

OFFICE OF  
JUDGE ADVOCATE  
GENERAL  
OF THE ARMY

---

BOARD  
OF REVIEW

---

HOLDINGS  
OPINIONS  
REVIEWS

---

VOL. 59

---

1946

R

16

B63

v. 59

Judge Advocate General's Department

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 59

including

CM 302791 - CM 307003

also

CM 296507

**LAW LIBRARY  
JUDGE ADVOCATE GENERAL  
NAVY DEPARTMENT**

Office of The Judge Advocate General

Washington : 1946

05770

CONTENTS OF VOLUME 59

<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
296507	Hollins	3 July 1946	1
302791	Kaukoreit, Ackerman, Bald	26 Aug 1946	7
302833	Young	26 Sept 1946	29
302838	Zaleski	26 Apr 1946	45
302849	Hertz	29 Mar 1946	59
302850	Masterson	25 Feb 1946	71
302851	Weddle, Kebstock	11 Apr 1946	79
302852	Noah	6 May 1946	87
302853	Peterson	19 Feb 1946	95
302854	Juhl	28 Feb 1946	99
302855	Rodrigues	21 Mar 1946	109
302864	Ryan	1 Mar 1946	121
302885	Payne	29 Mar 1946	133
302887	Garner	3 May 1946	143
302889	West	8 Mar 1946	161
302897	Hicswa	9 Apr 1946	167
302899	Capps	12 Mar 1946	191
302940	Manuel, Jones	14 Mar 1946	197
302949	Hamm	20 Mar 1946	209
302962	Deeg	17 Jul 1946	215
302963	Kimbrough	3 Oct 1946	235
302964	Strickland	1 May 1946	247
302965	Phillips	14 Mar 1946	261
302966	Baker	6 Mar 1946	269
302967	Grey	5 Apr 1946	279
302968	Anderson	19 Sep 1946	285
302969	Eskridge	16 Apr 1946	295
302970	Guiteras	29 May 1946	303
302971	Hall	18 Mar 1946	311
302972	Belgrade	25 Feb 1946	321
302973	Evans	19 Apr 1946	327
302974	Malarchok	25 Feb 1946	337
302975	Machlin	3 Mar 1946	343
302998	Hayne	12 Apr 1946	349
307000	Miller	22 Jul 1946	353
307001	Mercy	13 Mar 1946	361
307002	Parham	12 Sep 1946	375
307003	Hamilton, McDaniel, Rusk	27 Aug 1946	387

WAR DEPARTMENT  
In the Office of The Judge Advocate General  
Washington 25, D. C.

JUL 3 1946

JAGG - CM 296507

UNITED STATES )

PHILIPPINE BASE SECTION

v. )

Trial by G.C.M., convened  
at Headquarters, Base M, APO  
70, 28 September 1945. To be  
hanged by the neck until dead.

Private ROBERT HOLLINS )  
(38390412), 4459th )  
Quartermaster Service )  
Company, Base M, San )  
Fernando, APO 70. )

-----  
OPINION of the BOARD OF REVIEW  
WURFEL, OLIVER and DAVIS, Judge Advocates.  
-----

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert Hollins, 4450th (sic) Quartermaster Service Company, did, at APO 70, on or about 7 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Nathaniel Johnson, a human being by shooting him with a Carbine.

Accused pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. Accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority confirmed the sentence and withheld the order directing execution pursuant to Article of War 50½.

3. On 20 November 1945 the Board of Review in the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific examined the record of trial and held it legally sufficient to support the findings and the sentence. The Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board is attached to the record. On 21 November 1945 the Assistant Judge Advocate General in charge of that Branch

Office approved the holding of the Board of Review and advised the confirming authority that he had authority to order the execution of the sentence. The sentence was ordered executed by General Court-Martial Orders No. 43, General Headquarters, United States Army Forces, Pacific, 1 December 1945.

4. By letter dated 30 January 1946 the Theater Judge Advocate advised this office that the sentence had not been executed and that, in view of War Department communications directing the Commander-in-Chief, United States Army Forces, Pacific, to refrain from exercising the powers granted under Articles of War 48, 49, 50, 50½ and 51 and prohibiting the execution of all death sentences, the sentence could not be carried out in that theater. The record of trial was thereupon forwarded to The Judge Advocate General, Washington, D. C.

5. The record of trial has now been examined by the Board of Review in the Office of The Judge Advocate General, Washington, D. C., and it adopts and concurs in the holding of the Board of Review in the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific, a copy of which holding is annexed to the record of trial, and, for the reasons set forth therein, is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

Seamus W. Wurfel, Judge Advocate  
Thomas J. Davis, Judge Advocate  
Walter H. Davis, Judge Advocate

JAGQ - CM 296507

1st Ind

WD JAGO, Washington 25, D. C.

JUL 23 1946

TO: The Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Robert Hollins (38390412), 4459th Quartermaster Service Company, Base M, San Fernando, APO 70.

2. Accused was found guilty of murder in violation of Article of War 92 and was sentenced to be hanged by the neck until dead. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. In this case the accused killed another soldier, whom he believed had stolen certain property belonging to the accused. On three occasions, each about four hours apart, the accused asked the deceased for the return of his property and each time the request was refused, whereupon the accused secured his carbine and shot the deceased in the back, wounding him fatally.

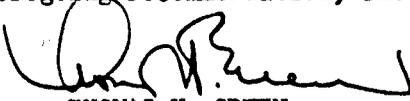
3. The accused is a young colored soldier, 21 years of age, who has had only a five-year grammar school education. He is of low grade mentality, having an Army General Classification Test score in Class V. His service is characterized by his company commander as "satisfactory" and he is described as an "average soldier". He appears to have had no trouble in civilian life, and no evidence of previous convictions was introduced at the trial. Psychiatric examination shortly after the offense disclosed that accused was sane, knew the difference between right and wrong and may be held responsible for his actions.

4. The Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific was of the opinion that the death sentence was inappropriate in this case. In view of the circumstances of this case, the background and prior good conduct of the accused, I concur in this opinion and recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life, and that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

5. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

3 Incls

- 1 - Record of trial
- 2 - Dft ltr for sig Sec of War
- 3 - Form of Executive action



THOMAS H. GREEN

Major General

The Judge Advocate General

---

( G.C.M.O. 265, 26 Aug. 1945).

ARMY SERVICE FORCES  
 In the Branch Office of The Judge Advocate General  
 With the United States Army Forces  
 In the Pacific

20 November 1945

Board of Review  
 CM P-1020

U N I T E D     S T A T E S     )

v.     )

Private ROBERT HOLLINS     )  
 (38390412), 4459th Quarter- )  
 master Service Company, Base )  
 M, San Fernando, APO 70.     )

Trial by G.C.M., convened at  
 APO 70, 28 September 1945.  
 To be hanged by the neck until  
 dead.

---

HOLDING by the BOARD OF REVIEW  
 ROBERTS, BROWNE and SNYDER  
 Judge Advocates.

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following charge and specification:  
 CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert Hollins, 4450th Quartermaster Service Company, did, at APO 70, on or about 7 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Nathaniel Johnson, a human being by shooting him with a Carbine.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence. The confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The evidence establishes that at about 1700, 7 September 1945, a single shot was heard in the area of the 4459th Quartermaster Service Company and the accused was observed lowering a carbine from his shoulder; the deceased, Nathaniel Johnson, who had been walking to the mess hall with his mess gear in his hand (R. 10), at the same time fell to the ground about six feet away (R. 8, 13), blood gushing from the left side of his chest, and cried out, "Oh Lord, Oh Lord" (R. 8, 10). He died that day from the effects of this injury, a gun shot wound (R. 23). Accused was the only person to be seen in the vicinity with a gun at the time of the fatal occurrence (R. 7-9).

After the shooting accused walked to the mess hall, holding his carbine low in one hand and delivered it without comment to the first sergeant. The latter observed it to be empty but did not determine whether it had recently been fired (R. 15-17).

Accused made a voluntary statement to an investigator later to the effect that he last observed his trousers and a shirt on a wire holding his mosquito bar in his tent at about 1615, 3 September 1945, when he left for guard mount. When he returned, the trousers and a mattress cover were missing. At about 0700, 7 September 1945, deceased was in accused's tent. The latter knew Johnson had taken clothing from other members of the company on another occasion and sold it. He was wearing tight fitting trousers which accused concluded were the ones which had been taken from his tent. About 0800, the accused asked deceased to allow him to inspect the waist and length measurements of the trousers. Johnson at first refused, then agreed. When it was found that they were accused's size, Hollins informed deceased they belonged to him (accused) and demanded their return. Johnson denied that they were accused's. At 1200, accused again asked for the return of the trousers, but deceased again denied Hollins' ownership. About 1630, the request was repeated to deceased, who was then sitting on a bed in the adjacent tent, but in vain. Accused stated that he thereupon went to his tent for the purpose of getting his carbine to shoot the deceased, loaded one live round in the magazine, and pulled the operating slide throwing it into the chamber. He left the tent, saw Johnson walking toward the mess hall with his mess gear, asked him again for the trousers and once more received no reply. Hollins then pulled the trigger, firing from the hip, about six feet away from the deceased. The latter fell to the ground and accused walked to the mess hall, turning the weapon over to First Sergeant Wright. He accompanied Wright to the orderly room and was turned over to his company commander. (R. 20, Ex. B).

No evidence was offered by the defense (R. 24).

4. From the foregoing facts, the court could conclude, to the exclusion of every other reasonable hypothesis, that accused shot and killed the deceased. The taking of his trousers and refusal to return them under the circumstances in evidence did not excuse or justify

(6)

Hollins' violent actions (CM 235143, McKinney, 21 B.R. 309, 313, 315, 2 Bull. JAG 309; CM 232400, Thomas, 19 B.R. 67, 78, 2 Bull. JAG 187), and were not such adequate provocation as to reduce his offense to manslaughter (MCM, 1928, par. 149a, p. 166; CM 231988, Steels, 18 B.R. 371, 374, 2 Bull. JAG 188).

Malice and specific intent appear by inference from accused's acts (MCM, 1928, par. 126a; CM P-951 Laws, 6 Nov 45; CM 232400, supra).

The record therefore contains substantial evidence that the accused was guilty of murder as alleged.

The trial was had three days after service of copy of the charges upon accused. No inquiry was made as to whether he had been afforded an adequate opportunity to prepare his defense. However, no request for a continuance was made and the allied papers accompanying the record disclose that the accused was present at the pretrial investigation under Article of War 70 fourteen days before trial, failing to take advantage of the opportunity then to call witnesses in his behalf. It cannot be said that accused's substantial rights were injuriously affected by failure to allow a longer interval between the date of service of copy of the charges on him and the date of trial. Although such shortening of time is contrary to declared policy, the irregularity was not jurisdictional and does not vitiate the findings and sentence (CM 135290 (1919), Dig. Op. JAG, 1912-40, sec. 428(15); CM P-947 Freeman, 8 Nov 45).

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. The death penalty in this case was approved by the reviewing authority, confirmed by the confirming authority and appears to be justified in the light of the undisputed evidence of murder.

5. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and sentence.

Harley Roberts, Judge Advocate.  
Colonel, J.A.G.D.

Allan R. Browne, Judge Advocate.  
Lieutenant Colonel, J.A.G.D.

Hart Snyder, Judge Advocate.  
Major, J.A.G.D.

WAR DEPARTMENT  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(7)

JAGK - CM 302791

26 AUG 1946

UNITED STATES

PENINSULAR BASE SECTION

v.

Trial by G.C.M., convened at Treponti,  
Italy, 14 and 24 September 1945. EACH:  
To be hanged by the neck until dead.

Oberwachtmeister HEINRICH )  
KAUKOREIT, Unteroffizier )  
HERBERT ACKERMANN and Wach- )  
meister ERNST BALD, all )  
1 Schwadron Gebirgs- )  
Aufklaerungsabteilung 85, )  
members of the German surren- )  
dered forces. )

-----  
OPINION of the BOARD OF REVIEW  
SILVERS, McAFEE and ACKROYD, Judge Advocates  
-----

1. The record of trial in the case of the members of the German surrendered forces named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Oberwachtmeister Heinrich Kaukoreit, Unteroffizier Herbert Ackermann and Wachtmeister Ernst Bald, all Germans subject to military law, acting jointly, and in pursuance of a common intent, did, at Borgomasino, Italy, on or about 6 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Gefreiter Franz Weiss, a human being, by beating him on the head and shooting him with a machine pistol.

Each accused pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced as to any of the accused. Each was sentenced to be hanged by the neck until dead, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved the sentence as to each accused and forwarded the record of trial to the Commanding General, Mediterranean Theater of Operations, for action under Article of War 48. That officer confirmed the sentence as to each accused but withheld the order directing the execution thereof and forwarded the

record of trial to the Branch Office of The Judge Advocate General, European Theater of Operations, for action under Article of War 50 $\frac{1}{2}$ . Before action could be taken by the said Branch Office the powers, statutory or otherwise, in so far as they pertain to courts-martial, of the Commanding General, Mediterranean Theater of Operations, were suspended and in accordance with instructions the record of trial was forwarded to The Judge Advocate General.

### 3. Evidence for the Prosecution.

The court took judicial notice of the fact that at 1400, on 2 May 1945, the German forces in Italy surrendered unconditionally to the Allied forces (R. 8). Paragraph 5 of secret letter, Allied Force Headquarters, APO 512, dated 7 July 1945, was admitted in evidence as Prosecution's Exhibit A and was read to the court as follows:

"5. General a. Status of Enemy Forces (1) All enemy personnel, including those of the Luftwaffe, who had not passed through Army cages before 1400 hours 2 May have been termed 'Surrendered Enemy Forces', and have not been regarded as prisoners of war except on the specific authority of AFHQ/MTOUSA." (R. 14,15)

Oberleutnant Leonard Kastl testified that on 2 May 1945 he was the commanding officer of the German Mountain Reconnaissance Unit 85 and that accused Kaukoreit, Ackermann and Bald were members of his unit. Franz Weiss was also a member of his unit. On 2 May 1945 he knew the war had ended and passed on the information to the whole company. At this time the unit was stationed in Mongrovello, Italy, but on 6 May 1945 it was stationed in Borgomasino, Italy. He said his unit did not come into the actual control of the Allied authorities until the 9th or 10th of May when they moved to Piverone where, sometime between the 9th and 13th of May, he and the members of his unit which included the accused passed through the allied prisoner of war cages. Between 2300 and 2400, 6 May 1945, the accused Kaukoreit reported to witness that Weiss was dead. He saw Weiss' "body" lying in the courtyard by the kitchen and noticed that the head was pretty much swollen and that a wooden splinter about four inches long was sticking out from the top of the head. Witness gave accused Kaukoreit "instructions" to sew the body in a blanket and bury it "near the house." Later he asked accused Kaukoreit if the body had been buried and Kaukoreit replied that the body had been thrown into the canal (R. 6,7,8,9,10,11). On 2 May 1945 witness' company was still performing its normal functions but witness "couldn't order the men any more, but just instruct them in a good-will manner" (R. 11). The men were not free to go any place they wanted after 2 May 1945 and he was expected to keep his company together. Accused Kaukoreit told witness that Weiss would not do any duty for the company but witness did not speak to Weiss about it, for Weiss was never "home". When he reported Weiss' death to his commander, the commander said, "I am not at all surprised about this."

In the German Army all soldiers are trained to take over when their superior officer fails to do his duty. Accused Kaukoreit was not the first sergeant of the company, but was the "leader of the company headquarters" and "the shadow of the C.O." (R. 12,13,14). According to witness, accused Kaukoreit "did not have any disciplinary power, but in my absence he could easily give an order and later communicate this order to me." Accused Kaukoreit was not in command in the absence of witness but "the most inside beside the CO was the leader of the company headquarters." The second in command was the "oldest lieutenant in the company" (R. 14).

Doctor Walter Janout testified that on 6 May 1945 he was a medical doctor on the staff of the battalion of which Lieutenant Kastl's squadron was a part (R. 15). On the night of 6 May he was invited to a platoon party which he attended with Lieutenant Kastl. He left the party about 2330 or 2345 with Lieutenant Kastl and received a report that a dead man was lying in the "courtyard." When he arrived at the "courtyard" he saw the body of Weiss, a wooden splinter about ten centimeters long protruding from the head. Brain substance had already started to come out of the head wound. Witness declared Weiss dead. According to witness the head wound must have been the cause of death, and "if it wasn't an immediate death, it must have been death after a few seconds." Witness did not see any other wounds beside the head wound (R. 16). He did not examine the body to see if there were other wounds beside the head wound (R. 17).

Corporal Franz Fuchs, a member of accused's organization, testified that on 2 May 1945 it had been publicly announced to the organization that the war was over. The announcement was made by the company commander and later by "a battalion commander". Two days afterwards, in the street in Borgomasino, witness heard accused Kaukoreit addressing a group of men including accused Bald, accused Ackermann, one Hanke and others. Accused Kaukoreit said, "Men, we are going to found a Werewolf, that is the best thing to do. Whoever is for it raise his right hand." All present raised their hands except witness who refused to join the movement. On the night of 6 May 1945 witness went to a platoon party. When "the tailor, Weiss" arrived he was already partly drunk. At this time those attending the party were singing individual rhymes. After the commanding officer had sung a rhyme, Weiss countered with another to the effect that "the one who has just sung and who does not understand, for him it would be better if he shut his mouth." After that there was "an uncanny silence" and witness left the party because he "knew the strong political tension since Kaukoreit had already quarreled with Weiss" (R. 18). The prior quarrel occurred on 2 May 1945 immediately after the capitulation when Weiss had said, "Well, the Fuhrer is dead now and we are not bound to the Fuhrer any more, so I don't have to

listen to anybody any more" (R. 19). After he left the party witness went to bed. Later accused Bald entered witness' quarters and gathered everyone from the platoon about him. Accused Bald then said,

"Men, a lot has happened this night. Our squadron tailor, Weiss, is dead. The command court-martial has judged him. He was a scoundrel, a communist. He is already buried and it's no use to start any investigations."

Accused Ackermann was present during this speech but accused Kaukoreit was not (R. 19). The next day Lieutenant Kastl made a speech to the company and said that Weiss had been judged by a court-martial of his fellow soldiers (R. 20). After the capitulation there was a strong political feeling among members of the unit. The leading group of the noncommissioned officers "were on the side that you shouldn't curse about the Fuhrer, and the most important thing that was considered in the first few days was the thought of escape" (R. 23).

Private Karl Bresien, a member of accused's organization, testified that on 6 May 1945 he returned to his organization after having been away in the hospital for half a year. He went to the platoon party that night to greet some old comrades and then returned to his quarters and went to bed. About 2400 or 2330 that night Weiss entered the quarters. Weiss was a little drunk and was talking loudly and cursing. Upon being told to go to sleep he left the quarters and a minute later cried out. Witness, having been informed by two other occupants of the quarters that Weiss had "been beaten to death" went out of the quarters and found Weiss "lying about three meters away from the door with his head pointing towards the gate." Weiss "was lying in a pool of blood and he had a wooden splinter in his head." There were some more soldiers standing around the body and someone said, "One should give him a mercy shot." Upon that accused Bald shot at Weiss. Witness could not see exactly whether accused Bald used a machine pistol or a pistol and thought that only one shot had been fired. Witness heard Weiss "still breathing, labored breathing" before the shot was fired (R. 24,25).

Agent Michael E. Desmond, Criminal Investigation Division, Headquarters MTOUSA, testified that he was assigned to make an investigation into the circumstances surrounding the death of one Franz Weiss. After warning each accused of his rights under Article of War 24 he took their statements. The statement of accused Kaukoreit, along with a supplementary statement, was admitted in evidence without objection by the defense as Prosecution's Exhibit B, the statement of accused Ackermann as Prosecution's Exhibit C, and the statement of accused Bald as Prosecution's Exhibit D. Witness made a search for the body of Weiss but did not find it (R. 26,27,28,29,30).

According to the statement of accused Kaukoreit, he had been the principal speaker at a meeting of a group of men held in the street near his company area a few days before Weiss was killed. The group talked about the men in their unit who were disobeying orders since the war in Italy ended. Accused Kaukoreit pointed out that Weiss was one of the biggest offenders and that "we should get rid of" him. Everyone was unanimously agreed that Weiss should be killed. He then ordered accused "Balt" and Ackermann to "commit the deed at the best opportunity." Accused "Balt" and Ackermann said they would. Two days later accused Kaukoreit informed accused Ackermann that "tonight would be a good night to kill Weiss" because he "would put Taxacher and Krampfl as sentries from 12 p.m. to 2 a.m. because they could be trusted." He then saw Taxacher and Krampfl and told them of his plan to kill Weiss that night. Later he went to the platoon party where he saw Weiss. Weiss appeared drunk. Each of those present at the party sang comical songs individually. After Lieutenant Kastl, the commanding officer, finished his song, Weiss sang, "The one who has just sung, and who is stupid, for him it would be better if he shut up." Everyone ignored Weiss at this time. Later, Lieutenant Kastl sang another song and Weiss repeated his song. Still nothing was done. Lieutenant Kastl then made a speech during which Weiss shouted remarks and made "bad" gestures. Lieutenant Kastl thereupon told accused Kaukoreit to send Weiss away and accused did so. The party went on and, shortly before midnight, accused "Balt" and another reported to accused Kaukoreit that Weiss was lying in the courtyard beaten to death. The whole group went to look at Weiss and Lieutenant Kastl began interrogations. Accused "Balt" and Ackermann never discussed the matter of beating up Weiss with accused Kaukoreit and accused Kaukoreit "didn't want to know who did it."

In a supplementary statement accused Kaukoreit said that he had been a soldier for many years and had been "brought up on the duties and attitudes of a soldier." After the capitulation Weiss frequently refused to do his duties and tried to induce his fellows to revolt. When accused Kaukoreit demanded that Weiss be punished the leader of the "Squadron" told him that he no longer had the means to do so. Accused's organization "had become a community without any jurisdiction" and its members were "compelled to settle all things by ourselves. \*\*\* A German court did not exist any more \*\*\*. We were not yet subordinated to an American court. It is a natural fact that under these circumstances, a primitive law is used only." The "court of fellow soldiers" contained a total of ten persons.

In his statement accused Ackermann said he had reported to accused Kaukoreit that Weiss, who was drunk, had called him, accused Ackermann, a dirty swine and had said that he had browbeaten the men and that he should be killed for that. Weiss had pulled out his submachine gun

but accused Ackermann had grabbed the weapon and taken away the magazine. The evening of the same day accused Kaukoreit spoke to a group of men in the street about Weiss. Accused Ackermann was present. Accused Kaukoreit asked the group whether they would join a comrade tribunal and all agreed. He told the group that Weiss "should be beaten to death at the first opportunity" and ordered accused Ackermann and Bald to commit the act. Accused Ackermann and Bald acquiesced. The following day accused Ackermann and Bald agreed that "Weiss would be beaten to death and thrown into the canal on this night, if possible." That night accused Ackermann attended the platoon party and saw Weiss there. Weiss was drunk and insulting. When Weiss left the party accused Ackermann and Bald and another left also and went directly towards Weiss' billet. As they entered the courtyard they could hear Weiss' voice inside the house. When Weiss came out accused Ackermann had gone to the courtyard gate. Weiss came to the courtyard gate and stumbled into accused Ackermann, recognizing him at once. Weiss asked him what he was doing there and started wrestling with him. Accused Ackermann's foot touched a wooden stake about three feet long by 10 1/2 inches wide and he "grabbed the stick, pushed Weiss away, and Weiss then fell on the ground, and as I was on top of him, I hit him twice on the head with the stick. The stick broke. I heard someone coming out, and I then ran away." Accused Ackermann later returned to the courtyard with some other men where they found Weiss groaning on the ground. Accused Bald being present at the time took a gun from one of the other men and shot Weiss in the heart. Lieutenant Kastl then came and told accused Ackermann to remove Weiss' body from the courtyard. Someone helped him drag the body to the canal where it was thrown in. He "tied an iron bar to Weiss' body so that it would sink."

In his statement accused Bald said that a few days before Weiss was killed he was standing in the street near his area with accused Ackermann and two other men. Accused Kaukoreit approached the group and started to talk about Weiss and suggested that they "found a Werewolf group and put Weiss aside." All agreed to join the group except one Fuchs. They then discussed killing Weiss and accused Kaukoreit asked who would do it. Accused Ackermann said he would do it. Weiss was to be killed at the first opportunity, if possible that night. Accused Bald went to the platoon party where Lieutenant "Kastel" sang a short song. Weiss answered with an insulting song. When Lieutenant "Kastel" made a small speech, Weiss interrupted several times and made "bad" remarks. An hour later accused Bald, accused Ackermann and another left the party and went to "the creek." Ackermann said he was looking for a place to throw the body of Weiss in. They "all found a place where the water was deep." They then went to the courtyard in front of Weiss' quarters. Accused Bald heard steps coming out of the house and ran about 25 yards away to a vehicle and hid so that he "would not be seen." Within a few seconds he heard

Weiss' voice in the courtyard, then he heard a bump and Weiss groan. He could see nothing because of the darkness. He waited about two minutes and then ran to the street where he met accused Ackermann and the other man he had been with. Upon being informed by two other men that Weiss had been beaten and was lying in the courtyard he went to look at Weiss. He borrowed a flashlight and, shining it upon Weiss, saw that Weiss was still breathing. Weiss' head was cracked open and there was a wooden splinter sticking out. Also "the brain was hanging half out." Accused Bald "saw that Weiss was as good as dead," so he "borrowed a machine pistol \*\*\* and fired one shot into his heart." He then went back to the platoon party and reported the incident to accused Kaukoreit. Later he and accused Ackermann dragged Weiss' body to the creek about 100 yards away. At the creek, Ackermann bound a piece of iron around Weiss' neck and both of them pushed Weiss' body into "the river." Later that evening, back at the quarters, accused Bald made the following speech:

"This had been a night of much happenings. Weiss has been executed by comrade courtmartial. He was a pig, a scoundrel, a communist, and did not belong to the squadron. He has been buried, how and where is none of your business. \*\*\*"

The President instructed the court that the extra judicial statements of each co-accused could be considered as evidence only against the one who made them and not as evidence against the other co-accused (R. 33).

#### 4. Evidence for the Defense.

Oberwachtmeister Kaukoreit, having had his rights as a witness explained to him, elected to take the witness stand in his own behalf. He testified that he had been in the German Army eleven years. He had known Weiss since December 1943 and Weiss had been the company tailor. On 2 May 1945 he heard of the surrender terms and still received duty and instructions from the company commander, Lieutenant Kastl. The company still carried on as a unit in a "completely normal way of duty" (R. 32,33). On 4 May 1945 Bald and Ackermann reported to him that Weiss would not obey any more orders and that he had threatened to shoot any officer who would try to make him do so with a machine pistol.

"\*\*\* And this moment according to my soldierly feeling was a very critical situation with respect to the keeping of discipline. In such times as this it is always thus that a bad example makes himself willing and easily followed, so I called a court immediately at that place which at first consisted of us three. In view of the fact that Lieutenant Kastl had refused to take any steps a few days before, we agreed unanimously on the death punishment." (R. 33)

Accused Kaukoreit had no personal grudge against Weiss. At the end of 1944 orders were issued in the German Army to the effect that when a leader fails to do his duty for his unit in a critical situation, the next superiors all the way down to private first class were to take over. He considered the failure of Lieutenant Kastl to take any action against Weiss as "a plain failing of the company commander in this case." He regarded Weiss' acts as open mutiny. The company had not been told that it was subject to "allied law." He was dissatisfied with the company commander as a leader at that time. There was another lieutenant with the company but he was not consulted in the matter of Weiss, for first, accused Kaukoreit supposed him to have the same opinion as Lieutenant Kastl since both officers had just come from an officers' meeting, and second, because he was too young. The battalion commander was not consulted, for most probably he, like Lieutenant Kastl himself, would refuse any action on disciplinary cases. A few days after Weiss had been killed an order was read to the effect that the accused's organization was still under the jurisdiction of German courts. It was not until they came to Piverone that they heard the Americans would take jurisdiction over all offenses (R. 34,35,36). The court accused Kaukoreit set up was called an "emergency court-martial." In such a court-martial it is not necessary that there be a person on the court whose rank equals the rank of the person to be tried. The members of an emergency court-martial are supposed to be officers but they were not officers in this case due to the existing circumstances (R. 36,37).

Unteroffizier Nerbert Ackermann, having had his rights as a witness explained to him, elected to take the witness stand in his own behalf. He testified that he had no personal animosity against Weiss and that he tried to kill him on 6 May 1945 because "we had decided in the emergency court-martial that Weiss should be killed." The customary method of killing a man after he is condemned to death in the German Army is by shooting him, not by beating him to death. The emergency court-martial determined that Weiss was to be shot. The beating accused Ackermann gave Weiss was not in accordance with the death sentence that had been passed by the emergency court, but since accused Ackermann "didn't get to draw" his pistol, he "took the stick first and hit him to keep him away" (R. 37,38). Accused Ackermann knew of no other emergency court set up with non-commissioned officers acting as the court. He had the feeling that non-commissioned officers had the duty to take over a command in matters other than battle when they felt that their superior officers were not doing their duty. Weiss was not present when the emergency court was held. Weiss could never be reached. During the day he was always gone and at night he went to a place in the quarters where nobody could find him." "Either" accused Ackermann "or" accused Bald

were ordered to kill Weiss. Accused Ackermann did not volunteer to kill Weiss; that was decided by the emergency court-martial of which accused Kaukoreit had charge. The emergency court-martial consisted of ten or eleven men altogether, comprising all the non-commissioned officers of the company plus the privates first class who had been notified by the accused Kaukoreit. The emergency court-martial was not called a "werewolf" (R. 39,40).

Wachtmeister Ernst Bald, having had his rights as a witness explained to him, elected to take the witness stand in his own behalf and testified only to the fact that he signed his pre-trial statement (R. 41,43).

Lieutenant Colonel Victor von Schweinitz, German Army Group C, associate defense counsel, testified that his present status is that of "surrendered enemy personnel" and that he is stationed at the prisoner of war camp at Ghedi, Italy. He was present at Caserta when the surrender terms were signed at that place and was one of the persons representing the German Army in Italy in its capitulation (R. 45). He is not a member of the legal profession in the German Army but studied law in Germany and France for several years (R. 48,49). Under the terms of the surrender document signed at Caserta, to become effective 1400, 2 May 1945, German military authorities remained responsible for discipline and German officers and military police were allowed to keep their firearms. Nothing about German courts-martial was stated in the surrender document, but the document did contain a statement that further instructions would come later. Sometime in 1944 an order was issued by Hitler himself which provided, for the first time in the German Army, that in certain cases non-commissioned officers were authorized or even obliged to take over the authority of their superiors. There are such things as emergency courts-martial in the German Army (R. 45). A German commander is authorized to hold an emergency court-martial in all cases in which immediate action is necessary to maintain discipline and where the normal court-martial cannot be reached.

"\*\*\* That was the case here where the judge advocate of this division had killed himself, I think on May 2nd. In such cases an emergency court-martial can be held, and in a case like this it must be held and the company commander or battalion ought to have held an emergency court-martial, but they didn't do anything at all, didn't take any action against the act of mutiny of lance corporal Weiss, and it certainly was a failure of the commander to do his duty." (R. 45,46)

An emergency court-martial is appointed by a company commander, battalion commander or regimental commander, as the case may be. Usually

there are only three members sitting on the court, at least one member of which is of the same rank as accused. In a normal court-martial, a non-commissioned officer or private cannot be judged if there is not a non-commissioned officer or private on the court. For the type of offense Weiss committed the customary type of punishment a German court would mete out would be death. The accused must be present but if the accused escapes it is possible that he could be condemned in absentia (R. 46,47). In this case the battalion commander should have appointed the court and if he could not or did not do it, then the company commander. If the company commander did not appoint the court then under the order of the Fuhrer of 1944, anybody actually could do it. The emergency court which acted on the case of Weiss was abnormal, "but a thing which could happen according to this order published last year." It is not customary to have all members of a company who volunteer sit on the court. "The order issued by Hitler last year is absolutely irregular, something that exists in no army in the world and didn't in our Army before, and as I told you it was approved by very few people" (R. 48). Witness did not know whether there was any limit to the number of men that can sit on an emergency court (R. 48). The customary method of execution in the German Army for a death sentence is shooting. Witness did not think there was another method of executing such a sentence (R. 50).

#### 5. Jurisdiction in General.

On 29 April 1945 all German forces under the command and control of the German Commander-in-Chief, Southwest (northern Italy and Austria), surrendered unconditionally by Instrument of Local Surrender, effective on 2 May 1945, to the Supreme Allied Commander, Mediterranean Theater of Operations. Paragraph 8, Appendix A to the Instrument of Local Surrender, provided that:

"All personnel of the German Armed Forces shall be subject to such conditions and directives as may be prescribed by the Supreme Allied Commander. At the Supreme Allied Commander's discretion, some or all of such personnel may be declared to be prisoners of War."

Paragraph 16 of the above Appendix A provided that,

"The German authority will remain responsible for the maintenance of discipline throughout the German Land Forces."

On 18 May 1945, Allied Headquarters informed subordinate commands that "Enemy Courts-Martial may be permitted to function under allied supervision." On 19 May 1945, the Supreme Allied Commander issued the following directive to the German Commander-in-Chief:

"(2) Your responsibility in maintaining discipline among all personnel under your command or control will be exercised by you in accordance with German military law and procedures and subject to suspension and control by the Supreme Allied Commander or Subordinate Commanders.

"(3) In addition, you and all personnel under your command or control will be subject to trial in Allied Military Government Courts for all offenses, civil or military, against orders issued by or with the authority of the Supreme Allied Commander, against the laws and usages of war, or against the Civil Code, provided, however, that any such personnel who shall have been declared to be prisoners of war shall be tried in accordance with the provisions of the Geneva Convention."

On 4 July 1945, by direction of the Supreme Allied Commander, the following instructions were issued to subordinate Allied Commanders:

"(2) Since the issuance of those orders /19 May 1945, cited above/ there has been established by U.S. Military authorities the MTOUSA Prisoner of War Command. Surrendered personnel under MTOUSA Prisoner of War Command will, in addition to laws and tribunals mentioned in such orders of 19 May 1945, be subject to trial in U.S. courts-martial for violations of U.S. Articles of War and laws and usages of war in any case or class of cases in which Commanding General, MTOUSA Prisoner of War Command, so directs."

The offense for which the accused were here tried was committed on 6 May 1945. The unit of the German Army to which the accused belonged did not come into the actual physical control of the Allied authorities until sometime between 9 and 13 May 1945, at which time its members passed through the Allied prisoner of war cages at Piverone, Italy. By secret letter (AFHQ, AG 386.3/163) dated 7 July 1945, (Pros. Ex. A, R.15) it was provided that all enemy personnel who had not passed through Army prisoner of war cages before 1400 hours, 2 May 1945, were to be regarded as "Surrendered Enemy Forces" and not as prisoners of war in the absence of an express declaration that they or any of them occupied the latter status. On 6 September 1945, the charges against accused were referred for trial before a general court-martial appointed by the Commanding General, MTOUSA Prisoner of War Command under the authority granted him in the above quoted directive of the Supreme Allied Commander of 4 July 1945.

From the foregoing surrender terms and directives of the Supreme Allied Commander in implementation thereof, it is obvious that the

victorious Allied forces assumed full and complete control over all personnel of the German Armed Forces on 2 May 1946. Furthermore, the Allied forces became the occupying power with the right and obligation under international law to govern the territory formerly in the possession of the enemy surrendered forces and to punish violations of its laws (Hague Regulations, Article 43, TM 27-251, p. 31). There was no jurisdictional void created by the surrender during the period between 2 May 1946 and the time when the Allied Forces took actual physical custody of the surrendered enemy forces or the territory formerly occupied by them, for it is sufficient that the victor have the present ability to make its authority felt within a reasonable time (par. 276, FM 27-10). Nor was the directive of Allied Headquarters to subordinate commanders of 18 May 1945 or the directive to the German Commander-in-Chief of 19 May 1945 permitting enemy courts-martial to function under Allied supervision any grant of exclusive court-martial jurisdiction to the surrendered enemy forces. These were but permissive, temporary expedients designed to maintain discipline in the vanquished and disorganized enemy military establishment. These orders and directives expressly recognized the supremacy of Allied jurisdiction and law. Also, although prior to 2 May 1945 members of the German Armed Forces were not subject to local (Italian) law or any law other than their own (Coleman v. Tennessee, 97 U.S. 509; see Garner, International Law and the World War, Vol. 11, p. 477), as a result of the unconditional surrender on that date they thereafter became subject to the directives of the Supreme Allied Commander which directives made applicable to them both the local and Allied military law. Even if it may be said that under the directives of the Supreme Allied Commander the accused in this case could have been tried for their crime by a German court under German law, they were not so tried in fact. When they were tried by a United States Army court-martial, the victor was merely asserting the authority which had fallen to him on 2 May 1945.

It appears then that the Allied forces had the right and duty to try accused for a crime committed by them after the effective date of surrender either on the theory that accused were prisoners of war or occupied an assimilable status or on the theory that they had committed a crime against the laws of the occupied territory (See SPJGW 1943/3029, 2 Bull JAG 51; Spaight, War Rights on Land, p. 358; Dig Op JAG 1912-40, p. 1067).

#### Jurisdiction of General Courts-Martial.

In case of capture by the enemy, the armed forces of the belligerent parties have a right to be treated as prisoners of war (Hague Regulations, Art. 3, TM 27-251, p. 15; par. 70, FM 27-10). However, war criminals are

not entitled to the status of prisoners of war and it may well be that, upon capture, those who are suspected of having committed war crimes need not be initially interned as prisoners of war (Oppenheim, International Law, VOL. II, p. 299; British Manual of Military Law, Laws and Usages of War on Land, par. 56). Apparently having in mind the possibility that undetermined members of the German Armed Forces in Italy may have committed war crimes or belonged to allegedly criminal groups, the Allied Forces refused to declare all captured enemy personnel prisoners of war and instead chose to regard them simply as "Surrendered Enemy Forces."

If it may be considered that the accused, despite this declaration of the Allied forces, were entitled to be considered as prisoners of war by virtue of the provisions of the Hague Regulations, or that their status as "Surrendered Enemy Forces" was assimilable to that of prisoners of war, and that they committed the offense for which they were tried while in that status, then there can be little doubt but that the general court-martial was the proper tribunal and that they were subject to be tried by such court under an appropriate Article of War (AW 12; Hague Regulations, Art. 8, TM 27-251, p. 19; Geneva Convention, PW, Art. 63, TM 27-251, p. 101; SPJGT 1943/3029, 2 Bull JAG 51).

If on the other hand it is considered that the accused did not occupy the status of prisoners of war at the time the offense was committed or that they never did become prisoners of war or assimilés, and that the occupying Allied forces were employing their judicial instrumentalities merely as a substitute in time of war for the local criminal courts, then the general court-martial in this case also is a proper tribunal. It is not necessary, as a matter of law, to employ the military commission in such cases (AW 12, par. 7, FM 27-10). The occupant may substitute his own tribunals to administer local law where military necessity or the maintenance of public order and safety demand such action, where the machinery of justice has been so dislocated by the events of war as to be practically inoperative or where the trial of certain classes of cases in the local courts may be inimical to the interests of the occupant (Spaight, War Rights on Land, p. 358; Garner, International Law and the World War, Vol. 2, p. 87; par. 42d, FM 27-5). That the occupying power in the present case deemed it necessary to take such action with respect to members of the "surrendered enemy forces" is shown in the above quoted directive of the Supreme Allied Commander to the German Commander-in-Chief of 19 May 1945 and the directive of the Supreme Allied Commander to subordinate Allied commanders of 4 July 1945.

Courts created by a military governor or theater commander to administer the local criminal law depend for their existence on the

laws of war and not on the constitution or legislation of the legitimate sovereign (United States v. Reiter, Fed. Cas. No. 16, 146, TM 27-250, p. 1). This being so, although military tribunals acting in the place of the local criminal courts apply the substantive law previously existing in the occupied territory, it is manifest that such tribunals need not follow the forms of the local law. The accused in this case were tried for the crime of murder in violation of Article of War 92. The mentioned Article of War does not define murder and the definition of that crime found in the Manual for Courts-Martial does not materially depart from the definition thereof in the Italian Criminal Code. The latter definition is as follows:

"Art. 575. Homicide. Whoever causes the death of a human being shall be punished with imprisonment for not less than twenty-one years.

"Art. 576. Aggravating circumstances. Death penalty. The death penalty shall be applied if the act contemplated by the foregoing article was committed: \*\*\* whenever there was premeditation; \*\*\*" (Translation supplied).

Therefore, the accused have been in no way prejudiced by having been tried under a specification which would as substantially set out the offense of aggravated homicide under the Italian Criminal Code as it would the offense of murder under the 92nd Article of War. Death is a permissible punishment upon conviction of the offense charged seen in either light. (See SPJGA 1946/614)

#### Necessity for Review and Confirmation.

In discussing the necessity for examination of the record of trial in this case by the Board of Review under the provisions of Article of War 50 $\frac{1}{2}$  and for confirmation of the sentence herein under the provisions of Article of War 48, it is unnecessary to determine whether the accused were tried as prisoners of war or as common criminals, for the accused were tried before a general court-martial and not by a military commission. In this respect the case is to be distinguished from Ex parte Quirin (317 U.S. 1) and In re Yamashita (66 S. Ct. 340). The second paragraph of Article of War 50 $\frac{1}{2}$  provides in pertinent part:

"Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review." (Underscoring supplied.)

Article of War 48 provides:

"In addition to the approval required by article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

\* \* \*

(d) Any sentence of death, \*\*\*" (Underscoring supplied).

Since the accused were given the death sentence by a general court-martial in this case, it is apparent that both examination of the record of trial by the Board of Review and confirmation of the sentence are necessary.

#### General Discussion.

The accused claim to have taken the life of their fellow soldier, Weiss, pursuant to the sentence of an "emergency court-martial." The "court" was convened by the accused Kaukoreit, apparently the ranking non-commissioned officer in the unit to which all accused and the deceased belonged, and the accused Ackermann and Bald were members, ordered to execute its sentence by the accused Kaukoreit. If the "court" had been a properly constituted forum and its sentence had been properly reached and executed according to German military law, it is possible that the accused would have made out a complete defense to the crime for which they were here charged and found guilty. Such, however, was not the case. Lieutenant Colonel von Schweinitz, a German officer, legal scholar, associate defense counsel and a witness for the accused testified that under an order published by Hitler himself in 1944, non-commissioned officers were authorized and even obliged in certain cases to take over the authority of their superiors; that a German commander was authorized to hold an "emergency court-martial" in all cases where immediate action was necessary to maintain discipline and where the normal court-martial could not be reached; that in this particular case the judge advocate of the division of which accused's unit was a part had committed suicide on 2 May 1945 and therefore a normal court-martial could not be held; that the battalion or company commander should have held an "emergency court-martial" to try the deceased Weiss for his alleged open insubordination; that since these officers either would not or could not hold such a court the accused Kaukoreit could legally do so under Hitler's order and that the death penalty was proper in the circumstances. He also testified that the accused must be present at a trial before an "emergency court-martial," although he could be tried absentia if he escaped, and that the customary method of execution of a death sentence in the German Army is by shooting. Here the accused, Weiss, was not present at the "trial" before the emergency court which

condemned him to death and he lost his life, not by shooting, but by being brutally clubbed over the head in the black of night and without any warning whatsoever of his impending doom.

Accused Ackermann testified that Weiss could never be found at his organization during the day and that "at night he went to a place in the quarters where nobody could find him" and Lieutenant Kastl, the company commander, testified that Weiss was never "home". This, however, is hardly the equivalent of the "escape" which, it is alleged, would warrant the trial in absentia under German military law of a person accused of a capital offense. In this connection it may be noticed that Weiss' execution coincided with his appearance in the company area. Shortly before he was killed he had attended the platoon party and certainly there was ample opportunity to give him notice of the charges pending against him at that time. Accused Ackermann testified on the witness stand that the emergency court-martial determined that Weiss was to be shot but since he, Ackermann, "didn't get to draw" his pistol, he "took the stick first and hit him to keep him away." However, in his pre-trial statement, accused Ackermann said that Weiss was to "be beaten to death at the first opportunity" and that he, Ackermann, and accused Bald, on the day Weiss was killed, agreed that "Weiss would be beaten to death and thrown into the canal on this night, if possible." This statement, of course, can be used only against the accused Ackermann. Moreover, the most cursory examination of the record of trial would reveal that the whole course of the proceedings leading up to the death of Weiss was tainted with such irregularity, secrecy, malice, and stealth as to vitiate completely any semblance of judicial action, and this is so even when the admitted facts are considered in the light of the most barbaric system of justice imaginable. Stated tersely, the accused took what they considered to be the law into their own hands, informing none of the officers present in their organization of their plans. Conduct of the type exhibited by the accused in the record of trial has unfailingly shocked the conscience of civilization and has been consistently punished since the time men first learned to live together in organized society. The fact that the deceased Weiss may have been openly insubordinate on several occasions and may, indeed, have deserved severe punishment, does not serve to make his life forfeit at the hands of every group of desperados which unlawfully arrogates to itself the power and authority to judge and condemn (See CM 248793, Beyer, 50 BR 21).

As to accused Kaukoreit.

Accused Kaukoreit testified that he had no personal grudge against Weiss. His actions, however, give the lie to his testimony on the witness

stand. The "trial" was but a meeting of a group of men of deceased's company held in a street near the company area at which accused Kaukoreit was the principal speaker and at which he pointed out that Weiss had been disobeying orders since the war in Italy ended. It was agreed that they should "get rid of" Weiss. Accused Kaukoreit ordered accused Bald and Ackermann to "commit the deed at the best opportunity." On the day Weiss was killed he informed accused Ackermann that "tonight would be a good night to kill Weiss" because he would place two men "as sentries from 12 p.m. to 2 a.m. because they could be trusted." He then informed the two sentries of his plan to kill Weiss that night. Weiss was killed in the company area between 2330 and 2400 that night while accused Kaukoreit was at the platoon party. Shortly before midnight, while still at the party, accused Bald and another reported Weiss' death to him. Accused Kaukoreit "didn't want to know who did it." He did not inform either of his company officers or the battalion commander of his plan to kill Weiss, for he thought that they all would refuse to take any action on disciplinary cases. It thus appears, by his own admissions, that accused Kaukoreit conceived and organized the plot upon Weiss' life and that he set the stage for its furtive execution. Although he was not immediately present at the scene of the crime in the "courtyard" at the time it was committed, he was within easy reach thereof and if anything had gone amiss in the plan to take Weiss' life his assistance would have been readily available to his co-conspirators. It is not necessary to prove the immediate presence of the accused at the time and place of the commission of the crime, or that he actually aided in the commission of the offense; if he was in such a situation as to be able readily to come to the assistance of his companions, the knowledge of which was calculated to give additional confidence to them, he was aiding and abetting and may be charged as a principal (Com. v. Lucas, 2 Allen (Mass.) 170; CM ETO 1453, Fowler, 3 Bull JAG 284; CM 266724, McDonald, 43 BR 291). There can be little doubt that the accused was, at the very least, an accessory before the fact to the crime, for he ordered and commanded its commission. Under the law to be applied in United States courts, no distinction is drawn between accessories before the fact and principals, as these terms were defined at the common law, for the Criminal Code of the United States provides that "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal" (18 U.S.C. 550). The law of Italy, if it be considered that the accused was tried under that law, is to the same effect, for Article 113 of the Italian Criminal Code provides that "In a crime, when the act has been caused by the cooperation of several persons, each one of them is subject to the punishment established for the crime itself" (Translation supplied). By reference to another article, this article also provides that "promoting" or "organizing" the "cooperation" will be considered an aggravating

circumstance. That accused Kaukoreit appreciated the wrongfulness of his conduct is obvious from his clandestine actions and his statement that he "didn't want to know" who participated in the actual killing of Weiss.

As to accused Ackermann.

Accused Ackermann testified that he had no personal animosity against Weiss and that he had killed him in pursuance of the order of an "emergency court-martial" which had sentenced Weiss to be shot to death. He hit Weiss over the head with the stick only because "he didn't get to draw" his pistol. However, as has been pointed out above, the accused Ackermann in his pre-trial statement said that Weiss was to "be beaten to death at the first opportunity" and that he, Ackermann, and accused Bald, on the day Weiss was killed, agreed that "Weiss would be beaten to death and thrown into the canals on this night, if possible." This is precisely what happened according to accused Ackermann's statement and he was the chief actor. After he had hit the deceased twice on the head with the stick, with sufficient force to break the skull, he "heard someone coming out, and then I ran away." Later, someone helped him drag the body to the canal where it was thrown in. He "tied an iron bar to Weiss' body so that it would sink." Running away from the scene of the homicide and disposing of the body of the victim in the manner here shown are hardly the acts of an official executioner acting under the orders of competent authority. Such acts show the presence of a guilty mind, a fear of just retribution.

As to accused Bald.

The accused Ackermann, on the witness stand, testified that "either" accused Ackermann "or" accused Bald had been ordered to kill Weiss. In his pre-trial statement accused Bald admitted that, a few days before Weiss' death, he had voluntarily joined a "Werewolf group" the purpose of which was to "put Weiss aside", this mission, according to him, being then undertaken by accused Ackermann. It also appears from accused Bald's pre-trial statement that on the night of Weiss' death he, accused Ackermann, and another left the platoon party together and went to "the creek". At this time accused Ackermann informed accused Bald that he was looking for a place to throw the body of Weiss in. They "all found a place where the water was deep." They then went to the courtyard in front of Weiss quarters and, when accused Bald heard steps coming out of the house, he ran about 25 yards away so that "he would not be seen." Within a few seconds he heard Weiss voice in the courtyard, then he heard a bump and Weiss groan. He could see nothing because of the

darkness. He waited a few minutes and then ran out to the street. Later he returned to where Weiss was lying in the courtyard and noticed that Weiss was still breathing, a wooden splinter sticking out of his head and the brain "hanging half out." Seeing that Weiss "was as good as dead," accused Bald borrowed a machine pistol and "fired one shot into his heart." Private Bresien testified that Bald shot at Weiss after someone had said, "One should give him a mercy shot." Again according to accused Bald's statement, after reporting the incident to accused Kaukoreit, he and accused Ackermann dragged Weiss' body to the creek about 100 yards away where, after accused Ackermann had bound a piece of iron around the neck, they threw it in. Later that evening, back at the quarters, accused Bald made the following speech:

"This has been a night of happenings. Weiss has been executed by comrade court-martial. He was a pig, a scoundrel, a communist, and did not belong to the squadron. He has been buried, how and where is none of your business. \*\*\*"

From the foregoing recital of the evidence as it relates to accused Bald it is obvious that he participated fully in the conspiracy to kill Weiss. He was one of the men ordered to carry out the death sentence according to accused Ackermann and in any case was put on notice of impending events when, knowing that accused Ackermann intended to kill Weiss, he accompanied accused Ackermann to the creek to find a convenient place to do away with Weiss' body. He was present at the scene of the crime and, although he did not actually see the struggle between accused Ackermann and Weiss, he knew or should have known that the crime was being committed. He fired the "mercy shot" and afterwards helped to dispose of Weiss' body. Where one's presence is by preconcert, he may be guilty as an aider or abettor, even though he does not encourage or discourage the commission of the offense by word or act (CM ETO 1453, Fowler, supra). Accused Bald, therefore, is chargeable as a principal equally with the accused Ackermann who delivered the fatal blows. If any actual evidence of malice and intent be needed, accused Bald himself supplied that evidence in his speech to his fellow soldiers after the killing. He knew very well that he was not justified in acting as he did, for he ran away when he heard footsteps coming so that "he would not be seen." His actions throughout were those of a common criminal rather than those of one honorably employed to execute the duly promulgated sentence of a court-martial.

6. The court was legally constituted and had jurisdiction over each accused and of the offense. No errors injuriously affecting the

substantial rights of any accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused and to warrant confirmation of the sentence as to each accused. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92.

Christ E. Silvers, Judge Advocate.

Carlos E. McAfee, Judge Advocate.

Albert E. Schryer, Judge Advocate.

JAGK - CM 302791

1st Ind

SEP 20 1946

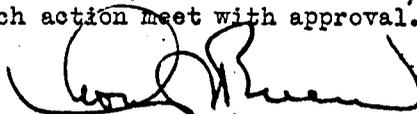
WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Oberwachtmeister Heinrich Kaukoreit, Unteroffizier Herbert Ackermann and Wachmeister Ernst Bald, all members of the German surrendered forces.

2. I concur in the opinion of 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 and to warrant confirmation thereof. Due to the fact that this offense was committed during a period of extreme disorganization and disruption of normal authority among the conquered German forces, that the accused purported to act under color of law and that their standards of justice and right may have varied substantially from those adhered to by us, I recommend that the sentence as to each accused be confirmed but commuted to confinement at hard labor for the term of the natural life of each accused, and that the U. S. Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature transmitting the record of trial to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

3 Incls

1. Record of trial
2. Draft ltr sig USW
3. Form of Ex action

---

G.C.M.O. 302, 16 Oct 1946).



WAR DEPARTMENT  
In the Office of The Judge Advocate General  
Washington, D. C.

JAGH-CM 302833

26 SEP 1946

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

CHANOR BASE SECTION

v.                                        )

Trial by G.C.M., convened at  
Brussels, Belgium, 12 and 13  
October 1945. Dismissal and  
total forfeitures.

Major OSCAR L. YOUNG  
(O-410665), Coast Artillery  
Corps.                                 )

-----  
OPINION of the BOARD OF REVIEW  
HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates  
-----

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

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

CHARGE I: Violation of the 80th Article of War.

Specification: In that Major Oscar L. Young, 563rd Anti-aircraft Artillery Automatic Weapons Battalion (Mobile), did, in conjunction with First Lieutenant Oscar M. Kimbrough, Master Sergeant Millard R. Bowman, First Sergeant William Dalmau, and Technician Fourth Grade Lawrence E. Willis, all of the 563rd Anti-Aircraft Artillery Automatic Weapons Battalion (Mobile), at Liege, Belgium, on or about 16 July 1945, wrongfully and unlawfully sell and dispose of the following captured property of the United States, namely, one truck, passenger bus, capacity approximately thirty-five (35) passengers, Diesel-engined, body manufactured by Graff & Griff, 6 wheels, for the sum of 120,000 Belgian francs, of the exchange value of about \$2800.00, thereby receiving as profit to himself, 25,000 Belgian francs, of the exchange value of about \$500.00.

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

Specification: (Finding of not guilty.)

To Charge I and its Specification, accused pleaded in bar of trial upon the ground of former jeopardy. It was stipulated between the prosecution and the defense that on 10 September 1945, the accused was brought to trial before a court-martial under competent orders of the Commanding General, Chanor Base Section, and arraigned upon the same Charge and Specification as Charge I and the Specification thereof upon which he was arraigned in the instant case (R 6). At or near the end of the prosecution's case a nolle prosequi was entered by the appointing authority as to the accused (R 6, 9). The record of the previous trial was not offered into evidence. After hearing argument of both prosecution and defense as to the propriety of accused's plea, it was denied. He then pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. Thereafter accused withdrew his plea of guilty and pleaded not guilty to Charge II and its Specification. He was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. No evidence of any previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution's evidence shows that accused, on the date of the commission of the offense alleged in Specification of Charge I, was, and had been for some time prior thereto, a member of the 563rd Anti-Aircraft Artillery Automatic Weapons Battalion (Mobile), of which organization Lieutenant Colonel Elwood N. Chambers was the Commanding Officer. On either the 13th or 14th of June 1945, Warrant Officer Junior Grade Irving A. Offstein, also a member of accused's organization then stationed at Weilberg, Germany, acting on orders of Colonel Chambers, proceeded to Displaced Persons Camp Number 44 located at Coblenz, Germany, and took possession of the bus described in the Specification of Charge I. The bus was delivered into the custody of Warrant Officer Offstein by a Lieutenant Colonel Barnett, the Commanding Officer of the Displaced Persons Camp, and Offstein thereupon transported this bus to Weilberg. Two days later accused's organization was moved from Weilberg, Germany, to Liege, Belgium, and again Offstein transported this bus to the new station at Liege. The bus in question was described as being painted in German camouflage. On its right side there was painted a German swastika and German eagle. It was about twenty feet long and had a passenger capacity of about twenty-five persons. The name of the bus manufacturer was Kaltem-Aufbaun and the name of the body builder was Graff and Griff. There was posted upon the windshield an authorization from the military government permitting the transport of the bus to Liege. The vehicle was not marked with any authorized United States Government identification (R 13, 25, 31, 32). It had been used to transport displaced persons from one camp to another and was under control of the military government (R 60-61). Offstein was given a written authority to transport the bus from Kreis (county) by military government. The written authority, which was posted

on the windshield read "the following vehicle, operated by the U. S. Army, has permission to go from blank to blank in the particular Kreis." No other documents or receipts were given or exchanged between Offstein and the military government at the time the former took possession of the bus. The vehicle was never listed or carried on property books of accused's organization (R 50, 58, 109). At the time accused's organization moved from Weilberg to Liege, the vehicle in question was transferred as a part of a convoy and delivered to the battalion motor pool. No receipt was obtained for it (R 54-58).

The bus remained in the motor pool for about four weeks (R 26). While there, it was never used and efforts to dispose of it by turning it into an Ordnance installation at that station met with no success. The motor pool sergeant was advised by Ordnance to take the vehicle to a roadside and abandon it. One day while inspecting the motor pool, the accused had a conversation with First Lieutenant Oscar M. Kimbrough, who was in charge, relative to the disposition of the bus and suggested that it be sold. Previously, a similar suggestion had been made by the Battalion Commander, Lieutenant Colonel Chambers, to the motor sergeant (R 32, 78, 85). During the course of the conversation between accused and Lieutenant Kimbrough, a civilian girl came and inquired if the bus was for sale. She was accompanied by her sister and brother and after inspecting the vehicle, they made an offer of 80,000 francs for it. The offer was accompanied by an invitation to meet socially for food and drinks. After these civilians departed, Lieutenant Kimbrough and the accused continued their discussion about selling the bus and Private (then battalion motor pool sergeant) Millard R. Bowman overheard them mention a price of 80,000 francs. He thereupon stated that he could get 100,000 francs for it and that 80,000 francs was not enough (R 28-31, 34, 41-43, 86-87). Accused told the sergeant to "Go ahead and see what you can do" and then stated to the group generally "well, why don't we three sell the bus and split the money three ways?" Kimbrough and accused thereafter visited the home of the two girls and their brother, who had previously offered to purchase the bus. They tried to get the civilians to increase their offer but were unsuccessful. On returning to the motor pool accused again instructed Bowman to go ahead and see what he could do about selling the bus (R 41-45). Bowman secured the services of Sergeant William Dalmau as interpreter and commenced negotiating with a civilian named M. Eugene Vigneron of the Liege Bus Association and about two weeks thereafter Vigneron bought the bus for the sum of 120,000 francs. On 16 July 1945, Bowman delivered the bus to the purchaser at his place of business in Liege and Sergeant Dalmau was paid 120,000 francs therefor. Dalmau retained 15,000 francs for his services and gave 105,000 francs to Bowman. Bowman in turn gave Lieutenant Kimbrough 50,000 francs, Sergeant Lawrence E. Willis 20,000 francs, kept 25,000 as his share and gave 10,000 francs to the men in the motor pool (R 13-14, 24, 30). Thereafter Lieutenant Kimbrough invited accused to his room at the Hotel D'Angleterre and gave him 25,000 francs. Accused had expected to receive 30,000 francs from the transaction and when a lesser sum was given to him, he demanded an explanation from Bowman. All transfers of the money took place on the day the bus was delivered to the purchaser (R 43, 28). Within a short time following

the sale of the bus, Lieutenant Kimbrough was placed in arrest in quarters at his hotel and while in that status, he received a note from accused (Pros Ex 5). In this note accused offered to pay part or all of Kimbrough's fine if Kimbrough would in turn testify that accused received no part of the money realized from the sale of the vehicle. Kimbrough was also requested to reply to accused and destroy the note by burning it (R 66, 129).

4. Private Bowman was called as a witness for defense and testified that Lieutenant Colonel Chambers, Commanding Officer of accused's battalion, spoke to him only once about disposing of the bus and that was to ask why he didn't get rid of it, "Why don't you sell the damn thing" (R 77). This conversation between Bowman and Colonel Chambers was corroborated by the testimony of Corporal Marvin J. P. Wood, a defense witness (R 78-80).

Following a full explanation of his rights as a witness, accused was sworn and testified that on 16 July 1945 he was executive officer of his battalion; a short time prior to that date the battalion came into possession of a German bus through a former battalion commander, Lieutenant Colonel Barnett. In the meantime a directive from higher headquarters was published requiring all units to dispose of captured or abandoned vehicles by turning them over to Ordnance. Accused then consulted the battalion commander (Chambers) about compliance with the directive and was told to comply by getting rid of the bus. This order was communicated to Lieutenant Kimbrough, the motor officer, by accused. Kimbrough told accused that Ordnance would not accept the bus and while these two were discussing the matter at the motor pool, two civilian girls and a man appeared on the scene and inquired if the bus was for sale. After these civilians departed, Private Bowman informed accused that he had been offered 100,000 francs for the bus. The following day accused again discussed the sale of the vehicle with the girl civilians and two or three days later he again discussed the sale with Bowman and learned that Colonel Chambers had instructed Bowman to sell the bus (R 84-88).

On 16 July 1945 Lieutenant Kimbrough informed accused that the bus had been sold and he went to Kimbrough's room and received 25,000 francs (R 89). Colonel Chambers was on leave when the bus was sold and accused was in command of the battalion for the time being. When Chambers returned, he placed accused in arrest in quarters and informed him that "innumerable charges" would be preferred against him. Thereafter he refused to see accused or discuss the matter with him, except on one occasion when he told accused "one of us had to take the rap" (R 90-92). Accused admitted writing the note (Pros Ex 5) to Kimbrough. After the investigation, he returned the 25,000 francs to the Provost Marshal, Lieutenant Price, in the same denominations that he had received it and was given a receipt therefor. He denied that he made any protestations to Bowman about receiving less than his share of the proceeds from the sale and asserted that when he spoke to the personnel of the motor pool of selling the bus, he did so in a joking manner (R 93-98).

Captain James H. Charlton, a defense witness, testified that he was the Battalion S-4 and Custodian of the property records. These records did not show the battalion had ever received or had ever been charged with a bus. He was aware of the fact that the vehicle in question had been placed in the battalion motor pool and was a gift from a former battalion commander. He had made no effort to learn the ownership of the bus. Property of this character, if received from other than official sources, would normally be picked up and listed by the Adjutant as battalion funds. The S-4 would not list or carry such property unless it was received from Ordnance or some branch of the United States Army. The only time equipment is picked up on property books is when it belongs to the Table of Equipment, bears a registration number and is in fact government property (R 108-113).

5. As noted, accused entered a plea in bar upon arraignment on the ground of former jeopardy (R 6). In support thereof it was stipulated between the prosecution and the defense that on 10 September 1945, the accused was brought to trial before a court-martial under competent orders of the Commanding General, Chanor Base Section, and arraigned upon the same charge and specification as Charge I and the Specification thereof upon which he was arraigned in the instant case (R 6). Both the defense counsel and the trial judge advocate stated to the court that at or near the end of the prosecution's case in the first trial, a nolle prosequi was entered by the appointing authority as to Major Young (R 6, 9). The record of trial was not offered in evidence, nor was there a showing as to the reason why the appointing authority entered a nolle prosequi as to Major Young during the course of the trial. After argument the court denied the plea in bar (R 10).

The question for consideration is whether the accused, under the facts disclosed by this record, was placed in jeopardy, so as to bar a second trial, when he was arraigned and tried on 10 September 1945, before a general court-martial appointed by the Commanding General, Chanor Base Section.

That no person shall be twice placed in jeopardy for the same offense is a maxim of great antiquity which has found expression in the Constitution of the United States and the Articles of War (Winthrop's Military Law and Precedents (Reprint, 1920, p 259).

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

"\*\*\*; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; \*\*\*."

Article of War 40, in part provides that:

"No person shall, without his consent, be tried a second time for the same offense; but no proceedings in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case. \* \* \*."

The Fifth Amendment has been held to be a limitation on courts-martial as they, like other courts deriving from an exercise of the Federal power, are subject to the provisions of the Bill of Rights, except insofar as special constitutional provision is made (CM ETO 15320, Wade; Sanford v. Robbins (CCA 5th 1940), 115 F (2nd) 435, Certiorari Denied, 312 U. S. 697; United States v. Hiatt (CCA-3d 1944), 141 F (2nd) 664.). In Sanford v. Robbins, supra (at p 438), the court said:

"We have no doubt that the provision of the Fifth Amendment, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,' is applicable to courts-martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirements of an indictment, abundantly shows that such cases were in contemplation but not excepted from the other provisions."

In determining when an accused has been placed in jeopardy, courts have arrived at various interpretations. Some courts have held that the first jeopardy is complete on swearing of a jury or on submission of evidence, unless the trial is halted for manifest necessity, unforeseeable at the time of arraignment (United States v. Shoemaker, Circuit Court, Illinois, 1840, Federal Cases 16279; Cornero v United States (CCA 9th, 1931), 48 Fed (2nd) 69). In other cases it has been held that jeopardy attaches only when there has been a complete trial including a finding (Winthrop's, Military Law and Precedents, Reprint 1920, p 260). However, most jurisdictions have sustained the right of the court to terminate the trial because of manifest or serious necessity, without affording an accused the right to plead former jeopardy in a subsequent prosecution. This doctrine has been held applicable where the jury was unable to agree: (United States v Perez (1824), 9 Wheat 579, 6 L. Ed 165; Logan v United States (1892), 144 U. S. 263, 36 L. Ed 429); where a juror becomes incapacitated during the trial (Simmons v United States (1891), 142 U. S. 148, 35 L. Ed 968); and where a juror is discovered to have been a member of the grand jury which returned the indictment (Thompson v United States (1894), 155 U. S. 271).

Likewise, in military law it appears well settled that an appointing authority may withdraw charges and specifications from a court-martial at any time before or after arraignment and plea, unless the court has arrived at a finding.

The Manual for Courts-Martial provides in pertinent part:

"\* \* \* An officer who has the power to appoint a general court-martial \* \* \* may withdraw any specification or charge at any time unless the court has reached a finding thereon" (MCM, 1928, par 4, p 5).

In discussing nolle prosequi the Manual provides:

"\* \* \* Proper grounds for such direction (nolle prosequi) include: Substantial defect in the specification; insufficiency of available evidence to prove the specification; and the fact that it is proposed to use one of the accused as a witness.

"A nolle prosequi is not in itself equivalent to an acquittal or to a grant of pardon and it is not a ground of objection or of defense in a subsequent trial. It may be entered either before or after arraignment and plea" (MCM, 1928, par 72, pp 56-57).

There is authority for the position that the foregoing provisions of the Manual for Courts-Martial are qualified expressions of the doctrine of "imperious necessity" as it is applied to military law. In its relation to military court, the doctrine is more liberally interpreted than as it applies to civilian courts (CM ETO 15320, Wade, 1st Ind).

In Sanford v Robbins, supra, at page 439, the court said:

"As applied to courts-martial the provisions against double jeopardy finds expression in Article of War 40, \* \* \* 'No person shall, without his consent, be tried for the same offense'. A first complete trial, and not a justly or unavoidably interrupted one is meant" (Underscoring supplied).

Although Winthrop recognized no legal limitation to the appointing authority's power to enter a nolle prosequi, he urged caution in its use after arraignment and plea:

"In the military practice, the nolle prosequi has mostly been resorted to at the outset of a trial and especially where a special plea or motion to strike out has been allowed by the court \* \* \*. If, at a later stage of the trial, it is found that a charge or specification cannot be sustained, or it is determined for other reasons that the same shall not be pursued, while it will be legal to enter a nol. pros. thereto, it will be the preferable course, as well as most just to the accused, not to do so, but to allow the accused to be formally acquitted thereon at the finding." (Winthrop, supra, p 248.) (Underscoring supplied.)

In the Wade case (CM ETO 15320), the Board of Review in the Branch Office of The Judge Advocate General with the European Theater held that a second trial was barred in a case where the appointing authority, after both prosecution and defense had rested, entered a nolle prosequi because certain witnesses desired by the court were unavailable due to the tactical situation. The Assistant Judge Advocate General in charge of the said Branch Office, in dissenting from the holdings of the board, stated:

"\* \* \* Well defined constitutional principles appear to deny the right of the approving authority to withdraw the charges once jeopardy has attached to accused if such withdrawal is prompted solely by the fact that the prosecution has failed in its proof and the appointing authority capriciously desires to afford the prosecution another opportunity to secure a conviction. Under established canons of statutory construction the quoted provisions of the Manual (MCM, 1928, par 5, p 4) should be construed so as to uphold its constitutionality rather than to construe it so that it will run afoul constitutional prohibitions. The power vested in the appointing authority to withdraw charges is a valuable and necessary administrative device and it may be preserved to him if its exercise is based upon the doctrine of "imperious necessity" as such doctrine is adjusted to meet the needs peculiar to the functioning of courts-martial \* \* \*" (CM ETO 15320, Wade, 1st Ind).

Whatever may be the rule pertaining to former jeopardy, where an appointing authority enters a nolle prosequi arbitrarily during the progress of the trial, the burden rests upon the accused not only to plead, but also to prove his former jeopardy (AW 40; Dig Op, JAG, 1912-40, sec 397 (4), p 243; CM ETO 15320, Wade; Levin v United States (CCA 9th, 1925), 5th Fed (2nd) 597; Brady v United States (CCA 8th, 1928), 24 Fed (2nd) 399; Caballero v Hudspeth (CCA 8th, 1940), 114 Fed (2nd) 545; McGinley v

Hudspeth (CCA 10th, 1941), 120 Fed (2nd) 523). However in the instant case the record is barren as to the circumstances under which the nolle prosequi was entered at the first trial. In the absence of a showing to the contrary appearing in the record, the court-martial had no alternative but to presume that the appointing authority had just and compelling reasons for withdrawing the case from the first court-martial and that he did not act capriciously. Accordingly, the action of the court in denying accused's plea in bar was proper.

