

Head Quarters, Department of the East,

New York City, Dec 24th 1863.

Col Joseph Holt
Judge Advocate Genl U. S. A.
Colonel

By direction of the Major
General Commanding, I have the honor
to forward herewith proceedings of
General Courts Martial, in the cases
of
Captain M. D. Cheney 154th N. Y. Vols
1st Lieut Edwin Green 9th N. Y. "
Lieut J. J. Donahaw 10th " " "
together with the General Order pro-
mulgating the same.

I am

Very Respectfully

Your Obedt Servt

H. E. Blake

Capt and A. D. C.

Case of Lieut. *J. J. Donahau*, 10th N. H. Vols.
Case of First Lieut. *Edwin Green*, 9th N. H. Vols.
Case of Captain *M. B. Cheney*, 154th N. Y. Vols.

HEADQUARTERS, DEPARTMENT OF THE EAST,

New York City, December 14th, 1863.

GENERAL ORDERS, }
No. 24. }

I. Before a General Court Martial which convened at "Depot for Drafted Men," Long Island, Boston Harbor, by virtue of Special Orders No. 98, current series, from these Headquarters, of November 10th, 1863, and of which Colonel JAMES L. BATES, 12th Massachusetts Volunteers, is President, were arraigned and tried:

Lieutenant *J. J. Donahau*, 10th Regiment Infantry, New Hampshire Volunteers.

Charge.

"Violation of the Forty-second Article of War."

Specification—"In this, that he, Lieutenant *J. J. Donahau*, of 10th Regiment Infantry, New Hampshire Volunteers, did lie out of his camp, it being the Camp of the Detachment of Drafted Men for the Third Regiment of Infantry, New Hampshire Volunteers, without leave from his superior officer, from the 23d of October, to the 27th of October, 1863. This at Long Island, Boston Harbor, Massachusetts."

To which charge and specification, the accused pleaded as follows:

To the specification, "Not Guilty."

To the charge, "Not Guilty."

Finding.

The Court, having maturely considered the evidence adduced, finds the accused as follows:

Of the specification, "Guilty."

Of the charge, "Guilty."

Sentence.

And the Court do, therefore, sentence him, Lieut. *J. J. Donahan*, 10th Regt. New Hampshire Volunteers, "To the forfeiture of one month's pay and allowances."

First Lieutenant *Edwin Green*, Company "H," 9th Regiment New Hampshire Volunteers.

Charge.

"Conduct unbecoming an officer and a gentleman."

Specification—"In this, that he, *Edwin Green*, First Lieutenant Company "H," 9th Regiment New Hampshire Volunteers, did, without cause or provocation, maltreat a soldier, Private *Elbridge Stevens*, of the 8th Maine Detachment, by striking him repeatedly with a drawn sword. This on board a vessel lying at the wharf on Long Island, Boston Harbor, on or about the 9th day of November, 1863."

To which charge and specification, the accused pleaded as follows:

To the specification, "Not Guilty."

To the charge, "Not Guilty."

Finding.

The Court, having maturely considered the evidence adduced, finds the accused, First Lieutenant *Edwin Green*, 9th Regt. New Hampshire Volunteers, as follows:

Of the specification, "Not Guilty."

Of the charge, "Not Guilty."

And the Court do, therefore, acquit him.

II. In the case of Lieutenant *J. J. Donahan*, 10th Regiment Infantry, New Hampshire Volunteers, the proceedings and finding of the Court are approved. The sentence is confirmed, and will be duly executed.

III. The finding of the Court, in the case of First Lieutenant *Edwin Green*, 9th Regiment New Hampshire Volunteers, is not approved. Even if he had not been mistaken in the identity of *Elbridge Stevens*, there would have been no excuse for his conduct in inflicting a wound in the absence of all evidence of insolence, or of any direct refusal to obey orders. Lieut. *Green* was obviously acting under the influence of passion, and thus was betrayed into a wrong against a man who had committed no offence, and was not even under his orders. He will return to his duty with the injunction to exercise, in future cases, a better self control.

IV. Before a General Court Martial which convened at "Depot for Drafted Men," Elmira, N. Y., by virtue of Special Orders No. 79, current series, from these Headquarters, of September 4th, 1863, and of which Colonel WILLIAM EMERSON, 151st New York Volunteers, is President, was arraigned and tried:

Captain *M. B. Cheney*, 154th New York Volunteers.

Charge.

