebert (Specification 3, Charge II):

After accused aimed his carbine at Madame Hebert she took it from him whereupon he chased her, overtook her, threw her to the ground and dealt her four or five blows on the head with his helmet and fists. The assault was utterly without justification in its brutality. Assault with intent to do bodily harm is

CONFIDENTIAL

(223)

"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

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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" (MCM, 1928, par.149n, p.180).

Such assault is one

"where the means or instrument used to accomplish the injury are highly dangerous or where the assailant has some ulterior and malicious motive in committing the assault other than a mere desire to punish the person injured. * * * The intent in such case is a question of fact for the jury, and the malicious intention is to be inferred from the situation of the parties, their acts and declarations, the nature and extent of the violence, and the object to be accomplished" (4 Am.Jur., sec.26, p.142). (Quoted with approval in CM ETO 1177, Combes).

In view of the foregoing principles and their obvious applicability to the acts of accused, the Board of Review¹³ of the opinion that the court's findings of guilty were proper and will not be disturbed upon appellate review (CM ETO 2782, James L. Jones, and authorities therein cited).

8. (a) A U. S. Army Signal Corps photograph of the Mace home and adjoining roadway was identified by Hebert, who testified that it was taken while he was at the hospital and that it was a fair, true, correct copy of what it purported to be. The defense objected to its admission in evidence because it was not "qualified". The court was closed and upon being opened the law member announced that the objection was overruled. The photograph was admitted in evidence as Pros. Ex. A (R15-16). The law member should have ruled personally on the objection (MCM, 1928, par.51d, p.40), but as the ruling was correct, no injury to accused's substantial rights could have occurred (Cf: CM ETO 4608, Murray and Miles).

5584

CONFIDENTIAL

(224)

"photographs * * * as to localities * * * are admissible as evidence when properly verified * * * by anyone personally acquainted with the locality * * * thereby represented or pictured, and able to state their correctness, from his own personal knowledge or observation" (MCM, 1928, par.118b, p.122).

(b) During the examination of Marie Osouf, the law member asked her if she told Madame Laisne what happened following the rape, to which Marie replied in the affirmative. The prosecution objected to the question on the ground that the answer would be hearsay. The law member "in order to avoid any possibility of error" declined to ask her concerning the details of her report to Madame Laisne (R27). Details such as the identity of her assailant might properly have been introduced in evidence for the purpose of corroborating Marie's testimony as to the rape (CM ETO 4608, Murray and Miles, and authorities therein cited). The error, however, was in accused's favor and thus immaterial.

(c) There appears to be no reason why the court might not regard the statement of accused to the members of the mental board (Def. Ex.1) as to his actions at the time in question, including his rape of the "younger woman", as a voluntary confession. The fact that he was not warned as to his rights under Article of War 24 did not ipso facto render the confession involuntary (CM ETO 2926, Norman and Greenawalt). Its voluntariness was a question of fact (CM ETO 1606, Sayre), and as bearing on this was the fact that the defense offered the copy of the report in evidence. In the absence of evidence indicating involuntariness, the findings of the court will not be disturbed upon appellate review (CM ETO 2343, Walbes, and authorities there cited). The fact that the report contained such confession and also an account of accused's background, including his civilian criminal record cannot, under the circumstances, be regarded as having injuriously affected his substantial rights. The defense obviously introduced the whole report for the purpose of supporting the conclusion therein that accused was insecure, immature and emotionally unstable. Any error was self-invited and, in view of other clear evidence, nonprejudicial (CM ETO 4967, Junior G. Jones, and authorities there cited).

(d) Testimony of Staff Sergeant Nesfield as to accused's inculpatory statements to witness and Captain Rollman was introduced over objection, overruled by the law member, of the defense that as a stenographer was present, took notes of the conversation and reduced the same to writing, the written statement was the best evidence of its contents and therefore the oral testimony as to the conversation was inadmissible (R41-42). The Board of Review sitting in the European Theater of Operations, following the

5584

Board of Review sitting in Washington, has held that the best evidence rule excludes oral testimony of an accused's extrajudicial confession where the confession had been reduced to writing and the writing was not accounted for by the prosecution (CM ETO 739, Maxwell, pp.20-21, and authorities therein cited). The Board also held therein that a failure to object to such oral evidence constituted a waiver of such objection (under MCM, 1928, par.116a, p.120). The doctrine is evidently an application of the rule applied in civil courts that a formal written confession taken before an examining magistrate is the sole evidence of the confession, and its contents may not be shown by parol, provided the writing is duly authenticated (20 Am.Jur., sec.530, pp.451-452; 1 Wharton's Criminal Evidence, 11th Ed., sec.415, pp.658-659; People v. Giro, 197 NY 152, 90 NE 432). The doctrine is an exception to the rule that

"When the fact of which evidence is sought to be adduced is one that may have been observed by a witness, then his testimony regarding what he has seen or heard is primary evidence, regardless of whether such fact is reduced to writing and incorporated in a record or document; the witness testifies, not as to what the writing contains, but as to what he observed or knows" (1 Wharton's Criminal Evidence, 11th Ed., sec.409, p.652).

The above-mentioned exception as to a formal confession before an official evidently rests upon the highly serious character of the evidence and the consequent desirability of a rigid application of the best evidence rule. But it does not appear herein that accused's inculpatory statements revealed by Nesfield's testimony amounted to a confession. They constituted admissions of facts which connected accused with the crimes charged, but did not admit guilt of all necessary elements of any crime charged, nor did they amount to an acknowledgment of guilt. They were thus in law admissions against interest and not a confession (CM ETO 4945, Montoya, and authorities there cited). Admissions are not within the aforementioned exception to the rule admitting primary evidence of statements notwithstanding the fact of their contemporaneous reduction to writing, and the general rule is that the best evidence rule has no application to them.

"All that the accused voluntarily wrote, or said, or signed, which is material to the charge, is competent against him, because it is his own admission, and against his own interest. It may be in the form of a letter, or of several letters to different persons, or may consist of detached

conversations with many people, or it may be a formal confession [other than one upon a hearing before a magistrate, see supra], or all of these together, yet all are admissible for the prosecution, upon the principle that no one will voluntarily make an admission against himself unless it is true" (People v. Giro, supra).

The rule has generally been applied to render competent as primary evidence in a criminal case a party's admissions, even though they tend to prove the contents of a writing (1 Wharton's Criminal Evidence, 11th Ed., sec.415, p.658). Even in the case of admissions made by a witness at a former trial, it has been held that proof thereof by testimony of the stenographer who took the testimony or by testimony of some other person who heard the admissions is the proper mode of proof and is preferable to an unauthenticated record of the whole of the former trial (Johnson v. Umsted et al, CCA-8th Cir, 1933, 64 F (2d) 316,320). And it is the general rule that it is not incumbent upon the party seeking to show an admission to introduce in evidence the entire writing in which it is contained (31 CJS, sec.373, p.1157). In view of the foregoing authorities, the Board of Review is of the opinion that the doctrine of the Maxwell case does not apply to the case of admissions against interest and that therefore the same were properly admitted in evidence herein (Cf: CM ETO 5363, Skinner).

(e) In view of the substantial evidence of accused's sanity and mental responsibility at the time of his offenses, which conditions evidently obtained at the time of the trial, the findings of guilty, which include a finding of the existence of all essential elements of criminal liability, will not be disturbed upon appellate review (CM 225827, Gray, (1942), Bull. JAG, Dec.1942, Vol.I, No. 7, sec.395(44a), p.360), 14 B.R.339,346; CM ETO 3963, Nelson, Jr.).

9. The charge sheet shows that accused is 21 years three months of age and was inducted 23 January 1943 at Fort Leavenworth, Kansas, to serve for the duration of the war plus six months. He had no prior service.

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

11. The penalty for rape or murder is death or life imprisonment, as the court-martial may direct (AW 92).

W. M. Miller

Judge Advocate

William M. Miller

Judge Advocate

Edward L. Stevens, Jr.

Judge Advocate

CONFIDENTIAL

5584

CONFIDENTIAL

1st Ind.

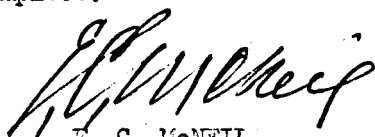
(227)

War Department, Branch Office of The Judge Advocate General
with the European Theater of Operations. 16 JAN 1945 TO: Com-
manding General, European Theater of Operations, APO 887, U. S.
Army.

1. In the case of Private WATERS YANCY (37499079),
1511th Engineer Water Supply Company, attention is invited to
the foregoing holding by the Board of Review that the record
of trial is legally sufficient to support the findings of guilty
and the sentence, which holding is hereby approved. Under the
provisions of Article of War 50¹, you now have authority to order
execution of the sentence.

2. When copies of the published order are forwarded
to this office, they should be accompanied by the foregoing hold-
ing, this indorsement and the record of trial which is delivered
to you herewith. The file number of the record in this office is
CM ETO 5584. For convenience of reference, please place that
number in brackets at the end of the order: (CM ETO 5584).

3. Should the sentence as imposed by the court and con-
firmed by you be carried into execution, it is requested that a
full copy of the proceedings be forwarded to this office in order
that its files may be complete.



E. C. McNEILL,

Brigadier General, United States Army,
Assistant Judge Advocate General.

1 Incl:
Record of Trial.

(Sentence ordered executed. GCMO 33, ETO, 3 Feb 1945)

CONFIDENTIAL

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(229)

BOARD OF REVIEW NO. 1

1 MAR 1945

CM ETO 5593

UNITED STATES)

36TH INFANTRY DIVISION

v.)

) Trial by GCM, convened at APO 36,
) U. S. Army (France), 1 December
) 1944. Sentence: Dishonorable
) discharge (suspended), total for-
) feitures and confinement at hard
) labor for 30 years. Seine Disci-
) plinary Training Center, Paris,
) France.

Private ROBERT E. JARVIS
(37571906), Company B,
141st Infantry

OPINION by BOARD OF REVIEW NO. 1
RITER, SHERMAN and STEVENS, Judge Advocates

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

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

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

Specification 1: In that Private Robert E. Jarvis, Company B, 141st Infantry, did, in the vicinity of Tendon, France, on or about 15 November 1944, desert the service of the United States, and did remain absent in desertion until on or about 21 November 1944.

CONFIDENTIAL

(230)

Specification 2: In that * * * did, in the vicinity of Deycimont, France, on or about 23 October 1944, desert the service of the United States, and did remain absent in desertion until on or about 6 November 1944.

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

Specification: In that * * * having received a lawful command from Captain Gregory A. Comnes, 141st Infantry, his superior officer, to return to his company, Company B, 141st Infantry, did, at vicinity of Granges, France, on or about 21 November 1944, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and the specifications thereunder. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 30 years, ordered the sentence as thus modified executed but suspended the execution of that portion thereof adjudging dishonorable discharge pending the soldier's release from confinement, and designated the Seine Disciplinary Training Center, Paris, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Number 154, Headquarters 36th Infantry Division, APO 36, U. S. Army, 8 December 1944.

3. The prosecution's evidence was as follows:

An extract copy of the morning reports of accused's organization, Company B, 141st Infantry, for 4 and 6 November 1944, certified by the assistant personnel officer of the regiment, and an extract copy of the company morning reports for 16 and 22 November 1944, certified by the same officer without indication of his capacity, were received in evidence after the defense stated it had "no objection to its introduction as an official document" (R5; Pros.Ex.1). (A certificate dated 30 January 1945 signed by the Adjutant General, 36th Infantry Division, accompanying the record of trial, states that the officer who certified the extract of the morning reports for 16 and 22 November 1944 was, at the time he certified, assistant personnel officer and acting personnel officer, 141st Infantry.)

3593

The sole witness, Captain Gregory A. Connes, 141st Infantry, testified that at the time of trial he was commander of the regimental service company and, as such, returned men to their units. On 21 November 1944 he saw accused in the service company installations at Granges, France. At that time he was accused's superior officer "Until such time as accused was returned to his organization" and gave him an order "To return to his organization". Witness could not quote the exact words but accused stated "he wouldn't return to his organization" (R6). Witness did not know whether the tenor of accused's reply was "I'll not go back" or "I can't go back", but he did not go back and indicated his refusal at the time he was given the order (R7). Captain Connes was wearing his insignia of rank on the day in question and accused showed no evidence by his actions that he did not recognize him as his superior officer (R6). In the performance of his duties witness was required to return many men, a very high percentage of whom were from Company B, to their units (R6-7).

4. Accused elected to make the following unsworn statement through counsel:

"I was inducted at Fort Snelling, Minnesota, on 7 July 1943, at the age of 18 years. Placed on the Enlisted Reserve list, I was called into service on 28 July 1943. I was given three months basic training at the Cavalry Replacement Training Center, Fort Riley, Kansas, and sent to the Army Ground Forces Replacement Depot as an infantryman. With less than seven months service, I was sent overseas and joined Company B, 141st Infantry Regiment on 10 May 1944. I served honorably throughout the Belletri-Rome-Grossetto engagements as a rifleman. I was awarded the Combat Infantryman's Badge by General Order Number 20, Headquarters 141st Infantry Regiment, dated 28 June 1944, with date of qualification 22 May 1944. I landed in France on 'D' Day" (R7).

No evidence was introduced for the defense.

5. The improper authentication of the extract copy of the morning reports for 4 and 6 November 1944 by the assistant personnel officer was waived by the failure of the defense to object thereto and the document was properly admitted in evidence (CM ETO 5234, Stubinski). The authentication of the extract copy of the morning reports for 16 and 22 November 1944

does not disclose the capacity of the officer who signed the same. It is unnecessary to decide whether the presumption of regularity of this signature was rebutted by the evidence that such officer was the assistant personnel officer at the time he certified the other extract copy or whether the certificate by the Division Adjutant General stating that such officer was assistant and acting personnel officer at the time he certified the extract of the reports for 16 and 22 November may properly be considered as part of the record of trial. In any event all objections to the authentication of the copy were waived by failure to assert the same and it was therefore properly admitted in evidence (Ibid).

6. a. Charge I and Specifications. Accused was charged with desertion on two separate occasions, from 23 October to 6 November and from 15 to 22 November 1944. His absences without leave for these periods were established by the extract copies of morning reports above mentioned. The only question for determination is whether there was substantial evidence of the other essential elements of the offenses charged. The record contains no evidence that at either time accused absented himself without leave he intended to avoid hazardous duty, to shirk important service or not to return, nor is there any evidence that at any time during either absence he intended not to return. Neither the location, tactical situation nor activity of his company is shown. The duration of the absences is not in itself probative of any of the necessary intents nor is accused's refusal, at the end of the second absence, to return to his organization evidence thereof (CM ETO 5234, Stubinski; CM ETO 6039, Clayton Brown; Cf: CM ETO 5958, Perry and Allen). There is no evidence of the manner of termination of either absence. The record of trial is legally sufficient to support only findings of guilty of absence without leave for the periods alleged.

b. Charge II and Specification. The testimony of Captain Connes shows that, as accused's superior officer, he lawfully ordered accused to return to his organization and that the latter at the time and place alleged willfully disobeyed the order by refusing and failing to return to his organization. The variance between the word "company" as alleged and the word "organization" as proven is immaterial. The evidence supports the findings of guilty (CM ETO 7549, Ondi, and authorities therein cited).

7. The record shows (R2) that the trial took place only four days after the charges were served on accused. No objection to trial at such time or motion for continuance was made. The record of trial does not indicate that his substantial rights were prejudiced in any degree. Due process of law was duly observed (CM ETO 4820, Skovan; and cases cited in CM ETO 4564, Woods, Jr.).

CONFIDENTIAL

(233)

8. The charge sheet shows that accused is 20 years of age and was inducted at Detroit Lakes, Minnesota, on 7 July 1943. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2 of Charge I and Charge I as involves findings that accused did, at the places and for the periods alleged, absent himself without leave from his organization in violation of Article of War 61, and legally sufficient to support the findings of guilty of Charge II and the Specification thereunder and the sentence.

10. The designation of the Seine Disciplinary Training Center, Paris, France, as the place of confinement should be changed to the Loire Disciplinary Training Center, Le Mans, France (Ltr., Hq. European Theater of Operations, AG 252, Op TFM, 19 Dec. 1944, par.3).

 Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

(234)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 1 MAR 1945 TO: Com-
manding 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 Act 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private ROBERT E. JARVIS (37571906), Company B, 141st Infantry.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Specifications 1 and 2 of Charge 1 and Charge I except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz: conviction of desertion in time of war, so vacated, be restored.

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

4. In view of the reduction in grade of the offense, the absence of previous convictions and the soldier's good military record, I recommend that the period of confinement be further reduced to 20 years. In the event that you agree with this recommendation, the inclosed forms of action and GCMO should be modified accordingly. The place of confinement designated in the reviewing authority's action should be changed to the Loire Disciplinary Training Center, Le Mans, France.



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

3 Incls.

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

(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 108, ETO, 3 Apr 1945)

CONFIDENTIAL

(235)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

10 MAY 1945

CM ETO 5595

UNITED STATES)

36TH INFANTRY DIVISION

v.)

Private MICHAEL A. CARBONARO)
(32229071), Medical Detach-)
ment, 143rd Infantry)

) Trial by GCM, convened at Headquarters
) 36th Infantry Division, APO 36, U. S.
) Army (France), 29 November 1944. Sen-
) tence: Dishonorable discharge (sus-
) pended), total forfeitures and confine-
) ment at hard labor for 30 years. Seine
) Disciplinary Training Center, Paris,
) France.

OPINION by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Michael A. Carbonaro, Medical Detachment, 143rd Infantry, did, on or about 3 November 1944, desert the service of the United States, and did remain absent in desertion until on or about 21 November 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one

5595

CONFIDENTIAL

CONFIDENTIAL

previous conviction by special court-martial for wrongfully striking a noncommissioned officer with his fist, stated to be in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 30 years, ordered the sentence executed as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated Seine Disciplinary Training Center, Paris, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 159, Headquarters 36th Infantry Division, APO 36, U.S. Army, 13 December 1944.

3. The evidence for the prosecution was as follows:

The prosecution offered in evidence

"as Government Exhibit 1, the extract copy of the morning report of the Medical Detachment, 143rd Infantry [accused's organization according to the charge sheet dated 23 November 1944] for the dates of 4 November and 21 November 1944, as pertains to the accused, Michael A. Carbonaro" (R5).

The defense stated it had no objection and the document was admitted in evidence, was marked Prosecution's Exhibit 1, and became part of the record of trial (R5). The document actually attached to the record of trial consists of a carbon copy and reads as follows:

"COMPANY		
MORNING REPORT	Ending 15 December 1944	
	(Day) (Month)(Year)	
STATION		
ORGANIZATION	Med Det	143rd Inf
SERIAL NUMBER	NAME	GRADE CODE
	4 November 1944	
32229074	Carbonaro, Michael A	Pvt
	Duty 861 MOS 861	
	Above EM fr dy to AWOL as of 3 Nov 1944	
	0700 hours	
	21 November 1944	
32229074	Carbonaro, Michael A	Pvt
	fr AWOL to abs conf 36 Div stockade MOS 861	

I certify a true extract copy.

/s/ Raymond E. Bernberg

/t/ RAYMOND E. BERNBERG

1st Lt 143d Inf Pers Off

* /s/ Joel B. Cunningham

SIGNATURE JOEL B. CUNNINGHAM Maj MC" (Pros.Ex.1).

5595

The sole witness for the prosecution, First Lieutenant Herman L. Tepp, 143rd Infantry, testified that he was assistant to the regimental adjutant and had the duty, among others, to return men to their companies. On 21 November 1944 accused was brought to witness near La Houssiere, France, by military police. Witness asked him his reasons for being absent and "whether he was going back up to the company". He replied that he did not know whether it was "yellow" or not, but he could not "go back up to the company". Witness took no further action in the matter and accused did not return to the company (R6-7).

4. After the defense stated his rights had been explained to him (R7), accused elected to make an unsworn statement through counsel substantially as follows:

After his induction on 16 March 1942, he joined the 93rd Armored Field Artillery Battalion of the VI Armored Corps, arrived with his unit in Italy in October 1943 and fought with it as an artillery man through the entire Italian campaign. He was made a cannoneer in May 1944. He participated, with the 36th Infantry Division, in the landing in France on 15 August (1944) and fought with it until October, when he was transferred from his unit to the 143rd Infantry as a medical aid man. He felt unqualified for this type of work by virtue of his limited experience therein and his nerves were becoming bad as a result of several "close calls" during the Italian and French campaigns. Because under these circumstances he felt it would be difficult to perform his duties as aid man, he left his organization in order to secure a transfer to the Field Artillery. When he discovered that such a transfer was impossible, he surrendered to military police at Epinal (France) on 18 November 1944 and returned to his organization on or about 21 November (R8).

5. a. A question vital to the legal sufficiency of the record of trial to sustain the findings of guilty and the sentence arises from the fact that the document attached to the record, purportedly as Prosecution's Exhibit 1, referred to above in paragraph 3, consists of an unmarked carbon copy of purported extracts from morning reports of accused's organization for 4 and 21 November 1944, upon an original morning report form (WD AGO Form No. 1, March 25, 1943), bearing the date 15 December 1944. The trial took place on 29 November 1944 and the action of the reviewing authority is dated 13 December. The chronology sheet, attached to the record and signed by the staff judge advocate, indicates that between 3 December and 13 December the record was "lost during change of stations". The record was mailed to the Branch Office of The Judge Advocate General with the European Theater of Operations on 18 December. It is apparent that the document attached to the record as Prosecution's Exhibit 1 could not be the exhibit which was received in evidence at the trial held 16 days before its date. There is no indication in the record or accompanying papers as to

(238)

what disposition was made of the exhibit actually received at the trial, and it would appear that the other document was annexed to the record on or after 15 December. As the reason for this procedure was not disclosed and was material to a determination whether the document might properly be considered as evidence in the case, the Assistant Judge Advocate General wrote to the reviewing authority on 26 February 1945 requesting that the original exhibit introduced at the trial be forwarded to that office and that an explanation be made of the circumstances under which the document dated 15 December was annexed to the record.

On 19 March 1945, the reviewing authority replied by first indorsement as follows:

"This Headquarters is unable to offer any explanation of the discrepancy pointed out in the basic communication. The retained file contains no reference to the morning report, the reporter has no independent recollection of the transaction, and the officers of the Staff Judge Advocate's Section at the time this case was tried and record prepared are no longer available for questioning".

By second indorsement dated 30 March the Assistant Judge Advocate General suggested that the officer who signed the document of 15 December be contacted with respect to preparation and location of original morning reports and original exhibit. By third indorsement dated 7 April 1945 the reviewing authority replied that the last mentioned officer was questioned as suggested but had "no recollection of the incident".

b. It is manifest from the foregoing that the original exhibit offered at the trial does not accompany the record and there is absolutely no evidence available that the document actually annexed thereto is a true copy of such original. Consequently the Board of Review must, in fairness to the accused and in the complete absence of evidence to the contrary, assume that the record of trial is incomplete in that an exhibit constituting a vital and material part thereof is missing therefrom.

Article of War 33 provides that

"Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it".

Manual for Courts-Martial, 1928, provides that the record of the proceedings in each case

"should be separate, complete and independent in itself both in form and in substance" (par.85a, p.71).(Underscoring supplied).

and

"will set forth a complete history of the proceedings had in open court in a case"(par.85b, p.71)(Underscoring supplied).

The Board of Review (sitting in Washington) has held legally insufficient to support the findings and sentences adjudged, records of trial which were incomplete in the sense that it appeared that they had been prepared from unauthorized sources (CM 156085, Mayo (1923); CM 156084, Alsup (1923), Dig. Op. JAG, 1912-1940, sec. 390 (3), p.196), as well as records from which vital and material exhibits were missing (CM 192451, Hajek (1930), 1 B.R. 361, Dig. Op. JAG, 1912-1940, sec. 390 (3), p.196, CM 227459, Wicklund (1942), 15 B.R. 299, 1 Bull. JAG 358). In the Hajek case a deposition which had been received in evidence was omitted from the record. The Board wrote:

"It is evident that this statutory review [under Article of War 50 $\frac{1}{2}$] could not be performed in this case with respect to the convictions of the offenses involved in Charges I and II and their specifications for the reason that there is no complete record of trial upon these charges and specifications within the contemplation of either Article of War 33 or Article of War 50 $\frac{1}{2}$. * * * Through no fault of his, accused has been, by the deficiency of the record, deprived of the right conferred by law to have the complete proceedings at his trial upon these charges and specifications reviewed in an appellate capacity. This right is of a highly substantial character, and it must be concluded that its denial to him is fatally injurious within the contemplation of the 37th Article of War. * * * It has been held by state courts in cases in which there was not an automatic appellate review as is provided for by Article of War 50 $\frac{1}{2}$, that if, by reason of the loss of an important part of a record, a defendant is unable through no fault of his to perfect his appeal, the judgment will be reversed (State vs. McCarver, 20 S.W. (Mo.) 1058)".

The foregoing language is applicable to the instant case. The only competent evidence even tending to prove absence without leave, an essential element of the desertion alleged, other than that which the document attached to the record purports to contain,

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consists of the testimony of the assistant adjutant that accused was brought to him by military police, stated in response to inquiry that he could not return to his company and refused to return thereto, and accused's unsworn statement through counsel at the trial that "he left the organization" because he desired a transfer. The incompleteness of the record makes it impossible for the Board of Review to reach a determination as to whether the missing evidence was properly admitted or whether, in view of the lack of compelling and convincing evidence of absence without leave, the rights of accused were adversely affected by such admission, and thus denied to accused a right of such highly substantial character as to be fatally injurious within the contemplation of Article of War 37 (CM 192451, Hajek, supra).

6. The charge sheet shows that accused is 27 years of age, was inducted 16 March 1942 at Camp Upton, New York, and had prior service with Company A, 119th Medical Regiment from 15 October 1940 to 14 October 1941, inclusive.

7. The court was legally constituted and had jurisdiction of the person and offense. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

B. J. Allen, Jr. Judge Advocate

Wm. F. Brown Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

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(241)

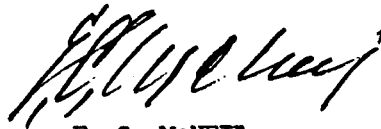
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War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 10 MAY 1945 TO: Command-
ing General, European Theater of Operations, APO 887, U.S.Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private MICHAEL A. CARBONARO (32229071), Medical Detachment, 143rd Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which he has been deprived by virtue of said findings and sentence so vacated be restored.

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



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

3 Incls:

- Incl. 1 - Record of Trial
- Incl. 2 - Form of action
- Incl. 3 - Draft GCMO

(Findings and sentence vacated. GCMO 191, ETO, 29 May 1945)

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(243)

BOARD OF REVIEW NO. 1

6 JAN 1945

CM ETO 5596

UNITED STATES)
v.)
Private CARL L. REYNOLDS)
(34893110), Company L,)
142nd Infantry)
)
)
)
)

36TH INFANTRY DIVISION

Trial by GCM, convened at Headquarters
36th Infantry Division, APO 36, U. S.
Army (France), 21 November, 3 December
1944. Sentence: Dishonorable dis-
charge, total forfeitures and confine-
ment at hard labor for life. Eastern
Branch, United States Disciplinary
Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Carl L. Reynolds, Com-
pany L, 142nd Infantry, did at or near Xamontarupt,
France, on or about 5 October 1944, desert the ser-
vice of the United States, and did remain absent in
desertion until on or about 4 November 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. In view of the youth of accused, his previous good record of service and the

CONFIDENTIAL

(244)

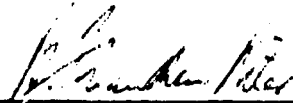
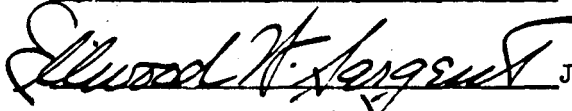
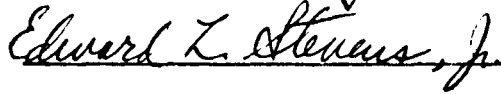
possibility of his rehabilitation, the reviewing authority returned the record of trial to the court for reconsideration of its sentence and revision. The court reconvened and, upon reconsideration, revoked its former sentence and in lieu thereof, three-fourths of the members of the court present at the time the vote was taken concurring, sentenced accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the substituted sentence, designated Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial contains substantial evidence that accused on 5 October 1944 absented himself from his organization without permission or authority and remained absent until 28 October 1944 when he was apprehended in Lyon, France. and returned to military control. Accused's own statements as a witness on his own behalf clearly indicate that he did not intend to return to the military service (R11,12,13). All of the elements of the offense of desertion were established (CM ETO 1629, O'Donnell; CM ETO 2842, Flowers).

4. The charge sheet shows that accused is 19 years of age and that he was inducted at Camp Croft, South Carolina, 11 October 1943. He had no prior service.

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

6. The penalty for desertion committed in time of war is death or such other punishment as the court-martial may direct (AW 58). Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

 Judge Advocate
 Judge Advocate
 Judge Advocate

CONFIDENTIAL

(245)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 6 JAN 1945 TO: Commanding
General, 36th Infantry Division, APO 36, U. S. Army.