6. Accused stands convicted of a Specification and Charge laid under Article of War 80, alleging that he, in conjunction with other named persons, wrongfully and unlawfully sold and disposed of a particularly described bus "captured property of the United States", whereby he received as profit to himself 25,000 Belgian francs of the exchange value of about \$500.00. The essential elements of the offense, charged under this Article, are found discussed in paragraph 430, Manual for Courts-Martial, 1921, page 387-8, and the elements of proof are:

"(a) That the accused has disposed of, dealt in, received, etc., certain public or private captured or abandoned property."

"(b) That by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself."

The prosecution's evidence shows that in mid June 1945, while stationed at Weilberg, Germany, the 563rd Anti-Aircraft Artillery Weapons Battalion, came into possession of a passenger bus of German manufacture, painted with camouflage paint and marked with a German eagle and swastika. Accused was a member of this organization. Lieutenant Colonel Chambers was the Commanding Officer, Lieutenant Kimbrough was the Motor Officer, Private Bowman (then sergeant) was the Motor Pool Sergeant and Private Dalmau (then sergeant) was the First Sergeant of the Headquarters Battery. The bus was donated to the battalion by one of its former Commanders, Lieutenant Colonel Barnett. A warrant officer of the battalion took delivery of the bus at a Displaced Persons Camp near Coblenz, Germany, and thereafter drove it to Weilberg, where the battalion was then stationed, thence to Liege, Belgium, a few days later when the battalion moved to that city. The vehicle had been under the control of the military government and had been used to transport displaced persons. No authorized American identification markings appeared on the bus, but posted on the windshield was a paper indicating military government's permission to transport the bus from the Kreis (county) in which it had been located. This document described the vehicle as being under military government control only. No official record was

ever made of the transfer of the bus. No receipts were given at the time it was delivered to the warrant officer and the bus was never picked up or carried on the property books of the organization by the property officer. The battalion had no use for the vehicle and made several attempts to dispose of it to Ordnance without success. Learning that Ordnance would not accept it, Colonel Chambers suggested to Bowman, the motor pool sergeant, that he try to sell it. The accused and Lieutenant Kimbrough were at the motor pool and discussing the disposition of the vehicle, when they received an unsolicited offer from three civilians to buy the bus for 80,000 francs. Bowman overheard the offer and stated to accused that ne, Bowman, could get 100,000 francs for it. Whereupon, accused said, "Go ahead and see what you can do," and to the group generally, "Well, why don't we three sell the bus and split the money three ways." Shortly thereafter Bowman, with the assistance of Dalmau, as interpreter, sold the bus to one M. Eugene Vigneron for the sum of 120,000 francs (\$2400). On 16 July 1945, the bus was delivered to the purchaser by Bowman and the purchase price of 120,000 francs was paid Dalmau, who deducted and kept 15,000 francs as his share and delivered the remainder to Bowman. On the same day, Bowman, after deducting a certain amount as his share and certain other soldiers in the motor pool, delivered 50,000 francs to Lieutenant Kimbrough. Kimbrough retained 25,000 francs as his share and gave a like number of francs to accused.

At the close of the prosecution's case in chief, defense counsel moved the court for a finding of not guilty on the ground that the prosecution had failed to prove that the vehicle in question was captured property of the United States. This motion was denied. Thereupon accused withdrew his plea of guilty to Charge II and the Specification thereto. Prosecution then called Warrant Officer Offstein, who testified substantially as follows:

"The bus was painted in German camouflage colors (R 55). On the right rear side it had a German swastika and eagle. It was first seen at a DP Camp at Coblenz, Germany, then commanded by Lieutenant Colonel Barnett of the Seventh U. S. Army (R 56). On the windshield was an authorization from Military Government to transport the vehicle from Coblenz to Liege, Belgium (R 57). Another written authorization had to be obtained to transport the bus out of the kreis (county) (R 57). The latter authorization stated only that the bus was operated by the U. S. Army, and stated nothing of ownership (R 61). No receipt was given or accepted for the vehicle and no record of the receipt of such property was made by the unit" (R 50, 57, 58).

Judicial notice was taken that Weilberg, Germany, is part of a country with which the United States was at war; that it is located in that part of Germany which the American armed forces captured; that within 1945 it was formerly held by the German army; and that active hostilities between Germany and the United States ceased on 9 May 1945 (R 58).

It will be observed that the bus was actually delivered at Coblenz and not Weilberg. However, since the substance of the matter of which the court took judicial notice applies equally to Coblenz, the error does not prejudice the rights of the accused.

The evidence clearly shows that the accused was one of several persons who appropriated to themselves a motor bus which was not their property by selling it to a Belgian civilian. The participation by the accused in the sale and his joint responsibility for it are uncontrovertibly demonstrated by evidence showing that he instigated the negotiations for the sale of the bus, was aware of the pendency of such negotiations, and that he received a substantial part of the proceeds resulting when the sale was consummated.

There remains for consideration whether the evidence shows that the bus in question was "captured property of the United States."

"Capture" has been judicially defined as the taking of property from one belligerent by another, and as a "taking by military power." In point of law, nothing more is necessary, to constitute a capture, than an intention to capture, followed by an actual or constructive possession of the property. Force and violence or physical support are not required. It is sufficient that there be a dedito or submission on the one side, and an asserted possession on the other (The Alexander (U.S.), 1 Fed Cas 357, 360; In re Whitfield, 11 Ct Cl 44, 456; United States v Athens Armory (U.S.), 24 Fed Cas 878, 880). In view of the preceding authorities, the evidence is inconsistent with any other hypothesis than that the bus was captured property. Whether a captured item is the property of the United States must be determined in the light of the following authorities:

Article of War 79 provides in pertinent part:

"All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, \* \* \*."

Article 53, paragraph 1, Annex to Hague Convention No. IV of October 18, 1907, embodying the regulations respecting the laws and customs of war on land adopted by that convention, provides in pertinent part:

"MOVABLE PROPERTY.--An army of occupation can only take possession of cash, \* \* \* means of transport \* \* \*, and generally, all movable property belonging to the State which may be used for military operations." (Underscoring supplied.)

Field Manual 27-10, Rules of Land Warfare, further provides in pertinent part:

"322. Property of unknown ownership treated as public.-- Where ownership of property is unknown--that is, where there is any doubt as to whether there is public or private, as frequently happens--it should be treated as public property until ownership is definitely settled.

\* \* \*

"327. Booty.--All captures or booty belong, according to the modern law of war, primarily to the government of the captor."

In the opinion of the Board all of the necessary elements of proof have been well established by competent evidence. There is ample evidence from which the court could reasonably infer that the bus in question was captured property of the United States within the meaning of the laws of war, and Articles of War 79 and 80. It was a bus of German manufacture of a type commonly used by the German government, bore government markings and was painted with German military camouflage colors. It was received in Germany from another American Army Unit by the organization of which accused was a member.

It is immaterial that no direct evidence was introduced to show the capture of the bus by American forces. The mere presence of a vehicle which is unmistakably marked as the equipment of an enemy belligerent in the American zone of military operation justifies the conclusion that it is captured property of the United States. Whether actual possession of the vehicle was taken before or after 9 May 1945 is likewise immaterial, since there can be no question that the United States was, on 15 June 1945, and still is, at war with Germany. Accordingly, the record of trial sustains the finding of guilty of Charge I and the Specification thereof.

7. The accused is 28 years of age and single. The records of the War Department show that he graduated from high school in 1936 and thereafter pursued a course in Industrial Management for four years at Georgia Tech, but did not graduate. He was appointed a second lieutenant, Coast Artillery Corps, National Guard of the United States and of the State of Georgia, 10 February 1941 and commissioned a second lieutenant in the Army of the United States 7 April 1941. He was promoted to first lieutenant 2 June 1942, to captain 11 December 1942 and to major 8 June 1945.

8. The court was legally constituted and had jurisdiction of the accused and the offense. No error injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the

sentence. Dismissal is authorized upon conviction of a violation of Article of War 80.

*A. Hottenstein*, Judge Advocate

*William A. Wolf*, Judge Advocate

On Leave, Judge Advocate

JAGH - CM 302833

1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Oscar L. Young (O-410665), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of, in conjunction with others, unlawfully selling and disposing of a passenger bus, captured property of the United States, for personal profit in violation of Article of War 80 (Chg I, Spec). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. I concur in that opinion.

The accused was the executive officer of the 563rd Anti-Aircraft Automatic Weapons Battalion, stationed at Liege, Belgium on Military Police Duty. On 13 or 14 June 1945 while the unit was stationed at Weilberg, Germany, the unit received from another American unit stationed at Coblenz, Germany, a twenty-five passenger bus of German manufacture, painted in German military camouflage colors, and bearing the swastika and eagle insignia of the Nazi Government. Two days later accused's organization moved from Weilberg, Germany to Liege, Belgium and the bus in question was moved with the organization and placed in the battalion motor pool. The bus remained in the motor pool for about four weeks without being used. A directive from higher headquarters was received ordering that captured vehicles be turned over to Ordnance. Efforts were made to dispose of the vehicle by turning it in to an Ordnance Depot but enlisted personnel at that installation refused to accept the bus. One day while inspecting the motor pool, the accused had a conversation with Lieutenant Kimbrough, the motor officer, and suggested that the bus be sold. Previously, a similar suggestion had been made by the Battalion Commander, Lieutenant Colonel Chambers, to the battalion motor sergeant. During the conversation between accused and Lieutenant Kimbrough, two civilian girls inquired if the bus was for sale and offered 80,000 francs for it. The motor sergeant, Millard Bowman overheard the conversation and suggested that the bus was worth 100,000 francs and that he believed he could get that much. Accused told the sergeant to "Go ahead and see what you can do", and then stated to the

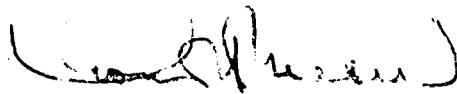
group generally "Why don't we three sell the bus and split the money three ways?" After some negotiation with several interested parties, Bowman and Sergeant William Dalmau sold the bus to a M. Eugene Vignoron, of the Liege Bus Association for 120,000 francs. On 16 July 1945 Bowman delivered the bus to the purchaser and Sergeant Dalmau was paid 120,000 francs therefor. Dalmau retained 15,000 francs for his services and gave 105,000 francs to Bowman. Bowman in turn gave Lieutenant Kimbrough 50,000 francs, Sergeant Lawrence E. Willis 20,000 francs, kept 25,000 francs as his share, and gave 10,000 francs to the men in the motor pool. Thereafter Lieutenant Kimbrough invited accused to his quarters and gave him 25,000 francs which accused accepted.

Within a short time following the sale of the bus, Lieutenant Kimbrough was placed in arrest in quarters at his hotel and while in that status, he received a note from accused in which accused offered to pay part or all of Kimbrough's fine if Kimbrough would in turn testify that accused received no part of the proceeds of the sale. After charges were preferred against him the accused made full restitution.

4. The defense pleaded double jeopardy on the ground that accused had been brought to trial jointly with Kimbrough and others for the offense here involved and that after the trial had progressed to a considerable extent, the charge against accused had been nolle prossed. I concur in the conclusion of the Board of Review that the plea of double jeopardy was properly overruled, but do not agree with all that is said by the Board in support of that conclusion. The overruling of the plea was legally justified for the reason that within the meaning of Article of War 40 and paragraph 149 (3) (b) of the Manual for Courts-Martial, 1921, (which is applicable) an accused has not been "tried" until findings on the general issue have been reached or, in the event of findings of guilty, until final action has been taken by the reviewing authority.

5. In the companion case of Lieutenant Kimbrough the court sentenced the accused to dismissal, total forfeitures and confinement at hard labor for one (1) year. The reviewing authority remitted the confinement and recommended that the sentence, as thus modified, be mitigated to a \$500 fine. I recommended that the sentence, as approved by the reviewing authority, be suspended during good behavior. In view of the action in that case and of the circumstances connected with the sale of the bus, including the approval of the sale by the battalion commander, I recommend that in the instant case the sentence be suspended during good behavior.

6. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

- 2 Incls
- 1 - Record of trial
- 2 - Form of action

( G.C.M.O. 335, 31 October 1946 ).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

SPJGN-CM 302838

26 April 1946

UNITED STATES )

DELTA BASE SECTION  
COMMUNICATIONS ZONE

v. )

First Lieutenant SIGMUND  
J. ZALESKI (O-1306354),  
Transportation Corps. )

Trial by G.C.M., convened at  
Marseille, France, 10 November  
1945. Dismissal and total  
forfeitures. )

-----  
OPINION OF THE BOARD OF REVIEW  
BAUGHN, O'CONNOR and O'HARA, Judge Advocates  
-----

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

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

CHARGE I: Violation of the 94th Article of War.

Specification: In that First Lieutenant Sigmund J. Zaleski, Headquarters 6th Port, Transportation Corps (then of the 3311th Quartermaster Car Company), being at the time custodian of the Negresco Officers' Transient Mess Fund of Headquarters, United States Riviera Recreational Area, did, at or near Nice, France, on or about 4 July 1945, feloniously embezzle by fraudulently converting to his own use approximately twenty-nine thousand seven hundred and fifty (29,750) French Francs, of the value of about five hundred ninety five dollars (\$595.00), the property of the United States, intended for the military service thereof, entrusted to him, the said First Lieutenant Sigmund J. Zaleski, by virtue of his official position as custodian of said funds.

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

Specification: In that First Lieutenant Sigmund J. Zaleski, Headquarters 6th Port, Transportation Corps (then of the 3311th Quartermaster Car Company), then the Custodian of the Negresco Officers' Mess Fund of Headquarters, United States Riviera Recreational Area, did, at Nice, France, on or about 4 July 1945, wrongfully remove monies of the said funds from the station to which they pertained.

ADDITIONAL CHARGE: Violation of the 95th Article of War. (Finding of not guilty but guilty of violation of Article of War 96).

Specification 1: In that First Lieutenant Sigmund J. Zaleski, Headquarters 6th Port, Transportation Corps, did, at or near Marseille, France, on or about 18 August 1945, wrongfully borrow the sum of 32,500 French francs, of a value of about \$650.00, from Private First Class Tony Marano, an enlisted member of the United States Army.

Specification 2: (Finding of not guilty).

FURTHER ADDITIONAL CHARGE I: Violation of the 69th Article of War. (Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

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

Specification 1: (Disapproved by reviewing authority).

Specification 2: In that First Lieutenant Sigmund J. Zaleski, Headquarters 6th Port, Transportation Corps, then on temporary duty with 386th Port Battalion, did, at Marseille, France, on or about 21 October 1945, wrongfully enter an off-limits place, to wit, a house of prostitution.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Specification 2 of Additional Charge and not guilty of Additional Charge but guilty of violation of Article of War 96, and guilty of the remaining Charges and Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Further Additional Charge I and its Specification and Specification 1 of Further Additional Charge II, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 27 February 1945 the accused was detailed as "Mess Officer of Officers", and transient Enlisted Men's Messes" at the United States Riviera Recreational Area (R. 14; Pros. Ex 1). As such, accused was custodian of the "Negresco Transient Officers' Mess Fund," a fund that was derived from the monies paid by persons who ate at the various military messes (R. 37). This fund, together with a list of the persons who had paid and the amount that they had paid, was transmitted to the Mess Officer daily and then paid by him to the Finance Officer at Nice at the end of the month (R. 37, 38). Apparently, however, there was some laxity at some of the messes in making these daily returns (R. 38). In the months of March and April accused, as custodian of the mess fund, received 23,000 francs (approximately \$460) and about \$344, respectively (R. 16).

On 10 April 1945 accused was relieved as "Officer's Mess Officer," assigned as train commander on the Aachen-Nice railway run, and Captain James B. Cobb was appointed in his stead (R. 25; Def. Ex. A). Between that date and 3 July accused made several trips between Aachen and Nice, the round trip taking about five days (R. 25, 26). On the other hand, it was stipulated by and between the trial judge advocate, the defense counsel, and the accused that Captain Cobb never acted as custodian of the officers mess fund because he was transferred to another station before he received the funds from accused (R. 27). On 27 June 1945 Captain Alba S. Heywood was appointed "Mess Officer of the USRRA Officers' Messes," the order appointing him not stating whom he was relieving (R. 28; Pros. Ex. B). It was stipulated by and between the prosecution, defense, and accused that the order appointing Captain Heywood was revoked "shortly after being put out" (R. 29). According to Major John H. Olin, administrative officer of the United States Riviera Recreational Area, Captain Kicey succeeded Captain Heywood when the latter was transferred and, in turn, was succeeded by Captain Heywood on his return (R. 29). Major Olin was unable, however, to specify the date of Captain Kicey's appointment. The witness was unable to account for the gap between 10 April 1945 - when accused was relieved - and 27 June 1945 when Captain Heywood was appointed (R. 29), although the latter testified that he succeeded accused and that Captain Kicey succeeded him (R. 37).

On 1 July 1945 accused was transferred from the United States Riviera Recreational Area (R. 15; Pros. Ex. 2). On 3 July Major Olin delivered the orders to accused and told him to account for the mess funds if they were still in his possession (R. 21, 26). Accused replied that he did not have the money at the time, was not aware of what had happened to it, and made a reference - otherwise unclarified by the record - having been hit on the head with a rock and to finding sleeping pills beside his bed on awakening and not being aware of where he had obtained them (R. 22). Major Olin then told him to turn the money over to Captain Kicey who, he believed, was accused's successor, by 4:00 p.m. that day and accused stated that he would comply. Major Olin disclaimed

any intention of issuing an order to accused to account for the money and insisted that it was merely a recommendation (R. 22, 26). The next day Major Olin took steps to prevent accused from leaving for his new assignment (R. 23).

On 6 July 1945 accused turned over to Agent Sidney Barr, Criminal Investigation Division, \$603.00 together with the mess council books of the Negresco Mess Fund. An audit revealed that accused had made an overpayment of \$8.00 and that otherwise the account was in order (R. 32, 34). For reasons not at all apparent in the record accused on 19 July 1945 made another settlement with respect to the Negresco Mess Fund. On that day he turned over \$755.60 to Captain Alba S. Heywood, the "mess custodian", after an audit, which required "considerable time", revealed that this was the sum due (R. 37-39).

On 10 September 1945 accused made an extra-judicial statement, properly admitted in evidence, wherein he said that when he was relieved as mess officer on 10 April 1945 he retained the mess fund pending the appointment of his successor; that when he was transferred to Marseille he left without remembering that he still had the fund in his possession and did not realize it until an agent of the Criminal Investigation Division brought it to his attention. (R. 36; Pros. Ex. 3).

On 16 October 1945 accused made another extra-judicial statement which was likewise properly admitted in evidence, and which we quote in its entirety.

"He told me he had been custodian or mess officer in Nice and that he had left Nice on sudden orders. That there had been no audit of the mess funds for some time and that he had not had time to account for the mess funds, and for that reason he had been keeping them in his custody. He left Nice and came to Marseille. He was returned to Nice, or returned to Nice, with Lieutenant Carlucci of the CID, and that he borrowed approximately \$650.00 from the CID Agent to pay over the mess funds for which he was responsible. He told me that Lieutenant Carlucci had been an old friend of his - that he knew him in Africa - and that he used the money borrowed, along with some other funds, to make this amount he needed. He told me that he turned over the money and the mess books or council books to Agents Barr and Kallemyrn, turned the money over to the responsible officer at Nice, for which he received a receipt.

Q Did he mention anything about what opportunity he had to turn over the mess funds to anybody?

A He said he had no opportunity to do so, and had never been asked to do it" (R. 72).

On 21 October 1945, the accused, in company with an enlisted driver, left St. Victoret in a jeep and drove to Marseille, France. On their way back they stopped at a house (R. 49-50). The night was dark, it was raining, and there were no street lights (R. 50, 52, 56, 58, 59). They entered the house where there as a bar and five girls (R. 50) but left when one of the girls stated that the military police were there (R. 50, 51). The military police had stopped before the house at 0200 hours (R. 56), to investigate an empty jeep parked outside (R. 52, 54, 56, 60, 68). Shortly thereafter the accused approached them from somewhere behind the house (R. 54, 57) and drove the jeep away (R. 57). This house was located at 148 Rue L'Estac, "on the outskirts of" Marseille, France (R. 60), and had been placed off limits on 17 September 1945 (R. 53, 60). It was a house of prostitution (R. 54) and "off-limits" signs appeared on both sides of the door to the establishment (R. 55, 56). The accused had visited Marseille on the strength of a duty pass to see the trial judge advocate (R. 63; Pros. Ex. 5) but not visit that party before returning to camp (R. 51, 69).

Private First Class Tony Marano testified that on 18 August 1945 he loaned to the accused 32,500 francs to pay off a loan of the same amount that the accused had made from a CID Agent. Accused gave Marano a note. The loan is still unpaid. It was made in the presence of their commanding officer, Major Brown (R. 42-44; Pros. Ex. 4) and had his approval. Accused was not Marano's commanding officer but was a friend (R. 45).

4. Defense evidence: The night of 21 October 1945 was very dark. There were no street lights. It would have been possible for a person to have entered the off-limits establishment at 148 Rue L'Estac without noticing the off-limits sign (R. 73, 74).

In the accused's behalf it was shown by a fellow officer that the accused had handled large amounts of money in connection with company funds and payrolls. The amounts handled had reached between \$25,000 and \$30,000. During this period the general reputation of the accused and his reputation for truth and veracity were excellent (R. 75-76).

The rights of the accused as a witness were explained to him (R. 79, 80), and he elected to make an unsworn statement. Therein he disclosed that he entered the service in January 1941 and was graduated from Officer Candidate School in September 1942. He landed in Casablanca in July 1943, and soon saw service with SOS, COMZONE, ETOUSA and SOLOC as personnel officer and Class "A" agent. In Italy he had charge of between 800 and 1,000 civilians and at SOLOC he was in charge of 1,400 men and handled payrolls of \$75,000 to \$80,000. In Nice he set up a system for the employment of civilians; had custody of "the funds" and was later made defense counsel for all Special Courts-Martial;

was also responsible for several messes; and was made train commander, riding trains in and out of Nice. Thereafter he was sent to Marseille where he had charge of four detachments, took care of them and had them shipped out. Since that time he had been unassigned attached to the 386th Port Battalion. He has no previous convictions by court-martial, and has never had any previous trouble (R. 80, 81).

5a. The Specification of Charge I. In this Specification accused is charged with embezzling 29,750 French Francs (595.00), property of the United States, intended for the military service, in violation of the 94th Article of War. The evidence shows that accused, on 27 February 1945, was appointed Mess Officer of "Officers' and transient Enlisted Men's Messes" of the United States Riviera Recreational Area and that one of his duties as such was to assume custody of the "Negresco Transient Officers Mess Fund"; that as custodian of the fund he actually received some \$804 in the months of March and April; that the money so received was property of the United States; and that on two separate occasions he settled his accounts as mess officer. It is thus established that accused occupied a fiduciary capacity and received United States Government property by virtue of the position of trust he occupied. The remaining element of the offense which the prosecution was bound to establish was that accused fraudulently converted these funds to his own use (MCM, 1928, par. 149h).

A careful examination of the record reveals, however, that proof of this element comes solely from admissions made by accused. The evidence is undisputed that accused was relieved as mess officer on 10 April 1945 and that the officer appointed to succeed him, Captain Cobb, never assumed the post. The position thus remained unfilled until 27 June 1945 when Captain Heywood was appointed. Clearly then during the interval between 10 April 1945 and 27 June 1945, so far as this record is concerned, there was no person acting as mess officer and as custodian of the mess funds. Moreover, within ten days after the appointment of a mess officer, on 6 July to be specific, accused had settled his accounts.

Assuming that accused's failure to settle promptly with Captain Kicey after the conversation with Major Lin would be enough to establish a fraudulent conversion, the record is so confused that it is impossible to conclude that Captain Kicey was the proper person to whom he should account. Major Olin believed that Captain Kicey was the mess officer at that time and further stated that he acted for a time when Captain Heywood was absent. The latter's testimony, while not inconsistent with this view, certainly lends it little support. No order appears in the record to show that Captain Kicey served at any critical time and the general laxity in appointing and relieving mess officers which is therein revealed leave us far from satisfied that he was the proper person to whom accused was obliged to account. Moreover, even if it had been established that Captain Kicey was the officer properly designated to relieve the accused, in the circumstances we cannot assume that accused's

delay in settling with Captain Kicey was so unreasonable as to indicate a fraudulent conversion. There was an interval of only three days between Major Olin's conversation with accused and the first settlement. In connection with the second settlement there was evidence that a proper audit required considerable time and it was not suggested that accused was responsible for this. The record of monies received was contained in daily sheets and it is not improbable that a correct accounting could not have been made within any shorter period.

A word should be said about the confusion in the record arising from the testimony as to the second settlement made on 19 July 1945. It should be remembered that accused is charged with embezzling \$595 and that he accounted for this sum (plus an \$8.00 overpayment) on 6 July 1945. He then, on 19 July 1945, paid Captain Heywood \$755.60. The record contains no explanation as to the necessity for this payment, whether it was in addition to the \$595 previously paid to the agents of the Criminal Investigation Division, and, if so, why this additional payment was necessary in view of the satisfactory state of accused's accounts on 6 July 1945, or whether the \$595 was included in the \$755.60.

The proof thus far adduced fails to show that accused embezzled the money as alleged and to establish this element of the case we must, perforce, rely on accused's extra-judicial admissions. These have been detailed above and no useful purpose will be served by going into them again. It is elementary that a conviction cannot be supported unless there is evidence of the corpus delicti apart from accused's admissions. 2 Wharton's Criminal Law (12th Ed.) sec. 1279, pa. 1595; MCM, 1928, par. 111a.

It may be urged that the facts that Major Olin took steps to prevent accused from leaving the base, that an agent of the Criminal Investigation Division was involved in the settlement of accused's accounts; and that accused borrowed a large sum of money from an enlisted man supply the corpus delicti. The action of Major Olin, however, is not shown to have been based on anything other than accused's own statement to him, and the involvement of the Criminal Investigation Division does nothing more than cast an aura of suspicion on accused without showing with any definiteness that there was a defalcation. As far as the loan is concerned, it was made one month, lacking a day, after the second settlement and is meaningless to show a shortage in accused's accounts unless we have recourse to accused's own statements to the lender. We conclude, then, that there is no evidence, apart from accused's admissions, that would justify a finding that he embezzled the money, as alleged, and, accordingly, the conviction on that Specification must be disapproved.

5b. The Specification of Charge II. This Specification charges accused with wrongfully removing the fund from the station to which it

pertained (AR 210-50, par. 15a(2)). The only evidence of this charge was contained by implication in the accused's alleged confession made to the investigating officer on 16 October 1945. There is similarly as to this Specification no proof of the corpus delicti apart from the confession and therefore the record is not legally sufficient to support a finding of guilty.

5c. Specification 1 of the Additional Charge. This Specification charges accused with wrongfully borrowing money from an enlisted man. The uncontradicted evidence for the prosecution showed that at the time and place alleged in the Specification the accused did borrow \$650 from an enlisted man. Although the enlisted man was not under his command and was a close personal friend of the accused and the transaction was approved by the enlisted man's commanding officer, an officer who outranked the accused, nevertheless the accused, a commissioned officer, has technically violated the 96th Article of War by borrowing money from an enlisted man. Such an act has consistently been held to constitute a violation of that Article and we do not feel justified in making an exception to that principle notwithstanding the extenuating circumstances of this case (CM 233817, 20 BR 149; CM 272462, Ezell; CM 276755, Morris).

5d. Specification 2 of Further Additional Charge II. This Specification charges accused with wrongfully entering an "off-limits" place, a house of prostitution. The evidence clearly established that the accused did, at the time and place alleged in the Specification, enter a place that had been ordered to be and was marked "off-limits". It is immaterial whether or not the accused knew the house of prostitution was so designated. This act was a violation of standing orders of the command of which accused was a member and therefore constituted a technical violation of Article of War 96 (CM 241385, 26 BR 283; CM 241620, 26 BR 313).

6. War Department records show that the accused was born 18 January 1913 in the United States of Polish parents and is married. He attended high school for two years. He was employed as a baker for six years, as a foreman of operating machines in a leather finishing plant for six years, and as a pipe fitter in shipbuilding yard for three years. He was inducted into the service on 13 January 1941, commissioned second lieutenant, Army of the United States, in Infantry on 31 December 1942, and promoted to first lieutenant 7 May 1944.

7. The court was legally constituted and had jurisdiction of the accused and of the offenses. Except as herein noted no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Charge I and Charge II and their respective Specifications, but is

legally sufficient to support the findings of guilty of the remaining Charges and Specifications as approved and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

/s/ Wilmot T. Baughn, Judge Advocate

/s/ Robert J. O'Connor, Judge Advocate

/s/ Gerald O'Hara, Judge Advocate

JAGN-CM 302838  
 WD, JAGO, Washington 25, D. C.  
 TO: The Under Secretary of War

1st Ind.

29 August 1946

1. In the case of First Lieutenant Sigmund Zaleski (0-1306354), Transportation Corps, attention is invited to the foregoing opinion by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge I and Charge II and their respective Specifications, but is legally sufficient to support the findings of guilty of the remaining Charges and Specifications as approved, and the sentence, and to warrant confirmation thereof. I concur in the opinion with the exception of that part which expresses the view that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification. I do not concur in that excepted part of the opinion.

2. Upon trial by general court-martial this officer was found guilty of embezzling \$595, property of the United States entrusted to him as Mess Officer, in violation of Article of War 94 (Chg. I); wrongfully removing mess funds from the station to which they pertained (Chg. II); borrowing \$650 from an enlisted man (Add. Chg.); wrongfully entering the City of Marseille in violation of standing orders; wrongfully entering a house of prostitution marked "off-limits" (Further Add. Chg. II, Spec. 1, 2), in violation of Article of War 96; and breach of arrest in violation of Article of War 69 (Further Add. Chg. I). He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Further Additional Charge I and its Specification (Breath of arrest) and Specification a of Further Additional Charge II (Wrongfully entering City of Marseille), approved the sentence and forwarded the record of trial for action under Article of War 48.

3. As stated in the opinion, the evidence showed that on 27 February 1945 the accused was detailed as "Mess Officer of Officers' and transient Enlisted Men's Messes" at the United States Riviera Recreational Area (R. 14; Pros. Ex. 1). As such, accused was custodian of the "Negresco Transient Officers' Mess Fund," a fund that was derived from the moneys paid by persons who ate at the various military messes (R. 37). In the months of March and April accused, as custodian of the mess fund, received 23,000 francs (approximately \$460) and about \$344, respectively (R. 16).

On 10 April 1945 accused was relieved as "Officers' Mess Officer" and assigned as train commander on the Aachen-Nice railway run. On 27 June 1945 Captain Alba S. Heywood was appointed "Mess Officer of the USRRA Officers' Messes," the order appointing him not stating whom he was relieving (R. 28; Pros. Ex. b). The evidence does not make clear who occupied the position of mess officer of the mess in question.

between 10 April 1945, when the accused was relieved, and 27 June 1945 when Captain Heywood was appointed (R. 29).

On 1 July 1945 accused was transferred from the United States Recreational Area (R. 15; Pros. Ex. 2). On 3 July Major John H. Olin delivered the orders to the accused and told him to account for the mess funds if they were still in his possession (R. 21, 26). Accused replied that he was not going to pull any punches about it - that he did not have the money at that time, was not aware of what had happened to it, and made a reference - otherwise unclarified by the record - to having been hurt by being hit on the head with a rock or piece of concrete thrown from an upper story and to finding sleeping pills beside his bed and not being aware where he had obtained them (R. 22).

On 6 July 1945 accused turned over to Agent Sidney Barr, Criminal Investigation Division, \$603.00 together with the mess council books of the Negresco Mess Fund. An audit revealed that accused had made an overpayment (of \$8.00) and that otherwise the account was in order (R. 32, 34). For reasons not apparent in the record accused on 19 July 1945 made another settlement with respect to the Negresco Mess Fund. On that day he turned over \$755.60 to Captain Alba S. Heywood, the "mess custodian," after an audit revealed that this was the sum due (R. 37-39).

On 10 September 1945 accused made an extra-judicial statement, properly admitted in evidence, wherein he said that when he was relieved as mess officer on 10 April 1945 he retained the mess fund pending the appointment of his successor; that when he was transferred to Marseille he left without remembering that he still had the fund in his possession and did not realize it until an agent of the Criminal Investigation Division brought it to his attention (R. 36; Pros. Ex. 3).

On 16 October 1945 accused made another extra-judicial statement which was likewise properly admitted in evidence as follows:

"He [the accused] told me he had been custodian or mess officer in Nice and that he had left Nice on sudden orders. That there had been no audit of the mess funds for some time and that he had not had time to account for the mess funds, and for that reason he had been keeping them in his custody. He left Nice and came to Marseille. He was returned to Nice, or returned to Nice, with Lieutenant Carlucci of the CID, and that he borrowed approximately \$650.00 from the CID Agent to pay over the mess funds for which he was responsible. He told me that Lieutenant Carlucci had been an old friend of his - that he knew him in Africa - and that he used the money borrowed, along with some other funds, to make this amount he needed. He told me that he turned over the money and the mess books or council books to Agents Barr and Kallemyrn, then stationed at Nice, and so far as he knew they had turned the money over to the responsible officer at Nice, for which he received a receipt." (R. 72)

Private First Class Tony Marano testified that on 18 August 1945 he loaned to the accused 32,500 francs to pay off a loan of the same amount that the accused had made from a CID Agent (R. 45).

4. The record of trial clearly shows that accused was detailed as "Mess Officer of Officers' and transient Enlisted Men's Messes" at the United States Riviera Recreational Area, that as such he was custodian of the "Negresco Transient Officers' Mess Fund," and that in the months of March and April he received, as custodian of the Mess fund, 23,000 francs (approximately \$460) and about \$344. The fund was derived from the moneys paid by persons who ate at the various military messes and was property of the United States, intended for the military service thereof. When directed by Major Olin, on 3 July 1945 to account for the mess funds accused admitted that he did not have the money at that time. On 16 October 1945 the accused admitted that he borrowed approximately \$650.00 "to pay over the mess funds for which he was responsible" and "that he used the money borrowed, along with some other funds, to make this amount he needed." The accused's unsupported statement (with reference to having been hit on the head with a rock or piece of cement and having sleeping pills alongside his bed, the source of which he did not know, is of little or no value in explaining the absence of the money from his possession.

The Board of Review takes the position that in view of the general laxity and confusion in appointing and relieving mess officers the accused's delay in accounting for the mess fund was not so unreasonable as to indicate a fraudulent conversion; that, aside from accused's extra-judicial admissions, proof of fraudulent conversion of the funds to accused's own use was lacking, and that, since proof of this element rests solely on admissions made by the accused, the findings of guilty of Charge I and its Specification are improper.

5. The competency and admissibility in evidence of the statements by the accused mentioned in paragraph 2 above are not challenged by the defense (R. 22, 36, 71), and neither is the fact that the accused has been intrusted with the Negresco Officers' Transient Mess Fund, USRRA, property of the United States in the amount alleged. The sole material question respecting the legal adequacy of proof of the Specification of Charge I is whether or not support for accused's admissions is furnished by the record. With respect to the technical legal requirements in this connection it has been stated:

"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." MCM, 1928, par. IIIa.

"\* \* \* all that is required by way of proof of the corpus delicti is some evidence corroborative of the confession touching the commission of the offense (CM 202213, Mallon) \* \* \*." CM 202601, Sperti (1934) 6 BR 171.

"While some corroborative evidence is prerequisite to the instruction of a confession, full proof of the corpus delicti, independent of the confession is not required. All that is required is some corroborative evidence. Dig. Ops. JAG, 1912-40, sec. 395 (11), CM 210693 (1938)." CM 257802, Stiehl (1944), 37 BR 243, 251.

There is evidence, independent of accused's admissions, tending to establish the corpus delicti. Captain Alba S. Heywood was appointed "Mess Officer of the USRRA Officers' Messes" on 27 June 1945 (R. 29; Def. Ex. B). On 1 July 1945 accused was ordered transferred from the United States Riviera Recreational Area (R. 15; Pros. Ex. 2). On 3 July 1945 Major Olin instructed accused to clear himself before leaving, including the turning over of mess funds. Accused said he did not have the funds. The next day Major Olin cancelled transportation which would have carried accused away from the area. On 6 July 1945, ten days after appointment of accused's successor as mess officer and three days after accused had been instructed by Major Olin to clear the mess accounts, Agent Sidney Barr, Criminal Investigation Division, had occasion to interview the accused relative to the Negresco Officers' Mess Fund. At that time accused turned over to Barr a mess council book and approximately \$600 in francs (R. 32, 34). Subsequently, on 18 August 1945, accused borrowed 32,500 francs (approximately \$525.00) from Private First Class Tony Marano (R. 45). The evidence mentioned is sufficient to establish the corpus delicti and, together with the accused's admissions, justified the court in finding him guilty of Charge I and its Specification.

6. Drafts of action for your signature are inclosed, Form A for use in the event you concur in the opinion by the Board of Review and Form B in the event you concur in my views.

/s/ Thomas H. Green

3 Incls

- 1 - Record of Trial
- 2 - Form of Action - Form A
- 3 - Form of Action - Form B

THOMAS H. GREEN  
Major General  
The Judge Advocate General



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D. C.

(59)

SPJGK - CM 302849

29 MAR 1946

UNITED STATES )

IX ENGINEER COMMAND

v. )

) Trial by G.C.M., convened at Headquarters,  
) IX Engineer Command, APO 126, U.S. Army,  
) 31 August 1945. Dismissal, total for-  
) feitures, and confinement for five (5)  
) years.

) First Lieutenant RUSSELL  
) J. HERTZ (O-577895), Air  
) Corps. )

-----  
OPINION of the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates.  
-----

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that First Lieutenant Russell J. Hertz, 895th Military Police Company (Aviation), IX Engineer Command, did, at or near Eiedrich, Germany, on or about 27 July 1945, willfully, feloniously and unlawfully kill one Kurt Kretzschar, a human being, by shooting him with a pistol.

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

Specification 1: In that First Lieutenant Russell J. Hertz, \*\*\*, being in charge of a motor vehicle, property of the United States intended for military use, did, at or near Hiedrich, Germany, or or about 27 July 1945, wrongfully and in violation of Section VI, pamphlet, Headquarters, European Theater of Operations, 24 January 1944, file AG, 451/2 Pub GC, Subject: "Maintenance and Operation of Motor Vehicles", transport in said vehicle one Constance Machat, a civilian.

Specification 2: In that First Lieutenant Russell J. Hertz, \*\*\*, being on duty as a military police patrol officer and having knowledge of the death of one Kurt Kretzschar and of the location of the body of the said Kurt Kretzschar, did, at or near Kiedrich, Germany, or or about 27 July 1945, wrongfully fail to report the same.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by general court-martial for "Fraternization" in violation of the 96th Article of War, for which the sentence as approved on 27 July 1945, according to the certificate offered, provided for a forfeiture of \$100 per month for six months. In the instant case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. Two of the seven members of the court recommended that the sentence of confinement be reduced. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, U.S. Forces European Theater, for action under Article of War 48. Prior to action by the Commanding General, United States Forces, European Theater, his powers, statutory or otherwise, in so far as they pertain to courts-martial, including the power of confirmation of sentences of general courts-martial and including powers conferred in time of war by Articles of War 48, 49, 50, 50½ and 51, were terminated 19 January 1946 by direction of the President, and in accordance with instructions contained in a cable from the War Department, dated 19 January 1946, as clarified by a cable from the War Department, dated 21 January 1946, the Commanding General, United States Forces, European Theater, forwarded the record of trial to The Judge Advocate General for action by the confirming authority or other appropriate action.

### 3. For the prosecution.

On 27 July 1945, the accused was assigned to the 895th Military Police Company (Aviation), stationed at Kiedrich, Germany (R. 5,6). At 2130 hours on that date he entered a jeep at Headquarters driven by Private First Class William R. Isenberg, preparatory to assuming his duty of patrolling the town of Kiedrich (R. 6,7,18). The accused was under instructions "to check on curfew violations both by civilians and the military and report such violations" (R. 42). As a Military Police officer it was his duty "to enforce the directives that were in force at that time" and he was to enforce all directives found in Field Manual 19-5 and the handbook for Military Government (R. 43). Both the accused and his driver were armed with .45 Colt pistols (R. 8). When he was departing for duty, Constance Machat, a French civilian woman, boarded the jeep at the gate (R. 7,24,63,64). She had asked to go with the accused and entered the jeep despite the reluctance of the accused to accede to her request (R.64). After patrolling for approximately ten or fifteen minutes this troupe encountered a male civilian (R. 8). It was then after the curfew hour and the accused asked the civilian to produce his credentials, whereupon the

man looked through his pockets and finally was heard to say, "Nix papers" (R. 8,9,21,26,42,60,64). The accused "motioned for him to come into the jeep" and upon his failure to comply the accused "got out" and "grabbed him by the shoulder - by his arms and then he knew - the deceased came along then" and entered the jeep (R. 9,10,64). The jeep was then driven for "approximately one block," at which point it was stopped and the accused conversed with Mrs. Anita Butschkus, an interpreter (R. 10,28,64). The accused inquired of her if "she knew the name of this man" and upon her reply that she did not but could "ask other people," the accused stated, "It is not necessary to ask the people. I will bring him to the jail in the town hall" (R. 28). Mrs. Butschkus, together with her small niece who was present, then entered the jeep for the purpose of directing the accused to the Burgomeister from whom he desired to obtain the keys to the jail (R. 10,21,32). At this point there were then six people in the jeep. In the front seats were the enlisted driver, the accused and the French woman, the latter sitting between the driver and the accused (R. 11,64). In the rear were Mrs. Butschkus, her small niece, and the German civilian who sat directly in rear of the driver (R. 11). The jeep and its occupants proceeded "for about a half a block" at which point the driver "felt somebody hit his right arm" and upon looking around, observed the German in "a half-standing position, leaning forward with arms outstretched" (R. 12). The French woman observed this and screamed (R. 65). The German "lunged forward" and "grabbed" accused by the shoulder, whereupon the accused shoved him back toward his seat and as the German came forward again the accused drew his gun and shot him (R. 12,19,20,22,65). After this shooting, which occurred at approximately 2200 hours, the accused appeared to be panic stricken, "his talk was stuttering, and he was all red, and he didn't know exactly what to do" (R. 13,20,22). - The jeep continued without stopping (R. 13,33). The deceased "was bent way out over the back of the jeep and his head was hanging down" (R. 25). The accused was "holding him by the leg" and the "French girl was holding him too" (R. 25). The route of travel passed Headquarters, IX Engineer Command, but at the direction of the accused, it continued on without turning in (R. 13,21,22). Mrs. Butschkus, who thought the deceased had fainted, remarked that they were not on the "right way" to proceed to the home of the Burgomeister to which the accused made some reply, from which Mrs. Butschkus could glean only the word "hospital" (R.33). After proceeding further, the jeep stopped at a railroad crossing where Mrs. Butschkus and her niece dismounted (R. 13,33). The balance of the party proceeded in the jeep to the Rhine River where the driver, at the order of accused, assisted accused in throwing the body into the Rhine River (R. 13,14,23). Thereafter, the jeep and its three occupants returned to the railway crossing, picked up Mrs. Butschkus and her niece and took them to their home (R. 14). The accused "mentioned" to Mrs. Butschkus not to say anything about the occasion" (R. 15). The jeep was then driven to the Headquarters Motor Pool in Kiedrich where the accused, assisted by the French woman, cleaned blood out of the back end of the jeep (R. 15,16).

(62)

About ten minutes later, at approximately 2245 or 2300 hours, the enlisted driver drove the accused and the French woman to a hotel where he left them (R. 16). The enlisted driver returned to his Company, and at 0900 hours the following morning, saw the accused when the accused came to the driver's room (R. 16). At that time, the accused said, "How do things look?" and "I think I did wrong" (R. 16,17).

On 28 July 1945, at Erbach-on-Rhine, "a little town on the Rhine," Mr. Nickolaus Kroneberger, a resident of Kiedrich, identified the body of a deceased as that of Kurt Kretzschmar. Mr. Kroneberger had last seen deceased alive at 2100 hours on 27 July 1945 as the latter was leaving Kroneberger's home. He identified a photograph introduced into evidence as being one of Kurtz Kretzschmar (R. 46,47).

On 29 July 1945, a United States Army medical officer examined a body identified as being that of Kurt Kretzschmar (R. 38,46, Pros. Ex. 2). The body was that of a white male, estimated to be between 20 and 30 years of age and was attired in "civilian" clothing (R. 38). It was the opinion of the examining officer that death had been caused by "passage of a bullet through the head from an area on the right side of the face, approximately two inches in front of and slightly below the level of the left ear to another spot to the rear of the head, slightly behind on the left and approximately two centimeters to the right of the occiput, which is a small bone in back of the head" (R. 38). Further, the medical officer was of the opinion that the weapon, when discharged, was "in front of, slightly to the right of, and approximately level with the head of the deceased"(R. 39).

Private First Class Isenberg, the enlisted driver, testified that the deceased was attired in "Just a white - gray shirt and every-day pants" (R. 25). After the deceased had been struck by the bullet he noticed that blood was on the "right side of the face" and "around" the neck of deceased, but he was not "sure where the hold was" (R. 17,18). Mrs. Butschkus, the interpreter, was shown a picture of the body of Kurt Kretzschmar and asked if she could recognize him, to which she replied, "Yes. I don't remember. No" (R. 37). Constance Machat testified that the "shot" struck the German civilian at "a spot along or near the right jaw" (R. 55). When confronted with a picture of a body identified as that of Kurt Kretzschmar and asked "whether or not you have seen the man in that picture before?" the following answer was given by the interpreter: "She says the face is swollen and she can't say positively. She can't make any recognition but she sees a hole in the neck and that is where the blood was (R. 66).

An extract copy of Section VI of a "directive" issued by Headquarters, European Theater of Operations, United States Army, entitled "Maintenance and Operation of Motor Vehicles" was introduced into evidence without objection (R. 51). This section reads as follows:

"VI--CIVILIANS IN VEHICLES"

US vehicles will not be used to transport civilians except as follows:

1. Uniformed civilian personnel on duty with the US forces.
2. Civilians on official business which requires such transportation.
3. Civilians having been required to work past the hour when normal public transportation or other transportation furnished by the US forces has ceased.
4. Except as otherwise stated under Section XXXVIII--Motor Transportation for Recreational Purposes." (Pros. Ex. 4)

4. For the defense.

On 28 July 1945 a wallet was found in the room of a deceased German. The wallet contained, among other items, an American Military Government pass issued in Eiesbaden, and authorizing Kurt Kretzschmar to go to Halle-Saale, some three or four hundred kilometers northeast of Wiesbaden (R. 53-56, Def. Ex. A).

The accused, after being apprised of his rights as a witness, elected to make an unsworn statement (R. 59,60), which may be briefly summarized as follows:

On the evening in question, after having taken a walk with "this French woman," he proceeded "to the school to get the jeep." Upon being asked by the French woman if he was going "out to the hotel" where she was staying, he replied, "Yes," but before doing so he drove around in Kiedrich where he saw some people whom he questioned and then directed to enter their houses. They then drove toward the northern end of town where he noticed the "deceased" apparently trying to enter a courtyard or barnyard. He dismounted from the jeep and asked "this man" for "his papers in my broken German" and the man "pulled his pockets out" indicating he had no papers and said, "Nix papers." The accused, "without using a great deal of force" made the man understand he was to enter the jeep "which he did." The accused, not knowing where the Burgomeister lived and desiring to obtain from him the keys to the jail in order to incarcerate "this man" for questioning, "drove on a bit further" and picked up the interpreter and her niece for the purpose of having the interpreter direct the way to the Burgomeister's home. The "prisoner was in the rear seat to the left, this German woman next to him, and the child was on the metal side, on the right-hand side of the jeep, and in the front was the driver, the French woman next to him, and myself; I was on the outside." The accused then stated:

"We started down the road again and I was looking for further violators and I wasn't paying too much attention to the prisoner when the first thing I knew the French woman let out a yell--I wouldn't say it was a loud yell, but a light yell. I then

turned to my left and at the same time this German placed his hands on my shoulders, not to hold me but to push me out of the jeep, or at least that was my conclusion. I pushed him away with my left arm and he sat down and started to spring again. At that time I drew my pistol and fired, hitting him.

"These things happened very quickly. The driver asked me what to do and I said to go on. We got down near the entrance to the Headquarters and he started to turn and I said, 'Don't turn in. Let's go to the hospital.' We continued down the road and meantime I looked again and this fellow was stretched out over the back of the jeep apparently in a convulsion, I don't know. The French woman was holding one leg and I grabbed the other. We got down to the railroad tracks. The child was screaming and the interpreter was excited--and I was, too. I frankly admit I lost my head then. Anyway, I thought it best to let them out there. At the same time I looked at this deceased with a view of pulling him back into the jeep since his body was still hanging over and more or less we were holding him by the legs. At that time I found that he was dead. And as I said, I frankly lost my head and I didn't know what to do. I told the driver to turn right and we drove on down the road and came to this town and I saw this road leading to the river and I told the driver to turn down this road and then dumped the body into the river. I have no excuse for it. I don't know why I did it, but things happened too fast. I will say this, that I feel that I was justified in shooting him because in my opinion he tried to push me out of the jeep. And that is all, sir." (R. 60,61)

5. a. The Specification of Charge I alleges that the accused did, "at or near Kiedrich, Germany, on or about 27 July 1945, willfully, feloniously and unlawfully kill one Kurt Kretzschmar, a human being, by shooting him with a pistol." A specification so drawn charges voluntary manslaughter.

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

"Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation." (MCM, 1928, par. 149a, at page 165.)

The elements of the offense and the proof required for a conviction of manslaughter, according to applicable authority, are as follows:

"(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act); and (b) that such killing was with malice aforethought." (MCM, 1928, par. 149a). (Underscoring supplied.)

From the foregoing it is clear that in order to sustain a conviction of manslaughter as alleged in this case, it is first necessary that it clearly appear that the accused killed Kurt Kretzschmar. That accused shot and killed a German civilian is established beyond reasonable doubt. The prosecution introduced evidence which established that on 27 July 1945, the accused, while on patrol duty in Kiedrich, Germany, took into his custody a German civilian who was on the streets after the curfew hour, and that accused subsequently, at approximately 2200 hours, shot and killed the German civilian. The body was then transported to the Rhine River where accused, with the aid of his enlisted driver, threw the body into the river. The German civilian at the time of the shooting was dressed in a "white-gray shirt and every-day pants" and the bullet fired by accused struck the German in "a spot along or near the right jaw." It is also established beyond reasonable doubt that one Kurt Kretzschmar is dead, and that his death occurred sometime between 2100 hours on 27 July 1945 when he left the home of a resident of Kiedrich and the following day when his body was viewed at Erbach-on-Rhine and identified. A medical officer who examined the body on 29 July 1945 testified that death was caused by the passage of a bullet through the head from an area on the right side of the face approximately two inches in front of and slightly below the level of the left ear to another spot to the rear of the head, slightly behind on the left and approximately two centimeters to the right of the occiput, which is a small bone in back of the head.

Although from the above we may safely conclude that accused killed a German civilian and that Kurt Kretzschmar is dead, there remains for determination whether the German civilian and Kurt Kretzschmar are one and the same person. In the opinion of the Board of Review there is insufficient evidence of record to establish such a conclusion beyond reasonable doubt.

The prosecution introduced into evidence, as an exhibit, a photograph identified as that of the deceased Kretzschmar. The French woman and the German interpreter, both of whom were in the jeep at the time of the shooting, were shown the photograph and neither of them would identify the man portrayed therein as a person they had previously seen, although the French woman stated that the "hole in the neck" was "where the blood was." The enlisted driver was not shown the photograph nor questioned concerning it. No evidence was offered showing that the body of Kurt Kretzschmar was retrieved from the Rhine River nor that it had ever been in the river. Such facts, if true, would have been easily susceptible of proof. The only facts presented to the court from which it could possibly infer that the person accused killed was the individual named in the specification were that Kurt Kretzschmar was in Kiedrich and met his death at or near the time the accused shot an individual, and that the death of each resulted from wounds inflicted by the entry of a bullet in the right side of the face or neck. Although these are circumstances which indicate that the German civilian killed by accused may be the individual named in the specification they by no means prove such beyond a reasonable doubt. The authorities are in agreement that "the identity of the person killed with

(66)

the person alleged to have been killed must be fully established" (30 Corpus Juris 288; Smith v. State, S6 S 640; CM CBI 49, Coe; see CM 191369, Seluskey, 1 BR 245). In our opinion the evidence fails fully to establish that the German civilian and the individual named in the specification are one and the same and therefore the specification of Charge I and Charge I must fall for want of proof of an essential element.

b. Specification 1 of Charge II alleges that on 27 July 1945 the accused "wrongfully and in violation of Section VI, pamphlet, Headquarters, European Theater of Operations, 24 January 1944, file AG 451/2 Pub GC, Subject: 'Maintenance and Operation of Motor Vehicles', transport in said vehicle one Constance Machat, a civilian."

In support of this specification the evidence of record establishes that while on official duty and patrolling the City of Kiedrich, the accused transported Constance Machat, a French civilian woman in an Army vehicle for the period from approximately 2130 to 2300 hours on 27 July 1945. The directive named in the specification and introduced into evidence without objection prohibited the transportation of civilians in United States vehicles except under circumstances and conditions not herein material. No contention is made that the transportation was authorized and the facts clearly show otherwise. Although the prosecution did not offer affirmative evidence showing that the accused had actual knowledge or should have had knowledge of the directive in question, it is inconceivable that an officer on duty as a military policeman and charged with the duty of enforcing directives that were in force at that time would not have had knowledge of the prohibition contained in the directive. In the absence of any contention or claim of lack of knowledge by the accused, we have no difficulty in assuming that he was well aware of the prohibition against transporting unauthorized civilians in a United States vehicle. "Disobedience of standing orders" is conduct prejudicial to good order and military discipline and therefore violative of Article of War 96 (MCM, 1928, par. 152a).

c. Specification 2, Charge II, alleges that accused "being on duty as a military police patrol officer and having knowledge of the death of one Kurt Kretzschmar and of the location of the body of the said Kurt Kretzschmar, did, at or near Kiedrich, Germany, on or about 27 July 1945, wrongfully fail to report the same." In support of this specification the evidence of record shows that on the date alleged accused was on duty as a military police patrol officer, that he had knowledge of the death of a German civilian and the disposition of his body, that although he had a duty to report that occurrence he failed to do so, and that Kurt Kretzschmar is dead. There is no evidence however that accused had any knowledge of the death of Kurt Kretzschmar and, as we have previously stated herein, it is our opinion the evidence is insufficient to establish that the German civilian killed by accused was Kurt Kretzschmar. In the absence of any proof of knowledge on the part of the accused that Kurt Kretzschmar is dead it follows that he was under no duty to make any report concerning

him. Evidence of the wrongful failure of an accused to report the death and disposition of the body of an unidentified individual will not sustain a conviction of a specification alleging wrongful failure to report the death and disposition of the body of a specifically named person. The variance is fatal.

6. War Department records disclose that this officer is 34-1/2 years of age, is married, and attended high school for 3-1/2 years but did not graduate. In civilian life he was employed for approximately eight years as a "Patrolman" for the New Jersey State Park Police Department and for shorter periods as a "Dispatcher" for a bus line and as a "Foreman" for an aluminum company. He served as an enlisted man in the United States Army from 20 September 1940 to 20 October 1941. He reentered the service on 9 October 1942 and upon later attendance at and completion of the course prescribed by the Air Forces Officer Candidate School, Miami Beach, Florida, was commissioned a temporary second lieutenant in the Army of the United States on 16 April 1943. He was promoted to first lieutenant on 16 April 1945.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, 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 not legally sufficient to support the findings of guilty of Charge I and its Specification, and Specification 2 of Charge II, but is legally sufficient to support the findings of guilty of Specification 1 of Charge II and of Charge II, and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 96.

\_\_\_\_\_, Judge Advocate

\_\_\_\_\_, Judge Advocate

\_\_\_\_\_, Judge Advocate

(68)

SPJGK - CM 302849

1st Ind

APR 18 1946

Hq, ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Russell J. Hertz (O-577895), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the voluntary manslaughter of Kurt Kretzschmar, in violation of Article of War 93 (Specification, Charge I), of wrongfully transporting a civilian in an Army vehicle (Specification 1, Charge II) and of wrongfully failing to report the death of and the location of the body of Kurt Kretzschmar (Specification 2, Charge II), both in violation of the 96th Article of War. Evidence was introduced of one previous conviction by general court-martial for "Fraternization" in violation of the 96th Article of War, for which the sentence as approved on 27 July 1945 provided for a forfeiture of \$100 per month for six months. (An examination of the record of trial of the previous conviction on file in the office of The Judge Advocate General shows that in addition to the approved forfeiture, accused was sentenced to a reprimand which was also approved.) In the instant case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. Two of the seven members of the court recommended that the sentence of confinement be reduced. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, U. S. Forces European Theater, for action under Article of War 48. That officer did not take action upon the record, but in view of the interim suspension of his confirming powers and in accordance with instructions from the War Department forwarded the record of trial to The Judge Advocate General for action by the confirming authority or other appropriate action.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification (manslaughter), and Specification 2 of Charge II (failure to report death), but is legally sufficient to support the findings of guilty of Specification 1 of Charge II and of Charge II (wrongfully transporting civilian), and the sentence, and to warrant confirmation of the sentence.

4. While on official duty as a military policeman and patrolling the City of Kiedrich, Germany, the accused allowed a French civilian woman to enter an Army vehicle of which he was in charge and he thereafter transported her through the streets of Kiedrich, ultimately driving her to a hotel. The transportation of civilians in a United States vehicle except under

certain circumstances and conditions was prohibited by a directive then in force. No contention was made of a lack of knowledge of the prohibition nor that the transportation was authorized.

5. Such action on the part of an officer while on duty as a military policeman and charged with the duty of enforcing directives and maintaining discipline, clearly demonstrates unworthiness of a commission. Less than 30 days prior to the commission of the offenses here alleged, the accused was tried and convicted by a general court-martial for fraternization. In addition to the imposition of a forfeiture of \$100 per month for six months he was given a reprimand which in part is as follows:

"--- Your conduct was especially reprehensible because your military duties charged you with the enforcement among military personnel of the very orders you violated so flagrantly. By the leniency of the sentence imposed, the court has indicated its belief that in the future you will demonstrate yourself to be worthy of your position as an officer. It is expected the confidence which the court thus expressed will be justified by your future exemplary conduct. In the event of your conviction of any subsequent offenses committed within three years of this offense, evidence of this conviction will be introduced for the consideration of the court in determining an appropriate punishment."

Accused admits a homicide amounting to voluntary manslaughter. In view of the foregoing, I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted, and that the sentence as thus modified be carried into execution.

6. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

2 Incls.  
1. Record of trial  
2. Form of action

THOMAS H. GREEN  
Major General  
The Judge Advocate General

\*\*\*\*\*

GCMO 87, 1 May 1946)





deceive Military Authorities collaborate with Staff Sergeant Calise J. Manceaux, Battery A, 26th Field Artillery Battalion, in preparing a statement and instructing Private William T. Turner, Jr., Battery A, 26th Field Artillery Battalion, to give the same statement, which statement was in substance as follows:

"That on 19 September 1945, a report was made to Sergeant Manceaux at his Battery that a suspicious meeting was going on in a beer hall at Aschau, Germany; that Sergeant Manceaux took a loaded pistol and proceeded to the beer hall with Private Turner; that upon arrival at the beer hall Sergeant Manceaux sent Private Turner for Lieutenant Masterson, the Battery Duty Officer; that Lieutenant Masterson arrived and proceeded to search all civilians present telling Sergeant Manceaux to take Karol Lamos back to the Battery for questioning by an interpreter; that Lieutenant Masterson remained at the beer hall; that as Sergeant Manceaux was proceeding to the Battery Karol Lamos jumped out of the vehicle causing Sergeant Manceaux to chase and shoot at Karol Lamos; that Karol Lamos disappeared into the night and Sergeant Manceaux reported back to Lieutenant Masterson",

or words to that effect, which statement was made to military authorities by Private Turner although known by the said Lieutenant Masterson to be untrue in that there was no report made about or suspicious meeting in progress at the beer hall; that the pistol was procured by Sergeant Manceaux from Private Turner at the beer hall; that Karol Lamos was taken from the beer hall in the company of Lieutenant Masterson for the purpose of being shot; that Karol Lamos was ordered from the vehicle, shot at and killed by Sergeant Manceaux.

CHARGE IV: Violation of the 96th Article of War.  
(Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Charge I and its Specification but guilty of each of the other Charges and the Specifications thereunder. 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 might direct, for ten years. The reviewing authority disapproved the findings of guilty of Charge IV and its Specification, approved

the sentence, and forwarded the record of trial for action under Article of War, 48.

3. Evidence for the prosecution: Early on the night of 19 September 1945 the accused and Staff Sergeant Calise J. Manceaux were drinking rum in the latter's room. Private William T. Turner, Jr., entered and was engaged in conversation by the accused. The subject discussed was a .32 caliber Belgique pistol which Turner owned and which the accused desired to purchase. When Turner made it plain that he would not sell, the accused, who was acting as Duty Officer, ceased his solicitation and directed him "to get the jeep" (R. 7, 29-31).

Chauffered by Turner, the accused rode to the house of Silna Sofia, a Polish displaced person who was his "girl friend." After picking her up, they carried her to the Battery movie theater and, at the conclusion of the performance, conveyed her back to her home. As the accused went inside, Manceaux, who was drunk, "came out" and, stepping into the jeep, directed Turner to proceed to the gasthaus Piglmeir in Aschau, Germany (R. 7-8, 14, 30, 34, 36, 38, 48-50). Upon arriving there, Manceaux was about to order a "round of beer" for some of the civilians present when he happened to glance into a small room in which there was a group of twelve to fourteen other civilians who "looked suspicious" to him. He immediately relieved Turner of his pistol and ordered him "to go for the accused and ask him to come" (R. 8, 30, 37, 42).

The accused in the meantime, being a "bit drunk," had undressed and gone to bed in Silna Sofia's home. About fifteen or twenty minutes after he had dropped off to sleep he was awakened by Turner and given Manceaux's message (R. 8, 10, 49). Without any hesitation the accused dressed himself in his "ODs" and accompanied Turner to the gasthaus. While Turner waited outside in the jeep, the accused joined Manceaux in the small room. The first act of the accused was to order Joseph Hopfinger, one of the civilians present, to search the others. When Hopfinger was done, the accused checked everyone himself. Having completed the second search, the accused undertook a third one. For this purpose he called back into the room a Doctor Karol Lamos, whom he had previously excused. The doctor became very excited and protested that he had already had his papers checked twice. A heated argument ensued in the course of which the doctor declared that, "Up until now I had a very high opinion of American soldiers, but I am certainly changing this now." The accused retorted by addressing Lamos, who was a citizen of Czechoslovak, as "You Nazi." When the doctor persisted in his recalcitrant attitude, the accused said in broken German, "I am very mad and if I want to I am able to shoot." After provocatively urging the accused to "go ahead," Lamos finally "took out his papers in a very angry fashion and threw them on the table." The accused continued to check the papers of several other

civilians and then, referring to Lamos, instructed Manceaux in English "to take this one out and shoot him" (R. 14-28, 30-31, 37-39, 46).

The accused, Manceaux, and Lamos, entered the jeep and were driven by Turner for a distance of some three hundred yards. At this point the accused alighted and directed Turner to go where Manceaux desired and repeated his instructions to Manceaux to "take [Lamos] out and shoot him." Without questioning the legality of this order Manceaux had Turner drive another mile or mile and a half, told Lamos to "get out," followed him down the road on foot, and fired three or four shots in his direction. Reentering the jeep, Manceaux returned to the Battery with Turner (R. 9, 31-32, 34, 38, 41, 43-45).

One of the bullets struck Lamos near the groin on his right leg and pierced the "big artery." The noise of the shooting and his shouts soon brought help; but by the time medical treatment could be procured he had lost a tremendous quantity of blood. He died shortly after being removed to a nearby farmhouse (R. 19-20, 50-51; Pros. Exs. 2, 3, 4, 5, 6, 7).

Turner described the accused as "under the influence of liquor" (R. 11). Another witness stated, "I would say he made a slightly intoxicated impression" (R. 16). Another one testified, "I believe he had some liquor in him" (R. 24) Manceaux was too drunk himself to be able to say whether accused was drunk (R. 46). The Polish girl said he "was a bit drunk" so she helped him to get undressed and to get to bed (R. 49).

Upon learning the next morning of Lamos' death, the accused went to Manceaux and advised him that "we'd better make up a story." A tale was promptly concocted which was summarized by Turner as follows:

"\* \* \* this soldier [named Thomas] came there and reported a suspicious meeting at the gasthaus in Aschau, so the Sergeant and myself went down there and after we got there the Sergeant sent me back after the Lieutenant and I went for the Lieutenant. And after the Lieutenant came he and the Sergeant started checking the papers there. We came to this civilian and the lieutenant sent the Sergeant back to the Battery for interpretation, and just before we got to the Battery the civilian jumped out of the Jeep, and the Sergeant started after him, and the Sergeant had to shoot, but the civilian disappeared in the darkness" (R. 11).

This version was impressed by Manceaux and the accused, in turn, upon Turner, who repeated it to various military authorities (R. 11, 13, 32-34, 40-41).

4. The accused, having been apprized of his rights as a witness, elected to remain silent. No evidence was offered on his behalf.

5. The court recalled as its own witness Private William T. Turner, Jr., and asked him whether he had heard the accused direct Manceaux to shoot Lamos. The answer was in the negative (R. 55).

6. The Specification of Charge II alleges that the accused, on or about 19 September, was "found drunk while on duty as Battalion Duty Officer." This offense was laid under Article of War 85. The Specification of Charge III alleges that the accused, on or about 20 September 1945, did "with intent to deceive Military Authorities collaborate with Staff Sergeant Calise J. Manceaux \* \* \* in preparing a statement and instructing Private William T. Turner, Jr. \* \* \* to give the same statement, which \* \* \* was made to military authorities by Private Turner although known by the said [accused] to be untrue \* \* \*." This was set forth as a violation of Article of War 95.

The evidence is clear and uncontradicted that the accused was intoxicated to the extent that the full exercise of his mental and physical faculties were impaired on the night of 19 September 1945 while on duty as Duty Officer. Such condition is drunkenness within the meaning of the 85th Article of War (MCM, 1928, par. 145, p. 160). His condition when put to bed at Silna Sofia's home, his noisome and irrational conduct toward the civilians at the gasthaus, and the various descriptions of his condition given by the witnesses, all indicate his drunkenness. The Specification of Charge II has been sustained beyond a reasonable doubt.

The same is true of the Specification of Charge III. Having regained sobriety the following morning and having learned the ghastly consequences of the night before, the accused sought to save himself or to save Manceaux by collaborating with the latter in the preparation of a false account of the events leading up to the slaying and by inducing Turner to present the false version to superior military authority. Obviously the fraudulent statement was designed to deceive and to mislead those assigned to investigate the tragedy. It was with no assistance from the accused that the truth was ferreted out and his duplicity revealed. No conduct could be more flagrantly unbecoming an officer and a gentleman (CM 249824, Graves; CM 277595, Rackin; CM 280840, Fischer).

6. The accused is about 25 years of age, having been born on 30 September 1920. War Department records disclose that he is a native of Worcester, Massachusetts, where he was graduated from high school and subsequently worked as a machinist. Having attended Citizens Military Training Camp for four sessions and having completed certain

extension courses, he was appointed, on 24 February 1942, a temporary second lieutenant in the Army of the United States. He entered upon active duty 14 March 1942. In May, 1944, and again in July, 1944, reclassification proceedings were recommended against him, but in each instance he was reassigned and the proceedings discontinued.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to sustain the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 at any time and upon conviction of a violation of Article of War 85 in time of war.

Charles Deplum, Judge Advocate.

Robert Glauert, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 302850 1st Ind  
Hq ASF, JAGO, Washington, D. C.  
TO: The Secretary of War 8 March 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward T. Masterson (O-439462), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty, in violation of Article of War 85; of collaborating with a non-commissioned officer in the preparation of a false statement and in instructing an enlisted man to give this statement, with intent to deceive military authorities, in violation of Article of War 95; and of fraternizing with a German civilian contrary to orders, in violation of Article of War 96. 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 might direct, for ten years. The reviewing authority disapproved the Specification relating to fraternization, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof.

While serving as duty officer on the night of 19 September 1945, at Aschau, Germany, accused began drinking rum and became "a bit drunk." Upon being summoned by Staff Sergeant Calise J. Manceaux to investigate the presence of a group of civilians in a building accused proceeded to have them searched three different times causing one of the civilians, Doctor Karol Lamos, to protest angrily. Staff Sergeant Manceaux testified that after a further exchange of words with Doctor Lamos accused ordered him to be taken out and shot. Lamos was taken down the road in a jeep by Manceaux and Private William T. Turner, ordered to get out, and then shot at several times by Manceaux. One of the bullets severed an artery in his leg and he soon died from loss of blood. The following morning accused and Manceaux concocted a story to the effect that accused ordered Manceaux to take a civilian to headquarters for investigation and during the trip the civilian jumped out of the jeep and Manceaux fired several shots at him in a futile attempt to prevent his escape. Private Turner was instructed to tell, and did tell, the same story when questioned by military authorities.