"Neglect of duty to the prejudice of good order and military discipline."

Specification—"In this, that Captain *M. B. Cheney*, 154th New York Volunteers, Infantry, while officer of the guard, at Barracks No. 3, at Elmira, New York, on the 16th of September, 1863, did permit a substitute named *Philip Dyer*, charged with desertion, to escape from his custody; this, through the neglect on the part of the said Captain *Cheney*, of the ordinary precautions to prevent such escape."

To which charge and specification, the accused pleaded as follows:

To the specification, "Not Guilty."

To the charge, "Not Guilty."

Finding.

The Court, having maturely considered the evidence adduced, finds the accused as follows:

Of the specification, "Guilty," except the words "charged with desertion."

Of the charge, "Guilty."

Sentence.

And the Court do, therefore, sentence him, Captain *M. B. Cheney*, 154th New York Volunteers, "To be reprimanded in General Orders, and to be ordered to rejoin his Regiment."

V. The objection of Captain *M. B. Cheney* to the form of the charges against him, was well taken in his defence. He should have been tried under the 81st Rule of the Rules and Articles of War, which provides for the specific offence with which he was charged. As he has joined his Regiment by order of the War Department, no further action in his case is necessary.

By COMMAND OF MAJOR GENERAL DIX,

D. T. VAN BUREN,

Assistant Adjutant General.

OFFICIAL:

H. E. Blake

Aide de Camp.

H. E. Blake

N. 810

Proceedings

- of a -

General Court Martial
Convened at Chemung N.Y.
on the trial of

Capt. M. B. Cheney

154th N.Y. V.I.

C. H. Lang.

G. J. Adv.



Proceedings of General Court
Martial, convened at Depot for Drafted Men,
Elmira N.Y. by virtue of the following order viz:

Head Quarters, Department of the East
New York City, Sept 4th 1863.

Special Order

No 39.

1. A General Court Martial is hereby appointed, to meet at Depot for Drafted Men Elmira N.Y. on the 8th day of September 1863, at 12 o'clock M., or as soon thereafter as practicable, for the trial of such persons as may be brought before it, by authority from these
Head Quarters

Detail for the Court

1. Colonel William Emerson 151st N.Y. Vols.
2. Major W. S. Babcock 77th " do
3. Capt. L. Baldwin 107th " do
4. " H. H. Conrass 146th " do
5. " C. W. Gibbs 44th " do
6. " H. Hallam 43rd " do
7. " O. J. Swat 139th " do

Lieut and Adjt C. H. Young 136th N.Y. Vols

Judge Advocate

No other officers than those named, can
be assembled without manifest injury to the service

Should any of the officers named in
the detail be unable to attend, the court
will nevertheless proceed to and continue the
business before it, provided the number present
be not less than the minimum number
prescribed by law

By command of
Major General Dix
(signed) Chas Temple Dix
Major & A. D. C.
A. A. G.

Elmira N. Y.

Oct. 17th 1863

9:30 A.M.

The court met pursuant to adjou-
rnment

Present

Col. Emerson.

Capt. Baldwin.

" Carran.

Maj Babcock.

Capt Wallau.

Lt Young, Judge Advocate.

And the court proceeded to the trial of
Capt M B Cheney, 154th New York Vols, who being
called into court, and having heard read the
order concerning the Court, was asked if he had
any objections to make to any member of the
Court to which he replied that he had not

The Court was then sworn by the
Judge Advocate, & the Judge Advocate by the President
of the Court, in his presence, & Capt M B Cheney,
154th New York Volunteers, was arraigned upon
the following charge & Specification

Charges, & Specifications, against Captain
M B Cheney, 154th Regt. N. Y. Vol. Infantry

Charge: Neglect of duty to the prejudice
of good order, & military discipline.

Specification. In this that Captain M. B.
Cheney, 154th Regt. N. Y. Vol. Infantry, while officer
of the guard at Barracks No 3 at Elmira N. Y.
on the 16th of Sept. 1863 did permit a Substitute,
named Philip Dyer, charged with desertion, to
escape from his custody, this through the neglect
on the part of the said Captain Cheney of the
ordinary precautions to prevent such escape.

Witness

(signed) P. P. Brown

Capt Jno McAnally, 155th N. Y. Col. Comdg.
Supt. Barrack Druman 161st N. Y. Vol. Barrack No 3.

Exhibited.

Head Quarters. Department of the East.
New York, Sept. 23. 1863.