1. In the case of Private CARL L. REYNOLDS (34893110), Company L, 142nd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. The sentence of life imprisonment is considerably more than usually adjudged in similar cases. I am advised that the subject of battle offenses and the effect of combat fatigue is now under intensive study, and I suggest for your consideration the question whether the dishonorable discharge in this case should be suspended so that the Government may be free to act in accord with whatever policy may be decided upon. You stated in your indorsement returning the record to the court that there was a "possibility of his rehabilitation". If the dishonorable discharge is executed, he cannot be returned to duty except upon his own request; if it is suspended, the Government may restore him to duty at its option.

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 CM ETO 5596. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5596).



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

5596

CONFIDENTIAL

CONFIDENTIAL

(247)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

15 JAN 1945

CM ETO 5607

UNITED STATES

v.

Second Lieutenant WILLIAM H.
BASKIN (O-533408), Company M,
117th Infantry

30TH INFANTRY DIVISION

Trial by GCM, convened at Alsdorf,
Germany, 22 October 1944. Sentence:
Dismissal, total forfeitures and con-
finement at hard labor for two years.
Eastern Branch, United States Discip-
linary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

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

Specification: In that Second Lieutenant William H. Baskin, Company "M", 117th Infantry, having received a lawful command from Lieutenant Colonel Samuel T. McDowell, his superior officer, to go forward to the Regimental Command Post, did, one mile west of St. Barthelmy, France, on or about the 8th day of August 1944, willfully disobey the same.

5607

CONFIDENTIAL

(248)

CHARGE II: Violation of the 75th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that * * * did, one mile east of L'Epine L'Orbiere, France, on or about the 16th day of August 1944, by his neglect endanger the safety of his platoon, which it was his duty to defend, in that he left his platoon without issuing any orders and failed to return until the following day.

He pleaded not guilty and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge I, except the word "willfully", of the excepted word not guilty, not guilty of Charge I, but guilty of a violation of the 96th Article of War, not guilty of Specification 1 of Charge II, guilty of Specification 2 of Charge II, and Charge II. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, 30th Infantry Division, approved the sentence but reduced the period of confinement at hard labor to two years and forwarded the record of trial for action under Article of War 48.

The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the finding of guilty of Specification 2 of Charge II as involved a finding that accused did at the time and place alleged by his neglect endanger the safety of his platoon, which it was his duty to defend, in that he left his platoon without issuing any orders and failed to return until the following day, in violation of Article of War 96. The confirming authority also confirmed the sentence, notwithstanding its gross inadequacy as punishment for an officer convicted of such shameful and serious misconduct, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. a. Evidence for the prosecution under the Specification of Charge I:

On 8 August 1944 in the vicinity of Le Vallee (near St. Barthelmy), France (R8), the 117th Infantry was in contact with the enemy with "one company on the line with the First Battalion" and two companies deployed to make contact with a unit of its left (R7).

5607

CONFIDENTIAL

(249)

(Accused testified that the unit on the left was the 39th Infantry (R24)). Accused had been appointed liaison officer between the 117th and 39th Infantry and "did a good job with reference to the information he brought". One evening, after he had returned from this duty, Lieutenant Colonel Samuel T. McDowell, 3rd Battalion, 117th Infantry, "directed Captain Phillips to notify Lt. Baskin he was wanted at the Regiment" and "heard Captain Phillips give Lt. Baskin the order to report there". McDowell learned accused did not go to the Regiment when "Major Hill, Regimental S-3 called and said Lt. Baskin had not been there". McDowell then found that accused was at Company M's command post, called Captain Thomas, commander of Company M, told him Lt. Baskin was to report to the Regiment immediately (R6,7) and

"told him to tell Baskin that it was an order for him to report to the Regiment. Captain Thomas called back in a few minutes and said there was mortar fire and Lt Baskin said he could not get back to the Regiment. I replied that it was a direct order and he would go to the Regiment at that time" (R7-8).

He did not give accused the order himself but "heard Captain Phillips give him the order to report to the Regiment in my presence" (R8). Part of the foregoing hearsay testimony, to which there was no objection, was affirmed by Captain William H. Thomas, Jr. (R8), who testified,

"Colonel McDowell, called me on the telephone and told me to have Lt Baskin report to the Regimental C.P. I turned around and told him Lt Colonel McDowell said for him to report to the Regimental C.P." (R9).

Accused did not say anything at that time but

"later on outside, he said the artillery was coming down so bad, he thought it would be impossible to get to the Regimental C.P.".

From Company M's command post to the Regimental command post it was about a mile and a half over a hard surface road on which "it was quite easy for a vehicle to travel" (R9). At Company M's command post, "not more than two or three shells * * * fell during the night" (R10).

b. Evidence for the prosecution under Specification 2,
Charge II:

On 16 August 1944 (R13) about one mile east of L'Epine L'Orbiere, France (R14), First Lieutenant Michael Barron, 117th Infantry, platoon leader of Company M's mortar platoon (R10-11)

5607

CONFIDENTIAL

CONFIDENTIAL

(250)

turned over the platoon to accused and went forward with Lieutenant Wagoner "on a reconnaissance and located" position for the mortar platoon. He then sent back a guide to "tell Lt Baskin to bring the platoon up", told the guide where the gun positions were to be put and

"also told him to tell Lt Baskin what I had told him and to get the mortar platoon dug in and lined up until we could give them the firing orders" (R13).

He did not see accused again until the next day or the day after that (R14). When the guide returned with the platoon with accused in charge, the guide, according to the platoon sergeant, Technical Sergeant James M. Barnett,

"gave us the gun position and we got them in place and Lt. Baskin left immediately and I did not see him again" (R18).

He gave no orders and did not say where he was going (R18,19).

Lieutenant Barron discovered accused was not with the platoon when "some of the section wanted mail censored and they came around wanting to know where he was" (R14). On the same day, First Lieutenant Albert J. Herman, platoon leader of the second platoon of Company M, was with his unit which was in a defensive position attached to Company I (R19-20). He saw accused at Company I's command post and had a conversation with him that

"ran something like this - I knew that it did not make any difference with me but it seemed funny to me that he was not with his own section. I asked him about it and he made a few evasive answers and I felt it was none of my business, so I did not press the matter further" (R20).

Accused was there for a period of three or four days,

"Just hanging around the C.P. It was a defensive situation and the C.P. was established there and he was living with us all that time" (R21).

Company I was not then engaged with the enemy (R21).

4. a. Evidence for defense under Specification of Charge I:

After being advised of his rights (R21-22), accused testified that

5607

CONFIDENTIAL

(251)

"Colonel McDowell called me and I reported to him and he asked me to act as liaison officer between the Battalion and the unit on our left - the 39th Combat team, which was about 2,000 yards away. I was furnished a jeep and driver from the section to use in this work. The evening I was accused of disobeying the order, I returned about dusk from across the valley where the 39th was with the situation for my battalion. I had my map on which I had used my own private code, so that if it was captured, it would be more difficult for them to read. From my map I could put it on any other situation map. I returned to Colonel McDowell about dusk and explained my map to him and gave the situation, which was static and contained no new information, to him. I showed him the situation of the 39th Infantry Combat team--by battalions and companies. After this I left and was informed by the Captain that I was to report to Regiment. I was not informed that I was a carrier or liaison officer from the Regiment but rather that I was to work from the Battalion to the unit across the valley. Captain Phillips told me he wanted me to give the information to S-3 at the Regiment. By that time it was dark - about 10:30. My jeep and driver had returned to the motor pool and the driver was tired as he had worked all day, so rather than get him up, I called Major Hill at the Regiment by telephone. I could not get him by telephone - a direct line to him, so I gave the report to the switchboard operator for S-3, by saying the situation was the same" (R22-23).

He understood he was directed to get the information to "S-3". While there was mention of very heavy artillery fire on the road, that was not the reason he did not go "down there".

"There was no heavy artillery fire that night. My driver and jeep were in the motor pool and he had been working hard that day and it was much simpler to just call the negative report to S-3 than waking him up. Also the enemy had the high ground between us and the Regiment and could observe us and as the wire ran right to the Regiment, it seemed best to call" (R23).

follows: Cross-examined, accused gave answers to questions as

CONFIDENTIAL

5607

(252)

- "Q. When you came to the C.P., Captain Phillips told you to go to Major Hill with the information. You testified that you tried to telephone.
- A. I estimated the situation and decided it would be better to telephone the report in.
- Q. Did Major Phillips tell you to go there?
- A. Not in that way.
- Q. If he did not tell you to go there, why did you have to make an estimate?
- A. I merely telephoned because I figured it was the most logical thing to do.
- Q. After telephoning did you go to M Company's C.P.?
- A. Yes, sir.
- Q. Did Captain Thomas tell you to go to the Regiment?
- A. I don't remember Captain Thomas' part in this.
- Q. What?
- A. I remember his testimony but I don't remember the part he played in the action.
- Q. When you went to M Company's C.P., you did not get a telephone call from Colonel McDowell to go to the Regiment?
- A. I can't recall when I went back to the C.P." (R25).

The following questions by the court and accused's answers are relevant:

- "Q. Concerning the Specification for Charge I, you said your instructions were to get the information to Major Hill, S-3?
- A. Yes.
- Q. How many times did you call before you gave the information to the telephone operator?
- A. I don't know - I couldn't get him, so I gave the switchboard operator the message for Major Hill.
- Q. Did you check later to see if he got it?
- A. No sir. The next morning he said he wanted to see me though.
- Q. What did he say?
- A. He did not mention receiving the message" (R27).

5607

b. Evidence for defense under Specification 2 of ChargeII:

Accused testified that

"We had come through the battle around St. Clair the previous evening. We moved back about 1,000 yards to spend the night. The next afternoon after lunch, Wagoner and the other section leader came in with the information of the reconnaissance, route, gun placements and direction of fire. He did not take me with him on the reconnaissance and did not tell the situation to me. He was never talkative with me and never spoke with me about the situation. I did not know the situation except that the unit was pinched out and was moving up in a defensive position. I assembled the platoon and with Norton as a guide, led them down the road through several fields to a sunken trail and then Norton lost his direction. I stopped the platoon and told Norton to make a reconnaissance. He did and got his bearing and led us to the field to put the guns in. Norton told the section sergeants where the platoon leader stated he wanted each section located. The section sergeants placed their guns and the men dug in in the section areas assigned to them. I watched them. We were not given any firing orders then. I saw that all guns were laid in the proper directions and dug circular holes for firing in any direction---rather saw that the holes were dug. The mortars were dug in and the men dug in along the hedge rows and covered their holes. They camouflaged the mortars with straw that was in the wheat field we were in" (R23-24).

On cross-examination, accused was asked if he went to Company I "to get the situation". Accused answered, "Yes sir" and, asked why he stayed over at this company, stated

"I received the situation from I Company's Commander and I was told by him that we were pinched out and were in a defensive position and it would probably turn in to a rest period, which it did. When he told me the situation, the C.P. house was about 200 yards from the mortar area" (R25).

Company I was in a house and

"Lt Herman was in a barn which adjoined the house and I asked if I could sleep there and he said sure. I had no blankets and he did" (R26).

5607

CONFIDENTIAL

(254)

There were answers by accused to questions of the court as follows:

- "Q. When you took your platoon in the mortar position on the 16th, were you the only officer with the platoon?
- A. Yes sir.
- Q. Was it your understanding that the platoon was under your command?
- A. No, under the platoon leader's command. I wasn't there when he took them over. I saw him come in though.
- Q. Did you let him or anyone else know where you had gone?
- A. He called for me and said he had some mail for me to censor. He did not mention anything about his firing plan (R27).

5. With reference to the prosecution's evidence under the Specification of Charge I, considerable hearsay evidence was received, without objection, as to Lieutenant Colonel McDowell's telephone conversation regarding his order that accused report to the regimental command post. Defense counsel should have objected to this evidence. However, disregarding this hearsay evidence in its entirety, since it was clearly shown by the testimony of Thomas, accused's company commander, that the order was transmitted by him to accused and accused's own testimony indicated that he received such order, no substantial right of accused was thereby injuriously affected.

6. The evidence for the prosecution under the Specification of Charge I did not clearly establish that accused failed to obey the alleged order. No motion was made by the defense for a finding of not guilty of this Specification when the prosecution rested, but the testimony of accused showed clearly that he did receive the order and never complied with it. As accused's rights to testify in his own behalf or to remain silent were fully explained to him by the court, no substantial right of accused was injuriously affected by the failure of the defense to make a motion for a finding of not guilty. It was apparent that the order was one to be obeyed immediately and the statement of accused, described in Thomas' testimony, made "later on outside" when he

"said the artillery was coming down so bad, he thought it would be impossible to get to the Regimental C.P."

disclosed at least an unpardonable and unwarranted delay in carrying out the order. The court could properly have called for additional evidence had accused elected to remain silent (MCM, 1928, par.75, pp.58-59).

5607

CONFIDENTIAL

7. When Captains Thomas and Abbes were respectively called to testify as prosecution witnesses, the defense announced in each instance that it was taken by surprise and did not know that the witnesses would appear (R8,15). Neither officer's name is included among prosecution's witnesses on the charge sheet. Defense counsel did not object to testimony of either witness or ask for continuance but stated he "would like it to go in the record" that each was a "surprise witness". As the testimony of Captain Abbes concerned only the allegations in Specification 1 of Charge II of which accused was found not guilty, the Board of Review is of the opinion that no substantial right of accused was injuriously affected by the fact that his name did not appear in the charge sheet. In regard to the status of Captain Thomas as a "surprise witness" to the defense, the evidence for the prosecution shows that he was the company commander of accused, that he transmitted to accused the order from Lieutenant Colonel McDowell while accused was at the company command post, that accused thereafter reported to Captain Thomas that "the artillery was coming down so bad, he thought it would be impossible to get to the Regimental C.P." Thomas' part in transmitting the order of Colonel McDowell to accused was so positively shown by the prosecution's evidence that accused's failure to remember "Captain Thomas' part in this" is not convincing. Upon all the evidence it is not considered that the defense was unprepared for Thomas' testimony or that it was properly entitled to describe him as a "surprise witness". In the opinion of the Board of Review, no substantial right of accused was thereby injuriously affected.

8. With reference to Charge I and Specification, in order to sustain a conviction of the offense of willful disobedience of the lawful command of a superior officer in violation of the 64th Article of War the burden is upon the prosecution to prove the following elements:

- "(a) That the accused received a certain command from a certain officer as alleged;
- (b) that such officer was the accused's superior officer; and (c) that accused willfully disobeyed such command" (MCM, 1928, par.134b, p.149).

It is immaterial that the order was not given to accused by McDowell personally. A showing that the order emanated from him was sufficient (Winthrop's Military Law and Precedents, Reprint - p.574; MCM, 1928, par.134b, p.149). It was within the province of the court to find him guilty as it did, only of the lesser included offense of failing to obey the order in violation of Article of War 96. The record is legally sufficient to support the findings of guilty under the Specification as amended in violation of the 96th Article of War.

5607

CONFIDENTIAL

(256)

9. With reference to the approved findings of guilty under Charg II, Specification 2, in violation of Article of War 96, the evidence showed clearly that accused left his platoon, which it was his duty to defend, without issuing any orders and failed to return under the circumstances alleged. The gravamen of his offense was leaving the platoon without issuing necessary orders operative during his absence, regardless of whether he left with or without proper authorization. The presence of the enemy in the vicinity was indicated and the safety of the platoon and the morale of its members were jeopardized by such conduct. It was a disorder and neglect prejudicial to good order and military discipline under the 96th Article of War (Winthrop's Military Law and Precedents - Reprint - 1920, p.726). Where an offense is necessarily included in the phraseology of a specification under Article of War 75, a conviction under the 96th Article of War or other appropriate article is proper (CM ETO 2212, Coldiron and cases therein cited; CM ETO 5114, Acers). The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of guilty under Article of War 96.

10. The charge sheet shows that accused is 20 years eleven months of age and was commissioned a second lieutenant 23 November 1943, at Fort Benning, Georgia. No prior service is shown.

11. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence.

12. Dismissal is authorized, with total forfeitures and confinement at hard labor, upon conviction of a violation of Article of War 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

P. J. Walker Judge Advocate

William L. Hays Judge Advocate

Edward L. Stearns, Jr. Judge Advocate

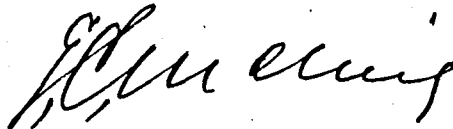
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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. **15 JAN 1945** TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant WILLIAM H. BASKIN (O-533408), Company M, 117th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as approved, 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 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 CM ETO 5607. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5607).



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

(Sentence ordered executed. GCMO 23, ETO, 21 Jan 1945)

CONFIDENTIAL

(259)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

9 JAN 1945

CM ETO 5608

UNITED STATES

v.

Second Lieutenant JOHN C. GEHM,
(O-819258), 587th Bombardment
Squadron (M), 394th Bombardment
Group (M)

) IX BOMBER COMMAND (now 9th Bombard-
ment Division).

) Trial by GCM, convened at Bournemouth,
Hampshire, England, 15,16 September 1944.
Sentence: Dismissal, total forfeitures,
and confinement at hard labor for two
and one-half years. Federal Reformatory,
Chillicothe, Ohio.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification 1: (Finding of not guilty)

Specification 2: In that Second Lieutenant John Carl Gehm, 587th Bombardment Squadron (M), 394th Bombardment Group (M), AAF Station 455, APO 140, did, at Ytene Lodge, Bransgore, Hampshire, England, on or about 24 August, 1944, unlawfully enter the dwelling of Squadron Leader I. B. Beesley, with intent to commit a criminal offense, to wit, assault therein.

5608

-1-
CONFIDENTIAL

CHARGE II: Violation of the 95th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In * * * did, at Ytene Lodge, Bransgore, Hampshire, England, on or about 24 August 1944, unlawfully and indecently assault Mary M.C. Beesley a female person of the age of about nine years.

He pleaded not guilty, and was found not guilty of Specification 1, Charge I and of the Specification of Charge II and Charge II and guilty of Specification 2, Charge I and Charge I and of the Specification of Charge III and Charge III. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for two and one-half years. The reviewing authority, the Commanding General, 9th Bombardment Division (M), approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence "though grossly inadequate punishment for the offense of which accused was found guilty", designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that on the evening of 24 August 1944, Mary M. C. Beesley, nine years of age, was alone at her home, "Ytene Lodge", Bransgore, Hampshire, England (R8,24). Her mother had left the house at about ten o'clock, her father, Flight Lieutenant I. B. Beesley of the Royal Air Force, was stationed elsewhere, and her cousin, Michael Stokes, then a guest of the Beesleys, was outside the house hunting rabbits (R8,17,24,25). Neither Lieutenant nor Mrs. Beesley had invited any American officer to their home that night (R23,25). Mary, after first having been examined as to her competency as a witness, testified that at about 10:30 "I woke up in bed, and there was a man in my bed" (R9). He had "nothing on" (R10). He kissed her, and asked her to kiss him and to remove her pajamas, which she refused to do. Just at this time the telephone rang. Mary said she was going to answer the telephone, "jumped over his head and hid in Michael's room". Shortly thereafter, the man came into "Michael's room", unclothed, to look for her and shortly after that "came in dressed" to look for her again. Mary had hidden herself behind a door and the man did not discover her hiding place (R9,10). The second time the man came in the room he was holding a candle above his head and Mary was able to see his face (R11,16). He "wasn't very tall", had brown hair which was "rather long", and had "fat lips" (R15). He was

5608

CONFIDENTIAL

wearing a khaki cap, green flight jacket with wings, and green trousers (R15,16,40).

Michael Stokes, aged fifteen, testified that he returned to the house about 10:30, went upstairs, and "saw this man standing in Mary's doorway with a cigarette lighter held above his head" (R9, 19). The light was sufficiently bright to illuminate the man's features (R20). He was wearing pilot's wings and had a gold bar on his collar (R18,21,39). He said "Don't disturb us", so Michael went to his room, unloaded his gun, and went downstairs. About ten minutes later the man came downstairs, said "sh-h-h" and left the house (R17,20). Michael then heard Mary call for her mother at which he went upstairs and brought Mary down to the drawing room (R17). Mary who was crying at the time, told him that a man had been in her bed (R19,22).

Both Mary and Michael testified that the man who had been upstairs returned to the house about half an hour after his departure and talked with them. During the course of the conversation he noticed the Beesley dog and told them he had a similar dog at his squadron called Flak. He also gave Michael a cigarette and offered him a light with his cigarette lighter (R12,14,18,20,21). The man then left but again returned one half-hour later, said he had made a "fool" and a "nuisance" of himself and that he "hoped we wouldn't gauge Americans by himself" (R12,18). He then again departed (R18).

The following day, Mary and Michael went to a nearby air corps installation for the purpose of attempting to identify the man involved (R13,19). All combat second lieutenants were ordered by Colonel Thomas B. Hall, the commanding officer of the station, to report to the briefing room to participate in an identification parade. Neither Mary nor Michael identified any of these men as the officer who had been at the Beesley home the night before. Certain lieutenants, among whom was accused, did not appear at the briefing room at the time originally specified and these men were ordered to report later. Accused and four other second lieutenants so reported. Of these men, both Mary and Michael identified accused as the man who had molested Mary the previous night (R13,19,26).

Colonel Hall, after warning accused of his rights, asked him if he wished to make any statement. He "made a statement in substance that he had been at the club the night before, had been drinking and returned to his hut. Beyond that he remembered nothing" (R26,64).

4. Accused, after having been advised of his rights as a witness, was sworn and testified that he had been married three and

one-half years, was the father of a child two months old, and that his marriage was an extremely happy one (R31). He testified that he had never seen Mary Beesley prior to the day of the identification parade and stated that he had never been to the Beesley home at any time (R31,33). However, he knew the location of the house and stated that it was between his squadron area and the officers' club (R31). On the evening of 24 August 1944, he went to the officers' club at about eight o'clock to attend "sort of a farewell party for one of the boys that was moving up to Headquarters". He stayed there until after the bar closed at 10:30, waited for a time to see if any of the men were going in his direction and ultimately started toward his quarters alone. On his way to his quarters, at about 11:25, he "stopped in the orderly room at the WAAF site and talked to two WAAFs there" (R29). He then proceeded on to his quarters and went to bed. On the night in question he was dressed in "green shirt, pink pants, and a green overseas hat" (R30). He owned no cigarette lighter, did not have a khaki cap and was not the owner of a dog called Flak (R30). However, a First Lieutenant Patterson had such a dog and he had seen it around the field (R30,33). When, subsequent to the identification, he was asked by Colonel Hall whether he wanted to make a statement

"I was just so shocked by the charge that he brought against me that I couldn't say anything. I just said I didn't remember, that's all. It's just so hideous, I just couldn't say anything. My mind was numb" (R31).

During cross-examination and examination by the court, accused stated that he had not been present at the original identification parade because he was sleeping (R32). This was permissible because he was not on duty that day (R35). After he had been confined on the 26th, he sent his pilot to see his squadron commander, Colonel Keating, who had been at the club the night before, in an effort to secure a witness who could verify his presence at the club. He received word that "there was nothing he could do, the Colonel didn't remember anything about it" (R36). The dog Flak was "pretty well known on the field" (R33). During cross-examination the following exchange of questions and answers took place:

- "Q. As a matter of fact, Lieutenant, when you were talking to the children, did you talk about the dog?
- A. I don't remember telling them whose dog it was. As a matter of fact, I don't remember. I didn't talk to the children.

- Q. You do remember telling them something?
You said you don't remember telling them
whose dog it was.
- A. I said, sir, I do not remember the conversation because I was not present"
(R33).

Accused testified that he had been drinking on the night in question but that nothing was "hazy" and he was able to remember all his actions. When he made his previous statement to Colonel Hall to the effect that he had been drinking the night before and had returned to his hut but beyond that he remembered nothing, he meant that he "couldn't remember going down to the house" (R36).

5. Upon motion by the defense, the court granted an adjournment in order to enable the accused to secure additional witnesses. When the court reconvened, Lieutenant Colonel Robert E. Keating was called as a witness and testified that he was at the officers' club on 24 August 1944. He did not definitely remember seeing accused at the club on that night (R42,45). Accused had not contacted him directly or indirectly in an effort to establish his presence at the club on the evening in question (R45).

Major Robert E. Johnsen, 578th Bombardment Squadron, 394th Bombardment Group, testified that he remembered seeing accused at the officers' club at approximately nine or nine thirty on 24 August. He also testified that, after accused had been confined, he had a conversation with accused during which accused asked him whether he remembered seeing him at the officers' club on the night in question (R46). He told accused at the time that he did not remember seeing him after nine or nine thirty (R46). A Lieutenant Patterson of the squadron owned a spaniel called Flak. Patterson was "about five foot seven", his lips were "about average" and he had thick black hair cut rather short (R47,52). Patterson was a first lieutenant on 24 August 1944 (R54).

Second Lieutenant Frederick W. Tasney, 587th Bombardment Squadron, 394th Bombardment Group, testified that he saw accused at the officers' club "a few times" during the evening of 24 August and that, to the best of his recollection, he last saw him there "about nine thirty or ten" (R51).

Accused's presence at the WAAF site on 24 August was confirmed by Leading Aircraftswoman Betty Ashman of the Woman's Auxiliary Air Force. She testified that accused appeared at the guard room sometime between eleven and twelve o'clock, probably at about 11:20 (R55,57). Accused at that time did not appear to have been drinking (R55).

6. The testimony of Mary Beesley, corroborated as to surrounding circumstances by the testimony of Michael Stokes, establishes clearly that an American officer was present in the Beesley home on the evening alleged and that this officer committed an assault upon Mary while

in the house. A sharp issue of fact was raised at the trial as to whether accused was the officer who committed the assault. In this connection, the evidence shows that both Mary and Michael positively identified accused as the officer who was in the Beasley home on the night in question. The credibility of accused's denial that he was the officer involved is weakened by the fact that he had previously given a somewhat inconsistent version of his activities that evening and by the rather unsatisfactory character of his testimony as a whole. Any inference which might otherwise have arisen from the circumstance that the officer at the Beasley home told the children he had a dog called Flak and that this dog was owned by a Lieutenant Patterson rather than accused is rather fully dispelled by other evidence in the record. The Beasley home was located between accused's squadron area and the officers' club and accused knew of its location. The evidence offered by him in an attempt to establish an alibi is not convincing. On this state of the evidence, the court was amply warranted in finding that accused was the officer who committed the assault. With reference to the charge of housebreaking, it was shown that accused was not invited to the Beasley home at any time and, as indicated above, the evidence was sufficient to warrant a finding that accused was present in the house on the evening alleged. Further, having found that accused assaulted Mary Beasley, the court was justified in inferring that his unlawful entry was accompanied by the intent to commit such assault since the actual commission of a criminal offense in the building entered is probative of an intent to commit that offense at the time of the unlawful entry (CM ETO 3679, Roehrborn; CM ETO 3707, Manning; Cf: CM 230541, Bull. JAG, Vol.II, No.5, May 1943, sec.451 (14), p.189).

7. The charge sheet shows that accused is twenty-seven years of age, that he enlisted at Syracuse, New York, on 7 September 1942 and that he was commissioned a second lieutenant on 4 December 1943. No prior service is shown.

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

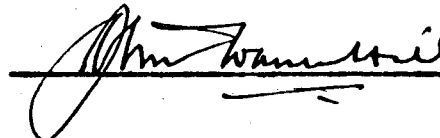
9. Confinement in a penitentiary is authorized for house-breaking (AW 42; sec.22-1801, Title 22, Ch.18, DC Code, 1940 Ed). As accused is under 31 years of age and the sentence is for not

CONFIDENTIAL

(265)

more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II. pars.1a(1),3a).

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CONFIDENTIAL

5608

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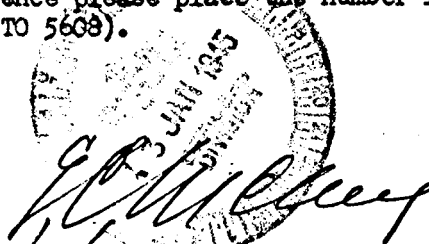
(266)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 9 JAN 1945 TO: Command-
ing General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant JOHN C. GEHM (O-819258),
587th Bombardment Squadron (M), 394th Bombardment Group (M),
attention is invited to the foregoing holding by the Board of Review
that the record of trial is legally sufficient to support the findings
of guilty and the sentence, which holding is hereby approved. Under
the provisions of Article of War 50½, you now have authority to order
execution of the sentence.

2. When copies of the published order are forwarded to this
office, they should be accompanied by the foregoing holding and this
indorsement. The file number of the record in this office is CM ETO
5608. For convenience of reference please place the number in brackets
at the end of the order: (CM ETO 5608).



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

(Sentence ordered executed. GCMO 22, ETO, 21 Jan 1945)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

5 JAN 1945

CM ETO 5609

UNITED STATES

v.