(73)

In addition to the offenses of which he was convicted accused was tried for murder but was acquitted. His past record is not impressive. On two occasions he was recommended for reclassification. The sentence imposed is manifestly too severe for the offenses now standing against him and I accordingly recommend that the sentence be confirmed but that the forfeitures be remitted and the confinement be reduced to one year, that an appropriate United States Disciplinary Barracks be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls  
1 - Record of trial  
2 - Form of action

---

( GCMO 93, 1 May 1946 ).

WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(79)

SPJGH - CM 302851

11 APR 1946

UNITED STATES )

v. )

Captain JOHN E. WEDDLE )  
(O-1579278), and First Lieu- )  
tenant JAMES REBSTOCK (O-1592000), )  
both of Quartermaster Corps. )

SEINE SECTION  
THEATER SERVICE FORCES  
EUROPEAN THEATER

Trial by G.C.M., convened at  
Paris, France, 18 October 1945.  
Each accused: Dismissal and fine  
of \$500.

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, STERN and TREVETHAN, Judge Advocates.  
-----

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain John E. WEDDLE, Headquarters and Headquarters Detachment, 4506th Quartermaster Service Company, and First Lieutenant James REBSTOCK, 4504th Quartermaster Service Company, acting jointly, and in pursuance of a common intent, did, at or near Paris, France, on or about 18 August 1945, feloniously take, steal and carry away four (4) watches and one (1) gold partial denture, all of a total value of more than Fifty Dollars (\$50.00), the property of First Lieutenant Amandus J. Boyer.

Accused Rebstock was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant James REBSTOCK, 4504th Quartermaster Service Company, and Captain John E. WEDDLE, Headquarters and Headquarters Detachment, 4506th Quartermaster Service Company, acting jointly, and in pursuance of a common intent, did, at or near Paris, France, on or about 18 August 1945, feloniously take, steal and carry away four (4) watches and one (1) gold partial denture, all of a total value of more than Fifty Dollars (\$50.00), the property of First Lieutenant Amandus J. Boyer.

Each accused pleaded not guilty to the respective Charge and Specification pertaining to him and each was found guilty, by appropriate exceptions and substitutions, of the lesser included offense of wrongfully taking the property described in the Specification, in violation of Article of War 96. No evidence of previous convictions was introduced. Each accused was sentenced to be dismissed the service and to pay a fine of \$500. The reviewing authority approved each sentence, recommended that so much of each sentence as involved dismissal be suspended and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that on 18 August 1945, First Lieutenant A. J. Boyer was in possession of four watches and a gold denture. Before leaving his billet on the Island of St. Germaine, Paris, France, at 7:30 p.m. that evening, he wrapped these five articles in a towel, placed them in a steel locker or lock box in his room and closed the padlock thereon (R.6,7,10). One of these watches had been given to Lieutenant Boyer by a sergeant; another watch (Pros. Ex.A) belonged to a Captain Bruner, and the two remaining watches (Pros. Exs. B,C) and the denture (Pros. Ex.D) belonged to Colonel Patrick H. Buckley. Colonel Buckley had given Lieutenant Boyer one of these two watches to wear and the other watch and the denture were to be taken to Germany by Lieutenant Boyer where he was to have the denture made into a ring for Colonel Buckley and was to use the watch to pay for that work (R,7,8,11,14).

Lieutenant Boyer returned to his quarters about 1:15 a.m. the following morning, 19 August 1945, and found that the padlock had been removed from his locker and that the four watches and the denture were missing although nothing else had been taken from the locker. He had given no one permission to take these articles (R.8).

Both accused, who had been drinking, had spent part of the evening of 18 August 1945 in Paris with Mme. Suzanne Renno, a friend of accused Weddle. Accused Weddle remained with her at a hotel for the night, leaving the following morning around 11:30 a.m. Soon thereafter, Mme. Renno left the hotel and as she walked along the street, both accused hailed her from a passing jeep and offered her transportation to her home. When they arrived at her home accused Rebstock gave her three watches and a denture which he asked her to keep, stating that he and accused Weddle would call for them later (R.15-17).

Sometime the latter part of the morning of 19 August 1945, Lieutenant Boyer met the two accused, mentioned his loss to them and they expressed their sympathy (R.9). An investigation had already been commenced and about 11:45 a.m. that morning, Agent Louis S. Ficocelli of the Criminal Investigation Division questioned the two accused, observed a picture of Mme. Renno in Weddle's quarters, obtained her address and thereafter visited her, requesting the watches accused Weddle had given to her. She promptly gave him three watches and a denture which were subsequently identified as a portion of the property taken from Lieutenant Boyer's locker (R.16,18-21). About

4 p.m. that afternoon, both accused called Lieutenant Boyer into the latrine in their quarters, told him that they had taken the watches and the denture as a joke and had thereafter lost one of the watches. Approximately two hours later three of the watches and the denture were returned to Lieutenant Boyer (R,9,10). It was stipulated that the four watches and the denture had a combined value in excess of \$50 (R.24).

In a voluntary statement given by accused Rebstock, he stated that about 2000 hours on 18 August 1945 he was playing cards with accused Weddle in their officers' barracks and that thereafter they entered Lieutenant Boyer's room and, with a key furnished by accused Weddle, they opened a strong box and Rebstock removed four watches and a gold denture. Accused Weddle took two of the watches and accused Rebstock retained the rest of the articles. Thereafter they went to Paris, drank awhile and then separated, accused Weddle going to a hotel where his girl friend was lodged. Meeting again the next morning accused Weddle informed accused Rebstock that he had lost one of the watches. They then decided to give the remainder of the articles to Weddle's girl friend to hold until they had an opportunity to talk to Lieutenant Boyer. When they took the watches and the denture they did so as a joke intending to return the property to Lieutenant Boyer (R.22; Pros. Ex.E). The voluntary statement given by accused Weddle was similar to Rebstock's in all material respects (R.23; Pros. Ex.F).

4. The defense offered evidence to show that both accused were observed playing cards on the afternoon of 18 August 1945 in their officers' quarters. They had a cognac bottle on the table which had about two inches of liquid in it (R.40). When they were driven to Paris that evening their driver observed that both had been drinking heavily (R.41).

Lieutenant Colonel Patrick H. Buckley, commanding officer of both accused, testified he had always found them truthful (R.46). Captain Robert T. Walker and Captain Clarence J. Heidke testified that they had always found both accused to be honest. The latter officer also stated that accused Weddle was quite a practical joker (R.42-44). Colonel Buckley identified two of the watches and the denture as his property. He had given one of the watches to Lieutenant Boyer to wear and had given him the denture to have a ring made therefrom in Germany, the second watch to be used to pay for fashioning the ring (R.47).

Both accused elected to give sworn testimony after their rights had been fully explained. Accused Weddle testified that he and accused Rebstock played cards and drank a bottle of cognac on the afternoon of 18 August 1945, visiting the Post Exchange at intervals where they consumed about four beers apiece. Lieutenant Boyer visited them several times during their game, exhibited some watches and stated he had fifteen more which he was keeping in his room prior to his departure for Berlin. Because Lieutenant Boyer had the habit of belaboring a subject to the annoyance of those about him, the two accused decided it would be a good joke on him if the watches were to disappear. Had they been sober, however, they would not have contemplated

such a scheme. Between 7:30 and 8:00 p.m. that evening, they entered Lieutenant Boyer's room and saw a small lock box which had a Post Exchange lock on it. Accused Weddle had a pass key which fit such type of locks. Unlocking the box they removed a towel in which four watches were wrapped. The testimony of accused Weddle as to events thereafter transpiring was similar to the pre-trial statements given by the accused. Weddle admitted the episode did not seem humorous the next morning when he discovered he had lost one of the watches. He asserted that he gave the three remaining watches to Mme. Renno to avoid discovery of them in his possession before he had an opportunity to explain the situation to Lieutenant Boyer (R.27-31). Accused Rebstock concurred in the testimony given by accused Weddle, stating also that taking the watches was a joke which they would not have contemplated had they been sober (R.36,37).

5. Lieutenant Boyer was recalled to the stand at the conclusion of the defense's case and he testified that he saw the accused playing cards on the afternoon of 18 August, exhibited one watch to them and mentioned that he had others in his possession which he was taking with him to Berlin (R.47,48).

6. The proof amply demonstrated that the two accused, acting jointly, took certain property to which they were not entitled from the possession of Lieutenant Boyer without his permission. Such an unauthorized taking, although there may have been no intent permanently to deprive Lieutenant Boyer of this property, was an offense violative of Article of War 96 and lesser included of the offense charged (CM 219438, Tate, 12 BR 265, 1 Bull JAG 21, 22; CM 227743, Younger, 15 BR 337, 1 Bull JAG 364). Although Lieutenant Boyer was not the owner of the property taken he was rightfully in possession thereof and, accordingly, it was proper to allege the proprietary interest as in him (MCM, 1928, par. 149g; CM 244884, Tennant, 29 BR 63; CM 252981, Eames, 34 BR 229). The evidence amply sustains the court's findings of guilty as to each accused.

7. Accused Weddle is 28 years of age and unmarried. War Department records indicate that after attending college for two years he held various clerical positions from 1937 to 1941. He entered military service in March 1941. After successfully completing the course of instruction at The Quartermaster School, Camp Lee, Virginia, he was commissioned a second lieutenant on 25 September 1942. He was promoted to first lieutenant on 2 February 1943. Available records do not indicate the date of his promotion to captain.

Accused Rebstock is 29 years of age and married. The only records available on this accused indicate that he was inducted into military service at Fort Niagra, New York, 26 June 1942 and was commissioned a second lieutenant on 14 May 1943.

8. After announcing the sentence of the court, the president stated that all members of the court recommended that so much of each sentence as involved dismissal be remitted in the event that the accused resigned for

the good of the service. Lieutenant Colonel Patrick H. Buckley, commanding officer of the accused, urged in a written recommendation attached to the record of trial that so much of each sentence as involved dismissal be suspended in view of the military qualifications and the overseas records of each accused. He also personally appeared before the Board of Review on 14 March 1946 and stated that he had independently investigated the matters serving as the basis of these Charges and was convinced that the two accused had intended nothing more than perpetration of an ill-considered practical joke on Lieutenant Boyer.

9. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentences and to warrant confirmation of the sentences. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas M. Dapp, Judge Advocate.  
Joseph J. Stern, Judge Advocate.  
Robert E. Tremblay, Judge Advocate.

SPJGH - CM 302851

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

MAY 9 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain John E. Weddle (O-1579278), and First Lieutenant James Rebstock (O-1592000), both of Quartermaster Corps.

2. Upon joint trial by general court-martial these two officers were found guilty of wrongfully taking four watches and a gold denture from a third officer, in violation of Article of War 96. Each accused was sentenced to be dismissed the service and to pay a fine of \$500, all members of the court recommending that so much of each sentence as involved dismissal be remitted in the event the accused resigned for the good of the service. The reviewing authority approved each sentence, recommended that so much of each sentence as involved dismissal be suspended and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

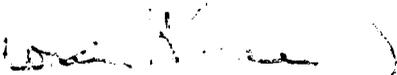
During the afternoon of 18 August 1945, while the two accused were playing cards and drinking cognac in their billet on the Island of St. Germaine, Paris, France, Lieutenant A. J. Boyer showed them at least one watch and remarked that he had others which he was soon taking to Germany. That evening, having consumed a substantial amount of liquor, the two accused removed four watches and a gold denture from Lieutenant Boyer's locker and took these articles to Paris with them. They spent the night in Paris and the following morning discovered that one of the four watches was missing. The two accused then gave the three remaining watches and the denture to Mme. Suzanne Renno, a friend of accused Weddle, from whom they were recovered that afternoon by the authorities. The two accused fully admitted taking these articles but insisted they were only perpetrating a joke on Lieutenant Boyer at a time when their better judgment was clouded as a result of the liquor they had consumed. They contended that the following morning they realized the seriousness of their conduct and gave the watches to Mme. Renno to hold temporarily until they could explain the situation to Lieutenant Boyer. Apparently the court accorded credence to their contentions for they were found not guilty of larceny as originally charged but guilty of a lesser offense involving no felonious intent permanently to convert the property to their own use. Lieutenant Colonel Patrick H. Buckley, commanding officer of the two accused, appeared personally before the Board of Review on 14 March 1946 and on the same date conferred with me. He stated that he had investigated this matter independently, had

concluded that accused intended nothing more than perpetration of an ill-considered, practical joke, and urged that clemency be extended to each accused.

In view of all the circumstances of this case, including the several recommendations for clemency mentioned herein, I recommend that the sentences be confirmed but that each be commuted to a reprimand and a forfeiture of \$100 per month for three months and that the sentences as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.

2 Incls  
1 - Record of trial  
2 - Form of action

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

---

( GCMO 145, 28 May 1946 ).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D. C.

(87)

SPJGK - CM 302852

6 MAY 1946

UNITED STATES )

v. )

First Lieutenant JESSE L. )  
NOAH (O-566324), Infantry )

DELTA BASE SECTION  
COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS

Trial by G.C.M., convened at Marseille,  
France, 24 August 1945. Dismissal,  
total forfeitures and confinement  
for two (2) years.

-----  
OPINION of the BOARD OF REVIEW  
KUDER, CARROLL and WINGO, Judge Advocates.  
-----

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 1st Lieutenant Jesse L. Noah, 19th Reinforcement Depot, then of the 4165th Quartermaster Depot Company, knowing that his unit 4165th Quartermaster Depot Company was alerted for overseas movement, did, without proper leave, absent himself from his organization and station at Calas, France from about 10 July 1945 to about 22 July 1945 thereby wrongfully avoiding shipment overseas with his organization.

Specification 2: In that First Lieutenant Jesse L. Noah, \*\*\*, did, without proper leave, absent himself from his organization and station at Calas, France, from about 8 July 1945 to about 10 July 1945.

He pleaded not guilty to and was found guilty of the Charge and its Specifications. No evidence of any previous conviction 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 for two years. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, U.S. Forces, European Theater, for action under Article of War 48. Before action was taken by that officer his powers, statutory or otherwise, in so far as they pertain to courts-martial, were terminated, and, in accordance with instructions from the War Department, the record of trial was forwarded to The Judge Advocate General for action by the confirming authority or other appropriate action.

3. For the prosecution.

It was stipulated between the prosecution, defense and the accused, that accused was in the military service of the United States on the dates of the alleged offenses and on the date of trial, that he was a member of the 4165th Quartermaster Depot Company during the period 8 July 1945 to 22 July 1945, and that his organization on the date of trial was the 19th Reinforcement Depot (R. 6,7).

A duly authenticated extract copy of the morning report of the 4165th Quartermaster Depot Company for 9 July 1945 was introduced and received in evidence without objection, the pertinent entry thereon showing accused "Fr dy to AWOL 1700 8 July 45" (R. 7, Pros. Ex. 1).

A voluntary written statement dated 31 July 1945 made under oath and signed by accused was admitted in evidence without objection (R. 8,9, 10; Pros. Ex. 2). This statement may be summarized as follows: On or about 30 May 1945 he was placed on Detached Service with the Marseille District from the 54th Reinforcement Battalion. He stayed with the District Headquarters for about two weeks and then was sent by this headquarters to Arles, France to open and operate beer parlors. He remained on this duty until 1 July 1945 when he received orders to report to the 4165th Quartermaster Depot Company at Calas Staging Area. The orders were issued by the 54th Reinforcement Battalion and he received a copy. He reported as ordered on 2 July 1945 to the Commanding Officer of the 4165th Quartermaster Depot Company. The accused told the Commanding Officer that he would like a transfer to the Marseille District and had already taken some steps to accomplish this. He then requested permission to go to Arles to speak with Captain Willis about the transfer. This permission was granted but it was not stated when accused was to return. Accused left on 3 July 1945; he did not return until 5 July 1945. During the time he was away he worked with Captain Willis and Lieutenant Brandeau clearing up beer garden affairs which he had turned over. Accused made other efforts to effect a transfer and then on 8 July 1945 he left for Arles to effect the transfer and clear his responsibility with reference to some receipts. His commanding officer knew he was going to Arles because he had given him a ride to where he "caught" a ride to Arles. He worked on beer garden affairs between 8 and 10 July and then returned to his unit. There he saw Lieutenant Bernard A. Barton (Executive Officer of the 4165th Quartermaster Depot Co. (R. 35)) and told him he was still working on his transfer. He asked Lieutenant Barton if there was anything new but did not ask whether the unit was alerted because he had been told that it was when he joined the unit. He then returned to Arles the same day, where he remained until 13 July. During the time he was there he worked on various accounts with which he previously had been charged. He had explained to his commanding officer on 8 July that he had to straighten out these accounts. On 13 and 14 July accused talked with the Commanding Officer, Marseille District and his transfer was arranged except for the concurrence of Major Johnson, Commanding Officer of the 4165th Quartermaster Depot Company. Major Johnson however had previously expressed his consent. On 14 July 1945 he and Captain

Willis left for Lyon, France. Accused notified no one beforehand. On 15 July accused called Major Taylor, Adjutant General, Delta Base Section, and was told the consent of Major Johnson had not yet been secured. Accused then called the Calas Staging Area and left a message for Major Johnson to call the Adjutant General. On these facts the accused believed his transfer would be effected and was all but completed. On 17 July or 18 July at about 1700 hours accused received a telephone call from Lyon District Headquarters telling him to call Major Cunningham, Calas Staging Area. He made the call at about 1730 hours and was told to report back to his unit by 2400 hours. He left Annemasse, France, at 1800 hours but was delayed on the way because of a flat tire. He arrived at Arles at 0400 hours 18 July. From there he called the Calas Staging Area but could not get in touch with his unit. He then drove to the staging area but his outfit was not there. Next he went to the pier in Marseille but he could get no information concerning his unit there. He then returned to Arles and since he could find no one to take the jeep back to Captain Willis he drove it to Annemasse, France. On 23 July 1945 he reported to the Provost Marshal at the Calas Staging Area (Pros. Ex. 2).

During June and July 1945, Captain Emerson P. Willis was on duty with the Mess and Billeting Section of the Marseille District Headquarters (R. 11). The accused, during the month of June 1945 and until his transfer to the 4165th Quartermaster Depot, was "on Detached Service from the Reinforcement Depot to Marseille District" and was under the command of Captain Willis (R. 12, 18, 19). Accused "was in charge of establishing and operating a GI beer garden and beer parlors at Salon, St. Martin and Arles" (R. 12).

Approximately 26 May 1945 First Lieutenant Henry P. Brandeau was assigned to the Marseille District as "overseer" of all "GI" beer gardens under the Marseille District (R. 22). He was associated with accused from that date until the beginning of July when he (Brandeau) "took over at Arles" (R. 22). After the second or third of July accused never worked with him in an official capacity but he (Brandeau) did ask him "some questions pertaining to some items which were left" (R. 22). The time consumed amounted to "an hour or so together" but never amounted to "a full-day" (R. 23).

On 13 July 1945, Captain Willis spoke to the executive officer of the Marseille District about having the accused transferred from the 4165th Quartermaster Depot to the Marseille District and it "was agreed that a transfer could be effected but that another Lieutenant would have to be assigned in [accused's] place" (R. 17).

On 14 July 1945, under orders, Captain Willis traveled to Lyon by jeep accompanied by accused who stated he "just wanted to go along" (R. 13, 18). The following day they proceeded to Bonne-sur-Menge (Annemasse) where they remained together until 17 July 1945 (R. 14,15). The accused was not, to the knowledge of Captain Willis, working on this trip (R. 18). At approximately 1500 hours on 17 July 1945 Captain Willis was in telephonic communication

with Major Robert C. Cunningham (Provost Marshal, Calas Staging Area), where after some conversation, Captain Willis "turned the telephone over to accused" (R. 14, 24). About 10 minutes later accused "left for Marseille" (R. 15). Captain Willis next saw accused about two days later when the latter returned to Bonne-sur-Menge (Annemasse), at which time accused stated he had "missed his unit" (R. 15,16). Captain Willis did not "believe" that accused stated "he was unable to send the jeep back with anyone else" (R. 16). The following day Captain Willis left by train for Lyon and accused "drove down to Marseille-Calas" (R. 16).

Major Cunningham testified that for about a week prior to 17 July 1945 he had attempted to locate accused (R. 27). In the telephone conversation on 17 July 1945 he told accused that accused "was AWOL from his unit and had been since 8 July" and that according to his (Major Cunningham's) records, accused's "unit was alerted for overseas shipment" (R. 25). He told accused to report to him not later than midnight that night, and further testified, "I told him that it was a direct order to report back. I then asked him if he understood what I had told him and also asked him if he understood what a direct order was and he answered that he did" (R. 25,26). Major Cunningham did not see accused until the latter "reported for duty" on 23 July 1945 (R. 26). The Provost Marshal's office remains open each night until midnight (R. 26).

The 4165th Quartermaster Depot departed from the assembly area "on the way to the boat" at 0710 hours on 19 July 1945 (R. 31,32; Pros. Ex. 3).

#### 4. For the defense.

Accused, after being apprised of his rights as a witness, elected to testify under oath (R. 32,33). He reiterated in substance the statement made by him which was admitted in evidence. In addition he stated that he was never given any assigned duties in the 4165th Quartermaster Depot Company but did give "an hour lecture" on the first day (R. 36). He received notification of his transfer to the 4165th Quartermaster Depot Company by telephone and never received any copy of the orders (R. 37). During the early part of July he worked at Arles finishing up some matters he had left. He had to pay some civilian help, had to turn over about 50,000 francs, and had to make an inventory (R. 37,38). In the course of conversation with Lieutenant Barton on 10 July 1945 he did ask him if Major Johnson had preferred charges but "It was more or less a joke. When I drove up into the Company Area, Lieutenant Barton was standing outside of his tent polishing his shoes and in a joking manner, I said was I AWOL and he said, 'No'" (R. 38,39). Although he was told Major Johnson was in his tent, he (accused) did not stop in to see him (R. 40). He had no orders to go to Lyon but merely said to Captain Willis that he would like to accompany him and Captain Willis said he would be glad to have him along (R. 40). When Major Cunningham ordered him to be back by 2400 hours on 17 July 1945, he (accused) told him he could not make it by 2400 hours (R. 44). It was at that time Major Cunningham said, "This is a direct order and you will report here by 2400 tonight" (R. 44). It took

him one hour to travel from Annemasse to Bellgarde and he had tire trouble shortly after passing Bellgarde which delayed him three hours (R. 44,45). He arrived in Arles "about three or four in the morning" (R. 45,46). When accused reached the Calas Staging Area he went to Block "M" or "N" and found the officers' tent and orderly room empty, also equipment which had been in the company area was gone (R. 46,49). Major Cunningham had "told me to report to the 4165th Quartermaster Company" (R. 56). On 23 July 1945 he reported to Major Cunningham because it was the only place he could think of to go (R. 52). When he took the trip with Captain Willis, "it was not (his) intention to go AWOL" because, at all times it was his understanding that the transfer would be effected (R. 36); he did not know that it was an unauthorized absence (R. 53).

5. Rebuttal for the prosecution.

Major William D. Taylor of the Adjutant General's Section, Delta Base Section, testified that he had a telephone conversation with accused on 15 July 1945. Accused asked about the status of his transfer and was told that Marseille District had requested it but the consent of accused's commanding officer had not been received as yet. Major Taylor then asked accused to put his commanding officer on the phone. Accused stated he was not calling from his organization but from another phone in the Calas Staging Area (R. 61).

6. Specification 2 of the Charge alleges that accused was absent without leave from his organization and station at Calas, France, from about 8 July to about 10 July 1945. Specification 1 of the Charge alleges that accused, "knowing that his unit \*\*\* was alerted for overseas movement, did, without proper leave, absent himself from his organization and station \*\*\* from about 10 July 1945 to about 22 July 1945 thereby wrongfully avoiding shipment overseas with his organization." Both specifications were laid under Article of War 61.

On or about 2 July 1945 accused was transferred to and reported for duty with the 4165th Quartermaster Depot Company, stationed at Calas, France. At that time he was advised that the unit was alerted for overseas shipment. Prior to 2 July he was on detached service to the Marseille District and had been trying to effect a transfer to that command and so advised his Commanding Officer on reporting to his new unit. Thereafter, with the approval of the Commanding Officer, he continued in his efforts to effect the transfer. On 8 July he left his organization and proceeded to Arles, France. On 9 July an entry was made in the morning report of his organization showing a change in his status from "dy to AWOL 1700 8 July 45". On 10 July he returned to his organization for a few minutes at which time he inquired of the Executive Officer thereof if his (accused's) Commanding Officer had preferred charges against him. Upon receiving a negative reply he again departed from his organization and returned to Arles. He remained in Arles until about 14 July on which date he accompanied Captain Willis to Lyon and thence to Bonne-sur-Menge. On 15 July, by telephone, accused inquired of an officer of the

Adjutant General's Section, Delta Base Section, concerning the status of his requested transfer. At that time he was advised that although the Marseille District had requested his transfer his commanding officer had not as yet given his consent. While at Bonne-sur-Menge, on 17 July, he received a telephone call from the Provost Marshal of the Calas Staging Area who advised him that he was absent without leave from his organization and had been so since 8 July. The Provost Marshal also advised accused that his unit was alerted for overseas shipment and ordered him to report to him not later than midnight of that night. The accused however did not report to him until 23 July. On 19 July the 4165th Quartermaster Depot Company departed from the assembly area "on the way to the boat."

The Board of Review is of the opinion the evidence clearly establishes beyond reasonable doubt the commission of the offenses as alleged. The extract copy of the morning report properly admitted in evidence and the other evidence of record shows that except for a short period on 10 July 1945 accused was absent without leave from his organization for the entire period between 8 July and 22 July 1945. It is also clear that the offense was aggravated by knowledge that his organization was alerted for overseas movement. At no time did accused assert he had express permission to be absent from his unit and in fact admitted he had no orders authorizing his absence. His only contention was that he did not intend "to go AWOL" and that at all times it was his understanding that his transfer would be effected. Obviously such a contention is without merit. Specific intent is not an element of the offense of absence without leave and proof of the absence without leave alone is sufficient to establish guilt (MCM, 1928, par. 126a).

7. War Department records disclose that this officer is 25 years of age, is married, and is the father of one child. He graduated from high school and attended Harding College for one year but did not graduate. In civilian life he was employed by the Standard Oil Company as an "Oil Field Tool Dresser" for approximately 4-1/2 years. He served in the Oklahoma National Guard from 14 February 1937 to 7 September 1938. He entered the service on 27 February 1940 and on 28 October 1942, upon subsequent attendance and completion of the prescribed course at the Army Air Forces Officer Candidate School, he was appointed and commissioned a temporary second lieutenant in the Army of the United States. He was promoted to first lieutenant on 1 September 1944.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

William B. Hudes, Judge Advocate

Donald T. Carroll, Judge Advocate

6 Earl W. Wingo, Judge Advocate

SPJGK - CM 302852

1st Ind

Hq ASF, JAGO, Washington 25, D. C.      MAY 23 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Jesse L. Noah (O-566324), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 8 July to 10 July 1945 (Specification 2) and of absence without leave from 10 July to 22 July 1945 knowing that his unit was alerted for overseas movement (Specification 1), both in violation of Article of War 61. No evidence of any previous conviction 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 for two years. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, U. S. Forces, European Theater, for action under Article of War 48. Before action was taken by that officer his confirming powers were suspended, and, in accordance with instructions from the War Department, the record of trial was forwarded to The Judge Advocate General for action by the confirming authority.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

On 8 July 1945 the accused absented himself without leave from his organization at Calas, France, and remained absent until 10 July 1945 on which date he returned to his organization for a few minutes and again absented himself without authority and remained absent until 22 July 1945. His unit departed from the assembly area "on the way to the boat" on 19 July 1945. Accused had full knowledge that his organization was alerted for overseas movement. Such action on the part of an officer is inexcusable and cannot be condoned. I recommend that the sentence be confirmed and carried into execution.

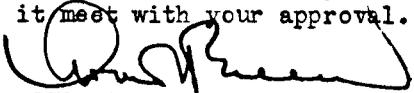
4. Consideration has been given to a letter from Mrs. C. E. Noah, mother of accused, addressed to The Judge Advocate General, requesting clemency.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

3 Incls

1. Record of trial

2. Form of action

3. Ltr fr mother of acc'd ( GCMO 198, 21 June 1946).  
to TJAG

  
THOMAS H. GREEN

Major General

The Judge Advocate General



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

SPJGN-CM 302853

U N I T E D S T A T E S	)	HEADQUARTERS COMMAND
	)	UNITED STATES FORCES EUROPEAN THEATER
v.	)	
Major LAWRENCE L. PETERSON	)	Trial by G.C.M., convened at
(O-474517), Signal Corps.	)	Frankfurt-Am-Main, Germany,
	)	21 August 1945. Dismissal.

-----

OPINION of the BOARD OF REVIEW  
HEPBURN, O'CONNOR and MORGAN, Judge Advocates

-----

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Major Lawrence L. Peterson, Signal Corps, Signal Division, United States Forces, European Theater (then Supreme Headquarters, Allied Expeditionary Force), APO 757, United States Army, was, at Frankfurt-am-Main, Germany, on or about 12 July 1945, in a public place, to wit: SHAEF Officer Mess, drunk and disorderly while in uniform.

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

3. Evidence for the prosecution: About 1:00 a.m. of the morning of 12 July 1945 the accused, dressed in his military uniform, entered

the rear portion of the I. G. Farben building, Frankfurt, Germany, where the Officers' Mess Hall and Snack Bar was located and, approaching three or more German women working there as charwomen, offered them cigarettes, opened his trousers and with one hand made a gesture of playing with his privates and with the other beckoned to one of them to enter the washroom. He also tendered them some money (R. 6-7, 18-19). One of the women told him to go home and led him to the door (R. 15). He persisted in returning. Some of the women complained (R. 19) to an American soldier on duty in the Snack Bar as a "shift leader" (R. 22), who upon investigating saw accused, indecently exposed, with the German women, and persuaded him to go into the Snack Bar where he drank some coffee and fell asleep (R. 23-24). Shortly thereafter accused procured his hat and left (R. 24, 28). He caused no disturbance in the Snack Bar (R. 24, 26). That he was drunk was shown by all the evidence and admitted by his counsel (R. 19, 23, 27). The building in which the incident occurred was a "public place for officers" (R. 22).

4. In defense Lieutenant Colonel J. D. Haight and Colonel W. M. Mack testified that they each had known the accused for an appreciable length of time, had successively acted as his commanding officer, and considered him an excellent officer with a reputation and character of the highest (R. 29,30). The accused, having been advised concerning his rights as a witness, elected to testify in his own behalf (R. 32). He entered the service 22 June 1942 in the grade of Captain. In civil life he had been an economic statistician for the Illinois Bell Telephone Company for twelve years and was married. After serving in the Office of the Chief Signal Officer in Washington, D. C., he went overseas 25 May 1944. On the evening of 11-12 July he had been drinking and went from his billet to the Snack Bar - four or five blocks away - to get a cup of coffee. After drinking his coffee, he located his hat and left (R. 32-34). He denied making any suggestive motions to any women. He recalled offering some cigarettes to some women working "around there" but could not identify them (R. 34). He did not create any disturbance although he was under the influence of liquor (R. 35). He denied committing any indecent acts. He did fall asleep over his coffee and might have waved his hand to the women (R. 36).

5. The accused has been found guilty of being drunk and disorderly in a public place while in uniform in violation of Article of War 95. The evidence clearly established and the accused admitted that at the time and place alleged in the Specification he was drunk while in uniform. Two German women testified that while drunk he indecently exposed himself and made indecent proposals to them. He denied such conduct but was rather hazy regarding his actions. An American soldier who led him away from the women observed that his trousers were open and his privates exposed. Being grossly drunk and conspicuously disorderly in a public place is an instance of a violation of Article of War 95 (MCM, 1928, par. 151,

page 186). The court has resolved the issue of fact thus raised concerning his disorderly conduct against the accused. We can find no good reason for disturbing this finding. It is supported by the weight of the evidence. The conduct described by the female witnesses was clearly such as to dishonor and disgrace him personally as a gentleman and seriously compromise his position as an officer. We have no difficulty in reaching the conclusion that the accused's conduct violated the standards set in the 95th Article of War for an officer and a gentleman (CM ETO 7585, Manning; CM 249211, 32 BR 55). An officers' club is a public place (CM 207887, 8 BR 377).

6. War Department records show that the accused is 39 years of age and married. He graduated from high school and the University of Iowa where he received degrees of A.E. and M.A. For a period of twelve years he was employed as statistician by the Illinois Bell Telephone Company. On 26 May 1942 he was commissioned Captain, AUS, and assigned to the Signal Corps for duty on 22 June 1942. On 15 June 1943 he was promoted to the rank of Major. He was awarded the Bronze Star Medal for meritorious service in connection with military operations from 20 May 1944 to 8 May 1945.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Charles Stephen, Judge Advocate.

Robert J. Cannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

(98)

SPJGN-CM 302853  
Hq ASF, JAGO, Washington, D. C.  
TO: The Secretary of War

1st Ind

20 FEB 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Lawrence L. Peterson (O-474517), Signal Corps.

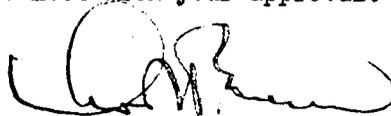
2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in a public place while in uniform in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

Shortly after midnight the accused, in uniform, entered the rear of the I. G. Farben Building in Frankfurt, Germany, where the Officers' Mess was located. He was drunk. Several German charwomen were employed there. Accused approached them and opened his trousers, offered them cigarettes and money and beckoned one of them to enter the wash room with him. He was led away by an enlisted man who observed his open trousers and indecent exposure.

In view of his previous excellent civilian and military record and his award for meritorious service of the Bronze Star Medal, I recommend that the sentence be confirmed but commuted to a reprimand and a forfeiture of \$50 of his pay per month for three months and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls  
1 - Record of trial  
2 - Form of action

---

( GCMO 53, 6 March 1946 ).

WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(99)

SPJGH - CM 302854

23 FEB 1946

UNITED STATES )

83d INFANTRY DIVISION

v. )

Trial by G.C.M., convened at  
Linz, Austria, 3 December 1945.  
Dismissal and total forfeitures.

Second Lieutenant KENNETH N.  
JUHL (O-2005342), Infantry. )

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, STERN and TREVETHAN, Judge Advocates.  
-----

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

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

CHARGE I: (Nolle Prosequi entered by direction of the reviewing authority).

Specification: (Nolle Prosequi entered by direction of the reviewing authority).

CHARGE II: Violation of the 93d Article of War.

Specification 1: (Findings of not guilty).

Specification 2: In that Second Lieutenant Kenneth N. Juhl, Company B, 329th Infantry, did, at or near Passau, Germany, on or about 24 August 1945, with intent to do him bodily harm, commit an assault upon Johann Mittermaier, by pointing at him a dangerous weapon, to wit, a pistol.

Specification 3: In that Second Lieutenant Kenneth N. Juhl, Company B, 329th Infantry, did, at or near Passau, Germany, on or about 24 August 1945, with intent to do him bodily harm, commit an assault upon Joseph Schano, by pointing at him a dangerous weapon, to wit, a pistol.

Accused pleaded not guilty to Charge II and all Specifications thereof, was found not guilty of Specification 1 of that Charge and guilty of the Charge and of Specifications 2 and 3 thereof. No evidence of previous convictions was introduced. Accused was sentenced to dismissal and total

forfeitures. The reviewing authority approved the sentence, forwarded the record of trial for action under Article of War 48 and recommended that so much of the sentence as involved total forfeitures be remitted.

3. On 24 August 1945, in preparation for a company party to be held the following day, accused accompanied by two enlisted men, Steinhaus and Shoemaker, was driven in his jeep to the town of Passau, Germany (R.6,7). There they knocked on the door of a house, asked for wine and accused and his two companions then proceeded to the cellar carrying G.I. cans. Taking a hose they siphoned some 225 liters of cider into ten G.I. cans and into a barrel which they then carried off with them (R.7,8,22,24,27). The cider was owned by Johann Schambach and he and his son, George Schambach, were present during these proceedings. They told accused not to take all of the cider but just as much as they could drink. Johann Schambach did not try to prevent the removal of the cider because accused was armed with a pistol. Before accused left this house, the two Schambachs and a friend of theirs who was present were each given a cigarette (R.9,25-28).

After leaving the Schambachs, accused and his companions then visited another house where they obtained more cider (R.10). In the meantime, two local policemen, Mittermaier and Schano, were informed of accused's whereabouts and going to the cellarway of the second house they peered down it and, according to Mittermaier, called "police" as accused and his companions were ascending the cellarway with their newly acquired cider (R. 10, 29). As to events then and thereafter occurring there is disparity between the testimony of Steinhaus, the soldier, and Mittermaier, the policeman. Therefore, the testimony of each is hereafter summarized separately.

According to Steinhaus, Mittermaier and Schano pointed rifles at accused and him as they ascended the cellar stairs. Reaching the landing accused took their rifles and removed the ammunition therefrom. Neither Mittermaier nor Schano wore "any special kind of uniform" nor did Steinhaus notice any armband worn by them (R.10,16). Thereafter Mittermaier and Schano were ordered into the trailer attached to accused's jeep and were driven several miles down the road where the party halted. Accused motioned the two policemen from the trailer and he and Steinhaus conducted them a short distance into the woods bordering the road where accused asked them for the numbers of his jeep that they had taken. When they stated they had no such numbers accused drew his pistol from the holster and pointed it at the ground, "pulled the magazine out and put the magazine back in again and they were willing to give us the numbers at that time" (R.11-13). The two policemen then handed over a piece of paper on which they had written the numbers of accused's jeep and accused and Steinhaus then left the scene. The driver of the jeep had seen them take the numbers earlier and had so reported to accused (R. 13,19,21).

According to Mittermaier after he and Schano called "police" down the cellarway, accused ascended the steps with two soldiers bearing G.I. cans

LAW LIBRARY  
JUDGE ADVOCATE GENERAL  
NAVY DEPARTMENT

(101)

containing cider and when four or five steps from the landing, accused drew his pistol. Thereafter the two policemen exhibited their "passes" from the police force to accused and he stated "no good" as he pocketed them (R.29). In addition to the "passes" the two policemen wore armbands to identify them as police. They had been employed as civilian police and armed with rifles since 7 May 1945 (R.31,32). Accused next took their rifles, removed the ammunition therefrom, placed the rifles in a corner and instructed the policemen to enter the jeep's trailer. After driving a distance the jeep was stopped and the two policemen were instructed to alight. Accused then drew his pistol and led the two policemen into the woods bordering the road with one of the soldiers following in the rear. Eventually the two policemen were halted against a cliff and accused stood a few meters from them pointing his pistol at them as they beseeched him not to shoot. Accused then asked them for the jeep numbers they had written down. In accordance with instructions they had received from the occupation troops, these two policemen had previously made written note of the numbers of accused's jeep. Acceding to accused's demand Mittermaier tore a page from his notepad and handed it to accused who then left the scene after warning the two policemen to say nothing of the incident (R.30-32).

In a voluntary statement made by accused and admitted in evidence, he described his meeting with the two policemen and his disarming of them. He then described events thereafter occurring as follows (R.33; Pros. Ex.2):

"So I threw the rounds of ammunition out of the door and set their rifles in a corner and mentioned for them to get in the trailer in which they did. Then the driver told me that they had taken down the number of the jeep so I told him to drive away. We went about five or six miles, I told the driver to stop and I got out and motioned for them to follow me and they did. Then Steinhaus followed them. We walked about 30 or 50 feet into the woods. I stopped and had Steinhaus ask them for the numbers which they had taken. Steinhaus told me that they said they didn't have them. So then I took my pistol out of my holster and took the magazine out and put it back in again and had Steinhaus ask them again for the numbers. Then they gave the numbers up immediately to Steinhaus. I took the paper with the numbers on it and read them. I then gave it back to Steinhaus and told Steinhaus to tell them to shut up and take off. Then I and Steinhaus walked back to the jeep and Steinhaus asked what he should do with the numbers. I said, 'Tear them up or throw them away'".

4. After having been advised of his rights accused elected to give sworn testimony in his own behalf. He testified with respect to the visits to the two houses where cider was obtained with the tacit consent of the occupants and then stated that as they were ascending the cellarway of the

(102)

second house they were accosted by two civilians who pointed rifles at them. Accused took the rifles, removed the ammunition and motioned for the two civilians to enter the trailer of the jeep. The driver of the jeep then told accused the two civilians had taken the numbers of the jeep. After driving some four or five miles, the jeep was stopped, accused motioned the two civilians to accompany him a short distance from the road and there he asked them for the jeep's numbers (R.34,35). His testimony thereafter is as follows (R.35):

"They said they didn't have them. I took my pistol out, took the magazine out and put the magazine back in and put the pistol in my holster. Then they came across with the numbers so I just told them to shut up and take off and we went back to Hengersburg."

Accused admitted he took the civilians in the trailer because he wished to get the jeep numbers from them (R.36). He denied knowing they were civilian policemen or that they wore anything to identify them as such although he did not ask them why they possessed rifles (R.36,37). He claimed he drew his pistol in the woods, removed the magazine only as a routine check to see if the pistol was loaded and pointed it at the ground as he did so (R.35,37,38). He had previously examined his pistol at drill that morning and it was unloaded. He had not loaded any ammunition in it thereafter (R.38). He further testified that he entered the service on 8 March 1939, served in the European Theater of Operations with the 99th and 83d Divisions and received a battle field commission on 23 January 1945. He was awarded the Bronze Star, Silver Star, Good Conduct Ribbon, Pre-Pearl Harbor Ribbon and European Theater of Operations Ribbon (R.35).

Accused was reputed to be an excellent, courageous soldier and because of his soldierly qualities and leadership ability he was awarded a battle field commission along with several other enlisted men (R.39,40,42).

Technician Fourth Grade Paul E. Shoemaker, one of the enlisted men accompanying accused on this trip, testified that the two civilians pointed their rifles at accused as he came up the cellarway and that they wore no armbands to identify themselves as civil policemen (R.44,45).

5. Accused is charged in separate Specifications with assault with intent to do bodily harm with a dangerous weapon. The assaults occurred when accused leveled his pistol at two civil policemen and demanded that they hand over written memorandum they had made of the number of his jeep.

To constitute the offenses, alleged, the weapon involved must have been used in a manner likely to produce death or great bodily harm (MCM, 1928, 149m). The authorities are almost unanimous in holding that an unloaded pistol leveled as a firearm is not likely to produce such a result and, accordingly, it is not a dangerous weapon (Price v. U.S., 156 Fed. 950, CCA-9th, 1907; CM 242706, Preziosi, 27 BR 147 and see 74 ALR 1206 for collection of cases). There is no evidence in this record of trial to show that accused's

pistol was loaded when he pointed it at the two policemen. Accused testified that the pistol was not loaded and had not been loaded at any time during the day in question. If the burden be upon the prosecution to establish, as one of the essential elements of its case, that the firearm was loaded, clearly it has failed to discharge that burden. Accordingly, we must consider whether or not such burden rested upon the prosecution.

Our research has uncovered no Federal case nor any opinion of this office on this question. Turning to the other jurisdictions within this country, we find a divergence of opinion. Certain jurisdictions follow the rule that, since in criminal cases it is incumbent upon the prosecution to establish all of the essential elements of the offense, the burden is upon the prosecution to establish that in fact the firearm was loaded; other jurisdictions have adopted the rule that there is a presumption that the firearm was loaded; and still other jurisdictions have adopted the rule that, at least where a threat to shoot accompanies an aiming of a firearm, the burden is on the accused to establish that the gun was not loaded (See cases collected in 15 LRA (NS) 1274; 41 LRA (NS) 181; 42 LRA (NS) 975; 74 ALR 1206; 4 Am. Jur. p. 180; Montana v. Barry, 45 Mont. 598, 124 Pac. 775). The cases establishing the last rule, i.e., that the burden of proof is upon the defendant, do not satisfactorily delineate the extent of the rule since they do not clearly reveal whether the accused must establish by a preponderance of the evidence the fact that the firearm was unloaded or whether accused need only introduce sufficient evidence to raise a reasonable doubt on that question (See cases collected in 42 LRA (NS), note p. 975 and 74 ALR 1206).

As we already have stated if the first rule be applied, i.e., that the burden is upon the prosecution to establish that the firearm was loaded, the prosecution here has failed to sustain that burden. We are compelled to observe at this point that this first rule seems to us the most salutary one since, as the court remarked in Montana v. Barry, supra, that rule alone is consistent with the principle universally recognized in our law that the burden of establishing beyond a reasonable doubt all essential elements of a criminal offense rests upon the prosecution.

Those cases adopting the presumption rule seem to base the rule on the theory that, when evidence is introduced to show that a firearm is leveled at another and its use as a firearm threatened, such facts warrant a presumption that the weapon was loaded (See cases collected in 15 LRA (NS) 1274; 41 LRA (NS) 181; 42 LRA (NS) 975). Such a presumption deduced from the establishment of particular facts is not evidence nor is it irrebutable; it is merely a rule of evidence which dispenses with proof of the thing presumed "unless something in the testimony suggests a doubt of the existence of the presumed fact" in which event the prosecution must then move forward with the burden of proof to establish existence of the originally presumed fact (Wharton's Criminal Evidence, 11th ed., Vol. 1, p. 78, 79). Here accused testified that the pistol was unloaded and the prosecution introduced no evidence to controvert that testimony. Furthermore, undisputed evidence reveals that when accused first met the two policemen he relieved them of

their loaded rifles without encountering objections or resistance. When he escorted them into the woods accused led the procession, followed by the two policemen and then by an enlisted man who was unarmed so far as the evidence reveals. It is quite apparent that these policemen, holding their office under the authority of our occupation forces, were in awe of accused presumably because of his position with our forces and were content to obey his commands even when he brandished no weapon at them. Such behavior is understandable under the circumstances. The entire situation was one where mere exhibitions by accused of an unloaded pistol, although not known so to be by the victims, would have probably produced accused's desired result. The least that can be said of this evidence as to the surrounding circumstances is that it is not inconsistent with accused's testimony that the pistol was unloaded. Applying the presumption rule to this case, it is our opinion that sufficient evidence had been introduced to suggest a reasonable doubt of the existence of the presumed fact and the presumption, therefore, was rebutted as a matter of law. The burden then fell upon the prosecution to establish evidentially that the pistol in fact was loaded and that burden it failed to sustain.

The third rule which places the burden upon accused to establish that the pistol was unloaded is difficult of application. As stated above, it is not clear from the cases whether it be enough for accused to introduce such evidence as raises a reasonable doubt that the pistol was loaded or whether he must establish by a preponderance of the evidence that it was unloaded. In any event, we are of the opinion that, irrespective of other jurisdictions, our military jurisprudence should be extremely hesitant before embracing the preponderance-of-evidence construction since in net effect it places upon an accused the burden of establishing his innocence by a preponderance of evidence. Such a rule is repugnant to our universal presumption of innocence and to our equally well recognized proposition that the prosecution must establish by proof beyond a reasonable doubt an accused's guilt of all essential elements of an offense charged. The inherent evil of this construction becomes obvious when we consider that the rule only comes into play when no shot is fired from the weapon. In many such cases an accused may leave the scene unapprehended. Thus, he alone will know whether or not the weapon was loaded and although he truthfully testifies that it was unloaded, he may nevertheless find himself convicted of a heinous offense without there being any evidence to disprove his testimony. We will only recommend the adoption of a construction leading to such a result after our jurisprudence abandons the presumption of innocence. If this third rule, on the other hand, be construed to mean that the burden is upon the accused to introduce sufficient evidence to raise a reasonable doubt that the pistol was loaded, and parenthetically we can offer no sound legal reasons for the adoption of such a rule, nevertheless we are of the opinion that such burden has been here discharged by accused.

In this case we are privileged to weigh the evidence presented to the court (CM 152797, MCM, 1928, note p.216). When we consider the behavior of the two policemen in unhesitatingly permitting accused to relieve them of their rifles, in entering the jeep trailer and thereafter obediently following accused through the roadside woods, it seems quite apparent that at least up

to the time they were asked for the memorandum, accused's official position rather than a show of armed force compelled their compliance with his orders. Having exhibited such an unresisting attitude, accused could well have concluded that the mere brandishing of an empty side arm would frighten his two victims into compliance with his directives. He was seeking to intimidate meek and pliant, not courageous or violent, individuals. Thus, as we have already said, there is no inconsistency between the other evidence in this record and accused's contentions that the pistol was unloaded. We are compelled to conclude that upon such a state of the record there exists a very substantial doubt that the pistol was in fact loaded.

In view of the foregoing we are of the opinion that the record of trial does not sustain the findings of guilty of the offenses charged. Further, it does not sustain findings of guilty of the lesser offense of assault with intent to do bodily harm. No bodily harm can be inflicted when an empty firearm is presented as a firearm at another. Such an act is clearly done not with the intent of inflicting bodily harm but with the intent deceitfully to place another in fear of such non-existent harm. Proof of the latter intent is insufficient to establish the requisite intent. This lesser offense is only established by proof that when the assault occurred the accused entertained the concurrent intent in fact to inflict bodily harm by the assault (MCM, 1928, par. 149n).

However, it is clear that the two policemen believed the pistol to be loaded and that when accused presented it at them they were placed in fear. Accordingly, accused's conduct does constitute a criminal simple assault (Price v. U.S. 156 Fed.950-CCA 7th-1907), and the evidence sustains so much of the findings of guilty as involve findings of guilty of that lesser included offense.

6. Accused is 24 years of age. War Department records show that he completed nine grades of public schooling. From 1936 to 1938 he farmed with his father. On 8 March 1939 he enlisted in the Regular Army and eventually rose to the grade of technical sergeant. On 23 January 1945 while serving with the First United States Army he was awarded a battle field commission as a second lieutenant. He was awarded the Silver Star for gallantry in action in that, while a technical sergeant, he manned a machine gun that had been abandoned in a forward position, commenced firing at enemy infantry who were following in the wake of enemy tanks and eventually moved the gun from its emplacement to exposed ground where he continued firing for some thirty minutes, killing sixteen of the enemy. The enemy tanks were eventually forced to withdraw because of loss of supporting infantry. He was also awarded the Bronze Star Medal for heroic action in that when his squad was pinned down at a river crossing by enemy fire from a bridge tower, he crawled some forty yards along the bridge exposing himself to enemy fire, knocked out the enemy machine gun with a bazooka and thus permitted his squad to continue their mission.

7. Four of the five members of the court urged that clemency be accorded accused because his record showed him to be an excellent combat soldier who

(106)

had faithfully served his country prior to the instant offenses. The fifth member of the court agreed with these sentiments but was not available to sign the clemency request.

8. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused, other than those noted above, were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support so much of the findings of guilty of Charge II and its Specifications 2 and 3 as involves findings of guilty of simple assault, in violation of Article of War 96, and to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Tappay, Judge Advocate.  
Joseph J. Stern, Judge Advocate.  
Robert C. Swettenham, Judge Advocate.

SPJGH - CM 302854

1st Ind

Hq ASF, JAGO, Washington 25, D. C. 20 March 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth N. Juhl (O-2005342), Infantry.

2. Upon trial by general court-martial this officer was found guilty of two offenses of assault with intent to do bodily harm with a dangerous weapon (Chg., Specs. 2, 3). He was sentenced to dismissal, and total forfeitures. The reviewing authority approved the sentence, forwarded the record of trial for action under Article of War 48 and recommended that so much of the sentence as involved total forfeitures be remitted.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support so much of the findings of guilty of Charge II and Specifications 2 and 3 thereof as involves findings of guilty of simple assault in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 24 August 1945, in preparation for a party to be held by his organization, accused, accompanied by two enlisted men, was driven to the nearby town of Passau, Germany, where he entered two houses and proceeded to siphon cider into G. I. cans in the presence of the occupants of these dwellings. As he ascended the cellarway of the second house, he was accosted by two armed civil policemen. He took possession of their rifles, extracted the ammunition and placed the rifles in a corner without objection or resistance being offered by the two policemen. Learning that they had made a record of the number of his jeep, he ordered them into the jeep and, after proceeding some distance down the road, ordered them from the jeep, led them into the roadside woods and pointed his pistol at them as he demanded the record they had made. So far as the evidence in the record reveals, it must be assumed that the pistol was not loaded. After obtaining the memorandum, accused left the scene with his companions.

Accused had enlisted in the Regular Army in 1939, had received the Silver Star for gallantry in action while a technical sergeant, had been awarded a battle field commission as second lieutenant and thereafter was awarded the Bronze Star Medal for heroic action in combat. Four of the five members of the court recommended that clemency be shown accused because, prior to commission of the instant offenses, he had faithfully served his country as an excellent combat soldier. The fifth member of the court agreed with this recommendation but was not available to sign it. In view of accused's outstanding combat record and considering the nature

(108)

of the convictions sustained by this record of trial, I recommend that the sentence be confirmed, but commuted to a reprimand and a forfeiture of pay of \$100 per month for three months and that the sentence as thus commuted be carried into execution.

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such action meet with your approval.

2 Incls

1. Record of trial
2. Form of action

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

---

( G.C.M.O. 88 , 1 May 1946 )



Private Ottis F. Greer - \$850 in currency and \$300 in United States Treasury checks  
 Sergeant Joseph Alusick - \$35  
 Sergeant Philip Linker - \$160  
 Technical Sergeant Clyde Reeves - \$250  
 Technical Sergeant Guy S. McDonald - \$230  
 Sergeant Charles R. Ajamy - \$40  
 Sergeant Samuel Friedman - \$30  
 Master Sergeant John J. Franz - \$200  
 Sergeant Barney J. Rarog - \$150  
 Technical Sergeant John W. Kellogg - \$250  
 Corporal James A. Morgan - \$80  
 Corporal Henry R. Ridgely - \$60  
 Master Sergeant Charles W. Pyffer - \$100  
 Second Lieutenant Russell W. Park, Jr. - \$242  
 First Lieutenant Garland Price - \$150  
 Second Lieutenant Louis B. Sewell - \$200  
 Staff Sergeant William Dempster - \$150

all said moneys and checks having been entrusted to said Captain John T. Rodrigues for various purposes, namely, for safekeeping in the case of said Master Sergeant Charles W. Pyffer; for transmission to the United States through Personal Transfer Accounts in the case of said Second Lieutenant Russell W. Park, Jr., First Lieutenant Garland Price, Second Lieutenant Louis B. Sewell and Staff Sergeant William Dempster; and for deposit in their respective Soldier's Deposit Accounts in the case of the other named individuals.

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

Specifications: In that Captain John T. Rodrigues, 326th Bombardment Squadron (H), 92nd Bombardment Group (H), did, at AAF Station 109, APO 557, U. S. Army, between 3 April 1945 and 3 June 1945, wrongfully and negligently handle certain moneys entrusted to him for deposit in their respective Soldier's Deposit Accounts by the following named individuals, who entrusted to said Captain Rodrigues for that purpose British currency having the equivalent dollar value stated after their respective names, on or about the date also stated after their respective names, as follows:

<u>Name</u>	<u>Amount</u>	<u>Date of Delivery</u>
Corporal Franklin K. Gastrock	\$50.	16 April 1945
Corporal Ernest Margolies	\$25	30 April 1945

<u>Name</u>	<u>Amount</u>	<u>Date of Delivery</u>
Corporal Ernest Margolies	\$50.	1 May 1945
Sergeant Samuel Friedman	\$60.	30 April 1945
Corporal Leland H. Gile, Jr.	\$100.	30 April 1945
Technical Sergeant Edward W. Kuntscher	\$120.	30 April 1945
Master Sergeant John R. D. Dupuis	\$100.	1 May 1945
Master Sergeant Charles W. Pyffer	\$200.	1 May 1945
Corporal Stanley L. Kistler	\$85.	1 May 1945
Corporal Elmo A. Cooper	\$20	1 May 1945
Technical Sergeant Harry L. Karpf	\$40	2 May 1945
Sergeant George J. Fannuchi	\$30.	5 May 1945
Technical Sergeant John W. Kellogg	\$250.	5 May 1945
Private First Class David W. Sanders	\$65.	5 May 1945

in that said Captain Rodrigues failed to deposit said moneys promptly in the appropriate accounts, not delivering said moneys to the Finance Office at said Station for that purpose until 28 May 1945, in the case of Technical Sergeant Edward W. Kuntscher, and until 3 June 1945, in the case of the other named individuals, although having ample opportunity to do so beforehand.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. 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 might direct, for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 46.

3. Evidence for the prosecution: a. Accused was appointed Adjutant of the 326th Bombardment Squadron on 1 December 1944 and thereafter served in that capacity (R. 9, 10; Pros. Ex. 4). Among his duties was the handling of deposits made by enlisted men (R. 10). The money was received for deposit at the orderly room by a clerk and taken to accused or some other officer on duty there who signed the receipt (R. 42, 48). From time to time the money on hand was taken from the orderly room to the finance office for deposit (R. 27). Deposits drew interest only from the time they were received by the finance office and accused had been instructed by his commanding officer to transfer them promptly and not to allow them to accumulate in the orderly room (R. 10, 27). In addition to soldiers' deposits, money was similarly received in the orderly room from enlisted men for safekeeping and also for transmission to the United States by "PTA", i.e., Personal Transfer Account (R. 48-49, 80).

There was a safe in the orderly room which was used by accused to hold moneys left with him and also to contain classified documents

(R. 14, 118; Pros. Ex. 21). When he became Adjutant two keys to the safe were given him. He broke one of them but the other remained in his possession and he was the only one able to, and who did, open the safe by key except on occasions when a file clerk or the first sergeant would open it in accused's presence (Pros. Ex. 21).

b. Charge I (Embezzlement). It was stipulated that on various dates between 3 April 1945 and 1 June 1945, the seventeen officers and soldiers named in the Specification to Charge I delivered to the orderly room the respective amounts entered after their names, for the purposes recited in the Specification. Of these amounts twelve were received for deposit on 23 May, 31 May and 1 June 1945; one for safekeeping on 3 April 1945; and four for "PTA" transmission on 6, 7, and 21 April 1945. The receipts for the sums delivered for deposit were signed either by Captain L. G. Johnson, First Lieutenant Walter A. Wesley, First Sergeant P. Alexander, or the accused; the receipt for the single sum delivered for safekeeping, by First Lieutenant James L. MacFarlane; and the receipts for the four sums delivered for "PTA" transmission, by accused (R. 8-9; Pros. Exs. 1, 3). Each of the men named above testified that he turned over the money for which he had given a receipt, to accused, and that accused placed it in the safe (R. 24, 31, 57, 74).

Accused made a plane trip with other officers to Paris on 3 April and another on 11 April (R. 16, 84). While waiting to take off on the first trip he opened a handbag and took out three or four white envelopes and put them in his blouse. He remarked that there were 100 pounds in each envelope (R. 85). Accused and the six other officers went to a night club the first night they were in Paris and expenses were "pretty well distributed" (R. 86). The second night they again went to a night club taking four civilians with them. Captain Henry G. Callahan, one of the officers present, testified that he believed accused paid the bill but "I couldn't say for sure." Accused bought flowers for the ladies in the party and a big doll for his own girl (R. 87). The following day the group had an elaborate luncheon and accused and the civilians all wished to pay the check but Captain Callahan could not definitely state who finally secured the check. That night they again went to a night club and the witness "believed" that accused paid the bill (R. 87-88). When they arrived back in England the officers with accused decided that since he had borne most of the expenses he should be reimbursed so each paid him about twelve pounds (R. 88). During this first trip to Paris accused purchased a large quantity of perfumes and cosmetics which he placed on sale in the orderly room on his return (R. 25, 50, 71).

Before leaving for Paris accused had told another officer that the key to the safe was misplaced (R. 101, 104). During his absence,

however, an enlisted man came into the orderly room for money he had left there and accused's room was searched and the key found in his battle jacket (R. 58, 82). The safe was opened in the presence of an officer and two enlisted men but no money could be seen. One of the men picked up one of the "safekeeping envelopes" and noted that it was open and apparently empty (R. 59). The safe was thereupon locked and the key returned to accused's room (R. 60, 76). After accused's return from Paris he reported that he had found the key. He subsequently opened the safe but said nothing about any money being missing (R. 61).

When accused made his second trip to Paris he gave each of the other three officers with him a five-thousand franc note, equivalent to \$100 in American money (R. 16, 90). Accused, his officer friends, and two French civilians went to night clubs and to restaurants together. Accused paid for the majority of the meals (R. 17). According to Major Victor A. Cherback, one of the officers on the trip, the group agreed that one man would pay the expenses and at the end of the trip the others would contribute their share. The expenses were "rather lavish" and after they returned to the base they asked accused on several occasions to state what their share was, but each time he said he would figure it up later (R. 17, 51). It was only after the charges in the instant case were brought that he asked for the return of the 5000 francs he had advanced each man (R. 17, 92).

Accused had the reputation of being a liberal spender (R. 103). He kept large sums of money in his pocket from which he paid off men who had left their money, presumably in the orderly room safe, for safekeeping (R. 60-61, 70). He made loans to officers and enlisted men out of his pocket and out of the orderly room safe (R. 101, 103). The squadron surgeon observed accused's lavish spending, including the purchase of expensive cameras, and inquired where he got all of his money. He replied that he had saved considerable money in civilian life and had it on hand. The surgeon "gathered" from the conversation that accused had an income of around \$10,000 a year in civilian life (R. 106-107). However, his form 66-2 discloses that he actually made between \$3000 and \$4800 a year before entering the Army (R. 116; Pros. Ex. 20). His pay account showed that in March 1945 his net pay after deductions was \$127.03; in April, \$144.09, and in May, \$147.20 (R. 27; Pros. Ex. 7). The surgeon was of the opinion that accused had undergone "a slight change in personality" and exhibited a paranoid trend. It was not, however, sufficient to require his hospitalization and he was able to distinguish right from wrong and to adhere to the right (R. 109-112).

Accused was transferred to a new station on 3 June 1945 (R. 21). About 2 o'clock in the morning on that date he asked Corporal Charles J. Vacanti, a former orderly room clerk, to help count the money in the

orderly room (R. 93-94, 96-97). Corporal Vacanti testified that the count disclosed about 326 pounds on hand (R. 97). Later in the morning accused went to the room of an orderly room clerk, Staff Sergeant Sidney Goldman, and handed him 266 pounds with some "Soldiers Deposits" forms, instructing him to deposit it when he went on duty (R. 46). Before departing that morning accused gave a clerk two cigar boxes containing about 76 pounds to be delivered to Captain Frank B. Roberts. The latter had given accused 70 pounds for safekeeping some time previously (R. 100-102, 105; Pros. Ex. 19). Accused also left the key to the safe with a clerk (R. 95).

The safe was opened and only \$60 was found in it. With the 266 pounds which accused had turned over to the clerk there was on hand only about \$1135. A preliminary check of the deposit slips showed there should have been \$2635 in the safe. A later check showed a greater shortage (R. 32). The \$100 which Master Sergeant Charles W. Pyffer had left for safekeeping on 3 April 1945 could not be found (Pros. Ex. 1). No record could be found of the four sums turned in for Personal Transfer Account transmission (Pros. Ex. 1). The finance officer, through whose office "PTA transmissions" necessarily passed testified that the money never reached his office (R. 26-27). The deficiency in accused's accounts was reported to his commanding officer and when the latter got in touch with accused and asked for an explanation he gave "a very indefinite answer." He did say that he was the responsible officer and that he would make the loss good (R. 16). After the investigation into the loss began Corporal Vacanti talked to accused and asked if the money was missing the night he counted it. Accused said he did not think so but added "I believe I am in for it" (R. 98). In a statement given to an investigating officer accused asserted that when he counted the funds in the safe on the morning of 3 June the money was divided into two lots, one of the money deposited before 10 May, and the other of money deposited later. The second lot contained some 290 pounds (R. 117-118; Pros. Ex. 21). In a subsequent statement accused revised his figures and asserted the second lot contained some 590 pounds (R. 118; Pros. Ex. 22).

Under the official military rate of exchange 50 Francs were equivalent to \$1, and 1 Pound was equivalent to \$4.035 (R. 9; Pros. Ex. 5).

c. Specification, Charge II (Negligent handling soldiers' deposits). It was stipulated that the thirteen enlisted men named in the Specification to Charge II delivered to the orderly room for deposit the sums set out after their names on the dates recited in the Specification (Pros. Exs. 2, 3).

Of the above amounts the \$120 delivered to the orderly room by Technical Sergeant Edward W. Kuntscher on 30 April 1945, was deposited in the soldiers' account at the Finance Office on 28 May 1945. The

reason this deposit was made at that time was that Kuntscher was going home and came in to see about the status of his deposit (R. 46; Pros. Exs. 2, 13). The remaining sums, delivered to the orderly room on various dates between 16 April and 5 May 1945, were not deposited to the soldiers' accounts in the Finance Office until 3 June 1945 (R. 33; Pros. Exs. 2, 9). These deposits, totalling \$1135, were delivered to the Finance Office by the squadron executive who used the money which accused had turned in that day to Staff Sergeant Goldman (R. 46-47; Pros. Ex. 9). Forms to accompany the deposit of these monies had been prepared by a clerk and placed on accused's desk as early as 10 May but although all he had to do was sign the papers he did nothing about it (R. 43, 45, 47, 48, 55; Pros. Exs. 12, 14, 15, 16).

4. Evidence for the defense: The accused, having been advised of his rights, elected to remain silent (R. 128). Two witnesses testified for the defense. One officer asserted that he had made an investigation into accused's assets. A search of accused's room disclosed no money. He had no account or safety deposit box in any of the several banks which the witness checked. Finance Office records disclosed that he sent no money to the United States except two or three \$25 checks. Inquiry of the Fiscal Office in London failed to disclose that the Treasury checks mentioned in the Specification to Charge I had been cashed (R. 126).

Another officer who had accompanied accused on the first trip to Paris testified that accused advised each man that his share of the expenses was 12 pounds and that all contributed their share except one officer who had gone home. This witness gave accused 105 pounds during the trip to purchase perfumes. The perfume was brought back and sold to the enlisted men. Accused returned 100 pounds and a bottle of perfume valued at 17 pounds to the witness (R. 122-123).

Evidence as to accused's character and performance of duty was adduced on the cross-examination of the prosecution's witnesses. Lieutenant Colonel Ernest C. Hardin, commanding officer of accused's squadron until 29 May 1945, thought accused performed his duties in an excellent manner and gave him a "superior" rating. There were no complaints about his handling of soldiers' deposits and he appeared to be making his deposits promptly (R. 10-13). The Finance Officer testified that accused acted as a Class A Finance Officer on several occasions and that his accounts were in order (R. 29).

Accused received a letter of commendation from the Commanding Officer, Army Air Force Station 109, on 30 April 1945 (R. 128; Def. Ex. D). An inspection on 26 January 1945 when he was mess officer revealed that the mess was in excellent condition (R. 128; Def. Ex. F). On 17 January 1945 he was appointed recorder on a board appointed to investigate recommendations for the reduction of non-commissioned officers (R. 128; Def. Ex. G).

5. The Specification of Charge I alleges that between 3 April and 3 June 1945 accused embezzled 788 pounds in British currency, of the value of \$3177, and \$300 in United States Treasury checks, the property of certain named individuals, who entrusted the currency and checks to him either for the purpose of safekeeping, or for deposit in their accounts, or for transmission to the United States by Personal Transfer Accounts. The Specification is laid under the 93rd Article of War.

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come". (MCM, 1928, par. 149h).

It is established that between 3 April and 1 June 1945, \$3177 in English currency and \$300 in United States Treasury checks were entrusted to accused by the enlisted men and junior officers named in the Specification, members of the Squadron of which he was the Adjutant. All of the funds were delivered to the squadron orderly room and given either directly to accused or to other officers on duty who, in turn, handed the money over to him. The money was placed in a safe to which accused held the only key. He received them in his capacity as Squadron Adjutant for various purposes: for the purpose of depositing them to the soldier's account in the Finance Office, for safekeeping, or for delivery to the Finance Office for transmission to the United States by Personal Transfer Account. It is apparent from the circumstances that he received these monies in a position of trust and that a fiduciary relationship existed between the individual depositors and himself.

On the morning of 3 June 1945, accused departed for a new station leaving behind him with a clerk approximately \$1075 and some soldiers' deposit slips. He left the key to the safe with another clerk and when the safe was opened a little later in that day it was found to contain only \$60. When this \$60 was added to the \$1075 there was on hand the approximate amount of soldiers' deposits which had been left with him prior to 10 May 1945 and for which deposit slips dated 10 May were already made out. The deposits received subsequent to 10 May, the money received for safekeeping, and the sums received for Personal Transfer Account transmission, all of which constitute the funds described in this Specification, were missing. When accused was questioned about the shortage he was very vague and indefinite in his replies. Some time later he made a statement intimating that the money was in the safe when he turned over the key and left the station on 3 June. However this appears to be more of an afterthought and unworthy of much consideration. There was only 326 pounds (approximately \$1300) in the safe when Corporal Vacanti counted the money that morning. The Board of Review has reaffirmed on many occasions the principle laid down in CM 123488 and CM 203849; 1912-40 Dig. Ops. JAG sec. 451 (17); as follows:

"An adult man who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, cannot complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence."

The large amount of testimony adduced at the trial concerning accused's lavish spending, and the irregular manner in which he handled the money entrusted to his care, lead to the conclusion that the funds had been dissipated and were no longer in his possession when he departed from the station. Further support for this conclusion is found in the fact that part of the money was entrusted to accused only for delivery to the Finance Office and had been retained by him for long periods. The money given him for Personal Transfer Account transmission on 6, 17, and 21 April should have been deposited in the Finance Office long prior to 3 June. The soldiers' deposits given him on 23 May should have reached the Finance Office by 3 June. Under these facts the court was amply justified in finding that the funds entrusted to him had been fraudulently converted to his own use. The Specification and Charge are accordingly sustained.

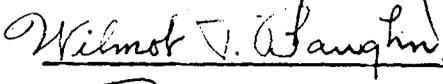
6. The Specification of Charge II alleges that accused wrongfully and negligently failed to deliver promptly to the Finance Office for deposit in the respective soldier's deposit account various sums of money totalling \$1195 entrusted to accused between 16 April and 5 May, 1945. The Specification is laid under the 96th Article of War.