For Trial.

By Command of Major General Dix
(signed) W. E. Blake.
Capt. and A. S. Co.

In which Charge & Specification in
the prisoner, Capt M B Leheny, 154th N. Y.
Vol., pleaded as follows;

In the Specification. Not Guilty-
" " Charges. Not Guilty-

All persons to give Evidence were
directed to withdraw, & remain in waiting.

Capt Jm Mc Anally, 155th N. Y. Vol., a witness
for the prosecution, being duly sworn testified
as follows.

Ques. by J. A. Advocate. What is your main rank &c?

Ans. Jm Mc Anally Capt 155th N. Y. Vol. Co. "I"

Ques. by J. A. Do you know the prisoner?

Ans. Yes Sir.

Ques. by J. A. Where are you and the prisoner stationed?
Ans. at Barracks No. 3. Elmira.

Ques. by J. A. Were you officer of the guard at Barracks No 3 15th Sept. 1863?

Ans. Yes Sir.

Ques. by J. A. When and by whom were you relieved?

Ans. by Capt Cheney on the morning of the 16th ^{about 11 o'clock} or a little after.

Ques. by J. A. Did you turn over to him the prisoners in your charge?

Ans. Yes Sir.

Ques. by J. A. Was one Phillip Dyer a prisoner turned over to him among them?

Ans. Yes Sir.

Ques. by J. A. State the circumstances connected with Dyer?

Ans. When Capt Cheney relieved me, the prisoner Dyer was standing at the Guard House door talking with his wife, I called the Roll. He answered to his name. I asked Capt Cheney if I should bring him into the Guard House, turn him over. He asked if he asked if he was all right I told him he was there, and a guard over him, & I would turn him into the Guard house if he wanted I should. Capt Cheney said nothing to this. He receipted for all the prisoners, & I turned the receipt over to the adjutant.

Q. by J.A. Did you see any thing more of the prisoner Dyer?

Ans. No Sir. I left Camp immediately after.

Q. by P. M. When the new guard marched by the adjt. & when they came to an "order Arms" did you pull out the Receipt for the Prisoners, & ask Capt Cheney to sign it before the Roll was called?

Ans. Not that I know of.

Q. by P. M. When the Roll was called did not Dyer fail to answer to his name, & when the prisoner asked where he was did you not tell him he was outside?

Ans. He answered to his name.

Q. by P. M. Was a written statement of charges on which the prisoners were confined, delivered to the Prisoner by you that morning?

Ans. No Sir.

Q. by P. M. Was any charge against Dyer, set opposite his name in the Guard Report Book?

Ans. There was.

Q. by P. M. Was the charge there when the prisoner was delivered to Capt. Cheney?

Ans. I don't think it was.

Q. by P. M. Was the charge put in the Book that

day when the Guard Report was made?

Ans. The prisoner Dyer had only come in the day before, and no charges were sent with him.

Ques. by Pris. Did you receive a copy of the charges afterwards?

Ans. No Sir.

Ques by Pris What was the charge set opposite the prisoner's name in the Guard Report Book?

Ans. I made out a new report, because I could not find the charge before, about a day after. There were a number of charges against prisoner which the officer of the day before did not make out, and I could not file my report until he had.

(Shows Guard Report Book).

Ques. by Pris Did you fix the new report on to the old one?

Ans. Yes Sir.

Ques. by Pris What was your object in so doing?

Ans. The Adjutant wanted the report with the charge opposite the man's name?

Ques. by Pris Was this done after Capt. Cheney was arrested?

Ans. I came up the morning Capt. Cheney was relieved, & the Adjutant wanted I should make a new Report & I made it on the 18th

Ques by Pris Was there any talk of charges being preferred against Capt Cheney, or any difficulty?

Ans There might have been but I did not know of any.

Ques by Pris When was Dyer standing at the time you speak of, how was he guarded?

Ans. At the guard house door, & a Sgt. & Supernumary with him.

Ques by Pris What was the Srgt's name?

Ans A. B. Blackman. 106th N.Y. I think there were two Srgts. on duty, & I could not tell whether Blackman or the other was on duty at this time.

Ques. by Pris. Is it customary for officers of the guard to allow prisoners out of the Guard House to talk with their friends?

Ans It has been.

Ques by Pris Who was Dyer confined by?

Ans He was ordered from jail by Col. Brown. Col. B. ordered me to send to jail. I sent a relief, & brought up about 15. Dyer among them.