Captain RICHARD W. BLIZARD
(O-1695999), Medical Corps,
39th Evacuation Hospital

THIRD UNITED STATES ARMY

Trial by GCM, convened at Nancy,
France, 22 October 1944. Sentence:
To be dismissed the service.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification: (Finding of not guilty).

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

Specification 1: In that Captain Richard W. Blizard, Medical Corps, 39th Evacuation Hospital, did at or near Toul, Meurthe-et-Moselle France on or about 1 October to 7 October, 1944 inclusive, wrongfully use morphine tartrate, a narcotic drug.

5609

(268)

Specification II: In that * * * did at or near Toul, Meurthe-et-Moselle France on or about 1 October to 7 October, 1944 inclusive, fail to record in his narcotic register thirty (30) morphine syrettes received from Pharmacy, in violation of hospital regulations.

He pleaded guilty, and was found not guilty of Charge I and the Specification and guilty of Charge II and of Specifications 1 and 2 thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Third United States Army, approved the sentence, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused is a captain, Medical Corps, United States Army, and that during the period 1 October to 7 October 1944, he was assigned as ward surgeon, Ward A, of the 39th Evacuation Hospital at Toul, France (R14,18,23). Between these dates, Ward A was not functioning for the reason that no patients had been received therein. Accused had no patients elsewhere that required his attention or services. However, from 1 to 7 October 1944, six prescriptions, each for five morphine tartrate syrettes were filled by the hospital pharmacy for accused. These prescriptions, signed by accused as authorizing medical officer, were marked "For Ward 6" (R10, 25,28; Pros. Ex.2). Upon being questioned by his commanding officer relative to writing prescriptions for narcotic drugs when he had no patients, accused stated that he felt that he needed morphine and that he wrote the prescriptions, obtained the drugs and administered or applied them to his own use (R12,22). On 7 October 1944, accused was hospitalized for observation and treatment for drug addiction, since his use of narcotics had rendered him unfit for duty (R13,14). The accused because of these happenings was considered, by the chief of medical service of the hospital to be a drug addict (R13,14). Regulations of accused's hospital do not prohibit medical officers from obtaining drugs for their own use by means of personal authorizations by prescriptions. However, the pharmacy officer testified that if he had known the prescriptions, of such quantity, were for the officer's own use he would not have filled the orders (R15,22,26). The prosecution's evidence further established that all narcotics for use in each ward are required to be retained in the possession of the ward nurse and that such drugs may not be withdrawn and administered without a written prescription being given and a record thereof made in the "Ward Narcotic Book" showing to whom administered (R17,19; Pros. Ex.1). The accused had knowledge of this hospital regulation (R19,20). The ward nurse of Ward A testified that she made all entries showing the acquisition and

5609

and disposition of narcotics in her ward and that during the period from 1 October to 7 October 1944 there had been no entries recorded. She had no knowledge of accused obtaining the drugs in question (R27,28).

4. After his rights as a witness were fully explained to him, by the court, accused elected to remain silent. The defense produced only one witness, Captain Connie I. Hood, Neuropsychiatrist of the 39th Evacuation Hospital, who testified that he examined accused and found him suffering from chronic alcoholism and drug addiction. His condition was diagnosed as "C.P.S." (Constitutional Psychopathic State). Captain Hood prepared a report of his findings wherein he recommended that accused be evacuated for further medical treatment and stated that disposition of such cases ordinarily is made through reclassification proceedings (R30,33; Defense Ex.1). The normal chain of evacuation for a drug addict requiring prolonged medical care is admission to a general hospital, disposition by a reclassification board and treatment at a federal narcotic farm until cured or released (R14). Information obtained from accused, during the course of his observation as a patient, disclosed prior addiction and habitual use of morphine, cocaine, opium, barbituates and various narcotic derivatives. His medical history disclosed two voluntary and one involuntary admission to institutions for treatment for drug addiction (R31,33; Defense Ex.1). The neuropsychiatrist expressed the opinion that accused knew the difference between right and wrong but that he had a lessened resistance and as a consequence his desire for drugs overrode his knowledge and insight into his addiction (R33).

5. The plea of guilty entered by accused, as to each Charge and Specification, is amply supported by substantial competent evidence. However, the court found accused not guilty of Charge I and the Specification thereof, such findings being based upon evidence that a physician may write prescriptions for his own use and that the mere use of a drug was not regarded as a misapplication of government property. He was found guilty of Charge II and Specifications 1 and 2 thereunder. The repeated use of drugs over a period of several days, for other than necessary medicinal purposes, evidencing addiction, certainly constitutes conduct prejudicial to good order and military discipline as charged in Specification 1. The failure of accused to inform the ward nurse of the receipt of narcotics for his ward, coupled with the fact that he had knowledge of the hospital regulation directing the ward nurse to make a record of all such drugs withdrawn and administered, constitutes an obvious violation of the spirit and intent of the regulation. As the ward medical officer and superior of the ward nurse, it became the duty and responsibility of accused to comply with the provisions of the regulation as he alone, of the personnel of Ward A, had knowledge of the acquisition of such narcotics. He was therefore properly found guilty of Specification 2, as charged.

Counsel for the defense at the beginning of the trial moved that the case be referred to a medical board, because the condition of the accused was such that the case should be handled through medical

CONFIDENTIAL

(270)

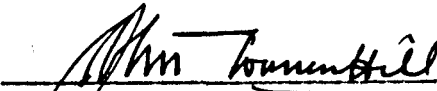
channels; that was the usual way of handling similar cases rather than trial before a general court-martial. It was not contended that accused was insane but that he was unable at times to keep from doing wrong, although he realized right from wrong. The motion was overruled by the law member. Subsequent to the trial, at the direction of the reviewing authority, a board of officers was appointed to consider the mental condition of accused. The board found that although accused is a constitutional psychopath, addicted to drugs and alcohol, he was sane at the time of the commission of the offenses alleged and at the time of the examination. It is abundantly clear therefore that accused could distinguish right from wrong and that he was possessed of his normal mental faculties and accordingly responsible for his actions. It has been held in numerous cases that where persons accused are addicted to alcohol, emotionally unstable or otherwise possessed of undesirable habits or physical abnormalities, yet sane at the time of the commission of the offense, that such accused are responsible for their conduct (CM 201485, Darr; CM 223335, Price; CM 226219, Rickards; CM 239909, Grady).

6. Accused is 32 years of age. He was commissioned first lieutenant, Medical Corps, 31 July 1942, and entered upon duty from Philadelphia, Pennsylvania, 3 September 1942.

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

8. Dismissal is authorized as punishment for an officer for violation of Article of War 96.

 Judge Advocate

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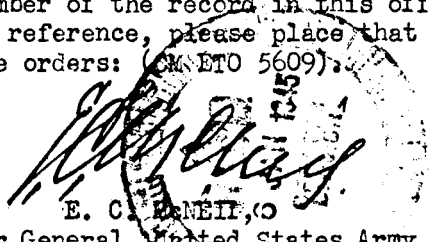
(271)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. **5 JAN 1945** TO: Com-
manding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain RICHARD W. BLIZARD (O-1695999), Medical Corps, 39th Evacuation Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5609. For convenience of reference, please place that number in brackets at the end of the orders: (CM ETO 5609).


E. C. BENNETT, (O)
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 13, ETO, 10 Jan 1945)

CONFIDENTIAL

5609

CONFIDENTIAL

(273)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

12 JAN 1945

CM ETO 5633

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

v. }

Private EVERETT J. GIBSON
(39418979), 315th
Replacement Company, 44th
Replacement Battalion,
10th Replacement Depot. }

UNITED KINGDOM BASE, COMMUNICATIONS
ZONE, EUROPEAN THEATER OF OPERATIONS.

Trial by GCM convened at Whittington
Barracks, Lichfield, Staffordshire,
England, 23 November 1944. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard labor
for 11 years. United States Penitentiary,
Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification: In that Private Everett J. Gibson, 315th
Replacement Company, 44th Replacement Battalion, did,
without proper leave, absent himself from his organi-
zation, Package Shipment Detachment X-88C, at Tidworth,
Wiltshire, England, from about 10 September 1944 to
about 19 September 1944, after having been alerted for
shipment to the Continent of Europe.

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

Specification: In that * * * did, in conjunction with
Private Charles F. Salyer and another American soldier

5633

(274)

whose name is unknown, at Birmingham, Warwickshire, England, on or about 18 September 1944, with intent to do him bodily harm, commit an assault upon Simon Eastwood, by striking him on the head with a dangerous weapon, to wit, an iron bar.

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

Specification: In that * * * did, in conjunction with Private Charles F. Salyer and another American soldier whose name is unknown, at Birmingham, Warwickshire, England, on or about 18 September 1944, wrongfully take and use without consent of the owner, a certain automobile, to wit, a black saloon taxi-cab, property of Simon Eastwood of a value of more than \$50.00.

He pleaded not guilty to Charge I and its Specification, guilty to all remaining charges and specifications, and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved the sentence, remitted 14 years of 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. The evidence adduced clearly sustains the findings of guilty of Charges II and III and the Specifications thereunder, to all of which accused pleaded guilty.

Concerning the Specification, Charge I, the prosecution introduced a duplicate original of the morning report, 315th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot, for 9 September 1944, showing accused transferred, as of that date, to "Advance Hdqrs Repl Sys APO 583 US Army" (R17; Ex.3). The personnel officer, 10th Replacement Depot, testified over objection that he received official information "by a telephone call in due course of business" that accused did not report at his new station and, as a result, had him deleted from the assignment of men included in "Package X-88-C" which departed from the depot 9 September 1944 (R20). Defense counsels' objection to this testimony on the ground that it was hearsay was overruled, as was his subsequent objection, as based on hearsay, to the introduction of the Prosecution's Exhibit No. 4, the depot's embarkation personnel roster relating to accused, dated 9 September 1944, showing accused as a deletion from "REPL DET NO. X-88-C. (1st

5633

Army)", which entry was made by the personnel officer based on the telephone call to which he testified (R20; Ex.4). In reply to questions propounded to him by the court, the personnel officer testified that the deletion on the roster, although dated 9 September 1944, was made on or about 20 September 1944, at the time that the information was received (R22).

The British police constable who arrested accused at Banbury on 19 September 1944 was asked whether, as the result of accused's arrest, accused was "returned to the United States Military Authorities". He replied that he was (R12). Accused's extrajudicial confession admits that he went absent without leave on or about 10 September 1944, and remained so until arrested by the police at Banbury 19 September 1944 (R8; Ex.1). Defense objected to the introduction of this confession when offered, on the ground that there was no other evidence in the record to show the commission of the offense charged. The trial judge advocate then stated:

" The prosecution is well aware of that rule of law that it must establish a corpus delicti. It promises to do that prior to the end of the case" (R8).

4. When the prosecution rested, defense moved the court not to consider any part of the confession "which bears on the Charge I and the specification thereunder on the grounds that the prosecution has not proved the corpus delicti of absence without leave on or about 10 September 1944". The motion was denied, whereupon defense moved

"that the court return a verdict of not guilty to Charge I and the specification thereunder, on the grounds that there is no competent evidence before the court to establish the offense" (R22).

This motion was also denied. The defense presented no evidence, and accused, after his rights were explained to him, elected to remain silent (R23).

5.

"An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the

(276)

offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense" (ECM 1928, par.114a, p.115).

There is no competent evidence that accused was absent without leave. The personnel officer's testimony and his entry deleting accused from the embarkation roster were inadmissible as hearsay and as based on hearsay respectively. Accused's arrest in Banbury does not prove or tend to prove any element of the offense charged. Outside of the confession and the wholly inadmissible testimony above noted, the evidence for the prosecution merely shows that on 9 September 1944 accused was transferred from the company from which he was charged with absenting himself without authority, and assigned to the advance headquarters of the replacement system; and that on 19 September 1944 he was arrested in Banbury and - a mere generalization in response to a flagrantly leading question on direct examination - as the result of his arrest, returned to the United States military authorities. The civilian who testified in answer to this leading question was in no sense qualified or competent to testify that accused was returned to military control and by such testimony afford a proper basis for the implications flowing therefrom. This is neither evidence that the offense charged was committed or that it was probably committed.

"The overwhelming weight of authority * * * recognizes that * * * a confession * * * may be considered in connection with other evidence to establish the corpus delicti, and that it is not necessary to prove it by evidence which entirely excludes a consideration of the confession" (Wharton's Criminal Evidence, Vol.2, sec.640, p.1072).

Where, however, evidence relied on as a predicate for introducing the confession is as wholly without potency to show that the offense was committed, as is the evidence under consideration, the minimum burden of probable proof has not been discharged. The evidence is therefore legally insufficient to support the findings of guilty of Charge I and its Specification.

6. The charge sheet shows that accused is 19 years four months of age and that, with no prior service, he was inducted at Monterey, California, 22 September 1943.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except those noted, no errors injuriously affecting the rights of the accused were committed

5633


CONFIDENTIAL

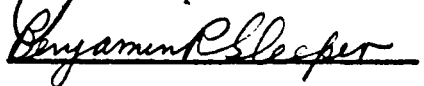
(277)

during the trial. The Board of Review is of the opinion that the record of the trial is legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the remaining findings of guilty and only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

8. Penitentiary confinement is authorized for assault with intent to do bodily harm with a dangerous weapon (AW 42; US Code, Title 18, sec.455) and for unauthorized use of a motor vehicle (DC Code, sec.22-2204). As accused is under 31 years of age and that portion of the sentence which the record of trial is legally sufficient to support is for not more than ten years, the Federal Reformatory, Chillicothe, Ohio, should be designated as the place of confinement (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1),3a).

 Judge Advocate

 Judge Advocate

 Judge Advocate

5633

CONFIDENTIAL

(278)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 12 JAN 1945 TO: Commanding
General, United Kingdom Base, Communications Zone, European Theater
of Operations, APO 413. U. S. Army.

1. In the case of Private EVERETT J. GIBSON (39418979), 315th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification; legally sufficient to support the remaining findings of guilty and only so much of the sentence as involves dishonorable discharge, forfeitures of all pay and allowances due or to become due, and confinement at hard labor for ten years, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. In accordance with the authority cited in the Board of Review opinion, the place of confinement should be changed to the Federal Reformatory, Chillicothe, Ohio. Supplemental action in accordance with the foregoing holding should be forwarded to this office to be attached to the record of trial.

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 CM ETO 5633. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5633).



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

CONFIDENTIAL

CONFIDENTIAL

(279)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

3 FEB 1945

CM ETO 5641

UNITED STATES)

v.)

Private VICTOR E. HOUSTON)
(16074448), Headquarters)
Squadron)

XIX TACTICAL AIR COMMAND

Trial by GCM, convened at Chalons-sur-Marne, France, 6,7,8 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification: In that Private Victor E. Houston, Headquarters Squadron, XIX Tactical Air Command, did without proper leave, absent himself from his post and duties at the Landing Strip near Vraux, France, from about 1400 hours, 6 November 1944 to about 1930 hours, 6 November 1944.

CHARGE II: Violation of the 92nd Article of War.

Specification: In that * * * did at or near Aigny, France, on or about 6 November 1944 forcibly and feloniously, against her will have carnal knowledge of Jeanine Marie Fourcroy.

CONFIDENTIAL

(280)

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused, a member of the alert crew, Headquarters Squadron, XIX Tactical Air Command, absented himself without authority, from his post and duties from 1400 to about 1930 hours, 6 November 1944 (R6,63,64,66). That evening he visited a nearby town where he drank a considerable quantity of intoxicating beverage, after which, he was seen wheeling and riding his bicycle in the direction of his camp. Proceeding along the roadway, accused met a French girl, Jeanine Marie Fourcroy, aged 10 years 11 months, whom he seated on his bicycle and rode a short distance down the road and through a field (R6,8,61,78,79).

After fully establishing her competency as a witness, the child testified that she saw an American soldier near the railroad station at Aigny, France, about 5:30 pm, 6 November 1944. She recited the events that occurred as follows:

"I was on my way to Vraux to look for my mother. He [the American soldier] picked me up on his bicycle. I didn't want to. I turned back towards the railroad station and he came after me. He got down off his bicycle and took hold of me. He put me on the bars of his bicycle. Arriving at the bridge * * * he put me down on the ground * * * took off his pants and put himself on top of me. * * * I screamed and he put his hand over my mouth. * * * [She struggled and resisted] with my feet. * * * He stretched apart my legs and put his Pierrot [here the witness demonstrated by pointing to her genital organs]" (R8,9,17).

The witness further testified that the accused "hurt" her. In answer to a question "How?", she replied, "He entered with his end in my opening". She indicated the location of the male organ by pointing to the middle portion of the body of the interpreter (R17,19). Thereafter the witness ran away from the scene and within a few minutes met her mother, Madame

Marie Fourcroy. Her mother testified that she immediately related that she had been attacked by a "dark" person (R31,33) and not by a "negro" as erroneously recited in witness' written statement made on 10 November 1944, introduced as Defense Exhibit 1. She was crying and trembling. Witness took her home and, upon washing her, observed blood on the little girl's crotch (R23,31). That evening Jeanine complained when urinating and was seen to pass some blood (R24,32). Both a civilian and a military doctor examined the child, shortly after the incident, and each found that there had been a recent tearing of the hymen (R27,28,57,58).

The evidence for the prosecution further shows that, when accused returned to his base at approximately 1900 hours, 6 November 1944, he appeared to be under the influence of intoxicating liquors, although he spoke fairly coherently (R60,61,63). On 7 November 1944 accused was interviewed by his immediate commanding officer, First Lieutenant Charles L. McHugh, Jr. (R65), and on the day following questioned by agents John T. Orr and Thomas J. Madigan of the CID (R36,49). On both occasions accused signed written statements concerning the commission of the offense alleged in the Specification, Charge II, hereof. These statements were admitted in evidence, over objection of the defense, as Prosecution's Exhibits 3 and 4 (R68,37-39). In the former (Pros.Ex.3) accused stated that he remembered he "did attempt to rape" the little girl and in the latter (Pros.Ex.4) he indicated his actions as follows:

"I took out my penis, and then spread the little girl's legs apart and placed my penis into her vagina, seeing the vagina would not accept my penis, after trying, I decided to place my finger into her vagina. I was unable to complete sexual intercourse and unable to put my finger into her vagina".

4. After being advised of his rights as a witness, by the court, accused elected to be sworn and in his own behalf testified that sometime during the afternoon of 6 November 1944, being possessed of a "crazy notion", he left the air strip and went to Conde-sur-Marne, where he visited a cafe and drank two quarts of champagne and one bottle of beer (R78,79). He then left the cafe on his bicycle, which he had "difficulty in riding" (R79). After this, accused said he remembered nothing until the following day, when his recollection was refreshed, at which time he recalled meeting a little girl and giving her a ride on his bicycle. They rode up a side road where accused stopped, spread his jacket on the ground and motioned for her to sit on his coat. According to accused, she did so, and he then pushed her down, using "no force at all" (R86). She spread her legs apart and although accused "wasn't sexual" he admitted unzipping his pants, getting on top of the little girl and trying "a sexual intercourse". He stated that he touched her legs with his penis but that he couldn't "rile" himself. He then "tried" his finger. When he used his finger "she kind of

CONFIDENTIAL

(282)

flinched a little bit and made a little sound" (R79,80,86,87). He denied that he accomplished the act of sexual intercourse, stating that he was unable to get an erection and that he had no emission (R80,87). After a few minutes, the little girl got up and walked across the field and waved at him. She made no protest to accused's actions and advances (R80).

In addition to the testimony of accused, the defense introduced in evidence the deposition of Major Lindsay E. Robinson, Medical Corps Neuropsychiatrist, showing that, in the opinion of this officer, accused was not responsible for his actions because of a co-existing state of "pathological intoxication with amnesia", caused by excessive drinking (Def.Ex.2, pp.2,4,5). On cross-examination, he explained that his opinion was not that accused was but that he may have been in such a state on the occasion in question (pp.7,8).

5. Competent substantial evidence establishes the fact that accused absented himself, without authority, from his post and duties on the date and under the circumstances, as alleged. He was therefore properly found guilty of Charge I and the Specification thereunder.

The testimony concerning the commission of the crime of rape (Charge II) is sufficient to establish this offense.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165).

There are three elements of this offense: penetration, lack of consent on the part of the female and the employment of force by accused to accomplish his purpose. Concerning carnal knowledge, the child testified that the soldier "entered with his end in my opening". Although the accused did not admit that there had been any penetration, he did admit that he had attempted sexual intercourse with the little girl. The Manual for Courts-Martial provides that:

"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not" (MCM, 1928, supra).

The term "woman", as used herein, is defined to include "a female of any age" (MCM, 1928, ibid.).

The testimony of both the military and civilian doctors regarding the recent tearing of the child's hymen tends to corroborate the statement given by the child, as does the recital by the mother of her daughter's condition immediately following the incident.

The evidence concerning the use of force and want of consent shows that accused pushed the child down, although he stated he used no force. The victim stated that she struggled and screamed and that the soldier put his hand over her mouth. The amount of force used and resistance required depends upon the circumstances of the case and the relative strength of the parties (Wharton's Criminal Law, 12th Ed., Vol.I, secs.744,748). The law does not demand that a child of tender years be capable of resisting a grown man in the same manner or to the same extent as a woman of more advanced years (52 CJ, sec.29, p.1019; Winthrop's Military Law and Precedents - Reprint, 1920, p.678).

The testimony of the child concerning her resistance and the commission of the rape coupled with the circumstantial evidence in corroboration and support thereof constitutes ample proof, independent of the written admissions, for the court to have found that accused committed the offense alleged. The court had the opportunity to judge for itself as to the veracity of the witnesses. Questions regarding the credibility of witnesses and the resolving of disputes of fact are issues for the sole determination of the court and such findings, where supported by substantial evidence, will not be disturbed by the Board of Review (CM ETO 1899, Hicks; CM ETO 1953, Lewis).

Although the Army psychiatrist testified that, at the time of the commission of the rape, accused was or may have been in a state of pathological intoxication with amnesia and, in his opinion, not responsible for his actions, the law is well settled that voluntary drunkenness does not constitute an excuse for the crime of rape nor destroy the responsibility of the accused for his misconduct (Wharton's Criminal Law, 12th Ed., Vol.I, sec.66).

6. Accused is 31 years of age. He enlisted in the Army at Peoria, Illinois, 17 September 1942. No prior service is shown.

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

8. The offense of rape is punishable by death or imprisonment for life (AW 92). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

William H. H. H. H. Judge Advocate

Wm. H. H. H. Judge Advocate

Benjamin R. Soper Judge Advocate

5641

CONFIDENTIAL

(284)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 3 FEB 1945 TO: Commanding
General, XIX Tactical Air Command, APO 141, U. S. Army.

1. In the case of Private VICTOR E. HOUSTON (16074448), Headquarters Squadron, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5641. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5641).



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

CONFIDENTIAL

CONFIDENTIAL

(285)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

16 FEB 1945

CM ETO 5642

UNITED STATES)

v.)

Privates First Class ARCHIE
C. OSTBERG (37568070) and
HENRY R. KAIN (33514556),
both of Company C, 121st
Infantry)

8TH INFANTRY DIVISION

Trial by GCM, convened at APO 8, U.S.
Army (France), 13,14 December 1944.
Sentence as to each accused: Dishon-
orable discharge, total forfeitures and
confinement at hard labor for life.
United States Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN and STEVENS, Judge Advocates

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

2. Accused were charged separately and with their respective
consents were tried together upon the following charges and speci-
fications:

OSTBERG

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

Specification: In that Private First Class Archie
C. Ostberg, Company "C", One Hundred and Twenty
First Infantry, did, in the vicinity of Hurtgen,
Germany, on or about 0900, 23 November 1944,
desert the service of the United States by
absenting himself without proper leave from his
place of duty, with intent to avoid hazardous
duty, to wit, engage in combat with the enemy,
and did remain absent in desertion until appre-
hended at or near First Battalion Command Post,

5642

CONFIDENTIAL
-1-

(286)

in the vicinity of Hurtgen, Germany, on or about 1600, 24 November 1944.

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

Specification: In that * * * having received a lawful command from Captain James H. Godfrey, his superior officer, to return to his organization Company C, did in the vicinity of Hurtgen, Germany, on or about 24 November 1944, willfully disobey the same.

KAIN

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

Specification: In that Private First Class Henry R. Kain, Company "C", One Hundred and Twenty-First Infantry, did, in the vicinity of Hurtgen, Germany, on or about 0900, 23 November 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit, engage in combat with the enemy, and did remain absent in desertion until apprehended at or near First Battalion Command Post, in the vicinity of Hurtgen, Germany, on or about 1600, 24 November 1944.

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

Specification: In that * * * having received a lawful command from Captain James H. Godfrey, his superior officer, to return to his organization Company C, did, in the vicinity of Hurtgen, Germany, on or about 24 November 1944, willfully disobey the same.

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, each was found guilty of both charges and specifications preferred against him. No evidence of previous convictions of either accused was introduced. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority as to each accused approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

5642

3. The evidence for the prosecution established the following facts:

On 20 November 1944, Company C, 121st Infantry, was in reserve as the 1st Battalion, of which it was part (R19), moved to attack the enemy in Hurtgen Forest in Germany. On 23 November, Company C replaced Company A on the front line (R12,19). The immediate mission of the battalion was to secure a sector in the forest which would become the line of departure for Combat Command R (R12). On 24 November the battalion command post was about 1,000 yards in the rear of the first platoon of the company. The second platoon was in support of the company and was located a few hundred yards to the rear of the first platoon, and forward of the battalion command post (R21).

Accused Kain was a member of the first platoon of Company C (R17,22). On 23 November this platoon was about 500 yards from the enemy and was receiving indirect fire from machine guns, mortars and artillery. Kain was last seen in the platoon area by the platoon commander on that date (R23). Accused Ostberg was a member of the second platoon of Company C. On 20 November he was last seen by the platoon commander in the platoon area. At that time the platoon was shelled by the enemy and received stray mortar fire (R17,24,25). Neither Kain (R19,22) nor Ostberg (R19,25) had authority to leave the areas of their respective platoons at any time between 20 November and 24 November, both inclusive.

On 22 November, at the battalion command post, the two accused were delivered by Lieutenant Vater of Company C to Staff Sergeant Alexander K. Kuda, Company C, 121st Infantry, to escort them to the company. While en route to the company, shells burst in their proximity and the accused ran away from Sergeant Kuda (R7).

On 23 November, at the battalion command post, the two accused were brought to the attention of Captain James H. Godfrey, Adjutant of the 1st Battalion, and were delivered to him as stragglers (R9). At that time the entire battalion was subject to enemy ^{shells} fire and its forward elements to small arms fire (R10). Captain Godfrey turned them over to Private First Class Robert L. Jackson, the company runner, to deliver them to the company. Jackson was accompanied by Sergeant Kuda (R7). En route enemy shells fell near the four men and again the accused disappeared (R8,10,13,14). On the afternoon of 23 November, Jackson again received the two accused from Captain Godfrey and Lieutenant Vater, with instructions to take them to the company. En route there was heavy shelling and accused refused to proceed further. Jackson went to the company command post alone (R14). On the next morning (24 November), the accused were brought to Captain Godfrey at the battalion command post by Lieutenant Vater. Captain Godfrey explained to them the meaning of the 58th and 75th Articles of War. In the afternoon of that day the officer talked to them again concerning their misconduct (R11). At that time he gave each of them the di

CONFIDENTIAL

order:

"You will return to your organization
Company C immediately" (R11).

Both accused refused to obey the order and upon further questioning indicated they fully understood the nature of their conduct. Captain Godfrey was in uniform and wore his insignia at the time he gave the orders. When the accused refused obedience they were placed in arrest (R11).

In unsworn statements each accused expressed the desire to return to his company (R26).

a. Charges I and Specifications: There is in the record of trial substantial evidence from which it could be fairly and reasonably inferred that both accused were fully informed as to the operations of his platoon and each knew they were hazardous. Each deliberately and willfully ran away from Jackson and Kuda while en route to the company on 23 November. (The allegations of the specifications allege the offenses were committed at 0900 hours; hence they have reference to the first trip to the company on 23 November). The evidence makes it clear that both accused were determined to avoid the hazards and perils of battle. The offense of absence without leave to avoid hazardous duty was proved (CM ETO 4570, Hawkins; CM ETO 4701, Minnetto).

b. Charges II and Specifications: Each accused deliberately and willfully refused to obey Captain Godfrey's order to return to the company. The offenses charged were sustained by substantial proof (CM ETO 3988, O'Berry, and authorities therein cited).

4. The charge sheets show that accused Ostberg is 21 years of age and was inducted 16 June 1943 at Fort Snelling, Minnesota. Accused Kain is 23 years of age and was inducted 11 August 1943 at Harrisburg, Pennsylvania. Neither had prior service.

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

6. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Penitentiary confinement is authorized for desertion in time of war (AW 42). The

CONFIDENTIAL

5642

CONFIDENTIAL

(289)

designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b, as amended).

[Signature] Judge Advocate

James P. [illegible] Judge Advocate

Judge Advocate

5642

CONFIDENTIAL

CONFIDENTIAL

(290)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 16 FEB 1945 TO: Command-
ing General, 8th Infantry Division, APO 8, U.S. Army.