The evidence shows that thirteen soldiers delivered deposits, totalling \$1195, to the orderly room between 16 April and 5 May. The money was placed in accused's hands and remained in his safe until the day of his departure, 3 June 1945. Accused had been instructed to transmit such deposits to the Finance Office promptly and not to keep them in the orderly room because they drew interest only from the time they reached the Finance Office. Forms to accompany the deposits were prepared for accused's signature as early as 10 May. It was only necessary for him to execute the forms and take the money to the Finance Office nearby but he failed to do so. A subordinate finally delivered the money to the Finance Office a few hours after accused's departure. His procrastination was inexcusable and did an injustice to the enlisted men concerned. His action was clearly a neglect to the prejudice of good order and military discipline and, hence, violative of Article of War 96.

7. Accused is approximately 33 years of age having been born 27 April 1913. On his Personnel Placement Questionnaire he asserts that he was graduated from high school, attended Pitt College for two years, and night school for seven years. His employment record discloses that

between August 1933 and February 1941 he was employed successively as a department store buyer, sales and advertising manager of a retail dairy chain, steel mill inspector, owner and operator of an wholesale lubricant business, assistant superintendent of a coal mining company, and owner and publisher of a community "Shoppers News". After entering the Army as an enlisted man 6 April 1942, he was promoted to corporal and then sergeant, attended Officer Candidate School, and was commissioned a temporary second lieutenant, Army of the United States, on 9 December 1942. He entered upon active duty on the date of his commission, was promoted to the grade of first lieutenant on 2 July 1943, and to captain on 1 April 1945.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd or of the 96th Article of War.

 , Judge Advocate.  
 , Judge Advocate.  
 , Judge Advocate.

SPJGN-CM 302855 1st Ind  
Hq ASF, JAGO, Washington, D.C.  
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain John T. Rodrigues (O-569973), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of embezzling \$3177 in English currency and \$300 in United States Treasury checks entrusted to him by enlisted men and junior officers, in violation of Article of War 93 (Spec., Chg. I); and of negligently handling soldiers' deposits amounting to \$1195 entrusted to him, in violation of Article of War 96 (Spec., Chg. II). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

While accused was on duty in England as a Squadron Adjutant various sums of money were entrusted to him by enlisted men and junior officers of the Squadron. English currency equivalent to \$1195 was delivered to him by enlisted men, for deposit, between 16 April and 5 May 1945 (Funds described in the Specification, Charge II). English currency equivalent to \$2335 and United States Treasury checks for \$300 was delivered to him by enlisted men, for deposit, between 23 May and 1 June 1945; \$100 was given him by an enlisted man for safekeeping on 3 April 1945; and a total of \$742 was entrusted to him by an enlisted man and three officers, between 6 and 21 April 1945, for delivery to the Finance Office and transmission to the United States by Personal Transfer Account (Funds described in the Specification, Charge I).

Soldiers' deposits draw interest only from the date of deposit in the Finance Office. Accused should have turned them over promptly. There was no reason for his retaining the money delivered to him for "PTA" transmission to the United States. Nevertheless, on 3 June 1945, when accused made a change of station, none of the monies described had been delivered to the Finance Office. Before departing, accused turned over to a clerk approximately \$1135 in soldiers' deposits. He also turned over the key to the safe in which he ordinarily kept funds entrusted to him but, when searched, the safe yielded only \$60. The \$1195, which he left behind, accounted for the monies delivered to him between

16 April and 5 May and was finally deposited to the soldiers' credit on 3 June 1945. None of the other monies delivered to him could be found. He was questioned immediately concerning the shortage but his replies at the time were very indefinite. Two weeks later, however, he advanced the contention that practically all of the money was in the safe when he left the station and inferred that it was stolen after his departure. A soldier who helped accused count the money in the safe the night before his departure counted only \$1300. There is evidence of lavish spending on accused's part and of a reckless handling of the money entrusted to him, supporting the conclusion that he converted the missing funds to his own use.

Although his previous record is good, the approved sentence is not excessive for the offenses of which he was found guilty. I recommend that the sentence be confirmed and ordered executed, and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to a brief submitted by Mr. Gordon S. P. Kleeberg, Attorney, New York, N. Y. Mr. Kleeberg also appeared personally and presented oral argument before the Board of Review and The Judge Advocate General.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

3 Incls

- 1 - Record of trial
- 2 - Form of action
- 3 - Brief submitted by  
Mr. Gordon S. P. Kleeberg

---

( GCMO 117, 10 May 1946 )•

WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

(121)

SPJGK - CM 302864

1 MAR 1946

UNITED STATES )

CHANOR BASE SECTION

v. )

) Trial by G.C.M., convened at Brussels,  
) Belgium, 18 December 1945. Dismissal,  
) total forfeitures, and confinement  
) for one (1) year.

Major THOMAS W. RYAN )  
(O-401678), Infantry. )

-----  
OPINION of the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates.  
-----

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of Article of War 93.

Specification: In that Major Thomas W. Ryan, attached unassigned, Headquarters Chanor Base Section, then a member of the 634th Tank Destroyer Battalion, did, at or near Brussels, Belgium, on or about 13 November 1945, feloniously embezzle by fraudulently converting to his own use one diamond stone of the value of more than \$50.00, the property of Markus Teichler, entrusted to him by the said Markus Teichler.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of any previous conviction 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 for one year. Five of the seven members of the court, the trial judge advocate and the defense counsel recommended that the period of confinement be remitted. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the Prosecution.

Mr. Max Domb, a civilian resident of Brussels, Belgium, "first met" accused in October 1945 (R. 6,7). On 12 November 1945, in a cafe opposite the Central Hotel located in Brussels, the two of them were engaged in a conversation, in the course of which accused inquired of Mr. Domb whether the latter "knew somebody who would be able to sell him a diamond" and Mr. Domb replied that he "would bring him in contact with a friend of mine who

was a merchant in diamonds" (R. 7). At 1800 hours the same day, and after Mr. Domb had introduced Mr. Teichler, a jeweler, operating a jewelry store, to the accused, Mr. Teichler showed the accused "a couple of diamonds which he had brought along, but the Major said that he would not be able to buy it at that time because he had not sufficient money" (R. 7,10). The accused then inquired of Mr. Teichler if the latter "could make out a paper stating the value of the stone \*\*\* in order to enable the Major to go to the Finance Office and explain why he would have some money changed" (R. 7).

At noon, on 13 November 1945, they again met in the cafe opposite the Central Hotel, at which time Mr. Teichler had with him "the diamond" and "the paper" (R. 8,11). Mr. Teichler gave the diamond, described as "a very clear stone", weighing 1.31 carats, and the paper to accused (R. 11). Mr. Teichler testified "I had put in that paper that Major William Gowain had expressed the wish to buy a ring from me for 40,000 francs and I signed it" (R. 13). He used the name William Gowain because accused "told me that that was his name" (R. 13). He further testified that accused "said it first fluently and then he told me letter by letter and I put it down" (R. 15). Mr. Teichler stated that accused read the paper and said, "It's right" (R. 15). Mr. Domb testified the accused did not look at the paper but put it in his pocket (R. 10). Arrangements were made at that time that accused would go to the Finance Office and have his money exchanged and then return to the same cafe at 1500 hours on the same day and pay Mr. Teichler (R. 11,12). Mr. Domb and Mr. Teichler were present at the designated time and place, where they waited until 1830 hours, but accused failed to appear (R. 9,11). The two men then went to the Central Hotel and then to the "MPs" (R. 12). Mr. Teichler testified that he had "asked 40,000 francs for the diamond. About 40,000 francs" and had not as yet received the 40,000 francs nor had the accused returned the diamond to him (R. 13). In reply to the question, "Was this paper supposed to have been in effect a contract for sale?" Mr. Teichler replied, "No, it was not. I only gave it to him to change the money" (R. 19).

On cross-examination Mr. Teichler stated that the transaction was "conducted" in English and that he spoke English "not sufficient" (R. 14). Upon being asked whether in a pre-trial statement he said, "There is a possibility this name was not correct, because I do not speak English fluently. I can not remember whether it could have been T. W. Ryan", he replied that "I said in that statement maybe there is" (R. 18).

It was stipulated by the prosecution, the defense and the accused that at the time alleged in the Specification the diamond referred to in the Specification was owned by Markus Teichler and was of a value of more than fifty dollars (\$50.00) (R. 15, Pros. Ex. A).

On 21 November 1945, Mr. John H. Lamothe, and Mr. Alvin I. Yeager, agents of the Criminal Investigation Division, located accused at Camp Phillip Morris, "just outside LeHavre, France," where Mr. Lamothe, after

identifying himself and explaining his mission, interrogated accused (R. 20, 21, 22). Mr. Lamothe asked accused if the latter knew anything about "the diamond" or the "incident concerning the diamond," to which the accused replied in the negative (R. 22). Mr. Lamothe then explained to accused the latter's rights under the 24th Article of War and "Major Ryan decided to remain silent -- in other words, disclaimed all knowledge of the incident or diamond" (R. 22). The accused, upon being advised that "he would be subjected to search of his possessions and belongings in the hope of finding the aforementioned diamond," replied, "All right, fine" (R. 22). After a futile search the accused said, "If you will leave me alone for a half hour I will produce the diamond" (R. 22). The agents then examined the contents of accused's pockets but found nothing (R. 22). Following this examination the accused asked what would happen if the diamond were found and returned to the owner, to which the agents replied that the case was in the hands of the authorities at Chanor Base Section Headquarters (R. 23). Mr. Yeager then noticed that accused had a "paper" in his hand and inquired of the latter if it was "the diamond." The accused said, "Yes" (R. 25). The paper, upon being opened, revealed "a small diamond stone" (R. 25).

It was stipulated by and between the prosecution, defense and the accused that if Second Lieutenant Raymond L. Williams were present in court he would testify that -

"On November 23, 1945 Major Thomas W. Ryan, without any threats, promises, duress or coercion, made, signed and swore to a statement concerning the alleged embezzlement of a diamond on or about the 13th of November 1945" (R. 19, Pros. Ex. B).

It was further stipulated that the following statement, dated 23 November 1945, which was admitted in evidence, was the statement referred to in the previous stipulation:

"On or about the 12th or 13th of November 1945, a man I now know as Mr Teichler showed me an unset diamond. I gave him my correct name, Maj. T. W. Ryan, and he prepared a letter saying I would like to buy the stone. He brought the letter back to me; gave me the letter which had a Maj. G. -- something --. The name was quite long and I know I could not pronounce it. It didn't seem to make any difference to me at the time because I was going to have the ring appraised. I remarked that my name was not spelt right. Mr. Teichler handed me the paper and then handed me the diamond without my asking him for them. I told him that I should be back by three o'clock that day. I left with the paper and the stone. The thought struck me when I left the store, that I might be able to keep the stone and not go back; especially where the name they had on the paper was not mine. I left for camp with the stone. I stopped several times on the way intending to turn

back and return the stone. Something -- I don't know myself made me continue. I was convinced that sooner or later the stone would have to be returned. From that time until the time the CID came to me, I had been thinking of ways of returning the stone, in such a manner that would not stop me from shipping. Mailing seemed to be the only method, as all passes were canceled, and I knew postal service would not accept the package unless it had my name on it. The time just passed on -- that was all.

"This is the first time I ever got mixed up in any dealing of this sort; either in the Army or out. The only time I have had dealing with the law, was for a parking violation ticket, several years ago in civilian life." (R. 20, Pros. Ex. 3)

#### 4. For the Defense.

Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 27,28). His testimony is summarized as follows:

He arrived in Brussels, Belgium, on 11 November 1945 and was there on 13 November 1945 (R. 28). He had less than 100 points at that time and orders were still in effect that field grade officers with less than that number would not ship (R. 28). During previous trips to Brussels he had met Mr. Domb in a cafe located across the street from the Central Hotel, and on 12 November 1945 again had a conversation with him. On that date, while in the cafe, he saw a Captain purchase a diamond from Mr. Teichler and he (accused) asked Mr. Domb how the Captain was able to convert sufficient money to buy a diamond (R. 29). Mr. Domb informed him that the Finance Office was authorized to convert money for the purpose of purchasing "legitimate" material (R. 29). Accused then explained that he was interested in a diamond, whereupon Mr. Domb "called Mr. Teichler over and asked Mr. Teichler to show me a diamond" (R. 29). Mr. Teichler displayed some diamonds and pointed out, at his request, a good one (R. 29). Accused was asked his name "so that they could prepare a bill in order to take down to the Finance, and I told them my name was Thomas W. Ryan." Mr. Teichler wrote the name down on a match box (R. 29). Accused did not spell out his name for Mr. Teichler but just said, "Thomas W. Ryan." The accused asked Mr. Teichler if he understood and he replied, "Yes," and told accused to come back at 1100 hours the following day (R. 29).

The accused returned to the cafe the next day and at about 1100 hours Mr. Teichler and Mr. Domb entered the cafe (R. 30). Mr. Teichler handed the accused the paper and the diamond. The accused then explained to the court -

"\*\*\* Previous to this other day they said you couldn't get money at the Finance - they would want to see the article being purchased, so they gave me the diamond. He handed me the slip of paper with

the note on it. I glanced at it and told him it wasn't my right name and he went and made motions with his hands like this, like most Frenchmen usually do. I thought it wouldn't make any difference, so I took off with the piece of paper" (R. 30).

The reason he did not think the name would make any difference was "due to the fact it wasn't a bill of sale," he was only using the paper to get the money converted (R. 30). There was no "specific understanding" what would be the purchase price of the diamond (R. 34).

He made arrangements with Mr. Teichler to meet him at 1500 hours, designating that hour because "the truck generally got there around 3:30 and I figured it would be a little before the time I got the truck to go home" (R. 30). He then went to the hotel, had dinner, packed his bags and brought them downstairs. When he got outside, it was about 1400 hours and the "jeep had already arrived," whereupon he put his "stuff" in the jeep and started back to camp taking the diamond with him. He was notified the next day that his unit would ship to Phillip Morris and asked the Commanding Officer if he could get a pass to go to Brussels. The Commanding Officer said, "No, all passes were cancelled" (R. 30,31). He moved to Phillip Morris and when he got there "there was a lot of work to do while there, preparing papers, etc., and at the time I forgot about returning the diamond" (R. 31). He later asked his "unit mail clerk" the procedure used to mail a package from "American Forces to a civilian in Belgium" and was informed by the clerk "at that time he didn't think the American Postoffice handled it. If they did, I would have to go to the post office and declare the valuation and what was in it prior to mailing it" (R. 31). While at Camp Phillip Morris he also tried to get a pass from "the Commanding Officer" to visit Brussels but did not explain he "had this diamond belonging to someone in Brussels," as he "was ashamed because of the fact I had the diamond" (R. 31). By "ashamed" he "meant the fact that I had the diamond there and hadn't brought it up to him. I thought I would be able to mail the diamond myself or give it to some Chaplain and get it back to its owner that way" (R. 31). When the Criminal Investigation Division agents questioned him, he told them he did not have the diamond,

"\*\*\* hoping they wouldn't find the diamond and I would be able to do something to get it back without missing the shipment home. At that time I didn't know whether or not, if I gave them the diamond right away, they would let me ship home" (R. 31).

He gave them the diamond when he was told that he would not ship "if the diamond showed up or didn't show up" (R. 32). At no time did he intend to keep the diamond, he was "fully aware the diamond was to go back" and he intended to return it prior to shipment "even if I did have to go to the postoffice and declare it" (R. 32).

He entered the service in January 1941 and "was promoted to the rank of Second Lieutenant by appointment by the Regimental Commander the latter part of February, 1941" (R. 32). He has served as a communications officer, a company commander and a battalion adjutant. He was "Battalion S-3 and Regimental S-3" of the "101st Infantry, 26th Division" (R. 32). He has had 17 months overseas service and has four battle stars, the Bronze Star and has been recommended for the Silver Star and Legion of Merit" (R. 33). His first efficiency rating was "VS", his next, "as a First Lieutenant, Excellent. Then I have, I don't remember whether 12 or 14 consecutive superiors" (R. 33).

On cross-examination in reply to the question, "Why did you leave the Brussels area about 1400 hours when you knew you had a specific understanding with Mr. Teichler to pay him the purchase price of that diamond, or return the diamond to him at 1500 hours?" accused replied, "Up until the time it just slipped my mind. 1400 hours came around and when the driver told us that for me to get back to duty by six o'clock we would have to leave then, because the car wasn't running as good as it should, we left" (R. 36). When questioned concerning the meaning of his statement to the investigating officer that "The thought struck me when I left the store, that I might be able to keep the stone and not go back; especially where the name they had on the paper was not mine. I left for camp with the stone," he replied, "Just what anybody would think -- just a passing thought. I didn't put any great significance on it" (R. 38). He was then asked, "You mean when you made this statement \*\*\* you attached no significance?" To this he replied, "That is right. They asked what I thought, and I told them I had a passing thought like that. Somebody offers you a cigarette and you think, do I want this or the other one" (R. 38).

5. The Specification alleges that the accused did at a designated place on or about 13 November 1945 "feloniously embezzle by fraudulently converting to his own use one diamond stone of the value of more than \$50.00, the property of Markus Teichler, entrusted to him by the said Markus Teichler."

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (MCM, 1928, par. 149h).

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship." (id.)

The proof required to establish guilt of a charge of embezzlement is (a)

that accused was entrusted with certain money or property of a certain value by or for a certain other person, as alleged, (b) that he fraudulently converted or appropriated such money or property, and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent (id.).

The competent evidence clearly establishes each and every element of the offense as alleged. The accused, after an introduction to Mr. Teichler, a jeweler and resident of Brussels, Belgium, entered into negotiations with the latter for the purchase of a diamond. Between 1100 and 1200 hours on 13 November 1945 Mr. Teichler entrusted a diamond to accused for the specific purpose of enabling him to exchange money at the finance office and thereby obtain funds to pay for the stone. No contention was made that the purchase was complete and accused admitted he was fully aware the stone had to be returned. Although at the time accused was entrusted with the diamond arrangements were made that he would meet with Mr. Teichler at a designated place at 1500 hours the same day and complete the transaction, he failed to keep the appointment and had in fact at 1400 hours departed for his camp with the stone in his possession. Such action on the part of accused coupled with his retention of the stone for eight days, during which period he made no efforts to return the stone other than alleged attempts to get a pass to Brussels and an alleged inquiry of a mail clerk as to the procedure of mailing a package, clearly indicates conversion. In addition, when interrogated by agents of the Criminal Investigation Division on 21 November 1945 he denied all knowledge of the diamond and only admitted possession of it after a search by the agents.

Under the facts and circumstances as presented here, the Board of Review is compelled to find that the conversion of the diamond was with a fraudulent intent. Although the accused denied that he ever intended to keep the diamond, his action in deliberately leaving Brussels with the stone in his possession after promising the owner he would return at a stipulated time, his retention of the diamond for eight days without notifying the owner, his concealment of any knowledge of the diamond until its discovery on his person after a search by the Criminal Investigation Division agents and the attendant facts and circumstances, clearly warrant a finding of a contrary intent. The evidence of record fully supports the findings of guilty of the Charge and its Specification.

6. War Department records disclose that this officer will be 31 years of age on 9 April 1946, is single, and is a high school graduate. He attended Wentworth Institute, Boston, Massachusetts, for one year but did not graduate. In civil life he was employed as a machinist by the Boston Gear Works, North Quincy, Massachusetts. He was a member of the Massachusetts National Guard in an enlisted status from 7 January 1936 until his appointment as a second lieutenant in the National Guard of the United States on 12 December 1940. Pursuant to an order of the President of the United States he entered upon active duty as a second lieutenant on 16 January 1941. He

was promoted to first lieutenant, Army of the United States, on 1 February 1942, to Captain on 21 October 1942, and to Major on 16 June 1945. For "heroic achievement in connection with military operations against an armed enemy near \*\*\* on 21 November 1944" he was awarded the Bronze Star Medal.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of accused were committed by the court during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Norman Mayes Judge Advocate  
William B. Huder , Judge Advocate  
Earl W. Wingo , Judge Advocate

SPJGK - CM 302864

1st Ind

Hq ASF, JAGO, Washington 25, D. C. 19 March 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Thomas W. Ryan (O-401678), Infantry.

2. Upon trial by general court-martial this officer was found guilty of embezzling a diamond of the value of more than \$50.00, in violation of Article of War 93. No evidence was introduced of any previous conviction. 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 might direct, for one year. Five of the seven members of the court, the trial judge advocate and the defense counsel recommended that the sentence to one year's confinement be remitted. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

The accused, after an introduction to Mr. Markus Teichler, a jeweler and resident of Brussels, Belgium, entered into negotiations with the latter for the purchase of a diamond. Under the belief of both parties that if one in the military service desired to exchange money at the finance office for the purpose of purchasing an article it was necessary that he have the article in his possession to indicate the legitimacy of his purpose, at between 1000 and 1200 hours on 13 November 1945 Mr. Teichler entrusted a diamond to accused for the specific purpose of enabling him to exchange money at the finance office and thereby obtain funds to pay for the stone. Although at the time accused was entrusted with the diamond arrangements were made that he would meet Mr. Teichler at a designated place at 1500 hours the same day and complete the transaction, he failed to keep the appointment and had in fact at 1400 hours departed for his camp with the stone in his possession. Eight days later, when questioned by agents of the Criminal Investigation Division, he denied knowledge of the diamond and only admitted his possession of it after a search resulted in its discovery.

Accused's defense is based upon his lack of intention to keep the diamond. He contended that because of car trouble he had to return to camp on 13 November 1945, earlier than expected; that when he was

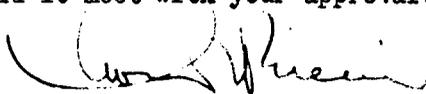
notified the next day that his unit would ship to Camp Phillip Morris, he asked for and was refused a pass to Brussels because all passes were cancelled; that after his arrival at Camp Phillip Morris, the pressure of work caused him to forget about the diamond temporarily; and that later when he again asked for a pass to Brussels his request was refused. He also claimed that he had discussed mailing the diamond to the owner with the mail clerk, and that his denial of knowledge of the diamond when questioned by agents of the Criminal Investigation Division was actuated by his hope that they would not find it and that he could return it without missing shipment home.

4. Although accused's dishonest and fraudulent conduct clearly warrants severe punishment and is in nowise condoned, in view of his almost five years of honorable service as a commissioned officer during which period his efficiency rating was for the most part superior, his excellent reputation in civilian life, his overseas service during which he received the Combat Infantry Badge, the European Theater Ribbon with four battle stars, the Bronze Star Medal, and recommendations although not approved, that he be awarded the Bronze Star Cluster, Silver Star Medal, Purple Heart Medal and Legion of Merit, I recommend that the sentence be confirmed, but that the forfeitures and confinement be remitted, and that the sentence as thus modified be carried into execution.

5. Consideration has been given to (a) the following communications accompanying the record of trial: (1) the recommendation that the period of confinement be remitted, signed by five of the seven members of the court, the trial judge advocate and the defense counsel, (2) the recommendation for clemency signed by Mr. Marcus Teichler, (3) the letter of Major General W. S. Paul pertaining to the character and military efficiency of accused, (4) a cablegram containing information furnished by Colonel Julian B. Lindsey, Infantry, Headquarters, USFA, USACA, Executive Division, and (5) a Statement of Service of the accused, and to (b) the following communications forwarded to this office and attached to the record of trial, consisting of: (1) a letter from accused addressed to the Honorable Leverett Saltonstall, United States Senator from Massachusetts, stating his views of his trial by court-martial, (2) a letter from Paul G. Kirk, Justice, Superior Court, Commonwealth of Massachusetts, addressed to The Adjutant General concerning the good character and reputation of accused, (3) a letter from Mr. William I. Rose, formerly Brigadier General, U.S.A., addressed to The Adjutant General stating that he considered accused to be a superior soldier and that he concurred in the views expressed by Justice Paul G. Kirk, (4) a letter from Lieutenant Colonel Daniel J. Murphy, Jr., addressed to Lieutenant Colonel Hermann Moyses, Chairman of Board of Review No. 2, stating his willingness to appear as a character witness for the accused, (5) a letter from Mr. H. H. Kerr, President of the Boston Gear Works, Incorporated, addressed to the Honorable Richard W. Wigglesworth, Congressman from Massachusetts, attesting to accused's ability and conduct,

and (6) a letter from Colonel Walter T. Scott, IGD, addressed to Whom it May Concern, attesting to accused's good habits and superior efficiency.

6. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

9 Incls

1. Record of trial
2. Form of action
3. Ltr fr acc'd to Sen.  
Saltonstall
4. Ltr fr Judge Kirk to TAG
5. Ltr fr Mr. Wm I Rose to TAG
6. Ltr fr Lt Col Murphy to Col Moyse
7. Ltr fr Mr. H.H. Kerr to Cong Wigglesworth
8. Ltr fr Col Scott, IGD
9. Ltr fr Cong C.A. Herter

---

( GCMO 74, 14 April 1946).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

(133)

SPJGK - CM 302885

29 MAR 1946

UNITED STATES )

v. )

Second Lieutenant URIE J.  
PAYNE (O-1175826), Field  
Artillery. )

11TH AIRBORNE DIVISION

Trial by G.C.M., convened at APO 468,  
10 and 17 January 1946. Dismissal and  
total forfeitures.

-----  
OPINION of the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates.  
-----

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that Second Lieutenant Urie J. Payne, Battery A, 675th Glider Field Artillery Battalion, was, at APO 468, on or about 30 November 1945, found drunk while on duty as Battery Officer and Roving Patrol Officer.

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

Specification: In that Second Lieutenant Urie J. Payne, \*\*\*, was, at APO 468, on or about 30 November 1945, drunk and disorderly in a public place, to wit, Sakura Bar, Yonezawa, Yamagata ken, Japan.

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

Specification: In that Second Lieutenant Urie J. Payne, \*\*\*, having received a lawful order from First Lieutenant Edward J. Simon, to drink no intoxicating beverages while on duty, the said First Lieutenant Edward J. Simon being in the execution of his office, did at APO 468, on or about 30 November 1945, fail to obey the same.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by general court-martial for being drunk in station at APO 468 on or about 9 October 1945, for which he was sentenced to forfeit \$100 of his pay per month for three months. In the present case he was sentenced to be dismissed the service,

to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and the forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

### 3. For the prosecution.

On 28 November 1945 accused reported for duty to Battery A, 675th Glider Field Artillery Battalion, which was then stationed at Yonezawa, Yamagata, Japan, and on 30 November 1945 was reconnaissance officer and supply officer for the Battery (R. 6, 7, 9, 13, 17, 18). On the latter date, in addition to his other duties he was detailed by First Lieutenant Edward J. Simon, his Battery Commander, as Roving Patrol Officer, whose duties consisted of patrolling the streets of Yonezawa to maintain order among military personnel (R. 7,14,16,17,18,24; Pros. Ex. 1). As a Battery officer accused was on duty from 0700 to 1700 and as Roving Patrol Officer from 1730 to 2130 (R. 7,11,12). Lieutenant Simon saw the accused on several occasions between 0730 and 1330 on 30 November 1945. On none of these occasions did he appear to have been drinking (R. 7,8). At about 1300 Lieutenant Simon "told" accused to "go down and check the Supply Room records." At about 1600 he went to the Supply Room "smelled whiskey in the room" and sent accused, who "seemed a little flustered," to his room (R. 8). When accused reported to Lieutenant Simon at about 1700 before going on duty as Roving Patrol Officer Lieutenant Simon again "smelled" whiskey but accused gave the appearance of being able to and assured Lieutenant Simon that he could perform his duties (R. 9). A little after 1700 Lieutenant Simon saw accused drinking something from a bottle in his room, but did not attempt to find out what the bottle contained (R. 9,11). When accused first reported for duty on 28 November 1945 he was given a direct order by Lieutenant Simon not to drink during duty hours. This order was repeated to him by Lieutenant Simon on 30 November 1945 (R. 9). In addition between 1500 and 1600 hours on 30 November 1945 this order was again repeated to him under instructions from Lieutenant Simon by Second Lieutenant John P. Heppard, who at that time also informed the accused of his duties as Roving Patrol Officer that evening (R. 9,14,15). At the time of this conversation with accused Lieutenant Heppard detected the smell of liquor on accused's breath and noticed that his speech was slurred and not distinct. He, therefore, came to the conclusion that accused had been drinking (R. 14,16).

Private First Class Carl L. Ireland, 675th Glider Field Artillery Battalion, who was jeep driver of the Roving Patrol on 30 November 1945, first saw the accused at about 1830 hours on that date (R. 20). At that time Private Ireland smelled liquor on the accused's breath, noticed that he staggered as he walked, and was of the opinion that the accused was then under the influence of liquor (R. 20). The accused entered the jeep and was driven first to the Geisha House and then to the Sakura Bar in Yonezawa, Yamagata Prefecture (R. 20,21). The Sakura Bar was operated by

Japanese civilians and was open to all enlisted men (R. 18,19). The accused entered the Sakura Bar and when he had not returned to the jeep in 15 minutes, Private Ireland went into the bar, where he saw the accused sitting with a girl on his lap (R. 21,22). Thereafter, the accused gave the girl some money, and when Private Ireland instructed her to give it back, the accused became angry and began throwing chairs at the floor (R. 21,22). Private Ireland and Private First Class John Holland, who was on duty with him that evening, quieted the accused and took him outside (R. 21). The accused stated that he had to go back to the latrine and when he did not return the two enlisted men searched for him and finally found him in a dim alley (R. 21). The accused struggled with the two enlisted men, who finally succeeded in carrying him back to the jeep (R. 21). At the time of the incidents in the Sakura Bar the accused was wearing a Military Police brassard and there were about 12 Japanese women and 12 enlisted men in the bar (R. 21). In Private Ireland's opinion, accused was under the influence of liquor, this opinion being based upon the accused's actions, his manner of walking and talking and the bloodshot condition of his eyes (R. 21, 22). The two enlisted men returned the accused to the battalion area and turned him over to Second Lieutenant Manny Marquez, who was Officer of the Day of the 675th Glider Field Artillery Battalion on 30 November 1945 (R. 23, 24). The accused, who then had a cut on his forehead, was intoxicated at that time and was unable to speak or talk very well (R. 24). Lieutenant Marquez turned the accused over to Lieutenant Simon at the officer's quarters at about 2015 hours (R. 9,24). The accused was then staggering and his speech was thick and incoherent (R. 9). In the opinion of Lieutenant Simon the accused was then drunk (R. 9). He placed the accused in arrest and had his cut examined by First Lieutenant Joseph H. Geyer, Battalion Surgeon, 675th Glider Field Artillery Battalion, who found the wound to be superficial (R. 9,25). Lieutenant Geyer was of the opinion that at the time the accused was drunk (R. 25).

For the defense.

It was stipulated that if Seizo Ishii were present in court and "under affirmation" he would testify that on 30 November 1945 he was manager of the Sakura Bar in Yonezawa, Yamagata Ken, Japan; that the bar was owned by Japanese stock holders, that it was open only to U. S. Army enlisted personnel, and that Japanese civilians were not permitted to drink in the bar although Japanese girls worked there as waitresses (R. 26).

Private Ireland, recalled as a defense witness, testified that although he noticed liquor on the accused's breath when he picked him up to go on Roving Patrol duty he did not see him drinking at any time (R. 26).

After a full explanation of his rights the accused elected to

be sworn as a witness. He testified that when he was dismissed and told to go to his room by Lieutenant Simon at about 1600 on 30 November 1945 he considered that he was off duty until 1730, and therefore had a drink or two of alcoholic beverages (R. 28). He remained in his room until meal time and remembered nothing more until about 2000 the following evening (R. 28). Upon cross-examination he denied drinking any intoxicating beverages on 30 November 1945 until after 1600 hours (R. 29). He recalled being notified about 1600 hours of his duty as Roving Patrol Officer (R. 29). He attributed his failure to recall any of the events to the fact that he had been taking phenobarbital tablets six or seven days prior to the incident. He stated that on the afternoon of 30 November he had taken four phenobarbital and two codeine tablets, and had had a total of ten phenobarbital tablets during the entire day (R. 30,31).

Rebuttal by prosecution.

Lieutenant Geyer, recalled as a witness, reiterated his previous opinion that accused was drunk on 30 November 1945 and stated that accused's condition could not have been caused by taking phenobarbital and codeine or a combination of such drugs and liquor (R. 34-37).

4. The evidence is conclusive that on 30 November 1945 accused (1) was found drunk while on duty as a Battery Officer and Roving Patrol Officer, (2) was drunk and disorderly in Sakura Bar in Yonezawa, Japan, and (3) failed to obey the orders given by his Battery commander to drink no intoxicating liquor while on duty.

a. The proof required to support a finding of guilty of "being drunk on duty" in violation of Article of War 85 is -

- "(a) That the accused was on a certain duty, as alleged, and
- (b) that he was found drunk while on such duty" (MCM, 1928, par. 145, p. 160).

It is immaterial "whether the drunkenness was caused by liquor or drugs \*\*\* and 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" (Idem).

The testimony of Private Ireland, as well as that of the officers present when accused was returned to his quarters, clearly establishes a state of intoxication denounced by the Manual. It is undisputed that at the time accused was a Battery officer performing the duties of Roving Patrol Officer. The only suggested defense was accused's assertion that his condition must have been due to his taking phenobarbital tablets in considerable quantity. This defense was completely eliminated by the testimony of Lieutenant Geyer, a medical officer, who examined the accused after he had been returned to his quarters. Testifying as a medical expert Lieutenant

Geyer expressed the opinion that accused's conduct was the result of drunkenness and that he displayed none of the symptoms of an overdose of phenobarbital or of codeine, or of a combination of these drugs with alcohol.

b. The proof as to drunkenness described in the preceding paragraph equally establishes that accused was drunk in the Sakura Bar as charged. That he was likewise disorderly at the same time and place is fully established as well. When the operator of his jeep, Private Ireland, located accused in the Sakura Bar accused was sitting with a native girl on his lap. He was wearing a Military Police brassard on his arm. Accused became angered when Private Ireland directed the girl to return to the accused some money given to the girl by accused and accused created a violent disturbance by throwing chairs on the floor. The bar was open only to U.S. Army enlisted personnel but was managed by a Japanese civilian and had Japanese women as waitresses. Twelve of the latter and a number of enlisted men were present when accused misconducted himself. Under these circumstances there is no merit to the defense's contention that since the bar was restricted to U.S. military personnel it was not a public place. In CM 250293, Riley (32 BR 318) the Board held that a house of prostitution was a public place "within the intendment and meaning of military law", and in CM 202846, Shirley (Dig Op JAG 1912-40, Sec 453 (10), 6 BR 352) it was held that an unlighted porch on an apartment building on a military reservation was a public place within the purview of Article of War 95, although only Army personnel and their wives were present. In the latter case the Board of Review properly held -

"It is a mistaken notion that the Army can be disgraced or discredited by the misconduct of one of its members only if that misconduct is seen by outsiders."

Drunkenness and disorderly conduct on the part of an officer do not always constitute a violation of Article of War 95 but are frequently held to be merely a violation of Article of War 96. However, accused's misconduct was so brazen, flagrant and conspicuous that it clearly makes him amenable to Article of War 95. As an American officer in an occupied foreign country he was under an obligation so to conduct himself as not to subject the military service to criticism, and as a law enforcement officer, wearing the indicium of his office, he was particularly required to refrain from himself committing an impropriety which he was required to prevent others from committing. In CM 221591, Brown (13 BR 187,188, 1 Bull JAG p. 164) the evidence showed that the accused was drunk and used vile language to strangers in a hotel dining room in South America, and that he had reported for duty in an intoxicated condition in the presence of several persons. In holding that under the circumstances being drunk constituted conduct unbecoming an officer and a gentleman in violation of Article of War 95 the Board of Review appropriately expressed the view that accused's offense "was aggravated by the fact that it occurred in a foreign country where accused was under an additional responsibility to maintain the dignity and honor of the army."

The open offer of money to a Japanese waitress who was sitting on his lap by accused and his violent display of anger, accompanied by the overturning of chairs, in the presence of Japanese civilians and enlisted men of the United States Army in a bar in a Japanese city, all while he was in a drunken condition and was wearing the brassard of a Military Police, in the opinion of the Board violated the standards of an officer and a gentleman and discredited American officers with enlisted men and civilians alike.

c. The evidence is indisputable that when accused reported for duty to Battery A, 675th Glider Field Artillery Battalion, on 28 November 1945 he was given a direct order by the commanding officer thereof not to drink while on duty, that this order was repeated to him by Lieutenant Simon on 30 November and was again repeated to him under Lieutenant Simon's instructions by Lieutenant Heppard on the same date. On 30 November 1945 accused was on duty from 0700 until 2130 with the possible exception of a half hour between 1700 and 1730. He admitted that he had at least one or two drinks of intoxicating liquor at about 1600 on 30 November 1945. His statement that he believed that he was off duty when he was sent to his room at 1600 finds no support in the record. In addition accused's highly intoxicated state when he was returned to his quarters at 2015 on 30 November clearly establishes that he had indulged in intoxicating liquors after 1700 in view of the fact that at that time he was not drunk, and assured his battery commander that he could perform his duties. The record of trial, therefore, conclusively establishes that accused violated a definite legal order given to him by Lieutenant Simon.

5. War Department records show that accused is 29-1/2 years of age, is married, and has one child (according to accused's statement attached to the record of trial he has two children). He is a high school graduate and between July 1934 and September 1936 was employed as a "powder man" and "machine man" with a mining company and as a "dock hand" with a commercial trucking company. He enlisted in the U. S. Army on 7 September 1936 and has been in the military service continuously since that time. He was discharged from enlisted status 6 January 1943 and commissioned a second lieutenant, Field Artillery, AUS, and called into active duty as such 7 January 1943. As an enlisted man he attained the grade of staff sergeant. He was hospitalized on 7 August 1944 for "observation, treatment and recommendation for type of duty if any that he may be physically qualified to perform" and on 10 October was found by a board of officers to be physically qualified for full military duty, including overseas service. He was returned to his command on 11 October 1944. According to statements in the review by the Staff Judge Advocate of the reviewing authority accused graduated from Parachute School 17 July 1943 as a qualified jumper and has been overseas since 24 September 1945. After the charges in the present case had been filed, accused addressed a communication to The Adjutant General dated 18 December 1945 requesting permission to resign his commission and to reenlist, and on 11 January 1946 tendered a resignation

for the good of the service "in lieu of trial by court-martial." The request was denied and the resignation disapproved.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Articles of War 85 or 95 and is authorized upon conviction of a violation of Article of War 96.

Norman Mayre, Judge Advocate  
William B. Kuder, Judge Advocate  
Earl W. Wingo, Judge Advocate

(140)

SPJGK - CM 302885

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

APR 12 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Urie J. Payne (O-1175826), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty as Battery Officer and Roving Patrol Officer at APO 468 in violation of Article of War 85 (Specification of Charge I), of being drunk and disorderly in the Sakura bar in Yonezawa, Japan, in violation of Article of War 95 (Specification of Charge II), and of failing to obey a lawful order given to him by his commanding officer not to drink intoxicating beverages while on duty, in violation of Article of War 96 (Specification of Charge III). All violations occurred on 30 November 1945. Evidence was introduced of one previous conviction by general court-martial for being drunk in station at APO 468 on or about 9 October 1945, for which he was sentenced to forfeit \$100 of his pay per month for three months. In the present case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and the forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

Accused was assigned to the 675th Glider Field Artillery Battalion then stationed at Yonezawa, Yamagata, Japan, on 28 November 1945. Because of his having previously been found guilty of being drunk in station he was specifically ordered by the Battery commander not to drink while on duty. This order was repeated to him twice on 30 November 1945. On the latter date in addition to his other duties as a Battery Officer he was detailed as Roving Patrol Officer. His duties as such consisted of patrolling the streets of Yonezawa to maintain order among military personnel. His hours of duty on that date were from 0700 to 2130 with the possible exception of the half hour between 1700 and 1730. During duty hours he was seen taking a drink from a bottle, and the odor of liquor was detected on his breath. While he was on duty he entered the Sakura bar, which was open only to U.S. military enlisted personnel, but was managed by a Japanese civilian and employed at least twelve Japanese women as waitresses. He was drunk at that time. The driver of his jeep, after awaiting his return from the bar for

some time, entered the bar and found accused seated therein with a native woman on his lap. He created considerable disturbance in the presence of enlisted men and the Japanese waitresses when the driver of the jeep instructed the Japanese woman to return some money which accused had given to her. Accused's sole defenses were that he did not consider that he was on duty when he took one or two drinks on the afternoon of 30 November 1945, and that he had taken so many phenobarbital tablets and codeine that he was not aware of what transpired during the course of that evening. According to competent medical testimony accused's condition was due to his being drunk from having imbibed alcoholic liquors and not to his having taken the drugs described by him.

Accused's conduct conspicuously violated the standards required of an officer and a gentleman, and following so closely upon his prior conviction of being drunk in station clearly demonstrated his unfitness to continue as an officer in the Army of the United States. He was under a particular obligation to maintain the highest standards by reason of the fact that he was serving with troops in an occupied foreign country and on the day in question was acting as a law enforcement officer. Under all the circumstances and despite accused's lengthy service as an enlisted man, I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to accused's request for clemency dated 21 January 1946 attached to the record of trial.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

- 3 Incls
1. Record of trial
  2. Form of action
  3. Request for clemency  
of accused dated 21  
Jan 1946.

---

( GCMO 95, 1 may 1946).



WAR DEPARTMENT  
 Army Service Forces  
 In the Office of The Judge Advocate General  
 Washington, D.C.

SPJGN-CM 302887

UNITED STATES )

CHANOR BASE SECTION

v. )

) Trial by G.C.M., convened at  
 ) Cherbourg, Manche, France, 3  
 ) and 4 October 1945. Dismissal,  
 ) total forfeitures, and con-  
 ) finement for two (2) years.

) Captain ROBERT E. GARNER  
 ) (O-401796), Corps of  
 ) Military Police. )

-----  
 OPINION of the BOARD OF REVIEW  
 BAUGHN, O'CONNOR and O'HARA, Judge Advocates  
 -----

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

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

CHARGE I: Violation of the 94th Article of War.

Specification 1: In that Captain Robert E. Garner, 2025th Prisoner of War Overhead Detachment, did, at or near Valognes, France, between 1 March 1945 and 1 June 1945, feloniously take, steal and carry away about twenty-five truckloads of certain building materials, to-wit, roofing, used lumber, and stone, of a value in excess of \$50.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that \* \* \*, did, in conjunction with Staff Sergeant Frank Wiseman, 2025th Prisoner of War Overhead Detachment, at or near Valognes, France, on or about 15 June 1945, wrongfully and knowingly dispose of, by delivery to a civilian, name unknown,

about ten 100-pound sacks of flour, of a value of about \$40.00, property of the United States, furnished and intended for the military service thereof.

Specification 4: (Disapproved by reviewing authority).

Specification 5: In that \* \* \*, did, in conjunction with one Emil Schelling, a German prisoner of war, and other persons whose names are unknown, at or near Valognes, France, between 1 July 1945 and 15 August 1945, wrongfully and knowingly dispose of, by delivery to civilians whose names are unknown, about 5000 flour sacks, of a value in excess of \$50.00, property of the United States, furnished and intended for the military service thereof.

Specification 6: In that \* \* \*, did, in conjunction with one Annie Debrowski, a civilian, at or near Valognes, France, on or about 15 August 1945, wrongfully and knowingly sell 4 sacks of flour, of some substantial value not in excess of \$20.00, property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of the 95th Article of War.  
(Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

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

Specification: In that Captain Robert E. Garner, 2025th Prisoner of War Overhead Detachment, did, at or near Valognes, France, on numerous occasions, between 1 March 1945 and 1 May 1945, wrongfully, knowingly, and unlawfully apply to his own use and benefit in the construction of a privately-owned dwelling house, not the property of the United States, the labor of one Heinz Rayers, a German prisoner of war, and of certain other German prisoners of war, whose names are unknown, who were then under his control as an officer of the Army of the United States.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications, excepting the words "about 25 truckloads of" in Specification 1, Charge I, of which words he was found not guilty. 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 might direct, for two years. The reviewing authority approved "only so much of the finding of guilty of Specification 1 of Charge I as involves larceny of roofing and used

lumber of some substantial value, property of the United States, at the time and place alleged"; disapproved the findings of guilty of Specifications 2 and 4 of Charge I, the Specification of Charge II and Charge II; approved the sentence; and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused was placed in command of an installation, designated "PWLE 30", at Valognes, France, about 15 February 1945 (R. 15, 68). The installation consisted of a prisoner of war camp and a bakery operated by the prisoners (R. 68). The bakery was located in a building partially occupied by a private bakery operated by French civilians (R. 25, 31). Staff Sergeant Frank Wiseman was "second in command" at Valognes, and, among the German prisoners, Heinz Rayers acted as "camp leader" and also as interpreter for accused (R. 47, 49, 62, 67-68).

After assuming charge at Valognes accused instructed Rayers to build a house for accused (R. 70). Rayers talked to a French woman who owned the land across the street from the bakery and secured permission to erect the house on her property (R. 66, 70, 71). The house was built in 20 days by the prisoners working in their "free time." In Rayers' words, "40 men \* \* \* worked 12 hours and 40 others during the night" (R. 69, 78). The material came from various sources. The foundation was made from stones taken from houses in Valognes; the brick in the fireplace was taken "from the bakery"; the tile in the bathroom was purchased in Cherbourg as was the plywood used in the walls, the nails, the locks and fixtures; and the roofing paper came "from the bakery". Subsequently, brick was purchased in Cherbourg and taken to the bakery to replace that carried away (R. 69, 70, 71, 75). Rayers estimated that 580,000 francs was spent on the house including 250,000 francs for fixtures and furnishings (R. 75). Part of the money used to finance the building of the house was obtained through the sale of old, spoiled flour from the camp bakery. The French bakery handled these sales and approximately 300,000 francs were raised in this manner (R. 28, 31, 70, 74). Not all of the money derived from the flour sales went into the house; some was used to purchase additional food for the prisoners' mess and to purchase tools and instruments for the prisoners' use (R. 77). Spoiled flour should have been returned by the bakery to the 555th Railhead Company at Cherbourg, where it was issued. The practice there was to have the veterinarian examine returned flour, condemn it, and it would then be destroyed (R. 20).

Rayers asserted that the balance of the construction cost, outside of that derived from the sale of the flour, was his own contribution. He obtained the money from a French lady friend (R. 77). As soon as the house was finished accused and an "Annie Debrowski" took possession (R. 49). Rayers specifically denied that either accused or Mrs. Debrowski ever contributed anything toward the building costs (R. 76). Photographs of the exterior and interior of the house show a frame house

of neat, substantial construction, with elaborate furnishings (R. 17, 56; Pros. Exs. A to I). The chairs, the buffet, music box, radio cabinet and other furniture were expertly made and finished by the prisoners (R. 61-62).

Sometime in June 1945 Sergeant Wiseman was instructed by accused to give 10 sacks of flour, of "the regular size," to "the French" (R. 53). A French boy called for the flour and Wiseman took it from the stockpile in the bakery and placed it in the boy's cart (R. 54). No money was received from the transaction (R. 55). Hans Hilbrig, a prisoner employed as a clerk in the bakery, remembered two occasions in June and July 1945 when Sergeant Wiseman instructed him to give 10 sacks of flour "to the French." Hilbrig transmitted these instructions to Joseph Fiedler, who was in charge of the flour stock room (R. 37). Ferdinand Petrak and Carl Dinger, who worked in the stock room with Fiedler, recalled handing out the sacks. Each weighed 100 pounds and was valued at \$4 (R. 20, 42-45).

Rayers departed from Valognes about 1 July 1945 and was succeeded as "camp leader" by another prisoner, Emil Schelling (R. 62). Near the prisoners' inclosure there was a pile of flour sacks which had become wet, causing a bad odor. Schelling told accused that the stench was being wafted into the prisoners' camp and that there was danger of disease. Thereafter Schelling sold the sacks or exchanged them for vegetables for the kitchen. Between 1 July and 15 August 1945 he sold approximately 100 sacks each containing 40 to 50 empty sacks. A filled sack brought 50 francs. The money derived from these sales was turned over to accused (R. 62-63). Mrs. Debrowski also admitted disposing of empty flour sacks for which she received vegetables for the prisoners' mess (R. 82). Empty flour sacks were valued at \$3.67 per hundred and, under area rules, were required to be returned to Cherbourg. This was true regardless of the condition of the sacks (R. 20).

On the morning of 15 August 1945 two French civilians, Van Der Mye and Duruel, came to the camp in a truck to purchase flour (R. 22, 23-24). One of them talked to Mrs. Debrowski who referred him to Schelling (R. 24, 64, 81). Schelling had no more "old flour" for sale but he did have four sacks of flour "sweepings." This was flour thrown on the floor from the bakery tables when they were cleaned. The flour was then swept up and sacked. Schelling placed the "sweepings" in the truck and collected 600 francs which he took to accused's home and placed on a table (R. 64-65). Mrs. Debrowski found the money there and took it over "to the sister of Mr. Duruel" (R. 81). The truck was stopped by guards and Captain George R. Fay, provost marshal at Cherbourg, was called. He "looked into the truck and there were four bags of flour in the back of the truck." The flour was "GI issue flour" (R. 15-16). Captain Fay later walked around accused's house and in the rear found flour sacks filled with empty sacks, all in good condition (R. 17).

4. Evidence for the defense: Accused took the witness stand in his own behalf (R. 109). He stated that he was 34 years of age, a resident of Hyattsville, Maryland, and a married man with two children (R. 109). After a number of years in the National Guard he entered on active duty as a second lieutenant on 3 February 1941, as a platoon leader in a rifle company of the 115th Infantry; in January 1942 he was promoted to first lieutenant and in August of that year he went overseas; in February 1943 he was placed on duty with the Military Police and in September 1943 he was promoted to captain (R. 109-110).

When he arrived at the installation at Valognes about 12 February 1945, he found about 25 to 50 prisoners there (R. 111, 114). In time, the camp expanded in size to 500 prisoners with 30 enlisted men (R. 115, 132). All of the "PW" inclosures within the Carentan-Granville-Cherbourg area, with a few exceptions, obtained their bread from Valognes (R. 134). The output, which in the beginning was 19,000 pounds of bread a day, eventually increased to 80,000 pounds a day (R. 113). Approximately 50,000 pounds of flour was used daily (R. 120). Considerable construction work was done in the camp, mess halls, barracks and other buildings being erected (R. 112-113). Most of the material used, including lumber, tar paper, cement, and stores, was obtained from other Army units moving out of Valognes (R. 114-115). Plumbing fixtures, radiators, and light fixtures were obtained from German fortifications (R. 115).

When he was sent to take charge of the bakery nothing was said to him about his quarters. He lived for a time in a tent in the camp (R. 135-136). The camp was small and he did not like to live with the enlisted men. On the other hand he did not want to live too far away from camp. There was a hotel in the town but he did not know whether there was a room available there (R. 123). Rayers suggested building a house and accused was favorable to the idea (R. 123, 127).

Rayers spoke to the woman owning the land and accused also talked to her before construction commenced (R. 129). He made no definite arrangements with the woman concerning the disposition of the house upon his departure from Valognes. It was his "impression" that it was a Government building although he thought he might have to tear it down when he left (R. 124). He exercised no supervision over the actual building of the house as he was too busy in the bakery. He thought the structure would only be a "barracks" and had no idea that it would develop into the house which was constructed (R. 123-124). He admitted, however, that a small sketch of the proposed house had been shown him by Rayers (R. 127). The wood used for the framing and the siding came from the bakery. It was scrap lumber that otherwise would have been used for firewood (R. 117). The brick in the chimney and in the fireplace was the same brick as that used in the ovens (R. 130). The roofing material was similar to the landing strip material that was used on the bakery (R. 126-127). The stone, the tile and the

plywood used in the house was purchased by Annie Debrowski (R. 117, 130-131). Mrs. Debrowski was a displaced person whom accused had met when she was in his camp at Cherbourg (R. 127-128). Insofar as the labor on the house was concerned accused stated that he knew the prisoners were working there but he was told it was in their spare time. No prisoner ever worked more than his eight hour shift in the bakery unless he volunteered (R. 116, 123-124).

Accused denied ever stealing any flour. Some 27 truckloads of spoiled flour was received from a depot at LeMoley, and, after salvaging whatever part that was useable, he ordered the balance given to French farmers. This flour was billed as spoiled flour and consequently he thought it would be "silly" to return it. Before ordering the spoiled portion given away he had a medical officer come up from the "Prisoner of War Overhead Detachments Group" and condemn it. It was not until he talked to the investigating officer that he found out that his instructions to give the flour away had not been followed (R. 118-120). He never authorized Sergeant Wiseman to dispose of flour and had no knowledge of the delivery of the ten sacks of flour to French civilians on 15 June 1945 (R. 120-121, 134). He likewise had no knowledge of the sale of the four sacks of flour on 15 August 1945. On that date he was in Brussels and was on temporary duty (R. 122-123).

He had no knowledge of any SOP concerning the return of flour sacks (R. 118). At one time he sent the "Carentan DP" some sacks at their request. Subsequently accused tried to send them another lot but they refused his offer. On another occasion he sent sacks to "PWE 24". One of his sergeants told him Cherbourg would not accept sacks. Accused did not know personally whether or not this was true (R. 121-122, 132). Since he had no other outlet he ordered the sacks given away to the French who made clothes out of them (R. 122). He was not authorized by higher authority to make such a disposition (R. 133). He never received any money for them except once when a sergeant reported that Schelling had received 600 francs from a French woman. This money was turned over to accused and he spent it to buy feed for horses at the camp (R. 122).

Mrs. Debrowski, testifying as a defense witness, asserted that she had contributed 100,000 francs toward the cost of construction of the house (R. 94). This was money which she had earned while working as an interpreter for the Germans at a salary of 6000 francs per month (R. 89-90). The money was used to purchase the tile, the plywood, the paint and the glass for the house (R. 90, 91, 93). Mrs. Debrowski presented several receipted bills (R. 92-93; 130; Def. Exs. 1 to 5). One of the bills showed the purchase of plywood for 8000 francs (Def. Ex. 4). The other bills related principally to payment for glass and glazing work and for furniture and house furnishings (Def. Exs. 1, 2, 3, 5). She further testified:

"I didn't say that I paid for all the house. I paid for

some articles, and all the furniture, but for the house itself I don't know. The house doesn't belong to me. I don't have anything to do with the house. What I furnished, it was for the Captain, because I wanted something comfortable and I used to like the Captain. The Captain didn't have enough money to furnish a lot of things" (R. 101).

She met the accused at Cherbourg in October of 1944 and moved into accused's house in Valognes in May 1945 living there ever since (R. 99-100). The reason she spent all her money on the house was that she "liked very much the Captain" and hoped that by making the house comfortable he would stay in Valognes (R. 95).

Mrs. Debrowski protested that she had been compelled to take the witness stand for the prosecution by threats of the French police that otherwise she would be expelled from France or go to prison (R. 94). She also asserted that any testimony she gave for the prosecution concerning the sale of flour sacks or flour was untrue (R. 95-96).

Mr. Charles Meury, a French civilian, received 4000 flour sacks from accused, to be distributed gratuitously among war sufferers. The bags, one to a family, were distributed at the city hall (R. 105-106). An enlisted man who delivered the sacks verified M. Meury's testimony (R. 107-108). Major Joseph C. Vergilio, Commanding Officer of a Prisoner of War enclosure, asserted that prisoners of war could be used for all types of construction in connection with the operation of camps. However, the Army did not authorize the use of prisoners to construct dwellings on private grounds (R. 136-137).

Captain William E. Harvey, Executive Officer in accused's organization, was of the opinion that accused's work was "superior". The bakery at Valognes was operated very efficiently. Captain Harvey "never had any occasion to doubt [accused's] truth and veracity" (R. 102-103). The stipulated testimony of Major F. P. Moore, Commandant of the Chanor Rehabilitation Training Center; of Major General Milton A. Record, Office of Chief of Staff, War Department; of Lieutenant Colonel P. G. Murrell, Marine Operations Section, Regional Transportation Office, WBS, APO 515; and of Lieutenant Colonel James E. Watson, Jr., Medical Corps, Headquarters 280th Station Hospital; showed that accused had performed his duties in excellent fashion and that he was of good character (R. 137-138).

5a. Specification 1 of Charge I, as amended by the court's findings and by the reviewing authority's action, alleges that between 1 March 1945 and 1 June 1945, at Valognes, France, accused stole used lumber and roofing material of some substantial value, the property of the United States, in violation of Article of War 94. The Specification of Charge III alleges that between 1 March 1945 and 1 May 1945, at Valognes, accused wrongfully applied to his own use and benefit in the construction of a dwelling house, not the property of the United States, the labor of Heinz Rayers and other German prisoners of war, then under accused's control as an officer of the United States. This Specification is laid

under Article of War 96.

When accused assumed command at Valognes no quarters were provided for him. There was a hotel in the town but since he wished to live near camp he did not ascertain whether rooms were available. At first he lived in a tent inside the camp but this was unsatisfactory. Considerable construction work was done in the camp, under accused's supervision, to provide for the increasing number of prisoners confined thereof. Barracks, mess halls, and similar structures were erected using lumber, tar paper, and other materials left at Valognes by departing Army units. Plumbing fixtures and other fixtures found in German fortifications were also taken to the camp and used. In order to be near his command accused decided to build quarters for himself using the materials in the camp. It would appear that under existing conditions he would have been guilty of no impropriety in utilizing building materials owned by the Government for the purpose of providing quarters for himself. Clothed as he was with either the express or implied authority to construct such buildings as were necessary for the successful operation of the camp, his use of the Government's property for his own housing could not be held to be an abuse of discretion.

The structure erected for his quarters, however, was much more elaborate than what would have been required for ordinary purposes, and was not erected within the prison compound. On private property across the road from the camp there was constructed for accused with prison labor a luxurious, permanent dwelling, with a stone foundation, tiled bath, fireplace, and other appointments, in which he and his paramour took up housekeeping. While permission to erect the house was procured from the owner of the private property the right of removal was not preserved and no attempt was made to protect the interests of the Government. There is no showing as to the *lex situs* but, in accordance with the principles of our own law, we may presume that the building became affixed to the realty and that the Government was permanently deprived of its property. The materials taken from the prison camp, principally lumber used for framing and siding, and tar paper used for roofing, constituted but a small part of what went into the house. The major part of the materials used were purchased on accused's behalf and commingled with the Government's property in the construction of the dwelling. In taking the Government's property from the prison camp and incorporating it into what was clearly accused's private dwelling house, and erecting it on private property, accused was guilty of larceny. The circumstances show plainly a "taking and carrying away of property by trespass" and "an intent to deprive the owner of his property therein." *Manual for Courts-Martial*, par. 149g, p. 173. Although accused was in charge of the prison camp and the property therein was under his control he had no more than a mere custody and his taking of the materials from the camp constituted a trespass upon the Government's ownership. CM 211810, Houston, 10 BR

117; CM 220398, Yeager, 12 BR 397; CM 252103, Selevitz, 33 BR 383. There is no showing as to the value of the materials taken but from the use made of it it is evident that it had "some substantial value."

In addition to his formal denials of any intent to deprive the Government of its property, assertions at variance with the circumstances of the case, accused claimed ignorance of the manner in which the building was constructed placing the blame upon Rayers, the "camp leader." His claim is not entitled to credence. It is established that accused saw a sketch of the proposed dwelling and personally made the arrangements with the owner of the private property for its erection. The house was erected across the road from the camp and the movement to and from camp of the 40 prisoners who built the dwelling could hardly have escaped his notice. His knowledge of, and participation in, the building of the house is obvious. The larceny of the used lumber and roofing material as alleged in Specification 1, Charge I, is proved beyond any reasonable doubt.

The charge that accused wrongfully applied the labor of German prisoners under his control to his own use in building the house presents a difficult problem. The record shows that the work was done by the prisoners in their spare time. No compulsion was exercised over the prisoners and the circumstances of the case lead to the conclusion that they gave their services voluntarily. Was accused's acceptance of their services wrongful?

Under the rules of the Geneva convention prisoners of war may be employed in connection with the installation of prison camps and without compensation (G.P.W. Art. 34). The construction of quarters for a commanding officer of a prison camp would, reasonably, be encompassed by this provision. It cannot be said, however, that the use of prisoner labor in erecting what was primarily a private dwelling for accused outside of camp, and only incidentally a quarters, could be justified under the provision. It is clear that we are dealing with an instance of a prison camp commander accepting the labor of prisoners for his own personal uses.

The acceptance by accused of the labor of the prisoners of war for his own personal use does not differ essentially from the acceptance by an officer of gratuities from enlisted men under him. The latter is condemned by Federal Statute (R.S. 1784; 5 U.S.C. 113; par. 663 M.L.), which is written into the Army Regulations on "Military Discipline" (par. 2e(6)(a) AR 600-10, 8 July 1944). Such acts are held to be a violation of Article of War 96. CM 230829, Mayers, 18 BR 65, 91; CM 264728, Price, 42 BR 243, 254; CM 264936, Sansweet, 42 BR 355, 370. The acceptance of presents by an officer from those serving under him leads to favoritism and similar abuses and is clearly incompatible with good order and military discipline. Although the relationship between a prisoner of war camp

commander and his prisoners is, of course, not precisely the same as that existing between an officer and enlisted men, the former relationship is susceptible to the same abuses as the latter and the practice in question is similarly destructive of the maintenance of an orderly, well disciplined camp. For this reason his acceptance of labor from prisoners was wrongful and violative of Article of War 96. The Specification of Charge III is sustained.

b. Specification 3 of Charge I alleges that on 15 June 1945, in conjunction with Staff Sergeant Frank Wiseman, accused wrongfully disposed of, by delivering to an unknown civilian, ten 100 pound sacks of flour, valued at \$40, property of the United States. The Specification is laid under Article of War 94.

The prosecution's evidence establishes that about the time alleged Sergeant Wiseman took the flour in question from the bakery stockpile and delivered it to a French boy who had called for it. The only question is whether Sergeant Wiseman acted in accordance with accused's instructions in making this disposition of the flour. Sergeant Wiseman's testimony that accused gave him such orders was flatly contradicted by accused on the witness stand. The court saw fit to accept the testimony of Sergeant Wiseman and reject that of accused. It was the province of the court-martial to resolve the issue resulting from the conflict in the testimony and no reason is perceived why their conclusions should be disturbed. The Specification is accordingly sustained.

c. Specification 5 of the Charge alleges that between 1 July 1945 and 15 August 1945, accused, in conjunction with Emil Schelling and others, wrongfully disposed of 5000 flour sacks, value over \$50, property of the United States, by delivering them to civilians, in violation of Article of War 94.

The sale of the flour sacks described was shown by the testimony of Schelling. He asserted that the sacks, which had a value of \$3.67 per hundred, brought about one franc apiece. Accused denied any knowledge of the sale of sacks but admitted issuing orders that they be given away to civilians. On his own admission, therefore, he was guilty of the offense alleged. While he contended that he had no knowledge of regulations requiring the return of flour sacks to the depot from whence the flour was issued he admitted in effect that he had made no personal inquiry as to their proper disposition. In assuming to dispose of Government property without authorization accused acted at his peril. His plea of ignorance is no defense. As an Army officer of considerable experience he must have known that he had no right to dispose of Government property. Whether he gave away the sacks to French civilians out of charitable motives as he contends, or sold them and used their proceeds for his own purposes or for the benefit of the camp, as appears from the prosecution's testimony, in any event his actions were violative of Article of War 94.

d. Specification 6 of the Charge alleges that on 15 August 1945, in conjunction with Annie Debrowski, accused sold four sacks of flour, of some substantial value not in excess of \$20, property of the United States, in violation of Article of War 94.

The complicity of accused in this transaction, which involved the sale of four sacks of flour "sweepings", is not established by the record. On this date, according to accused, he was on temporary duty in Brussels. The weakness of the prosecution's case as to this Specification was noted in the review of the Staff Judge Advocate who recommended disapproval of the finding of guilty. The action of the reviewing authority, apparently inadvertently, fails to disapprove the finding. The Specification should be disapproved.

6. War Department records show that accused is approximately 35 years old having been born 11 February 1911. He has a grade school education and subsequently worked as a delivery man for a department store for two years and as a clerk in the United States Department of Agriculture for 13 years. He is a married man with two children. From 3 July 1928 until 1 July 1940 he served as an enlisted man in the Maryland National Guard. He was appointed a second lieutenant in the National Guard of the United States on 2 July 1940, entered upon active duty 3 February 1941, was promoted to first lieutenant on 27 January 1942 and to captain on 27 September 1943. On 22 November 1944 he received punishment under Article of War 104 for "misconduct". His superior officer recommended him for the Bronze Star on 26 May 1945 for his services in connection with the successful administration of the Valognes bakery.

7. The court was legally constituted. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 6 of Charge I; legally sufficient to support the remaining findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94, or Article of War 96.

(Dissent)

\_\_\_\_\_, Judge Advocate.

*Robert J. Cannon*  
\_\_\_\_\_, Judge Advocate.

*James H. ...*  
\_\_\_\_\_, Judge Advocate.

WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D. C.

SPJGN-CM 302887

UNITED STATES )

CHANOR BASE SECTION

v. )

Trial by G.C.M., convened at  
Cherbourg, Manche, France, 3  
and 4 October 1945. Dismissal,  
total forfeitures, and con-  
finement for two (2) years.

Captain ROBERT E. GARNER )  
(O-401796), Corps of )  
Military Police. )

---

Dissenting Opinion by BAUGHN, Judge Advocate

---

I concur with the majority holding except that it is my opinion the record is legally sufficient to support only so much of the findings of the accused guilty of Specification 1 of Charge I and Charge I as involves a finding of guilty of wrongful conversion of roofing and used lumber of some substantial value, property of the United States, at the time and place alleged, in violation of Article of War 96. Two of the required elements of the offense of larceny, viz. (1) the trespass or taking without consent and (2) " \* \* a fraudulent intent to deprive the owner permanently of his property or interest in the goods \* \* " (MCM, 1928, par. 149g and 150i), have not been established by the proof adduced.

With respect to the element of trespass, it should be emphasized that the Specification of which the accused has been found guilty deals solely with roofing and used lumber obtained from the former site of other American installations. Were the accused convicted of larceny of flour from the bakery under his charge, which commodity manifestly was issued through usual supply channels for a specific purpose and over which the accused could exercise little or no discretion, a different result could be expected and could be supported on the basis of a liberal interpretation of CM 220398 Yeager, and CM 252103 Selevitz, cited in the majority opinion. Analysis of the present case, however, discloses a factual situation in no way analogous to the precedents relied upon. The accused Captain Garner was the commanding officer of an isolated military installation and was not formally billeted by higher authority or assigned or furnished quarters. Unless he lived inside of the prisoner of war

enclosure with either the prisoners or enlisted men of his command, the only alternative appearing from the record, other than locating nearby, as he did, would be that of living at a hotel situated some distance from his place of duty. It should also be remembered that the situs of the alleged offense was in a foreign country, not too far removed from the zone of active hostilities, where such legal desirables as leases, property accountability and formal procurement of real and personal property were hardly what would be found in the zone of interior. Even more important is the factor that the property was obtained from the site of other installations and was not issued through regular supply channels for a specific purpose. No question of larceny or wrongful conversion has been posed with respect to the use of similar material for the admitted construction of barracks inside the enclosure, and it is the opinion of the writer that no question would have been raised had the accused built a modest barracks for himself "of roofing and used lumber, property of the United States," across the street from the bakery enclosure. Unlike the situation in the Yeager and Selevitz cases, the accused, as commanding officer and the only officer present, was expected and required to make decisions, especially in instances where general property was involved and there were no specific instructions for its disposition, either expressly promulgated by higher headquarters or fairly implied from usages and customs of the service. It should be noted that in the Yeager and Selevitz cases also each accused was a subordinate officer to other officers present. While the writer concurs with the result in these cases, he is not willing to go several distinct steps farther and hold that the accused in the present case had custody only of the roofing and used lumber. This would in effect be holding that a person in the military service can never have more than custody of property, which is obviously inconsistent with existing military precedents. The latter adhere in general to the common law position that custody is normally limited to cases of servants or others of menial position who have property for a specific purpose. CM 197396 Christopher (1931) 3 BR 91; CM 211810 Houston (1939) 10 BR 117; Yeager and Selevitz, supra. "If the accused has possession of the property [and it is believed he did in the present case] he cannot be guilty of larceny \* \* \*." CM 279377 (1945); 4 Bull JAG. 280, 281 and authorities cited therein.

The evidence is similarly considered insufficient to establish a fraudulent intent to permanently deprive the government of its property. There is nothing in the record to show that a formal lease of the premises was required or that the accused knew a rule of law in France whereby the property upon attachment became part of the realty. Actually it is possible that no such rule existed and the accused's conviction rests on a presumption, as set forth in the majority opinion. While it is not essential to a decision in the present case and is therefore not decided, it is believed ordinary rules of civil law will have little or no application in cases of this kind. It must be remembered that the accused was a member

of an allied army occupying a liberated area unquestionably with the consent of a grateful nation. In any event these technical considerations should not be relied upon for an inference of larcenous intent. Factually speaking it is clear that accused had the structure erected directly across the street from his command and not in some remote secluded place far removed therefrom. The record is void of evidence indicating an effort at concealment. The quarters were constructed and occupied openly and notoriously as the accused's.