Ques by J.A. When prisoners have been allowed out of Guard House has it been the custom always to put them in charge of a guard?

Ques. by C.A. Did you state to Capt Leheny what crime
you was charged with?

Ans. No sir.

Ques. by J.A. Was any thing more said about him
than what you have stated?

Ans. Nothing was that I know of.

Ques. by J.A. Is it customary at Barracks No 3 at
Guard Mounting each morning to discharge from
the Guard House, prisoners whom no charges are filed
against whom no written charges are filed?

This question was objected by the prisoner.

The court was cleared and after due delib-
eration decided to sustain the objection.

Ques. by J.A. Are there not a great number of prisoners
confined at the Guard House, so many that
it would be impossible to prefer charges against
them, before the next Guard Mounting after they
were confined?

This question was objected to by the prisoner,
on the ground that it would be no excuse for vio-
-lating regulations.

The court was cleared, & after due delibera-
-tion decided to sustain the objection.

Ques. by J.A. Has the commanding officer at Barracks
No 3 given orders forbidding the release of prisoners
at Guard Mounting according to Regulation?

Ans. I have never seen such orders.

Sergeant Baskin Freeman 161st N.Y. Vols. a witness for the prosecution being duly sworn testified as follows:

Ques. by J.A. What is your name rank &c.?

Ans. Baskin Freeman 1st Supt 161st N.Y. Vols.

Ques. by J.A. Do you know the prisoner Capt. C.?

Ans. I know him by sight.

Ques. by J.A. Were you on duty with him Sept. 16th at Bk.

No 3 + in what capacity?

Ans. I was as Supt of the Guard -

Ques. by J.A. Were you at the Guard House that morning?

Ans. Yes Sir: I relieved the Supt. there.

Ques. by J.A. Do you remember seeing a prisoner Philips
to you there?

Ans. Yes Sir

Ques. by J.A. State what was done by Capt. Leheny with
reference to him?

Ans. When I relieved the Supt. he (the Supt.) said there was a man he had let out to talk to his wife. He said he appeared like a very fine fellow, & he thought he would let him go to the Barracks, if he was going to be on. He stood there & talked with his wife a short time, & came to me, & asked if he could go to the Barracks. I said I could not let him go, but referred him to the officer of the guard Capt. Leheny.

He went and talked with Capt. C. a short time
then he went down to the Barracks.

Ques. by J.A. Did Capt. Lehney see him go?

Ans. I suppose so. He was talking with Capt. C. & turned
away and went to the Barracks with his wife.

Ques. by J.A. Did Capt. C. say any thing to you about him?

Ans. No sir. Don't remember as he did.

Ques. by J.A. Did you see any thing more of Dyer?

Ans. Nothing more after I saw him go down to the Bks.

Ques. by J.A. Was he there next morning when the
Roll was called?

Ans. No sir.

Ques. by the Court. Did you hear the conversation betw-
-een the prisoner Dyer & Capt. Lehney & what was ^{it?}

Ans. I didn't hear it.

Ques. by the Court. Did Capt. C. know that Dyer
was a prisoner?

Ans. That is more than I could tell.

Ques. by Court. Did Dyer return after leaving the Grand
House?

Ans. I didn't see him.

Ques. by Pres. How long after you released the Capt. was it
that Dyer wanted to go to the Barracks?

Ans. I should judge it was about 10 minutes.

Ques. by Pres. When you refused Dyer to Capt. Lehney did
you say to Capt. Lehney that he was a prisoner?

Ans. I turned to Capt Cheney and said here is a man talking to his wife that wants to go down to the Barracks - I can't be positive as to the words.

The Judge Advocate here introduced in Evidence the Guard Report Book at Barracks No 3, as the Report made by Capt. Cheney on the 16th Sept 1863. The prisoner admitted the Report and signature to be in his hand writing, Except that the entry opposite Dyer's name under the head of charges, was not there when he signed it. The following entry appears in the Report as the list of Prisoners

No. x	Name x	Charge Description	Remarks x
35	Philip Dyer	"	Escaped through the lines Sept. 16 th /63

The Prosecution here rested.

The prisoner introduced the deposition of Lt. Col. D.B. Allen 154th N.Y. Vols. taken this morning before a Justice of the peace in the presence of the Judge Advocate on account of the illness of the witness, which was read to the court by the Judge Advocate - & of which the following is a copy.