1. In the case of Privates First Class ARCHIE C. OSTBERG (37568070) and HENRY R. KAIN (33514556), both of Company C, 121st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5642. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5642).



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

(291)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

22 FEB 1945

CM ETO 5643

UNITED STATES	)	8TH INFANTRY DIVISION
)	
v.	)	Trial by GCM, convened at APO 8,
	)	U.S. Army, 16 December 1944.
Private First Class WELDON	)	Sentence as to each accused:
T. HARRIS (20403685), Com-	)	Dishonorable discharge, total
pany M, and Private PORTER	)	forfeitures and confinement at
WILHITE (34031525), Medical	)	hard labor for life. United
Detachment, both of 121st	)	States Penitentiary, Lewisburg,
Infantry	)	Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN and STEVENS, Judge Advocates

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. Accused were charged separately and tried together with their consent upon the following charges and specifications:

HARRIS

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Weldon T. Harris, Company "M", One Hundred and Twenty First Infantry, did, in the vicinity of Hurtgen, Germany, on or about 21 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in deser-

5643

(292)

tion until he was apprehended at Rivage, Germany, /Belgium/ on or about 0100 hours, 4 December 1944.

WILHITE

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Porter Wilhite, Medical Detachment, One Hundred and Twenty First Infantry, did, in the vicinity of Hurtgen, Germany, on or about 21 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he was apprehended at Rivage, Germany, /Belgium/ on or about 0100 hours, 4 December 1944.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced against either accused. Three-fourths of the members of the court present at the time the votes were taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for life. The reviewing authority as to each accused, 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. In determining whether the findings of guilty are supported by substantial evidence the Board of Review will assume that the morning reports of Company M and of the Medical Detachment of 121st Infantry (Pros.Ex.1), were inadmissible in evidence. They will therefore not be deemed to possess any evidential value. The admission in evidence of the extract copies of the morning reports was non-prejudicial. The facts attempted to be proved thereby were shown by other competent evidence. The evidence, excluding the morning reports, proved the following facts:

On 20 November 1944, accused Harris was a private first class and a member of the machine gun section of the heavy weapons platoon of Company M, 121st Infantry. Staff Sergeant James M. Scarborough was leader of said section. Accused Wilhite

5643

on said date was a private in the Medical Detachment of said platoon (R11,12). The heavy weapons platoon of Company M was attached to Company L, 121st Infantry. On said date Company L and the platoon from Company M moved by truck from Luxembourg in the direction of Hurtgen Forest in Germany. The detachment detrucked and during the afternoon proceeded on foot a distance of four or five miles. Its destination was a position in a densely wooded area of the Hurtgen Forest. The enemy was then about 150 yards from the position. As the detachment went into the lines it drew enemy fire (R22). Enroute to the position and before going to the forward assembling area the personnel "dropped their rolls". Accused Harris and Wilhite and two other soldiers, Gunter and Zurr, at about 1730 or 1800 hours left with the rolls (R13,14,17). Wilhite was left to care for two soldiers who had been lately wounded (R16). On the morning of 21 November, the four men received ^{orders} from their section leader to proceed forward and join the section (R14,17,19). The group advanced as far as a fire break when heavy shelling from the enemy was encountered. The two accused and Zurr remained at the fire break and expressed the intention of remaining there until the barrage ceased. Gunter, a member of the same platoon as Harris, proceeded forward and joined his section. Thereafter he never saw the two accused until he encountered them in court (R17,18). Sergeant Scarborough last saw the two accused on the evening of 20 November immediately prior to the time the bedding rolls were "dropped" (R16).

On the evening of 20 November, Gunter knew that his platoon was to attack the enemy the next morning because his squad leader had informed him of this fact, and it was common knowledge in the platoon that such attack was intended (R20).

During the month of November the two accused visited the home of a civilian in Rivage, Belgium (R29). Upon complaint of civilians, the military police apprehended and arrested them at the home of this civilian on 4 December 1944 (R30,31).

4. Each accused elected to remain silent (R32).

Captain Jack R. Melton, Company I, 121st Infantry as a witness for defense, testified that on 3 December 1944 "on the road from Brandenburg to Kleinhan", he requested the Medical Detachment to send him aid men. Two aid ~~man~~ appeared. One was called "Tony"; the other wore a red cross brassard. When witness asked him his name, he replied, "Wilhite". Each of the accused resembled this man, but Captain Melton was uncertain that either of them was the man who called himself "Wilhite" and whom he met at the company area on 3 December (R33,34).

(294)

5. The evidence is uncontradicted that both accused left the detachment of which they were members on the morning of 21 November. When they were last observed by Gunter they refused to advance farther because of enemy shell fire. It is also manifest from the evidence that their unit composed of Company L and the heavy weapons platoon of Company M was committed to battle that morning. The evidence considered as a whole forms a substantial factual basis from which the court was fully justified in inferring that each accused when he left his command did so without authority or permission and that each was well aware of the perils and dangers to be immediately encountered by them. The fact that they were subjected to shell fire when last seen tells in no uncertain language that they left their places of duty intending to avoid the hazards of battle. Captain Melton's testimony was a matter for evaluation by the court as indicated by its findings, it gave it no credence. Their offenses were fully proved (CM ETO 4054, Carey et al; CM ETO 4570, Hawkins; CM ETO 4701, Minnetto).

6. The charge sheets show the following with respect to the service of accused:

Harris is 24 years old. He was inducted 15 July 1940 at Hawkinsville, Georgia.

Wilhite is 25 years old. He was inducted 17 March 1941 at Fort Bragg, North Carolina.

The service period of each accused is governed by the Service Extension Act of 1941. Neither had prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June, 1944, sec. II, pars.1b(4),3b).

[Signature] Judge Advocate

Maccom R. [Signature] Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

(295)

1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 22 FEB 1945 TO: Commanding General, 8th Infantry Division, APO 8, U.S. Army.

1. In the case of Private First Class WELDON T. HARRIS (20403685), Company M, and Private PORTER WILHITE (34031525), Medical Detachment, both of 121st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused, to support the findings of guilty 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 execution of the sentences.

2. The two soldiers were absent about two weeks. Both have served honorably in the past campaigns with records above average. They definitely appear to have possibilities of future service. It is suggested that consideration be given to suspension of the dishonorable discharges.

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 CM ETO 5643. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5643).



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

CONFIDENTIAL

5643

CONFIDENTIAL

(297)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

20 JAN 1945

CM ETO 5646

UNITED STATES	}	104TH INFANTRY DIVISION
v.		Trial by GCM, convened at Brand, Germany,
Private EVARISTO SOROLA		19 December 1944. Sentence: Dishonorable
(38408003), Company B,		discharge, total forfeitures and confine-
415th Infantry.	}	ment at hard labor for life. Eastern
		Branch, United States Disciplinary Barracks,
	}	Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Evaristo (NMI) Sorola, Company B, Four Hundred and Fifteenth Infantry, did, at Stolberg, Germany, on or about 18 November 1944, misbehave himself before the enemy, by refusing to advance with his command, which had then been ordered forward by Captain Raymond A. Garino, to engage with the German forces, which forces, the said command was then opposing.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction

CONFIDENTIAL

by Special Court Martial for absence without leave for 17 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, ~~Greenhaven~~, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution showed that accused was a private, first platoon, Company B, 415th Infantry (R8). Acting pursuant to the orders of the battalion commander, Captain Raymond A. Garino, commanding Company B, ordered an attack near Stolberg, Germany, at 0800 hours on 18 November 1944 (R7,10). The company was to move out by platoons and accused, a scout, was to move forward as a part of the connecting file between his platoon and the platoon which preceded it (R8). Captain Garino testified that after accused's squad had moved out in the direction of the enemy and was about 100 yards from the command post, he received a report from accused's platoon sergeant as the result of which he proceeded to the command post. He there saw accused and told him to go on the mission. Accused refused to do so and Captain Garino then formally ordered him to rejoin his squad and platoon (R7). Accused stated that he would rather be shot than go and did not obey the order (R7,11). Upon accused's refusal to go forward, Captain Garino placed him in arrest (R11).

Staff Sergeant James A. Jay, platoon sergeant, first platoon, Company B, 415th Infantry, testified that at 0800 hours on 18 November 1944 the company commander ordered an attack near Stolberg, Germany (R9,10). About the time the platoon was ordered forward, he received a report from accused's squad leader as the result of which he reported accused to the company commander. Almost immediately thereafter the platoon proceeded on and "run through an attack" with the enemy. (R9). Although the sergeant did not excuse him from his duties, accused was not present with the platoon when it jumped off on the attack (R9,10). It was developed on cross examination that Sergeant Jay had been acquainted with accused for about two years, that he had known accused to fall out while taking hikes during training in the United States and that he was "pretty sure" accused was at one time on a list of those men who had physical defects which disqualified them for overseas duty (R10).

4. For the defense, First Lieutenant Comerford W. McLoughlin,

CONFIDENTIAL

5646

415th Infantry, testified that accused was in his platoon and that while he had no knowledge that accused suffered from any definite physical handicap he did know that accused was never able successfully to perform hikes with the other men while on maneuvers. It had been necessary several times to make arrangements to have him carried while the rest of the men marched. For this reason he was at one time transferred to the company headquarters platoon (R12). Accused's difficulty on hikes was attributed to flat feet and the fact that he was a small man - smaller than average (R14). At one time he might have been on a list of those men thought to be unfit for overseas service but this list had never been called for. However, men deemed unfit had been "turned over to the medics" and he had no knowledge that accused was ever considered for transfer or discharge (R12). On cross examination, Lieutenant McLoughlin testified that on 17 November 1944 Company B was in battalion reserve and engaged in a skirmish with the enemy. However, the company marched only about one half mile on that day and engaged in no activity after about 1800 hours. He saw the accused at about 0800 on 18 November 1944. At that time accused did not appear to be exhausted or fatigued but appeared normal (R13).

Accused, after having been advised of his rights as a witness, elected to make an unsworn statement. In his statement he recited that at the time he was ordered to go forward with his squad

"I was pretty excited and I had been like that for the last few days. I didn't feel sick. I didn't feel anything like vomiting, but I did feel that I couldn't stand to go. We was under fire about eight days and we went up to the front lines * * * If Captain Garino had given me a chance I could explain why I didn't go out * * * I just couldn't go out. I went this other morning to see this medic and I said I couldn't stand it. I can't stand a noise like artillery" (R14,15).

He stated that he had had heart trouble since childhood. He further stated that he smoked marihuana. He was "pretty sure" his name was on a list prepared in the United States of those men who were unfit for overseas service but he had not been transferred from the unit. He could not understand why he had not been transferred. He stated that he liked to work and that "if they will transfer me to another outfit I would do my best to make good" (R14,15).

6. The evidence adduced by the prosecution, together with accused's admissions, shows that, at the time and place alleged, accused refused to advance with his unit which had been ordered to attack. There can be no doubt that accused was before the enemy

at the time of his refusal to advance. Such conduct constitutes misbehavior before the enemy in violation of Article of War 75 (CM ETO 5346, Hannigan; Winthrop's Military Law and Precedents, Reprint, 1920, pp.622-624). The evidence for the defense, as well as accused's unsworn statement, tends to show that accused was below standard physically and that he smoked marihuana. His statement indicates that he was nervous under fire. However there was testimony that at the time of his refusal to advance accused did not appear to be exhausted or fatigued but appeared normal. Whether or not accused was suffering under a genuine or extreme illness or other disability at the time of the alleged misbehavior, which would constitute a defense (Winthrop's Military Laws and Precedents, Reprint, 1920, p.624), was essentially a question of fact for the court. On the entire evidence, it does not appear that the court abused its discretion in resolving this question adversely to the accused (CM ETO 5346, Hannigan; CM ETO 4095, Delre).

7. The charge sheet shows that accused is 26 years of age and was inducted at Houston, Texas, on 27 November 1942. No prior service is shown.

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

9. Misbehavior before the enemy is punishable by death or such other punishment as a court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Earl Vandenberg Judge Advocate

John Hannibal Judge Advocate

Benjamin Sleeper Judge Advocate

5646

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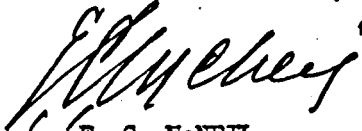
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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. **20 JAN 1945** TO: Commanding
General, 104th Infantry Division, APO 104, U. S. Army.

1. In the case of Private EVARISTO SOROLA (38408003), Company B, 415th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5646. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5646).



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

(303)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

27 APR 1945

CM ETO 5659

UNITED STATES

v.

Private HURCHEL MAZE, JR.
(33784290), 3512th Quarter-
master Truck Company

) SEINE SECTION, COMMUNICATIONS ZONE,
) EUROPEAN THEATER OF OPERATIONS
)
) Trial by GCM, convened at Paris, France,
) 25 November 1944. Sentence: Dishonor-
) able discharge, total forfeitures and
) confinement at hard labor for 15 years.
) Eastern Branch, United States Disciplinary
) Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

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

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

Specification: In that Private Hurchel Maze, Junior, 3512th Quartermaster Truck Company, European Theater of Operations, United States Army, did, without proper leave, absent himself from his organization at or near Cherbourg, France from about 19 September 1944, until he was apprehended at Malakoff, France on or about 11 October 1944.

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

Specification: In that * * * in conjunction with Private First Class Robert T. Williams, did at or near Paris France, on or about 7 October

5659

CONFIDENTIAL

(304)

1944 wrongfully have on his possession eleven thousand (11,000) packages of cigarettes, ten thousand two hundred (10,200) boxes of matches and one thousand three hundred (1,300) packages of tobacco, property of the United States with the intent to apply said property to his own use and benefit .

He pleaded guilty to Charge I and its Specification, not guilty to Charge II and its Specification, and was found guilty of both charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for three days in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. Accused's unauthorized absence from his organization on 19 September 1944 was proved by its morning report (Pros.Ex.A) and his apprehension in Paris by a Criminal Investigation Department Agent on 11 October 1944 was shown (R10). He pleaded guilty to Charge I and its Specification.

With respect to Charge II and its Specification, there is a total absence of proof that the cigarettes and tobacco were property of the United States. Its delivery to the Post Exchange officer of Seine Section, Communications Zone, European Theater of Operations (R5,6,11) shows by inference that it was the property of the Army Exchange Service. It is well established that property of the Army Exchange Service is not the property of the United States and that a charge of stealing or misappropriating property of the United States is not supported by proof that the property was owned by the Army Exchange Service. The variance is fatal (CM ETO 1538, Rhodes and authorities therein cited). The findings of guilty of Charge II and its Specification cannot be sustained.

4. The charge sheet shows that accused is 22 years four months of age. He was inducted 19 June 1943 at Fort Meade, Maryland, to serve for the duration of the war plus six months. No prior service is shown.

5. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons herein stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification but legally insufficient to support the findings of guilty of Charge II and its specification and legally sufficient to support the sentence.

CONFIDENTIAL

5659

CONFIDENTIAL

(305)

6. Eastern Branch, United States Disciplinary Barracks,
Greenhaven, New York, was properly designated as the place of confine-
ment.

B. Frank Rite Judge Advocate

H. F. Burrows Judge Advocate

Edward L. Stevens Judge Advocate

5659

CONFIDENTIAL
- 3 -

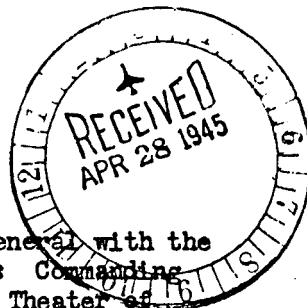
CONFIDENTIAL

(306)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations.

27 APR 1945 TO: Commanding General, Seine Section, Communications Zone, European Theater of Operations, APO 887, U. S. Army.



1. In the case of Private HURCHEL MAZE, Jr (33784290), 3512th Quartermaster Truck Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification but legally insufficient to support the findings of guilty of Charge II and its Specification and 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 execution of the sentence.

2. The record of trial exhibits gross carelessness in preparation of the charges and in conduct of the trial. Had accused been charged with larceny of Post Exchange property under the 93rd Article of War the evidence would have sustained the findings of guilty. Accused was absent without authority from his organization for 22 days. Although the period of his absence was relatively short, his activities during his absence were such as allow the inference that he intended to absent himself permanently from the military service and would therefore have sustained a charge of desertion under AW 58.

For the foregoing reasons, I believe the sentence may be justified and I do not recommend any reduction in the period of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5659. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5659).

E. C. McNEIL

Brigadier General, United States Army,
Assistant Judge Advocate General.

CONFIDENTIAL

CONFIDENTIAL

(307)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

3 FEB 1945

CM ETO 5666

UNITED STATES

) XX CORPS

v.

Private First Class ROGER W.
BOWLES (33634034) and Private
JOHN BURRELL (33633527), both
4049th Quartermaster Truck
Company.

) Trial by GCM, convened at Thionville,
France, 6 December 1944. Sentence as
) to each accused: Dishonorable dis-
) charge, total forfeitures and confine-
) ment at hard labor for life. Eastern
) Branch, United States Disciplinary
) Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

2. Accused were tried together, with no objection by either to their common trial, upon the following charges and specifications:

BOWLES

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

Specification: In that Private first class ROGER W. BOWLES, 4049th Quartermaster Truck Company did, at or near Maintenon, France, on or about 18 August 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to-wit: operations in the forward area in contact with the enemy, and did remain absent in desertion until he

(308)

was apprehended at or near Paris, France,
on or about 22 October 1944.

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

Specification: In that * * * did, at Maintenon, France, on or about 18 August 1944, knowing and willfully apply to his own use without proper authority, one GMC, 6 X 6, 2½ ton cargo vehicle, bearing USA Number W4247075, Company Number 35, of the value of more than fifty (\$50.00) dollars, property of the United States, furnished and intended for the military service thereof.

BURRELL

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

Specification: In that Private JOHN BURRELL, 4049th Quartermaster Truck Company, did, at or near Maintenon, France, on or about 18 August 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to-wit: operations in the forward area in contact with the enemy, and did remain absent in desertion until he surrendered himself at or near Paris, France, on or about 20 October 1944.

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

Specification: In that * * * did, at Maintenon, France, on or about 18 August 1944, knowing and willfully apply to his own use without proper authority, one GMC 6 X 6, 2½ ton cargo vehicle, bearing USA., Number W4247075, Company Number 35, of the value of more than fifty (\$50.00) dollars, property of the United States, furnished and intended for the military service thereof.

Each pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of all charges and specifications pertaining to him. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, each accused

was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved each sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for each accused and forwarded the record of trial pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 18 August 1944 and continuously for a month prior thereto, units of the quartermaster truck company of which both accused were members were attached to combat teams of the 5th Division, having been assigned the mission of transporting infantry to points designated by division authorities for patrolling and probing the enemy forces (R10-11,14). During this month the company and the units with which it was serving were in contact with the enemy all the way across France (R13). Two or three days before 18 August 1944, they moved into the vicinity of Chartres, where Company B of the 2nd Infantry was on outpost duty near the town of Maintenon (R11,14,18). The two accused were driver and assistant driver respectively of one of three trucks belonging to the 4049th Quartermaster Truck Company, assigned to Company B for transportation of its personnel (R15,17). They were quartered in the bivouac area and messed with members of the organization which they were servicing (R10,20).

Captain Oscar E. Easton, commanding the 4049th Quartermaster Truck Company, testified that he had given orientation talks to his men, acquainting them with the tactical situation and the part which they were to play therein - "the fact that they were with combat teams and that they had to be with these teams when they were ready to move" and personally instructed them that their vehicles were always to be available for movement (R11-12). "They had their standing orders in regard to these combat teams" and both accused "knew that they were in contact with the enemy". Indeed, it was common knowledge among the men of accused's organization, at the time and place in question, that they were in the presence of the enemy (R12,13). First Lieutenant Robert W. Eubanks, commanding accused's platoon, which was attached to the 2nd Infantry, described that regiment's tactical situation on or about 18 August 1944 as "in contact with the enemy, in that there was nobody between them and the enemy" (R11,15). First Lieutenant Joseph F. Roche, Company B, 2nd Infantry, testified that for the last few days previous to 18 August 1944, his company "had been moving from one part of France to another, mostly in pursuit of the enemy", running into small groups occasionally, with some attendant firing, but engaged in no pitched battle until shortly after they left Maintenon on August 19th. "The first one after that was at Etampes and it lasted about a day and a half" (R22).

The corporal of the 4049th Quartermaster Truck Company, in

CONFIDENTIAL

(310)

charge of the six men and three trucks assigned to Company B of the 2nd Infantry, testified that they remained for about three days at the bivouac area in question, that there was not very much action going on while they were there and they spent most of the time "sitting around playing cards" (R17,18,19). Witness did not know where the enemy was, "but some of the fellows said they were close" (R19). They dug no foxholes while in this position and heard no guns being fired. It was necessary for drivers in his section to tell witness where they were going at all times. He, however, drove a truck himself and was gone "quite a bit" of the time (R19,20). On the day before they transported some of the personnel of the infantry company to Etampes, witness saw both accused leave the bivouac area in a 6 X 6 truck, company number 35 (R18,21). They had no permission from witness to leave. Neither accused nor the truck ever returned to the organization. Witness looked for the truck in the village. The next morning he reported the loss of it to the company commander and to Lieutenant Eubanks who commanded his platoon (R18,19).

Lieutenant Eubanks testified that on the morning of the 19th he found only two of his three vehicles with Company B of the 2nd Infantry, and that the missing vehicle was a 2½ ton truck, 6 X 6, and its number was "35". He made an unsuccessful effort to find the truck, which was never returned to his organization; nor had his organization ever received a report of its being found (R15-17).

Accused Bowles was absent without leave from his organization from 18 August 1944 until he was apprehended by military police in a hotel in Paris, France, 21 October 1944 (R10,24;Ex.3). Accused Burrell was absent without leave from his organization from 18 August 1944 until he voluntarily turned himself in to a roving military patrol in Paris, France, 20 October 1944, asserting, at the time, that "a driver had left him there the night before and hadn't returned to pick him up" (R9,26,27;Ex.2).

After due warning, Bowles made the following statement to the investigating officer (R7-8):

"I don't exactly know how many days it was after we got lost from the 2nd Infantry Division but we finally found our group headquarters and John Burrell, 33633527, Private, 4049th QM Truck Company went in and reported to the colonel, I don't know what the colonel's name was, and explained the situation to the colonel and then the colonel gave him the numbers of the highways and also the name of the place where the organization was but instead of him

(311)

writing it down he did not do that. He came back and gets in the truck and he pulls off. After he gets two (2) miles from the headquarters he forgets the numbers of the highways and the name of the place and then he just continues to drive on and that's all" (Pros.Ex.1).

4. No evidence was introduced on behalf of the accused and both, after their rights were explained to them, elected to remain silent (R29).

5. The Specification, Charge I, as to each accused, alleges absence without leave with intent to avoid hazardous duty, to wit: operations in the forward area in contact with the enemy. The evidence shows that accused's assignment, attached as they were to an infantry company on outpost duty, involved transporting the members of combat teams pursuing and maintaining contact with the enemy. Accused had received instructions as to the nature of their duties and that their vehicles should always be available for movement. The evidence shows that during a brief temporary lull in the pursuit, on the very day before its resumption involved a pitched battle with the enemy, accused not only left their organization without authority, but deprived a company combat team of one of the three vehicles attached to it for the purpose of transporting its personnel. The circumstances thus established support the inference that accused's departure was motivated by their intent to escape hazardous duty. Thus every element of the offense alleged is established by the showing made. The length of time they were absent and the place of their return to military control also indicates their intent not to return to their place of duty.

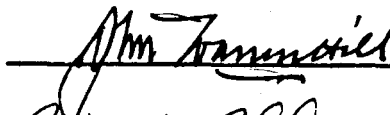
The Specification, Charge II, as to each accused alleges knowing and willfull misapplication of one GMC, 6 x 6, 2½ ton cargo vehicle, bearing USA number W4247075, company number 35, of the value of more than \$50.00, property of the United States, furnished and intended for the military service thereof. Although no evidence was adduced to prove the value of the truck which the record shows was misapplied as alleged, courts-martial may take judicial notice of the price of articles issued or used in the Military Establishment when published to the army in orders, bulletins, or price lists (MCM, 1928, par.125, pp.134, 135). Army motor vehicles fall within this category. Moreover where the character of the property clearly appears in evidence, the court, from its own experience, may infer that the property has some value (MCM, 1928, par.149g, p.173). However it would have been better practice to have established its value by evidence adduced on the trial of the case, and also to have shown that it was a GMC truck, USA number W4247075. In view of all the other elements of identity proved as alleged, the latter omissions may be regarded as immaterial.

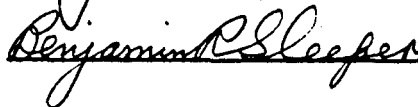
(312)

6. The charge sheet shows that Bowles is 21 years six months of age and that, with no prior service, he was inducted at Richmond, Virginia, 15 April 1943; that Burrell is 21 years one month of age and that, with no prior service, he was inducted at Richmond, Virginia, 12 April 1943.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as to each accused. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

 Judge Advocate

 Judge Advocate

 Judge Advocate

CONFIDENTIAL

(313)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. **3 FEB 1945** TO: Commanding
General, Headquarters XX Corps, APO 340, U. S. Army.

1. In the case of Private First Class ROGER W. BOWLES (33634034) and Private JOHN BURRELL (33633527), both 4049th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as to each accused, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5666. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5666).



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

CONFIDENTIAL

(315)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

27 JAN 1945

CM ETO 5740

UNITED STATES	)	FIRST UNITED STATES ARMY
)	
v.	)	Trial by GCM, convened at Chaud-
	)	fontaine, Belgium, 8 December 1944.
Private JAMES GOWINS	)	Sentence: Dishonorable discharge,
(34626553), 3192nd Quarter-	)	total forfeitures and confinement
master Service Company.	)	at hard labor for 20 years. United
	)	States Penitentiary, Lewisburg,
	)	Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James Gowins, Three Thousand One Hundred and Ninety-Second Quartermaster Service Company did, at Bouray, France on or about 11 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 20 October 1944.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction

5740

CONFIDENTIAL

(316)

by summary court for AWOL on 6 May 1944 in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty as involve a finding that accused did, at the time and place alleged, desert the service of the United States and did remain absent in desertion until 20 October 1944, approved the sentence but reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 11 September 1944, while his organization was stationed at Bouray, 20 miles south of Paris, furnishing labor in connection with the operation of a master gas dump, accused went absent without leave (R7,10). He had not returned to his company nor had any information been received as to him or his whereabouts when Captain Frederick C. Malkus, Jr., his company commander, visited Mortier Stockade in Paris "around the 1st of November" 1944 (R8,9). There, Malkus testified, accused "came up and reported to me". The same witness also testified that he examined the records at the stockade and observed the delinquency report of accused's apprehension "on the 20th" (R8). He was not present in Paris on 20 October 1944 and had no personal knowledge of what occurred on that date regarding the accused (R9). It was stipulated that accused was returned to military control at Paris, France, 20 October 1944 (R11).

4. The defense presented no evidence. Accused, whom defense counsel stated he had advised of his rights, elected to make the following unsworn statement:

"Well, sir, when I went over the hill I went to a little village, got to drinking up there, stayed about, till about nine o'clock at night; boy came along and said 'Let's go to Paris'; I don't know who he was, just a boy in a truck; and I went on to Paris with him. When I got up there I got drunk, stayed overnight. Next day I was riding around with him in a weapons carrier; the weapons carrier overturned, I got hurt and I went to the hospital. I returned from the hospital to the 19th Replacement and from there I went back to Paris. When I got to Paris, I got sick again. I had gonorrhea. I got gonorrhea

5740

CONFIDENTIAL

(317)

and I turned in to the MP's and he turned me back to the hospital, and the hospital back to the stockade. Company commander, he came. I don't know whether he come after me or not, but I looked -- I was up stairs and I looked out and saw him. I came down, I reported to my Captain" (R12).

5. Accused's unsworn statement that "I turned in to the MP's" is not inconsistent with the recital in the stipulation that the accused "was returned to military control", which is an expression customarily used to denote termination of absence without leave when the manner is not known or cannot be proved. Captain Malkus' hearsay testimony as to the contents of the delinquency report was inadmissible to show apprehension and was highly prejudicial. The admissible evidence approximates the minimum of competent, substantial evidence heretofore held, in the absence of prejudicial errors or irregularities, legally sufficient to support the inference of intent not to return in a desertion case (CM ETO 1629, O'Donnell). It is certainly not compelling; and Captain Malkus' erroneously admitted testimony of apprehension was of a character to preclude the possibility of the court's giving any credence whatsoever to the explanation^{involved} in the accused's unsworn statement. The record, fairly regarded, raises a bona fide issue as to accused's intent, in view of which the hearsay evidence of apprehension cannot in reason be presumed not to have injuriously affected the substantial rights of the accused (CM ETO 3213, Robillard). The evidence, therefore, sustains only so much of the findings of guilty as involves conviction of the accused guilty of absence without leave, in violation of Article of War 61.