Having determined that the record contains no substantial evidence of trespass or larcenous intent chargeable to the accused, it is considered he is nevertheless guilty of the offense of wrongful conversion of "roofing and used lumber of some substantial value," being conduct prejudicial to good order and military discipline, in violation of Article of War 96. This offense is lesser included to that of larceny (CM 243937, Sheriff (1943) 28 BR 149), and "In unlawful conversion \* \* \* it is immaterial whether the converter acquired possession of the property by trespass or otherwise - trespass is not an essential element of proof." CM 252620 Watterson (1944) 34 BR 95. Similarly, as required for this position in the present case, where the fraudulent intent is absent, authorities indicate that the wrongful exercise of dominion over property or a wrongful use of property is sufficient for the offense of unlawful conversion and violative of Article of War 96, i.e.

"\* \* \* to use, sell, or exercise dominion over it [government foodstuff obtained without trespass but from one having no right to part with it], whether with knowledge of the owner's right, or even in good faith without such notice, constitutes wrongful conversion \* \* \*. When accused, as shown by undisputed evidence of record, secured the foodstuffs in question and carried them from the Army post to his house, he dealt with the property in a manner wholly inconsistent with the right of the organization to the immediate possession and use of such property and with the intent in so doing to assert a dominion over it adverse to that right. \* \* \* the offenses of which the accused stands convicted [including wrongful conversion as above] are obviously prejudicial to good order and military discipline, and as such are violative of Article of War 96" (underscoring supplied). CM 252620, Watterson, supra.

"In retaining this money [from underpayment of his enlisted men] accused exercised a wrongful dominion over it and was thereby guilty of wrongful conversion, an act prejudicial to good order and military discipline and violative of the 96th Article of War." CM 271265, Weed (1945), 46 BR 79.

In the present case, the accused's use of government materials to erect a structure so elaborate as to be obviously out of proportion

to the normal temporary housing requirements of an officer of his rank and position was clearly adverse to the rights of the government and unauthorized. When the structure reached the point of grossly exceeding reasonable limitations in size or character, its construction, use and/or the exercise of dominion thereover ceased to be for the benefit of the government and continued on for the sole personal benefit of the accused. Cohabitation there with Madame Debrowski, an offense with which the accused has not been charged, simply constituted additional evidence of the wrongful personal use of government property by the accused. Thus the evidence of record is considered legally sufficient to support the offense of wrongful conversion of government property by the accused, to the prejudice of good order and military discipline, in violation of Article of War 96.

Wilmot T. Bangum, Judge Advocate.

SPJGN-CM 302887 1st Ind  
Hq ASF, JAGO, Washington, D. C.  
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 23 May 1945, there are transmitted herewith for your action the record of trial, the opinion of the Board of Review, one member dissenting, and the dissenting opinion, in the case of Captain Robert E. Garner (O-401796), Corps of Military Police.

2. Upon trial by general court-martial this officer was found guilty of the larceny of building materials, to wit, roofing, used lumber and stone, value in excess of \$50, property of the United States (Spec. 1, Chg. I); of the larceny of 65 tons of flour, value in excess of \$50, property of the United States (Spec. 2, Chg. I); of wrongfully disposing of, by delivery to an unknown civilian, ten 100 pound sacks of flour, value about \$40, property of the United States (Spec. 3, Chg. I); of wrongfully disposing of ten sacks of flour, one box of soap, and thirty pounds of coffee, value about \$48.40, property of the United States (Spec. 4, Chg. I); of wrongfully disposing of, by delivery to unknown civilians, 5000 flour sacks, value over \$50, property of the United States (Spec. 5, Chg. I); of wrongfully selling four sacks of flour, value not in excess of \$20, property of the United States (Spec. 6, Chg. I); all in violation of Article of War 94; of wrongfully applying to his own use in the construction of a privately owned dwelling house, the labor of German prisoners of war under his control, in violation of Article of War 95 (Spec., Chg. II); and of wrongfully applying to his own use in the construction of a privately owned dwelling house, the labor of German prisoners of war under his control, in violation of Article of War 96. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved only so much of the findings of guilty of Specification 1 of Charge I as involves larceny of roofing and used lumber, at the time and place alleged, of some substantial value, property of the United States; disapproved the findings of guilty of Specifications 2 (larceny) and 4 (wrongful disposition) of Charge I and the Specification of Charge II and Charge II (wrongful application of prisoner of war labor); approved the sentence; and forwarded the record of trial for action under Article of War 48.

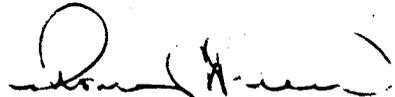
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the majority opinion of the Board that the record of trial is legally sufficient to support all findings of guilty except the finding of guilty of Specification 6 of Charge I, legally sufficient to support the sentence and to warrant confirmation thereof.

During the period from March to August 1945 accused was in command of a prisoner of war enclosure, at Valognes, France, which operated a large bakery. Using the labor of prisoners of war in their spare time, he built a very substantial dwelling on private grounds across the road from the camp and occupied it with a "lady friend." Some lumber and roofing paper, which was Government property kept in the enclosure for construction purposes, was incorporated in this private home. The major part of the materials was purchased on accused's behalf by his paramour and by the "camp leader" of the prisoners. Some of the money used to buy these materials was derived from the sale of spoiled flour from the bakery. (Accused was convicted of the larceny of this flour, but the reviewing authority disapproved the finding on the ground that since the spoiled flour had been condemned accused had the right to dispose of it and his offense was in the manner of disposition, i.e. sale and retention of the proceeds, not a larceny nor lesser included therein.) In addition to his offenses connected with the construction of his home, accused is shown to have instructed an enlisted man and prisoners to deliver to French civilians on one occasion ten one hundred pound sacks of Government flour, valued at \$40, and at another time to have given away approximately 5000 empty flour sacks. The record does not establish whether any money was obtained for the flour, although it does show that some of the flour sacks were sold at a franc apiece. Accused denied ever selling any flour but admitted ordering flour sacks given away to French civilians for their use in making clothes.

I recommend that the findings of guilty of Specification 6 of Charge I be disapproved. Further, that the sentence be confirmed but that forfeitures be remitted and the confinement reduced to one year, and as thus modified be ordered executed.

4. Consideration has been given to correspondence in behalf of the accused from Senators Millard E. Tydings, and Edwin G. Johnson, Honorable Lansdale G. Sasser, Member of Congress, and from Mr. Thomas G. Abbott, 119 B. Street, N. E., Washington, D. C., with inclosures. Mrs. Robert E. Garner, wife of the accused, and Mr. Abbott personally appeared before the Board of Review in behalf of the accused.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

- 6 Incls
- 1 - Record of trial
  - 2 - Form of action
  - 3 - Ltr. from Sen. M. E. Tydings,  
Oct. 29, 1945
  - 4 - Ltr. from Sen. E. C. Johnson,  
Dec. 5, 1945, w/incl
  - 5 - Ltr. from Hon. L. G. Sasser,  
Oct. 25, 1945
  - 6 - Ltr. from Mr. T. G. Abbott,  
Dec. 29, 1945, w/4 incls

---

(GOMO 194, 20 June 1946).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General

(161)

SPJGH - CM 302889

8 MAR 1946

UNITED STATES )

THIRD SERVICE COMMAND

v. )

) Trial by G.C.M., convened at  
) Aberdeen Proving Ground, Maryland,  
) 23 January 1945. Dishonorable dis-  
) charge and confinement for five (5)  
) years. Midwestern Branch, Discip-  
) linary Barracks.

Private EUGENE M. WEST  
(35978760), Company L, 10th  
Battalion, 9301 Technical  
Service Unit. )

-----  
HOLDING by the BOARD OF REVIEW  
TAPPY, STERN and TREVETHAN, Judge Advocates.  
-----

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

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

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

Specification: In that Private EUGENE M. WEST, Company L, 10th Battalion, 9301 Technical Service Unit, Detachment No. 3, Army Service Forces Training Center (Ordnance), Aberdeen Proving Ground, Maryland, formerly attached to 9301 Technical Service Unit, Ordnance Detachment No. 6, 8th Enlisted Training Company, The Ordnance School, Aberdeen Proving Ground, Maryland, did, without proper leave, absent himself from his organization at Aberdeen Proving Ground, Maryland from about 27 August 1945 until he was apprehended by military authorities at Charleston, West Virginia, on or about 12 December 1945.

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

Specification 1: In that Private EUGENE M. WEST, \* \* \*, did, at Charleston, West Virginia, on or about 12 December 1945, wrongfully appear in the uniform of a Major of the Army of the United States.

Specification 2: In that Private EUGENE M. WEST, \* \* \*, with intent to defraud, did at Charleston, West Virginia on or about 6 December 1945, unlawfully pretend to Eulah Proctor that he was a Major in the Quartermaster Corp., well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Eulah Proctor the sum of \$5.00.

Specification 3: (Findings of not guilty).

Specification 4: In that Private EUGENE M. WEST, \* \* \*, with intent to defraud, did at Charleston, West Virginia on or about 10 December 1945, unlawfully pretend to William L. Gordon that he was Major Gene West, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said William L. Gordon the sum of \$25.00.

Specification 5: In that Private EUGENE M. WEST, \* \* \*, with intent to defraud, did at Charleston, West Virginia on or about 11 December 1945, unlawfully pretend to S. A. Sloman that he was Major A. R. Allen, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said S. A. Sloman the sum of \$5.00.

Specification 6: In that Private EUGENE M. WEST, \* \* \*, did at Charleston, West Virginia on or about 6 December 1945, wrongfully take, carry away, and convert to his own use one ring, value about \$200.00, the property of Dorothy Scott.

Accused pleaded guilty to Charge I and the Specification thereof and not guilty to Charge II and its six Specifications. He was found guilty of Charge I and its Specification; guilty of Charge II, not guilty of Specification 3 thereof, and guilty of all the remaining Specifications under said 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 for ten (10) years. The reviewing authority approved the sentence, reduced the period of confinement to five (5) years, designated the Midwestern Branch, Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The findings of guilty of Charge I and its Specification are supported not only by accused's plea of guilty but by documentary evidence conclusively establishing his guilt as alleged. As concerns Charge II and Specifications 1, 4 and 6 thereof, the prosecution's evidence, controverted only by accused's unsworn statement, established beyond a reasonable doubt all the essential elements of the offenses charged and is legally sufficient to support those findings.

The only question requiring consideration therefore is whether the evidence is legally sufficient to support the findings of guilty of Specifications 2 and 5 of Charge II. In both Specifications accused is charged with obtaining money by false pretenses, it being alleged in Specification 2 that he unlawfully pretended to Eulah Proctor that he was a major in the Quartermaster Corps, and by means of said false pretense, did fraudulently obtain from her \$500, and in Specification 5 that he fraudulently obtained

\$5.00 from S. A. Sloman by means of the false pretense that he was "Major A. R. Allen."

To establish the offense of false pretenses the prosecution must prove four essential elements, (a) the intent of accused to defraud the person or persons named (b) an actual fraud committed (c) the false pretense and (d) that the fraud resulted from the employment of the false pretense (Underhill's Criminal Evidence, 4th ed., par. 696).

It is clear from the evidence that all of the foregoing elements except the last were established, but as to that ingredient there is no testimony whatsoever in the record of trial to show that either Miss Proctor or Mr. Sloman were induced to part with the money because of the false representation. The testimony of both witnesses was introduced by their depositions. Miss Proctor testified that she was stopped on the street by accused dressed in the attire of an Army major. Accused, after intimating that he knew her, was asked his name and replied that he was Major Rafferty, Quartermaster Corps. He then stated to Miss Proctor that he had lost his wallet with \$600 in it and asked her to loan him some money with which to eat. She loaned him \$5 and he agreed to repay her at her place of employment on a specified day. Accused did not repay the loan.

The testimony of Samuel A. Sloman shows that on the date alleged, accused attired in Army officer's uniform entered the witness' place of business, stated to Mr. Sloman that he was Major Allen, that he had lost his wallet and would like to borrow \$5 until a certain date. Sloman agreed and handed accused \$5 for which accused signed a piece of paper reading "Maj. A.R. Allen \$5.00." Accused did not repay the loan.

No other evidence was introduced to establish the commission of these offenses. While it is true that in proving this offense, the prosecution is not required to show that the property in question was parted with solely because of the false pretense alleged, such pretense must have had a preponderating influence in inducing the person to part with his property (Wharton's Criminal Law, Vol. 2, 12th ed., par. 1442). For all that appears, both witnesses may have been influenced in making the loans by other considerations entirely independent and unconnected with the wearing of the uniform or the representation that accused was a major. The prosecution's witnesses did not testify that they believed the false representation that accused was a major in the Army of the United States, and that they made the loans relying upon such representation. Accordingly, the prosecution has failed to meet the burden placed upon it of showing beyond a reasonable doubt that the persons defrauded were induced by the false representations to part with their property. It follows therefrom that the offenses alleged in those Specifications have not been proved.

The question then arises as to whether or not the proof under those Specifications will support findings of guilty of any offense included within those charged. A lesser included offense is one that is always lesser than and necessarily included in the offense charged, i.e., an offense the

elements of which necessarily are proved in proving the offense charged (CM 254312, Buchanan, 35 BR 205). Section 32 of the Federal Criminal Code (title 18, sec. 76, USC), commonly known as the false personation statute, reads as follows:

"Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document or other valuable thing, shall be fined not more than \$1,000 or imprisoned not more than three years or both."

The foregoing Federal statute has been authoritatively interpreted as defining two separate offenses, the first clause, above underscored, constituting one offense and the second clause another (U.S. v. Lepovitch, 318, U.S. 702 (1943)). It was stated therein that the purpose of the first branch of the statute is "to maintain the general good repute and dignity of the Government service itself" and that "it is not essential to charge or prove an actual financial or property loss to make a case under that statute." The following essential ingredients must be established to prove the offense denounced therein (a) that the accused falsely pretended to be and acted as an officer or employee of the United States and (b) that he intended to defraud the United States or some person. These two elements are two of the four essential elements of the offense of false pretenses as here alleged and, accordingly, must always necessarily be proved in proving the essential elements of that offense. Under the rule of the Buchanan case, supra, it follows therefore that the offense denounced by the first branch of the statute is lesser included of the offense of false pretenses as here alleged. The balance of the Specifications commencing with the words "and by means thereof" may be treated as surplusage and disregarded. The sentence being amply supported by the findings of guilty of the several other offenses, it is unnecessary here to decide what is the maximum limit of confinement for conviction of these offenses, as lesser included of those charged.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specifications 2 and 5 of Charge II as involves the offense of falsely pretending to be an officer of the Army of the United States with intent to defraud and legally sufficient to support all other findings of guilty and the sentence, as approved by the reviewing authority.

Sharon M. Folley, Judge Advocate.  
Joseph J. Stern, Judge Advocate.  
Robert C. Trevittan, Judge Advocate.

SPJGH - CM 302889

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

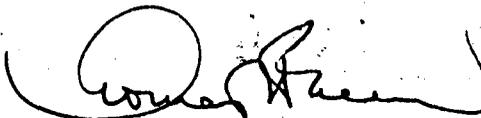
TO: Commanding General, Third Service Command, Army Service Forces,  
Baltimore 2, Maryland.

1. In the case of Private Eugene M. West (35978760), Company L, 10th Battalion, 9301 Technical Service Unit, Detachment No. 3, I concur in the holding by the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of Specifications 2 and 5 of Charge II be approved as involve a finding in each case that, with intent to defraud, accused did, at the place and time alleged, falsely pretend to the person alleged that he was an officer of the Army of the United States as alleged. Upon compliance with the foregoing recommendation, you will, under the provisions of Article of War 50 $\frac{1}{2}$  have authority to order execution of the sentence.

2. In view of the nature of the offenses and the youth of accused it is suggested that consideration be given to [reducing the period of confinement to three (3) years]

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 302889).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl  
Record of trial



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

(167)

SPJGK - CM 302897 -

9 APR 1946

UNITED STATES )

98TH INFANTRY DIVISION

v. )

Trial by G.C.M., convened at APO 98,  
8, 9, 10 and 11 January 1946. To be  
shot to death with musketry.

Private First Class JOSEPH  
E. HICSWA (12206403), Head-  
quarters Battery, 98th Divi-  
sion Artillery. )

-----  
OPINION of the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates.  
-----

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Joseph E. Hicswa, Headquarters Battery 98th Division Artillery, did at, Nara, Honshu, Japan, on or about 24 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Yasuichi Sugita, a human being by stabbing him with a sharp instrument.

Specification 2: In that Private First Class Joseph E. Hicswa, \*\*\*, did at, Nara, Honshu, Japan, on or about 24 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Choji Nishimoto, a human being by stabbing him with a sharp instrument.

He pleaded not guilty to and was found guilty of the Charge and both Specifications. No evidence of any previous conviction was introduced. He was sentenced to be shot to death with musketry, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

### 3. Preliminary statement.

The record of trial is conclusive that the two murders with which accused is charged were committed in the City of Nara, Honshu, Japan, immediately adjoining a poorly lighted area known as Nara Park. The plat accepted in evidence as Prosecution's Exhibit 5 clearly indicates that this park is a fairly large one, although no measurements are given. It is completely surrounded by public streets. That on the west where the first homicide was committed runs in a southerly direction from Nara Normal College, located immediately northwest of the park, and passes by a shrine or building generally referred to in the testimony as "the Tori," between three and four blocks south of the college. About one block south of the college is a stone bridge. Both the bridge and the Tori are located on the eastern side of the street in the park. This street likewise passes in front of the area occupied by the 390th Infantry and the Nara Hotel, both located on its western side. The second murder was committed on the street which adjoins the park on the east. It runs almost parallel with the street forming the western boundary of the park and passes in front of a municipal police station located on its eastern side and, a short distance further south in the extreme southeastern corner of Nara Park, the area occupied by the Headquarters Battery of the 98th Division Artillery, located on its western side. Nara Normal College and the quarters of the Headquarters Battery may therefore be described as located at opposite ends of a line running through the park from its northwest corner to its southeast corner.

Prosecution's Exhibit 5 shows the entire Nara Park area. Prosecution's Exhibit 6 is an enlarged portrayal of the scene of the first homicide and Prosecution's Exhibit 7 one of the scene of the second crime. Prosecution's Exhibits 8, 9, 10 and 11 are photographs of the scene of the second crime and Prosecution's Exhibits 13, 14 and 15 of the first crime. Prosecution's Exhibit 12 shows the body of Chosi Nishimoto, the victim of the second crime, shortly after its discovery. Prosecution's Exhibit 16 is a sketch of the building occupied as living quarters by the enlisted men of Headquarters Battery, 98th Division Artillery. In it are also located the kitchen, mess hall, shower room, orderly room, post exchange, dayroom, supply room and other auxiliary rooms.

There is no conflict in the testimony as to the approximate points at which the two assaults were committed by the accused. There is equally

no conflict that the bodies of the assaulted Japanese were found at the approximate spots at which the respective assaults were committed.

4. For the prosecution.

On Saturday, 24 November 1945, and at the time of his trial, the accused was in the military service as a private first class in the Headquarters Battery, 98th Division Artillery, then stationed at Nara, Japan (R. 6,43,116,124; Pros. Ex. 5). Private Alexander Pappas was a member of the same organization. Both the latter soldier and accused had re-enlisted in the regular Army but had been granted furloughs to return to the United States, and on 24 November were on orders to leave Nara for Nagoya on the following day en route to America (R. 51,63,98; Pros. Exs. 17,18). They were quartered in Wing No. 1 of the building occupied by their organization but were assigned to different rooms, separated by that occupied by Private First Class William E. Rourke (R. 127,131,189; Pros. Ex. 16). They had known each other for sometime but had not become particularly friendly until they served together as voluntary "KP's" for a period of about three weeks, starting sometime in the latter part of October (R. 50). Preparatory to their departure they had turned in their equipment prior to 24 November. Accused had turned in a carbine bayonet, although he was not charged with having been issued one, but Pappas, who was similarly not charged with such a weapon, retained the one that had been issued to him at the 13th Replacement Depot in Hawaii (R. 63,118,120). On 24 November this bayonet was in Pappas' duffle bag in which he carried it with him to Nagoya and was never removed from the bag until Pappas gave it to the provost sergeant sometime after 24 November (R. 63,64,65). Both accused and Pappas had received a "regular saber or sword" with a "long blade on it and a handle" from "Headquarters up here" as a "souvenir," but on 24 November the one belonging to Pappas was tied to his "Japanese rifle with a water-proof cover over it" and Pappas was not carrying it on the night the crimes were committed. Pappas did not see accused carrying any saber that night (R. 70, 71). Each had been issued and was supposed to have two pairs of woolen trousers and one "Eisenhower" jacket (R. 119,120). Private Richard E. Teeters, a member of the 367th Field Artillery Battalion, which occupied an area directly across the street from that of Headquarters Battery, 98th Division Artillery (Pros. Ex. 5), knew Pappas but did not become acquainted with accused until 24 November. Teeters had also re-enlisted in the regular Army but was not scheduled to leave with the accused and Pappas (R. 89,97, 98). On the afternoon of Saturday, 24 November 1945, Teeters went from his area to the quarters of Pappas to see the latter "while he packed his bag" (R. 91,98). Teeters returned to his own quarters before supper and rejoined Pappas between 1730 and 1800. They then proceeded to the post exchange located in the same building in which Pappas and accused were quartered, and each secured two, three or four bottles of beer which they then took to Pappas' room and drank. At about 1900 the accused came into Pappas' room and left after chatting for about five minutes. This was the

first time that Teeters had seen the accused. At this particular time accused was drinking from an American beer bottle. At about 1945 Teeters and Pappas made a second trip to the post exchange, at which time each again procured two, three or four bottles of beer which they drank upon returning to Pappas' room (R. 53,54,98,99). At about 2000 the accused returned to Pappas' room (R. 99) and asked Pappas and Teeters if they wanted to go out with him, without designating any particular destination (R. 55,100). No special plans were discussed and all three left the area at about 2030 with the accused taking the lead (R. 55,91,100). At the time the accused was dressed in OD's and, his companions believed, was wearing a field jacket (R. 65,91). He did not appear drunk to either Pappas or Teeters, and none of the three was drunk while they were together (R. 70,105). Neither Pappas nor Teeters was armed, nor did either see any weapon or knife of any kind in accused's possession or on his person at any time during the evening (R. 49,56,58,63,64,95,110,188,189).

Leaving the headquarters the three walked toward Nara Park (R. 44, 55,91,100). They stopped in the park to light a cigarette, and while there saw two Japanese walking on the road which adjoins the park on the west (R. 33,36,44,92; Pros. Exs 5,6). These men were civilians, Nakanishi Masafumi and Yasukazu (Yasuichi) Sugita, who shortly before had left a local restaurant where they had dined (R. 33,34,35,36,39). According to Pappas -

"\*\*\* Hicswa asked if we wanted to get these here and I said do you think we should, and I can't recall how it was, anyhow, Hicswa grabbed this one Jap and this other one started running up the road and I started running after him \*\*\*" (R. 44-45).

According to Teeters, the incident started in the following manner:

"We stopped in the middle of the park. We stopped to light a cigarette. There was two Japs walking along the road and Hicswa said 'Let's get them.' We started walking fast and we started running, Hicswa started running first, then Pappas started running, then I started to walk up, up to where Hicswa had caught the Jap. \*\*\*" (R. 92).

The Japanese whom Pappas chased, Nakanishi Masafumi, outran him but accused overtook the other Japanese, Yasukazu Sugita, who was carrying a handbag or brief case in one hand and a second bag on his back (R. 40,44,92). Accused knocked Sugita down, and when Pappas and Teeters reached the scene of the assault was on top of the Japanese, who was lying on his back, and was swinging at the latter with one hand (R. 48,50,92). The assaulted man made some sounds during the struggle and was heard by his companion, as the latter was making his escape, to cry out in Japanese the equivalent of "I have nothing. I have nothing" (R. 37). After the Japanese whom Pappas had chased had evaded him by turning off to the right on the street bounding the park on the north, Pappas returned to the spot where accused was striking the

Japanese whom he had knocked down, and pulled the accused off his victim. Neither Pappas nor Teeters saw any weapon or knife of any kind in the possession of the accused, but did not look at the accused's hands (R. 58, 61, 92, 104). There was some light at the scene of the assault (R. 66), but it was "pretty dark" (R. 56). When the three left the scene the assaulted Japanese was lying on the road and was making no noise or sound whatsoever (R. 64, 66). No one other than accused had struck him (Pros. Ex. 17). The Japanese who had evaded Pappas ran to a residence, called the civilian police over a "police telephone" and requested that the military police be notified. When he returned to the scene of the incident the military police had already arrived and were carrying his companion to a jeep. The man so picked up was then taken to the dispensary of the 98th Division Artillery. He was bleeding from a spot right over the heart (R. 28, 29, 31).

Immediately after the incident the accused, Pappas and Teeters started back toward their quarters through the park (R. 46, 58, 93). As they were proceeding the accused remarked, "There is one Jap who will never walk or talk again" or words to that effect (R. 46, 68, 93, 187). A little later, prior to the second incident, the accused grabbed Teeters by the lapels of his jacket and without threatening him said, "You did not see anything. You do not know me and I do not know you," or words to that effect (R. 49, 64, 94, 103).

The three reached the roadway on the eastern side of the park and were proceeding south toward their quarters on the left side of the road when a Japanese approached them from the south (R. 46, 58, 93) -

"\*\*\* walking on the right-hand side, to our right, and Hioswa jumped over, knocked him up against the fence, a bamboo picket fence there. The Jap rolled into the ditch and Hioswa jumped on top of him" (R. 94).

This was approximately 30 minutes after the first incident. It was quite dark at the scene of this second incident but accused could be seen holding the Japanese with one hand and striking at him with the other (R. 61, 97, 101, 183, 184). The Japanese was yelling or talking (R. 50, 101, 104), but the sounds became more muffled and mumbling and Pappas did not recall his making any sounds when they left (R. 64). Pappas and Teeters pulled accused off the second Japanese, who was left lying in a ditch on the road at the point where the attack took place (R. 64, 95, 97). No one other than accused had struck him (Pros. Ex. 17). Neither Pappas nor Teeters saw any weapon being used by accused, but they did not recall having observed his hands (R. 95, 104, 184, 185, 188). The area was "pretty dark" (R. 95). In pulling the accused off the Japanese Pappas lost his cap and was unable to find it (R. 62, 95, 107). The cap was found near the body of the second victim, Chosi Nishimoto, the following morning (R. 76, 86).

The three soldiers then continued toward their quarters (R. 47, 95). While walking the accused made some remark about looking for blood (R. 95, 110). They stopped for a few seconds and then walked on. Before reaching the area

occupied by Headquarters Battery, Teeters separated from Pappas and the accused and returned to the area occupied by his organization (R. 47,96). The accused and Pappas entered their area by a back way (R. 47,189,190), passing through an opening in a fence at a point just opposite a door leading into the kitchen. At about 2130 they entered the kitchen (R. 190), then passed through it into the mess hall and then from the mess hall into a corridor which connected with a corridor leading to the rooms of the accused and Pappas. On one side of this corridor were located rooms that were used for administrative purposes and storage of supplies, including the supply room, and on the opposite side were located the three wings used as living quarters by the members of the Headquarters Battery. At the end of the corridor nearest to Wing 1, in which both the accused and Pappas had their rooms, was the day room (Pros. Ex. 16). There was a light in this corridor, but Pappas did not observe accused's clothes nor did he see any weapon in accused's possession (R. 62). Pappas left accused in the supply room, walked down to his own room, and did not see accused any time thereafter that night (R. 190,195). According to Staff Sergeant Harold Lieberman accused entered the supply room at about 2130, at which time he was wearing OD trousers, an "Eisenhower" jacket and an OD cap (R. 116,118,122), and his clothing appeared to be in good condition (R. 122). Accused asked for a pair of trousers and a jacket (R. 116,118) and when the sergeant asked him why he needed the clothing replied: "I was downtown and got in a fight and these were dirtied-up. I want them to wear to Nagoya tomorrow" (R. 116). The supply sergeant gave accused a pair of trousers, but no jacket (R. 116, 118). At 0500 on the morning of 25 November Pappas awakened Sergeant Lieberman and secured from him an OD cap (R. 116,117).

Private First Class William E. Rourke of the Headquarters Battery occupied Room 3 in Wing 1. The accused occupied Room 2 on one side of him and Pappas Room 4 on the other side (R. 127,131; Pros. Ex. 16). Rourke saw the accused and Pappas near the mess hall door at about 2130 on the evening of the two incidents (R. 196). Pappas seemed to be attempting to hide something, that is, he

"\*\*\* had his Eisenhower blouse unbuttoned and with his left hand was holding on to the side with the button-holes, holding it from his body several inches and holding the button-hole side over past the center of his body \*\*\*" (R. 130).

Rourke remarked to accused, "Tight again, Joe?" because "it probably appeared to me that he had a drink or so" (R. 128). Three or four times later that evening Rourke saw the accused and Pappas pass in the corridor which runs along all of the rooms in Wing 1 (R. 127,131,196). At about 2300 accused came through Rourke's room, at which time he was loud and appeared to have been drinking. Accused went into the next room "and to my hearing he opened a window and jumped out and then I don't recall. It wasn't long after that when I heard the corporal of the guard bring him back in and he said, I don't know if Hicswa was mumbling something, the corporal of the guard said

something like 'Get the hell to bed and stay there'" (R. 128-129).

At about 2120 on 24 November Private John R. DiCello, a member of the Military Police detachment at Nara in answer to an official call from his headquarters proceeded with Sergeant Trezza to the "Orange Shrine," picked up the body of a Japanese and took it to the Division Artillery dispensary. The body was located on the east side of the street running north and south between the Normal College and the 390th Infantry area, "approximately one-third of the distance from the intersection of Nara College to the intersection with the Tori" in the area known as Nara Park (R. 28,29). The area was "pitch dark and as we made the bend the headlights hit the body" (R. 30). The body was picked up at about 2120 and was left at the dispensary about two or three minutes later (R. 31). The witness did not know whether the Japanese was dead at the time, but stated that he was bleeding right above the heart (R. 31). At about 2145 that evening Captain Jerome Schwartz, Division Artillery Surgeon, 98th Infantry Division, was called from the Nara Hotel to the dispensary to examine a Japanese civilian (R. 6,7). This civilian had died of multiple stab wounds in the neck and chest and had been dead anywhere from one-half hour to an hour prior to Captain Schwartz's arrival (R. 7). He identified Prosecution's Exhibits 1 and 2 as true photographs of the man whom he examined. His conclusion was that the deceased had been stabbed with a "sharp, double-edged, short-bladed instrument" (R. 8). He found about fourteen "stab wounds." Of these seven or eight were in the right side of the neck, three were over the anterior part of the left chest at the level of the heart, and one was in the lower right side of the abdomen "at about the level of the liver." Death had been caused by "any one or more of the stab wounds" and no other factor had contributed to the death (R. 8). Captain Schwartz "probed the stab wounds over the heart and the probe would go in about an inch and a half" (R. 7). He did not perform a complete post mortem (R. 7 and 8).

Dr. Nagamichi Kubai, of Nara City, a physician, performed an autopsy for the Nara police at Sawai Hospital at about 1300 on 25 November on the Japanese civilian shown in Prosecution's Exhibits 1 and 2. The cause of death was "a cut on the right neck and the blood went into his chest and it caused the death." The doctor found 15 or 16 wounds on the body but no other marks. The stab wounds were caused by "a real sharp knife, \*\*\* a knife with blades on both sides and quite long." The instrument was in his opinion "not too short" but he could not estimate how long it was. In his opinion the deceased had been dead since 9 or 10 o'clock P.M. the preceding day (R. 16,19,20).

It was stipulated that if Ryokiohi Okazacki of Nara City were present he would testify as follows:

"On the morning of 25 November 1945, at 0545, I was riding down the so-called surrounding street in Higashioji-Cho, Takabatake, Nara City. I noticed something in the ditch to the left of the

road. I got off my bicycle and went over and saw that it was a body. I went immediately to the Takabatake police station and guided a policeman to the spot. I then went about my business" (R. 88,89).

Seiko Takeda, a lawyer and judge of Nara City, was called in his official capacity on the morning of 25 November to investigate two crimes. He first proceeded to the road running North and South between the Nara Normal College and the Tori and then to the area on the east side of Nara Park known as Takabatake-Cho (R. 73,74). He arrived at the latter area about 9:30 A.M. and found a body in the ditch on the west side of the road, this spot being approximately the same previously identified by Privates First Class Teeters and Pappas (R. 76). The witness found two caps near the spot where the body was located, one, an ordinary cap worn by civilians in Japan, which was about 10 feet in front of the body, and the other about five feet away in the grass, being of the type "worn by occupation forces" (R. 76,86). The ditch in which the body was found was described as being two feet wide and one foot five inches deep (R. 81,82). He found something that looked like blood near the body but "could not find real evidence of blood" (R. 88). The man whose body he found was identified by him as Chosi Nishimoto (R. 87), being the man portrayed in Prosecution Exhibit 3. At the scene at which the body of Yasuichi Sugita had been found and which witness visited at about 8:10 on the morning of November 25 he found two blood spots about five feet apart (R. 82). The larger of the two spots was two feet in length and eight inches at the widest point and the smaller four inches by four inches. There was no evidence of any more blood (R. 87).

Dr. Nagamichi Kubai was called to perform and performed an autopsy on the body of Chosi Nishimoto at the Suwai Hospital at Nara at about 11 o'clock on the morning of 25 November. The cause of the death was a knife cut in the chest (R. 20). Dr. Kubai found about 20 wounds on the body, "in the chest, in the head and over on the sides" and "there were some on the back." There were no other marks besides the wounds. In the witness' opinion the wounds had been caused by "a knife that has a blade on both sides and is kind of long." The wounds were inflicted by "about the same weapon" that had been used in inflicting the wounds on Sugita, and, in witness' opinion, the death of Nishimoto had occurred "about 9 to 10 o'clock in the evening, at night" (R. 21). There were no marks by any instrument except that which he had described, and in his opinion if any man had been beaten by any "other human individual" there would be some bruises on the body (R. 22). The wounds on the deceased could have been caused by a Samurai sword, but not by a pen knife, as the wounds were deep, the one on the chest going through his lung for a total depth of about 15 centimeters (R. 23,24). Captain Schwartz examined Nishimoto at the hospital at about 1600 on 25 November. It was his "guess" that he had died sometime in the early hours of the morning (R. 8). He identified the deceased as the individual shown in Prosecution's Exhibit 3 (R. 8). He made only a superficial examination because he had "no interest in the dead Jap." At the

time he concluded that the deceased had probably died of a fractured skull, "because of this pounding he had received on his head with a sharp instrument." He had also concluded that the instrument was a "long sharp-bladed, either saber or samurai sword" (R. 9). He later changed his mind and concluded that the same type of weapon that had caused the first death also caused the second death, namely, a "short-bladed, double-edged, sharp instrument. A pointed instrument." Hunting knives and bayonets fall within the class of weapon so described (R. 11,12). While Captain Schwartz was of the opinion "that the man had died sometime in the early hours of the morning" deceased could have been dead as much as 24 hours or even 72 hours (R. 13). "The very appearance of the man and the texture of the body at the time, I thought he had died in the early morning \*\*\* about 0200 or 0300 on 25 November 1945. It may have been earlier or it may have been later" (R. 13,14).

First Lieutenant James E. Reeb, Provost Marshal of the 98th Division Artillery, investigated the first crime at about 2145 on 24 November, after receiving a report from Sergeant Trezza who had been previously dispatched to investigate "an incident" that had been reported to him. At the scene of the "incident" he found a Japanese by the name of Masafumi (R. 138). The following morning at about 0800 another "incident" was reported to him. As a result he proceeded to the spot where there was a Japanese man lying in a gutter "face up" (R. 139). There were two "hats" near the body of the dead man. These two "hats" were about ten feet from the feet of the dead body. "One resembled a Japanese army hat and the other was an enlisted man's issue hat" (R. 139). At 8:20 the witness telephoned the "OD'S" at each division artillery battalion and the "Recon Troop" and asked for a report on any man who had any articles of clothing missing (R. 139). As a result of this inquiry, Captain George B. Welsh, Jr., commanding Headquarters Battery, 98th Division Artillery, proceeded to have a "show-down inspection" in search for "clothes with blood stains and a missing cap." He found "no clothes with blood stains or no missing hat that morning with the men present." Privates Hioswa and Pappas had already left, but their beds were investigated and "no unusual marks" were found (R. 132,133).

Supply Sergeant Lieberman helped Captain Welsh to conduct the "show-down inspection" (R. 134). After the inspection the sergeant recalled having issued a pair of trousers to accused to replace a pair that had "allegedly" been soiled, and of having issued a cap to Pappas. He reported these two incidents to Captain Welsh (R. 121,123). This information in turn was transmitted to the Provost Marshal, and Hioswa and Pappas were brought back from Nagoya (R. 134).

Second Lieutenant Manning I. Harrison of the 98th Division Military Police Platoon was called to Nara on 25 November to investigate a case and received from Lieutenant Reeb all accumulated information up to that time. On Tuesday, 27 November, he questioned both accused and Pappas (R. 142,143). Details of the interrogation of accused on this day are as follows:

"Q. Would you tell the court, to the best of your recollection, what you told the accused?

"A. I first talked with the accused, I asked him this question, 'Do you know why you were brought back from Nagoya?' 'Have you any idea as to why you were brought back?' He replied in words to this effect, 'No' I then told him of the incidents that had occurred up in Nara over the past weekend, or on the 24th. I told him that I had reason to believe that he might know something about this. I then told him I wanted to question him regarding this. I then told him that he did not have to answer any questions that if he did these answers might be used for or against him in a military court. I believe that's about all that was said regarding that.

"Q. Did you then question him?

"A. I did, sir.

"Q. Do you recall the extent of your questioning?

"A. I first told him just why I had reason to think that he might know something about this particular incident. I asked him if on the 24th he had gone to Headquarters Battery supply room and requested a new pair of trousers. He replied that he had" (R. 143,144).

On the following day, after further explanation of his rights, the accused made the following statement to Lieutenant Harrison, which was accepted in evidence as a statement against interest, without objection by the defense, after cross-examination to determine its voluntary nature:

"After having been warned of my rights under the 24th Article of War to the effect that I am not required to make any statements of a self-incriminating or degrading nature, but that if I do, these statements could be used against me in the event of my trial by court martial or other competent court, I make the following statement.

"I was feeling very high this 24 Nov 1945 day for I was leaving the next day to go home. After supper, Pappas and I went up town and near the Nara Park I saw one Jap. I grabbed him and started to beat him up. We left him and after walking for some distance we met another Jap. I started to beat him up and Pappas pulled me off. We went back to the Battery. I got a new pair of pants from the Supply room. Pappas went to bed. I saw Wong and Garrison in the Dayroom and they told me there was a dead Jap in the dispensary. I wanted to see the dead Jap so I went for a short arm since I was supposed to have one before I left the next morning. I believe I threw up at the dispensary. The dead Jap made me sick. I went back to the Dayroom again and then went to sleep. I don't remember going to bed but woke up the next morning in my cot. I left both Japs lying where I beat them up. The first one in Nara Park and the second one I left on the road from Nara Park towards Artillery Headquarters.

"I alone beat up both Japs, Pappas did not touch either one of them." (R. 144,145; Pros. Ex. 17.)

On Monday, 26 November, Private Rourke "got nosey" and "started to look around." At the end of Wing 1, in which accused, Pappas and the witness

were quartered, is located an old "Jap latrine that was boarded up." As Rourke was walking on the outside of the latrine he looked in the window and "spotted something on the floor." He climbed into the room, opened the door, and saw some "OD clothes" in a bundle on the floor (R. 126,179, 180). These clothes he believed to be a pair of pants and a field jacket, and he further believed that the field jacket was stained red (R. 129). Private Rourke also testified, "I was sorry I ever started looking around. I tried to forget it" (R. 126). In the hope that someone else would discover the clothes he did not report his discovery to Sergeant Lieberman until Thursday morning. On the following day, Friday, Rourke was latrine orderly and as such it was his duty "to keep the place looking fairly decent." The urinal, located a short distance north of Wing 3 and east of that portion of the building in which were located the kitchen, mess hall, shower room and boiler room, was not draining properly (R. 126,127;Pros. Ex.16). The witness secured a couple of Japanese laborers and a couple of shovels and went out with them to dig a new hole for the urinal.

"\*\*\* Well, I went out and kicked over the old urinal and right at the top of it in the bottom of the urinal I noticed a bayonet. I went in and got Captain Welsh and brought him right out. Then it seemed funny to me I should find the clothes and the bayonet so I decided to go in and tell him the whole thing, how I found the clothes also." (R. 127).

Private Rourke was not present when the bayonet was removed from the urinal, but from what he saw it was a carbine bayonet. As a result of information transmitted to him by Sergeant Lieberman, Captain Welsh called for the Provost Marshal, Lieutenant Reeb, and accompanied by him and Sergeant Lieberman proceeded to the old Japanese latrine at the end of Wing 1. In the center of this latrine they discovered a pair of trousers and an M1943 field jacket. There appeared to be blood stains in the vicinity of the knees of the trousers and some blood stains on the jacket, according to Captain Welsh's opinion (R. 135). This opinion was also shared by Lieutenant Reeb (R. 140). On the morning of 30 November 1945, Private First Class Rourke, who was "shaking and white" appeared at the orderly room and made a report to Captain Welsh. As a result of seeing Private Rourke, Captain Welsh -

"\*\*\* went outside the third wing of the barracks. We have a urinal out there and the urinal had been over-flowing and he had orders from the first sergeant to build another one. He was building another one when he took two tile pipes to replace. When he knocked the first tile pipe off there was a carbine bayonet in the scabbard in the urinal" (R. 135).

Captain Welsh removed the bayonet from the scabbard, examined it, and found it to be a carbine bayonet with "one unusual marking," but it was impossible to state whether it was blood or rust (R. 135). These stains were reddish

brown (R. 136). The carbine bayonets issued in Headquarters Battery, 98th Division Artillery, were not issued by serial number (R. 136). Most of the reddish brown stains were "right around the handle where it fits on the scabbard \*\*\*. The blade was more or less streaky and it looked like most of it had assembled where it enters the scabbard" (R. 137). In answer to the question: "The scabbard of the bayonet, does it not have a flexible flap just inside the opening into the scabbard that would tend to wipe a blade clean upon pushing it into the scabbard?" Captain Welsh replied, "That's right. It is just like the other bayonets. They have a groove like, on the inside, that fits in" (R. 137).

At 9 o'clock on Friday, Captain Welsh called Lieutenant Reeb to his orderly room and showed the latter what "looked like a bayonet trench knife" which was covered by two issue handkerchiefs (R. 140).

"It was a sheath and a weapon. On the handle there appeared some stains which again looked like dried blood to me, and on the handkerchief with which it was covered there were stains which appeared like dried blood, the same color; and it had been taken from the urinal. There was a distinct and definite indication that there was a presence of urine on the weapon and the sheath" (R. 141).

Lieutenant Reeb examined the blade, but the only thing that he remembered about it was "that it was crusted with something, a substance which was the action of being in the urinal for about a week" (R. 141). The weapon was turned over to Lieutenant Manning I. Harrison. Woolen clothing had only recently been issued to the members of accused's Battery and had not yet been marked by them (R. 136). Lieutenant Reeb found "no markings of the usual kind, that is, initials or last numbers of the serial number" on the field jacket which had been discovered in the Japanese latrine. However, there appeared on the jacket a Japanese character similar to laundry marks that he had seen. The field jacket and trousers were also turned over to Lieutenant Harrison (R. 141,142). Subsequent to the written statement made by the accused to Lieutenant Harrison (Pros. Ex. 17) Lieutenant Harrison saw accused on several occasions. On Friday, 30 November, accused accompanied Lieutenant Harrison to the two areas where the two deceased Japanese had been found. The spots indicated by accused as the places at which he had assaulted two Japanese coincided almost exactly with the spots at which the bodies were found (R. 149,150). On the following day, Saturday, accused was again questioned and gave voluntary answers without coercion. Lieutenant Harrison had with him at the time the trousers and field jacket that had been turned over to him by Lieutenant Reeb but did not show them to accused. His account of what transpired is as follows:

"On Saturday afternoon, which is December 1st, I questioned Private Hicswa regarding the clothing, and so forth. The conversation went something like this: I asked him to repeat a question that I had asked him previously. I asked him to repeat

what he did with the trousers that he was wearing after he put on the trousers that he was given by the supply sergeant. His answer was this, that he had thrown them in the garbage."

\* \* \*

"I then asked Hloswa if it wasn't true that the trousers and the field jacket that had been found in an old Jap latrine were his. To that he replied 'I don't know.' I then asked him, 'Isn't it true the trousers and jacket in this package,' and I pointed to the package to his right, 'belong to you and are the ones that you threw in the Jap latrine?' To that he replied 'I suppose that's right.' I then asked him this question, 'Don't you know that's right?', to which he replied 'They are mine.' I then asked him 'Isn't it true that bayonet found in the old latrine pipe is yours, and didn't you put it there?' His answer, 'Do I have to answer that?' I then asked him again, 'Isn't it true?' His answer, 'I prefer not to answer that question.'" (R. 151,152.)

It was stipulated that if Technician Fifth Grade Nicholas J. Dellisanti, Headquarters Battery, 98th Division Artillery, were present he would testify that on 20 November 1945 he gave Private First Class Pappas an OD wool cap similar to the one shown to him by Lieutenant Reeb on 1 December 1945 (Pros. Ex. 18).

#### 5. For the defense.

At the conclusion of the prosecution's case in chief defense counsel made a motion for a finding of not guilty. The law member denied the motion but upon objection by a member of the court the court was cleared and closed. Upon its being reopened the president announced that the motion had been denied.

By stipulation it was agreed that if Privates First Class Morris Hoffman and Leo Yancey, both members of Headquarters Battery, 98th Division Artillery, were present they would testify, respectively, as follows:

"I was with Pfc Leo Yancey, and the accused on Saturday afternoon, 24 November 1945, in our barracks. Between about 1500 and about 1700 we were drinking beer. I saw the accused drink more than one bottle of beer. We were also drinking hot sake out of canteen cups. The cups were not full. I saw the accused drink more than one cup of hot sake." (Def. Ex. A)

"I was with Pfc Morris Hoffman, and the accused on Saturday afternoon, 24 November 1945, in our barracks. Between about 1500 and about 1700 we were drinking beer. I saw the accused drink more than one bottle of beer. We were also drinking hot sake out of canteen cups. The cups were not full. I saw the accused drink more than one cup of hot sake." (Def. Ex. B)

Private First Class Russell E. Guerin, a member of accused's organization saw accused at the entrance gate "to the Battery" between 6:30 and 7:30 in the evening of 24 November. At that time the witness had in his possession a quart of Japanese whiskey which was "almost full." He and Hicswa each had three or four drinks from the bottle, which he thereafter gave to Hicswa (R. 158,159).

Technician Fifth Grade Donald S. Cornell, who was also a member of accused's organization, was on guard duty between 1700 and 1900 on 24 November. Immediately after he went on duty he saw accused at the front entrance of the Battery area bidding some friends goodbye (R. 161). He saw accused again at about 1900 with a bottle of beer in his hand (R. 161, 162) and again "somewhat after 2100" in the "hallway" of the Battery building. At that time witness could not state whether accused had been drinking as he did not talk to him. At 2300 when witness went back on his shift he saw the accused once more.

"He come out of the day room window, sir, and asked if he could vomit outside where I was on post. \*\*\* Did he vomit? Yes sir." (R.162,163)

"From all outward appearances" it appeared to the witness that accused had been drinking (R. 162). Twice later during the night accused made "trips out through the window." The first of these trips was about 20 minutes after the first time that accused had vomited. On both of these occasions he again vomited. The witness saw the accused for the last time that night at about 0100, at which time accused was sitting in a chair in the day room sleeping (R. 163). After each trip that the accused made through the window he returned to the barracks and on none of these trips did he carry anything with him (R. 163). The witness did not notice whether or not accused's clothes were soiled at any time during the evening and on none of the occasions on which witness saw accused on November 24-25 did accused have on a field jacket or coat (R. 164,165).

Technician Fifth Grade Hugh B. Ward, another member of accused's organization, was corporal of the guard on 24 November (R. 165,166). The first time that he saw accused on 24 November was between 6:30 and 7 o'clock in the evening in the barracks. At that time "we was talking and a guy gave him a drink." The individual referred to was identified by witness as Morris Hoffman and the drink so given as whiskey. Witness likewise saw accused drinking beer "in the Battery" between 6 and 7 o'clock and "later on in the night." At about 1900, while the witness was going up to post his guard he heard a girl "hollering; 'Joe'." Whereupon the witness "hollered, 'Hicswa' and Hicswa understood so he come out and so I went on up to post the guard \*\*\*. He had been drinking. He knocked a board off the fence. He didn't go through the gate, he knocked a board off the fence" (R. 166,167). Witness again saw the accused at the dispensary at 11 o'clock that evening. In his opinion accused had been drinking at that time. On that occasion accused was looking at the body of a dead

Japanese. Witness did not hear accused say anything nor did he see him become ill at that time (R. 167,168). The witness did see accused become ill around 12 o'clock that night and when he last saw him he was "in the day room in the Battery" (R. 167,168). This was "a quarter after 12" (R. 167). Referring to the window in the day room, witness described it as being "2 $\frac{1}{2}$  to 3 feet to the ground. The window is about 2 $\frac{1}{2}$  feet from the inside of the floor and about 3 feet from the outside to the ground." In answer to a question relative to the use of the window, accused stated, "We don't go in and out of the window, but we have all of our stoves outside the window. Sometimes we have to get outside the window to change oil" (R. 168,169). The witness did not notice whether accused's uniform was soiled but did not believe that he was wearing any type of jacket (R. 169).

The defense called Captain Jerome Schwartz, who had previously testified as a witness for the prosecution, and after the witness had identified a report which he had made on 30 November 1945 relative to accused's condition on 24 November 1945, this statement was offered in evidence. Upon objection by prosecution that the witness was present and could be interrogated by the defense as to the matters included in the statement, the offering was not received. The witness was asked no further questions by the defense.

After being advised by the defense counsel "that the accused does understand his rights as a witness" the president of the court explained these rights in detail to the accused. The president then asked the accused whether he understood his rights, to which he replied, "I do, sir." The president thereupon directed the accused to consult with his counsel and inform the court what he wished to do. Thereafter the accused stated, "Sir, I understand my rights and I would rather remain silent." In answer to the question by the president, "Is there anything else that you would like to have in the way of explanation of your rights before we proceed?" the accused replied, "No sir, I understand my rights" (R. 173,174).

#### 6. Rebuttal for prosecution.

Captain Jerome Schwartz was recalled by the prosecution and testified that he had seen the accused at the Division Artillery dispensary about 2245 of 24 November, at which time he had a short conversation with accused and conducted "the usual short-arm examination." This conversation and examination took place, according to witness' recollection, just after he had examined "the dead Japanese." Accused had on a shirt and trousers but no coat or jacket. Accused's clothes "weren't disheveled, but they did look slightly dusty, not dirty, but dusty, as if he had brushed up against a wall or fallen to the ground. Oh, and I did make the note that there was no blood on his clothes" (R. 174,175). Accused stated to the witness that "I had a few beers" and in witness' opinion accused was "feeling pretty good" (R. 175). The interrogation of the witness by the

prosecution then proceeded as follows:

"Q. Did you notice anything about his appearance which would give you an impression that he had been drinking?

"A. Yes. He staggered a little bit and he had difficulty in maintaining his equilibrium, his eyes were a little glassy and he seemed to be feeling pretty good. He had a big grin on his face.

"Q. Would you say that he was drunk?

"A. What do you mean by drunk?

"Q. I am asking you, in your opinion?

"A. I don't know what you mean by drunk.

Prosecution: I will withdraw the questions.

"Q. Have you ever seen anyone drunk?

"A. Yes.

"Q. Was this man drunk?

"A. Yes." (R. 175,176)

Further testimony as to the condition of the accused was developed in connection with the following examination of the witness by the court:

"Q. Doctor, on this testimony as to whether the accused was drunk or not, I believe the court does not understand what you mean by saying drunk. Can you explain to the court?

"A. Yes. I believe the criteria for drunkenness clinically, that is, just looking at a man, is that he will do something or behave in any way under the influence of alcohol that he would not do if he had not touched the alcohol.

"Q. Based on that statement then, is it quantities of alcohol, does that cover the thing? In other words, would you say a man is drunk, then, if he has had one bottle of beer?

"A. If a man had one bottle of beer and then did things that he normally did not do, then I would say yes, he would be drunk, because the threshold of normality in various people differs. Where it might take one man 20 beers to get him drunk, another man may need but one beer and he will be drunk.

"Q. How far off of this normal condition, normalcy, you speak of, must a man move before you say he is drunk?

"A. Enough so that his actions, the change in his behavior, his behavior pattern, would be perceptible immediately. A man usually walks a straight line and is able to maintain his equilibrium pretty well, unless he has something organically wrong with his brain. And when you see a man standing in front of you that is being short-armed, and is having difficulty in maintaining his balance, then I would say, to me, he was under the influence of alcohol and was probably in a state of drunkenness, because drunkenness itself has various stages.

"Q. And that was the condition of the accused at the time you decided he was drunk?

"A. Yes, he was staggering at the time that I saw him." (R. 177)

7. Recall of witnesses by court.

The court recalled Privates First Class Pappas, Teeters and Rourke and Technicians 5th Grade Cornell and Ward, whose testimony did not vary from nor add any substantial details to their prior testimony. Private First Class Pappas, however, denied seeing or concealing anything from Private First Class Rourke on the evening of 24 November in the corridor, and stated that he had made no trips up and down the corridor after he returned to his quarters (R. 186,187). He likewise stated that he and accused had entered the Battery area through the fence "right by the kitchen" and that they had gone directly to the door of the kitchen (R. 192-195). While Teeters reaffirmed his statement that accused had made some reference to "looking for blood" after the second incident (R. 182), Pappas stated that he did not recall hearing any such conversation (R. 188).

8. Every fact, incident and detail testified to by the witnesses, as well as every circumstance developed by the testimony, leads inexorably to one and only one logical, reasonable and inevitable conclusion, that the two Japanese civilians described in the specifications met death at the hands of the accused on the night of 24 November 1945 as charged. The record is absolutely devoid of any evidence which directly or by inference casts doubt upon the certainty and correctness of this conclusion. The accused admittedly attacked two Japanese civilians on the night in question at approximately the identical spots at which the dead bodies of the two Japanese civilians described in the specifications were subsequently found. Both assaults took place in a poorly lighted area, and although neither of accused's companions saw accused with a bayonet or other similar instrument, neither could say that he did not actually have or use one on the two assaulted men. Both saw him swinging repeatedly at his victims, and no one else struck either of the two Japanese. Both Japanese died from multiple wounds inflicted with a sharp double-edged instrument and no marks other than those caused by such an instrument were found on the body of either. As the three soldiers left the scene of each attack after accused had been pulled off his victim, the assaulted Japanese was left lying still and silent at the spot at which he had been assaulted by the accused. The first victim was picked up by the military police at the point at which he had been left about a half hour after the attack, following a telephone call from the dead man's companion, who had escaped when pursued by Private First Class Pappas at the same time that accused had successfully overtaken his victim. The body of the second Japanese was found the following morning at about 5:30 o'clock at the point at which he had been left. According to both Private First Class Pappas and Private First Class Teeters, accused's companions, Private First Class Pappas had lost his cap when he pulled accused off his second victim. A cap similar to one that had been given to Private First Class Pappas was found near the body of the dead man. Shortly after the three soldiers left the scene of the first assault, the accused remarked, "There is one Jap who will never walk or talk again," or words to that effect. Prior to the second incident, as they were walking through the Park, he addressed substantially

these words to Private First Class Teeters, "You did not see anything. You do not know me and I don't know you." After the second assault, accused made some remark about looking for blood. On the second day after the crimes had been committed, accused's blood-stained trousers and field jacket were found in an abandoned latrine at the end of the wing of the building in which accused and Private First Class Pappas were quartered. Accused admitted their ownership and their disposition by him. Shortly after his return to the headquarters of his battery on the night of the crimes he had requested the Supply Sergeant to issue him new trousers and a new jacket because he had been "down-town and got into a fight and these were dirtied-up." A stained carbine bayonet, an instrument of the type with which the fatal wounds were inflicted on the two Japanese, was found on the fifth morning following the crimes, stuck in the pipe of a urinal not far from the rear entrance used by accused and Private Pappas in returning to their quarters after the admitted assaults by accused on two Japanese. The fact that possession of the bayonet or a similar instrument and its actual use by accused are not established by direct evidence does not affect the ultimate conclusion as to accused's guilt, so clearly established by the overwhelming proof adduced.

It is, of course, elementary that in order to convict of an offense a court-martial must be satisfied beyond a reasonable doubt that the accused is guilty thereof. In discussing the term "reasonable doubt" the Manual for Courts-Martial, 1928, paragraph 78a, pages 62,63, lays down the following principles:

"\*\*\*By 'reasonable doubt' is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the defendant to escape conviction; nor a doubt prompted by sympathy for him or those connected with him. The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty."

The Board of Review has applied these basic principles to the facts and circumstances established by the positive testimony of unbiased and unprejudiced witnesses, and the declarations of the accused, and finds that the proof so adduced excludes every reasonable hypothesis except that of accused's guilt, and is not only consistent with guilt but inconsistent with innocence. There is no evidence whatsoever offered by accused to destroy the positive testimony offered against him.

Having thus reached the conclusion that the accused killed both of the Japanese described in the specifications, the Board of Review holds that the record of trial legally establishes that the two homicides were murder.

Murder is defined in the Manual for Courts-Martial, 1928, paragraph 148a, page 162, as "the unlawful killing of a human being with malice aforethought." The proof required is as follows (idem, p. 164):

"(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act); and (b) that such killing was with malice aforethought."

In discussing the term "malice" the Manual (pages 163,164) lays down the following principles:

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.(Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or 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 indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony."

In discussing this topic in his Military Law and Precedents, 2nd Edition, page 673, Colonel Winthrop expresses the following views:

"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 defence 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."

Both in the civil courts and military courts the same principle is applicable, namely, that while it is necessary to establish malice aforethought, this element is presumed in a homicide such as has been established

in the present case (Wharton's Criminal Law, 12th Ed., Sec. 419; CM 258020, Palomera, 37 BR, 300).

The motive for a homicide frequently explains the commission of the crime, and, at times, assists in the determination of whether it constitutes murder or manslaughter, but a motive is not an essential element of the crime of murder (Wharton's Criminal Law, 12th Ed., Sec. 420; Underhill's Criminal Evidence, 4th Ed., Sec. 559; CM 258020, Palomera, supra).

In the present instance the record shows conclusively that the attacks by accused were not occasioned by any action whatsoever on the part of either of his victims. Neither appears to have made any remark to or threatening gesture toward the accused, or in any other way to have provoked the attack. The attacks appear to have been unjustified, unprovoked, premeditated and deliberate and consequently the resultant deaths of the two victims from the wounds inflicted by the accused require a holding that the two homicides constituted murder.

9. It was urged in accused's defense that if the court believed that he had committed the two homicides, his intoxicated condition rendered it impossible for him to possess the specific intent required to establish the crime of murder. It is clear that he did indulge heavily in intoxicating liquors during the late afternoon and early evening of 24 November 1945 and that he was in fact "drunk" within three hours after the commission of the two murders. It also appears from the record that at the time of his return to his quarters after the commission of the second offense he gave some indications of having been drinking. However, the evidence conclusively shows that his condition never reached the stage that could exonerate him from responsibility for his acts or change the crimes from murder to manslaughter.

10. Although accused did not plead insanity, at the request of The Judge Advocate General and upon instructions from the War Department, a Board of Officers was appointed by the Commanding General, Eighth Army, to examine the accused and to determine his mental responsibility. After having examined the accused and after having considered the evidence before it, the Board on 8 March 1946 found as follows:

"(1) The accused was, at the time of the alleged offense, so far free of mental defect, disease and derangement as to be able, concerning the particular acts charged, to distinguish right from wrong.

"(2) The accused was, at the time of the alleged offense, so far free from mental defect, disease and derangement as to be able, concerning the particular acts charged, to adhere to the right.

"(3) The accused was, at the time of his trial, sufficiently sane to understand the nature of the proceedings and intelligently to conduct or cooperate in his defense.

"(4) The accused is, at the time of this examination, sane."

11. The record of trial discloses no errors which affect accused's rights. He was ably represented by experienced and competent counsel, and the trial judge advocate with admirable meticulousness performed the duty placed on him by the Manual for Courts-Martial to have "the whole truth revealed" (par. 41d, p. 32) and to prevent any irregularity whatsoever in the proceedings. While there is some slight variance as to the exact spelling of the names of accused's two victims, this variance is immaterial and in no way affects the legality of the findings (NATO, 696, Pakorney).

12. At the request of the parents of the accused, transmitted through Honorable Albert W. Hawkes, U.S. Senator from New Jersey, and Honorable Harry L. Towe, Member of Congress from New Jersey, a hearing was held before The Judge Advocate General and the members of the Board of Review on March 5, 1946. There were present at this hearing Senator Hawkes, Congressman Towe; the parents of the accused, Mr. and Mrs. Joseph Hicswa; an uncle of the accused, Adam Hicswa; an aunt of the accused, Mrs. Stella Switek; Dr. Stephen W. Lesko of Wallington, New Jersey, who had treated accused; and Mayor Anthony Gajewski, Mr. Peter P. Tursick, Tax Collector, and Mr. John J. Sakac, Service Officer of the Veterans of Foreign Wars, all of Wallington, New Jersey. Statements were presented relative to the physical condition of the accused prior to his enlistment in the U.S. Army, a head injury suffered in 1938, and subsequent indications of the effects of this injury. Accused's previous good character was likewise attested to. The Board has given due consideration to the facts so presented, as well as to similar facts contained in numerous communications referred to the Board, including a written report by Dr. Lesko.

13. War Department records show that at the time of the commission of the offenses described in the specifications accused was approximately 20 years and 5 months of age. He completed grammar school and for 1-1/2 years attended but did not graduate from high school. He worked for 1/2 year as "machinist's helper" and then enlisted in the Army of the United States on 14 June 1943, when not quite 18 years of age. He was honorably discharged on 21 November 1945 at Nara, Honshu, Japan, in order to enlist in the regular Army. On 22 November 1945 he enlisted for an additional period of one year. There is no record of any combat service. The following additional information concerning accused is contained in the review of the Staff Judge Advocate:

"On 14 August 1943 he became a member of Battery 'D', 17th Battalion, Field Artillery Replacement Training Command, Fort Bragg, North Carolina. On 1 September 1943 he was transferred to the 12th Battalion at the same station. He joined the Division Artillery, 98th Infantry Division, on 17 December 1943 and was assigned to Headquarters Battery. His efficiency and character ratings from that time until his re-enlistment in the Regular Army on 21 November 1945 were excellent. The accused was first assigned as a radio operator and later as a bugler. At the time of

his re-enlistment he was a wire telephone operator. During his military service he has had no courts-martial. \*\*\* Accused has been overseas for approximately 19 months."

14. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of death or of imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92.

Samuel Mays, Judge Advocate  
William B. Kuder, Judge Advocate  
Carl W. Wings, Judge Advocate

SPJGK - CM 302897

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

SEP 15 1946

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private First Class Joseph E. Hicswa (12206403), Headquarters Battery, 98th Division Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was found guilty of murder (2 Specifications) in violation of Article of War 92. No evidence of any previous conviction was introduced. He was sentenced by the court, all members present concurring, to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. While insanity had not been pleaded as a defense, the Commanding General of the Eighth Army, under instructions from the War Department, issued at my request, appointed a board of officers to pass upon accused's mental condition. As will appear from the report which has been attached to the record of trial, the board found that accused was legally sane at the time the crimes were committed, at the time of trial, and at the time of its examination of accused on 8 March 1946. Consideration was given by the board to information furnished my office and transmitted to it relative to the possible existence of epilepsy.

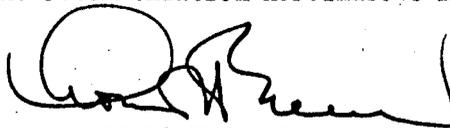
4. While the two murders committed by the accused were brutal, unprovoked and unjustified, and from a legal viewpoint were premeditated, there is nothing in the record to indicate that when accused left his quarters with two companions, on the evening preceding his departure for home, he had actually planned to take the life of any one or to commit any other crime. The unexpected appearance of two Japanese civilians, one of whom he chased, overtook and killed, seems to have brought into existence or to have unloosed a sudden desire to kill, probably aggravated by his indulgence in strong liquor during the afternoon and early evening, a desire which seemingly persisted uncontrolled until the commission of the second homicide or was recreated when he undesignedly came in contact with the Japanese civilian who became his second victim.

5. Accused voluntarily entered the Army when he was less than 18 years of age, and had been in military service for approximately 2-1/2 years at the time of the commission of the crimes. From the date of his assignment to Headquarters Battery, 98th Division Artillery, on 17 December 1943, to his discharge from that organization on 21 November

1945 to permit his re-enlistment in the Regular Army, his efficiency and character ratings were excellent. While he had no combat experience, at the time the crimes were committed he had been overseas for approximately 19 months. In view of all the foregoing circumstances, I am of the opinion that the death penalty should not be imposed in this case. I therefore recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for thirty years, and that a United States penitentiary be designated as the place of confinement.

6. At the request of the parents of the accused, transmitted through the Honorable Albert W. Hawkes, U. S. Senator from New Jersey, and Honorable Harry L. Towe, Member of Congress from New Jersey, a special hearing was held before the Board of Review and myself on 5 March 1946. Consideration has been given to the facts and arguments presented at this hearing, particularly with reference to accused's physical and mental condition, to a written statement subsequently submitted by Dr. Stephen W. Lesko, who had been accused's physician, attached hereto, to a letter from accused to the President, also attached, and to several thousand communications (all of which are on file in my office) from public officials, civic, patriotic, religious, labor and other organizations, public bodies and individuals, requesting that clemency be shown accused. These communications have been grouped as follows: (1) resolutions and petitions from organized groups: (a) church organizations, 15; (b) Polish organizations, 21; (c) political organizations, 8; (d) labor organizations, 45; (e) social, fraternal, and civic organizations and clubs, 19; (f) school organizations, 14; (g) miscellaneous organizations, 40; (h) War Mothers and Auxiliary organizations, 46; (i) American Legion posts, 94; (j) Veterans of Foreign Wars posts, 106; (k) American Veterans of World War II posts, 3; (l) Disabled American Veterans posts, 8; (m) Spanish War Veterans posts, 5; (n) miscellaneous veterans and patriotic organizations, 66; (o) municipalities, 11; (2) 286 petitions from unorganized groups, containing 48,706 signatures; (3) 79 letters from U. S. Senators; (4) 106 letters from members of the House of Representatives; (5) 274 letters from friends, relatives and acquaintances of accused; (6) 16 anonymous letters; and (7) 3,536 letters from various individuals.

7. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made should such action meet with approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

6 Incls

1. Record of trial
2. Drft ltr sig S/W
3. Form of Ex action
4. Report of Bd of Off of exam of acc'd
5. Ltr fr Dr. Lesko
6. Ltr fr acc'd to Pres

( GCMO 106, 3 May 1946 ).



reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused was first brought to trial jointly with Staff Sergeant William R. Cramer and Sergeant Charles V. Lopez on a Specification of conspiracy to conduct the wrongful enterprise of exchanging United States currency for French currency, and on six specifications based upon violations of the United States Postal Laws. Before the completion of the prosecution's case, on 21 March 1945, a continuance to procure further evidence was granted upon request and the court adjourned. On the same date the Charge and Specifications were withdrawn by the appointing authority from further consideration by that court and re-submitted for trial before a different court. On 23 March 1945, the trial of the case proceeded before the second court. No additional witnesses or other evidence was introduced before the second court that had not been introduced before the first court except certain evidence which the law member on the first court had not admitted. On the same date the court found the accused guilty and imposed sentence upon each. These findings and sentences were subsequently disapproved by the reviewing authority and a rehearing was ordered before another court to be thereafter designated.

4. Evidence for the prosecution: It was stipulated that the accused, during the occurrences hereinafter related, was a member of the United States Army and assigned to Headquarters Battery, 409th Anti-aircraft Artillery Gun Battalion; and that Section III, Paragraph 1, Circular No. 49, Headquarters North African Theater of Operations, dated 5 April 1944, provides that,

"all members of the U. S. Armed Forces, and persons serving with such forces including civilians and merchant seamen, excepting duly authorized U. S. Army Disbursing Officers as provided in paragraph 2 below, are forbidden to possess regular U. S. currency as distinguished from yellow seal U. S. currency, or regular British sterling currency as distinguished from British Military Authority currency, in this theater, or dispose thereof otherwise than by exchange as provided in paragraph 2 below, that Section III, paragraph 2a, of said circular provides that 'all personnel now assigned to permanent duty in this theater will exchange at the nearest Finance Office all regular U. S. currency in their possession in excess of \$1.00 and all regular British sterling currency for local currency within fifteen (15) days from the date of this circular.';"

and that said circular Number 47 was in force and effect between 15 May 1944 and 18 October 1944 (R. 11-12).

Staff Sergeant William R. Cramer testified that he was a member of the same organization as the accused from May to October 1944 (R. 7), and that during that time he and the accused and a Sergeant Lopez pooled their funds and engaged in the operation of sending money orders to correspondents in the United States and having those correspondents return currency of the United States. The United States currency was sold for French francs, more money orders purchased with the French francs and the operation repeated. The accused received American currency in this manner and turned it over to the witness to exchange it for francs. The witness used this money for that purpose and purchased the French francs from French civilians (R. 8-9). This occurred at Ajaccio, Corsica, upon three different occasions. The largest amount of money that he had on any of these occasions was \$1700 of which he received about \$600 from the accused (R. 10). Flora Clark of Houston, Texas, testified by a deposition that during June, August, and September 1944 she received a total of approximately twenty-three United States Postal money orders of the denomination of \$100 each from William F. Cramer and cashed these money orders and sent the money to the accused at his request. The cash was in the form of \$100 notes or bills (R. 11; Pros. Ex. 1).