Testimony of Lieut. Col. D.B. Allen in relation to certain charges preferred against Capt. M.B. Cheney 154th New York Vols.

Lt. Col. D.B. Allen Affidavit for the prisoner being duly

sworn testified as follows:

Ques. by Pris What is your name rank &c?

Ans. Lt. Col. D. B. Allen 154th N. Y. Vols.

Ques. by Pris Where stationed?

Ans. Barracks No. 3 Elmira N. Y.

Ques. by Pris Have you done duty there as officer of the day,

Ans. Yes Sir

Ques. by Pris What has been the custom about allowing
prisoners to visit their friends?

Ans. There has been two instances when I have been off-
-icer of the day of prisoners being allowed to visit
outside of the Guard House with their friends.

Ques. by Pris. Were they in charge of sentries?

Ans. There was no guard in charge of them.

Ques. by J. A. Were they allowed to go to the Barracks.

Ans. In one of the cases he was allowed to go to the Bks.
& drive a horse to the Guard House

Ques. by J. A. Did the instructions to the officer of the day
allow this?

Ans. There are no instructions except what are written
they don't say any thing about it.

Subscribed & sworn

before me this 17th } (signed) D. B. Allen

Oct. 1863

Lt Col. 154th N. Y. V.

George L Davis

Justice of the Peace

Lieut Col. J H Lansing 86th N.Y. Vols. a witness for the
Prisoner being duly sworn testified as follows:

Ques. by Pris. What is your name rank &c?

Ans. Jacob H Lansing Lt. Col. 86th N.Y. Vols.

Ques. by Pris. Do you know the prisoner?

Ans. I do Sir.

Ques. by Pris. Were you officer of the day at Barracks
No 3 Elmira Sept 16th 1863?

Ans. I was officer of the day Capt. Cheney was officer of
the guard & placed under arrest.

Ques. by Pris. How did Capt Cheney perform his duties that
day as officer of the guard?

Ans. In a good soldierly manner.

Ques. by Pris. Is it customary to allow prisoners outside
of the Guard House?

Ans. I presume not Sir: I answer that question accord-
-ing to written instructions unless under guard.

Ques. by Pris. Did you receive written charge against
Dyer that day at Guard mounting?

Ans. I did not.

Ques. by Pris. Have you ever received any?

Ans. I have not.

Ques. by J.A. Did you discharge Dyer from confinement
that day?

Ans. I did not.

Ques. by Pres. Is it customary for officers of the day
to give to officers of the guard the full custody
& control of Prisoners at Barracks No 3?

Ans. I presume it is. They receipt for the prisoners.

The prisoner introduced in evidence the
Guard Report Book at Barracks No 3 for the purpose of
showing that the first report made by Capt McAnally
on the 15th does not show for what Dyer was confined,
nor by whom, & that the second report is pinned on to
the first one.

The testimony here closed & the prisoner asked
for time until Monday morning the 19th inst. to
prepare his written defence.

The court was cleared & after due deliberation
decided to allow the prisoner the time asked for.

x x x x

The Court thereupon at 1 o'clock P.
M. adjourned until Monday Morning the 19th day of
October 1863 at 9 1/2 o'clock

C. H. Lang.

1st Lt. & Adj. S. C. M. S.

Judge Advocate.

W. W. Emerson

Col. 157th C. M. S.

President.

Elmira N. Y.

Oct. 19th 1863

9.30 am.

The court met pursuant to adjournment

Present.

Col. Emerson.

Maj. Babcock.

Capt. Baldwin.

Capt. Wallace.

" Curran.

Lt. Yonny Judge Advocate.

& the accused.

The minutes of the proceedings of the last meeting were read over to the court by the Judge Advocate, and the prisoner Capt. M. B. Leheny presented his written address hereto annexed ^{marked "G."}

No objections being made by any member of the court the address was read by Lt. + Adjt. A. Leruby
154th New York Vols.

The Judge Advocate submitted some remarks on behalf of the prosecution.

The court was cleared + after due deliberation found the prisoner Capt. M. B. Leheny
154th New York Volunteers as follows:

Of the specifications, Guilty, except the words

Charged with desertion.

Of the charge, Guilty.

And the Court did therefore sentence
Semi. Capt. M. B. Cheney, 154th Regt. C. V. Vols.
to be reprimanded in General Order & to be ordered
to rejoin his Regiment.