6. The charge sheet shows that accused is 21 years four months of age and that, with no prior service, he was inducted at Camp Shelby, Mississippi, 20 March 1943.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves finding that accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until 20 October 1944, in violation of Article of War 61; and legally sufficient to support the sentence of dishonorable discharge, total forfeitures and confinement at hard labor for 20 years, in a place, other than a penitentiary.

8. The place of confinement should be changed to Eastern Branch,

5740

CONFIDENTIAL

(318)

United States Disciplinary Barracks, Greenhaven, New York (AW 42;
Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

Ernest D. Dineen Judge Advocate

John W. Wainwright Judge Advocate

Benjamin B. Sleeper Judge Advocate

5740

- 4 -
CONFIDENTIAL

CONFIDENTIAL

(319)

1st Ind.

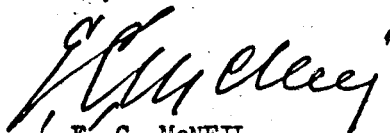
War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. **27 JAN 1945** TO: Commanding
General, Headquarters First United States Army, APO 230, U. S. Army.

1. In the case of Private JAMES GOWINS (34626553), 3192nd Quartermaster Service Company, 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 as involves finding that accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until 20 October 1944, in violation of Article of War 61; legally sufficient to support the sentence of dishonorable discharge, total forfeitures and confinement at hard labor for 20 years, provided some place other than a Federal penitentiary be designated as the place of confinement.

2. The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

3. Supplemental action in accordance with the foregoing holding should be forwarded to this office to be attached to the record of trial.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5740. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5740).



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

1 -
CONFIDENTIAL

5740

CONFIDENTIAL

(321)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

5 FEB 1945

GM ETO 5741

UNITED STATES

v.

Privates JOHN J. KENNEDY
(16146370), VINCENT G.
DUNNING (32792183) and
HOWARD F. MULCAHY (32518369)
all of 3807th Quartermaster
Truck Company.

) FIRST UNITED STATES ARMY.

) Trial by GCM, convened at Chaudfontaine, Belgium, 1 December 1944.
) Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification 1: In that Private John J. Kennedy, 3807 Quartermaster Truck Company, did, without proper authority, absent himself from his organization and station in the vicinity of Terwagne, Belgium, from about 1830 hours, 15 October 1944, to about 2300 hours 15 October 1944.

Specification 2: In that Private Vincent G. Dunning, 3807 Quartermaster Truck Company, did, without proper authority, absent him-

5741

CONFIDENTIAL

(322)

self from his organization and station in the vicinity of Terwagne, Belgium, from about 1830 hours, 15 October 1944 to about 2300 hours, 15 October 1944.

Specification 3: In that Private Howard F. Mulcahy, 3807 Quartermaster Truck Company, did, without proper authority, absent himself from his organization and station in the vicinity of Terwagne, Belgium, from about 1830 hours, 15 October 1944 to about 2300 hours 15 October 1944.

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

Specification 1: In that Private Howard F. Mulcahy, 3807 Quartermaster Truck Company, Private John J. Kennedy, 3807 Quartermaster Truck Company, and Private Vincent G. Dunning, 3807 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Terwagne, Belgium, on or about 15 October 1944, with intent to commit a felony, viz, robbery, commit an assault upon Marie Rose Legros by willfully and feloniously pointing a pistol at the said Marie Rose Legros in a menacing and threatening manner.

Specification 2: In that Private John J. Kennedy, 3807 Quartermaster Truck Company, did, at Terwagne, Belgium, on or about 15 October 1944, feloniously take, steal, and carry away coins in the amount of eighty (80) francs and twenty (20) centimes, lawful money of the government of Belgium, of the exchange value of One Dollar and Eighty-three cents (\$1.83), and two (2) silver plated mugs of the value of about Five Dollars (\$5.00), the property of Guy LeGros of Terwagne, Belgium, of the aggregate value, Six Dollars and Eighty-Three cents (\$6.83).

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

Specification: In that Private John J Kennedy, 3807 Quartermaster Truck Company, Private

5741

Vincent G. Dunning, 3807 Quartermaster Truck Company, and Private Howard F. Mulcahy, 3807 Quartermaster Truck Company, all serving with their organization in combat operations against the German Army and while they were temporarily stationed in their organization's bivouac area in the vicinity of Terwagne, Belgium, did, at Terwagne, Belgium, after leaving their said organization's bivouac area on or about 15 October 1944 in the night time, breach and disturb the peace in that they did wrongfully and unlawfully enter the dwelling of Jules Fiasse, and while in said dwelling with force and arms unlawfully and riotously and in violent and tumultuous manner and to the terror and disturbance of Jules Fiasse and his family, did forcibly search the said dwelling, including a bedroom therein occupied by the wife of said Jules Fiasse and his six (6) children, in an attempt to find Mademoiselle Andree Gahty, a girl aged about sixteen (16) years.

Each accused pleaded not guilty to all charges and specification. Two-thirds of the members of the court present at the time the vote was taken concurring, each accused was found guilty of the respective charges and specifications against him. No evidence of previous convictions was introduced as to accused Kennedy or Dunning. Evidence was introduced of one previous conviction by special court-martial of accused Mulcahy for absence without leave for seven days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority disapproved the findings of Specifications 1 and 2 of Charge II and of Charge II as to each accused to whom such specifications and Charge pertained, approved the sentences but reduced the period of confinement imposed in each to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to AW 50½.

3. With reference to Charge I and its specifications, the evidence for the prosecution showed that on 15 October 1944 the accused were

5741

CONFIDENTIAL

(324)

members of the 3807th Quartermaster Truck Company which was, on that date, stationed near Terwagne, Belgium (R6,7). Accused were shown to have been in a cafe in Terwagne from approximately 1900 hours to 2200 hours on 15 October 1944 and to have been present in a private home in Terwagne later that evening (R12,13,20,24). A search of their bivouac area was made shortly before 2300 hours that night and they could not be found in the area (R6,7). Shortly thereafter Captain Joseph A. Schroth, the commanding officer of the 3807th Quartermaster Truck Company, saw them surreptitiously returning to the area (R6,8). He thereupon "picked them up and brought them in" (R9). He testified that all appeared to have been drinking and that

"Dunning seemed to be the most sober and Mulcahy the most drunk and most affected by the liquor, and Kennedy was right in between the two. In other words Dunning seemed to have most control of his faculties and Mulcahy the least. * * * Dunning didn't stagger, Mulcahy did slightly and Kennedy--I don't believe Kennedy walked in any manner which would indicate that he was very drunk"(R9).

The company commander did not grant any of the accused any permission to be absent at any time on 15 October 1944 (R8).

With respect to Charge III and its Specification, M. Jules Fiasse testified that on the evening of 15 October 1944, he, his wife, his six small children, his sixteen year old niece, Andree Gathy, and Miss LaVant, a neighbor, were all present in his home in Terwagne, Belgium (R24,25,27,28). Miss LaVant prepared to depart at about 2215 hours and M. Fiasse went to the door with her. She left the house but returned almost immediately thereafter, said that there were some men in the yard and she was afraid, and asked to be readmitted. When M. Fiasse opened the door to admit Miss LaVant, the men, who were the accused, followed her into the house (R24). After entering the house

"They was sitting at the table and my wife was getting ready to put some rum into a cup of milk. They took the bottle, they drank a little and poured it on the floor. My wife went upstairs and I stayed alone with them for about 10 minutes. They asked then if we had a mademoiselle upstairs and they went up. When the first one put his foot on the steps I went to try to stop him. One of them Dunning grabbed me by the collar, made me sit down and pointed a revolver at me" (R25).

Following this, Kennedy went upstairs, knocked at the door, 5741

(325)

and "asked to have the door opened to find the mademoiselle" (R25,26). Shortly thereafter he returned whereupon two of them went upstairs and knocked at the door. During this time the accused were talking loudly. In the meantime, M. Fiasse shouted to his wife directing her to hide his niece in the closet. He later accompanied the accused upstairs and asked his wife to open the door. The accused then "examined" the room, which was occupied at the time by Madame Fiasse and the six children. "They were very orderly when they saw the young girl wasn't in the room and they came down" (R26). They left the house at about 2300 hours (R28). When the accused first entered the house M. Fiasse believed they were drunk because they were staggering and "they would go to sleep and they would wake up". They also argued among themselves (R27). M. Fiasse did not give the accused permission to enter the house or to go upstairs (R26). When Dunning pointed the pistol at him, Dunning said something but since he did not understand English he did not know what he said (R27). He testified that he was "very much afraid" when the gun was pointed at him. He was also afraid that they would enter his niece's bedroom because, although his niece was not acquainted with the accused, they had seen her when she passed the cafe earlier in the evening and were asking for her while in the house. However, he was not afraid for the rest of his family at this time (R28).

Mlle. Andree Gathy testified that, after she had gone to sleep on the night of 15 October 1944, some soldiers came to her uncle's house and, when they "kept hitting" the door, she awakened. Her aunt called and she hid herself in the closet. She did not know or see any of the soldiers involved (R29,30).

4. After each accused had been advised of his rights as a witness, accused Kennedy and Mulcahy elected to remain silent. Accused Dunning elected to take the stand and testified that he left his bivouac area at about 1900 hours on 15 October 1944 with Kennedy and Mulcahy. None had permission to leave (R31,32,34). The three first went to a cafe opposite the bivouac area where they had beer and wine and later went to a cafe in Terwagne where more wine was consumed as well as a quart of "anecet" (anisette) (R32,33,34). Although he "lost count" of the amount of wine consumed, wine cost 200 francs per bottle and together the three accused spent 3000 francs for drinks on the night in question (R36). He testified that Kennedy and Mulcahy "were drinking as much as I was". He remembered having a pistol with him but he did not remember leaving the cafe or where he went thereafter (R32). The last thing he remembered was sitting at a table at the second cafe talking with Mulcahy (R35). He did not recall ever having seen Mlle. Gathy prior to the date of the trial (R33).

5. The testimony of Captain Schroth, commanding officer of the 3807th Quartermaster Truck Company, as well as that of accused Dunning, shows that none of the accused had permission to be absent from their

5741

(326)

organization and station on the date alleged. The testimony, together with other competent evidence in the record, also shows that the accused were not present at their station on that date. The evidence is accordingly sufficient to support the court's finding that each accused was guilty of absence without leave in violation of Article of War 61 as alleged.

Accused were also charged with a violation of Article of War 96 by the commission of the acts set forth in the Specification of Charge III. Where conduct which cannot readily be characterized as one of the offenses denounced by some other Article of War is charged as a violation of Article of War 96 two questions usually are presented, namely whether the conduct described in the specification constitutes an offense and, if so, what punishment may be imposed therefor. As bearing upon both of these questions as here presented, see CM 238825 Jones (1943). In that case, accused was charged with a violation of Article of War 96 under a specification which reads as follows:

"In that Private Joseph Jones, Btry "C" 600th Field Artillery Battalion, did, at Fry, Arizona, on or about May 7, 1943, acting in concert with certain other soldiers to the number of about ten, whose names are unknown, did unlawfully and riotously, and in a violent and tumultuous manner disturb, enter and break into the dwelling house of Odessa Whitney, of Fry, Arizona, and did therein participate in the unlawful breaking up and destruction of furniture, gramophone records and other property of the said Odessa Whitney" (24 B.R. p.367).

The evidence adduced at the trial showed that accused committed the acts so alleged. In passing upon the legal sufficiency of the record, the Board of Review apparently felt that it was clear that the specification alleged an offense under Article of War 96 since this aspect of the case was passed over without discussion. With reference to the punishment impossible for the offense alleged, the Board said:

"No maximum limit of punishment is expressly prescribed for unlawfully and riotously breaking into the dwelling house of another and destroying property therein as alleged in the Specification, Charge II, but, in view of the circumstances of aggravation under which the unlawful entry into the dwelling house was effected, the offense is analogous to the offense of housebreaking for which the maximum limit of punishment is dishonorable discharge, total forfeitures, and confinement at hard labor for ten years (MCM, 1928, par.104c)" (24 B.R. p.367 at p.371).

5741

This case, then, indicates that the conduct alleged in the specification there under consideration constitutes an offense under Article of War 96 and that such conduct is subject to the same penalty as that which may be imposed for the offense of housebreaking.

Since the conduct of which accused were found guilty in the instant case is of the same general nature as that involved in the case discussed above, that case is at least of persuasive authority here. Even in the absence of this case, there would be little doubt that the conduct charged in the specification here under consideration states an offense under Article of War 96. The evidence here adduced shows that accused committed the acts charged in the specification. It is not alleged that such acts were committed willfully or with any specific intent and therefore drunkenness would not constitute a defense. In any event, even if the specification is interpreted to require a specific intent as an element of the offense charged, whether the accused were too drunk to be capable of entertaining the requisite intent was, under the evidence here presented, a question of fact for the court.

With respect to the penalty which may properly be imposed for the offense of which accused were here found guilty, it may be noted that the wording of the specification suggests that the draftsman thereof intended to charge an offense closely related to the offense of committing a riot denounced by Article of War 89 for which no limitation of punishment is prescribed by the Table of maximum punishments. While it is true that there are decisions holding that conduct similar to that of which accused were here found guilty constitutes a riot (49 ALR 1135), the question whether the conduct here shown could be said to be a riot or conduct closely related to that offense is at least a rather close one especially when it is remembered that a riot imports at least some suggestion of mob violence and is "essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such" (54 CJ, sec.3, p.830; Salem Mfg Co. v. First American Fire Ins. Co. of New York 111 Fed (2d) 797 (1940); Miller on Criminal Law, (1934) sec.167, p.486). In any event, the offense here in question is analogous to that mentioned in CM 238825, Jones, supra, for which ten years confinement was imposed and, in addition, the accused were convicted of absence without leave in violation of Article of War 61 for which the limitation of punishment set forth in the Table of maximum punishments has now been suspended. The sentence is therefore within the authorized maximum.

6. The charge sheets show that accused Kennedy is 21 years of age and enlisted at Chicago, Illinois, on 10 November 1942; that accused Dunning is 25 years of age and was inducted at New York, New York on 4 February 1943; and that accused Mulcahy is 24 years of age and was inducted at Fort Jay, New York, on 2 October 1942. No prior service by any of the accused is shown.

CONFIDENTIAL

(328)

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

8. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

Richard Burdick Judge Advocate

John Marshall Judge Advocate

Benjamin R. Slegger Judge Advocate

5741

CONFIDENTIAL

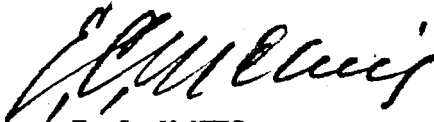
(329)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 5 FEB 1945 TO: Commanding
General, First United States Army, APO 230, U. S. Army.

1. In the case of Privates JOHN J. KENNEDY (16146370), VINCENT G. DUNNING (32792183), and HOWARD F. MULCAHY (32518369), all of 3807th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial as to each accused, is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5741. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5741).



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

CONFIDENTIAL

(331)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

5 MAR 1945

CM ETO 5745

UNITED STATES)

v.)

Private EDWARD ALLEN
(37003520), 3282nd Quarter-
master Service Company)

ADVANCE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS

Trial by GCM, convened at Verdun,
France, 4 December 1944. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard
labor for life. United States
Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Edward Allen, 3282nd
Quartermaster Service Company did, at or near
Sommesous, France, on or about 16 October 1944,
with malice aforethought, willfully, deliberately,
feloniously, unlawfully, and with premeditation
kill one Private James H. Murray, a human being
by shooting him with a rifle.

He pleaded not guilty and, all members of the court present at the time
the vote was taken concurring, was found guilty of the Charge and Speci-
fication. Evidence was introduced of one previous conviction, evidently
by special court-martial, for wrongfully striking another soldier on the
head with a knife in violation of the 96th Article of War. All members
of the court present at the time the vote was taken concurring, he was
sentenced to be dishonorably discharged the service, to forfeit all pay

CONFIDENTIAL

(332)

and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The following evidence was introduced by the prosecution:

Between 1400 and 1500 hours on 16 October 1944 Privates Lockett, Murray, and Smith of the 3282nd Quartermaster Service Company, which was bivouacked at Sommesous, France, went to the nearby village of Haussimont to get their laundry (R18). They were unarmed at the time (R20). While there, Murray and Lockett got into an argument which resulted in a tussle between them in the street (R18,19). Accused, a member of the same organization, came up to the scene of the disagreement and attempted to part them (R19). He was unsuccessful in his efforts and finally drew a pistol and pointed it at Murray (R19,27,29). Nothing was said at this time, but Murray and Lockett stopped their fighting and Murray returned to camp (R20,39). At camp Murray picked up his carbine and shortly afterwards returned to Haussimont (R20). The evidence is conflicting as to whether Smith accompanied him on this trip to camp and return (R20, 29,30) and as to whether Murray's carbine was loaded (R27,30). On his return to Haussimont, Murray again encountered accused (R20,30). Pointing his carbine at accused, Murray asked him why he had drawn a pistol on him (R21,27). Accused denied that he had done so, and at this point Corporal Mason, of their organization, interceded and separated them. Accused said "O.K." and Murray, Lockett, and Smith returned to camp. Murray had not fired his carbine and he took it back to camp with him (R21).

They reached camp at about 1600 hours and sometime thereafter Smith and Murray went to guard post number 6 to get Murray's galoshes (R21). At the adjacent post, number 7, there was a small fire around which several enlisted men of the organization, including accused, had gathered (R22). Accused was carrying his carbine under his arm, with muzzle down (R22,32,35,45). Murray approached from the direction of post number 6 carrying his carbine on his right shoulder at sling arms, with barrel pointed down, and his galoshes in his right hand (R23,25,32, 38,39,45). Accused raised his carbine and told Murray to halt, take his rifle off his shoulder, and lay it down (R23,32,35,38). Murray continued walking and Pinkard, one of the enlisted men present, fearing that accused intended to shoot, grabbed accused's carbine and pushed it up so that the bullet would go astray. The gun was discharged in the air (R23,33,35,39). Pinkard said "Don't shoot", to which accused replied "I'm not going to shoot". Pinkard, realizing that he was in the line of fire, withdrew (R33). Murray walked a few steps further, his rifle in his hand by this time, and accused repeated his demand that he lay down his rifle (R23,33,39,40,41,43,43,45). Murray

thereupon put down his galoshes, laid his rifle on the ground with its muzzle pointing toward accused, stood up and backed off from the rifle from one to six feet (R24,25,26,39,40,43,45). Accused then fired a second shot and Murray fell to the ground at a point about fifteen yards from where accused was standing (R24,26,43,46). This occurred at about 1640 hours (R10). Approximately one minute elapsed between the firing of the first and second shots (R36,46). Although two of the prosecution's witnesses stated categorically that accused fired the second shot, on cross-examination it appeared that none of them actually saw him in the act of shooting, their attention having been fixed on Murray at the moment the shot was fired (R24,25,40,43). Neither Murray nor accused appeared to be intoxicated or under the influence of narcotics (R30,31,34,35,40,46).

The company commander was immediately called to the scene of the shooting (R41,47). He arrived a minute or so later and found Murray's body lying on the ground. Accused was standing about ten to 15 yards away and Murray's carbine was lying about 15 feet from his body (R10,11). In the company commander's opinion, Murray was already dead, a bullet having passed through his head (R11). The accused was asked what happened and he replied "'He tried to shoot me and I beat him to it'". Upon being searched, accused was found to have in his possession, in addition to his carbine, two rounds of ammunition, a knife, and a loaded MAB, Brevete automatic pistol (R11,12,13,14). Accused was placed under arrest, and an attempt was made to give first-aid to Murray, a medical officer having been summoned (R11). Upon arrival of the medical officer at 1700 hours, Murray was pronounced dead as the result of a gunshot wound in the head (R6,7; Pros.Ex.1).

Although the ground on which Murray's rifle was lying was wet, the rifle was fairly clean and there were no deposits of dirt on the weapon such as might be expected had it been thrown to the ground. Nor did the company commander notice any marks on the ground indicating that the weapon struck it with any force (R11,12,15). He testified that both accused and Murray were scheduled to go on guard duty at 1800 hours (R16,17), and that weapons were to be carried only when on duty (R9,10). No privately-owned weapons were to be carried at all (R13).

4. Accused, having been duly warned of his rights, elected to take the stand and testify. He stated that he had never previously had any trouble with Murray, but that on the afternoon of 16 October 1944 he found him in Haussimont encouraging a fight between two enlisted men (R54,55,59,62). Accused attempted to stop the fight and told Murray he should be trying to stop them instead of encouraging them. Murray swore at him, but accused succeeded in stopping the quarrel by getting a bottle of champagne which they all joined in drinking except Murray (R55). Accused admitted that he had his pistol with him at this time, but there is no indication in his

CONFIDENTIAL

(334)

testimony that he used it for the purpose of stopping the fight (R55,60). Later on in the afternoon, as accused was about to return to camp, Murray stepped out from between two houses, armed with a carbine which he pointed at accused, saying "'I'm going to kill him. I went and got my rifle and I'm going to kill him'". Two other men attempted to intervene but Murray repeated his statement. It commenced to rain and the others departed, leaving Murray and accused alone. Accused attempted to reason with him on the basis of their previous friendship and finally Murray went away (R56,59,60). He appeared at this time to be intoxicated (R56).

Accused returned to camp, picked up one of his two carbines with the intention of turning it in at the orderly room, but, since he was wet and cold, stopped at the fire at post number 7 to warm himself (R56, 61). Murray approached from the direction of post number 6 carrying his rifle over his right shoulder. Accused said to Pinkard "He has been drinking and before he gets here you take his rifle away from him". Since Pinkard said nothing to Murray, accused said "'Murray, lay down that rifle'". Murray did not comply and, approaching nearer, took his rifle in his right hand pointing it at accused. Accused started to raise his rifle. Pinkard grabbed it and it was discharged in the air. Accused did not know what caused the discharge (R57). Murray backed up and continued to point his rifle at accused who, knowing that he had been drinking, feared he was going to shoot (R58). A second shot was fired (R58,62). Accused stated that he did not pull his trigger at any time (R58), that he "presumed" he fired the second shot and that he could not say definitely whether he shot and killed Murray. He admitted that he told Captain Saunders that "'Private Murray tried to shoot me and I beat him to it'" (R62).

Two enlisted members of accused's organization also testified for the defense. The quarrel or argument in Haussimont, which was the occasion of accused's first contact with Murray on 16 October 1944, occurred between Murray and Lockett as contended by the prosecution (R51). Murray appeared to be "sort of drunk", and accused talked them out of the disagreement by getting some champagne (R52). Accused did not appear to be armed and used no force (R51). Murray "got warm over the situation and was cussing" the accused. Later Murray reappeared with a rifle, told accused to halt and said he had come back to kill him. Murray was "pretty high" (R53). Corporal Mason was summoned and told them to desist, whereupon accused said "'It is all over with, let's go back to camp'" (R47).

Medical testimony offered by the defense showed, through the report of post mortem examination of the deceased, that his urinary and stomach alcohol content was sufficient to warrant a diagnosis of possible intoxication (R49,50; Pros.Ex.B). Further evidence for the defense revealed that, following the shooting, accused's and Murray's carbines were each found to contain a round of ammunition in the chamber and "one or

more" rounds in the magazine and that an empty carbine cartridge was picked up almost directly in front of the accused (Pros.Ex.C).

The defense neither suggested nor requested that any examination be made of the accused to determine his sanity.

5. The following definitions relative to the offense of murder are provided in paragraph 148a of the Manual for Courts-Martial, 1928:

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.

*

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Without legal excuse.--A homicide * * * which is done in self-defense on a sudden affray, is excusable. * * * To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * * The danger must be believed on reasonable grounds to be imminent * * * To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor.

Malice aforethought.--Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his 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 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 * * * (except when death is inflicted in the heat of sudden passion, caused by adequate

(336)

provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person * * * although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused".

Examination of the evidence in light of the above-quoted definition leaves no reasonable doubt of the sufficiency of the record to sustain the finding of guilty of murder in this case. The prosecution's evidence disclosed a cold willingness and intent on the part of accused unlawfully to avail himself to the fullest possible extent of a most dangerous weapon for the gratification of what at most was mere personal rancor. No reasonable or plausible motive or excuse for the shooting is shown. The evidence presented by the prosecution's several witnesses showed that the deceased, immediately before the shooting, had complied with accused's demand that he lay down his rifle and had retreated several steps. Despite such compliance and the fact that, as far as the prosecution's evidence indicates, there was nothing in the manner or attitude of Murray as he approached from the direction of post number 6 to justify the belief that he intended to harm the accused, the latter fired his carbine and shot him fatally in the head. Under these circumstances, the court was justified in concluding from the course of conduct pursued by accused that he acted with personal animosity and ill-will engendered by his previous encounters with Murray and with a degree of violence completely unjustified by any immediate or remote provocation or by any reasonable fear for his own safety. The use of a deadly weapon in a manner which, as in this case, is likely to and does cause death is sufficient to raise a presumption of malice (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.651-655) and hence to render the killing murder within the meaning of Article of War 92. The evidence is legally sufficient to support the findings of guilty of the Charge and Specification (see CM ETO 6159, Lewis; CM ETO 438, Smith; CM ETO 422, Green).

6. In defense, evidence was adduced for the purpose of proving that such ill-will as may have existed between accused and the deceased had been provoked entirely by the deceased, and that the manner and attitude of the latter immediately prior to the shooting was such as to cause fear on the part of accused that the deceased was about to shoot him. Thus, it is shown that the deceased was intoxicated, that accused did not use his pistol when he intervened in the quarrel in Haussimont, and that the deceased did not lay down his rifle prior to the shooting but, on the contrary, had shifted it to his right hand. Various inconsistencies appear within the testimony of accused and between it and the testimony of the other witnesses for the defense, and all of it, insofar as it favors the position of the defense, is in square conflict with the testimony of the witnesses for the prosecution.

CONFIDENTIAL

(337)

These, however, are issues of fact, involving the relative credibility of the various witnesses, and the determination of such issues was within the sole province of the court. Since the findings of the court are supported by substantial and competent evidence, they will not be disturbed (CM ETO 1621, Leatherberry; CM ETO 4640, Gibbs; CM ETO 5451, Twiggs).

7. Several procedural matters are worthy of comment:

a. The assistant defense counsel was excused for the purpose of enabling him to prepare another case for trial, without an affirmative showing of the consent of accused required by paragraph 43a, page 33, Manual for Courts-Martial, 1928. However, accused did not object and, when asked whom he desired as counsel, introduced individual counsel and the defense counsel as associate counsel (R1a). It may reasonably be inferred therefore that accused consented to and was not prejudiced by the absence of the assistant defense counsel.

In this connection, it is noted that the individual counsel introduced by accused was the investigating officer in the case. Although normally the designation as defense counsel of the officer who investigated the case and recommended trial by general court-martial is somewhat irregular, where, as in this case, he was selected by accused and appears from the record to have represented him ably and conscientiously, it cannot be said that accused was prejudiced thereby.

b. Throughout the proceedings, despite the presence of the law member, the president ruled upon all interlocutory questions, such rulings being made in the form prescribed in the Manual for Courts-Martial, 1928, for rulings by the law member. This procedure of course was improper (MCM, 1928, par. 51d, p.40). However, none of the rulings involved error injuriously affecting the substantial rights of accused and the fact that they were made by the president rather than the law member does not constitute a fatal defect in the proceedings (CM ETO 4004, Best).

8. The charge sheet shows that the accused is 37 years three months of age and was inducted at Fort Leavenworth, Kansas, 4 March 1941, to serve for the duration of the war plus six months. He had no prior service.

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

10. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is.

CONFIDENTIAL

(338)

authorized for the crime of murder (AW 42; secs.275,330, Federal Criminal Code (18 USCA 455,567)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4) and 3b).

Franklin R. Miller Judge Advocate

Malcolm R. Thompson Judge Advocate

Edward L. Otterness, Jr. Judge Advocate

CONFIDENTIAL

(339)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 5 MAR 1945 TO: Commanding
General, Advance Section, Communications Zone, European Theater of
Operations, APO 113, U. S. Army.

1. In the case of Private EDWARD ALLEN (37003520), 3282nd Quarter
master Service Company, attention is invited to the foregoing holding by
the Board of Review that the record of trial is legally sufficient to
support the findings of guilty and the sentence, which holding is hereby
approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have
authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office,
they should be accompanied by the foregoing holding and this indorsement.
The file number of the record in this office is CM ETO 5745. For con-
venience of reference please place that number in brackets at the end
of the order: (CM ETO 5745).



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

CONFIDENTIAL

(341)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

5 MAY 1945

BOARD OF REVIEW NO. 1

CM ETO 5764

UNITED STATES)

v.)