The witness Cramer was recalled and testified further that the money that he received from the accused for the purpose of purchasing French currency was American blue seal currency of \$100 denomination (R. 19-20).

5. The accused, having been fully advised concerning his rights as a witness, elected to make an oral unsworn statement through counsel, which in substance was as follows: He is twenty-six years of age. He was inducted in the service 26 June 1942 and commissioned a second lieutenant, Coast Artillery Corps, 24 July 1942. On 29 October 1942 he was promoted to first lieutenant and recommended for a battlefield promotion in Italy on 10 May 1943. He served overseas for about two and one-half years, took part in the North African and Italian campaigns and was awarded three battle stars. He graduated from Rice Institute in June of 1941 with a Bachelor of Arts degree. During his Army career he has never before been reprimanded or convicted of any offense (R. 18-19).

The accused's 66-1 card was admitted in evidence without objection and showed an average efficiency rating of 42 (R. 17; Def. Ex. A).

Lieutenant Colonel Edward B. Hempstead and Major Randolph L. Jones were called as character witnesses and testified that they rated the accused's performance of military duties as superior and his character and conduct during the time he was under their respective commands as beyond reproach and exemplary (R. 13-14, 15-16). It was

stipulated that if Major Norman J. Hackstaff were present and sworn as a witness, he would testify substantially to the same effect (R. 16-17).

6. Accused has been found guilty of violating standing orders by wrongfully possessing and dealing in United States currency, in conjunction with Sergeants William R. Cramer and Charles V. Lopez, in contravention of Article of War 96. The evidence for the prosecution and the plea of guilty of the accused clearly establishes that he did at the place and during the time alleged in the Specification wrongfully possess United States currency and did use that currency for the purpose of purchasing French currency, in violation of the standing orders existing during that same period of time. These orders were issued by the Headquarters Command, of which he was a member, and prohibited all members of the United States Armed Forces from possessing legal United States currency or of disposing of such currency otherwise than by exchanging it through the nearest Finance Office. The accused has, therefore, violated the terms of the standing orders referred to, thereby prejudicing good order and military discipline, in violation of Article of War 96 (CM 302838, Zaleski; and the cases cited therein).

7. War Department records show that the accused is 27 years of age and unmarried. He is a high school and college graduate. On 24 January 1942 he entered the service and after attending Officer Candidate School was commissioned second lieutenant, Army of the United States, in the Coast Artillery Corps on 24 July 1942. He was promoted to first lieutenant on 20 October 1942 and captain on 4 January 1944.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Earle Spburn, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Robert J. Cannon, Judge Advocate.

SPJGN-CM 302899

1st Ind

Hq ASF, JAGO, Washington, D. C.

TO: The Secretary of War

MAR 21 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Lee W. Capps, Jr. (O-1041725), Coast Artillery Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, violating standing orders by wrongfully possessing and dealing in United States currency, in contravention of Article of War 96. 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 might direct, for a period of three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

While stationed in Corsica between May and October 1944, the accused and two enlisted men entered into an arrangement whereby, with United States currency, they purchased French francs from Corsican civilians, converted the francs into United States Postal Money Orders, sent the Money Orders to the United States for conversion into United States currency, had the United States currency transmitted back to Corsica, again purchased French francs and repeated the process. They followed this procedure upon three different occasions thereby exchanging a total of approximately \$2300, of which the accused contributed one-third. Since Corsican civilians would pay more francs per dollar than the Army Finance Exchange the manipulations of accused and his friends produced considerable profit. Such practices were prohibited by orders issued by Headquarters, North African Theater of Operations. The two enlisted men also pleaded guilty and received the maximum punishment which could be imposed upon them, namely, confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. Because of the length of time they had been in confinement prior to trial the confinement was remitted.

Accused's previous military record appears to be without blemish. He has three battle stars for his part in the North African and Italian campaigns. A considerable volume of correspondence sent to this office attests an excellent civilian record. Allied papers indicate that he has been in confinement or under restraint for approximately eighteen months

pending the trial and disposition of his case. Because of his previous good record and the time he has been under restraint, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of \$100 pay per month for three months, and that the sentence as thus commuted be ordered executed.

4. Mr. J. P. Rice, Attorney, Dallas, Texas, Mr. D. Roland Potter, Secretary to United States Senator W. Lee O'Daniel, and Mr. L. W. Capps, father of accused, appeared before the Board of Review in accused's behalf. Consideration has also been given to communications requesting clemency from Honorable Tom Connally and W. Lee O'Daniel, United States Senate; from Honorable Albert Thomas, Lyndon B. Johnson and John E. Lyle, Jr., Members of Congress; from Colonel Julien C. Hyer, Dallas, Texas; and from Bishop A. Frank Smith, Mr. Sewall Myer, Mr. R. P. St. John. Mr. R. E. Smith, Honorable W. W. Moore, Mr. L. Goldston, and Mr. R. S. Sterling, all of Houston, Texas.

5. The Commandant of the Delta Disciplinary Training Center wrote to the Commanding General, United States Forces European Theater on 7 January 1945 stating, inter alia:

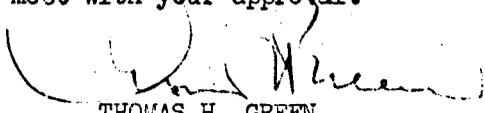
"In my official capacity as Commandant of the Delta Disciplinary Training Center I strongly recommend that clemency be granted this officer to the extent of commuting the total forfeitures to a reprimand and suspending the dismissal and confinement at hard labor completely.

"Since assuming command of the Delta DTC on August 8, 1945, there has been no single case among the thousands of prisoners confined here that has been so repeatedly and forcibly brought to my attention as deserving the maximum clemency as the case of Captain CAPPS. I might further add that this is the first case since I have been here in which I have made an independent official recommendation for clemency in any authority."

6. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

15 Incls

- 1 - Record of trial
- 2 - Form of action
- 3 - Telegram fr. Sen Connally
- 4 - Telegram fr. Sen. O'Daniel
- 5 - Two letters fr. Cong. Thomas w/incl.
- 6 - Ltr. fr. Cong. Johnson
- 7 - Ltr. fr. Cong. Lyle, Jr.
- 8 - Ltr. & telegram fr. Col. Hyer
- 9 - Ltr. fr. Bishop L. Frank Smith
- 10 - Ltr. fr. Mr. Sewall Myer
- 11 - Ltr. fr. Mr. R. P. St. John
- 12 - Ltr. fr. Mr. R. E. Smith
- 13 - Ltr. fr. Hon. W. W. Moore
- 14 - Ltr. fr. Mr. L. Goldston
- 15 - Ltr. fr. Mr. R. S. Sterling

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

---

( GCMO 73, 29 Aug 1946).

WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(197)

SPJGH - CM 302940

UNITED STATES )

SEVENTH ARMY

v. )

Trial by G.C.M., convened at Heidelberg, Germany, 11 September 1945. Manuel: To be shot to death by musketry. Jones: Dishonorable discharge and confinement for life.

Private HOMER E. MANUEL )  
(35870491), and Private )  
WILLIAM JONES, JR. (35706849), )  
both of 3919th Quartermaster )  
Gasoline Supply Company, )  
Seventh Army. )

OPINION of the BOARD OF REVIEW

TAPPY, STERN and TREVETHAN, Judge Advocates.

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

2. In a common trial accused Manuel was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 92d Article of War.

Specification 1: In that Private Homer E. Manuel, 3919th Quartermaster Gasoline Supply Company, did, at Abstatt, Germany, on or about 24 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Frieda Schwilk.

Specification 2: In that Private Homer E. Manuel, \*\*\*, did at Abstatt, Germany on or about 24 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Lydia Schwilk.

CHARGE II: Violation of the 93d Article of War.

Specification 1: In that Private Homer E. Manuel, \*\*\*, did, at Abstatt, Germany, on or about 24 April 1945, commit the crime of sodomy, by forcibly and feloniously and against the order of nature having carnal connection with the vagina of Miss Lydia Schwilk by mouth.

Specification 2: In that Private Homer E. Manuel, \* \* \*, did, at Abstatt, Germany, on or about 24 April 1945, commit the crime of sodomy, by feloniously and against the order of nature, force his penis into the mouth of Miss Lydia Schwilk.

and accused Jones was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private William Jones, Jr., 3919th Quartermaster Gasoline Supply Company, did, at Abstatt, Germany on or about 24 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Freida Schwilk.

Specification 2: In that Private William Jones, Jr. \* \* \*, did, at Abstatt, Germany on or about 24 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Emma Baumgarten.

Each accused pleaded not guilty to, and was found guilty of, the Charges and Specifications pertaining to him. Evidence of one previous conviction of accused Manuel for an absence without leave of several hours was introduced but no evidence of previous convictions was introduced as to accused Jones. Accused Manuel was sentenced to be shot to death with musketry and accused Jones was sentenced to dishonorable discharge, total forfeitures and confinement for life. The reviewing authority approved the sentence imposed on accused Manuel but recommended that it be commuted to dishonorable discharge, total forfeitures and confinement for life, approved the sentence imposed on accused Jones, designating the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 48 as to accused Manuel and under Article of War 50<sup>1</sup>/<sub>2</sub> as to accused Jones.

3. About 9 p.m. on 24 April 1945, two colored soldiers and a Pole entered the farm yard of Frieda Schwilk, located in Abstatt, Germany, and the Pole, holding a drawn revolver, struck Frieda and her husband in the face. Thereafter they left, the Pole remarking, "Now things will be different, you German dogs." Frieda identified the two accused as the two colored soldiers who entered her farm yard on this occasion (R.8,9).

About 11 p.m. on that same night, a Pole and two colored soldiers knocked on the door of Emma Baumgarten's house also located in the town of Abstatt, and threatened to break it down. When she admitted them they demanded meat or schnapps. She served them the requested schnapps after which the lighter colored of the two soldiers conducted her to the hall, exhibited a knife and a "fire weapon" and said "you fick fick or your head will come off." He then stood his rifle in a corner, threw the woman to the floor,

began to remove her panties and when she screamed he placed his knife at her throat (R.45,53). Thereafter he inserted his penis into her privates and as he experienced an emission she pulled her body away and avoided receipt of the discharge within her person. The second colored soldier then approached her and also had relations with her, placing his penis within her private parts. The first colored soldier held the knife while this act of intercourse occurred. She offered no resistance to the acts done by the second colored soldier because as she expressed it she was "so finished" and also because she thought if she did resist her throat would be cut (R.46,47, 53,54). After the second colored soldier experienced an emission, someone was heard approaching the door and when they inquired who it was she stated it was her father. The two colored soldiers then slung their rifles over their shoulders and left (R.48). Before leaving, the Pole took a pair of shoes among other things from her house. She identified Prosecution's Exhibit C as the pair of shoes so taken (R.48,49). Later a displaced Pole named Josef Swider was apprehended on the road to Heilbronn wearing these shoes (R.76). Emma Baumgarten could not identify the two accused as the soldiers who attacked her (R.46).

Frieda Schwilk and her family had retired soon after their first experience with the colored soldiers and the Pole, but about midnight were aroused when they heard their house door being broken. Throwing a shirt about her, Frieda opened the door, the lower part of which had by then been broken in. The Pole and the two colored soldiers whom on direct examination she identified as the accused entered the house (R.9,27). The two accused smelled of liquor and she was of the opinion they were drunk (R.22,23). They asked for schnapps, proceeded to the cellar with Albert Schwilk, Frieda's husband, and commenced drinking from a bottle. One of the three visitors then struck Albert in the face knocking him unconscious. He was unable to identify these soldiers as the accused because they wore helmets which set low over their foreheads (R.27).

Thereafter one of the colored soldiers whom Frieda identified as accused Manuel approached her carrying a firearm with a barrel about eighteen inches long, grasped her at the hip, pulled her outdoors and prodding her with the butt of his rifle forced her to a small pig pen about 30 to 50 meters from the house where she screamed for help (R.9-11,23,24). Holding the rifle in one hand he threw Frieda to the ground, pulled up her skirt and inserted his penis in her vagina. Frieda was fearful of the rifle and that accused would use it to kill her (R.9-11).

After accused Manuel's organ had been in her privates for about a minute, Frieda's daughter, Lydia, a twelve-year old child, entered the pig pen, called her mother and told Manuel to leave her alone. Manuel then approached Lydia, forced her head down between his legs and when Frieda sought to rescue her daughter, Manuel pushed her with his rifle. Manuel then lay down with Lydia, putting her head between his legs and his head between hers. Frieda then ran from the pig pen, obtained a pair of panties and

stockings and went searching for help. Obtaining no assistance, she returned home (R.12-14,33).

After she re-entered the farm yard the other colored soldier whom she identified as accused Jones grasped her, pulled her into the kitchen and began to remove her panties. When she objected and pushed herself from him, the Pole who was also present levelled a rifle at her. Thereafter Jones removed her panties, pulled her onto a table and placed his penis within her private parts where it remained for some 2 to 5 minutes until she felt a discharge upon her leg (R.15,16). Accused Jones and the Pole then opened and rummaged through the kitchen cupboards after which they walked outdoors, warning Frieda to remain in the kitchen (R.16).

Leaving the house by the cellarway, Frieda went to the pig pen and called to her daughter who replied, "Yes, mother, I am still living." Later she saw her daughter coming from the pig pen. Frieda then went around the house and did not see her daughter again that night although she thereafter searched for her (R.17,18).

With respect to her experiences with accused Manuel, Lydia testified that after she entered the pig pen Manuel pushed his rifle toward her, pulled down her panties and inserted his sexual organ into hers hurting her as he did so. Thereafter he grasped her by the shoulders, forced her to take his penis in her mouth and "to suck on his sexual organ" as he "sucked on mine." She could feel his tongue inside her privates. Next he sought again to place his privates inside hers but did not accomplish penetration as she pulled away (R.33-36,41-43). Following these acts, accused Manuel took Lydia from the pig pen to the street and pulled her to a hay barn some 100 to 150 kilometers from her home. When she objected to accompanying him, he told her the Pole would kill her if she didn't do so. In the hay barn she was again compelled to take accused Manuel's penis in her mouth while he inserted his tongue in her vagina. Thereafter Manuel fell asleep clasping Lydia in his arms. Lydia did not seek to escape for fear she would awaken Manuel and be killed. Finally around 7:00 a.m., Manuel awakened and giving Lydia some cigarettes he permitted her to go home where she arrived soon thereafter. Lydia was able to observe her assailant in the daylight of this morning and was certain that accused Manuel was the person who had subjected her to these experiences (R.36-39). When Lydia arrived home she was so excited and hysterical that, as her mother expressed it, "I did not recognize my girl" (R.18).

On cross-examination Lydia stated that accused did not get his penis into her vagina although he got it near it, but on redirect examination she stated that he did put it inside her for a brief period which caused her pain (R.41,42). Lydia was emphatic in her identification of accused Manuel as her attacker (R.33,38). Frieda, on direct examination, identified accused Manuel and Jones as her assailants but upon more searching questioning and after she had peered carefully at both accused, she reiterated her identification of accused Jones but as to accused Manuel she said "whether he is it I don't know but I believe so" (R.8,26).

On the morning of 25 April 1945, Frieda reported these occurrences to the authorities and on 27 April 1945 Lydia was examined by Captain Roger R. Spencer, Medical Corps. He found the hymen broken but no bruises, scratches or lacerations on the outer or inner lips of her genitalia, nor on her stomach, thighs or buttocks. The cervix, mouth and neck of the womb were normal and undamaged. However, the inside of the vaginal opening was found to be inflamed, and to have several "excoriated areas of nicking" from which blood flowed easily. In Captain Spencer's opinion such condition had been produced by "recent sexual intercourse or by a very rough type of fondling under duress" (R.55,56).

Lydia identified a letter opener and a camera, exhibited to her by the prosecution, as property that belonged to Frau Krebs (R.40; Pros. Exs.1,2). Accused Jones gave this letter opener to Private First Class Leo Jackson, one of his tent mates, on the morning of 25 April 1945 and gave the camera to another tent mate, Private Leroy Daniels, on the same morning (R.78,81). Jackson had retired about 11:00 p.m. on the night of 24 April 1945 and was subsequently awakened by the sound of gun fire. Soon thereafter accused Jones entered the tent (R.77,78). Daniels who had also retired about 9:00 p.m. was aroused about 2:00 a.m., 25 April 1945, and saw accused Jones in the tent. Daniels believed accused Jones was dressed at the time. Neither accused Jones nor Manuel, who was also a tent mate, had been in the tent when Jackson retired about 11:00 p.m. A sergeant awakened Daniels on the morning of 25 April 1945 to attend breakfast. At that time accused Manuel was not in his bed but shortly thereafter Daniels saw Manuel who was then fully dressed (R.77,80).

Several days after the occurrences related above, two agents of the Criminal Investigation Division interviewed both accused and after having been fully advised of their rights to remain silent and of the usability of any statement they might make, each accused made a statement freely and voluntarily (R.58-60,74-76).

Accused Manuel's statement contains the following recitation of his activities on the day in question (Pros.Ex.4). Sometime after supper on 24 April 1945, he and accused Jones walked to the town of Abstatt and about 2030 hours, in the company of an individual known as Josef, they visited a house where Josef commenced to beat a man and woman. Thereafter they strolled about the streets, conversed with some women and eventually went to a house where Josef knocked and asked a woman for schnapps. She produced a gallon jug of whiskey from which Manuel proceeded to drink. Then Manuel turned to the woman and said "fick fick" whereupon she removed her panties and Manuel had sexual intercourse with her. Leaving that house they returned to the house they had earlier visited where Josef had assaulted the man and woman. After Josef "banged" on the door they were admitted. Manuel "took the woman" to the barn and had sexual intercourse with her. A little girl entered the stable, Manuel asked her for "fick fick", she refused, he then gave her a package of cigarettes, said "blow, blow and she gave me a blow job." His statement thereafter continues as follows:

"The first woman might of been inside the stable when I started the blow job but she was not there when I finished. The girl was with me when I left the stable and the next time I saw her was in a straw pile of another barn a few blocks away when I awoke the next morning. I then told her to go home and I returned to camp at about 0700 hours of 25 April 1945 as I remember coming in time for breakfast."

Accused Jones in his statement related the occurrence of the following events on the night in question (Pros. Ex.5). He and accused Mamuel visited Abstatt on the evening of 24 April 1945 and encountered a young male civilian with whom they visited a farm house where the civilian struck a man and a woman. Later they visited another house where the civilian obtained a pair of shoes and Jones had sexual intercourse with a woman. About 2330 hours they returned to the house where the civilian had earlier assaulted a man and woman. The civilian kicked in the bottom portion of an outside door to that house. Entering the house they proceeded to the cellar where the civilian knocked a man down and kicked him. Jones took a woman into the kitchen and had sexual intercourse with her on a table. Thereafter they entered a room occupied by a young woman and a baby where the civilian "found a camera and a pen knife" which he gave to Jones. Being unable to locate accused Manuel, Jones returned to his organization alone, arriving there about 0230 hours. Later he gave the camera to Daniels and the pen knife to Jackson.

4. The defense offered in evidence prior statements made by Lydia Schwilk, Emma Baumgarten and Frieda Schwilk. These statements were admitted in evidence to impeach the testimony of these witnesses and not for the truth of the matter asserted in them (R. 83,85,86,92; Def. Exs. A,B,D). Agent Morris B. Grossman of the Criminal Investigation Division testified that he did not believe Lydia stated that her attacker had effected penetration of her privates. He also testified that Frieda Schwilk had stated she would be unable to identify either of the colored soldiers (R.84,86,87).

Lydia's statement is similar in all material respects to her testimony given at the trial except for the act of intercourse. In her statement Lydia recited that after reaching the pig pen the colored soldier

"grabbed me and forced me to take his penis into my mouth. I do not remember how long he had it there. When he finished he placed his penis near my vagina but not into it as I managed to push him away."

Nowhere in her statement does she assert that accused effected penetration of her privates with his penis (Def. Ex.A).

Emma Baumgarten in her statement recites that only one colored soldier and a Pole entered the home, the colored soldier having intercourse with her as he held a knife to her throat (Def. Ex.B). So far as the statement of

Frieda Schwilk is concerned, there is no material discrepancy between it and her testimony, at the trial except that she does state that she would be unable to identify the two colored soldiers (Def. Ex.D).

5. Accused Manuel is charged with four offenses, viz: raping Frieda Schwilk, raping her daughter, Lydia Schwilk, committing sodomy by having connection with Lydia's vagina by mouth and committing another act of sodomy by forcing his penis into Lydia's mouth.

Considering first the rape of Frieda Schwilk, the prosecution's evidence conclusively demonstrates that a colored soldier had intercourse with her in the pig pen of her farm yard on the night in question. She failed to offer vigorous resistance to her assailant because he was armed with a rifle or carbine, causing her to fear for her life. Such fear is quite understandable considering the fact that her assailant was clothed in the uniform of an enemy which had but recently overrun her home territory. There cannot be said to be consent to an act of intercourse when the woman fails or ceases to resist only because of a well founded fear that resistance will cause her death or at least severe bodily harm (CM 227908, 1 Bull JAG 364; CM 236612, Tyree, 2 Bull JAG 310, 23 BR 67). Frieda's identification of accused Manuel was unsatisfactory but her daughter, Lydia, although subjected to searching cross-examination, emphatically and unwaveringly identified him as the man who had her mother in the pig pen at the time in question. Lydia had an excellent opportunity to observe this assailant since she was with him until the daylight hours of the morning of the assault. Were the foregoing insufficient to connect accused Manuel with this crime, his statement would dispel any doubt since it contains an admission of an act of intercourse with a woman who could have been no one but Frieda considering the succession of events related in the statement as compared to those testified to by the prosecution's witnesses. Although the defense offered objection to the introduction of accused Manuel's statement it is quite apparent from all the evidence that the court was well warranted in concluding that it was freely and voluntarily made. Thus, even assuming that his statement as to this particular act constituted a confession rather than merely an admission against interest, it was properly admitted in evidence. The evidence fully sustains the conviction of accused Manuel under Specification 1 of the Charge I pertaining to him.

As for the alleged rape committed by accused Manuel on Lydia Schwilk, a twelve-year old girl, she testified on direct examination that after she entered the pig pen accused Manuel grasped her, removed her panties and inserted his privates within her. After commission of this act she testified that he perpetrated the alleged sodomies. Later he tried to penetrate her again but was unsuccessful because she drew away from him. Medical examination of her person made about two days after these events revealed inflamed and excoriated areas within her vaginal opening which, in the opinion of the medical examiner, had been produced by "recent sexual intercourse or by a very rough type of fondling under duress." Were there nothing in the

record to raise doubt as to the reliability of this evidence, obviously it would be sufficient to sustain the conviction of accused. However, there are other matters in the record which must be considered. In the first place, on cross-examination Lydia testified accused did get his penis near her privates but did not place it inside her. On redirect examination she returned to her original testimony that Manuel did get his penis inside her privates hurting her momentarily. Secondly, in her statement made to the officials investigating this affair, Lydia recited that as soon as she entered the pig pen accused committed an act of sodomy upon her and then attempted to effect a penetration of her privates but was unsuccessful because she pushed him away. The investigator taking her statement did not believe she ever stated that this accused did effect a penetration. Finally, Lydia's mother who was present at the time the rape was alleged to have occurred did not testify that she observed any such act. Indeed, her testimony shows that as soon as accused grasped Lydia he proceeded to commit an act of sodomy. She did not testify that he first committed an act of rape and then turned to sodomy. Thus, not only do discrepancies exist in the stories told by the prosecutrix with respect to this rape but an eye witness fails to sustain prosecutrix's contentions. It may well be that had the mother been questioned in greater detail and had the youthful witness been carefully examined as to her various stories, these discrepancies would have been explained. Further, the fact that the testimony of the girl and her mother was given through an interpreter may have interfered with evolution of a clear, evidential picture. Be that as it may, on the face of this record, substantial discrepancies do exist in the prosecutrix's stories and, in addition, an eye witness fails to corroborate her.

Since a charge of rape is easily made but disproved with difficulty, the uncorroborated testimony of a prosecutrix will sustain a conviction only if it is clear and convincing while contradictory testimony of a prosecutrix as to penetration is fatal to a conviction (CM 243927, Strong, 28 BR 129). Here the prosecutrix's testimony falls far short of being clear and convincing on the matter of penetration. Coupling to that fact the inconsistency between her direct testimony and the story she told the investigator, plus her mother's failure to corroborate her, it is clear that the evidence leaves a very substantial doubt that accused Manuel effected a penetration.

Although the evidence may be insufficient to establish penetration, the prosecutrix consistently maintained, both in her testimony and in her previous story to the investigator, that accused Manuel sought unsuccessfully at other times during this episode to penetrate her privates with his. Accused in his statement admits at least that when he turned from the mother to the child he asked the latter for "fick fick." It is also clear that accused's youthful victim did not consent to his overtures but did take all such measures to frustrate his design as were available to her considering her age and the attendant circumstances (See CM 250294, Martin, 32 BR 323). In our opinion, although the evidence does not sustain the conviction of rape it does support so much of the findings of guilty of Specification 2 of this Charge I pertaining to accused Manuel as involves assault with intent to commit rape.

As for the two offenses of sodomy, Lydia's testimony clearly demonstrates the commission thereof. Furthermore, her mother's testimony reveals that she observed accused Manuel place his and Lydia's bodies in such position as to leave no doubt of his intent to perpetrate these offenses. Lastly, in his statement accused admitted the commission of at least one unnatural act. There is no question but that accused Manuel was the offender since not only did Lydia convincingly identify him, but accused's own statement connects him conclusively with the commission of these acts. Accused committed an act of sodomy when he placed his penis in Lydia's mouth (MCM, 1928, par. 149k), and he committed a similar offense when he manipulated her privates by placing his tongue within her vagina (CM 278548, 4 Bull JAG 339). The evidence supports the court's findings of guilty of Specifications 3 and 4 of this Charge I pertaining to accused Manuel.

Considering next accused Jones, we find he was charged in separate Specifications with raping Frieda Schwilk and Emma Baumgarten. Frieda's testimony shows that after she returned to the house following her experience with accused Manuel in the pig pen, the second colored soldier had intercourse with her on the kitchen table. Although she objected and sought to push herself away, the Pole levelled a rifle at her head and she apparently then ceased all resistance. Frieda identified accused Jones as her assailant. In a voluntary statement made to the investigator accused Jones clearly identified himself as the perpetrator of this act. It is quite apparent that Frieda's lack of resistance resulted from the fact that she entertained a well founded fear that continued resistance would only bring about her death or the infliction of serious bodily harm. As we have already said, consent to sexual intercourse may not be presumed in the face of such conditions. The evidence fully sustains the court's findings of guilty of Specification 1 of this Charge pertaining to accused Jones.

The testimony of Emma Baumgarten reveals that, although only accused Jones was charged with rape upon her, both of the colored soldiers who entered her house with the Pole on the night in question had sexual intercourse with her. She offered little if any resistance because the soldiers exhibited a knife as well as a rifle and made it quite plain that she faced harmful bodily consequences unless she acceded to their desires. Again, no consent can be inferred under such circumstances. Clearly, the intercourse was had by force and without her consent. Although she could not identify either accused as her assailant, she did identify a pair of shoes taken at the time by the Pole from her house which he was later found wearing when apprehended. In his voluntary statement accused Jones admitted visiting a house with Manuel and the Pole where he (Jones) had sexual intercourse with a woman and the Pole appropriated a pair of shoes. The continuity of events recited in Jones' statement, when compared with the prosecution's evidence, leaves no doubt but that Emma Baumgarten was the woman with whom he had such relations. The evidence sustains the court's findings of guilty of Specification 2 of this Charge pertaining to accused Jones.

(206)

6. Accused Manuel is 30 years of age and was inducted into military service on 27 July 1943. Accused Jones is 21 years of age and was inducted into military service on 30 July 1943.

7. Consideration has been given to a communication from Congressman Noble J. Johnson and to the inclosures contained therewith relative to accused Manuel's good reputation and character as well as to a communication from Senator Homer E. Capehart, plus the inclosures contained therewith. All of the foregoing correspondence pertains to accused Manuel.

8. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of the accused, except as noted above, were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient, as to accused Manuel, to support only so much of the finding of guilty of Specification 2 of the Charge I pertaining to that accused as involves finding of guilty of assault with intent to commit rape upon the person and at the time and place alleged, legally sufficient to support the findings of guilty of all other Specifications and of all Charges pertaining to accused Manuel, legally sufficient to support the findings of guilty of all Specifications and the Charge pertaining to accused Jones, and legally sufficient to support the sentence as to each accused and to warrant confirmation of each sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

Thomas N. Tapp, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH - CM 302940

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

APR 2 1946

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Homer E. Manuel (35870491), 3919th Quartermaster Gasoline Supply Company, Seventh Army, who was tried in a common trial with Private William Jones, Jr (35706849) of the same organization.

2. Accused Manuel was found guilty of rape (2 Specs.) and sodomy (2 Specs.) and sentenced to be shot to death with musketry. I concur in the opinion of the Board of Review that the record of trial is legally sufficient as to accused Manuel to support so much of the finding of guilty of Specification 2 (rape of Lydia Schwilk) of Charge I pertaining to that accused as involves a finding of guilty of assault with intent to commit rape upon the person and at the time and place alleged, legally sufficient to support the findings of guilty of all other Specifications and of all Charges pertaining to that accused, and legally sufficient to support the death sentence imposed and to warrant confirmation of that sentence.

The rape upon Frieda Schwilk and the assault with intent to rape and the two sodomies committed upon her daughter, Lydia, were accompanied by threats with a firearm but were not attended by the application of personal violence or the infliction of any personal injury greater than that generally involved in the physical contacts inherent in the commission of these offenses. Accused's companion, Private William E. Jones, was found guilty of two rapes occurring at approximately the same time and place and was sentenced to confinement for life. The two sodomies of which accused Manuel was found guilty involve no greater maximum punishment than confinement for ten years and, accordingly, cannot of themselves justify the imposition of the death penalty. In his action the reviewing authority recommended that the sentence imposed on accused Manuel be commuted to dishonorable discharge, total forfeitures and confinement for life. In view of the foregoing, I concur with the recommendation of the reviewing authority and I recommend that the sentence be confirmed but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life, and that the sentence as thus commuted be carried into execution. I further recommend that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

3. Consideration has been given to the several communications urging clemency which are attached to the record of trial and also to the following communications received directly by this office and forwarded herewith, viz: letter from Congressman Noble J. Johnson and inclosures contained therewith relative to accused Manuel's good reputation and character; letter from Senator Homer E. Capehart and inclosures contained therewith.

(203)

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such recommendation meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

- 3 Incls  
1 - Record of trial  
2 - Dft. ltr for sig, S/W  
3 - Form of action

---

( As to accused JONES, GCMO 135, 24 May 1946).  
( As to accused MANUEL, GCMO 136, 24 May 1946).



(210)

conf USDB to escape at 0500" (Pros. Ex. 3) It was stipulated between the prosecution, defense counsel and accused that if the sheriff of Clay County, Illinois, were present in court and sworn as a witness he would testify

" That on 16 December 1945, I apprehended General Prisoner Fred C. Hamm, Central Branch, U.S. Disciplinary Barracks, Jefferson Barracks, Missouri, at the home of Norris Pickle located in the County of Clay, State of Illinois and the said prisoner was delivered to the Military Authorities at Scott Field, Illinois, on 20 December 1945 at 1045 hours" (Pros. Ex. 5).

Thereupon the prosecution rested.

The following proceedings then took place: It was stipulated between the prosecution, defense counsel and accused that if Lieutenant Colonel Clifford I. Hunn, supervisor of prisoners at the Central Branch, United States Disciplinary Barracks, Jefferson Barracks, Missouri, were present in court and sworn as a witness, he would testify that on 15 October 1945 accused was a parolee at the United States Disciplinary Barracks. Defense counsel thereupon made a motion that the exact copy of the morning report, Exhibit #3, be stricken from the record as having no probative value and suggested that a parolee could not escape (R.7.) The trial Judge Advocate replied that Prosecution's Exhibit #3 was introduced " for the sole purpose of proving absence without leave." Defense counsel's motion was denied and accused's rights as a witness were fully explained to him. Accused made an unsworn statement thru his counsel that he had no criminal record in civil life nor in the Army; that his entire offenses of a military nature were absence without leave; that his reasons for previous offenses of absence without leave were the result of great influence wielded over him by wife; that she repeatedly insisted that he come home to her and remain there; that she besieged him with letters exaggerating her financial straits, and that such conduct on her part rendered it difficult for him to think and judge clearly. He did not deny the commission of the offense charged.

At this point in the course of the trial, the court was closed and upon reopening the president announced " that the court considered the evidence of the prosecution insufficient in that nothing had been introduced to show that accused did not have authority to be absent from his station." A brief recess was had and thereafter the prosecution introduced in evidence without objection, an exact copy of morning report of the 1727 SCU Rehabilitation Center, 7th Service Command, Jefferson Barracks, Missouri, now the Central Branch, United States Disciplinary Barracks, containing an entry of 29 December 1944, pertaining to accused, reading "Hamm, Fred C. 7-2987 GP confd at 1930." It was then stipulated between the prosecution, defense counsel and accused that if Lieutenant Colonel Clifford I. Hunn were present in court and sworn as a witness he would testify that

"I am Clifford I Hunn, Lt. Colonel, Cavalry, O-11363, Supervisor of Prisoners, Central Branch, U.S. Disciplinary Barracks, Jefferson Barracks, Missouri.

On 29 December 1944, General prisoner Fred C. Hamm, Reg. No. 7-2987 was duly confined at 1727th Service Command Unit, Rehabilitation Center, Seventh Service Command, Jefferson Barracks, Missouri, then redesignated the 1772d Service Command Unit, Rehabilitation Center, Seventh Service Command, Jefferson Barracks, Missouri, per Section I, General Order No. 8, Headquarters, Army Service Forces, Seventh Service Command, Omaha, Nebraska, dated 26 January 1945, then redesignated the Central Branch, United States Disciplinary Barracks, Jefferson Barracks, Missouri on 15 June 1945, per Circular No 176, War Department, dated 13 June 1945.

On 15 October 1945, General Prisoner Fred C. Hamm, Reg. No. 7-2987, Central Branch United States Disciplinary Barracks, Jefferson Barracks, Missouri, did not have authority to be absent from his station at Jefferson Barracks, Missouri, and it is further certified that I did not authorize the accused to be set at liberty on 15 October 1945" ( Pros. Ex. 7).

The prosecution again rested and no witnesses were introduced or testimony offered by accused.

4. The prosecution sought to prove the initial absence of accused by the morning report entry reading from confinement "to escape." However, the prosecution stipulated that accused was a parolee and later stated that the above-mentioned morning report entry was being offered solely to establish absence without leave. It is well settled that when a parolee absents himself without authority he breaks his parole; he does not commit the offense of escape because he is under no physical restraint. The stipulation and the position taken by the prosecution relative to this morning report entry raise grave doubts as to its correctness if in fact it does not admit its complete falsity. Clearly the entry does not establish beyond a reasonable doubt the "escape" recited in it. Striking "escape" from the entry we find that the remainder of it recites no more than that accused was in confinement on 15 October 1945, which, of course, is evidence of no absence whatsoever. The prosecution in asserting that the entry was being offered only to show absence without leave failed to appreciate that once the reliability of the entry "escape" had been destroyed there was nothing left from which the court could infer absence without leave. Assuming, without deciding, that an unimpeached morning report entry reciting from confinement to escape warrants an inference of absence without leave from station as here alleged, nevertheless, since the inference is bottomed upon the fact of escape, if the entry as to the escape is demonstrated to be false or to be of insufficient probative value to establish escape, there remains nothing from which any inference of absence without leave could be drawn.

(212)

It was stipulated (Pros. EX. 5) that accused was apprehended by the sheriff of Clay County, Illinois, 16 December 1945 and delivered to military authorities at Scott Field, Illinois, 20 December 1945. From all that appears from the record of trial, accused may have had authority to be in Clay County, Illinois, on 16 December 1945. In any event, that stipulation does not establish that accused was absent without leave either on 16 December 1945 or at any time prior thereto. Finally, the stipulated testimony of Lieutenant Colonel Hunn that accused did not have authority to be absent from his station on 15 October 1945, and that he did not authorize accused to be set at liberty on that date is not proof that accused was in fact absent. Accordingly, the evidence in this record of trial is legally insufficient to establish that accused absented himself as alleged.

5. For the reasons indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Tappy , Judge Advocate

-----  
Stern , Judge Advocate

-----  
Trevethan , Judge Advocate  
-----

SPJGH - CM 302949

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

12 April 1946

TO: Commanding General, ASF, HQ, Seventh Service Command, Omaha, Nebraska.

1. In the case of General Prisoner Fred C. Hamm, attention is invited to the foregoing holding of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. I concur in the holding of the Board of Review and, for the reasons therein stated, recommend that the findings and sentence be vacated.

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

(CM 302949)

/s/ Thomas H. Green

1 Incl

Record of trial

THOMAS H. GREEN

Major General

The Judge Advocate General



WAR DEPARTMENT  
In the Office of The Judge Advocate General  
Washington, D. C.

JAGH - CM 302962

17 JUL 1946

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

HEADQUARTERS XXII CORPS )

v. )

Trial by G.C.M., convened at  
Pilsen, Czechoslovakia, 14

Captain ROBERT L. DEEG,  
JR, (O-1015629), Cavalry )

September 1945. Dismissal,  
total forfeitures and confine-  
ment at hard labor for five  
(5) years

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, HOTTENSTEIN and STERN, Judge Advocates  
-----

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Captain Robert L. Deeg, Jr., Cavalry, Headquarters XXII Corps, did, near Petschau, Czechoslovakia, on or about 29 July 1945, wrongfully agree with Gertrude Steinhauer, a German national to transport sixty-five hundred (6500) Reichmarks, of an exchange value of about six hundred and fifty dollars (\$650.00), property of Gertrude Steinhauer, across the Czechoslovakian border to Isareck, Germany.

Specification 4: In that Captain Robert L. Deeg, Jr., Cavalry, Headquarters XXII Corps, did, near Petschau, Czechoslovakia, on or about 29 July 1945, wrongfully agree to transport a package containing about thirty-two thousand (32,000) Reichmarks, of an exchange value of about thirty-two hundred dollars (\$3200.00), property of Princess Anna of Hohenlohe, Duke Henry von Beaufort, Prince Charles of Hohenlohe, and Ilse Olboeter, all German nationals, across the Czechoslovakian border to Starnberg, Germany.

Specification 5: (Finding of guilty disapproved by reviewing authority).

Specification 6: In that Captain Robert L. Deeg, Jr., Cavalry, Headquarters XXII Corps, did, at Pilsen, Czechoslovakia, on or about 20 August 1945, wrongfully order Staff Sergeant George J. Sudz, to destroy a package which the said Captain Robert L. Deeg, Jr., well knew was being sought by Major Peter D. Hanssen, IGD, Headquarters XXII Corps, in connection with an official investigation.

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

Specification 1: In that Captain Robert L. Deeg, Jr., Cavalry, Headquarters XXII Corps, did, at Pilsen, Czechoslovakia, on or about 30 July 1945, feloniously embezzle by fraudulently converting to his own use about thirty-two thousand (32,000) Reichmarks, of an exchange value of about thirty-two hundred dollars (\$3200.00), the property of Princess Anna of Hohenlohe, Duke Henry von Beaufort, Prince Charles of Hohenlohe, and Ilse Olboeter, entrusted into his care and control by the owners thereof, for delivery to Starnberg, Germany.

Specification 2: In that Captain Robert L. Deeg, Jr., Cavalry, Headquarters XXII Corps, did, on or about 30 July 1945, at Pilsen, Czechoslovakia, feloniously embezzle by fraudulently converting to his own use about sixty-five hundred (6500) Reichmarks, of an exchange value of about six hundred and fifty dollars (\$650.00), the property of Gertrude Steinhauer, entrusted into his care and control by the said Gertrude Steinhauer, for delivery to Isarech, Germany.

CHARGE III: Violation of the 95th Article of War. (Finding of guilty disapproved by the reviewing authority).

Specification: (Finding of guilty disapproved by the reviewing authority).

The accused pleaded not-guilty to all Specifications and Charges. He was found not guilty of Specifications 1 and 2 of Charge I, and found guilty of the remaining Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for five (5) years. The reviewing authority disapproved the findings of guilty of Specification 5 of Charge I and Charge III and its Specification, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In view of the court's findings of not guilty of Specifications 1 and 2 of Charge I and the disapproval by the reviewing authority of the findings of guilty of Specification 5 of Charge I and Charge III and the Specification thereunder, only the evidence pertaining to Charge I and Specifications 3, 4 and 6 thereunder and Charge II and its Specifications will hereinafter be summarized.

The accused was a member of the G-4 Section, Headquarters XXII Corps, in charge of captured enemy war material, when the section arrived at Pilsen, Czechoslovakia on or about 16 June 1945. He was granted considerable freedom to move about the Corps Area in performance of this duty, and was assigned a car which he drove himself (R 131, 132). On 27 June 1945, Headquarters XXII Corps published and distributed a letter, the pertinent parts of which are as follows:

HEADQUARTERS XXII CORPS  
APO 250  
U S ARMY

27 June 1945

SUBJECT: Czech Clearance of Germans Prior to Repatriation

TO : (Units under the jurisdiction of XXII Corps)

1. The following information is a compilation from current decrees published by the Central National Committee of Prague to the District National Committee in Bohemia.

2. There have been established ten (10) teams of Czech Customs Officials, who will be used to give clearance to all Germans leaving the country.

\*\*\*\*\*

5. Customs officials are authorized to confiscate the following property of German nationals:

a. All currencies other than Reichmarks, All Reichmarks over the amount of 200 RM for each adult and 50 RM for each minor.

b. All precious metals, stones, chinaware, silver coins and glass. Wedding rings are specifically exempted for confiscation.

- c. Expensive carpets, furs and paintings.
- d. Reserve food stocks.
- e. All Textiles or bolts of cloth not made into clothing.
- f. Excess clothes not for immediate needs.
- g. Livestock and poultry.
- h. Valuable documents.

6. Civil Affairs officers will inform the customs officials of the location of those Germans next scheduled for repatriation so that ample time will be available for the proper clearance.

7. Division commanders are responsible that Czech Customs Teams are observed to assure only authorized confiscation.

BY COMMAND OF MAJOR GENERAL HARMON:

s/ R. H. Shell  
R. H. SHELL  
Lt Col AGD  
Adjutant General"

DISTRIBUTION  
"X"

A copy of the foregoing bearing the initials of the accused, indicating that same had been read by him was introduced into evidence (R 7, 8, 9, Pros Ex 4).

On 4 July 1945 the accused met Maria Louise Steinhauer, a German national, in the Castle of Duke Henry Von Beaufort in Petschau, Czechoslovakia (R 21-22). Thereafter, during th month of July the accused met Maria several times (R 22-23). On 29 July 1945, accompanied by Lieutenant John D. Henson, Military Police Platoon, XXII Corps, the accused visited the castle (R 25, 92, 100). Prior to this date the accused had stated to Maria that his business frequently took him to Bavaria, and on this visit Maria, acting as interpreter for her mother, Gertrude Steinhauer, also a German national, asked the accused to take some money to Maria's sister, the Countess of Beaufort, who lived in Isareck, Bavaria, Germany. The accused consented and promised to take the money "as soon as he could possible do it" (R 26, 27, 38, 39). No date for the delivery of the money at its destination was specified (R 32). That day Gertrude Steinhauer delivered to the accused an envelope containing 6,500 reichmarks of which she was the owner. The accused took the envelope and put it in his pocket (R 27, 28, 34, 35, 38).

On 2 August the accused told Maria Steinhauer that he had been unable to take the money to her sister yet, but he would try "next time". She saw him again on 4 August, at which time he said nothing about his trip to Bavaria. She did not see him again thereafter (R 30). The Countess of Beaufort, for whom the money was destined, did not receive the money (R 43-44). Neither Maria nor her mother ever demanded the return of the money nor did Maria's mother ever get in touch with the accused and ask him for an accounting (R 33, 43).

On 26 July, during a visit to Duke Henry Von Beaufort's Castle, the accused met Princess Anna of Hohenlohe, an 83 year old German national, and told her that he would be going to Munich in a few days and volunteered to take jewels or "anything of value" to her children in Bavaria or Austria (R 44-46). The accused advised the Princess that it would be better for her to send her jewels or valuables to Bavaria or "somewhere else" (R 47). Princess Anna told the accused that she would discuss the matter with her son and give him an answer the next time he came (R 47). She and her son decided against sending jewelry but instead would send some money to her children in Bavaria. When the accused visited the castle on 29 July, Princess Anna gave him a parcel that Frau Ilse Olbeoter, secretary of Prince Charles of Hohenlohe, had prepared (R 47, 48, 57, 70). In this package, an old tin cake box, was placed 10,000 reichmarks contributed by Prince Charles of Hohenlohe, 10,000 reichmarks contributed by Princess Anna, 10,000 reichmarks contributed by the Duke of Beaufort, 2,000 reichmarks, a postal savings book and a half dozen silver teaspoons contributed by Frau Olbeoter, all of whom were German nationals (R 48, 56, 66, 70, 71, 74). The money was placed in separate envelopes, bearing the names of the contributors, except in the case of Frau Olbeoter, her portion was in a separate little package (R 71, 74). The accused was not told what was in the package and did not know at the castle that the package contained reichmarks (R 48, 51). The accused did not offer to take reichmarks into Bavaria for Princess Anna (R 53), for Prince Charles (R 58) or for Frau Olbeoter (R 77). Frau Olbeoter put the spoons in the package to make it heavier because she thought the accused "shouldn't know" what the package contained (R 76). The accused gave instructions that the address should not be placed on the package (R 95). Princess Anna wrote the address of her nephew, Count Almeida, on a separate sheet of paper, gave it to the accused, and told him to take it (the package) to the Count in Starnberg, Germany, near Munich (R 49, 51, 96).

The accused put the piece of paper in his pocket and at about 2100 left the castle, carrying the package under his arm (R 96, 163, 171-172). No time for the delivery of the package was agreed upon. The accused stated that he would be going to Munich in a few days and would deliver the package the next time he went there (R 49, 52, 58, 95).

This same evening, when on their way back from the castle, the accused told Lieutenant Henson that there were "three or four hundred thousand dollars" or "three or four thousand dollars worth of jewels in that box". In reply to Lieutenant Henson's inquiry whether he was going

to take the jewels to "this person in Bavaria", the accused replied, "I would be a fool to take the thing down there, wouldn't I?" (R 97). The day before the investigation in this case (19 August) the accused "mentioned" to Lieutenant Henson "something about making lots of money in this country", that "if he could just get back into Germany he could make quite a bit", that he could take reichmarks and buy merchandise in Germany with them (R 99, 105).

Captain Frank, Headquarters, XII Corps, who went to the castle with the accused on 22 July, was told by the accused 10 or 12 days later that he had a deal pending for someone in the Duke's family whereby he was to receive a quantity of jewels in a casket, valued at about \$200,000, which he was supposed to take and return at such time as the Duke's family was removed to Bavaria (R 85, 86).

After 29 July the accused returned to the castle and stated that he "could not deliver the parcel", because he had no time to go to Starnberg but that soon he would probably go to Munich again and would deliver the package the next time (R 49). He returned again to the castle and had a bad cold, said that he was not feeling well and was not able to go to Munich "now" but would be able to go in a short time (R 50, 59). The accused never delivered the "32,500" reichmarks to Count Charles Almeida (R 79). Neither Princess Anna, Prince Charles nor the Duke of Beaufort demanded their money of the accused or ask him for an accounting. Questioned whether he considered that the accused had breached his trust to him, the Duke of Beaufort replied, "I don't believe so" (R 52, 59, 68).

On 20 August 1945, Major Peter D. Hanssen, Assistant Inspector General of the XXII Corps, was ordered to investigate certain "allegations" against the accused. Pursuant to these instructions, the major, accompanied by two non-commissioned officers, went to accused's office that day at about 1015. There the major informed the accused that he had been directed to make an investigation, that he was looking for a sizeable sum of reichmarks, and that it would be necessary to search the accused and his personal possessions. The accused gave the major a key ring containing several keys and one separate key and told him these were the keys to his wall and foot lockers (R 106-109, 118). The accused asked the major to wait a few minutes until he finished some business. A few minutes later the accused came out and asked for permission to go to the latrine. After returning from the latrine the accused went to his office from which he emerged about twenty minutes later and stated that he was ready to go (R 108). However, before he left his office the accused showed Staff Sergeant George J. Sudz, assigned to his section, a note written by the accused, containing instructions (considered as a request, by Sudz (R 129)) for him to remove from the accused's footlocker a package wrapped in a newspaper and to put it in the furnace. The accused told Sudz that on the package was a slip of paper which said it was private property and personal papers. He gave Sudz the key to his footlocker (R 122, 129), where

Sudz found the package wrapped in a newspaper and attached thereto a type-written sheet stating that it was private property and that in case it was lost or anything happened to the accused it was to be forwarded to his wife's address (R 123). Sudz took the package to the officer's billet and placed it in the furnace. The furnace was full of coal covering some dying embers (R 124).

In the meantime, while on the way to his quarters, the accused told the major that he had forgotten to make a telephone call and asked and secured permission to return to his office (R 108). While Sudz was still in the accused's quarters, which were located in the military caserne, Pilsen, the accused called him on the phone and asked whether he had placed the package in the furnace. When Sudz replied that he had, the accused told him to leave the building immediately and to get into another building where he would not be seen (R 125, 136). After rejoining the major and upon arrival at his quarters, the accused told him that there was a package of reichmarks in his ETO jacket. There the major found a package of 1,000 reichmarks in 50 reichmark denominations (R 110, 117). The search was completed at 1215 and the major told the accused to report to the major's office at 1330. After lunch the accused told Sudz that the package had not been burned and later that day he contacted Sudz and wrote a note explaining that the package could be found in a "scuttle or shuttle hole" in the latrine. He asked Sudz to destroy the package and its contents and offered to pay him 100 marks for doing same. Sudz, who in the meantime had learned that the accused was involved in some trouble, ignored the instructions and reported the matter to Captain D'Esposito and then, at about 1500 or 1600 reported it to Colonel William R. McMaster, G-4, XXII Corps. The colonel had the accused report to him; turned him over to Major Hanssen and "later that evening" placed him in arrest (R 126, 127, 132-133). At 1630 that afternoon another search of the accused's quarters was made by the major, who was then accompanied by the accused and Sudz. Nothing was found during this search and Major Hanssen left. At 1830 the major and Sudz returned to make a further search and during this search found a package in the attic over the latrine. This package, identified as Prosecution's Exhibit 11, was the same package which Sudz had removed from the accused's footlocker that morning (R 109, 111-112, 116, 124, 127-128). The package was in the same condition it was in that morning except that the slip of paper stating it was private property was missing (R 128). The package was wrapped in a newspaper and sealed with scotch tape. Upon opening the package it was found to contain a tin box wrapped in protective paper and in this box were the following: a German letter with the signature of Ilse Olbeoter, several pieces of paper, an envelope marked "Ilse Olbeoter", which contained a postal savings book, a sealed envelope marked "Carl Hohenlohe", containing 10,000 reichmarks, a sealed envelope marked "Beaufort", containing 9,000 reichmarks and one small medal, and unsealed envelope with a string around it marked "10,000 reichmarks A. S. Hohenlohe", containing 6,500 reichmarks, a sealed package containing 2,000 reichmarks marked "Ilse Olbeoter" and a small package containing six silver spoons (R 113, 114, 144-145). While making the search on 20 August the major found also, a

piece of paper in the accused's footlocker, bearing the following typewritten address: "Count Charles Almeida, Villa Almeida, Starnberg on the Lake/Bavaria (near Munich)" (R 119-120, Pros Ex 17). The following day, after the accused had made a statement, Major Hanssen found an envelope containing 6,500 reichmarks between the newspaper, Stars and Stripes, dated 5 August 1945 (Pros Ex 11), that served as the outer wrapping for the package and the brown wrapping paper that encased the box. In the same place he also found 4,000 reichmarks in bundles.

The envelope containing 6,500 reichmarks, found in the package by Major Hanssen on 21 August (Pros Ex 8), was identified by Frau and Maria Steinhauer as the one turned over to the accused on 29 July, after he had agreed to take it to the Countess of Beaufort, in Germany (R 28, 40). The tin box (Pros Ex 10) and the several envelopes and small package therein, (Pros Ex 12, 13, 14, 15) found by Major Hanssen during his investigation on 20 August, were identified by Frau Olbecker as those items contained in the package prepared by her and intrusted to the accused on 29 July (R 73-74).

On the day the investigation started the accused told Lieutenant Henson to state, if called in the investigation, that he heard the accused refuse to deliver a package, that he (the accused) said, "I can't do that" (R 100). Also on the morning of this day he passed a note and a key to Captain Frank, requesting him to go to accused's room, remove a package from his footlocker, and burn it. The captain returned the key to the accused, stating that he was expecting a phone call from G-3 and could not leave his office (R 136).

The accused made several pre-trial statements which were introduced into evidence. On 20 August, in his initial statement, he disclaimed any knowledge of offering to transport jewels or money for any person in Czechoslovakia, to Germany, and stated that the only reichmarks he ever had in his possession was one bundle containing a quantity but which he had never counted; that this bundle remained in his pocket until 20 August, at which time it was taken by the investigating officer; that this money was a souvenir which the duke had given him for his (the accused's) children. He denied that he received a tin box, although he did state that he was offered one by Princess Anna for safekeeping (R 144, Pages 4-5, Pros Ex 18). On the evening of 20 August, after the package (R 116, Pros Ex 11) had been discovered, the accused was questioned further and then stated that on the way back from the castle he discovered a package in his car. He concluded that it had been "planted" on him and that he immediately, without first opening it, wrapped it in a newspaper with a view to discarding it. He placed a note on it to the effect that it was found in his car and that he did not know where it came from. Two or three days later "after thinking over very hard" it occurred to him "that there may be something fishy" and, to avoid becoming involved in the illegal transporting of "items of value" from "another country", he "dashed" the box into the attic. On being asked whether he cut the identification data from the package at that time, the accused replied, "no at that time, I did not. My first reaction was to destroy it by burning. I decided that it was better thought for

retrieving it from the fire, cut the identification therefrom so that if it were ever found, I would not be involved with any illegal transactions" (R 144, Pros Ex 20). On 21 and 22 August, the accused admitted that he knew the package contained an envelope that had money in it. This he learned when an envelope that was on top of the package fell to the floor and came open. At that time some German reichmarks fell out. He resealed the envelope in great haste but discovered that he had not replaced the marks that had fallen out. He tried to burn the package and then removed it from the flames, cut the identification slips from it and threw the package in the attic. After that he gave the matter no further thought (R 144, Pros Ex 21, 24). He also admitted that during a visit to the castle, the princess asked him to take some jewels to Count Almeida. He told her that he could not do that since if he were caught doing such a thing he "would be strung up by the neck". The princess had the count's name typed for the accused and suggested that he might see the "many fine things" the count had in his castle near Munich. The princess also asked him to inquire of the count whether he had any news of her children. According to accused's statement his reply was: "I told her that were I lucky enough to visit Count Almeida's castle I would be happy to ask. At the same time I had no intentions of carrying any message or even visiting this Count Almeida, but replied in that manner to be courteous" (Pros Ex 24, Pages 4-5). The accused admitted that he instructed or asked Sergeant Sudz to return to the building and make sure that the papers were destroyed, and if any were not, to flush them down the "scuttle" (R 144, Pros Ex 19). In a subsequent statement, dated 22 August, the accused admitted that when the surprised inspection was "pulled" on him he had Sudz go to his quarters and remove from his footlocker a package of private letters and correspondence, the contents of which he did not desire to be known to anyone during his lifetime; that these letters and the correspondence were bound in a newspaper and had a certificate on the outside to the effect that they were personal letters and correspondence and that in the event of his death and under no other circumstances they were to be mailed to his wife. He also stated that when he returned to the office he called Sudz and asked him to return to the building and make sure that the letters were completely destroyed (R 144, Page 6, Pros Ex 24).

The rate of exchange of the reichmark as fixed by the United States Army was ten to the dollar (R 147).

4. The defense counsel announced that the accused had been advised not to testify (R 166). The law member then questioned the accused whether he understood his rights as a witness and whether he desired to remain silent. The accused answered both questions in the affirmative (R 167).

In the accused's behalf Dr. Andrew Stein, a Czechoslovakian lawyer of Pilsen (R 151), testified that he was familiar with the customs regulations of Czechoslovakia and that they contained no prohibition against the removal of German marks out the country (R 152). German marks are not legal tender in Czechoslovakia and the exportation of German Empire marks is allowed without any permit of the Minister of Finance of Czechoslovakia and without regard

to any amount of money (R 153). Documents dated 18 June 1945 and 18 August 1945, purporting to set forth directives from the Ministry of Finance of Czechoslovakia, which state that German marks may be exported in unlimited quantities, were admitted in evidence as Defense Exhibit B (R 154). A document of the Czech Ministry of Information dated 8 September 1945 which purported to say that all Germans leaving the country could take everything they could carry or send was received in evidence as Defense Exhibit G (R 163). Lieutenant Colonel Royal S. Copeland, Assistant G-5 of the XXII Corps, testified that Prosecution Exhibit 4, issued by Headquarters, XXII Corps, was based on an incorrect interpretation of Czech laws and had not been rescinded (R 164-166).

About three weeks prior to the date of trial (14 September 1945) Maria Louise Steinhauer went to Bavaria and at that time was not asked whether she had any marks, Maria did not know of any law that prohibited the taking of reichmarks into Bavaria. There were "just rumors about it" (R 32, 36).

Colonel McMaster, G-4, XXII Corps, while testifying as a witness for the prosecution, stated that prior to 4 August the accused, as enemy war material officer, was given plenty of latitude in traveling around the Corps Area, but after that date the accused was required to remain in the office and if he made trips thereafter he would not have been on business for the G-4 Section (R 131-134).

Lieutenant Colonel Joseph S. Grubb, Provost Marshal XXII Corps, testified that he knew the accused since March 1944 and considered him a highly efficient officer whose character was very good (R 155, 158, 159). Colonel Copeland testified that he knew the accused and had always found him open and above-board in his dealings (R 164). A citation of the accused for the Bronze Star Medal was introduced in evidence as Defense Exhibit H (R 167).

5. (Specification 3, Charge I - Wrongful agreement to transport 6500 Reichmarks across the Czechoslovakian border). It was clearly established by the evidence that on the date and place alleged the accused undertook to transport from Czechoslovakia to Germany the sum of 6,500 reichmarks. The question is whether this conduct was, under the proven circumstances wrongful. It is apparent that the theory of the prosecution is that the accused's conduct was enjoined by the writing published by the XXII Corps, identified and admitted in evidence as Prosecution Exhibit 4, that as such it is disobedience of a standing order and, consequently, is a "disorder" or "neglect" within the purview of Article of War 96 (MCM, 1928, par 152a). An examination of Prosecution Exhibit 4 reveals that it is an attempt to set forth the customs regulations of Czechoslovakia and that it specifically states that under the Czechoslovakian laws customs officials are authorized to confiscate from German nations entering Germany all reichmarks over the amount of 200 for each adult and 50 for each minor. The writing of the XXII Corps prohibits nothing in itself and merely purports to put the members of the command on notice as to what the customs regulations of Czechoslovakia are. The introductory portion of the writing recites, "The

following information is a compilation from current decrees published by the Central National Committee of Prague to the District National Committee in Bohemia". The only directive contained in the letter appear in paragraphs 6 and 7 thereof.

"6. Civil Affairs officers will inform the customs officials of the location of those Germans next scheduled for repatriation so that ample time will be available for the proper clearance.

7. Division commanders are responsible that Czech Customs Teams are observed to assure only authorized confiscation."

Under this construction of Prosecution Exhibit 4 the finding of guilty cannot be predicated upon the violation of anything contained in that Exhibit since, as indicated, the Exhibit does not by its terms enjoin the transportation of any currency across the Czechoslovakian border. Although the theory on which this Specification rests is suggested by the type of proof that was offered, it did not specifically allege a violation of a Corps order as the basis of the Charge against the accused and is, therefore, not limited in its proof by that writing. The Specification merely alleges that the accused did "wrongfully agree with Gertrude Steinhauer \* \* \* to transport" the reichmarks across the Czechoslovakian border and into Germany. Although conceivably uncertain and subject to a plea in abatement (MCM, 1928, par 66), the Specification states an offense (Bull JAG, Sep 1944, Sec 428 (8)) and, if the conduct of the accused was wrongful for any reason, the finding of guilty may be sustained. Since the evidence does not establish an offense in violation of standing orders, the only remaining alternative on which the accused's guilt might be predicated is that his agreement with Gertrude Steinhauer, a German national, was an agreement aiming to circumvent the laws of Czechoslovakia and, as such, is a "disorder, \* \* \*, or conduct of a nature to bring discredit upon the military service" (MCM, 1928, par 152c). Even if it were conceded that this type of violation of the law of a foreign state is an offense of which the military courts should take cognizance, the finding of guilty cannot be sustained in this case since all of the competent evidence on the customs regulations of Czechoslovakia, in force at the time of the alleged offense, indicates that there was no limitation on the quantity of German reichmarks that might be transported from Czechoslovakia into Germany, but rather encouraged, the removal of German reichmarks from Czechoslovakia. This was corroborated by prosecution evidence that when Maria Steinhauer went to Bavaria she was not asked whether she had any marks. Since the transportation of German reichmarks across the Czechoslovakian border was not illegal, an agreement to transport German currency could not be illegal and therefore, the finding of guilty of this alleged offense is not sustained by the evidence.

(Specification 4 of Charge I - Wrongful agreement to transport 32,000 Reichmarks across the Czechoslovakian border). In view of the above discussion, the finding of guilty of this Specification is also not sustained by the evidence.

(Specification 6 of Charge I - Wrongfully ordering a sergeant to destroy a package sought in an official investigation). By the terms of this Specification the accused is charged with wrongfully ordering Staff Sergeant George J. Sudz to destroy a package that the accused knew was sought in an official investigation. The evidence presented, however, tends to show that the accused merely requested Sudz to destroy the package. It was so construed by Sudz. A reasonable construction of the Specification is that the accused is charged with having procured Sudz to attempt to destroy the package that he knew was sought in the official investigation and it is immaterial whether the accused employed an order or request to achieve this end. The variance might have been fatal had the gravamen of the offense been the wrongful order to perform an ordinary personal service for the accused and had the proof been that he merely requested the sergeant to do it. However, the obvious theory of the wrongful act here charged in that the accused used the services of an enlisted man to interfere with the orderly administration of military justice. In respect to this offense the distinction between an order and a request can be of no conceivable importance.

It was established beyond a reasonable doubt that on 20 August 1945, after the investigating officer told the accused that he was making a search for a sizeable quantity of reichmarks, the accused requested Sergeant Sudz to destroy the package that contained the reichmarks. The accused admitted in his pre-trial statement that he made a request of Sudz when the surprise inspection was "pulled" on him but insisted that the package which he had in mind when he made the request consisted of private correspondence intended for delivery to his wife in the event of his death. The court was warranted in rejecting the accused's explanation. The accused failed to account for his sudden interest in destroying private correspondence that had no bearing on the matter being investigated. The description that the accused gave Sudz led the sergeant directly to the package that was sought in the investigation and, in view of the effort of the accused to conceal his possession of the money, there can be no doubt that the package Sudz was requested to destroy is the package that the accused knew contained the reichmarks.

Had accused himself destroyed the package, which was not legally his property, and especially after having been informed that an official investigation was in progress of a nature likely to involve the package, his act would have been wrongful. It has been previously held that an attempt on the part of an accused to impede the progress of an investigation into his activities was wrongful and obviously prejudicial to good order and military discipline, in violation of Article of War 96. (CM 198256, Huber, 3 BR 216; CM 276298, McNeil, 48 BR 301-302).

(Specification 1 of Charge II - Embezzlement of 32,000 Reichmarks). "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come" (MCM, 1928, par 149h). The constituent elements of this offense are "(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted

or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent" (*ibid*). Although denied by the accused in his pre-trial statements, there is abundant evidence that on 29 July 1945 the accused volunteered to take jewels or "anything of value" to Princess Anna's children in Bavaria and on that day he accepted a package which he agreed to deliver to Count Almeida the next time he would go to Munich. There was prosecution evidence that the accused did not know what the parcel contained and that spoons were placed in the package to make it heavier and thus to keep the accused from knowing the contents of the package. When the accused left with the package he attached no conditions to its ultimate delivery to Count Almeida except that relating to the time of delivery. In accepting the parcel the accused undertook to deliver it to the Count irrespective of its contents. In one of his pre-trial statements the accused admitted that he knew the parcel contained reichmarks, having made this discovery when one of the envelopes fell out of the package. In the light of the evidence as to how the package was made up, it is reasonable to conclude that the accused discovered at that time that the package consisted almost exclusively of money and the money belonged to the people in the castle. The accused then had the option to repudiate the bailment by returning the money to the owners during one of his several visits to the castle subsequent to 29 July. His failure to return the funds was a ratification of the bailment with the attending result that he remained chargeable as trustee with the duty to make the delivery in accordance with his promise or to return the funds to the owners. The accused's contention that the package was "planted" on him is entitled to no credence. This is flatly contradicted not only by the witnesses whose money was involved but by Lieutenant Henson who testified that he heard the accused at the castle discuss the details of taking a package into Bavaria.

"Any exercise of dominion or control by a bailee over property, inconsistent with the right of the owner, or with the nature and purpose of the bailment, is evidence of a conversion, if done with intent to defraud" (State v. Sienkiewicz, 4 Penn. (20 Del) 9, 55 Atl. 346, cited in note 10 Underhill's Criminal Evidence, Sec 491). The fraudulent conversion is amply proved by the evidence (a) that the accused failed to deliver the package although he admitted that he was in Munich after he received it; (b) that he asserted ownership in the contents of the package, as reflected in the instructions attached to the package; (c) that he denied that people who intrusted him with the package were the owners of it; (d) that he attempted to destroy the package; (e) that after he acquired the package he stated that he had a large quantity of reichmarks on which he could make "quite a bit" if he could get over into Germany; and (f) that when the investigation was made the accused was found to be in the possession of a sum that approximated the aggregate number of reichmarks that he secured at the castle on the evening of 29 July. The evidence presented leaves no room for doubt but that the accused intended to deprive the owners permanently of their property. The accused is not aided by the evidence that after 4 August his duties were confined to his office and that he was thereafter not able to go to Bavaria. The accused did not rely upon this as a defense and his asser-

tion of ownership in the package together with his denial that he volunteered to take, and did receive, the package in trust is inconsistent with this defense.

Several problems of proof merit some consideration. It is alleged that the 32,000 reichmarks were the property of the four persons named in the specification and the proof is that the persons so named did not have a common interest in the fund but rather that they individually owned distinct sums in separately wrapped parcels that were included in the package. Although it would have been better pleading to have separated the sums and identified the several sums with the individual owners thereof (Wharton's Criminal Law, Sec 1291), there was no fatal variance in proof. The gist of embezzlement is the breach of trust. The transaction having been clearly stated, the accused could not have been misled to his prejudice.

There was no proof that at any time after the accused received the package any of the contributors made a demand upon him for the return of the funds or for an accounting. "As a general rule, if a criminal intent accompanies a misappropriation of funds or property held by an agent or fiduciary, the crime or embezzlement is complete and the owner of embezzled property need not make a demand for its return, in the absence of a statute to the contrary. It is only when other evidence to prove a fraudulent conversion is not available that the proof of a demand is necessary" (18 Am. Jur., Sec 23, p 583). In this case the accused's unequivocal conversion of the funds rendered the demand unnecessary.

(Specification 2 of Charge II - Embezzlement of 6,500 Reichmarks). The evidence showed that on 29 July 1945 the accused received from Gertrude Steinhauer an envelope containing 6,500 reichmarks which the accused undertook to deliver to her daughter in Isareck, Germany "as soon as he possibly could do it". This transaction clearly established a fiduciary relationship between the accused and Frau Steinhauer. Therefore, when the accused asserted ownership in that fund by attaching the slip stating that the package, including the 6,500 reichmarks, was his personal property and when he ordered the package that contained these marks to be destroyed, he committed himself to conduct that was inconsistent with his trust, and consequently, was guilty of fraudulent conversion and embezzlement. It is significant that although the accused made elaborate statements about the 32,000 reichmarks that he secured from the other residents of the castle, he remained silent as to these 6,500 reichmarks, thus leaving the inference of guilt as to them unchallenged. The legal effect of the failure on the part of Frau Steinhauer to make a demand upon the accused for the return of the funds or for an accounting is treated above.

6. The accused is about 30 years of age, married and has two small children, a son and a daughter. The records of the War Department show that he was graduated from high school in 1935 and enlisted in the Regular Army a few months thereafter. From the date of his enlistment, 26 September 1935, until 15 May 1942, he was continuously in the service and advanced

through all the enlisted grades. On the latter date he was temporarily appointed to warrant officer (junior grade), Army of the United States. On 3 November 1942 the accused was enrolled at the Armored Force Officer Candidate School, Fort Knox, Kentucky, and upon graduation therefrom, 30 January 1943, was appointed temporary second lieutenant, Cavalry, Army of the United States. On 20 April 1944, he was promoted to the temporary grade of first lieutenant and on 1 March 1945 was promoted to the temporary grade of captain. For meritorious service in connection with military operations from 30 March 1945 to 8 May 1945, he was awarded the Bronze Star Medal.

7. Neither the court nor the prosecution recommended clemency in this case, however, consideration has been given to letters attached to the record from The Honorable Homer E. Capehart, United States Senate, from The Honorable Raymond E. Willis, United States Senate, from William F. McFeely, Attorney, Richmond, Indiana, from the several defense counsels to the reviewing authorities, from Colonel C. E. Morrison, a former Commanding Officer of the accused, from Dr. Ing Joset Kalenda, Chief of the Cabinet of Transportation, Czechoslovak Republic, all recommending clemency on behalf of the accused.