C. H. Saug

H. E. Curson

1st Lt. & Adj. S. C. V. S.

Col. 157th C. V. S.

Judge Advocate

President

... and objection of Captain M. B. Cheney to the form of the charges against him, was well taken in his defence. He should have been tried under the 81st Rule of the Rules and Articles of War, which provides for the specific offence with which he was charged. As he has joined his Regiment by order of the War Department, no further action in his case is necessary.

*Wm. A. D. M.
Cory. Gen. Insp.*

Scitify that the foregoing is a
correct transcript of all the testimony & pro-
ceedings had in the trial of Capt. M. B. Cheney
154th Regt. C. V. Vols. before the General Court-Mar-
tial convened at Columbia N.S. by virtue of Special
Order No 39 Head Quarters Department of the East.
Station; Columbia. N.S.

Date; Apr 27th 1863

C. H. Saug.

1st Lt. & Adj. S. C. V. S.

Judge Advocate.

J. C. M. S. If the Court please -

Oct 19/13 In relation to the charge and specification against me I wish to call the attention of the Court to the total absence of any proof in support of either

The charge is for "neglect of duty - to the prejudice of good order and military discipline"

The neglect of duty" is alleged in the specification as permitting a substitute named Phillip Dyer charged with desertion to escape from my custody" In this case the offense committed by me if any, consisted in suffering a person legally in my custody to escape or be released wrongfully, and in such a manner as to bring responsibility upon myself.

The evidence does not show that any prisoner charged with desertion came into my hands on the sixteenth of Sept last when the alleged escape occurred. It is true there is proof that a man named Phillip Dyer was in the vicinity of the Guard House when I took charge of the Guard, but there were no charges against him. And there is no evidence to show that orders had been given for his detention by the commanding officer.

By reference to the 82nd Article of War it will be seen in order to make an officer of the

Guard responsible for the receiving and safe keeping of a prisoner. The officer committing shall at the time deliver an account in writing of the crime with which the prisoner is charged.

Benét in speaking of the above says "The requirements of this article are unmistakable

And the proviso would seem to admit the right of the officer of the Guard to reject a prisoner when no written statement of the crime charged was submitted."

I therefore submit that in failing to show that the man Phillip Eyer was properly committed to my custody as a prisoner and a written statement of the crime with which he was charged delivered to me - the prosecution has failed to sustain the specification in its most vital and important particulars.

In another point of view I contend the evidence does not sustain the charge.

Article 226 Army Regulations makes provision for the disposal of prisoners against whom no written charges are submitted.

"All prisoners under Guard without written charges shall be released by the officer of the Day at Guard mounting unless orders to the contrary be given by the commanding officer."

It will probably be argued by the prosecution - that the above article does not confer authority upon the officer of the Guard to release prisoners against whom no charges have been preferred - I admit that it does not in terms confer the authority to release - directly upon the officer of the Guard.

The reason why it is given to the officer of the Day is to me quite obvious - Simply because the officer of the Day is charged with the safe keeping of prisoners. And all other duties pertaining to the guard and the Court are under his control. He is responsible to the commanding officer ^{for} the performance of all his duties - Therefore the Regulations in terms confer upon him the duty of releasing all prisoners at Guard mounting every day, against whom no charges appeared.

But it cannot be argued that the officer of the Day cannot authorize his subordinate officer of the Guard to do these things

The evidence of Lt Col Leansing is explicit as to the officer of the Guard being authorized to exercise entire control over the prisoners.

They were allowed to receipt for prisoners and have full and entire control over them.

By the ~~express~~ terms of the regulations this is all the business of the officer of the Day.

But by tacit consent and general custom these duties are performed by the officer of the Guard.

Had the officer of the Day visited the Guard House on the day in question and found the prisoner there in confinement without written charges, he would have been compelled to have released him. The regulations are imperative and explicit on this point. But in view of the custom which has been proven to exist at Barracks No. 3 the officer of the Day did not visit the Guard House for the purpose of inspection and the releasing of prisoners but as usual left that duty to his subordinate the officer of the Guard.

I think it will hardly be claimed that I am criminally guilty for doing as

subordinate to the officer of the Day,
and under the sanction of universal
custom that which he was expressly obliged
by law to do or have done.

If the prosecution urge that the man
Dyer was not discharged by virtue of the
Regulations, but escaped without permission
through any neglect, I answer that I am
not responsible for him after his release from
guard. If the man was entitled to his release
from guard and I was authorized under
the Regulations and by general custom to release
him, my responsibility ended when that was
done. and I cannot be held accountable for
his escape afterwards.