Corporal JOHN W. LILLY)
(34855738), Privates First)
Class JAMES L. AGNEW)
(35778252), JOHN E. LOCKETT)
(33545102), and WILLIE)
WASHINGTON (38267780), and)
Privates ERNEST BURNS)
(42102431), WILLIE J. CRAWFORD)
(42056739), HILDRITH H. FLEM-)
ING, SR. (34797550), HERBERT)
LAWTON (42057725), HERBERT)
MOULTRIE (34930417), and PERCY)
D. OREE (34915230), all of)
3247th Quartermaster Service)
Company)

UNITED KINGDOM BASE, COMMUNICATIONS
ZONE, EUROPEAN THEATER OF OPERATIONS

Trial by GCM, convened at Thatcham,
England, 9,10 November 1944. Sentence
as to each accused other than Lawton:
Dishonorable discharge, total forfeitures
and confinement at hard labor for life.
United States Penitentiary, Lewisburg,
Pennsylvania. Sentence as to Lawton:
Dishonorable discharge (suspended), total
forfeitures and confinement at hard labor
for two years. 2912th Disciplinary
Training Center, Shepton Mallet, Somerset,
England.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. Accused, (as to Lawton see par.3, infra) were tried together upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification 1: In that Private Ernest Burns,
Private Willie J. Crawford, Private Hildrith
H. Fleming, Sr., Private Herbert Lawton,
Private Herbert Moultrie, Private Percy D.
Oree, Private First Class James L. Agnew,

CONFIDENTIAL

5764

CONFIDENTIAL

Private First Class John E. Lockett, Private First Class Willie Washington, and Corporal John W. Lilly, all of the 3247th Quartermaster Service Company, acting jointly, and in pursuance of a common intent, did, at King-sclere, Hampshire, England, on or about 5 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Jacob J. Anderson, a human being by shooting him with a carbine.

Specification 2: In that * * * acting jointly, and in pursuance of a common intent, did, at Kingsclere, Hampshire, England, on or about 5 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Joseph W. Coates, a human being by shooting him with a carbine.

Specification 3: In that * * * acting jointly, and in pursuance of a common intent, did, at King-sclere, Hampshire, England, on or about 5 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mrs. Rose Amelia Napper, a human being by shooting her with a carbine.

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

Specification 1: In that Private Ernest Burns, 3247th Quartermaster Service Company, did, without proper leave, absent himself from his organization at Sydmonton Court, Burgh-clere, Hampshire, England, from about 2130 hours, 5 October 1944 to about 2200 hours, 5 October 1944.

Specification 2: (Identical specification as to Crawford).

Specification 3: (Identical specification as to Fleming).

Specification 4: (Lawton - par.3, infra).

Specification 5: (Identical specification as to Moultrie).

Specification 6: (Identical specification as to Oree).

CONFIDENTIAL

5764

Specification 7: (Identical specification as to Agnew).

Specification 8: (Identical specification as to Lockett).

Specification 9: (Identical specification as to Washington).

Specification 10: (Identical specification as to Lilly).

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

Specification: In that * * * acting jointly, and in pursuance of a common intent, did, at Kingsclere, Hampshire, England, on or about 5 October 1944, unlawfully and wrongfully engage in, and become part of, a disorderly and riotous assembly of soldiers.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the times the votes were taken concurring, each was found guilty of the charges and specifications preferred against him. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the times the votes thereon were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, as to each accused, 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. Private Herbert Lawton, 3247th Quartermaster Service Company, was tried with the other accused upon Charge I and specifications, Charge III and specification and also upon the following Charge and Specification:

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

Specification 4: In that Private Herbert Lawton, 3247th Quartermaster Service Company, did, without proper leave, absent himself from his organization at Sydmonton Court, Burghclere, Hampshire, England, from about 2130 hours, 5 October 1944, to about 2200 hours 5 October 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of Specification 4, Charge II except the words "2130" and "2200", substituting therefor the words "1900" and "2100", of the excepted words not

(344)

guilty, of the substituted words guilty, of Charge II guilty and not guilty of Charges I and III and the respective specifications thereunder. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time, the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but remitted eight years of the confinement imposed, ordered the sentence executed as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier is released from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement. The proceedings as to Lawton were published in General Court-Martial Orders No. 219, Headquarters United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S. Army, 19 December 1944.

4. Prosecution's evidence was, in pertinent summary, as follows:

On 5 October, all accused were members of the 3247th Quartermaster Service Company, a colored unit (R27) stationed at Tavistock, Devonshire, England. The unit moved on that day to Depot G-45 at Sydmonton Court, Hampshire (about one or two miles from Kingsclere, according to the testimony of accused Crawford (R106)), where they arrived about 1620 hours. For the trip each was issued his .30 caliber carbine marked with his name (R41,62-66; Pros.Exs.1-10). Their weapons were not taken from them until 2245 hours (R42). None had permission to be absent from his station that night (R27).

Between 1830 and 1900 hours, after the evening meal the ten accused left their new station without authority and proceeded in separate groups, some of which included other members of their organization, to Kingsclere, where they visited bars in various public houses, including one in the Crown Hotel (R28,86-98; Pros.Exs. 13-22). In these bars accused and their companions, most of whom were wearing field jackets, were approached by military police, who, acting pursuant to official instructions, informed them that because they were not in proper uniform, which was "Class A", they must leave the "pubs" and return to camp (Ibid; R62-63). Disputes followed between the military police and some of accused (R29; R87, Pros.Ex.14; R97, Pros.Ex.21). One military policeman told accused Burns he would "have to leave right now" and cocked his rifle (R95; Pros.Ex.20). After a time all accused started to return to camp by foot and accused Fleming warned the military police "We're going but we'll be back".

He did not regard the statement as a joke (R90; Pros.Ex.16). All accused (other than Crawford) and their companions were picked up by a truck at various points on the way and taken to their camp (R29, 87-90, 94, 96-98; Pros.Exs.13-16, 19-22). On the truck the soldiers' conversation indicated they were incensed by the action of the military police in requiring them to leave (R29, 97; Pros. Ex.21). Their anger was increased when Burns (who was picked up with Oree near the camp (R29, 88, 96; Pros.Exs.14, 20)) stated that one of the military police had cocked his weapon at him, and wanted to shoot him (R94, 97; Pros.Exs.19, 21). Upon the suggestion of Fleming and Burns, all accused in the truck (except Lawton) agreed to obtain their rifles and return to town in order to deal with the military police (R29; Pros.Exs.14-22). Accused Crawford and some companions went by bus from the town to camp (R31-32, 91; Pros.Ex.7), where he joined the other accused, learned of their grievances and designs and agreed to return to town with them (R92; Pros.Ex.17). (Crawford testified he was the only one who did not have a rifle (R103)). Lawton retired to bed, according to his voluntary pre-trial statement (R87; Pros.Ex.13). The other eight accused in pursuance of their agreement procured rifles and at some time before returning to town loaded them with ammunition (R87-98; Pros.Exs.14-22). Crawford returned with them to town (R92; Pros.Ex.17). Agnew said in his voluntary pre-trial statement that he had no ammunition (R93; Pros.Ex.18).

On the way back to Kingsclere, there was discussion among accused as to who was to kill "the little MP who caused all the trouble" and whether or not he should be killed or merely beaten up (R92; Pros.Ex.17). When accused arrived at the town, Crawford and Fleming entered two "pubs", inquired for the military police and were informed in both instances that they had left a few minutes before. The group then proceeded to the Crown Hotel and remained outside in the front while Crawford and Fleming entered and upon inquiry were informed that the military police were "on the other side". Fleming thereupon stepped outside to the street followed by Crawford, who noticed that the other accused had moved to a position about ten feet from the left hand door of the "pub" (R90, 92; Pros.Exs.16, 17). At this point, about 2200 hours (R45-48), Jacob J. Anderson, a colored military policeman, emerged from the left hand door of the "pub", evidently followed by another colored military policeman. Accuseds' rifles were pointed at the two, who were also armed with rifles. Someone exclaimed "Here they come", Anderson put on his flashlight, Lilly ordered "Drop your guns", one of the military police said "Disband rifles", and one of accused fired a shot which evidently hit Anderson, who "bent over with his hands over his stomach" (R48, 50, 88, 89, 91, 92, 94, 95, 97; Pros.Exs.14-22). Following the first shot, the occupants of the pub "all hit the floor" as the group outside fired a volley of shots through the windows and the portion of the building over its entrance (R48, 53, 69, 71). One of

(346)

the bullets which came through the window struck a colored military policeman, Joseph W. Coates, in the head as he was sitting at a table (R49,58,59), and another struck Mrs. Rose Amelia Napper, wife of the licensee of the Crown, in the neck as she was standing at her husband's side (R51-53,59-60).

According to their voluntary pre-trial statements, all accused except Lawton were present in the immediate vicinity and at the time of the shooting (R86-98; Pros.Exs.13-22). Washington stated that he believed all the men fired and that he fired ten rounds after he was hit in the back by a bullet (R89; Pros.Ex.15). Moultrie stated he fired two rounds over the top of the pub (R95; Pros.Ex.19). Lockett admitted that he fired two shots while standing at the door and then went down to the floor to avoid being shot and dropped his weapon (R98; Pros.Ex.22). Lilly stated that he pulled the trigger of his carbine but it did not fire because the clip had dropped out (R97; Pros.Ex.21). Testimony of a ballistics expert established that the carbines of Washington, Agnew, Lawton and Moultrie, which were delivered to him for examination and testing on 9 October (R73), had recently been fired (R75). Lawton's carbine was found by a British detective sergeant shortly after the shooting, in the barroom of the Crown Hotel with a clip therein containing four live rounds (R69-70; Pros.Ex.5). The sergeant also found outside of the building 33 expended .30 caliber shells (R69-70; Pros.Ex.12). Of these, according to the testimony of the expert, 15 had been fired by Washington's carbine, six by that of Agnew, seven by that of Lawton, and five had probably been fired by Moultrie's weapon. The weapons of Oree, Lockett, Fleming, Lilly, Crawford and Burns bore no evidence of recent firing (R75).

After the shooting, the accused left the scene in various directions (R87-98; Pros.Exs.14-22). At about 2245 hours their company commander checked his men and their arms and discovered that Agnew, Fleming and Crawford and their carbines were missing but that although Lockett was also missing (R42), Lawton's and not Lockett's carbine was gone (R43).

Medical testimony established that Anderson died as a result of internal hemorrhage from the rupture of the aorta and the bronchus caused by a bullet which entered the breast bone; Coates died as a result of a wound from a bullet which entered the right temple region behind the ear, penetrated and fractured the skull, lacerated the brain, and made its exit through the left temple region about two inches above the left ear (R55,58); Mrs. Napper's death was caused by asphyxia from respiratory obstruction due to hemorrhage into the base of the swollen tongue, in turn due to a bullet wound which entered the neck of the left side, penetrated the base of the tongue and emerged on the right side of the neck (R59-60).

5. The following evidence, in pertinent summary, was introduced for the defense:

On the evening of 5 October 1944, by order of the company commander, all rifles in accused's company were picked up, including one hanging beside Lawton's bed, not identified as his weapon (R99-100).

Washington's service record showed that his Army General Classification Test score was 42, Class 5, the lowest score obtainable. Without further examination, the need for which is indicated by such score, it would be impossible to determine whether it was a result of illiteracy, mental deficiency, psychosis or simply not trying. Such a score would have no bearing upon the man's ability to tell right from wrong (R111).

After explanation of their rights (R100-101), Crawford elected to testify as a witness on his own behalf (R102-110); Fleming, Moultrie, Burns, Lockett and Lilly, after first electing silence (R102), elected to make unsworn statements (R113-115); and Agnew, Washington, Lawton and Oree elected to remain silent (R102,112,114,115).

Crawford testified, in material substance, as follows:

He and his companions, including accused Moultrie, went to Kingsclere on the evening in question and entered a "pub" where two military policemen informed them they were out of uniform and must return to camp. Thereafter they took a bus to camp where Crawford met the others who said they had gotten into trouble with some military police. He was curious about the matter, but did not have a rifle because he did not know what was going to happen. He had no pass that night (R103,104).

"Finally, I end up in town with them. On the way there the boys say the reason they were taking their rifles was because they wanted to talk to the MPs and no-one had any intention of killing. They wanted to talk to the MPs and the only way to talk to them was to disband them of their rifles. I had to go inside the pub to see if the MP was there because I was the only one that did not have a rifle. I goes in the first pub and there was not anyone in there. I goes in the second pub and they were not in there. As I got to the last pub, and as I goes in there, I left the boys standing out by a 'phone booth. I went on one side of the door and the guy told me the MP was on the other side. As I goes in the door to

CONFIDENTIAL

(348)

tell the boys the MP was on the other side, I saw an MP one with a rifle and one with a flash light. He goes up to the boys and flashes his light on them. The other MP was almost in front of me. He came out later than the other MP. The MP backed out with the flash light and dropped the light. The next thing I heard was a single shot. He backed up against the wall again. The next time I heard a volley of shots and I heard this MP at that time holler and put his hand up against his stomach and against the wall he fell. At that time I dropped to my knees because I was in between the fire, but just to the right of it. I crawled and then I ran" (R103).

At camp he heard one of accused say they were going to kill the military police. He knew why the other accused had been directed to return to camp, but he did not believe they were going back to kill the military police. If they did not take rifles "they could not talk" to the military police, who were armed (R105). He knew everybody had ammunition. He heard Agnew say "No, let me kill him" when Burns said he was going to kill the military police, but he thought they were just talking. He knew accused were in an uproar (R106). Between eight and 12 men were in the group which returned to town (R108). He entered the pubs first, unarmed, so that he could lead the military police outside. The remainder of accused stayed outside with rifles slung on their shoulders (R107). At the Crown both of the military police who came out had carbines on their shoulders (R109). One of them said "Disband rifles" when one of accused' rifles was pointed at him (R108). The men were standing in front of the Crown in a group (R109).

Fleming stated that the group "had no intentions of murder", but returned to town to talk with the military police about the way the latter treated them. Most of accused were never in trouble before but were merely excited because men pointed rifles at them and threatened to shoot them if they moved (R113).

Moultrie stated that all accused were excited and did not know what they were doing. He did not know what caused them to fire, but it was neither his nor the other accused' intention to shoot or kill anybody. If Moultrie were given a chance he would try to join the Army again and to be a good soldier and thought the other accused would do the same (R113).

Burns admitted accompanying accused but emphatically denied saying "he was going to kill somebody" (R113).

Lockett stated he was never arrested or in court before. He worked on a farm in Virginia in his youth and then worked for the State of Virginia and the War department until his induction 11 December 1943. In the Army he never missed a formation and never had any trouble. He supported his wife and mother and did not want any trouble. On the night in question he drank six or seven beers in Kingsclere, the first drinking he had done in some time. He did not return to town "with any intention of doing anything to anyone", but merely "trailed along with the boys just because there was a crowd of us soldiers", who had no knowledge of what was going to happen. If he had known, he would have had more sense than to be in it. He did not shoot anybody or do anything to anybody. He highly regretted the whole affair and asked for mercy (R114).

Lilly stated that 5 October was his birthday and had it not been he would not have been in town. He was almost drunk. He emphasized that "Every man is for himself" (R115).

6. Accused were tried together without express consent and without objection on their behalf. They were charged jointly with three murders and with engaging in a disorderly and riotous assembly of soldiers and were charged severally with absence without leave, in each case at the same place and for the same period, on the date of the other alleged offenses. Under the circumstances the consent of each accused to be tried together was unnecessary. Had a motion for severance been made, the granting of the same would have been within the sound judicial discretion of the court. In view of the nature of the charges and the conduct of the trial there would have been no abuse of the same had the court denied the motion (CM ETO 395, Davis et al; CM ETO 3147, Gayles et al; CM ETO 8234, Young et al)

7. a. Charge II and specifications: The evidence, including the voluntary pre-trial statement of each accused, establishes beyond doubt that each was absent without proper leave at the place and date and for the period alleged. The court by substitutions and exceptions found accused Lawton guilty of absence without leave from about 1900 hours to about 2100 hours. The evidence, including his voluntary pretrial statement supports the findings and the only question is whether such finding involves a fatal variance from the period alleged in Specification 4, Charge II, i.e. "from about 2130 hours * * * to about 2200 hours". The relevant inquiry is whether the court's action changed the nature or identity of the offense charged or increased the amount of punishment imposable (MCM, 1928, par.78c, pp.64-65), and whether accused was notified of and accorded an opportunity to defend against the offense of which he was convicted (Winthrop's Military Law and Precedents (Reprint 1920), p.383; Cf: CM ETO 1663, Ison).

"The substitution of a new date * * * may, but does not necessarily change the nature or identity of an offense" (MCM, 1928, par.78c, p.65).

(350)

The court did not change the date of the offense but changed the period "from about 2130 hours * * * to about 2200 hours" as alleged, to "from about 1900 hours * * * to about 2100 hours". The use of the word "about" before the hour of commencement and hour of termination of the absence, put accused on notice that times other than the exact hours alleged might be proved (Cf: CM ETO 6842, Clifton). The fact that an absence of about one-half hour was alleged and an absence of two hours was proved does not, under the circumstances, render the variance fatal, as it obviously does not increase the amount of punishment imposable. Accused Lawton was reasonably notified and given a fair opportunity to defend against proof of any relatively short absence occurring within a reasonable time before or after that alleged. In the opinion of the Board of Review, neither the nature or identity of the offense charged was changed by the action of the court, accused was adequately notified in the specification of the offense of which he was found guilty and was given fair opportunity to defend against it, and therefore the variance did not injuriously affect his substantial rights within the contemplation of Article of War 37. There is no danger of accused's being again tried for either the absence alleged or that proven, as he was acquitted of the former and convicted of the latter (AW 40).

b. Charge I and specifications: Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed any may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed, 1932), sec.426, pp.654-655), and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944). An intent to kill a particular person is not essential where an unlawful act is done deliberately with the intention of inflicting serious bodily harm and death ensues from such unlawful act (1 Wharton's Criminal Law, supra, sec.426, p.632).

The evidence leaves no doubt as to the guilt of the accused (other than Lawton) of the crime of murder. Angered by the interference of military police with the pursuit of their pleasure, they conceived and agreed upon a murderous plan to wreak joint vengeance upon them or their kind. In execution of the plan they all, with the exception of Crawford, secured their carbines, loaded them with ammunition and marched back to town together for the express purpose of dealing with them. Crawford, who was fully cognizant of their purpose, remained unarmed and sought out the intended victims in two "pubs", and when he and Fleming found them at the Crown Hotel bar the other accused were grouped outside in front, ready to fire upon them. The shooting of Anderson which followed his exit from the bar was utterly cold-blooded; that of the

other unfortunate victims, Coates and Mrs. Napper, was the result of the manifest disregard of human life by those accused who together fired an entire volley into the "pub" which they know was occupied: Washington, Moultrie, Lockett and Agnew. Of their guilt of murder there can be no doubt (CM ETO 3585, Pygate; CM ETO 6229, Creech; CM ETO 7815, Gutierrez; and authorities cited in those cases). The fact that none of accused deliberately planned to kill Coates and Mrs. Napper, who were struck by bullets which were fired into the public house in the wild, indiscriminate shooting, is immaterial. They did, by their acts, show their intent to kill Anderson, and it is well settled

"Where A aims at B with a malicious intent to kill B, but by the same blow unintentionally strikes and kills C, this has been held by authorities of the highest rank to be murder, though if A's aim at B was without malice the offense would be but manslaughter" (1 Wharton's Criminal Law (12th Ed. 1932), sec.442, p.677-679).

Malice followed the bullets which killed Coates and Mrs. Napper (CM 221640, Loper 13 B.R. 195 (1912)). Even though Fleming, Oree Lilly and Burns, all of whom were in the group, evidently fired no shots, their guilt as aiders and abettors and thus as principals is equally well established in view of their active preconcert in the plot and their continuing presence, support and encouragement throughout its execution. The same is true as to Crawford although he carried no weapons (CM ETO 1453, Fowler; CM ETO 3740, Sanders et al; CM ETO 5068, Rape and Holthus; and authorities cited in those cases). All were members of an unlawful assembly, some of whom actually committed the cruel murders. As such, all members were guilty as principals (CM ETO 804, Ogletree et al; CM ETO 1052, Geddies et al). The Board of Review is of the opinion that the findings of guilty of all convicted accused are supported by competent substantial evidence of a convincing character.

c. Charge III and Specification: It was alleged that the ten accused (all of whom but Lawton were convicted)

"acting jointly, and in pursuance of a common intent, did /at the same time and place as the murders alleged in Charge I and Specifications/unlawfully and wrongfully engage in, and become part of, a disorderly and riotous assembly of soldiers".

As indicated in the discussion under subparagraph b, supra, the nine accused engaged in and became a part of an assembly of

(352)

soldiers whose conduct was most certainly disorderly, and the violent and tumultuous disturbance of the peace to the terror of the people, caused by their preconcerted fusillade upon the Crown Hotel bar, is conclusive evidence of the riotous character of the assembly (Cf: CM ETO 895, Davis et al). Indeed, all of the elements of the common law offense of committing a riot, condemned by Article of War 89, were present in this case and accused might more appropriately have been charged with such offense.

"Committing a riot is the joining in a tumultuous disturbance of the peace by three or more persons acting with a common intent either in executing a lawful private enterprise in a violent and turbulent manner to the terror of the people or in executing an unlawful enterprise in a violent and turbulent manner (54 C.J., sec.1, p.828; MCM, 1928, par.147c, pp.161,162)" (CM ETO 895, Davis et al, p.23).

The nine accused joined in a tumultuous disturbance of the peace, acting with the common intent of avenging themselves of the supposed injustice committed on them by the military police, and in the violent and turbulent execution of their malevolent purpose, fired a volley of shots into a public house, directly causing the death of three persons. There was clearly no multiplication of charges (Ibid.; CM ETO 4570, Hawkins and authorities therein cited; CM ETO 8234, Young). The Board of Review is of the opinion that the record of trial fully supports the findings of guilty of all convicted accused.

8. The charge sheet shows the following with respect to the age and service of the several accused:

<u>ACCUSED</u>	<u>AGE</u>	<u>DATE of INDUCTION</u>
Lilly	19 yrs.	16 December 1943
Agnew	24 yrs. 3 mos.	15 December 1943
Lockett	29 yrs. 11 mos.	11 December 1943
Washington	31 yrs. 11 mos.	1 February 1943
Burns	19 yrs. 1 mo.	15 December 1943
Crawford	19 yrs. 6 mos.	27 November 1943
Fleming	26 yrs. 3 mos.	1 December 1943
Moultrie	19 yrs. 11 Mos.	31 December 1943
Oree	19 yrs. 1 mos.	8 December 1943.

Each accused was inducted to serve for the duration of the war plus six months. None had prior service.

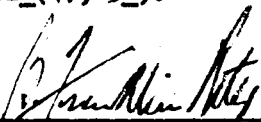
9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any accused were committed during the trial.

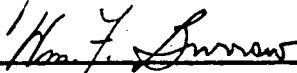
CONFIDENTIAL

(353)

The Board of Review is of the opinion that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence.

10. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

 Judge Advocate

 Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(354)

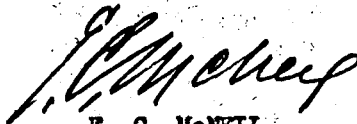
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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 May 1945 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S. Army.

1. In the case of Corporal JOHN W. LILLY (34855738), Privates First Class JAMES L. AGNEW (35778252), JOHN E. LOCKETT (33545102), and WILLIE WASHINGTON (38267780), and Privates ERNEST BURNS (42102431), WILLIE J. CRAWFORD (42056739), HILDRITH H. FLEMING, SR. (34797550), HERBERT MOULTRIE (34930417), and PERCY D. OREE (34915230), all of 3247th Quartermaster Service Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty 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 execution of the sentences of all of the foregoing accused.

2. Your attention is invited to paragraph 7c of the Board holding, wherein it is noted with respect to Charge III and its Specification that the accused might more appropriately have been charged with the very serious offense of committing a riot in violation of Article of War 89, which offense was clearly established by the evidence. The grave danger to the public peace and safety ensuing upon the concerted joining in a tumultuous disturbance by a group of persons in a violent and turbulent manner, which is the essence of that offense, is unhappily illustrated in this case. The fact that they were also charged with and proved and found guilty of the resultant murders does not make the committing of the riot less serious.

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 CM ETO 5764. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5764).



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

CONFIDENTIAL

5764

(355)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

30 JAN 1945

CM ETO 5765

UNITED STATES	)	BRITTANY BASE SECTION, COMMUNICATIONS
	)	ZONE, EUROPEAN THEATER OF OPERATIONS
v.)	
Private WILLIAM MACK	)	Trial by GCM, convened at Morlaix,
(32620461), Battery A, 578th	)	Brittany, France, 23 November 1944.
Field Artillery Battalion	)	Sentence: To be hanged by the neck
	)	until dead.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN and STEVENS, 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 William Mack, Battery A, 578th Field Artillery Battalion, did, at Pentreff, LeDrennec, Finistere, France, on or about 20 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Eugene Tournellec, a human being, by shooting him with a carbine.

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

5765

(356)

Specification: In that * * * did, at Pentreff, LeDrennec, Finistere, France, on or about 20 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Catherine Tournellec, by willfully and feloniously grasping her, forcibly tearing her clothing from her body, and exposing his private parts to her.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding Officer, Bri-
tany Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The prosecution's evidence was substantially as follows:

On 20 August 1944 accused was a cook in Battery A, 578th Field Artillery Battalion, stationed near Pentreff, LeDrennec, Department of Finistere, France (R8,49-50,54,57). Shortly after dinner on that day, which was served at about 1715 hours, he was seen drinking cognac. Between 1945 and 2015 hours in the mess tent he announced to the kitchen personnel "I'm going out and get me a piece of tail, and I don't want any of you to try to stop me or follow me". The mess sergeant, endeavoring to dissuade him, reminded him of the fact that no one was allowed to leave the area and ordered him not to leave (R9,27-28). He said "he was going anyway" (R28) and that "he was grown and no one could tell him anything" (R9). He thereupon departed "across the field" (R28). He was armed with a carbine, his breath smelled of liquor and he talked loudly but did not stagger (R11-12,28). He was not seen at his sleeping quarters until 0200 hours the next morning (21 August) (R28).

On 20 August Eugene Tournellec, 47 years of age, lived in Pentreff, LeDrennec, with his family, which consisted of his wife, Louise (R12,38) and the following children: Catherine, 16 (R12,29), Pierre, 15, (R12), Francois, 13 (R12-13), Michael, ten, Jeanne, nine, and Agnes, four months of age (R13,33). The Tournellec house was about one mile by road and about 500-600 yards "across fields" from where accused was stationed (R50). The dwelling comprised three floors. On the ground floor the only outside door entered upon a corridor, behind which was a small room with an outside window. At the end of the corridor was a door leading to the kitchen which

5765

contained a table cupboard, fireplace and two beds which stood by the rear wall (R14,16,17,30;Pros.Ex.2). Catherine and Jeanne slept in one of the beds; Michael and Francois in the other (R15,21,29). To the right of the corridor, near the entrance, were stairs leading up to the "first" floor (R13-14;Pros.Ex.2), which consisted of a bedroom, where slept Eugene Tournellec, his wife, and in a cradle near her mother's bed the baby Agnes, and one other room with "certain pieces of furniture" (R14-15,29). Pierre slept in the attic (R13,20,22). There was no electric lighting in the house (R39). A diagram of the ground floor, drawn by Catherine in open court, was admitted in evidence, the defense stating there was no objection (R47-48;Pros.Ex.2).

According to the testimony of Pierre and Catherine, the following events occurred at their home on the night of 20-21 August 1944: About 2300 hours (R29), when it was very dark (R39), after the family had retired for the night in the places above indicated, Pierre was awakened by a knock on the door of the house. When his father directed him to get up, Pierre took his flashlight and descended from the attic to the corridor. Before he had completely descended the stairs he saw a colored American soldier in the corridor, on whom he shone his flashlight when the soldier lit a match. Pierre advanced to within a meter of him and noticed that he was "straight—large * * * broad—big", but was unable to identify him at the trial. He detected a strong odor of liquor on the soldier's breath but the latter stood steadily on his feet and did not stagger when he walked (R13,14,20). He said "'pas Boche, pas Boche'", took Pierre's flashlight from him and when the latter opened the door to the kitchen, entered and searched that room, holding his carbine under his arm with the barrel pointed forward and also holding the flashlight. The soldier then directed Pierre to precede him and followed him upstairs to the first floor where with the flashlight he searched the bedroom occupied by Monsieur and Madame Tournellec and the baby Agnes, as well as the furnished room (R14,21,22). Pierre continued to the attic, put on his clothes and, after the soldier searched the attic, descended with him to the kitchen, when the soldier asked for wine, cognac and cider (R15,22).