8. The court was legally constituted and had jurisdiction of the 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 insufficient to support the findings of guilty of Specifications 3 and 4, Charge I and legally sufficient to support all other findings of guilty, as approved by the reviewing authority, and the sentence and to warrant the confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of both the 93rd and the 96th Articles of War.

Francis M. Saffy, Judge Advocate  
A. J. Stein, Judge Advocate  
Joseph J. Stern, Judge Advocate

JAGH - GM 302962

1st Ind

WD, JAGO, Washington 25, D. C.

048

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Robert L. Deeg, Jr., (O-1015629), Cavalry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully agreeing to transport German reichmarks from Czechoslovakia into Germany for German nationals (Chg I, Specs 3 & 4), wrongfully and without authority crossing the American Control Line near Petschau, Czechoslovakia (Chg I, Spec 5), and wrongfully ordering a staff sergeant to destroy a package which was being sought in an official investigation (Chg I, Spec 6), all in violation of the 96th Article of War; embezzlement of 38,500 reichmarks (\$3,850) (Chg II, Specs 1 & 2), in violation of the 93rd Article of War and wrongfully representing that as a commissioned officer of the United States Army he could circumvent the custom regulations of Czechoslovakia and could transport personal property of German nationals into Germany (Chg III, and its Spec), in violation of the 95th Article of War. No evidence was introduced of any previous convictions. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five (5) years. The reviewing authority disapproved the findings of guilty of Specification 5, Charge I, alleging wrongfully crossing the American Control Line, and of Charge II and its Specification alleging violation of the 95th Article of War, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 3 and 4 of Charge I (wrongfully agreeing to transport reichmarks, from Czechoslovakia into Germany, for German nationals), and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused was a member of the G-4 Section, XII Corps, in charge of captured enemy material when the section arrived at Pilsen, Czechoslovakia on about 16 June 1945, which position he held until 4 August 1945. He was granted considerable freedom to move about the corpsarea in the performance of his duties and was assigned a car which he drove himself. On 27 June 1945, Headquarters XXII Corps published and distributed a letter purporting to set forth decrees published by the Czechoslovakian government relative to the clearance of German nationals prior to repatriation into Germany. Paragraph 5 of this letter reads as follows:

"5. Customs officials are authorized to confiscate the following property of German nationals:

a. All currencies other than Reichmarks. All Reichmarks over the amount of 200 RM for each adult and 50 RM for each minor."

It was conclusively proved at the trial that the above was not proper interpretation of the Czechoslovakian decree relative to the transporting of reichmarks into Germany, that not only did the decree place no limit as to the number of reichmarks that could be taken from Czechoslovakia into Germany but on the other hand encouraged the removal of reichmarks from Czechoslovakia, where they were no longer legal tender.

On 4 July 1945 the accused went to a castle in Petschau, Czechoslovakia, beyond the corps boundary, where there lived several German nationals. He became acquainted with these German people and, thereafter, during the months of July and August visited the castle several times. He became interested in certain jewels, chinaware and "things of value" owned by the people in the castle. The accused informed them that his business frequently required him to go to Bavaria and he volunteered to take jewels or "anything of value" to their relatives living there. He advised the Princess of the castle that it would be better for her to send her jewels or valuables to Bavaria or "somewhere else". Subsequently, while visiting there on the evening on 29 July 1945, the accused received from these people an envelope containing 6,500 reichmarks (\$650) and a package containing some 32,000 reichmarks (\$3,200), a postal savings book and several silver teaspoons which he agreed to take to their relatives. The accused did not know the contents of the package when he left the castle. Lieutenant Henson had accompanied the accused to the castle on the occasion and while on their way home, he stated to Henson that there were "three or four hundred thousand dollars" or "three or four thousand dollars worth of jewelry in that box". In reply to Lieutenant Henson's inquiry whether he was going to take the jewels to "this person in Bavaria", the accused replied, "I would be a fool to take the things down there, wouldn't I?"

After 29 July he visited the castle on two occasions, 2 August and 4 August. During the first of these two visits, he stated that he had been in Bavaria but did not have time to deliver the "parcel". On his second visit he had a bad cold and said he was not able to go to Munich "now", but would be able to go in a short time.

Prior to 20 August 1945 the accused opened the package and discovered that it contained reichmarks. He rewrapped it, including therein the envelope with the 6,500 reichmarks, and attached thereto a typewritten sheet stating that it contained private property and that in case it was lost or anything happened to him, it was to be forwarded to his wife's address. He thereupon placed the package in his footlocker. On 19 August the accused "mentioned" to Lieutenant Henson "something about making lots of

money in this country", that "if he could just get back into Germany, he could make quite a bit", and that "he could take reichmarks and buy merchandise in Germany with them".

On the morning of 20 August 1945 Major Henssen of the Corps Inspector General's Office came to the office of the accused and informed him that he was making an investigation involving the accused and a sizeable sum of reichmarks, that it would be necessary for him to search the accused and his personal effects. The accused requested a few minutes to make a telephone call and go to the latrine, which was granted. Before reporting back to Major Henssen, he contacted both Captain Frank and Staff Sergeant Sudz, requesting them to go to his quarters, take the package from his footlocker and destroy it. Captain Frank told accused that he was expecting a call and could not leave his office. Sergeant Sudz, after having been given the key to accused's footlocker, went to accused's quarters, removed the package and placed it in the furnace where there were still some dying embers. Sudz was then called by the accused, and after telling him what he had done with the package, was instructed to leave the building at once and get out of sight. After lunch the accused again contacted Sudz and told him that the package had not burned and that it could be found in a "scuttle or shuttle hole" in the latrine. He asked Sudz to destroy the package and its contents and offered to pay him 100 marks for doing same. Sudz, who in the meantime had learned of the investigation, ignored the instructions and reported the matter to his commanding officer. After several further searches by Major Henssen the package, which had been placed in the furnace by Sergeant Sudz that morning, was found in the attic of the latrine. The typewritten sheet had been removed from the package before it had been placed in the attic through a small trap door in the ceiling of the latrine.

4. Consideration has been given to letters attached to the record from The Honorable Homer E. Capehart, United States Senate, dated 9 February 1946, 29 March 1946, and 3 July 1946; from The Honorable Raymond E. Willis, United States Senate, dated 20 February 1946; from William F. McFeely, Attorney, Richmond, Indiana, dated 7 May 1946; from the several defense counsels to the reviewing authorities, dated 26 September 1945; from Colonel C. E. Morrison, a former Commanding Officer of the accused, dated 5 November 1945; from Dr. Ing Joset Kalenda, Chief of the Cabinet of the Minister of Transportation, Czechoslovak Republic, dated 12 May 1946; all recommending clemency on behalf of the accused.

5. Accused has been in the military service as enlisted man, warrant officer and officer since September 1935. He was awarded the Bronze Star Medal for service in Europe.

6. I recommend that the findings of guilty of Specifications 3 and 4 of Charge I be disapproved, that the sentence be confirmed but that the period of confinement is reduced to three (3) years and that the sentence as thus modified be carried into execution. I also recommend that a United States Disciplinary Barracks be designated as the place of confinement.

7. Inclosed is a form of action designed to carry the foregoing recommendation into effect, should such action meet with your approval.

2 Incls

1 - Record of trial

2 - Form of action



THOMAS H. GREEN

Major General,

The Judge Advocate General

---

( GCMO 254, 8 Aug 1946 ).



WAR DEPARTMENT  
 In the Office of The Judge Advocate General  
 Washington, D. C.

JAGH - CM 302963

3 OCT 1946

UNITED STATES )

CHANOR BASE SECTION

v. )

Trial by G.C.M., convened at  
 Liege, Belgium, 10 and 11 Sep-  
 tember 1945. Dismissal and  
 total forfeiture

First Lieutenant OSCAR M.  
 KIMBROUGH (O-406854), Coast  
 Artillery Corps )

-----  
 OPINION of the BOARD OF REVIEW  
 HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates  
 -----

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

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

CHARGE: Violation of the 80th Article of War.

Specification: In that Major OSCAR L. YOUNG, First Lieutenant OSCAR M. KIMBROUGH, Master Sergeant Millard R. Bowman, First Sergeant William Dalmau and Technician Grade IV Lawrence E. Willis, 563d Antiaircraft Artillery Automatic Weapons Battalion (Mobile), acting jointly and in pursuance of a common intent, did, at Liege, Belgium, on or about 16 July 1945, wrongfully and unlawfully sell and dispose of the following captured property of the United States, namely: one truck, passenger bus, capacity approximately thirty five (35) passengers, diesel-engined, body manufactured by Graff and Griff, six wheels, for the sum of One Hundred and Twenty Thousand (120,000) Belgian Francs, of the equivalent value of about Twenty Eight Hundred Dollars (\$2800), thereby receiving as profit to themselves the sum of Twenty Eight Hundred Dollars (\$2800).

Before entering a plea to the general issue, accused moved to sever on the grounds that his defense was antagonistic to that of Major Young, another accused in the joint trial, and further that he intended to call other ac-

cused as witnesses in his defense. The law member, subject to objection, denied the motion (R 6). Accused then pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeiture, and confinement at hard labor for one year. The reviewing authority on 1 October 1945, approved the sentence. Thereafter on 20 November 1945, the reviewing authority withdrew his previous action, approved the sentence but remitted the confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows the accused was a member of the 563d Antiaircraft Artillery Automatic Weapons Battalion (R 27). Sometime in June 1945 the battalion commander of the 563d Antiaircraft Artillery Automatic Weapons Battalion (Mobile), acquired a bus from a Displaced Persons Camp Number 44, located in Coblenz, Germany (R 133, 147-149, 151). The battalion commander, orally directed a warrant officer of his command to pick the bus up at the Displaced Persons Camp, and on the 17th June 1945 the bus was driven from the Displaced Persons Camp to Wildberg, Germany and then to Liege, Belgium (R 147, 148). It was a camouflaged bus seating some thirty-five persons and was marked on the right side with a German eagle and swastika (R 72). It was the same bus that was in a civilian garage in Liege, Belgium at the time of the trial (R 73). The bus was described by a German prisoner of war, who was familiar with German buses, as having a Diesel powered Mercedes engine, and a seating capacity of thirty-three, manufactured by Graefinstift, Vienna, a type used by the German Government for postal operations and not one used by civilian bus companies (R 36-38). The bus remained in the battalion motor pool in Liege, Belgium from about 17 June to about 16 July 1945 (R 162). In the morning of 16 July 1945 a Sergeant Bowman and a Sergeant Willis placed a tow chain on the bus and were about to tow the bus away when the accused came up and started to talk to them and they unhooked the chain, parked the truck and left the bus there (R 41). At noon of that same day Sergeant Willis remained as CQ in the motor pool and the bus disappeared from the motor pool during the noon hour (R 41). On 16 July 1945 a civilian, one Eugene Vigneron paid 120,000 francs to Sergeant Dalmau for a bus (R 12, 13). At the time of the trial the bus was still in the civilian garage and it was in this garage when the civilian paid the 120,000 francs (R 14). The accused made the following voluntary extra-judicial statement:

"About three days after we moved to Liege, Belgium, WOJG Offstein brought a German bus into the battalion motor pool. I immediately approached Lt. Col. Chambers and Major Young and asked them what disposition I should make of the bus. They told me to try to get a registration number for it. When I found that was impossible Lt. Col. Chambers told me to turn it in to Ordnance here in Liege. The Ordnance in Liege was not authorized to accept the bus. One day soon after, while trying to get more information about an Ordnance Collecting Point, Major Young, Executive Officer, 563d AAA AW Bn came to the

motor pool. The conversation drifted around to how much civilian vehicles were being sold for on the black market. Major Young then said, 'Let's sell the bus', or words to that effect. At the time I thought he was joking. A few minutes later I noticed a civilian man and woman looking the bus over. The woman walked over to Major Young and I and asked if it would be possible to buy the bus. Major Young said it would be possible. The lady then offered us 50,000 francs for the bus and we refused. The man came up and joined the conversation. He offered us 80,000 francs for the bus. Nothing was settled about any sale. The man and woman invited us to their home at a future date and we accepted. \* \* \* we told the civilians we had been offered 100,000 francs for the bus. They told us about losing all their buses to the Germans and now couldn't afford to pay more than 80,000 francs. I made the remark that since they had lost so much I would gladly give them the bus just to get rid of it. \* \* \* The civilian woman came back to the motor pool several times during the next few weeks looking for Major Young or myself. \* \* \* When M/Sgt. Bowman returned from the delivery he told me he would give Tec/4 Willis 5000 francs and I agreed to give Tec/4 Willis 10,000 francs from Major Young and I. Then M/Sgt. Bowman and I went to "D" Battery motor pool and on the way M/Sgt. Bowman gave me 50,000 francs as the officers share. The same evening I gave Major Young 25,000 francs in my quarters \* \* \*" (R 113, 126).

It was stipulated that 120,000 francs as set forth in the Specification are of an equivalent value of about 2800 American dollars (R 113). The accused was identified by one Chislaine Brouwers, a civilian, as being one of the persons she conversed with about the sale of a bus in Liege, Belgium (R 54, 55).

The accused was called as a witness for the prosecution (R 114). Upon objection by defense counsel, the trial judge advocate withdrew the call for Lieutenant Kimbrough. The law member ordered the call for accused stricken from the record (R 115).

4. In behalf of the accused it was shown that an attempt was made to turn the bus into Ordnance, but such attempt was unsuccessful (R 154). As long as the bus was in the motor pool, no work was performed on it (R 162). The battalion commander inquired of Sergeant Bowman as to when he was going to get rid of the bus and was advised that he was going to junk it the next day. When the colonel was told that Ordnance would not accept the bus, he said, "Sell the damn thing" (R 144, 146). The battalion commander admitted having had a conversation with Sergeant Bowman in which Sergeant Bowman advised him that Ordnance would not take the bus, but stated further that he could not be positive about any other conversation about the bus (R 136). The battalion commander stated that the accused has always given superior service as the battalion motor transport officer since 30 April 1945 (R 133).

A captain of the battalion stated that he would be glad to have Lieutenant Kimbrough in his outfit anytime and further stated "There isn't one officer or man who would not trust their life with Lieutenant Kimbrough" (R 158). It was stipulated that any member of the battalion who might be called as to his reputation, character and so forth — would testify that it was of the very best (R 163).

5. As noted above, prior to pleading to the general issue, the accused made a motion to sever which was denied by the court (R 6). In support of his motion individual defense counsel for accused stated in part:

"\* \* \* Counsel for the accused, Lieutenant Kimbrough \* \* \* announces that he intends to call in his defense, the other accused now present, \* \* \* the defenses are necessarily antagonistic, that he must rely in his defense upon the presence of a senior officer, at the time the conspiracy is alleged to have happened, and for that reason cannot proceed in his defense without also prosecuting the accused, Major Young."

Proper grounds for a motion to sever as stated in paragraph 71 b, Manual for Courts-Martial, 1928 (Cor. 4-20-43) are:

"\* \* \* that the mover desires to avail himself on his trial of the testimony of one or more of his coaccused, or of the testimony of the wife of one; or that a defense of another accused is antagonistic to his own; or that the evidence as to them will in some manner prejudice his defense."

In the opinion of the Board of Review it was error to deny the motion to sever, since it appeared that Lieutenant Kimbrough's defense was predicated on the greater guilt of Major Young, a coaccused. In effect it was his intention to become a prosecutor of Major Young, whose substantial rights would have been prejudiced by the court's ruling (CM 194997, Elberson, Allen, Hughes and Kozo, 2 BR 173; Dig Op, JAG 1912-40, Sec 395, (49)). However the court's ruling did not injuriously affect the substantial rights of Lieutenant Kimbrough, particularly in view of the fact that a nolle prosequi was subsequently entered as to Major Young (R 116).

6. During the course of the trial the accused was called as a witness for the prosecution. The record of trial reveals the following preliminary proceedings:

"Prosecution: The prosecution at this time calls as its next witness, Lieutenant Kimbrough, and requests that the court at this time warn him of his rights to take the stand or not take the stand, for the prosecution. Further, I would like to call the court's attention to page 117, Manual for Courts-Martial, under paragraph c, the last sentence of that paragraph.

(The Law Member referred to the above reference in the Manual for Courts-Martial).

Law Member: That is not the point.

Capt. Winn: May it please the court, the accused would like to have his rights explained to him by the Law Member of the court, in answer to the request by the trial judge advocate.

Law Member: Lieutenant Kimbrough, as the accused in this case, you have a right to do one of three things. First, you may take the stand and be sworn like any other witness. If you do that, you may be fully cross-examined on your testimony, both by the Trial Judge Advocate and by the members of the court. Their cross-examination can cover not only the particular facts concerning which you have testified, but can also cover other facts which may relate in any way to the question of your guilt or innocence of the specific offense concerning which you have testified. Second, you may make an unsworn statement. This unsworn statement may be made by you or by your counsel, and it may be either oral or in writing. Such an unsworn statement is not evidence; you cannot be cross-examined on it and it is entitled only to such consideration as the court sees fit to give it. In the third place, you have a right to remain silent, to say nothing at all. You have a perfect right to do this if you wish; and if you do so, the fact that you stand on your legal rights and do not take the witness stand yourself or make any sworn statements, will not count against you in any way with the court. It will not be considered by the court as an admission that you are guilty, nor can it be commented on in any way by the Trial Judge Advocate in addressing the court. It is your legal right to remain silent if you wish to. Do you thoroughly understand what I have just told you?

Lt. Kimbrough: Yes, sir.

Law Member: Take time to consult with your counsel and tell the court what you want to do. You may do three things. First, you may take the stand as a sworn witness and be subject to cross-examination. Second, you may make an unsworn statement and in that respect, you will not be subject to cross-examination, but also, anything you say in that unsworn statement will not, of course, be given as much weight as if it were a sworn statement. Third, you may elect to remain silent. You have a right under the Manual for Courts-Martial to remain silent and not make any statement at all. If you elect to remain silent, it will not be considered against you in court. The court cannot consider that in its deliberation. Take time and talk with your counsel.

(The accused, Lieutenant Kimbrough, conferred with the defense counsels).

Capt. Winn: At this time, the defense asks for a two or three minute recess while we consider.

President: The court will recess for five minutes.

The court then at 1345 took a recess until 1350, at which hour the personnel of the court, prosecution and defense, the five accused and the reporter resumed their seats. The two interpreters were also present.

Capt. Winn: If it please the court, the prosecution has called the accused, Lieutenant Kimbrough, to take the stand. The defense, after the witness was instructed, requested a recess from the court, at which time the proposition was discussed as to how the accused should be advised. During that recess it is the opinion, consulted with authorities, it is now the opinion of all counsel that the accused is, at his own request but not otherwise, a competent witness. I am now quoting from paragraph 120d, page 125, Manual for Courts-Martial, United Army, 1928. It appears in the second paragraph of that page, 'the accused at his request, but not otherwise'---therefore, as chief counsel for the defence I state to the court that this witness is not competent to testify when called by the prosecution. For further informing the court, I quote the same page 125, in the third paragraph thereof---'one of two or more persons concerned in an offense is always competent to testify, whether he be tried jointly or separately, and whether he be called for the prosecution or for the defense; except that he can not, if on trial himself, be called except upon his own request, and if not on trial himself he may assert his privilege not to incriminate himself'. I, therefore, move that this witness cannot be called by the prosecution to testify, except at his own request.

Prosecution: And if the court pleases, the trial judge advocate at this time agreed wholeheartedly with the defense and requests that the original calling of Lieutenant Kimbrough be withdrawn and requests the court to attempt to wipe it from its memory, and the prosecution at this time withdraws its request for Lieutenant Kimbrough to testify.

Law Member: Since it has been withdrawn, there is nothing before the court to decide. The court takes no presumption of any kind from the fact that the call was made, or that there was no testimony. In other words, it is as though it had never happened. Everything, including the call, is stricken from the record." (R 114-115).

Whereas it was error to call Lieutenant Kimbrough as a witness for the prosecution without his consent and to put him on his election to assert his privilege under Article of War 24 (CM ETO 2297, Loper and Johnson), nevertheless, the withdrawal of the call by the trial judge advocate, and the law member's subsequent instruction that the call be stricken from the record and that no presumption or inference would be made as a result of accused's failure to testify, effectively cured the error insofar as accused's substantial rights were affected thereby.

7. Accused stands convicted of a Specification and Charge laid under Article of War 80, alleging that he, in conjunction with other named persons, wrongfully and unlawfully sold and disposed of a particularly described bus, captured property of the United States, whereby they received as profit to themselves 120,000 Belgium francs of an exchange value of about \$2800.00.

The provisions of Article of War 80 are not discussed in the Manual for Courts-Martial, 1928, but in the 1921 edition a useful discussion is found. Therein it is pointed out that this article is broader than Article of War 79 in that Article of War 80 protects abandoned as well as captured property and private as well as public captured or abandoned property. With respect to the provisions relating to dealing in captured or abandoned property, the 1921 edition states:

"This portion of the article addresses itself to several specific acts of wrongful dealings and looks especially to cases where, instead of appropriating the property to his own use in kind, the accused in any other way deals with it to advantage. The article prohibits receipt as well as disposition of captured or abandoned property by barter, gift, pledge, lease, or loan. It lies against the destruction or abandonment of such property if any of these acts are done in the receipt or expectation of profit, benefit, or advantage to the actor or to any other person directly or indirectly connected with himself. The expectation of profit need not be founded on contract; it is enough if the prohibited act be done for the purpose, or in hope, of benefit or advantage, pecuniary or otherwise." (MCM, 1921, par 430, p 387).

The elements of proof are stated as follows:

"(a) That the accused has disposed of, dealt in, received, etc., certain public or private captured or abandoned property.

(b) That by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself." (MCM, 1921, par 430, pp 387, 388).

42)

The necessary elements of proof have been well established by competent testimony and accused's extra-judicial confession, which was properly admitted in evidence.

The defense contended that the proof did not establish that the bus was captured enemy equipment. In the opinion of the Board of Review there is ample evidence from which the court could reasonably infer that the bus in question was captured enemy property. It was a bus of the type commonly used by the German Government, painted in German military camouflage colors, and was marked with the eagle and swastika symbols of the Nazi Government. It was received in Coblenz, Germany from another American Army unit by the organization of which accused was a member. The facts are capable of no other logical interpretation but that the bus was "captured property of the United States" within the scope of Article of War 80, and the laws of war.

The accused also raised as a defense the alleged order of his battalion commander, to sell the bus (R 129, 143-146). The battalion commander did not specifically recall the entire conversation in which the alleged order was supposed to have been made. He was not, however, specifically asked whether such an order was given. Whether the court believed that such an order was issued is immaterial in this case. Such an order could not possibly cause a reasonable officer to believe that it was a legal order or authorization for appropriating the property for personal profit.

Accordingly, the record of trial sustains the finding of guilty of the Charge and Specification and the sentence.

8. The members of the court which tried the accused have recommended clemency on his behalf, basing their recommendation upon the excellent citizenship, character, and reputation of the accused prior to service in the Army, and upon his service since being commissioned as an officer in the Army of the United States. The trial judge advocate also recommended clemency in behalf of the accused, stating that the accused has been very cooperative throughout the investigation and trial. Nineteen officers and twenty-four enlisted men of accused's organization have submitted statements attesting the character and integrity of the officer. By letter dated 20 November 1945, addressed to the Commanding General, United States Forces, European Theater, the reviewing authority recommended clemency stating:

"I have remitted the confinement imposed upon Lt. Kimbrough and I recommend that the sentence to dismissal and total forfeiture be mitigated to a \$500 fine \* \* \*."

The reviewing authority based his recommendation upon the circumstances heretofore enumerated, which were brought to his attention. (Attached to the record of trial.)

9. The records of the War Department show that accused is 27 years of age and unmarried. He was commissioned a second lieutenant, Coast Artillery, National Guard of the United States on 6 January 1941, and entered active duty on that date. He was promoted to first lieutenant on 2 July 1942. He served in Alaska from 11 August 1941 to 11 June 1943 and has served in Europe since 23 October 1944. He participated in the following campaigns: Battle of Aleutians, Dutch Harbor Attack, Ardennes Rhineland, and Central Europe. His civilian occupation was a Junior High School teacher.

10. The court was legally constituted and had jurisdiction over the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 80.

*P. Hottentius*, Judge Advocate  
*William A. Self*, Judge Advocate  
Leave, Judge Advocate

JAGH - CM 302963

1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and opinion of the Board of Review in the case of First Lieutenant Oscar M. Kimbrough (O-406854), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was tried jointly with three enlisted men and found guilty of unlawfully selling and disposing of a passenger bus, captured property of the United States, and receiving money as personal profit, in violation of Article of War 80 (Chg and Spec). No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. On 1 October 1945, the reviewing authority approved the sentence. Thereafter, on 20 November 1945, the reviewing authority withdrew his previous action, approved the sentence, but remitted the confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. I concur in that opinion.

The accused was the motor officer of the 563rd Antiaircraft Artillery Automatic Weapons Battalion, stationed at Liege, Belgium. Sometime in June 1945 the battalion received from another American unit stationed at Coblenz, Germany, a bus of German manufacture, painted with German military camouflage colors and bearing the swastika and eagle insignia of the Nazi Government. It was a bus of a type used by the German Postal Service prior to the war, and not used by civilian bus companies. Accused's organization had no use for the bus at Liege and made efforts to dispose of it by turning it in to Ordnance. The battalion commander had told the motor sergeant to get rid of the bus and when told that Ordnance would not accept it is alleged to have said "Sell the damn thing". On 16 July 1945 two of the co-accused, enlisted men, moved the bus to a civilian garage and received 120,000 Belgian francs from Eugene Vigneron, a civilian. The accused made a voluntary extra-judicial statement admitting that he participated in the negotiations leading up to the sale of the vehicle and that he received 25,000 francs as his share of the proceeds.

4. The members of the court which tried the accused recommended clemency on his behalf, basing their recommendation upon the excellent citizenship, character, and reputation of the accused prior to service in the Army,

and upon his service since being commissioned as an officer in the Army of the United States. The trial judge advocate also recommended clemency in behalf of the accused, stating that the accused had been cooperative throughout the investigation and trial. Nineteen officers and twenty-four enlisted men of accused's organization submitted statements attesting to the good character and integrity of the officer. By letter dated 20 November 1945, addressed to the Commanding General, United States Forces, European Theater, the reviewing authority stated that he had remitted the confinement and recommended that the sentence be mitigated to a \$500 fine.

The three enlisted co-accused were sentenced to dishonorable discharge, total forfeiture and confinement at hard labor for one year. However on 20 November the unexecuted portion of the sentences adjudged against the enlisted men was remitted.

5. I recommend that the sentence as approved by the reviewing authority be confirmed, but in view of all the circumstances and the recommendations for clemency, that it be suspended.

6. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls  
1 - Record of trial  
2 - Form of action

---

( G.C.M.O. 334, 31 Oct 1946 ).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(1247)

SPJGH - CM 302964

MAY 1946

U N I T E D	S T A T E S	)	XII TACTICAL AIR COMMAND
		)	
	v.	)	Trial by G.C.M., convened at
		)	Headquarters, XII Tactical Air
First Lieutenant WILLIAM H.		)	Command, APO 374, United States
STRICKLAND (O-576428), Air		)	Army, 5 January 1946. Dismissal,
Corps.		)	and confinement for two (2) years.

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, STERN and TREVETHAN, Judge Advocates.  
-----

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

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

CHARGE I: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant William H. Strickland, Headquarters, XII Tactical Air Command, did, in the European Theater of Operations, on or about 31 December 1943, make a claim against the United States by presenting to First Lieutenant Clarence Hutson, a finance officer of the United States duly authorized to pay such claims, his pay and allowance account in the amount of \$132.40 for pay and allowances, which claim was false and fraudulent in that there was due and owing to the said First Lieutenant William H. Strickland for pay and allowances only the sum of \$72.40 and was then known by the said First Lieutenant William H. Strickland to be false and fraudulent.

Specification 2: (Findings of not guilty).

Specification 3: In that \* \* \*, did in the European Theater of Operations, on or about 31 January 1944, make a claim against the United States by presenting to Captain J. L. Fortier, a finance officer of the United States, duly authorized to pay such claims, his pay and allowance account in the amount of \$76.60 for pay and allowances, which claim was false and fraudulent in that there was due and owing to the said First Lieutenant William H. Strickland for pay and allowances only the sum of \$16.60 and was then known by the said First Lieutenant William H. Strickland to be false and fraudulent.

Specification 4: In that \* \* \*, did, in the European Theater of Operations, on or about 5 February 1944, make a claim against the United States by presenting to Captain V. G. Schlink, a finance officer of the United States duly authorized to pay such claims, his pay and allowance account in the amount of \$60.00 for pay and allowances, which claim was false and fraudulent in that the United States was not indebted to the said First Lieutenant William H. Strickland and was then known by the said First Lieutenant William H. Strickland to be false and fraudulent.

Specification 5: In that \* \* \* did, in the European Theater of Operations, on or about 29 February 1944, make a claim against the United States by presenting to First Lieutenant J. L. Fortier, a finance officer of the United States duly authorized to pay such claims, his pay and allowance account in the amount of \$133.80 for pay and allowances, which claim was false and fraudulent in that there was due and owing to the said First Lieutenant William H. Strickland for pay and allowances only the sum of \$13.80 and was then known by the said First Lieutenant William H. Strickland to be false and fraudulent.

Specifications 6-47, inclusive:

Note: Specifications 6 through 47, inclusive, are identical in form with Specification 4 except as to date, amount of each claim and finance officers to whom said claims were presented. The variations are as follows:

<u>Spec.</u>	<u>Date</u>	<u>Amount</u>	<u>Finance Officer</u>
6	9 Mar 44	\$ 75.00	Capt. J. L. Fortier
7	23 Mar 44	\$ 75.00	Maj. R. K. Andrews
8	31 Mar 44	\$ 46.85	1st Lt. S. R. Mann
9	5 Apr 44	\$ 60.00	1st Lt. Clarence Hutson
10	12 Apr 44	\$ 55.00	1st Lt. W. Lax
11	30 Apr 44	\$ 93.28	1st Lt. S. R. Mann
12	10 May 44	\$ 80.00	Capt. B. P. Keuper
13	31 May 44	\$ 71.19	1st Lt. J. B. Baucum
14	12 Jun 44	\$100.00	Maj. James D. Boland
15	30 Jun 44	\$168.53	1st Lt. D. M. Pepper
16	6 Jul 44	\$ 60.00	Maj. James D. Boland
17	11 Jul 44	\$ 60.00	1st Lt. D. M. Pepper
18	22 Jul 44	\$ 80.00	Maj. James D. Boland
19	31 Jul 44	\$ 98.69	Capt. W. H. O'Brien
20	17 Aug 44	\$120.00	Maj. D. B. Conley
21	22 Aug 44	\$ 50.00	Maj. S. R. Gerard
22	29 Aug 44	\$100.00	Maj. B. P. Keuper
23	31 Aug 44	\$ 49.93	Lt. Col. C. C. Neely

<u>Spec.</u>	<u>Date</u>	<u>Amount</u>	<u>Finance Officer</u>
24	10 Sep 44	\$100.00	Capt. A. J. Carlson
25	15 Sep 44	100.00	Maj. W. O. Green
26	18 Sep 44	100.00	Maj. J. B. Monk, Jr.
27	30 Sep 44	95.28	Maj. J. L. McKenzie
28	8 Oct 44	100.00	Maj. L. H. Van Horne
29	16 Oct 44	100.00	Maj. A. A. Amunrud
30	27 Oct 44	100.00	Capt. A. A. Saitta
31	31 Oct 44	54.93	Maj. C. M. Andrews
32	10 Nov 44	90.00	Maj. Robert E. O'Dea
33	15 Nov 44	100.00	Maj. E. H. Andrew
34	18 Nov 44	120.00	Capt. D. M. Pepper
35	28 Nov 44	50.00	Capt. W. H. O'Brien
36	30 Nov 44	103.54	Capt. W. H. O'Brien
37	21 Dec 44	50.00	Capt. M. Campell
38	26 Dec 44	50.00	Lt. Col. Chas. S. McCormick, Jr.
39	29 Dec 44	100.00	Maj. S. R. Gerard
40	31 Dec 44	47.40	Capt. D. M. Pepper
41	31 Jan 45	146.68	Maj. C. M. Andrews
42	14 Feb 45	80.00	Maj. J. P. Boliva
43	28 Feb 45	62.48	Maj. G. R. Clark
44	3 Mar 45	50.00	Lt. Col. W.J. Fabritius
45	6 Mar 45	50.00	Lt. Col. W.J. Fabritius
46	10 Mar 45	120.00	Maj. H. C. Amick
47	30 Mar 45	50.00	Maj. G. R. Clark

CHARGE II: Violation of the 95th Article of War

Specification 1: In that \* \* \*, with intent to defraud the United States, did, in the European Theater of Operations, on or about 31 December 1943, unlawfully pretend to First Lieutenant Clarence Hutson, a finance officer of the United States, that he was entitled to pay and allowances in the amount of \$132.40, well knowing that said pretenses were false in that there was due and owing to the said First Lieutenant William H. Strickland for pay and allowances only the sum of \$72.40 and by means thereof did wrongfully and fraudulently obtain from the United States, through the said First Lieutenant Clarence Hutson, its lawfully authorized finance officer, overpayment in the sum of \$60.00.

Specification 2: (Findings of not guilty).

Specification 3: In that \* \* \*, did in the European Theater of Operations, on or about 31 January 1944, unlawfully pretend to Captain J. L. Fortier, a finance officer of the United States, that he was entitled to pay and allowances in the amount of \$76.60, well knowing that said pretenses were false in that there was due and owing to the said First Lieutenant William H. Strickland for pay and allowances only the sum of \$16.60 and by means thereof did wrongfully and

fraudulently obtain from the United States, through the said Captain J. L. Fortier, its lawfully authorized finance officer, overpayment in the sum of \$60.00.

Specification 4: In that \* \* \*, with intent to defraud the United States, did, in the European Theater of Operations, on or about 5 February 1944, unlawfully pretend to Captain V. G. Schlink, a finance officer of the United States, that he was entitled to pay and allowances in the amount of \$60.00 well knowing that said pretenses were false in that the United States was not indebted to the said First Lieutenant William H. Strickland, and by means thereof did wrongfully and fraudulently obtain from the United States, through the said Captain V. G. Schlink, its lawfully authorized finance officer, the sum of \$60.00.

Specification 5: In that \* \* \*, with intent to defraud the United States, did, in the European Theater of Operations, on or about 29 February 1944, unlawfully pretend to First Lieutenant J. L. Fortier, a finance officer of the United States, that he was entitled to pay and allowances in the amount of \$133.80, well knowing that said pretenses were false, in that there was due and owing to the said First Lieutenant William H. Strickland for pay and allowances only the sum of \$13.80 and by means thereof did wrongfully and fraudulently obtain from the United States, through the said First Lieutenant J. L. Fortier, its lawfully authorized finance officer, overpayments in the sum of \$120.00.

Note: Specifications 6 through 47 are identical in form with Specification 4 except as to date, amount and finance officer to whom said claims were presented. Each of these Specifications covers the transaction set forth in the similarly numbered Specification of Charge I.

After accused was informed of his right to plead the Statute of Limitations in bar of trial as to Specification 1 of Charge II, he waived said right through defense counsel and pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 2 of Charges I and II and guilty of all other Specifications and of both Charges. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeitures and confinement for five (5) years. The reviewing authority approved only so much of the sentence as provided for dismissal, total forfeitures and confinement for two (2) years and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced in evidence photostatic copies of forty-eight Pay and Allowances Accounts certified by the Chief Clerk of the General Accounting Office as true copies of the official documents on file in that office (R.32; Pros. Exs. 1, 1A and 2 through 47, inclusive). It

was stipulated that the signature "William H. Strickland" appearing on each of said documents was the signature of accused, that the transactions referred to in each and every Specification occurred in the European Theater of Operations and that the finance officer referred to in each is a finance officer of the United States, lawfully authorized to pay the type of claim stated therein (R.40,45; Pros. Ex. 52). The documents show that the amounts claimed therein were paid by the finance officers referred to in the several Specifications and that in each instance accused received in cash the net balance claimed by him. Thirty-three of the vouchers represented partial payment claims made by accused and fifteen were monthly pay and allowance claims submitted by him during the period from December 1943 to February 1945, inclusive. Each of the fifteen monthly vouchers recite debits involving Class N and Class E allotments totalling \$131.80.

A finance officer, duly qualified as an expert in accounting and auditing practices, testified that he made an analysis of accused's pay and allowance vouchers for the period involved and his calculations were received in evidence over objection of the defense (R.28,29,35,36; Pros. Ex. 48). These calculations show that on 20 December 1943 accused presented a partial payment voucher for \$60 and received that amount in cash (R.40,41; Pros. Ex. 1A). On 31 December 1943 he presented his pay and allowance voucher for the month of December 1943 in which he claimed a net balance due him of \$132.40 and received this amount in cash (Pros. Ex.1). However, he failed to debit his account with the \$60 previously received, thereby obtaining \$132.40 instead of \$72.40, the amount due him on that date (R.40).

On 19 January 1944 he received \$60 by partial payment voucher (Pros. Ex.2) and debited this amount when he presented his pay and allowance voucher for the month of January 1944, claiming a net balance of \$76.70. However, on 31 January 1944, the date on which the monthly pay and allowance voucher for January 1944 was presented, he still owed the United States \$60 for the partial payment received on 20 December 1943 so that on 31 January 1944 there was due him \$16.60 instead of \$76.60 which he claimed and received (R.42; Pros. Ex. 3). On 5 February 1944 he drew \$60 by partial payment voucher (Pros. Ex. 4) although nothing was due him on that date because his then existing indebtedness to the Government (\$60) was greater than the amount of his earned pay and allowances thus far accrued in the month of February 1944 (R. 44). On 29 February 1944 by his pay and allowance voucher for that month he made net claim for \$133.80 after deduction of Class E and N allotments plus other deductions but failed to debit his account with either of the two previous \$60 partial payments and, accordingly, received \$133.80 instead of \$13.80 to which he was then entitled. As of 29 February 1944 he had been overpaid \$120 (R.44; Pros. Ex.5).

Thereafter accused continued to present partial payment vouchers from time to time and to receive the amounts claimed therein. He also submitted his monthly pay and allowance vouchers on the last day of each month and in each instance received the net balance claimed. Each time after 29 February 1944 that accused presented a partial pay or monthly pay and allowance voucher and received the amounts claimed therein, his indebtedness

(252)

to the United States was greater than the amount due him for accrued pay and allowances, as shown by the following table, viz:

<u>Chg. I</u>	<u>Pros.</u>		<u>Am't Owed</u>		<u>Partial Pay</u>
<u>Spec.</u>	<u>Ex.No.</u>	<u>Date</u>	<u>U.S. Before</u>	<u>Net Am't</u>	<u>Deducted By</u>
			<u>Claim</u>	<u>Claimed</u>	<u>Accused</u>
6	6	9 Mar 44	\$ 120.00	\$ 75.00	\$
7	7	23 Mar 44	195.00	75.00	
8	8	*31 Mar 44	270.00	46.85	75.00 (9 Mar 44)
9	9	5 Apr 44	195.00	60.00	
10	10	12 Apr 44	255.00	55.00	
11	11	*30 Apr 44	310.00	93.28	55.00 (12 Apr 44)
12	12	10 May 44	255.00	80.00	
13	13	*31 May 44	335.00	71.19	80.00 (10 May 44)
14	14	12 Jun 44	255.00	100.00	
15	15	*30 Jun 44	355.00	168.53	
16	16	6 Jul 44	355.00	60.00	
17	17	11 Jul 44	415.00	60.00	
18	18	22 Jul 44	475.00	80.00	
19	19	*31 Jul 44	555.00	98.69	60.00 (11 Jul 44)
20	20	17 Aug 44	495.00	120.00	
21	21	22 Aug 44	615.00	50.00	
22	22	29 Aug 44	665.00	100.00	
23	23	*31 Aug 44	765.00	49.93	120.00 (17 Aug 44)
24	24	10 Sep 44	645.00	100.00	
25	25	15 Sep 44	745.00	100.00	
26	26	18 Sep 44	845.00	100.00	
27	27	*30 Sep 44	945.00	95.28	50.00 (22 Aug 44)
28	28	8 Oct 44	895.00	100.00	
29	29	16 Oct 44	995.00	100.00	
30	30	27 Oct 44	1095.00	100.00	
31	31	*31 Oct 44	1195.00	54.93	100.00 (16 Oct 44)
32	32	10 Nov 44	1095.00	90.00	
33	33	15 Nov 44	1185.00	100.00	
34	34	18 Nov 44	1285.00	120.00	
35	35	28 Nov 44	1405.00	50.00	
36	36	*30 Nov 44	1455.00	103.54	50.00 (28 Nov 44)
37	37	21 Dec 44	1405.00	50.00	
38	38	26 Dec 44	1455.00	50.00	
39	39	29 Dec 44	1505.00	100.00	
40	40	*31 Dec 44	1605.00	47.40	100.00 (29 Dec 44)
41	41	31 Jan 45	1505.00	146.68	
42	42	14 Feb 45	1505.00	80.00	
43	43	*28 Feb 45	1585.00	62.48	80.00 (14 Feb 45)
44	44	3 Mar 45	1505.00	50.00	
45	45	6 Mar 45	1555.00	50.00	
46	46	10 Mar 45	1605.00	120.00	
47	47	30 Mar 45	1725.00	50.00	

\* - Monthly Pay and Allowance Vouchers

After preferment of Charges, the investigating officer interviewed accused and before discussing the matter informed him of his rights under the 24th Article of War. The investigating officer, at accused's request, showed him a transcript of his (accused's) testimony before a Board of Officers on 18 January 1945 and after examining said document, accused stated that he did not desire to make a "formal" statement but that "the information contained herein will be my statement. I am standing by what is in the proceedings of the Board taken on the 18th of January" (R.63-65).

This statement was received in evidence over objection of the defense (R.67; Pros. Ex. 53). Therein accused admitted that he had drawn three partial payments of \$100 each in the month of September and similar payments in the month of October. He kept a record of the amounts drawn by him and knew that at the end of October he owed approximately \$800. He had no knowledge that "the first three payments" mentioned in a letter from "the Fiscal Director" had not been deducted but as to the remaining payments mentioned in said letter he knew there was "something due the Government." He had no intention of defrauding the Government and always intended to repay the overpayments with money which he had in the bank whenever he was notified that he was overdrawn. He believed that he was authorized to overdraw and repay the indebtedness later when informed by the Government of the amount (Pros. Ex. 53).

4. For the defense evidence in the form of a copy of a receipt was introduced to show that accused paid to the Finance Department of the War Department the sum of \$1775.00 on 17 November 1945, said amount being accused's indebtedness to the United States for overpayments received by him (R.59; Def. Exs. A,B).

Accused had been in confinement since 27 March 1945 (R.72; Def. Ex. C) and his conduct as a prisoner since 1 September 1945 was excellent (R.69). A letter of commendation dated 6 March 1944, purporting to bear the signature of accused's commanding officer and expressing appreciation for accused's excellent performance of duty in organizing his department was received in evidence without objection (R.76; Def. Ex. D). It was further stipulated that the author of Defense Exhibit D, if present, would testify that accused performed his duties in either an excellent or superior manner between 13 September 1943 and 31 March 1944 and between 15 April 1944 and 22 February 1945; also that during the time mentioned his character was beyond reproach (R.85; Def. Ex. F).

A certified copy of accused's Form 66-1 was received in evidence without objection (R. 84; Def. Ex. E). Said form shows that accused arrived in the European Theater of Operations on 4 September 1943 and that he is authorized to wear the European, African and Middle East ribbon. It further shows four efficiency ratings of superior, three of excellent and two of very satisfactory (R.84; Def. Ex. E).

After accused's rights as a witness were fully explained, he elected to be sworn and testified that he is 29 years of age and married; that he

attended the University of Southern California for one year and that he was a draftsman in civil life. From September 1940 until May 1942 he served in the Royal Canadian Air Force and was discharged to enlist in the United States Army as a sergeant. He attended the Air Corps Administrative School as an officer candidate from December 1942 until March 1943 (R.74,75). With respect to the offenses charged he testified that most of his pay, partial and monthly, was drawn while he was absent from his home station on inspection tours (R.77). Upon receiving a letter from "the Deputy Chief of Staff" inquiring as to his intentions with respect to his indebtedness to the United States, he replied that he had funds on hand at home and would pay the overpayment by March 10. He communicated with the local finance officer and pending receipt of an itemized account of his indebtedness, wrote to his home in January for funds to settle the account. The funds requested did not arrive until after accused cabled his bank and settlement was finally made in November 1945 (R.78,80).

Under cross-examination accused admitted that he had submitted in the European Theater of Operations all the pay vouchers mentioned in the forty-seven Specifications of both Charges to the finance officers named therein. He identified Prosecution's Exhibits 1 through 47 as photostatic copies of the pay vouchers signed and presented by him from 20 December 1943 through 30 March 1945. While he had no records of the transactions, to the best of his knowledge there was nothing due him by the Government from 9 March 1944 through 30 March 1945 when he presented the respective vouchers (R.81,82). He further admitted that he drew partial payments after he had been before the Board of Officers although at the time of the Board proceedings he was indebted to the Government in the sum of about \$1200 (R.82).

Upon redirect examination accused testified that he had no intention of defrauding the Government, that the funds from his monthly Class E allotments were available and adequate to reimburse the Government at any time he was notified of the amount of his overpayments. In this connection he testified as follows: (R.82).

" . . . the facts are as they were presented. The pay vouchers are there, I drew the money, the money was at home, and it has been available for repayment ever since overpayment occurred back in 1943."

Upon re-cross examination accused admitted that in November 1945 he received his pay and allowances for the months of March 1945 through November 1945 amounting to about \$1100, after deduction for Class E and Class N allotments and that this sum together with about \$600 which he obtained from his bank in Detroit was applied in satisfaction of his existing indebtedness of \$1775 (R.84).

5. Defense counsel's objection to the receipt in evidence of accused's statement to the investigating officer was properly overruled. While the voluntary character of the original statement made before the Board of

Officers was not established, the accused reaffirmed and adopted it after due and proper warning as to his rights by the investigating officer. The investigating officer was not obliged to inform accused that the testimony given before the Board could not be used against him because in our opinion it was not a confession. While the statement was a highly inculpatory admission against interest, nowhere therein did accused acknowledge guilt of the offense of making a claim against the United States with knowledge that it was fraudulent. He stated that he believed he could overdraw and pay his indebtedness later and that in every other case he knew "the officer was informed that he had overdrawn." He further denied any intention of defrauding the Government. Thus, the accused did not acknowledge his guilt and the statement cannot be considered a confession. It was, however, an admission against interest and was therefore admissible in evidence without a showing that it was voluntarily made (MGM, 1928, par. 114b).

Objection was made by the defense to the receipt in evidence of the chart prepared by the finance officer showing the result of mathematical calculations made by him from the forty-eight pay vouchers. It was contended that the exhibit was not the best evidence and therefore inadmissible. The argument overlooked the exception to the best evidence rule that:

"\*\*\*\*\* where books and papers are voluminous a qualified witness may summarize and explain the facts shown by such books and papers when they are all in court and the opposing counsel has full opportunity to cross-examine as to the correctness of the witness' testimony" (20 Am. Jr., Evidence, sec. 831, p. 698).

The tabulated statement and summary of the vouchers were properly received in evidence (1 Wharton's Criminal Evidence, 11th ed., sec. 412, note 4; State v. Dobry (Ia), 250 NW 702).

6. It was clearly shown that on the dates and at the places alleged accused made and presented to the finance officers named his partial payment and monthly pay and allowance vouchers and in each instance received in cash the net balance claimed. Starting with his voucher for the month of December 1943 he failed to debit amounts which he had previously received as partial payments and continued this practice until 30 March 1945 when his indebtedness to the United States by overpayments stood at \$1775. In each instance where money was drawn on partial payment voucher or by monthly pay and allowance voucher the proof shows that there was either less money due accused than claimed or nothing at all due him as alleged in the respective Specifications of which accused was found guilty. The prosecution's evidence was in no manner contradicted by the defense. Indeed, the accused admitted that he presented each of the vouchers and received the amounts claimed. He said, "The facts are as they are presented. The pay vouchers are here, I drew the money, the money was at home, and it has been available for repayment ever since overpayment originally occurred back in 1943."

From his testimony given at the trial, it is apparent that accused realized he was requesting and receiving money which was not due him when he presented these partial and monthly pay and allowance vouchers. He admitted that he knew he was indebted to the United States but sought to exculpate himself by stating that he believed he could overdraw and reimburse the Government later. Yet the record shows that he continued to draw partial and monthly payments even after he had appeared before the Board of Officers in connection with an investigation pertaining to his indebtedness to the Government because of the prior overpayments. The court was therefore justified in inferring that accused was aware of circumstances such as would induce an ordinary intelligent and prudent man to believe his vouchers to be false and hence that he had knowledge of the falsity of these claims. Subsequent to the offenses complained of and while in confinement awaiting trial, accused made restitution of his indebtedness to the United States. While restitution may be considered in mitigation it is no defense. To make and present pay vouchers containing such false and fraudulent statements for the purpose of obtaining claims asserted against the United States constituted offenses under the express provisions of Article of War 94. The evidence fully sustains the findings of guilty of Charge I and its Specifications.

Each Specification of Charge II has reference to the identical pay and allowance vouchers dealt with in the corresponding Specifications of Charge I and charges accused with the offense of false pretenses against the United States in violation of Article of War 95. Although Specification 9 of Charge II erroneously alleges the date of the offense as 15 April 1944 instead of 5 April 1944, the variance between the allegation and the proof is this regard is immaterial. It is clear from the record that the accused was in no manner prejudiced thereby. In establishing the offenses alleged under Charge I, the prosecution was not obliged to prove that accused received the amounts falsely claimed, for the mere making of a claim against the United States with the knowledge of its false or fraudulent character, as alleged in each of those Specifications, was a violation of Article of War 94. However, by also proving that in each instance accused received the amounts claimed by him, all the essential elements of the offense of false pretenses as there alleged were established. Although the offenses charged under both Articles of War arose out of the identical acts of accused they are not the same. It has been repeatedly held that it is not legally objectionable to charge the identical acts as both a violation of Article of War 95 and of some other applicable Article of War (CM 252773, Jonas, 34 BR 189). Accordingly, the evidence is legally sufficient to support the findings of guilty of Charge II and the Specifications thereunder.

6. Consideration has been given to a letter submitted by accused requesting clemency in the review of his case. The substance of his plea is that funds which were placed to his credit in a Detroit bank through a Class E allotment were available to cover the indebtedness to the United States and that prior to his confinement his record in the Army was excellent. He also mentions therein the long period spent in confinement awaiting

trial ( from 27 March 1945 to 5 January 1946) as grounds for the exercise of clemency. The Staff Judge Advocate states in his review that the long delay in bringing accused to trial was occasioned by the fact that the authenticated copies of accused's vouchers were dispatched three times from the General Accounting Office, Washington, D. C. before received in form warranting their receipt in evidence.

7. Accused is 29 years of age. War Department records show that he graduated from high school and attended the University of California for one year. In civilian life he was employed as a shipping clerk and subsequently as a salesman. From September 1940 to April 1942 he served in the Canadian Army being engaged as a draftsman in an aeronautical engineering office. He entered the military service of the United States in April 1942 as an enlisted man and thereafter attended the Air Forces Officers Candidate School from which he was graduated on 2 March 1943 with the rank of second lieutenant, Army of the United States. His 66-1 card shows that he went overseas on 23 August 1943. On 1 April 1944 he was promoted to the grade of first lieutenant.

8. The court was legally constituted and had jurisdiction of the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of all Charges and Specifications and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War '94 and is mandatory upon conviction of a violation of Article of War 95.

Thomas M. Taffy, Judge Advocate.  
Joseph J. Stern, Judge Advocate.  
Robert C. Newell, Judge Advocate.

SPJGH - CM 302964

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

MA. 21 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant William H. Strickland (O-576428), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of presenting forty-six false claims against the United States totalling \$1775, in violation of Article of War 94, and of fraudulently obtaining that sum from the United States by falsely pretending to the authorized finance officers to whom said false claims were presented that he was entitled to receive that amount, in violation of Article of War 95. He was sentenced to dismissal, total forfeitures and confinement for five (5) years. The reviewing authority approved only so much of the sentence as provided for dismissal, total forfeitures and confinement for two (2) years and forwarded the record of trial for action under Article of War 48.

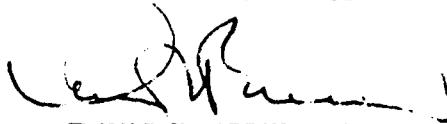
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

During the period from 31 December 1943 to and including 30 March 1945 accused presented to finance officers fourteen monthly pay and allowance vouchers and thirty-two partial payment vouchers and received the net balance claimed in each. Starting with the first monthly pay and allowance voucher for December 1943, he knowingly refrained from deducting a partial payment of \$60 which he had received on 20 December 1943 and thereby received \$132.40 instead of \$72.40 which was then due him. On his pay and allowance voucher for January 1944, he again refrained from debiting the \$60 which he then owed the United States and received the net amount claimed, \$76.60, instead of \$16.60 which was then due him. On the voucher for the month of February, he failed to debit his account with \$60 received by partial payment on 5 February 1944 and received \$133.80 instead of \$13.80 to which he was then entitled. When he received the partial payment on 5 February 1944, he was then indebted to the United States in the sum of \$60 and his accrued pay for the five days of that month was insufficient to cover his prior indebtedness. From 29 February 1944 until 30 March 1945 accused continued to present partial payment and monthly pay and allowance vouchers and received the net balance claimed in each case. On every occasion that payment was made during this period there was no money due accused from the United States because of his indebtedness as a result of failure to debit all partial payments previously received. As time went on, his repeated derelictions in this regard resulted in an indebtedness of \$1775 to the United States after the last partial payment was received on 30 March 1945. Although accused appeared before a Board of Officers in

January 1945, at which time he acknowledged he was indebted to the United States by reason of overpayments, he continued to submit partial payment and monthly pay and allowance vouchers and to receive the net balance claimed in each case. He subsequently reimbursed the United States for the overpayments but not until about eight months after Charges had been preferred against him. A substantial part of the funds used in paying this indebtedness was pay and allowance money which accumulated during the period accused was in confinement awaiting trial. He contended at the trial that he believed over-drawing of pay and allowances was authorized and that he had funds available at all times with which to make restitution for the overpayments.

4. Accused was in confinement awaiting trial from 27 March 1945 to 5 January 1946. The Staff Judge Advocate in his review states that the long delay in bringing this case to trial was occasioned by the fact that copies of the pertinent vouchers, indispensable to the prosecution's case, were dispatched from the General Accounting Office three times before legally admissible copies were received. He recommended to the reviewing authority, as did seven members of the court, that consideration be given to the time spent in confinement awaiting trial, and probably as a result thereof, the period of confinement was reduced to two (2) years by the reviewing authority. I am of the opinion that the clemency already exercised is sufficient and recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

5. Inclosed is a form of action designed to carry the above recommendation into effect, should such action meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls  
1 - Record of trial  
2 - Form of action

---

( GCMO 158, 4 June 1946).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

(261)

SPJGK - CM 302965

14 MAR 1946

UNITED STATES	)	HEADQUARTERS COMMAND
	)	UNITED STATES FORCES EUROPEAN THEATER
v.	)	
	)	Trial by G.C.M., convened at
Second Lieutenant NORMAN	)	Frankfurt-am-Main, Germany, 23
K. PHILLIPS (O-2011633),	)	November 1945. Dismissal.
Infantry.	)	

-----  
OPINION of the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates.  
-----

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Second Lieutenant Norman K. Phillips, Anti-tank Company, 29th Infantry, was at Frankfurt-am-Main, Germany, on or about 1 November 1945 drunk and disorderly while in uniform at or near an apartment house located at 38 Taunus Strasse in that he did, at said time and place, while drunk, fire a pistol, and did strike Kaethe Schafer, Berta Erlenbach and Rosa Rebscher, civilian occupants of said building, with a pistol.

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

Specification: In that Second Lieutenant Norman K. Phillips, \*\*\*, was at Frankfurt-am-Main, Germany, on or about 1 November 1945 drunk and disorderly while in uniform at or near an apartment house located at 38 Taunus Strasse in that he did, at said time and place, while drunk, fire a pistol, and did strike Kaethe Schafer, Berta Erlenbach and Rosa Rebscher, civilian occupants of said building, with a pistol.

He pleaded not guilty to and was found guilty of all Charges and Specifications, except in each specification the word "drunk", substituting therefor the words, "under the influence of intoxicants", of the excepted word not guilty, of the substituted words guilty. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority

approved the sentence and forwarded the record of trial to the Commanding General, U. S. Forces European Theater, for action under Article of War 48. Prior to action by the Commanding General, United States Forces, European Theater, his powers, statutory or otherwise, in so far as they pertain to courts-martial, including the power of confirmation of sentences of general courts-martial and including powers conferred in time of war by Articles of War 48, 49, 50, 50 $\frac{1}{2}$  and 51, were terminated 19 January 1946 by direction of the President, and in accordance with instructions contained in a cable from the War Department, dated 19 January 1946, as clarified by a cable from the War Department, dated 21 January 1946, the Commanding General, United States Forces, European Theater, forwarded the record of trial to The Judge Advocate General for action by the confirming authority or other appropriate action.

### 3. Summary of the evidence.

#### For the prosecution.

Berta Erlenbach and Kaethe Schafer are residents of Frankfurt-am-Main, Germany, living at 38 Taunus Strasse (R. 10,14). At about 2200 hours on 1 November 1945, Else Schell returned to this address and, near the entrance thereof, saw an American soldier using a flashlight to examine some garbage cans. The light was directed toward her face and she hurried into the house, the American soldier following her (R. 6,10). As she entered her apartment, the American was half way up stairs (R. 10,17). The American at that point accosted a man carrying coal for the apartment and asked him where the girl was whose husband was in the cellar. He also told Herr Schell, who had paused on the steps, "Go on or I'll shoot you" (R. 11). He held his pistol against the chest of Frau Schell's son (R. 17). He then proceeded to the apartment door where he kicked on the door and knocked a hole in it with his pistol. Berta Erlenbach opened the door and he entered the room of Kaethe Schafer, the sister of Berta (R. 11,15). Kaethe Schafer opened the balcony doors of her room and stood on the balcony as the American soldier entered with his pistol in one hand and flashlight in the other. He struck her on the shoulder, arm and side with the barrel of his pistol (R. 15). She (Kaethe Schafer) then ran out of the room and down the steps with the American soldier behind her, and a shot was fired past her into the wall adjoining the stairs (R. 6, 12, 16, 17; Pros. Ex. 1). Frau Schell noticed that the American had on an officer's overseas cap "with one metal bar" (R. 8).

Rosa Rebscher came out of the kitchen door during this altercation and was struck on the head with the pistol. She was knocked down thereby, but later arose and ran out into the street (R. 17). Berta Erlenbach ran to the balcony and called for help. The American pulled her away from the balcony, struck her on the head and shot at her as she was standing near the

bed (R. 12). The bullet missed Berta and buried itself in the wall (R. 12, 22; Pros. Ex. 1). The American beat Berta Erlenbach on the head, shoulder, arms and hands with his pistol (R. 12). Stitches were taken in her head as a result of this beating (R. 12, 13).

After the second shot, the American came out into the street from the apartment (R. 17). He proceeded across the street and was taken into custody by military police (R. 18) who had heard the shots and screaming while they were investigating another matter nearby (R. 19,21). The military police observed the accused leave the house and relieved him of a pistol which he had in his pocket (R. 19, 21, 22). At the time "he had on a trench coat of three-quarter length, officer's pinks, blouse and overseas cap" (R. 19). The odor of burned powder was evident on the pistol (R. 20). The military police observed that the accused had been drinking, but did not testify that he was drunk (R. 19, 22, 23). The two German women questioned on the point were of the same opinion, i.e., they could not state that the accused was drunk (R. 9, 13).

After having been warned of his rights under the 24th Article of War by the investigating officer (R. 23), the accused signed a statement on 6 November 1945 to the effect that he started drinking a quart or a fifth of whiskey after retreat on 1 November 1945, went to the Rendezvous Club, finished the last of the bottle with a glass three quarters filled, and remembered little about what happened thereafter until he awakened the next morning in custody (R. 24, Pros. Ex. 2).

For the defense.

The rights of the accused as a witness were explained to him (R. 25) and he elected to testify under oath (R. 26). This testimony disclosed that the accused came from Texas, had had six years of schooling and had served five years in the Army (R. 26). He came overseas as an enlisted man in December 1944, went into the line with his infantry unit on 26 December 1944 (R. 26) and remained there until April 1945 (R. 27). On 14 March 1945 he received a battlefield commission after having served as acting platoon leader in a unit which won a presidential citation (R. 27).

In the accused's behalf it was stipulated that his Battalion Commander would testify that he had had occasion to observe the conduct of the accused during the bitter combat that took place in Alsace-Lorraine during the winter of 1944-1945. This officer states that the outstanding bravery of the accused at all times was one of the primary factors contributing to the success of the undertaking which resulted in a Presidential unit citation. On three occasions the Battalion Commander had recommended an award for the accused because of bravery but on all three occasions, Army administrative procedures were faulty to the point of defeating the purpose. During the time the Battalion Commander knew the accused, the accused

conducted himself as a gentleman and was never admonished for misbehavior (R. 27, Def. Ex. 1).

4. That the accused did, at the time and place alleged, and while under the influence of liquor, enter into the apartment of a German family and therein commit an unprovoked assault and battery on Kaethe Schafer, Rosa Rebscher and another individual described as "Frau Schell's son," all German civilians, was conclusively proved by the evidence of the prosecution. The testimony is also clear and convincing that at the time the accused was dressed in the uniform of an officer of the United States Army, and wore the bar of a lieutenant. Although it appears from the evidence adduced by the prosecution and particularly from the pre-trial statement taken from the accused (Pros. Ex. 2), that the accused was quite completely drunk at the time, the court, by exceptions and substitutions held him guilty only of committing the offenses "while under the influence of liquor." In this connection it is obvious that the court gave credence to the testimony of the Military Police who came upon the scene and took the accused into custody. The substitution rendered the accused no less culpable. The conduct of the accused, in going in uniform and armed with a pistol into a civilian home in Frankfurt under the circumstances described, terrorizing the occupants by brandishing his pistol, firing it in their direction and assaulting them so seriously as to necessitate medical attention, was conduct to the prejudice of good order and military discipline, and discreditable to the military service. Such disorderly conduct, and particularly the striking of defenseless women, sufficiently offends law, justice, morality and decorum as to expose the accused and the Army he represents to disgrace and contempt, and supports the conviction of violation of Article of War 95 (Winthrop's Military Law and Precedents, 2nd Ed., pp. 711, 712; CM 256441, Rountree, 36 B.R. 283). There was no illegal multiplicity in charging the identical acts as violations of both Article of War 95 and 96 (II Dig Op ETO, 579, CM ETO 10362, Hindmarch).

A motion for dismissal on the ground that the accuser and investigating officer were one and the same person was interposed by the defense (R. 24, 25). The original accuser, in the sense used in Article of War 70, was a First Lieutenant Roy E. Parrish, Jr. The investigating officer, Captain James C. Creal, changed the charges to conform more satisfactorily to the expected evidence disclosed in his investigation, and thereafter signed the substituted charges as accuser. This was not improper.

"The evidence may, however, show a different offense, not included in the offense charged \*\*\* In such case, the investigating officer may recommend that the original charge be withdrawn and the accused tried on a substituted charge. The investigating officer should draft the substituted charge on a separate charge sheet, have it sworn to (or swear to it himself if to the best of his knowledge and belief the facts it contains are true) and forward it with his investigation" (TM 27-255, WD, par 45b).

In preparing the substituted charges, the investigating officer was following the approved procedures indicated. An additional investigation subsequent to the preparation of the substituted charges would have revealed no new facts. Article of War 70 was substantially complied with and, as it has been held that the investigation under this article is primarily for the benefit of the appointing authority and is not jurisdictional (1 Dig Op 440, CM ETO 969, Davis; ibid, 46, CM ETO 4570, Hawkins), the court appropriately denied the motion to dismiss.

5. War Department records show that accused is 26 years and 9 months of age and single. He only completed six grades in the elementary schools and attended no higher educational institution. In civil life he was employed as a baker from June 1938 to March 1940. He enlisted in the Army on 3 December 1940 and was commissioned a second lieutenant, Infantry, on 14 March 1945. He was awarded the Combat Infantryman Badge on 10 January 1945. As an enlisted man he attained the grade of technical sergeant.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Norman Mayo, Judge Advocate  
William B. Tuder, Judge Advocate  
Earl W. Wings, Judge Advocate

SPJGK - CM 302965

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

AF 100 1016

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Norman K. Phillips (O-2011633), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being under the influence of intoxicants and disorderly in uniform at or near an apartment in Frankfurt-am-Main, and of striking three German women with a pistol, in violation of both Article of War 95 (Specification of Charge I) and Article of War 96 (Specification of Charge II). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, U. S. Forces European Theater, for action under Article of War 48. Prior to action that officer, in accordance with instructions from the War Department, forwarded the record of trial to The Judge Advocate General for action by the appropriate confirming authority.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

While clearly under the influence of intoxicants, accused wearing the uniform of an American officer and armed with a pistol broke into an apartment in Frankfurt-am-Main, terrorized the three defenseless women who were occupying the apartment, fired his pistol at and narrowly missed two of them, and struck and painfully injured all three with his pistol.

The accused is 26 years and 9 months of age and is single. He enlisted in the Army on 3 December 1940 and attained the rank of technical sergeant. He participated in the Alsace-Lorraine Campaign of 1944-45 and received a battle field commission as second lieutenant for his bravery and ability. According to his Battalion Commander "his outstanding bravery at all times was one of the primary factors in the success of our unit, which culminated in the award of the distinguished service unit badge to our battalion." His Battalion Commander likewise certified that on three occasions he recommended that accused's bravery on the battlefield be recognized by "an appropriate award" but that "faulty administrative methods prevented authorization of these awards." Accused was awarded the Combat Infantryman Badge on 10 January 1945. While accused's conduct is indefensible, in view of his excellent military record I recommend that the sentence be

confirmed but that the execution thereof be suspended during good behavior.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

---

( GCMO 96, 1 May 1946).





allowances allegedly due him by the United States, which claim was false and fraudulent in that it was in excess of pay and allowances due him as was then well known by the said Captain Kenneth Baker.

Specifications 2 to 10: Similar to Specification 1 but differing as to place and time of offense, name of finance officer, and amount of claim, as follows:

<u>Spec.</u>	<u>Place</u>	<u>Date</u>	<u>Finance Officer</u>	<u>Amount</u>
2	APO 874	23 April 1945	Major R.E. Powell	\$50
3	id.	10 May 1945	id.	25
4	id.	11 May 1945	id.	50
5	id.	18 May 1945	id.	50
6	id.	22 May 1945	1st Lt. V.L. Blakly	140
7	id.	26 May 1945	id.	100
8	APO 228	13 June 1945	Major D.B. Conley	100
9	id.	15 June 1945	id.	100
10	APO 887	11 July 1945	Major Jos. Marshall	150

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. 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 might direct, for fifteen years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused was married to Eleanor Ambrose Anderson on 1 July 1939 (R. 9; Pros. Ex. 11, 12). This marriage was still in existence on 29 August 1944 (R. 9; Pros. Ex. 12). On this latter date "Kenneth Baker and Stella Helen Fabrykewicz" were united in marriage at Etampes, France, as shown by a photostatic copy of an extract of the 1944 marriage records of Etampes. The extract contained the signatures of the contracting parties, of two witnesses, and of the "clerk and notary to the mayor" of Etampes, and bore the city seal. In connection with the admission of the photostat (Exhibit 13) and a translation thereof (Exhibit 14) the following statements were made by defense counsel and accused:

DC: I wish to point out to the court that the stipulation agreed to in exhibit #14 is to the effect that the language contained in exhibit #13 is, substantially, the language contained in exhibit #14 and the stipulation goes no further than that. As to what that document purports to show, there is no stipulation.

I have no objection to the introduction of exhibits #13 and #14 with that understanding.

\* \* \*

LM: Captain Baker, do you personally consent to the admissibility of exhibit #13 and the stipulation, exhibit #14?

ACC: Yes, sir. (R. 9-10; Pros. Exs. 13, 14).

Accused's pay credits and debits for the month of April 1945 were as follows:

<u>Credits</u>		<u>Debits</u>	
Base and Longevity	\$240.00	Class N Insurance	\$6.66
Subsistence	42.00	Class E Allotment	250.00
Rental Allowance	90.00	Class B Allotment	18.75
	<u>372.00</u>	93 meals @ .25 for March, 1945	<u>23.25</u>
			298.66

Of the \$73.34 balance due him on the above account he obtained \$70 on a partial payment voucher on 10 April 1945. Although this practically exhausted his balance, he submitted to the finance officer, Major R. E. Powell, two more partial vouchers during the month, one for \$20 on 21 April and another for \$50 on 23 April, resulting in an overpayment of \$66.66 (R. 8; Pros. Exs. 8, 10).

His pay account for May 1945 was as follows:

<u>Credits</u>		<u>Debits</u>	
Base and Longevity	\$240.00	Class N Insurance	\$6.66
Subsistence	43.00	Class E Allotment	250.00
Rental Allowance	90.00	Class B Allotment	18.75
	<u>373.00</u>	Meals for April	<u>22.50</u>
			297.91

As shown by these figures the amount due him for May was \$75.49, which, when reduced by the \$66.66 overpayment from the preceding month, left only \$8.83 due him. Nevertheless during the month he submitted partial pay vouchers for \$25, \$50, \$50, and \$140. The voucher for \$140 was submitted on 22 May to First Lieutenant V. L. Blakly and the others, on dates not shown, to Major Powell (R. 6-8; Pros. Exs. 1, 2, 3, 8, 10).