Whatever view of the question the Court may
take, it is apparent that the practical result
was the same as if the prisoner had been
released by the officer of the Day - as he was
clearly entitled to have been.

The foregoing arguments are based upon
the law of the case - and in my opinion
entitle me to an honorable acquittal of the charge
and specification against me. But if the
Court disregard these conclusions and assume
that I am responsible for the escape of the

man Iyer from my custody at the Guard House. I have a few words to say on the evidence. There is sufficient evidence to establish the fact that it has been customary to allow prisoners to go out side the Guard House and talk with their friends.

It has been usual to allow them to go to the Barracks to visit friends. The evidence of Sgt Col Allen proves that he has known it to be done twice when he was officer of the Day. On one occasion a prisoner was allowed to visit the Barracks and drive a team down there. All the witnesses say it was customary to allow prisoners out side the Guard House to see their friends.

And I presume all the members of this Court know from their own personal experience that such has been the custom - sanctioned by Col Brown the commanding officer.

I submit to the Court in view of this custom and the general message of the Barracks that there was no neglect on my part of the ordinary precautions to prevent the escape of the man Iyer.

In relation to the descriptive averments contained in the specification -

For several reasons I hold that in not proving that Phillip Syer was a substitute charged with desertion the prosecution has failed to sustain the specification -

I understand that Courts Martial are as much bound by law as civil Courts - that the rules of evidence and the requirements of proof are the same - that the same amount and kind of evidence is necessary to sustain a charge and specification in a Court Martial proceeding as is to maintain an indictment in a civil Court of law. The charge and specification in Military Law answers to the indictment in criminal Law.

It is a principle in criminal law familiar to the Court that all necessary descriptive averments in an indictment must be proved as charged - and the rule goes even further and holds that if a person or thing is described with greater particularity than is requisite - yet it must be proved as laid -

The same rule is laid down by Benét in his Treatise on Military Law and Courts Martial, Page 295.

Hee says - When a person or thing necessary to be mentioned in an indictment is described with greater circumstances of greater particularity than requisite yet those circumstances must be proved otherwise it would not appear that the person or thing is the same as that described in the indictment. Hee further says that an allegation in an indictment must be proved though a prosecution for the offence might be supported without any such allegation having been made.

One great and controlling reason why this particularity of proof must be had, is that it may shield a man from a second conviction for the same offense. For instance if the prosecution after having convicted one on this charge and specification think proper to convict one again all that will be necessary to do will be to make out charges for furnishing to escape Phillip Dyer "a citizen" or Phillip Dyer charged with "absence without leave" or with any other species of offense except "desertion" and bring one to trial. I could not plead a former conviction

for the same offense in bar. because the second shows I was tried for letting a "Substitute" named Phillip Dyer charged with desertion escape -

Another and the last grounds upon which I claim an acquittal upon the law of the case. is that the charge and the specification come under different Articles of War. The charge - "Neglect of duty to the prejudice of good order and Military discipline" is under the 99th Article of War. The specification sets forth facts and circumstances falling directly under the Article 81st

This article expressly provides for cases of the nature set forth in the specification

Now it is a well settled rule of law governing Courts-Martial that "under whatever Article a charge is laid, the specification to it must state the act in terms appropriate to that article and not in terms which necessarily refer to some other article. Benet on Courts-Martial Page 52.

When an offense is of that specific quality as to be reducible to a particular Article of War. it must be prosecuted under

That article. That the intent of the law
and the purposes of justice may be answered
Sumner and Keogh. on Courts Martial and
also Benet on Courts Martial Page 53

Under the general article of War 99th, all
offenses not capital and not provided for by
other articles of war must be prosecuted -
But a specification appropriate to any
other particular article cannot be laid
under the general article "99

Benet on Courts-Martial Page 53.

In conclusion I would say that the manifest
result of my action in relation to the man
Dyer is the same as though he had received
his release by the officer of the Day.

That he was entitled to such release no one
will deny and if I was mistaken in
assuming to release him. I think trust
the court will consider that my act has
worked no practical injury to the service or
the government

During my connection with the Army I
have endeavored to perform my whole duty
as a soldier: but if I have at any time
violated the Military law I will cheerfully
submit to its penalty.

(signed) M. B. Cheney
Capt 154 NY Ia