Catherine and Jeanne had previously retired to bed, and had fallen asleep. The former wore her underwear or petticoat over a bathing suit. She was awakened by the sound of the soldier's voice (R29-30,39-40). She "stood" in her bed while the soldier went upstairs with Pierre. When the soldier returned to the kitchen his carbine was hanging on his shoulder and he shone the flashlight on Catherine and Jeanne who were in bed. Although there was no other light in the room, Catherine observed that he was a "high, big and a strong" colored American soldier. He searched in the bed occupied by Francois and Michael and in that occupied by the girls; stared at the latter for a moment and then left the room (R29-30,40). Meanwhile Monsieur and Madame Tournellec came to the kitchen and the father directed the four children to get up (R23). Catherine thereupon arose and put on her one-piece, short-sleeved dress and the other three also proceeded to get up. Pierre was also present in the kitchen. The soldier stood near the fireplace, beside Monsieur and Madame Tournellec (R23,30). Pierre, Catherine, Francois and Michael went into the corridor (R15,23), where the soldier attempted to kiss Catherine (R42). He continued to demand cognac, wine and cider and when told there was none, he evidently

(358)

became angered, and with his carbine in his hand shouted "'Boom, boom'". Thereupon the mother and father became frightened and left the house through the window in the small room behind the corridor (R15-16,23,30-31; Pros.Ex.2). Thereafter the children standing in the corridor, began to weep. Catherine endeavored to convince the soldier that there was nothing to drink (R30,41,43), but he only repeated "'boom,boom'" (R43), and "took" Catherine and told her to kiss him (R16). She led him to the door, which was then open, saying in English "'no cognac, no wine'" and telling him that he might be able to find something to drink in a shop farther on. He was still carrying his carbine (R41) with the stock under his arm (R42).

After leaving the house through the window with his wife, Eugene Tournellec proceeded outside of the house to the open entrance door which he closed, and said to the soldier, who was standing near the door in the corridor, "'I am going to close you there and fetch somebody else'" (R17,23,31,41,42). Almost immediately the soldier who stood within the corridor discarded the flashlight, lifted his carbine, advanced a few steps to within about a meter of the entrance door, aimed the carbine at it and fired. He faced the children in the corridor at this time. Both Pierre and Catherine testified positively that they saw the soldier fire his carbine at the door (R16-17,23,31,41-43). The flashlight was not "on" and it was dark in the corridor at the time, but shadows of people were discernible (R42-43). After this shot, Pierre testified, he was at the window and heard his father falling but did not hear him say anything (R18). The soldier opened the door, went outside and fired several more shots after which no further sound was heard (R18,32). Catherine and Jeanne sought refuge under the table in the kitchen (R32,43; Pros.Ex.2). Pierre and his brothers fled through the window through which their parents had escaped (R24,30,32; Pros.Ex.2).

Catherine testified that the soldier then reentered the house, lighted the flashlight, searched for her in the beds in the kitchen, discovered the two girls under the table and followed them to "the other end of the house". In the corridor he kissed Catherine nine or ten times on the face, mouth and lips (R32). She smelled alcohol on his breath, but he did not stagger (R45). "Afterwards I understood he wanted something else from me and I told my younger sister to get away" (R33). "Before he began to try" he put his carbine down, and Catherine heard somebody moaning from the outside (R34). She asked "'is my father there'", to which the soldier replied "'yes, your father is there'" (R35). Jeanne left through the window, leaving the soldier and Catherine alone in the house except for the baby Agnes upstairs.

"Then he took my breasts up * * * he wanted

(359)

to put down my bathing suit * * * he was trying at my shoulders, he could not do it easily. * * * Then afterwards he left them quiet. He opened his trousers. He took out his private parts and put my hand on it. * * * afterwards it was so he could not get my dress by pulling it down. He tried to tear my dress, my underwear and my bathing suit. * * * My dress and my underwear were not torn but the upper part of my bathing suit had been torn. * * * The whole upper part" (R33).

He unbuttoned her dress, put his hand underneath it, tore off one of the bathing suit straps, which were tied on both sides under the arms and succeeded in pulling the bathing suit down to just above her knees (R33-34,44). He did not succeed in exposing her private parts as she was fighting and struggling "as best I could", but "he wanted to touch it - - even when standing up" (R34). She endeavored to escape him, but he grabbed her by the arms and "when I wanted to flee away, he was taking my whole body in his arms and he was kissing me". She tried to push him away. During the struggle she slapped him, whereupon he said "'boom,boom'" and "wanted to take his weapon", which was "on the ground" near the door (R34,45). She understood that he wanted to kill her (R36). At that moment the girl began to faint and he took her in his arms and placed her on her back on the cement floor (R34). Her bathing suit was now about level with her knees, her dress up and her private parts exposed. The soldier's private parts were also exposed. She did not remember how long she remained in a fainting condition, but when she regained consciousness her clothing was still in the same condition and her position was unchanged. The soldier was kneeling by her side, his right knee level with her right knee, his left knee level with her head, and his head about level with hers. She was aware of his body across her face and "something from his private part" was rubbing on her lips (R35, 45-46,49). She could not state what it was but it was about the size of three fingers and "smelled nasty" - she had never smelled it before. He kissed her, picked her up, kissed her again "many times", told her that he would return "'tomorrow'", took his carbine and departed (R36,46).

Catherine followed the soldier to the entrance door and when he left went outside in order to see who was moaning. She saw her father lying "beside the door", his head "in the direction of the road" and again heard him moaning (R36-37,48). He was lying on his back, the back of his head on the ground and his arms alongside of his body. He said nothing to Catherine, who did not go to

5765

(360)

his side or attempt to help him in anyway and was afraid to seek help because she believed the American would prevent her from going (R37,49). After returning to the house and remaining one or two hours, she went to the house of a neighbor, where, upon the latter's advice, she remained for the night. Upon returning to her home the next morning (21 August) she saw her father lying in the same position as on the preceding night. "He had a hole in his forehead" (R37). "His whole brain was practically out of the scalp. * * * he was dead". By his side were some pieces of lead and about a meter and a half away were some blood clots (R38). Pierre testified that when he arrived home in the morning, after Catherine, he found his dead father "close to the door" with his head covered (R18).

About 2350 hours 20 August Jeanne came running to the bivouac area of the 578th Field Artillery Battalion, screaming "'the Boche, the Boche'" and "that they were murdering her mother and father " (R50). Second Lieutenant Alfred E. Kayes, of accused's battery, who had heard three or four shots which apparently came from the direction of the Tournellec farm about 2230 hours, met Jeanne when she arrived. Because he was previously warned that Germah patrols might be in the vicinity and desired to investigate the girl's story by daylight, he decided to wait until then to go to the farm. About 0600-0700 hours on the following morning he proceeded there with Lieutenant Colonel Gilbert C. Barnes, Commanding Officer of the Battalion (R49,50-51,64-65).

Kayes testified that upon arrival at the scene he quickly observed that Tournellec, from whose body blood was oozing, "had been shot through the head and was dead. * * * the top of his head was pretty badly blown off" (R51). Captain Richard V. Riddell, Medical Corps, 578th Field Artillery Battalion, testified that he arrived on the scene with a Major Nelson of the "CIC" about 1000 hours 21 August and observed Tournellec's body lying about ten feet from the door of the house, the feet pointed toward the door and the head away from it. He made an examination of the body, as to which he testified as follows:

"The only apparent wound was a gun shot wound through the forehead, the point of entrance being about an inch above the left eyebrow, a small hole, evidently the point of entrance of the bullet. There was a defect of about three inches in diameter of the skull, on top of the head, evidently the point of exit of the bullet, with considerable damage to the brain underneath this area and evidently a severe amount of hemorrhage the night before. There was considerable amount of clotted blood throughout the area where his head had lain through the night" (R54).

5765

(361)

The top of the head was laid open and what remained of the brain substance was visible, but "in that area" the brain was completely destroyed (R54). In witness' opinion the cause of death, which occurred probably over six hours prior to the examination, was a gun shot wound. It was possible that he lived up to half an hour after receiving the wound and also possible that he was able to make some sound during that period (R55). It was stipulated between accused, defense counsel and the prosecution that Tournellec "died by reason of a penetrating gunshot wound of the left cranium" (R70).

Kayes testified further that very close to the body he discovered four expended .30 caliber carbine ammunition cartridge cases and one live round of the same type, which were admitted in evidence, respectively, as Pros.Exs.3,4,5,6, and 7. The defense stated there was no objection (R51-52). Kayes, a former ordnance man whose hobby was small arms, examined the expended cases closely and noticed that the mark caused by the impact of the firing pin thereon was "a little off center" and that there was a "little defect" on the base of the cases, caused by "an imperfection on the face of the bullet". He was sure he would be able to find the weapon that fired the cartridges. The "very small, shiny mark" on the rim of the shells could easily be detected with the aid of a magnifying glass (R53). He handed the five cartridges to Lieutenant Colonel Barnes, who sealed them in an envelope. Upon returning to his command post the latter left them in the official custody of his executive and later turned them over to Colonel Ralph E. Bower, Inspector General, VIII Corps, of which the 578th Field Artillery was a part. The exhibits were examined with a magnifying glass by each member of the court (R53,57,65).

Captain J. C. Palmer, Jr., of the same battalion, testified that prior to 20 August accused was armed with a .30 caliber carbine (R55) and that after that date witness secured from accused's personal belongings at the 635th Collecting Station such a weapon, serial number 2971456. The defense stating it had no objection, it was admitted in evidence as Pros.Ex.1. The carbine, however, which was assigned and issued to accused by the battalion had a different serial number (R56). Catherine Tournellec testified that the weapon which the colored American soldier fired through the door of her house on the night of 20 August was "rather like it Pros.Ex.1 in appearance" (R31-32).

Colonel Bower testified that he investigated the case and on 23 September caused accused to be confined and then interrogated him in his (Colonel Bower's) office (R57,63). The questions and answers were taken down and transcribed into about 23 pages, which were not offered in evidence, but, without objection by the defense, were used by witness "to refresh my memory". The 24th Article of War was read and explained to accused, he was warned to tell the truth and was informed he would not be required to make any statement which might tend

5765

(362)

to incriminate him. Colonel Bower made no threats or promises to him, nor was accused under "the slightest" force, duress or compulsion. In response to interrogation accused narrated at length his actions on 20 August. He stated that he drank wine that day but "was emphatic that he was not drunk". He said he went to bed rather early, before dark and did not leave the battery area thereafter and that his "rifle" was with him all night (R58). Colonel Bower showed him the carbine (Pros.Ex.1) and accused stated he could identify it by the mark on the stock, "Rosbbell D". He stated he had lost the "rifle" originally issued to him "due to a vehicle overturning", but recovered another (Pros.Ex.1) and carved the above quoted name on the stock. (The name "Rosbbell D" appeared on the left side of the stock of Pros.Ex.1). He was very emphatic that he knew nothing about the shooting of Eugene Tournellec (R59), and disclaimed any knowledge of the crime. He protested lack of memory as to his actions between 2100 or 2130 hours 20 August and breakfast time the following morning. Colonel Bower "told him he knew he /accused/ had not told me all and that at any time he would like to tell me more, I would be glad to listen to him". The following day (24 September) Colonel Bower asked him if he desired to talk to him, but accused declined to elaborate on his story, saying "I can't remember everything yet". Thereupon Colonel Bower caused him to be taken to the scene of the killing and returned to the guardhouse for the night.

On the next day (25 September) Colonel Bower in his office (R60,64) again warned accused as to his rights and swore him as a witness. He again made no threats or promises to accused nor did he place him under "the slightest" duress or compulsion. The "testimony" was taken by a stenographer, but the transcription was not offered in evidence and, without objection by the defense, witness testified as follows:

"I approached him saying, 'Private Mack, you have told me you want to make a statement to me. What is it you want to tell me?' To which he replied in a very dramatic, sobbing manner, apparently most sincere, 'I want to ask you to forgive me for telling you the other day I was telling you the truth. I was as far as I knowed, but I remember better now. They took me out there yesterday to that house. I could not remember. It has been a long time that something has been bothering me. I could not remember what it was. I could not think what it was. I kept seeing a little baby. Oh, Lord! I could not remember whether I had dreamed it or whether it was real or what. Oh, Lord!'

5765

Then he sobbed. 'It seems like I went through a long lane and come to a house. I prayed last night and asked God to show me what was in my mind that I could not understand, and find what it must have been, that it could not have been nothing else. Oh, Lord! I must have been out of my mind. I would not have done it for nothing in the world. Oh, Lord! I did not know what I was doing. That poor old man. Oh, Lord!' He went on like that, explaining various things. At times, his speech became almost incoherent and sobbing. I asked him, 'then you know now that you are the man who killed Eugene Tournellec?' He said, 'yes, sir, I must be.' 'Don't you know?' 'Yes, sir, but I would not have done it for nothing in the world. I did not know what I was doing. I was out of my mind.' He continued in that vein and spoke: 'I could not do such a thing like that. I was just out of my mind. I did not know what I was doing. I thought it was something I had dreamed, but it was not.' I asked him, 'you mean that you had seen these things in your mind, and thought it was a dream?' He answered, 'they kept on passing in my mind.' 'What made you change?' He stated, 'yesterday when they carried me out, and I saw the little baby.' 'Had you seen that baby before?' 'It must have been that one. It came back to me.' I asked him, 'where was the baby?' He answered, 'in a bed—in a basket, beside a bed,' 'In what place?' 'In a house.' 'In what house?' 'I don't know, the house that I went to.' I asked him 'it must have been the house you went to?' 'Yes, sir.' 'Do you know if it was?' 'It must have been. I would not have done it for nothing in the world.' I asked him, 'do you remember where you were when you fired the first shot?' 'No, sir, I don't remember firing a shot at all. Just remember hearing somebody moaning. Don't remember the gunshot at all.' Question: But you do remember now after having been taken to the scene of the Tournellec farm that you had been there before? Answer: Yes, sir. Question: And that is where you had seen the baby in the bed and heard the man moaning? Answer: Yes, sir.

Q. All these questions are your questions?

A. Yes, sir.

Q. And that is what you said to the accused?

A. Yes, sir.

(364)

- Q. All the answers are the answers of the accused to you?
- A. Yes, sir, all of his own volition. Question: A little while ago, you said that 'poor old man'. What 'poor old man' do you mean? Answer: That is the one that was shot. Question: Did you see him? Answer: No sir, I did not see him. I don't remember seeing anybody. Question: How do you know he was an old man? Answer: I just heard him groan, and they say he was a man. I don't even remember leaving the house. I don't remember how I got away from there. Question: But you do remember now after having visited the Tournellec farm on Sunday, 24th of September, that it was the same place where you had seen the baby in the bed and had heard somebody groaning, and that you had thought it was a dream? Answer: Yes, sir. Question: Then did you, or did you not, on the 20th of August, 1944, go to the Tournellec farm that Sunday? That night? Answer: It must have been me. I could not remember. I don't even remember leaving the area, just remember going through a long lane. It seems like I would have known. Don't remember anybody saying anything to me at all. Question: Let's go back a little, Mack, to help refresh your memory, do you remember that Sunday, August 20th, when your battery moved, that you and Corpening had this bottle of white liquor in addition to the wine that you told us about? Answer: No, sir, I don't remember that. I just don't remember. I never swore to a lie before in my life. I never would in the world have done it—would not have done it.
- Q. Will you tell us more, by the way of testimony, as to what you actually said to him and what he actually said to you?
- A. Again I said to him: 'Do you remember now having gone down a long lane and having gone to a house where you saw a little baby in a crib and where you heard a man moaning?' He answered, 'yes, sir.' Question: So you do admit that it was your gun that killed Eugene Tournellec? And he answered, 'yes, sir, it must have been.' He was asked again, 'do you admit now that you are the man that killed Eugene Tournellec?' To which he replied,

5765

(365)

'yes, sir, I have to.'

Q. Were there any other times during the course of your conversation, in which he again made a statement to you, regarding the death of Eugene Tournellec?

A. I think I have mentioned all the times that he made that, at least, twice. I asked him one question, 'is there any doubt in your mind now, Mack, that the place you visited yesterday, is the same place you visited on the night of 20th August, when you saw the little baby in the crib and heard the person moaning?' To which he replied, 'no, sir, there don't seem to be' (R60-62).

* * *

"Q. Would you say his speech was coherent or incoherent throughout?

A. At times almost incoherent. We would have to ask him to repeat because he was whispering. He was wiping his eyes and had his head bowed very low, looking at the floor, sobbing, mumbling. When he would mumble, we would get him to repeat so that we could understand. Nothing was recorded that wasn't heard" (R64).

Witness identified Pros.Exs.3-7 as the four empty and one live cartridge cases handed to him on 31 August by Lieutenant Colonel Barnes, whose "testimony" he also took. Witness too noted the peculiar markings on the expended cartridge cases, somewhat resembling a diminutive "E target" (R62). His testimony concerning the test firing conducted in the 578th Field Artillery Battalion (R62-63) was purely hearsay and was ordered stricken in part by the law member (R63).

Major Arthur D. Brittingham, Jr., Ordnance Department, Brittany Base Section (R24), the official investigating officer in the case, testified that on or about 3 October in the guardhouse in the course of the investigation, he warned accused of his rights and read him his "testimony" given before Colonel Bower, and accused, without being threatened in any manner or promised anything, made a statement. It was "decidedly incoherent"; accused mumbled, was very morose and sobbed. Witness wrote down a relatively brief, coherent version of the statement and read it to accused, who said "'yes, that is all right'" (R26). The substance of the statement (R27) was as follows:

"On or about the 24th of October [corrected to September (R26)] I was taken to the home of Eugene Tournellec. This was the same house which I visited on the night

5765

(366)

of the 20th of August, 1944. At this house, I shot Eugene Tournellec I do not recall seeing anyone but an old man and a baby. There was no girl present" (R25).

The court adjourned in order to enable the prosecution to conduct a test firing of Pros.Ex.1, the defense stating that it had no objection (R66).

Second Lieutenant Raymond A. Dortenzo, Ordnance Department 5th Port, Morlaix (R66), testified that he had been an ordnance officer for seven months and that on the evening of the trial (23 November) he fired three shots from Pros.Ex.1, using .30 caliber carbine ammunition. He identified the three "blank" cartridges which he fired, and they were admitted in evidence as Pros.Exs.8,9 and 10, the defense stating it had no objection (R66-67). Witness never compared marks on spent cartridges before, but testified that the marks on Pros.Exs.8-10 and 3-6 "appear to me to be the same". The mark was "a small indentation on the run of the cartridge here, caused by the ejector * * * by the round being ejected. It is similar to a 'bull's-eye' or a 'rapid-fire target'". The same mark would not be made by all carbines, as the ejectors of different carbines are different (R68). All weapons "have their peculiarity" in this respect. Three carbines which witness checked all had different types of ejectors (R69). The defense offered no objection to the witness' testimony. The seven empty cartridge cases were handed to the members of the court for their examination (R68).

Recalled by the defense for further cross-examination, Lieutenant Kayes testified that he conducted a firing test of 125 carbines in his battery and that his examination of the spent cartridges revealed no marks caused by the ejector on any of them (R70-71).

4. a. The defense introduced the testimony of three members of accused's battalion to the effect that accused was drinking cognac and wine on the afternoon of 20 August (R74-76,77).

b. After full explanation of his rights accused elected to remain silent (R71-72).

5. a. The interview between Colonel Bower and accused which, it will be assumed, embodied his confession of the murder of Eugene Tournellec as alleged, was taken down by a stenographer and transcribed into a document of 23 pages. Without objection by the defense, Colonel Bower testified as to the interview, and the document was used merely to refresh his recollection and was not offered in evidence. It was pointed out in CM ETO 739, Maxwell, that the best evidence rule renders inadmissible oral evidence of an extra-judicial confession where the confession is written and the prose-

5765

(367)

cution has not accounted for the original, but it was held that a failure to interpose timely objection to such oral evidence constituted a waiver of the objection (Cf: CM ETO 4945, Montoya), under the following provision of Manual for Courts-Martial, 1928:

"An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: It does not appear that the original has been lost, destroyed, or is otherwise unavailable" (MCM, 1928, par.116a, p.120).

It is unnecessary to determine whether the rule of exclusion applies only in the case of a signed, sworn confession, as, under the doctrine of the Maxwell case, supra, ~~since~~ the defense effectively waived any objection to the oral evidence by its failure to object to the same.

Colonel Bower's testimony indicates that he warned accused of his rights in the premises and did not threaten him or make any promises to him before accused made his statements. However, Colonel Bower did tell him that "he accused knew he had not told" all, urged him to "tell me more" and caused him to visit the scene of the crime, after which he admitted the shooting. These facts were evidently not believed by the court to render the confession, assuming the statement to be such, involuntary. Its voluntariness was a question of fact (CM ETO 1606, Sayre and authorities therein cited; CM ETO 5584, Yancy), and in view of the substantial evidence that Colonel Bower was endeavoring to assist accused in remembering the details of the affair rather than endeavoring to force a confession and that the accused so understood the situation, will not be disturbed upon appellate review (Cf: CM ETO 2343, Welbes, and authorities there cited).

b. The seven empty cartridge cases, four of which (Pros. Exs.3-6) were found near deceased's body, and three of which (Pros. Exs.8-10) were test-fired from accused's carbine between sessions of the trial by Lieutenant Dortenzo, were all admissible in evidence for what they were worth (CM ETO 3042, Guy, Jr.; Cf: 2 Wharton's Criminal Evidence, 11th Ed., secs.967,992, pp.1702-1703,1734,1737). No objection was interposed by the defense; the members of the court were permitted to examine the cases for the purpose of comparing the markings thereon; and the testimony of the ordnance officer, not a ballistics expert, that the markings "appear to me to be the same" amounted to no more than a conclusion which was obvious to the members of the court. It is not perceived how any injury to accused's substantial rights could have resulted from this testimony, particularly in view of the strong evidence of accused's identity as the soldier in question (see par.6, *infra*).

c. Colonel Bower's testimony with respect to the test-

5765

(368)

firing of accused's carbine was patently hearsay and should not have been admitted. The law member, however, directed that at least part of the testimony be stricken and Lieutenant Dortenzo's direct testimony as to the test-firing of the carbine constituted ample evidence upon the point involved. No injury to accused's substantial rights resulted (Cf: CM ETO 4095, Delre; CM ETO 4122, Blevins).

d. Although there was evidence that accused was drinking wine and cognac and was talking loudly on the afternoon of 20 August, there was also evidence that he was not staggering or unsteady on his feet. Any questions of intoxication, and of the effect thereof upon the intents involved in the offenses alleged, were issues of fact for the sole determination of the court. The determination thereof against accused is supported by uncontroverted substantial evidence and will not be disturbed upon appellate review (CM ETO 3475, Blackwell et al; CM ETO 5561, Holden and Spencer).

e. Stipulations as to the testimony of the mess sergeant of accused's battery concerning accused's remarks before leaving the bivouac area and as to the cause of Tournellec's death were not consented to by the accused in person in open court, although the prosecution stated in each case that accused agreed to the stipulations and defense counsel confirmed that accused agreed to the latter stipulation (R27,70). Although it should clearly appear that accused understood what was involved in the stipulation, particularly in a capital case (MCM, 1928, par.126b, p.136), no injury to accused's substantial rights could have resulted, even assuming he did not so understand, in view of the other clear evidence of accused's identity and of the cause of the death of Tournellec.

f. Any question as to accused's sanity and mental responsibility, arising from his protestations to Colonel Bower that at the time of the offenses he did not know what he was doing, was out of his mind and believed he had merely dreamed about the affair, constituted an issue of fact for the court's determination. In view of the overall evidence as to accused's conduct and the lack of evidence that his actions were attributable to mental irresponsibility or other than to the effects of alcohol, it cannot be said that the court should have called for additional evidence upon this issue (MCM, 1928, par.15a, p.58). In view of the evidence of accused's sanity and mental responsibility at the time of his offenses, which conditions evidently obtained at the time of the trial, the findings of guilty, which include a finding of the existence of all essential elements of criminal liability, will not be disturbed upon appellate review (CM ETO 5584, Yancy; CM ETO 5747, Harrison, Jr.; and authorities cited in those cases). It is noted that the accompanying papers contain a statement dated 27 October 1944 and signed by Major Melvin F. Blaurock, Medical Corps, Neuropsychiatrist, 127th General Hospital, to the effect

5765

(369)

that in his opinion accused was not on that date psychotic or feeble minded, and "therefore if he is guilty he can be punished as the court sees fit".

6. Charge I and Specification:

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.

* * *

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. * * *

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 * * * 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" (MCM, 1928, par.148a, pp.162,163-164) (Underscoring supplied).

The following principles of law are particularly applicable in the instant case:

"Mere use of a 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, pp.654-655) (Underscoring supplied).

An intent to kill

"may be inferred from the acts of the accused, or may be founded on a manifest or reckless

5765

(370)

disregard for the safety of human life. Thus an intention to kill may be inferred from the willful use of a deadly weapon" (40 CJS, sec. 44, p.905) (Underscoring supplied).

"Reckless disregard of human life may be equivalent of specific intent to kill.--Looney v. State, 153 S.E. 372, 41 Ga.App. 495--Chambliss v. State, 139 S.E. 80, 37 Ga.App. 124" (Ibid., fn.67, p.944) (Underscoring supplied).

"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 circumstances 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, 2d Ed., Reprint 1920, p.673).

"The rule, as applicable to military cases, is similarly stated in the manual of Military Law, p.71, as follows - * * * On a charge of murder the law presumes malice from the act of killing, and throws on the prisoner the burden of disproving the malice by justifying or extenuating the act'" (Ibid., fn.55, p.673) (Underscoring supplied).

"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 inferable from the circumstances. The law presumes that one intended the natural and probable consequences of his act and the requisite intent to kill may be inferred from such acts. It may be inferred or presumed as a fact from the surrounding circumstances, such as the acts and conduct of accused, the nature of the instrument used in making the assault, the manner of its use, from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result, or from a total or reckless disregard of human life." (40 CJS, sec.79b, pp.943-944) (Underscoring supplied).

5765

(371)

Although neither of the Tournellec children who testified could identify accused, his identity as the colored American soldier who intruded upon their home on the evening of 20 August, terrorized the family and shot and killed the father, Eugene Tournellec, is convincingly established by accused's own confessions, by distinguishing markings on the four spent cartridge cases found near the body the day following the murder, which were shown to have been caused by the ejector in accused's carbine, and by the evidence that he left his bivouac area on the evening in question without authority with the avowed intention of securing sexual intercourse, and was not in the area at the time of the commission of the alleged offenses. None of this evidence was controverted.

The testimony of these children, which in its consistency and detail presents a convincing account of the events of the evening, shows that after searching the house, evidently seeking sexual intercourse, demanding alcoholic drinks without success, and terrorizing the occupants, accused (who had been drinking wine and Cognac) turned his attention to Catherine and attempted to kiss her. The mother and father fled through the window in fear and the latter went around to the entrance door of the house and closed it, telling accused, in effect, that he was going to close him in and summon aid. Thereupon accused, angered, stepped forward, aimed his carbine at the door and fired through the door. The evidence shows that the bullet struck Eugene Tournellec in the forehead and passed entirely through his head, causing his death the same night. After firing, accused opened the door, went outside and fired several more shots. The court was amply justified in finding that accused used the weapon in a manner which was likely to, and did, cause death, in which case, "the law presumes malice from the act".

"It is manifest that the discharge of the firearm through the house door with knowledge that a human being was standing immediately on the other side of it * * * was an act which intrinsically carried its own proof of malice aforethought" (CM ETO 4292, Hendricks).

The court was also justified in inferring an intent to kill his victim on accused's part "founded on a manifest or reckless disregard for the safety of human life". In view of the convincing evidence of accused's guilt of the offense of murder, the court's findings of guilty will not be disturbed upon appellate review by the Board of Review (CM ETO 1901, Miranda; CM ETO 3042, Guy Jr.; CM ETO 4149, Lewis; CM ETO 4292, Hendricks; CM ETO 5584, Yancy; and authorities cited in those cases).

7. Charge II and Specification:

After all members of the family had fled except the baby

5765

CONFIDENTIAL

(372)

upstairs and Catherine, accused left his carbine near the door, returned to her, attempted to disrobe her, put his hand beneath her dress, and tore her bathing suit. He exhibited his private parts, exposed her private parts, struggled with her, placed her in fear of losing her life, and when she began to faint laid her on her back on the floor. When she emerged from her fainting spell "something from his private part" was rubbing on her lips. This was ample evidence from which the court was warranted in inferring an intent on accused's part, concurrent with the assault, to have carnal knowledge of his victim by force and without her consent. All the elements of the offense of assault with intent to commit rape were established and the fact that accused voluntarily desisted is no defense (CM ETO 3309, Tapp; CM ETO 4292, Hendricks; and authorities cited in those cases).

8. The charge sheet shows that accused is 34 years of age and was inducted 6 November 1942 at New York, New York. He had no prior service.

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

10. The penalty for murder is death or life imprisonment, as the court-martial may direct (AW 92).

 Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

5765

(373)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 30 JAN 1945 TO: Command-
ing General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private WILLIAM MACK (32620461), Battery A, 578th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 5765. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5765).

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



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

1 Incl:
Record of Trial.

(Sentence ordered executed. GCMO 40, ETO, 9 Feb 1945)

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(375)

BOARD OF REVIEW NO. 2

CM ETO 5766.

12 JAN 1945

UNITED STATES

v.

Private LOUIS A. DOMINICK
(33682642), Company A, 30th
Infantry.

3RD INFANTRY DIVISION

Trial by GCM, convened at Bruyeres,
France, 22 November 1944. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard
labor for life. Eastern Branch,
United States Disciplinary Barracks,
Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN HENSCHOTEN, HILL and SLEEPER, 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 58th Article of War.
(Nolle Prosequi)

Specification: (Nolle Prosequi)

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

Specification: In that Private LOUIS A. DOMINICK, Company "A", 30th Infantry, having received a lawful command from 2nd Lieutenant Gilbert B. Hunt, his superior officer, to return to his platoon then in combat, did at or near St. Die, France, on or about 4 November 1944, willfully disobey the same.

5766

He pleaded not guilty and, all members of the court present when the vote was taken concurring was found guilty of Charge II and its Specification. No evidence of previous convictions was introduced. All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Infantry Division, approved the sentence, attached a recommendation for commutation of the sentence to dishonorable discharge, total forfeitures and confinement at hard labor for 25 years, and forwarded the record of trial for action under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but commuted it 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, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50¹/₂.

3. The evidence for the prosecution shows that on 4 November 1944, when accused's platoon was ordered to move out in an attack on the enemy, accused went to his company command post near St. Die, France, and stated in the presence of the acting first sergeant that he could no longer do combat duty (R7,10). He was thereupon taken to Second Lieutenant Gilbert B. Hunt, his company commander, who gave him an order to join his platoon and move out in the forthcoming attack. The accused replied, "sir, I refuse the order". Hunt -

"then continued talking to the accused and I told him his rights under military law. I told him the consequences of his refusal to obey my order and I told him to go into the next room and think this thing over. This was about 1800. At about 1925 I recalled the accused to my company CP, stood him before me in my presence and that of my first sergeant, and again gave him the same order and he repeated his refusal, repeating those words, 'sir, I refuse the order'" (R8-9).

Accused did not return (R10).

4. The defense introduced in evidence a character analysis of accused, signed by Captain Marshall T Hunt, Commanding Company F, 30th Infantry, reporting his character as good, efficiency and previous record fair, and desirability to service unknown; also the officer's belief that "a dishonorable discharge is justified" (sic) and his recommendation that "trial be by Summary Courts-Martial" (R12; Def.Ex.1).

5. After his rights were explained to him, accused elected to make an unsworn statement through counsel, reciting

"that he is 19 years of age; that he was inducted into the army in August, 1943; and that he had 17 weeks of

5766

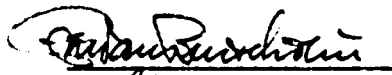

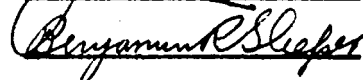
basic infantry training at Fort McClellan, Alabama. Then he was shipped overseas and joined the Third Division on February 27th on the Anzio beachhead. He fought with the 30th Infantry and on February 29th he fought with the 30th Infantry on Paratrooper Hill. He fought with the 30th Infantry on April 25th in the Mr. Green attack. He fought with the 30th Infantry on May 23rd in the push out on the Anzio beachhead and was wounded on that day for which he received the Purple Heart. He made the landing with the 30th Infantry on the southern coast of France and fought throughout the campaign in southern France with the 30th Infantry. He has received the Purple Heart and the Combat Infantry Badge. He has never been AWOL at any time since he has been in the United States Army prior to the month of October, 1944, and there are no previous convictions in the case of this accused" (R13).

6. The order which accused was charged with willfully disobeying related to a military duty and was a lawful command which the superior officer was authorized, under the circumstances, to give the accused. Although prior combat experience in which the 19 year old accused had participated honorably since he joined the 3rd Division on Anzio beachhead six months previously was undoubtedly a determining factor in his decision to permit his disinclination to participate in further combat to outweigh his obligation to perform his duty as a soldier, the record of trial contains substantial evidence to support the court's conclusion - implicit in its findings of guilty, in violation of Article of War 64 - that the disobedience proved involved an intentional defiance of authority.

7. The charge sheet shows that accused is 19 years of age and that, with no prior service, he was inducted 11 August 1943.

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

9. The offense of willful disobedience of any lawful command of a superior officer shall be punished by death or such other punishment as a court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

 Judge Advocate
 Judge Advocate
 Judge Advocate

5766

CONFIDENTIAL

(378)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 12 JAN 1945 TO: Commanding
General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private LOUIS A. DOMINICK (33682642), Company A, 30th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5766. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5766).



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

(Sentence as commuted ordered executed. GCMO 18, ETO, 19 Jan 1945)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

15 JAN 1945

CM ETO 5767

UNITED STATES

VI CORPS

v.

Captain JOSEPH M. PALMER
(O-1171709), 141st Field
Artillery Battalion.

Trial by GCM, convened at APO 46
(France), 8 November 1944. Sentence:
Dismissal, and total forfeitures.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain Joseph M. Palmer, 141st Field Artillery Battalion was, at St. Loup, France on or about 9 October 1944, found drunk while on duty as Convoy Commander, VI Corps Provisional Truck Convoy.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for two years. The reviewing authority, the Commanding General, VI Corps, approved the sentence, remitted the

CONFIDENTIAL

(380)

confinement, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence though stating that as modified by the reviewing authority, it was wholly inadequate punishment for an officer convicted of such gross and serious misconduct, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution discloses that on 8 October 1944, Lieutenant Colonel Clarence E. Forehand, VI Corps Artillery, was called upon to furnish a convoy for a trip to Marseilles. He arranged for the trucks and three officers; accused was placed in charge of the convoy with two lieutenants to assist him (R6,7). Accused was ordered to proceed ahead to St. Loup and report to Lieutenant Colonel Kirk A. Keegan, Transportation Corps, Seventh Army, for instructions concerning the trip. He was informed as to where the trucks were coming from and who would be in charge of each march unit, and he left for St. Loup at approximately 7:35 on the morning of 9 October. Colonel Forehand and Lieutenant Colonel Burton E. Miles, Headquarters, VI Corps, went to the truck park in St. Loup about one o'clock that day to see if the trucks had arrived. Accused who at that time was sitting in his jeep, got out and walked two or three steps toward them. On being questioned, he didn't seem to have a clear idea of how many vehicles he had in at the time; they were scattered around the park and he had made no effort to get them together. He had sent for gas as instructed. Colonel Forehand testified that, on being asked about these things, accused

"didn't have a clear idea of what it was all about. His eyes were red, bloodshot, and his stance, of course, was not too steady and so I left him standing there"---(R7).

Colonel Forehand talked to one of the lieutenants for a few minutes and then walked over and spoke to Colonel Miles concerning the condition of accused at which time they decided it best to relieve him of his duty as convoy commander. Colonel Miles then informed accused that he was relieved as convoy commander and Colonel Forehand instructed him to report to his organization and that First Lieutenant George W. Hoppe would accompany him back. Colonel Forehand testified that, "At the time, in my opinion, I felt that he accused was intoxicated" (R8). When accused reported at approximately seven o'clock that morning he was apparently all right (R9) but at St. Loup his appearance caused the opinion that he then was drunk (R9,43). His step was unsteady, the way he talked, didn't know much about the convoy or attempt to find out (R10) although he neither smelled nor saw any liquor (R42).

Colonel Keegan testified that accused reported to him about nine o'clock on the morning of 9 October (R11). Later that

morning he rode in the seat with accused for some 20 to 25 minutes when they went in search of a missing convoy unit (R12), leaving him just before noon (R13). At that time he could smell liquor and knew accused had been drinking but their conversation was normal and accused appeared sober (R12) and seemed to be taking care of the job. He saw no evidence of liquor in the jeep (R13).

Lieutenant Hoppe testified that he was with accused a few minutes about 7:30 when he appeared perfectly normal, and again between 9:30 and 10 o'clock at St. Loup (R14) at which time from the smell on his breath and his husky speech, it appeared that he had been drinking but he expressed no opinion as to accused's sobriety (R15). He did not seem as alert as when first seen, stayed in his jeep and didn't seem to know what was going on (R17). He saw him again around noon (R15) but was not close to him (R16). When accused was relieved, he walked all right but had a slight smell of liquor (R19).

Lieutenant Colonel Miles testified he saw accused (R19) about two o'clock (R21) on the afternoon of 9 October 1944, (R19,29,30) in the vicinity of St. Loup and talked to him. In his opinion accused was drunk (R31-33) at that time. He relieved him of his assignment (R39-40) and directed him to report back to his organization (R20,31-33).

4. The defense introduced a stipulation to the effect that if Major Oscar M. Gunderson, Transportation Corps, was present he would testify that he was instructed by Lieutenant Colonel Keegan to provide accused with necessary gas and rations and that he so informed accused (R21), and also that details of scheduling would be worked out and the drivers each supplied with strip maps. Accused did not seem to readily understand the instructions given him and asked repeatedly who would give him instructions and when he was to leave. He was the only officer asking such questions and they indicated that he was either incompetent or inexperienced to have charge of vehicles on a trip of 1000 miles (R21-22).

Technician Fifth Grade Jacob L. Buck, Service Battery, 141st Field Artillery Battalion, testified that he drove for accused on 9 October 1944. Accused was sitting in his jeep waiting for orders when a major and a lieutenant colonel (R23) came up, relieved him of his duty with the convoy and ordered him to report back to his organization. Buck drove him back (R24). Accused was normal throughout the time they were together, he did not stop at any place out of the way and Buck did not see him drink at any time (R24,35,40), nor did he notice any smell of liquor on him (R36). He did not see a bottle in the jeep that morning (R24,35,39) and he was with accused constantly except when accused twice went in the transportation office

(382)

and when he was talking to Colonel Forehand (R25) a period of not more than 30 minutes altogether (R25-26). He did not know whether accused had a canteen (R37-38).

Accused advised of his rights as a witness, elected to make an unsworn statement through defense counsel. The statement recites his reporting to Lieutenant Colonel Forehand and to Lieutenant Colonel Keegan who told him he would receive his orders out in the bivouac area and that the rations would be delivered as soon as made up. He went to the bivouac area and was awaiting orders when he was relieved by Lieutenant Colonel Miles. During this whole period he denies having a drink or stopping anywhere out of the way (R27-28).

5. Accused had been placed in charge of a large convoy and was at the bivouac area where the trucks were assembled in actual charge of preparations to start, at which time it was determined that he was under the influence of intoxicating liquor and he was relieved of his command. There is no question but that he was on a certain ordered duty. His eyes were bloodshot, his voice husky, his walk unsteady and he didn't seem to know what it was all about. Two officers testified that accused was drunk and two others that he had been drinking. Testimony

"on an issue of drunkenness * * * is not confined to a description of the conduct and demeanor of the accused, and the testimony of a witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion" (MCM 1928, par.145, p.160).

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

The issue of drunkenness is one of fact for the sole determination of the court (CM ETO 1065, Stratton) and in view of the evidence the Board of Review will not disturb its findings.

6. The charge sheet shows accused to be 30 years and one month of age. He had service as an enlisted man in the Army of the United States from 7 March 1941 to 14 October 1942 when he was commissioned as a second lieutenant. He was called to active duty as such in the Field Artillery, 15 October 1942.

7. The court was legally constituted and had jurisdiction of the

5767

(383)

person 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 of trial is legally sufficient to support the findings of guilty and the sentence as modified.

8. A sentence of dismissal of an officer convicted of being found drunk on duty in time of war is mandatory (AW 85).

Arthur Bunch Judge Advocate

John Hamilton Judge Advocate

Benjamin R. Sleeper Judge Advocate

5767

CONFIDENTIAL

(384)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater of Operations. 15 JAN 1945 TO: Commanding
General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain JOSEPH M. PALMER (O-1171709), 141st
Field Artillery Battalion, attention is invited to the foregoing
holding by the Board of Review that the record of trial is legally
sufficient to support the findings of guilty as approved and 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
CM ETO 5767. For convenience of reference please place that number
in brackets at the end of the order: (CM ETO 5767).



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

(Sentence ordered executed. GCMO 26, ETO, 22 Jan 1945)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

(385)

BOARD OF REVIEW NO. 1

16 JAN 1945

CM ETO 5770

UNITED STATES)

3RD INFANTRY DIVISION

v.)

Trial by GCM, convened at Bruyeres,
France, 2 November 1944. Sentence:Second Lieutenant ALOIS E.
KIEFFER (O-1313253), 7th
Infantry)Dismissal, total forfeitures and
confinement at hard labor for 50
years. Eastern Branch, United
States Disciplinary Barracks, Green-
haven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITTER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that 2nd Lieut. Alois E. Kieffer, Company "M", 7th Infantry did, at Cap Cavalaire, France, on or about 15 August 1944, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forwarded by 1st Lieut Morton H. Perry, to engage with the enemy, which forces the said command was then opposing.

He pleaded not guilty and, more than three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of

5770

(386)

previous convictions was introduced. More than three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing authority, the Commanding General, 3rd Infantry Division, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, 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, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence was undisputed and substantially as follows:

At about 0800 hours on 15 August 1944 M and Headquarters Companies, 7th Infantry (R7,10,19), landed on a beach near Cavalaire-sur-Mer, in the Cap Cavalaire area, France. A few enemy mortar shells fell in the landing area, but they were not confronted with small arms fire. First Lieutenant Morton H. Perry, executive officer of M Company, was in charge of its command post group, which crossed the beach and stopped after proceeding 100 yards because men of L Company just ahead (R7,8) were slowly picking their way through a mine field. M Company's first machine gun platoon with accused in command "came down" a railroad track and stopped in front of Perry's command post group. This platoon's mission was to follow L Company into an assembly area and to remain in battalion reserve until called upon for a mission. Perry asked accused if he had made contact with L Company and his reply indicated he "hadn't found them yet". Perry told him

"that they were just in front of us and to get somebody to keep in contact with them and to move out when they did. Also at that time his platoon was all huddled in groups and I tried to get him and the other members to scatter out while waiting. At that time instead of obeying my order he came over to where I was near a large rock and a lot of brush and he got in the brush and just stayed there and I asked him several times to get that contact out and he finally, in an excited manner, burst out and said that if he let all his men go out he wouldn't have anybody left in his platoon".

5770

(387)

About 15 or 20 minutes later L Company moved out, but accused did not lead his platoon forward and when Perry saw that they were not going he told him to "get them going and he didn't do anything about it" (R9). Perry then called the platoon sergeant and told him to get the platoon started, which he did. The platoon moved out and accused "did tag along at the end of his platoon and moved on with them". Perry's group followed and several hundred yards farther on at the base of hill by a small house he saw accused with his runner, Private First Class Moore, "just standing without his platoon". Perry asked him what he was doing there and he

"told me he was waiting to see me. I told him here I was, what did he want. He didn't say anything important enough to stick in my mind. I asked him where his platoon was and he told me they were going ahead and following 'L' Company, after questioning him about it. I noticed at that time that he seemed a little over-excited and I told him, well, he better come and join me and we would catch up to his platoon and he indicated he would so we moved out".

They crossed several very large hills covered with "thickly scrubbed brush" and it was difficult going (R10). They encountered no enemy resistance. Arriving at the area where there was to be an assembly of units, Perry looked around for accused to see if he could get him up to his platoon, but he was nowhere to be seen (R11). At about 1000 hours Perry sent a runner back to search for him but the runner returned without him (R11-12). After remaining at that place about two hours, Perry and his unit moved forward to a small hill where he again saw accused and asked him

"why he hadn't gone forward to join his platoon and urged him to do so at once. He didn't answer me directly as to why he hadn't and while he didn't say he would not go he made no move to go. I asked him if he felt bad and he told me something about his legs hurting him and hardly being able to walk. He indicated that he felt that way since he had hit the beach. However, his manner was very nervous and he appeared to be tense and excitable".

Perry told accused to "just come along with me" and they remained together until about 1600 or 1700 hours, during which time they alternately "stopped and moved but it was a continuous movement"

5770

(388)

(R12). Accused had no difficulty maintaining contact with Perry "because of his legs". Perry urged him several times, when they stopped, to get up and join his platoon but he never made an effort to do so. At about 1100 hours or a little later (R17) Perry arranged for another lieutenant to take command of accused's platoon, whose advance was required by a previously issued operations or field order, of which accused was aware (R16). Perry did not intend to relieve accused of his command, but merely desired to get a platoon leader until accused returned (R17). After 1700 hours Perry did not see him again that day (R15-16) and accused never did rejoin his platoon (R14). He had been with M Company since 30 May 1944 (R19) and, in Perry's opinion, performed prior to 15 August 1944 "an excellent job" during training and "as a platoon leader and an officer in training" (R14).

M Company made contact with the enemy on the evening of 15 August, which on the day of trial had been continuous for a period of 80 days (R13).

Captain David B. Fleeman, 3rd Battalion Adjutant and Commanding Officer of Headquarters Company, which assembled at about 0900 hours on 15 August at a point three or four hundred yards from the place of landing, noticed that the M Company machine gun platoon seemed "somewhat dilatory". He did not see the officer in charge until the platoon had completely passed that point. Then he saw accused to whom he suggested

"that he get at the head of his platoon
* * * and get ahead and lead the men
and get moving because he was holding
my company up" (R20).

At about 1100 or 1300 hours, after his company moved about 1200 yards from where the landing was made, Fleeman saw accused alone passing the battalion command post (R20-21). He asked accused why he was not with his platoon. Accused replied, "I just can't, I can't lead these men in combat, I don't know what is wrong with me". Fleeman

"urged him to rejoin his platoon and pointed out to him that the greatest dangers were past, that we had all been sweating out that landing and that things were pretty quiet and urged him to rejoin his platoon and that he would feel better and he said he couldn't make it so I told him to report to his company commander, Captain Davis".

5770

(389)

Fleeman did not see him any more and did not know where he went (R21).

4. For the defense, an original copy of accused's W.D. AGO Form No. 66-1 card was offered and received in evidence, without objection (R21-22). It was stipulated between accused, the defense counsel and the trial judge advocate regarding a copy thereof that

"this is a certified copy of the original copy of Lieutenant Kieffer's W.D. A.G.O. Form No. 66-1 and that the entries thereon are generally correct and that it is agreed to withdraw the original and substitute the certified copy in the record".

The certified copy was then received in evidence (R22; Def.Ex."I"). This record showed the following record of service by accused: he was a platoon leader, Company H, 290th Infantry, from 24 March 1943 to 30 June 1943, rated excellent; a heavy weapons platoon leader, Company G, 290th Infantry from 10 July 1943 to 12 August 1943, rated excellent; rifle company platoon officer, Company I, 290th Infantry, from 13 August 1943 to 25 August 1943, rated satisfactory; and mortar platoon leader, Company M, 290th Infantry, from 26 August 1943 to 30 December 1943, rated excellent. Transferred overseas as a pool officer, he was not rated. As platoon leader, 2nd Replacement Depot, 2 February to a date not indicated he was rated very satisfactory. As platoon commander, Company M, 7th Infantry, Third Division, from 25 May to 23 August 1944, the rating was unsatisfactory.

After being advised of his rights, accused elected to remain silent (R22-23).

5. Although there is no clear statement in the record that the "landing" referred to in the evidence was an invasion of a hostile shore held by the enemy, a combat situation is clearly shown. Enemy mortar shells heralded the landing and contact with the enemy was effected the same day, which manifestly placed accused "before the enemy". (CM ETO 2602, Picoulas and authorities therein cited).

6. The evidence clearly showed that accused at the time and place alleged, while before the enemy, misbehaved by failing to advance with his command which had been ordered forward as alleged. His admission that "I just can't lead these men in combat" and his persistent failure and unwillingness to go forward as ordered with his platoon constituted conduct in violation of Article of War 75 (CM ETO 1249, Marchetti and authorities therein cited; CM ETO 3196, Puleio and authorities therein cited; CM ETO 3811, Morgan and Kimball; CM ETO 5179, Hamlin; CM ETO 5475, Wappes and authorities therein cited).

5770

(390)

7. The charge sheet shows that accused is 28 years of age and was appointed a second lieutenant, Army of the United States, on 6 March 1943. Prior service is shown as follows: "Enlisted at New York City, N.Y. on 11 April 1941 in gr. of Pvt. for U. S. Army to serve one (1) year; discharged 5 Mar. 43 by reason of C. of G. to accept temp. apmt as 2nd Lt. AUS".

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

9. The penalty for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

W. Frank Miller Judge Advocate
Edward W. Morgan Judge Advocate
Edward L. Stevens, Jr. Judge Advocate

5770

CONFIDENTIAL

(391)

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. **16 JAN 1945** TO: Com-
manding General, European Theater of Operations, APO 887, U. S.
Army.

1. In the case of Second Lieutenant ALOIS E. KIEFFER
(O-1313253), 7th Infantry, attention is invited to the foregoing
holding by the Board of Review that the record of trial is legally
sufficient to support the findings of guilty and the sentence,
which holding is hereby approved. Under the provisions of Article
of War 50 $\frac{1}{2}$, you now have authority to order execution of the sen-
tence.

2. When copies of the published order are forwarded
to this office, they should be accompanied by the foregoing hold-
ing and this indorsement. The file number of the record in this
office is CM ETO 5770. For convenience of reference please place
that number in brackets at the end of the order: (CM ETO 5770).



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

(Sentence ordered executed. GCMO 25, ETO, 22 Jan 1945)

CONFIDENTIAL

(393)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

20 JAN 1945

CM ETO 5774

U N I T E D	S T A T E S	)	30TH INFANTRY DIVISION
)	
	v.	)	Trial by GCM, convened at Kerkrade,
		)	Holland, 13 November 1944.
Private JOSEPH SCHIAVELLO		)	Sentence: Dishonorable discharge,
(32828389), Company K,		)	total forfeitures and confinement at
117th Infantry		)	hard labor for life. Eastern Branch
		)	United States Disciplinary Barracks,
		)	Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification 1: In that Private JOSEPH SCHIAVELLO, Company "K", 117th Infantry, did, while before the enemy, without proper leave, absent himself from his organization at Tessy Sur Vire, France, from about 1 August 1944, to about 31 August 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his organization at Scherpenseel, Germany, from about 20 September 1944, to about 22 September 1944.

(394)

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

Specification: In that * * * did, at Scherpenseel, Germany, on or about 26 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: action against the enemy, and did remain absent in desertion until he was apprehended, at Heer, Belgium, on or about 6 October 1944.

Specification 2: In that * * * did, at Herleen, Holland, on or about 7 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Hozemont, Belgium, on or about 13 October 1944.

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

Specification: In that * * * having been duly placed in custody of the Military Police, 30th Infantry Division, on or about 7 October 1944, did, at Herleen, Holland, on or about 7 October 1944, breach parole before he was set at liberty by proper authority.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for five days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 1 August 1944, while the 117th Infantry was engaged with the enemy at Tessy Sur Vire, France, the third battalion was ordered to attack. Accused's Company K was the reserve company of the battalion (R7). Accused was Browning automatic rifleman for his platoon (R8). On the occasion of this particular attack, K Company was supporting I and L Companies, following at approximately five or six hundred

5774

yards (R7). When his company arrived at the line of departure, accused was not there. Neither were his weapon and ammunition. "We needed all the fire we could get at that time", his platoon sergeant testified. "That is the spot the 117th Infantry refers to as Purple Heart Hill". A physical check-up after the attack revealed that accused was missing. He remained absent without leave until 31 August, when he returned to his company in Belgium and was assigned to duty with the same platoon (R9).

On 20 September 1944, his company was tactically a "front line company holding force, waiting for an attack through the Siegfried Line" at Scherpenseel, Germany, when accused "took off again" (R7,9). On 21 September 1944, he was apprehended by military police in Heerlen, Holland, and returned to his unit (R11). On 22 September, according to the first sergeant of accused's company,

"They brought him in from the battalion C.P. We sent two men after him and they brought him back by force and I personally took him from the Company C.P. to his platoon leader. * * * From the 22 to 26 September he stayed in the platoon C.P. and refused to go out on the line. On the 26th he left again" (R9).

On 6 October, First Lieutenant Howard W. Upham, 970th Service Company, observed accused and another American soldier in a chateau "in a deserted area quite off the beaten track" in Heer, Holland. He questioned them and was told by accused that "at the time he got separated the unit he was with was under fire from artillery". Upham knew a Belgian lieutenant at the same chateau and learned from him "what 'the American soldiers' were doing there". He then told the Belgian "to take care of them and put them more or less under arrest as I did not have any transportation to take them back * * * Two days later", Upham testified, "I returned in a three-quarter ton and took them back * * * to the 19th Corps Headquarters Rear and turned them over to Corps MPs" (R12-13).

In the meantime, on 7 October 1944, a military police corporal of the 30th Division received instructions to go back to the Corps in Maastricht and pick up accused and bring him back to his organization (R13). Having taken accused in custody, the corporal permitted him to attend a show while waiting for "chow" in Heerlen, parolling him in his own custody for approximately one hour for that particular purpose. "I told him where to go in the balcony and told him after the show we would eat chow and then go back". He also showed him where to put his equipment. After the show, accused failed to appear at the appointed place. The corporal, discovering accused's equipment missing, searched the theater and patrolled the town of Heerlen but was unable to find accused (R13-14).

5774

(396)

Duly authenticated extract copies of pertinent morning reports were introduced showing accused absent without leave from 1 to 31 August and from 20 to 22 September 1944; also an entry of 26 September 1944 showing "Duty to AWOL 9-25-44" (R10,11; Pros. Exs.1,2,3).

After due warning, accused made a voluntary statement, in reply to questions propounded to him by the investigating officer, admitting all of the offenses charged, including his apprehension by military police at Hozemont, Belgium, 13 October 1944 (R14-15).

4. After his rights were explained to him, accused elected to make the following unsworn statement through counsel:

"I would like to state on behalf of the accused or rather for the accused, that the statement that he did take off on several occasions is as stated, however, he wishes to state that he took off, not in an attempt to shirk hazardous duty or because he wished to avert engagement with the enemy but because he could not take it any longer and something within him forced him to go to the rear when enemy actions got heavy. He further wishes to state that at no time did he use disrespectful or derogatory language to the Investigating Officer or give the impression that this did not effect him in the least. He states that when he stated to the Investigating Officer in answer to each charge, he admitted he did these things but he denied that he spoke to the Investigating Officer in a manner which indicated a complete disregard of army regulations. The accused further wished to state that while he is being charged with so many specifications and charges, he would still like an opportunity to prove his is worthy as a soldier, however, he states that he does not know whether he could stay up there any length of time or how he could take it up there. That is all" (R16).

5. The only question as to the legal sufficiency of the evidence to support the findings of guilty arises in connection with that portion of Specification 2, Charge II, which alleges that, having deserted 7 October 1944, accused remained absent in desertion until apprehended at Hozemont, Belgium on or about 13 October 1944. Lieutenant Upham testified that, having seen accused at Heer, Belgium on 6 October, he returned two days later (viz. 8 October), took accused back to 19th Corps Headquarters Rear and turned him over to Corps MPs. A military police corporal of the 30th Division testified

that he picked up accused at "Corps" in Maastricht 7 October and that subsequently, on the same date, accused broke his parole and escaped. The only evidence, other than Upham's apparently contradictory testimony, of the time, place and manner of the termination of the desertion thus accomplished is accused's confession to the investigating officer that he was apprehended by the MPs at Hozemont, Belgium, 13 October 1944. However, a reasonable construction of the evidence, meager as it is with reference to this particular specification, permits a fair reconciliation of the apparent discrepancies noted, on the basis that either Upham or the 30th Division military police corporal erred by at least one day in testifying as to either the date on which accused was returned to corps headquarters by Upham or the date on which the corporal took him into custody.

"evidence of the corpus delicti need not be sufficient of itself to * * * cover every element of the charge * * *" (MCM, 1928, par 114a, p.115).

"it is not necessary to prove 'the corpus delicti' by evidence which entirely excludes a consideration of the confession" (Wharton's Criminal Evidence, Vol 2, sec.640, p.1072).

The Board of Review considers that the evidence adduced by the prosecution, exclusive of the confession, narrowly fulfills the legal requirements to render consideration of the confession admissible for establishing the particulars of the offense alleged in Specification 2, Charge II.

6. The charge sheet shows that accused is 20 years one month of age and that, with no prior service, he was inducted at New York City, New York, 9 March 1943.

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


8. The offense of desertion in time of war is punishable by death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States

CONFIDENTIAL

(398)

Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept 1943, sec. VI, as amended).

 Judge Advocate

 Judge Advocate

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-6-

5774

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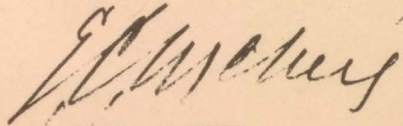
(399)

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War Department, Branch Office of The Judge Advocate General with
the European Theater of Operations. 20 JAN 1945 TO: Command-
ing General, 30th Infantry Division, APO 30, U.S. Army.

1. In the case of Private JOSEPH SCHIAVELLO (32828389),
Company K, 117th Infantry, attention is invited to the foregoing
holding by the Board of Review that the record of trial is legally
sufficient to support the findings of guilty and the sentence, which
holding is hereby approved. Under the provisions of Article of War
50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this
office, they should be accompanied by the foregoing holding and
this indorsement. The file number of the record in this office is
CM ETO 5774. For convenience of reference, please place that number
in brackets at the end of the order: (CM ETO 5774).



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

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BY CARL E. WILLIAMSON, LT. COL.
JAGC, ASST EXEC ON 20 MAY 54

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