For the month of June 1945 his account showed these items:

<u>Credits</u>		<u>Debits</u>	
Base and Longevity	\$240.00	Class N Insurance	\$6.66
Subsistence	42.00	Class E Allotment	250.00
Rental Allowance	90.00	Class B Allotment	18.75
	<u>372.00</u>	Meals for May	<u>23.25</u>
			298.66

The excess of credits over debits for June, amounting to \$73.34, was more than cancelled by his indebtedness to the Government from the overpayments in April and May. Despite this fact he submitted three partial pay vouchers during June, each in the sum of \$100. One voucher was submitted to Lieutenant Blakly and the others to Major D. B. Conley (R. 6-8; Pros. Exs. 4, 5, 6, 10).

In the month of July the excess of his credits over his debits was \$75.49. With the overpayments of the previous three months taken into consideration he was in fact indebted to the Government. But once again he presented a partial payment voucher, by means of which, on 11 July 1945, he secured \$150. This voucher was presented to Major Joseph Marshall (R. 6-8; Pros. Exs. 7, 10).

It was stipulated that the officers to whom the vouchers were submitted, were finance officers of the United States Army duly authorized to pay officers' claims for service pay and allowances (R. 8; Pros. Ex. 9).

4. Evidence for the defense: Accused, after explanation of his rights as a witness, elected to remain silent (R. 10). The only evidence offered was a stipulation that if Lieutenant Colonel R. N. Shuck, Finance Officer, 83rd Infantry Division, were present he would testify substantially to this effect: "That it is customary for certain finance officers to advance an individual's net cash earnings for the month upon request for partial payments during the month" (R. 9).

5. The Specification of Charge I alleges that accused, having a living, lawful wife, from whom he was not divorced, wrongfully entered into a second marriage with Stella Helen Fabrykewicz at Ville d'Etampes, France, on 29 August 1944. The Specification is laid under Article of War 95.

The evidence shows that accused was married to Eleanor Ambrose Anderson on 1 July 1939 and that this marriage had not been dissolved by death or divorce on 29 August 1944. To prove that accused was bigamously married on the latter date there was introduced in evidence a photostat of an extract from the marriage records of Etampes, France, which recited the marriage of Kenneth Baker to Stella Helen Fabrykewicz. The extract contained the signatures of

the contracting parties, two witnesses, the signature of the clerk and notary to the mayor of Etampes, and the city seal.

No attempt was made to comply with the provisions of 28 United States Code 695e (Act of June 20, 1936, ch. 640, #6, 49 Stat. 1563) which prescribe the form of authentication of documents on record in public offices of a foreign country, for their-admission in a court of the United States. Consequently, if proper objection was interposed, the document in question would not have been admissible in evidence. No objection was made, but, on the contrary, express consent to its introduction was given by the defense counsel and by the accused. Under these circumstances we believe that the lack of proper authentication was waived. The Manual for Courts-Martial (par. 116a, p. 120) provides:

"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 a purported copy of a public record is clearly authenticated."

Applying this rule in a similar situation the Board of Review in the European Theater of Operations (ETO 2663, Bell and Kimber, 7 BR ETO, 275) said:

"Although the 'public record' to which reference is made in the foregoing excerpt from the Manual for Courts-Martial undoubtedly refers to public records of the United States, its territories and possessions and of the States, the principle of waiver therein announced with reason and logic may be applied to the authentication of public records of a friendly foreign host country wherein Federal military courts are sitting. The Board of Review so concludes."

Although the case cited involved the admission of an English record in a court-martial sitting in England there is no reason why the waiver should be restricted to cases where the court-martial is sitting in the country whose public record is offered in evidence. In other words there is no valid reason why a French public record should be admissible if the court-martial is sitting in France but not if the court-martial has moved across the border and is sitting in Germany. We conclude that the document in question was properly admitted in evidence and that a bigamous marriage is accordingly proved. Bigamy is a violation of Article of War 95. CM 228971, Tatum, 17 BR 1.

6. The Specifications of Charge II allege that on various dates between 21 April 1945 and 11 July 1945 accused presented to finance officers ten pay and allowance claims in the total amount of \$785 which

he knew were false and fraudulent in that the amounts claimed were in excess of what was due him. The Specifications are laid under Article of War 94.

It is clearly shown that during the months of April, May, June, and July 1945 accused presented claims for partial pay in amounts varying from \$25 to \$150 and totalling \$785 and was paid the respective amounts claimed. The specific dates on which some of the claims were submitted is not shown but they correspond generally to the dates alleged in the Specifications. The capacity of the officers, to whom these claims were submitted, to approve and pay them, was established by stipulation.

The authority by which an officer may secure a partial payment on his pay and allowances in advance of his regular pay day is contained in par. 7a, Army Regulations 35-1360, 11 April 1944, which states:

"Commissioned officers and other personnel enumerated in paragraph 1a may, upon submission of proper vouchers therefor (unless payment is precluded by the provisions of AR 35-1740), be paid as partial payments the pay and allowances due and earned to and including the date of payment \* \* \*."

The amounts claimed by accused were not "due and earned" in the months in which the claims were presented. Some of the amounts claimed were earned by accused in the months subsequent to their payment but the net result was that by 31 July 1945 he had been overpaid \$557.34. The circumstances afford ample basis for the conclusion that he knew the claims were false or fraudulent. Not only was he charged with responsibility for the correctness of the claims he presented, but because of the size of his allotments and other fixed charges he must certainly have known that a partial payment of any size would not only exhaust the balance due him on his account but would result in an overpayment. All of the elements of the offense are proven beyond reasonable doubt.

7. Charges against accused are dated 24 September 1945 and they were investigated and referred to trial the following day. They were served on accused also on 25 September and the case was tried on 28 September. He was represented at the trial by individual counsel in addition to the regularly appointed defense counsel and no request was made for a continuance. Attached papers indicate that the case was under investigation by the Inspector General's Office in July 1945 at which time accused was interrogated with reference thereto. The major part of the prosecution's case was introduced by stipulation and in a letter to the reviewing authority requesting clemency accused states

that he made these stipulations because it was his desire "to make a full and complete presentation of all the facts for at no time have I entertained any criminal intent or personal motive." There is no suggestion in the record that accused did not have sufficient opportunity to adequately prepare his defense. Under the circumstances the Board perceives no violation of his substantial rights.

8. War Department records show that the accused is 26 and 7/12 years of age, a graduate of Wardlaw Preparatory School, and for three years a student at the University of North Carolina. Employment prior to his military service consisted of eight months as a junior chemist with the American Cyanimid Company. The accused enlisted in the Army for service with the Medical Department on 9 September 1940; was commissioned second lieutenant, Medical Administrative Corps, Army of the United States on 24 December 1941; was promoted to first lieutenant on 7 June 1942, and was promoted to captain on 10 April 1943. Official records disclose that he has a six-year-old daughter and a three-year-old son as dependents by his lawful wife.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 and is mandatory upon conviction of a violation of Article of War 95.

Earle Stephum, Judge Advocate.

Walter J. Bangin, Judge Advocate.

Robert J. Clonnan, Judge Advocate.

SPJGN-CM 302966

1st Ind

Hq ASF, JAGO, Washington, D. C.  
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Kenneth Baker (O-450992), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of bigamy, in violation of Article of War 95, and of presenting ten false claims for pay and allowances totalling \$785, in violation of Article of War 94. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

Although married, and the father of two small children, accused, on 29 August 1944, at Etampes, France, contracted a marriage with an Army nurse. Allied papers indicate that the nurse was pregnant at the time. He asserts that the marriage was an "ill-advised" attempt to help her out of an embarrassing situation and to enable her to return home.

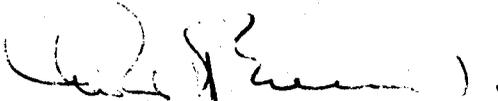
Between 21 April and 11 July 1945 accused presented ten different claims for partial pay and allowances ranging from \$20 to \$150 and obtained \$785. These claims were false in that at the time he presented them the amounts claimed were not due and earned. Some of the pay prematurely obtained subsequently accrued but as of 31 July 1945 he was overpaid in the sum of \$557.34. The record does not disclose whether this sum has been repaid although an attached letter from accused states that he has made available for restitution all pay and allowances over and above his allotments.

Accused's 201 File discloses that on 18 October 1944 he received a bullet wound in the leg. After first stating that the wounds were the result of rifle fire by unknown persons while he was riding in a jeep down a road in Luxembourg, he admitted that the wounds were inflicted by his own gun. There being insufficient evidence to show that the wounds were intentionally inflicted they were attributed to gross carelessness and he was ordered reclassified.

Although dismissal and confinement are clearly justified in this case, the length of the confinement imposed is excessive. I recommend that the sentence be confirmed but that the period of confinement be reduced to two years, that an appropriate United States Disciplinary Barracks be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to two letters from the accused, dated 6 March 1946 and 17 April 1946, the former addressed to the President.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

- 4 Incls  
1 - Record of trial  
2 - Form of action  
3 - Ltr. fr. accused  
to President  
4 - Ltr. fr. accused  
to TJAG

---

( GCMO 115, 10 May 1946 ).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(279)

5 APR 1946

SPJGH - CM 302967

UNITED STATES	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Ansbach, Germany, 24 October 1945.
Captain ROBERT P. GREY	)	Dismissal, total forfeitures and
(O-860022), Air Corps.	)	confinement for two (2) years.

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, STERN and TREVETHAN, Judge Advocates.  
-----

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

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

CHARGE I: Violation of the 84th Article of War.

Specification: In that Captain Robert P. Grey, Air Corps, 921st Air Engineering Squadron, 503rd Air Service Group, did at, Schweinfurt, Germany, on or about 26 September 1945 unlawfully sell to Corporal William E. Bridges one captured German civilian vehicle (1935 Ford, tudor sedan model) bearing U.S.A. registration number 1605-TT-9962, of the value of more than fifty (\$50.00) dollars, issued for use in the military service of the United States.

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

Specification: In that Captain Robert P. Grey, \* \* \*, did on or about 7 September 1945 make an unauthorized flight from air strip Y-79, Mannheim-Sandhofen Airfield to Y-72, Braunschardt Airfield.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I, guilty of the Specification thereunder except the words "captured German civilian," and guilty of Charge II and its Specification. No evidence was introduced of any previous convictions. He was sentenced to dismissal, total forfeitures and confinement for two (2) years. The reviewing authority approved only so much of the findings of guilty of Charge I and its Specification as involved a violation of Article of War 96, 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.

3. In support of Charge I and its Specification, the prosecution introduced evidence to show that on 26 September 1945 accused was a member of the 921 Air Engineering Squadron of the 503 Air Service Group then stationed at Field Y-72 near Braunhardst, Germany. The organization was then in the process of moving to its new station, R-25, at Schweinfurt, Germany. A few days before 26 September 1945 accused's commanding officer, Major Howard G. Williams, had ordered him to proceed to station R-25 as part of an advance group of the organization to receive personnel and equipment. When accused departed for the new station, Major Williams made available to him a 1935 Ford V8 two-door sedan equipped with a 1941 Mercury engine and bearing U.S. registration number 1605-TT9962. The vehicle was to be used by accused in connection with the move to Schweinfurt (R.6). It was issued for use in the military service of the United States (R.13.) and was listed on each of two machine record automotive vehicle inventories of the 921st Air Engineering Squadron, dated 15 July 1945 and 15 September 1945 (R.8,9;Pros.Exs.1,2). The car was painted an olive drab color and had a white star on its hood (R.15,17,18). It had been shipped to Major Williams' unit in July 1945 by the parent organization, the 503 Air Service Group, and was in excellent condition on 27 September 1945 (R.10,13). When Major Williams arrived at station R-25 on the latter date, he asked accused where the car had been placed and accused replied, "Major, I gave it away." Accused explained to Major Williams that while using it the wiring system burned out and he gave the car to a couple of soldiers (R.6). On the same day, Major Williams, accompanied by Lieutenant Colonel King, his superior commanding officer, began a search for the car and located it in an area of the station, occupied by the 503 Air Service Group. It was then in the possession of Corporal William E. Bridges of the 133 AACS, Detachment 316, stationed at station R-25, and at Major Williams' instructions was driven to the motor pool of the 921 Air Engineering Squadron (R.7,14).

Corporal Bridges testified that he had purchased the car from accused on 26 September 1945, the transaction having occurred in Schweinfurt, Germany, in front of an electric auto shop where the vehicle was parked. Bridges, accompanied by Corporal Schiefer, encountered accused as he was leaving the electric shop and inquired if he was the captain who had a 1935 Ford V8 automobile for sale. After some discussion, accused stated that the vehicle parked in front of the shop was for sale. After Bridges examined it a price of 2500 marks was agreed upon and he paid this amount to accused who informed him that the car was one which "he (accused) had acquired or taken from the Germans and there was no papers on the automobile" (R.14,15,17). Bridges drove away in the car and that evening while parking it behind the barracks at station R-25, he encountered Major Williams upon whose instructions he drove it to the motor pool. The witness described the car as being a 1935, olive drab color, Ford V8 sedan carrying an Army registration number and bearing a white star (R.15). Subsequently, about 28 September 1945, Corporal Bridges requested accused to return the money paid him for the car and accused complied (R.16). Corporal Schiefer corroborated Bridges' testimony relating to the transaction under which the car was purchased from accused (R.18).

As concerns Charge II and its Specification, the prosecution's evidence shows that on 7 September 1945 accused, accompanied by Lieutenant Joseph T. Stolte and an enlisted man went to field Y-79 in connection with the performance of official duties. At that place accused and Lieutenant Stolte were to check on an L4 aircraft for Colonel King. Upon arrival at Y-79 by automobile, they located the airplane in question and, after checking the controls, started the motor. Accused then took off alone in the plane while Stolte returned to the car and drove back to his home base at field Y-72 (R.20,22). The plane which accused flew had been grounded and was not in flyable condition. He had not obtained clearance for the flight as was then required by existing regulations of the United States Strategic Air Forces in Europe set forth in Flying Bulletin No. 8, dated 28 April 1945, of which the court took judicial notice (R.21,24,28). Upon Lieutenant Stolte's arrival at his station, Y-72, some 45 minutes after he left station Y-79, he again saw accused and also the plane in which he had seen accused depart from Y-79 (R.22). An aircraft of the type piloted by accused was seen to land at Y-72 by the flying control officer shortly before Lieutenant Stolte arrived there on his return from Y-79. In response to signals given from the control tower as the plane was landing, the accused shortly thereafter appeared before this officer and asked "were you trying to flag me down?" The officer asked accused the name of the pilot of the plane and accused replied "Captain Stroby" (R.25; Pros. Ex.C).

4. Upon being advised of his rights as a witness, accused elected to remain silent. Accused's commanding officer was called as a character witness by the defense and testified that from the early part of July 1945, the date of the alleged offenses here involved, the character and efficiency of the accused had been excellent (R.28). He further testified that accused was not a rated pilot.

5. Accused stands convicted of the unlawful sale of a motor vehicle of a value greater than \$50 issued for use in the military service, and of making an unauthorized airplane flight, both in violation of Article of War 96. The court in finding accused guilty of the Specification of Charge I excepted the words "captured German civilian." The offense involved would have been adequately charged had these words been omitted from the Specification. The gravamen of the offense is the unlawful sale of certain property issued for use in the military service and it is immaterial whether such property was captured before it was so issued. It is clear from the record that accused could not have been misled or injured by any failure of proof in the premises. The undisputed evidence conclusively establishes that accused sold the vehicle in question and that said vehicle had been issued for use in the military service as alleged. There was no testimony as to its value, but considering the fact that it was in good running order, was equipped with a 1941 Mercury engine and that the purchaser paid the accused the equivalent of \$250 for it, the evidence is clearly sufficient to establish that its value was in excess of \$50 (CM 262735, Kaslow, 41 BR 126). While the Specification was erroneously laid under a Charge alleging a violation of Article of War 84 the reviewing authority, recognizing that said

Article did not apply to officers, properly approved only so much of the findings of guilty of that Charge and Specification as involved a violation of Article of War 96 (See 4 Bull JAG 279, CM 279968(1945)).

As concerns the offense set forth in the Specification of Charge II (unauthorized flight), the evidence, in no manner contradicted by the defense, shows that accused took an aircraft which had been grounded and without obtaining clearance as required by existing regulations flew it to his home field. Clearly by so doing, he made an unauthorized flight as alleged. The language used in the Specification charging accused with making an "unauthorized flight" was sufficient to show that the act was wrongful as constituting an offense prejudicial to good order and military discipline and the proof amply supports the findings of guilty.

6. A full hearing was accorded the Honorable Henry J. Latham, Congressman from the state of New York on 13 March 1946, and a hearing was also accorded Mr. Lauson Stone, attorney of the firm of Boyle, Feller, Stone and McGivern, 25 Broad Street, New York, New York, who, accompanied by accused's father and sister, appeared before the Board of Review in accused's behalf on 25 March 1946. Consideration has also been given to a brief submitted by Mr. Stone and to numerous communications received in the Office of The Judge Advocate General, all of which are forwarded herewith.

7. Accused is 25 years of age and single. He attended various universities for about six years, eventually graduating from Tri-State College, Aneola, Indiana, in 1942 with a Bachelor of Science degree in aeronautical engineering. On 1 July 1942 he enlisted in the Army of the United States and thereafter was appointed an aviation cadet, completing the course of instruction 18 March 1943 at which time he was appointed a second lieutenant. He was promoted to first lieutenant on 21 July 1943 and to captain on 1 December 1944.

8. The court was legally constituted and had jurisdiction of the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

*Thomas N. Tapp*, Judge Advocate.  
*Joseph J. Stern*, Judge Advocate.  
*Robert C. Trevethan*, Judge Advocate.

SPJGH - CM 302967

1st Ind

Hq ASF, JAGO, Washington 25, D. C. APR 18 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Robert P. Grey (O-360022), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the offense of selling a Government vehicle issued for use in the military service (Chg. I, Spec.), in violation of Article of War 84 and guilty of making an unauthorized flight in Army aircraft (Chg. II, Spec), in violation of Article of War 96. He was sentenced to dismissal, total forfeitures and confinement at hard labor for two (2) years. No evidence was introduced of any previous convictions. The reviewing authority approved only so much of the findings of guilty of Charge I and the Specification thereunder as involved a violation of Article of War 96, 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.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 7 September 1945 the accused, who was not a rated pilot, flew an L4 aircraft from a field known as Y79 to his home field, Y72. The plane had been grounded because of a cracked propeller and was not in flyable condition. Accused did not fill out the forms required to obtain clearance of the plane and took no action to obtain its release as was required by existing Air Force Regulations, but flew it without mishap. On 26 September 1945, at Schweinfurt, Germany, accused sold a 1935 Ford Sedan to an enlisted man for 2500 German marks. The car was painted an olive drab color, had a white star on the hood and carried a United States registration number, yet accused represented himself to be the owner of the vehicle which in fact had been issued in the military service and was carried on the automotive inventory records of accused's organization.

Available records do not disclose what, if any, combat duty accused has performed, although a letter attached to the record of trial signed by the defense counsel and requesting clemency on behalf of accused, states that he has been stationed overseas for over two and one-half years and has an excellent record of service. Among the allied papers is a letter from accused's father stating that accused has six battle stars and a Presidential Unit citation. This information has not been confirmed and the Battle Honors Section of the Decorations and Awards Branch of The Adjutant General's Department (Captain Todd) informally advises that a search of its records does not

reveal the mentioned awards. I recommend that the sentence be confirmed but that the period of confinement be reduced to one year, that the sentence as thus modified be carried into execution and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

3 Incls  
1 - Record of trial  
2 - Form of action  
3 - Ltr fr/Samuel Gold-  
man dated 22 May '47  
w/incl.

---

( GCMO 216, 9 July 1946).

WAR DEPARTMENT  
 In the Office of The Judge Advocate General  
 Washington, D. C.

JAGH - CM 302968

1946

U N I T E D S T A T E S	)	HEADQUARTERS XX CORPS
	)	
v.	)	Trial by G.C.M., convened at
	)	Starnberg, Bavaria, Germany,
First Lieutenant FOLKE R.	)	11 October 1945. Dismissal
ANDERSON (O-1018700),	)	
Headquarters Company,	)	
753rd Tank Battalion	)	

-----  
 OPINION by the BOARD OF REVIEW  
 HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates  
 -----

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

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

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

Specification 1: In that 1st Lt Folke R. Anderson, Headquarters Company, 753rd Tank Battalion, did, at St. Anton, Austria, on or about 7 August 1945, feloniously embezzle by fraudulently converting to his own use twenty-two thousand (22,000) German Reichmarks value about two thousand two hundred dollars (\$2,200.00); one white gold diamond brooch value about one hundred forty dollars (\$140.00); one gold brooch with two carved red antique stones value about one hundred twenty dollars (\$120.00); one necklace with diamonds and five Ceylon sapphires value about four hundred forty dollars (\$440.00); one bracelet with diamonds and five Ceylon sapphires value about six hundred dollars (\$600.00); one pearl necklace with diamond clip value about two hundred sixty dollars (\$260.00); one antique baroque bracelet with green stones value about sixty dollars (\$60.00); one moss agate bracelet value about two hundred dollars (\$200.00); and one half moon brooch with

diamonds value about two hundred dollars (\$200.00) the property of Frau Dr. Maria Daelen entrusted to him by the said Frau Dr. Maria Daelen.

Specification 2: In that 1st Lt Folke R. Anderson, Headquarters Company, 753rd Tank Battalion, did, at St. Anton, Austria, on or about 7 August 1945, feloniously embezzle by fraudulently converting to his own use fifteen thousand (15,000) German Reichmarks value about one thousand five hundred dollars (\$1,500.00); one amethyst flower with diamonds value about one thousand dollars (\$1,000.00); one gold bracelet with diamonds value about six hundred dollars (\$600.00); one pearl mesh bracelet with pearl and brilliants value about two hundred eighty dollars (\$280.00); one half red and half yellow gold spring bracelet value about one hundred forty dollars (\$140.00); one golden bracelet with topaz stone value about one hundred forty dollars (\$140.00); one jade pendant value about one hundred dollars (\$100.00); two gold German coins value about four dollars (\$4.00) each; one small gold wrist watch value about twenty-eight dollars (\$28.00); three pearl shirt studs value about sixty dollars (\$60.00) each; one square link gold bracelet value about ninety-two dollars (\$92.00); one white gold ring with moon stone and diamonds value about one hundred eighty dollars (\$180.00); one gold ring with opal and diamonds value about five hundred sixteen dollars (\$516.00); one gold ring with topaz value about one hundred twenty dollars (\$120.00); one platinum pendant with aquamarine stone value about one thousand nine hundred twenty dollars (\$1,920.00); one white gold bracelet with aquamarine stone value about eight hundred forty dollars (\$840.00); one white gold bracelet with aquamarine stone value about five hundred forty dollars (\$540.00); one platinum bracelet with diamonds value about seven hundred twenty dollars (\$720.00); one gold bracelet with sapphire value about one hundred dollars (\$100.00); one gold link bracelet value about one hundred dollars (\$100.00); two gold chain mesh bracelets value about forty dollars (\$40.00) each; one small gold chain value about sixteen dollars (\$16.00); one platinum bracelet with sapphire value about four hundred eighty dollars (\$480.00); one gold pendant value about sixteen dollars (\$16.00); one gold stick pin with pearl value about one hundred twenty dollars (\$120.00); one large gold pocket watch value about one hundred twenty dollars (\$120.00); one gold brooch with rectangular topaz value about eighty dollars (\$80.00); one gold brooch with diamonds value about one hundred twenty dollars (\$120.00); one gold watch chain value about sixty dollars (\$60.00); eighteen gold German coins value about eight dollars (\$8.00) each; two United States twenty dollar gold pieces value

about twenty dollars (\$20.00) each; one brooch with pendant of large and small garnets value about sixty dollars (\$60.00) the property of Frau Flockina von Platen entrusted to him by said Frau Flockina von Platen.

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 that 1st Lt Folke R. Anderson, Headquarters Company, 753rd Tank Battalion, did, at Grassau, Germany, on or about 13 August 1945, with intent to deceive Frau Flockina von Platen, wrongfully report to the said Frau Flockina von Platen that her property, consisting of jewelry and money, had been delivered to one "Marina" which report was known by the said 1st Lt Folke R. Anderson to be untrue in that said property was then in his possession.

He pleaded not guilty to all Charges and Specifications. The court found him not guilty of the Specification of Charge II and Charge II and guilty of the remaining Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, although stating that it was inadequate, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, on 18 January 1946, approved only so much of the findings of guilty of Specification 1 of Charge I as finds that accused did, at the time and place alleged, feloniously embezzle by fraudulently converting to his own use twenty thousand (20,000) German Reichmarks, value about two thousand dollars (\$2,000.00); one white gold diamond brooch, value about one hundred forty dollars (\$140.00); one gold brooch with two carved red antique stones, value about one hundred twenty dollars (\$120.00); one necklace with diamonds and five Ceylon sapphires, value about four hundred forty dollars (\$440.00); one bracelet with diamonds and five Ceylon sapphires, value about six hundred dollars (\$600.00); one pearl necklace with diamond clip value about two hundred sixty dollars (\$260.00); one antique baroque bracelet with green stones, value about sixty dollars (\$60.00); one moss agate bracelet, value about two hundred dollars (\$200.00); and one half moon brooch with diamonds, value about two hundred dollars (\$200.00), the property of Frau Doctor Maria Daelen entrusted to him by the said Frau Doctor Maria Daelen. The sentence was confirmed but pursuant to Article of War 50½ the order directing its execution was withheld. The power conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Article of War

48, having been suspended on 19 January 1946, the record of trial was forwarded to The Judge Advocate General for appropriate action.

3. On the evening of 6 August 1945 accused became acquainted with Frau Flockina von Platen and Frau Doctor Maria Daelen in St. Anton, Austria (R 9, 19). By pre-arrangement, the next morning he called on Frau von Platen at her apartment, which she shared with Frau Daelen (R 10, 20). Accused told the women he was living at Grassau. They asked him to take some property of theirs to Garmish, in Bavaria, because, being Germans, they were not permitted to take any jewelry or money out of Austria and had been limited to "two kilos" of household goods (R 10). They asked him to deliver the property to Frau Hirth and he agreed with the proviso that he could give it to Marina von Ditmar, a mutual friend of the accused and Frau von Platen. This was satisfactory to the two women (R 12, 21). No definite date for the delivery was agreed upon but accused stated that he would give the property to one of the two women when he passed through Garmish on his return trip (R 18).

With these arrangements made, Frau von Platen placed 15,000 marks and her jewelry in a brief case (R 11). Frau Daelen then put "over 20,000 marks," in the same brief case together with her jewelry (R 22-24). Accused took the brief case and left (R 12). Frau von Platen identified Prosecution Exhibit 1 as an amethyst flower with diamonds, as one of the pieces of jewelry delivered by her to accused (R 14). Similarly she identified Prosecution Exhibits 10-33, inclusive, and 35-42, inclusive, as property she delivered to accused (R 14, 15). Frau Daelen identified Prosecution Exhibits 1-8 as property she delivered to accused (R 26). These exhibits were later received in evidence (R 45-46). Inasmuch as, with one exception, they conform to the descriptions of the items listed in the Specifications they will not be further described here. The exception is that Prosecution Exhibit 1 - a white gold diamond brooch - was identified by Frau von Platen as an amethyst flower with diamonds. Prosecution Exhibit 1 was also identified by Frau Daelen. Prosecution Exhibit 9 - an amethyst flower with diamonds - was identified by neither of the women as Prosecution Exhibit 9.

Private First Class Jack E. Noble testified that he drove accused from St. Anton to Grassau via Garmish. He could not recollect the date of the trip but remembered that accused told him that the contents of the leather brief case he was carrying were very valuable (R 55, 57). They made only one stop in Garmish, at an Army mess hall, where accused obtained some sandwiches (R 57, 58). Accused left the witness and the brief case in the jeep and was gone less than one hour (R 58).

On 15 August 1945 Frau von Platen received from accused a letter dated 13 August 1945 in which he stated, in part:

"\* \* \* Your property that you gave me is safe and sound in Garmish. I had to give it to Marina as I could not find the other person \* \* \*" (R 13, 41; Pros Ex 43).

Toward the end of August Frau von Platen and Frau Daelen went to Garmish but could not locate their property (R 13, 24, 25). Neither of the two designated recipients had been given the property. Frau Hirth had been at Garmish all during the month of August and Baroness von Hirschberg, born von Ditmar, had been there during that time, except for two days (R 30, 32). The latter knew accused but had not seen him for "a long time". About 21 or 22 August 1945 accused gave the First Sergeant of his company a package wrapped in cloth about four inches wide and ten inches long and asked him to put it in the company safe (R 47; Pros Ex 44).

On 28 August 1945 agents of the Criminal Investigation Division called on accused at Grassau. When informed that they were investigating the whereabouts of the jewelry accused appeared "extremely nervous and extremely agitated". He told them that the jewelry was in the safe at the officers' club in Garmish Partenkirchen. They requested permission to search his room and he admitted that he had some of the jewelry there which they found, together with "upwards of 8000 Reichmarks" (R 35, 36). The agents informed accused that he must accompany them to Garmish Partenkirchen. Accused agreed but left them to shave and to inform the first sergeant of his departure (R 38). That morning about 1100 hours he withdrew from the safe the package he had put there (Pros Ex 44).

Enroute to Garmish Partenkirchen they stopped off at Rosenheim. Here accused gave a Lieutenant Hainey a package containing jewelry which was wrapped in what appeared to be white handkerchiefs with the letter "A" on them (R 44). After leaving Rosenheim accused admitted that there was no jewelry at Garmish Partenkirchen (R 38). Prosecution Exhibits 1-33 and 35-42 were identified as having been taken from accused (R 37). In addition, 21,132 Reichmarks were recovered (R 38, 46; Pros Ex 46-56).

In an extra-judicial statement, properly admitted in evidence, accused admitted receiving on 7 August 1945 some property from two German women, one of them named Flockina, to deliver to Frau Hirth or to Marina von Ditmar in Garmish. On the way back from St. Anton he searched for Frau Hirth but was unable to find her. He did not return to Garmish and left the jewelry in his room, except for that which he put in the company's safe for safekeeping (R 39, 40, 43). He admitted writing Frau von Platen the letter which was introduced in evidence as Prosecution Exhibit 43 (R 41). He stated that he intended to deliver the property the weekend following the day he wrote the letter and that his work and "other things" had prevented him from so doing (R 44).

It was stipulated by and between the prosecution, the defense, and accused that the German Reichmarks was worth \$.10 (R 46; Pros Ex 45). In

addition, it was stipulated that the values of the items of Specifications 1 and 2 of Charge I were as listed in the Specifications (R 46, Pros Ex 46).

4. After being properly advised of his rights, accused elected to be sworn and testify but restricted his testimony to the Specification of Charge III (R 52).

He admitted writing Prosecution Exhibit 43 on 13 August 1945 but stated that he intended to go to Garmish the following weekend and deliver the jewelry. On the 14th or 15th, however, he was made Battalion Adjutant and had a lot of work to do in connection with the redeployment of troops (R 52, 53).

Second Lieutenant Clayton Badgley testified that since he had been assigned to accused's organization in July 1945 he had not known of any misconduct on accused's part (R 50).

It was stipulated by and between the prosecution, defense, and accused that between 8 August 1945 and 28 August 1945 he had an Adjusted Service Rating score of 63; that he desired to remain in the service; that under the regulations in force then and at the time of the trial an officer with an Adjusted Service Rating of 63 points who elected to remain in the service could not be released (R 51). It was further stipulated, as aforesaid, that accused had received four "excellent" efficiency ratings from four different officers; that he had been awarded the Bronze Star Medal and the Purple Heart, and that he had earned two battle stars (R 51).

5. Specifications 1 and 2 of Charge I. Accused is here charged with embezzlement in violation of Article of War 93.

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come \* \* \*. The gist of the offense is a breach of trust" (MCM, 1928, par. 149h).

There is no doubt that accused was intrusted with the property on 7 August, as alleged; that he did not deliver it, as he agreed; and that with the exception of 14,000 Reichmarks which had disappeared, it was found in his possession on 28 August. From these facts and the fact that he could have delivered it when he agreed to and did not; from the fact that he falsely told the owners that he had delivered it; and from the fact that he made false statements to the agents of the Criminal Investigation Division as to its whereabouts, the court was warranted in inferring that he converted it to his own use (CM 243794, Moore, 28 BR 97; CM 248224, Van Epp, 31 BR 193).

In Specification 1 of Charge I, the accused is charged, in part, with embezzling twenty-two thousand (22,000) German Reichmarks, the property of

Frau Doctor Maria Daelen. The only evidence submitted to support this part of the Specification is the testimony of Doctor Daelen that it was "over twenty thousand marks in four packets" (R 22). The confirming authority properly approved only so much of the finding of guilty of that portion of the Specification as involved 20,000 Reichmarks, value about \$2,000.00.

The confusion which arose as to Prosecution Exhibits 1 and 9 apparently arose solely because of misnumbering. Both items were identified by their respective owners and were introduced into evidence and the allegations as to their ownership and that they were part of the embezzled property are fully sustained. The record is legally sufficient to sustain the findings of guilty of these Specifications as approved.

Specification of Charge III. It is here alleged that accused, with intent to deceive, wrongfully reported to Frau von Platen that he had delivered the property to "Marina", a report which he knew to be untrue. Accused admitted writing a letter to that effect and admitted that it was untrue but denied he intended to deceive Frau von Platen, contending that he was merely stating what he hoped to accomplish in the very near future. From his manner of dealing with the property, which we have already discussed, the court was fully justified in finding that the letter was written with the intent to deceive, as alleged.

Such conduct was, in our opinion, a violation of Article of War 96. Accused was a fiduciary and this false report was made to those to whom he owed a duty of fidelity, for the purpose, so the court could find, of aiding him in his scheme to embezzle their property.

The record is legally sufficient to sustain the findings of guilty of this Specification.

6. War Department records show that accused is 27 years of age, unmarried, and that his mother and father are living in Providence, Rhode Island. He has completed one and a half years in Bryant College prior to entry into the military service. Accused entered the Army on 5 May 1942 and went to the Armored Officers Candidate School, Fort Knox, Kentucky. He was commissioned a second lieutenant, Army of the United States, on 3 July 1943 and later on a date not shown he was commissioned a first lieutenant, Army of the United States. He arrived in the European Theater of Operations on 2 November 1944 and had four months combat. During that time he has been wounded and has received the Bronze Star Medal for heroic achievement. His record shows that the manner of the performance of his duties has been rated "excellent".

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. In the opinion of the

Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of dismissal is authorized upon conviction of a violation of Articles of War 93 and 96.

*D. L. Lichtenstein*, Judge Advocate  
*Waldemar A. Joff*, Judge Advocate  
*Henry A. [unclear]*, Judge Advocate

JAGH - CM 302968

1st Ind

WD, JAGO, Washington 25, D. C.

OCT 1 2 1946

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of First Lieutenant Folke R. Anderson (O-1018700), Infantry, 753rd Tank Battalion.

2. Upon trial by general court-martial this officer was found guilty of embezzlement of German reichmarks and jewelry of a total value of approximately \$14620.00, the property of German civilians, in violation of Article of War 93 (Chg I, Specs 1 & 2); and of false and deceitful misrepresentation in violation of Article of War 96 (Chg III, Spec). No evidence was introduced of previous convictions. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. On 18 January 1946, the Commanding General, United States Forces, European Theater, approved the findings of guilty with a minor modification of Specification 1, Charge I. He confirmed the sentence, but pursuant to Article of War 50 $\frac{1}{2}$  withheld the order directing its execution. The power conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Article of War 48, was suspended on 19 January 1946 and the record of trial was forwarded to my office for appropriate action.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the Commanding General, United States Forces, European Theater, and legally sufficient to support the sentence. I concur in that opinion.

On 6 August 1945 accused became acquainted with Frau Flockina von Platen and Frau Doctor Maria Daelen, two German civilian women in St. Anton, Austria, which is in the French Occupation Zone. The two women were subject to deportation to Germany. German nationals deported from the French Zone were not permitted to take jewelry and money out of Austria. On the following day the two women entrusted jewelry and German currency of an approximate total value of \$14620.00 to accused, with the understanding that he would deliver it to either Marina von Ditmar or Frau Hirth, both residing at Garmish Partenkirchen, Bavaria. No definite date for the delivery was made, but accused stated that he would deliver the property to one of the two women when he passed through Garmish on his return trip to Grassau, Germany. Accused stopped in Garmish on his return trip but did not deliver the property entrusted to him to either of the designated recipients.

On 15 August 1945, Frau von Platen received from accused a letter dated 13 August 1945 in which he stated in part:

"\* \* \* Your property that you gave me is safe and sound in Garmish. I had to give it to Marina as I could not find the other person. \* \* \*".

Toward the end of August Frau von Platen and Frau Doctor Daelen went to Garmish and discovered that the property had not been delivered to either of the designated recipients. On 28 August 1945 agents of the Criminal Investigation Division called on accused at Grassau. Initially he stated that the property was in the safe in the officers' club in Garmish Partenkirchen, but on search of accused's quarters, the agents found part of the property. The agents took accused to Garmish and on the way he handed to the agents the remainder of the jewels and what was left of the German currency.

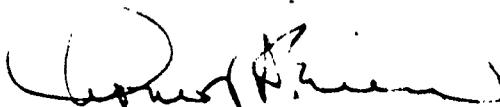
In an extra-judicial statement which was properly admitted in evidence accused admitted that the property had been entrusted to him for delivery to Frau Hirth or to Marina von Ditmar in Garmish. On the way back from St. Anton he was unable to find Frau Hirth. He did not return to Garmish and left the property in his quarters except for a part which was placed in the company's safe. He admitted writing a letter to Frau von Platen which she received on 15 August 1945. He stated that he intended to deliver the property the weekend following the day he wrote the letter, but that his work and "other things" had prevented him from so doing.

All of the property was recovered except approximately 14,000 reichmarks.

4. There are no mitigating circumstances and accused has conclusively demonstrated that he is unworthy of his commission. Accordingly, I recommend that the sentence be confirmed and carried into execution.

5. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.

2 Incls  
1 - Record of trial  
2 - Form of action



THOMAS H. GREEN  
Major General  
The Judge Advocate General

WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D. C.

(295)

SPJGK - CM 302969

16 APR 1946

UNITED STATES )

IX AIR FORCE SERVICE COMMAND

v. )

Trial by G.C.M., convened at IX Air Force  
Service Command, APO 749, Erlangen, Germany,  
17 November 1945. Dismissal.

Captain CARL E. ESKRIDGE )  
(O-311736), Air Corps. )

-----  
HOLDING by the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates.  
-----

1. The record of trial in the case of the officer named above has been examined by the Board of Review.
2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 85th Article of War.

Specification: In that Captain Carl E. Eskridge, 63rd Station Complement Squadron, 2nd Air Depot Group, was, at Strip R-14, on or about 20 April 1945, found drunk while on duty as officer in charge of a detail clearing debris from the building to be used as a post exchange at Strip R-14.

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

Specification: In that Captain Carl E. Eskridge, \*\*\*, was, at Strip R-14, on or about 20 April 1945, drunk and disorderly in station.

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

Specification: In that Captain Carl E. Eskridge, Headquarters and Headquarters Squadron, IX Air Force Service Command, was, at Luxembourg City, Luxembourg, on or about 6 July 1945, drunk while an accused on trial before a General Court-Martial.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Specifications and of Charge II and the Additional Charge. He was found not guilty of Charge I, but guilty of a violation of the 96th Article of War. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, U. S. Forces European Theater, for action under Article of War 48. Prior to action

by the Commanding General, United States Forces, European Theater, his powers, statutory or otherwise, in so far as they pertain to courts-martial, including the power of confirmation of sentences of general courts-martial and including powers conferred in time of war by Articles of War 48, 49, 50, 50½ and 51, were terminated 19 January 1946 by direction of the President, and in accordance with instructions contained in a cable from the War Department, dated 19 January 1946, as clarified by a cable from the War Department, dated 21 January 1946, the Commanding General, United States Forces, European Theater, forwarded the record of trial to The Judge Advocate General for action by the confirming authority or other appropriate action.

3. For reasons hereinafter stated, the Board of Review holds that accused was not accorded a trial on Charges I and II and their Specifications, that reading the evidence relating to the offenses therein alleged was error which prejudiced the court with respect to the findings of guilty of the Additional Charge and its Specification, and that therefore the record of trial is not legally sufficient to support any of the findings and the sentence.

4. On 29 June 1945 the Original Charges were referred to a court appointed by paragraph 6, SO 172, Headquarters IX Air Force Service Command, 26 June 1945. On 2 July they were withdrawn from that court and referred to a court appointed by paragraph 15, SO 178, Headquarters IX Air Force Service Command, 2 July 1945, as amended by paragraph 6, SO 180, 4 July 1945, as further amended by paragraph 1, SO 182, 6 July 1945.

The latter court met 6 July and heard the prosecution's case, which was based entirely on depositions admitted into evidence and read into the record. These depositions stated that about 16 April 1945 accused was placed in charge of an "advance party" in preparation for the movement of his squadron to Detmo, Germany (R. 8). Accused and his party arrived at Detmo at approximately 1900 hours (R. 11). Before going to bed, accused drank some white wine; "He was just starting to bed and had a few drinks was all and got intoxicated" (R. 13,23). The next morning he "took a couple of drinks" and went to a meeting; "He wasn't very intoxicated, but he was still under the influence of liquor" (R. 14,24). On 19 April, "at various times \*\*\* both day time and night," accused was not "drunk and staggering \*\*\* but he was under the influence of liquor" (R. 15,17,25). At 1000 hours 20 April accused got out of bed and "had a drink or two" of white wine and "was under the influence of liquor" (R. 15,16). He left his billet with a sergeant. "In front of the billets" they saw some German prisoners coming through a gate in a truck. Accused "was raising his carbine," apparently to fire at the prisoners, when the sergeant took it away from him. As the truck passed, accused said, "Well, everybody's gone now and I can't shoot anybody" (R. 16). At that time accused was drunk (R. 19). At 1930 hours, according to the deposition of a sergeant who, pursuant to the orders of the station commander, was escorting accused to the station guardhouse, accused "broke loose from me a couple of times. He called me a son-of-a-bitch, threatened to kill me \*\*\* I took him

inside the guardhouse, locked him up in a cell." Accused "broke out of the cell," and was handcuffed and reincarcerated, after which "he started pounding on the door \*\*\* He was drunk" (R. 28,29).

The defense moved for a finding of not guilty of Charge I and its Specification (R. 32). During the trial judge advocate's argument on the motion, after the court had returned from lunch, accused "in a soft tone muttered" (R. 45), "I don't like the way he is talking," and, "He is lying" (R. 37). At the request of defense counsel the court thereupon took a five minute recess. When it reconvened, defense counsel requested "permission to continue the case until other defense counsel can be substituted," whereupon the court adjourned at 1403 hours (R. 38). It had been discovered that accused might have been drunk in court when he made the foregoing remarks (R. 46,47,48). The Additional Charge was preferred for this offense, and on 6 November the Original Charges and the Additional Charge were referred to a different court, namely, that appointed by paragraph 6, SO 172, Headquarters IX Air Force Service Command, 26 June 1945, as subsequently amended by paragraphs 10, 11, 12 and 13, SO 305, 7 November 1945. This court met 17 November, at which time the following proceedings were had:

"PRES: Court will come to order.

"TJA: The prosecution is ready to proceed with the trial of the United States against the accused, Captain Carl E. Eskridge, Headquarters and Headquarters Squadron, IX Air Force Service Command.

"At the last session of this case, the court was recessed -- adjourned -- subject to further call of the president. That was on 6 July 1945. Since that time members of the court have been transferred from this command and it has been necessary to add new members. Since that time another charge and specification has been added against the accused which will require another arraignment. Now as to the additional charge and specification, I think it would be proper at this time to proceed in the normal course of events to arraign the accused" (R. 41).

The accused was asked whether he was satisfied with the regularly appointed defense counsel, and he said he was; the reporter was sworn; the accused stated he did not desire a copy of the record "with reference to the additional charge and specification" (R. 42); the trial judge advocate announced the names of members of the court present and absent, and stated the general nature of the Additional Charge and its Specification; the trial then proceeded as follows:

"TJA: \*\*\*

"It does not appear from the papers on the additional charge that any member of the court is disqualified from serving by reason of being the accuser or the investigating officer, or to appear as

a witness for the prosecution. Does any member of the court know of any reason whereby the prosecution or defense might have reason to challenge on the additional charge?

"MAJ HINGER: Having previous knowledge of the case and having sat on the previous court trying the same individual, I feel that my presence would be prejudicial to the interests of the accused; therefore, I would like to be excused.

"TJA: I ask the president of the court to excuse this member in view of his previous knowledge of the case.

"PRES: He may be excused. (Major Hinger withdrew from the court room.)

"TJA: Prosecution has no challenges either for cause or peremptorily; so far as the additional charge and specification are concerned.

"Does the accused have any challenges for cause or peremptorily.

"DC: The defense has challenges for neither.

"TJA: Is the accused satisfied with the court as it now stands so far as the additional charge and specification are concerned.

"DC: The accused is satisfied" (R. 42).

The court "and the trial judge advocate" were then sworn, the accused was arraigned only on the Additional Charge and Specification, to which he pleaded not guilty (R. 43), and the record continues as follows:

"TJA: At this time I think it would be proper to read to the court proceedings of the case up to the point we commence this morning, so that the court may be familiar with all the facts. I will omit readings of formal matters except insofar as pleas were recorded. As to all the specifications under Charge I and II, the accused pleaded not guilty, and at this point I will continue reading from the proceedings of the case.

"LM: Were there any special motions.

"TJA: There were no special motions or pleas.

"At this point the trial judge advocate read the previous proceedings in the case" (R. 43,44).

The court then proceeded to hear prosecution's evidence pertaining to the Additional Charge and its Specification. The former trial judge advocate

testified that during the recess requested by defense counsel at the former hearing,

"\*\*\* accused came over to the table of the court members and, pointing at me, said in rather a loud tone, that everything I had told the court was a lie and that I was a liar \*\*\* I was standing at my table at the time the accused walked out of the court-room, and I observed that he was staggering and very much unsteady on his feet" (R. 46).

He then accompanied accused to a nearby corridor, and "noticed that the accused was unsteady on his feet, both in a standing position and during the time that he was walking. I also observed that his manner of speech was rather thick and incoherent at times. He spoke in a loud tone when he did talk." The accused "said words to the effect, 'God damn it, let's get this thing over, Captain. If (defense counsel) does not want to be my lawyer, you get me another one. I want to get it over right now. Let's get back in there'" (R. 46,47). Accused's eyes were "very glassy and they were watery," his face was "definitely a red color," and there was "a strong odor of alcoholic beverage on his breath" (R. 47). Witness was of the opinion that accused was drunk at the time (R. 47).

The court reporter testified that during the recess accused "was a little bit unsteady on his feet. He was walking around in the corridor there as he was talking and his eyes to me seemed to be rather bleary and his face was rather flushed \*\*\* so far as his speech was concerned, he spoke quite intelligently -- all very coherent -- seemed to know just what was going on" (R. 49). Witness walked back to headquarters building with accused after adjournment; "as we walked along he was weaving from side to side, and didn't exactly keep up with me" (R. 50). Accused "was under the influence of intoxicating liquor rather slightly but not to the point where he was a nuisance or disorderly in any fashion" (R. 50). "At no time did I detect a strong odor of alcohol on his breath \*\* I wouldn't say that he was drunk" (R. 51).

This was the prosecution's case. Defense renewed the motion for findings of not guilty of Charge I and its Specification, and made a similar motion with respect to the Additional Charge and its Specification. These motions were denied, and defense offered the following stipulation; which was admitted into evidence and read into the record (R. 53):

"It is hereby stipulated and agreed by and between the prosecution, the defense and the accused, that if Sergeant Chester O. Miller, ASN 36817367 and Private First Class Louis E. Popper, ASN 36852054, both of the 1296th Military Police Company, APO 149, U.S. Army, were present they would testify as follows:

"We were ordered to proceed to Colonel Olmsted's office at about 1410 hours. We reported to Colonel Olmsted. He detailed us to go with Captain Friedman and look for a Captain that Captain Friedman would identify. We first searched the Pescatore and left

orders at Gate 1 and Gate 2 and instructed the guards to hold a man, a Captain, whom Captain Friedman described for the guards. We then went down to the Schwartz Hotel. As we approached the hotel we saw Captain Eskridge emerge. Captain Friedman asked Captain Eskridge to get in our vehicle, which he did.

"We observed Captain Eskridge. He appeared to have been drinking. We did not smell his breath. Captain Friedman did all the talking to Captain Eskridge and we merely followed the two Captains to vehicle. Captain Eskridge rode with us in the back seat. The Captain accompanied us readily. We did not observe Captain Eskridge to stagger but there was not much walking to be done. This was about three o'clock. On the way we talked to Captain Eskridge in a casual way. He seemed to us to speak intelligibly. At the dispensary we noted that Captain Eskridge was asked to walk a straight line. He did as told and came back to the Doctor and asked if that was all right. We then took him back to Colonel Olmsted. Colonel Olmsted instructed that the Captain be placed in Stockade and we therefore took him to the Seminary where the Stockade is. He was then turned over to Captain Garber. We observed Captain Eskridge. He seemed to talk intelligibly to Captain Garber and caused us no trouble. All this occurred on 6 July 1945." (Def. Ex. 1)

The court then made findings on all Charges and Specifications, and adjudged sentence.

5. It thus appears that the trial at the second hearing was conducted on the erroneous theory that it was simply a continuation of the first hearing before new members of the original court, whereas in fact the second hearing was before a new court. The accused was not advised by the new court, the trial judge advocate, nor his defense counsel, nor by arraignment, that he was being tried on the original Charges and Specifications. No evidence of the offenses alleged in the original Charges and Specifications was introduced, the trial judge advocate simply reading "to the court proceedings of the case up to the point we commence this morning, so that the court may be familiar with all the facts." As a further indication of the erroneous theory that the new trial was simply a continuation of the first hearing before new members of the original court, challenges were restricted to the Additional Charge and Specification. Under these circumstances it is clear that accused was not accorded a trial on the Original Charges and Specifications. In view of the conflicting testimony hereinafter more fully discussed, the reading of the record of the first hearing, which contained evidence pertaining to the offenses alleged in the Original Charges and Specifications, was error which injuriously affected the substantial rights of accused since it of necessity prejudiced the court in its findings on the Additional Charge and Specification. The evidence introduced at the first hearing related to occasions when accused was allegedly drunk on duty and disorderly, on or about 20 April 1945. These offenses had no connection with his alleged drunkenness 6 July, and evidence of the offenses committed

in April was immaterial to the issue raised by the plea of not guilty to the Additional Charge and its Specification, which was the only issue properly before the court. Reference to such unrelated offenses was error. The Manual for Courts-Martial states on this point that -

"A fundamental rule is that the prosecution may not evidence the doing of the act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not ever been tried and convicted of their commission" (par. 112b, MCM, 1928, p. 112).

The evidence concerning accused's drunkenness, if any, 6 July was in conflict. One witness for the prosecution testified that accused was unsteady on his feet, his speech was thick and incoherent at times, he spoke in a loud tone, his eyes were very glassy and were watery, his face "definitely a red color," and that there was a strong odor of alcohol on his breath. This witness was the only one who was of the opinion that accused was drunk. The other witness for the prosecution testified that, although accused was a "little bit unsteady on his feet" and his eyes seemed to be "rather bleary" and his face "rather flushed," his speech was "very coherent," and "at no time did I detect a strong odor of alcohol on his breath." This witness "wouldn't say that" accused was drunk. Two witnesses for the defense, who saw the accused less than an hour after the court adjourned, stated that, although he "appeared to have been drinking," they did not see him stagger, he seemed to speak intelligibly, and, when asked at the dispensary "to walk a straight line," he "did as told and came back to the Doctor and asked if that was all right." In the opinion of the Board of Review this evidence is in conflict, and the court might well have found that it was not proved beyond a reasonable doubt that accused was drunk as alleged had they not been informed that on other occasions he drank and had been drunk and while drunk had been violent and disorderly. Where evidence of alleged intoxication of an accused was in conflict, it was held by the Board of Review that introduction of evidence that "accused drank liquor and was intoxicated on other occasions" was prejudicial error, and "affected his substantial rights within the meaning of AW 37" (Dig Op JAG 1912-40, sec. 395(7), pp. 200,201, CM 114908 (1918)).

6. The Board of Review therefore holds that the record of trial is not legally sufficient to support the findings and sentence.

Thomas M. Mayo, Judge Advocate  
William B. Kuder, Judge Advocate  
Earl W. Wingo, Judge Advocate

SPJGK - CM 302969

1st Ind

May 10, 1946

Hq ASF, JAGO, Washington 25, D. C.

TO: Commanding General, IX Air Force Service Command, APO 66, c/o  
Postmaster, New York, New York.

1. In the case of Captain Carl E. Eskridge (O-311736), Air Corps, I concur in the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved.

2. When copies of the Published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows:

(CM 302969).

/s/ THOMAS H. GREEN

1 Incl  
Record of trial

THOMAS H. GREEN  
Major General  
The Judge Advocate General

WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(303)

SPJGH - CM 302970

28 MAY 1946

U N I T E D   S T A T E S                    )  
  )  
  )  
  )  
  )  
  )  
  )  
  )  
Lieutenant Colonel GEORGE G.            )  
GUITERAS (O-19321), Medical            )  
Corps.    )

  )    THIRD UNITED STATES ARMY  
  )    Trial by G.C.M., convened at  
  )    Munich, Germany, 18 November  
  )    1945. Dismissal.

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, STERN and TREVETHAN, Judge Advocates.  
-----

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

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

CHARGE: Violation of the 85th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Lieutenant Colonel George G. Guiteras, 112th Evacuation Hospital, was at or near Mosbach, Germany, on or about 13 April 1945, drunk on duty as commanding officer of the 112th Evacuation Hospital.

Specification 4: (Finding of not guilty).

Specification 5: In that \* \* \*, was at or near Traunstein, Germany, on or about 7 May 1945, drunk while on duty as the commanding officer of the 112th Evacuation Hospital.

Accused pleaded not guilty to the Charge and all Specifications. He was found guilty of the Charge and of Specifications 3 and 5 but not guilty of Specifications 1, 2 and 4 thereof. No evidence was introduced of any previous convictions. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that on 13 April 1945 the 112th Evacuation Hospital, of which accused was commanding officer, was

stationed in the vicinity of Mosbach, Germany (R.6,20,22,39; Pros. Ex. 1). That evening the area was strafed by a German plane. About fifteen to thirty minutes thereafter the accused entered a tent containing the pre-operating and operating rooms where Major Cottler, the hospital urologist, was engaged in writing up some cases (R.22,27). The accused was unsteady and after walking to the center of the tent, he slipped and grabbed for the tent pole. Captain Davies, the organization's adjutant, who was with accused, helped to steady him (R.23-25). The accused's eyes were "ragged" and he wore an unusual smile (R.23). In the opinion of Major Cottler the accused was drunk (R.23,27,29).

Technician Fifth Grade Hodges saw the accused leaving the surgical tent just after the German plane had strafed the area. He was of the opinion that accused had been drinking because the accused staggered slightly and told some soldiers who had been discussing the enemy plane not to spread any rumors (R.30-32). Private First Class Yalanzon saw the accused about five or ten minutes after the strafing. Yalanzon was telling a patient about the plane when the accused, who was normally a soft-spoken man, loudly shouted to Yalanzon that the latter had not seen or heard a thing and that no plane had passed overhead. At the time the accused's eyes had a "glassy stare." The witness was unable to detect the odor of liquor, being four or five feet from accused, but from the manner of his speech and the appearance of his eyes, was of the opinion that accused was drunk (R.39-42).

On 7 May 1945 the accused was still the commanding officer of the 112th Evacuation Hospital which was then located in the vicinity of Traunstein, Germany (R.6,22). The organization had begun to arrive there the preceding day (R.6; Pros. Ex. 1). Major Cottler, who had arrived at the new site with the second echelon about 4:30 p.m. or 5:00 p.m. on 7 May, observed that some furniture belonging to the nurses was unloaded from a truck and burned in the presence of the accused, the detachment commander, the first sergeant and others (R.23,24). In Major Cottler's opinion the accused was then drunk because "he stood there in this cock-sure manner," he had a "glitter in his eye," seemed to be "unconscious of what was going on around him" and "didn't seem in a rational frame of mind" (R.24). Private First Class Yalanzon testified that about two or three hours prior to the burning of the furniture, the accused hurried through the X-ray tent, staggering as he went, and stumbled once. The floor was level although the tent contained a considerable amount of equipment placed at intervals and not in alignment (R.47,48). Later in the evening, Yalanzon saw the accused close to the burning furniture walking up and down "more or less staggering." In the opinion of this witness, the accused was drunk both in the X-ray tent and at the fire (R.47,49). Technician Fourth Grade Mann testified that about 4:00 p.m. on the date in question, he saw the accused standing near the truck from which the furniture was being unloaded. The accused appeared unsteady on his feet. He asked Mann to have the first nurse report to him (R.57,58,60). It was Mann's opinion that accused was drunk although not "very drunk." He observed that accused "was slouched", his face was flushed and his words "were run together." the witness did not detect the odor of intoxicants on accused's breath (R.58,59).

Captain Davies, who saw the accused in the vicinity of the burning equipment, testified that in his opinion, based upon accused's walk, which was "a little more jerkier than usual," accused was drunk (R.70).

On the morning of 7 May 1945 accused had left his station to go to the Headquarters of the 7th Army. He and one Captain Dudley were driven in a car operated by one Private First Class Hardesty. En route they encountered an overturned German truck. While the accused remained in the car, Captain Dudley and Hardesty removed a case of cognac from the overturned truck and put it in the car in which they were riding. Upon returning from 7th Army Headquarters about 3 or 4 p.m. of the same day, accused took the case of cognac. About 7:30 or 8:00 p.m., Hardesty went to accused's quarters. He testified that there he asked accused for "a bottle" to take to the drivers. Accused refused and said that if Hardesty had "a bottle", he would confiscate it. It was Hardesty's opinion that accused was drunk at the time of this conversation because accused's face was flushed and he staggered in the tent (R.53,54). The witness admitted that he did not see the accused take a drink that day and that the case of cognac was full when it was brought to the organization area (R.55). He further admitted that he did not drive the accused and Captain Dudley back and that he felt "pretty good" while returning to his station and when he requested liquor of the accused although he denied that he was drunk (R.54,56).

4. For the defense evidence was offered to show that on 13 April 1945 Captain Davies, adjutant of the 112th Evacuation Hospital, was with the accused at the time of and immediately following the raid by the German plane. At the suggestion of accused, they toured the hospital and together visited either the operating or plaster tent (R.65,66). In the course of the inspection accused had a conversation with an enlisted man (R.65). The time spent in going through the hospital was about ten minutes. As far as Captain Davies observed, the manner of accused's speech was "all right." He had not seen accused drink anything on that day. Neither did he see the accused stumble in the operating room nor see an officer "hold him up" (R.67). It was the opinion of Captain Davies that accused had full control of his mental and physical faculties and was not drunk (R.66,67,71).

Captain Bird, detachment commander in accused's organization on 7 May 1945, testified that on that date, pursuant to instructions received from accused, he ordered certain excess furniture burned (R.72,73). At the fire Captain Bird detected the smell of alcohol on accused's breath. However, his speech was clear and his walk was steady. It did not appear to Captain Bird that accused was performing his duties improperly and he believed the accused was sober (R.74). The instructions relating to destruction of the furniture pertained to property other than TO and E equipment. It was furniture and equipment that had been accumulated by the organization in France and Germany. The organization was semi-mobile and the carrying of this extra furniture required the use of extra trucks (R.73).

Colonel Walter L. Peterson, 189th General Hospital, testified that he knew and had had the opportunity to observe the accused from June 1940 to June 1941, from June 1942 to April 1943, and for an unstated period in 1944; that the accused's reputation for sobriety and for performing his work was good and that he would like to have the accused in his command (R.76-79). It was stipulated that if Colonel A. A. White were present in court he would testify that if accused were a member of his command, he would assign him to the command of a hospital (R.79).

After his rights with respect to becoming a witness in his own behalf were fully explained, accused elected to remain silent (R.80,81).

5. After the defense had rested, the court re-called Major Cottler, Captain Bird and Technician Fifth Grade Hodges as its own witnesses. Major Cottler, whose knowledge of accused extended from 21 October 1944 to June 1945, testified that the accused had the reputation of being addicted to alcohol and that the accused was a strict disciplinarian. The witness had been reprimanded by him on one occasion (R.81,82). Captain Bird testified that accused was known to be a man who drank and was not considered a severe disciplinarian (R.82). According to Hodges, accused's general reputation with respect to sobriety in the organization was "that he got drunk." His reputation as a disciplinarian was good (R.83).

6. The accused stands convicted under two separate Specifications of being drunk on duty as the commanding officer of the 112th Evacuation Hospital (Chg., Specs. 3 and 5). The evidence clearly shows that on 13 April 1945, the 112th Evacuation Hospital was located near Mosbach, Germany, with the accused as its commanding officer. On 7 May 1945 its location was near Traunstein, Germany, with accused in the same status of command. On the former date after a raid by a lone enemy plane, accused was observed by Major Cottler walking through one of the tents in an unsteady manner. His eyes were "ragged" and he wore an unusual smile. He slipped and had to grab for a tent pole to catch himself. There was further testimony that he required the support of an officer (Captain Davies) who accompanied him through the tent although Captain Davies denied this to be the fact. In the opinion of Major Cottler the accused was drunk. Two enlisted men testified that immediately after the raid, accused admonished them against spreading rumors concerning the enemy plane. One of them stated that the accused, referring to the plane, loudly shouted that no plane had passed overhead and that the witness had not heard or seen a thing. One of the enlisted men was of the opinion that the accused had been drinking because he staggered while the other, judging by the accused's manner of speech and the "glassy stare" in his eyes, was of the opinion that accused was drunk.

To controvert this testimony, the defense introduced evidence through Captain Davies, the organization adjutant, to show that at the time and place above referred to, the accused accompanied by Captain Davies made a tour through the hospital tents following the strafing run by the German plane.

Captain Davies testified that accused's actions were entirely normal at that time; that he did not observe him stumble nor see any officer hold the accused up in the operating tent. Captain Davies believed the accused was sober.

With respect to the offense alleged to have occurred on 7 May 1945, the evidence shows that on the afternoon of that day, accused was in possession of a case of cognac obtained from an overturned German truck. Later in the day he ordered one of his officers to destroy some non-organizational furniture and equipment which just arrived with the organization at its new station. A prosecution's witness testified that he saw accused about 4:00 p.m. on that day standing near the truck from which the furniture was being unloaded. In the opinion of this witness, the accused was drunk because he was slouched, his face was flushed, his words were run together and he was unsteady on his feet. Another prosecution's witness testified that two or three hours before the furniture was burned, he observed the accused in the X-ray tent at which time accused staggered and stumbled. The same witness saw the accused at the burning of the furniture at which time accused was walking up and down "more or less staggering". The witness believed that accused was drunk in the X-ray room and at the fire. Major Cottler was also of the opinion that accused was drunk at the fire judging by his "cock-sure manner," the "glitter in his eye" and his apparent "unconsciousness" of what was going on around him. The fourth prosecution witness, Captain Davies, who saw accused near the vicinity of the burning furniture, was of the opinion that accused, because of his walk which was "a little more jerkier than usual," was drunk.

The last prosecution witness, the driver of the vehicle in which accused was an occupant when the case of cognac was obtained, testified that he entered accused's quarters about 7:30 or 8:00 p.m. on the evening of 7 May 1945 and that accused, who then refused his request for a bottle of cognac, was staggering around in the tent. According to the witness, the accused's face was flushed and he was drunk. The witness denied being drunk but admitted that he was feeling "pretty good" at the time.

To refute this testimony, the defense introduced as a witness the officer whom the accused had ordered to burn the furniture. He was present with the accused at the fire and testified that although he could detect the odor of alcohol on accused's breath, the accused's speech was clear, his walk was steady, and according to the witness, "it didn't appear to me that he wasn't performing his duty properly." In his opinion accused was sober at that time. In justification of accused's actions in ordering the furniture to be burned, it was shown (a) that said furniture was equipment which had been accumulated by the organization here and there in France and Germany and was not Government-issued property, and (b) that the furniture which was burned had impeded the movement of the organization, a semi-mobile unit.

Paragraph 145a of the Manual for Courts-Martial defines drunkenness within the meaning of Article of War 85 as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and

physical faculties." It is further stated therein that "The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty" and that "In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this Article." Considering the nature and the general location of the unit on 13 April 1945, common knowledge that hostilities were then in progress and indeed, the fact that accused was making a tour of the area as the commanding officer following a strafing by an enemy plane at the time of the alleged offense, the conclusion is inescapable that he was then on duty. So, too, on 7 May 1945 the facts showing that the unit was in enemy territory at a time when hostilities were not officially ended, the time of day when the alleged offense was committed, and the presence of accused at the scene where official orders which he had given were then being carried out, conclusively established that accused was on duty as alleged.

The evidence is persuasive that on each of those occasions, accused was intoxicated to such a degree that his mental and physical faculties were sensibly impaired. While two defense witnesses, one of whom testified as to the offense of 13 April 1945 and the other who testified with respect to the offense of 7 May 1945, were of the opinion that accused was not drunk and that he did not display evidence of drunkenness, the overwhelming weight of the evidence is to the contrary. Further, the defense testimony of accused's reputation for sobriety was more than off-set by testimony of prosecution witnesses in a better position to know accused's reputation in that regard at or about the time of the offenses. The weight to be given to the conclusion of the various witnesses was primarily a question within the province of the court which had the opportunity to observe the witnesses and, in the light of all the circumstances, judge the value of their testimony. The Board of Review is convinced that the court was fully warranted in concluding, upon all the evidence, that accused was in fact drunk on duty as alleged in Specifications 3 and 5 of the Charge, in violation of Article of War 85.

6. Subsequent to trial, four of five members of the court, the assistant trial judge advocate and the defense counsel signed a letter addressed to the reviewing authority recommending clemency. In said letter, the petitioners reviewed accused's military record and stated that their request for leniency was based upon accused's lengthy period of creditable service, meritorious performance of duty in post of high responsibility, his future value to the service, and the fact that the court had no alternative but to impose the sentence which it did because of its findings. Consideration has been given to this recommendation and to that of the reviewing authority who recommended that the sentence be commuted to a "suitable forfeiture" of the officer's pay. Consideration has also been given to several letters from individuals addressed to various authorities in the War Department on behalf of accused.

8. War Department records show the accused to be 39 years of age and married. He was graduated from the University of Pennsylvania with the degree of doctor of medicine in 1931 and accepted an appointment as first lieutenant in the Medical Reserve Corps on 5 November 1932. He became a

first lieutenant in the Medical Corps of the Regular Army on 3 July 1933, was promoted to captain 10 December 1935 and to major 10 December 1944. On 24 December 1941 he was promoted to the grade of major in the Army of the United States and to lieutenant colonel, Army of the United States, on 10 August 1942. Since 1 July 1933 accused has received efficiency ratings varying between Satisfactory and Excellent. From 1 July 1940 to 8 June 1945, he received seven ratings of Excellent and two of Very Satisfactory. The only entry noted suggesting the accused's prior immoderate use of intoxicants appears in his efficiency report for the fiscal year ending 30 June 1936 wherein the reporting officer made the following observation:

"A young officer of exceptional, natural ability but not inclined to exert himself unduly. While I have never seen him intoxicated, his appearance in the morning on several occasions has indicated an over-indulgence in alcohol the preceding night. He was married in March (1936) and since then I have seen no indication of this. If he lets liquor alone and will properly exert himself, he will make a very valuable medical officer."

9. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 3 and 5 thereof and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation in time of war of Article of War 85.

Maxwell M. Coffey, Judge Advocate.  
Joseph J. Stern, Judge Advocate.  
Robert C. Nevettau, Judge Advocate.

(310)

JAGH - CM 302970

1st Ind

WD, JAGO, Washington 25, D. C.

JUN 20 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel George G. Guiteras (O-19321), Medical Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty on two separate occasions (Chg., Specs. 3,5), in violation of Article of War 85. The first offense was committed on 13 April 1945 in a region of active hostilities, and the second on 7 May 1945 in enemy territory when hostilities were not officially ended. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

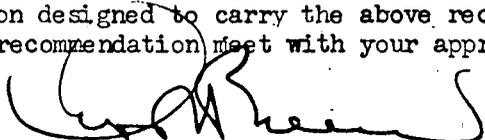
On 13 April 1945 accused was drunk while on duty as the commanding officer of an evacuation hospital then stationed near Mosbach, Germany. On 7 May 1945, while commanding officer of the same hospital unit then stationed in the vicinity of Traunstein, Germany, he was again drunk on duty. While he was not grossly drunk on either occasion, it is apparent from the evidence that he was intoxicated to such a degree that his mental and physical faculties were sensibly impaired and he was observed in this condition by several enlisted men of his command.

4. The accused has been a member of the Regular Army since 1933 and on 10 December 1944 attained the permanent grade of major. He is 38 years of age, married and has four minor children. Four of five members of the court which tried accused recommended clemency because of his long period of creditable service and his future value to the service. The reviewing authority recommends that the sentence be commuted to suitable forfeitures of the officer's pay. In view of all the circumstances, including the recommendations for clemency mentioned above, I recommend that the sentence be confirmed but suspended.

5. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.

2 Incls

- 1 - Record of trial
- 2- Form of action

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

(GCMO 217, 9 July 1946).

WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

(211)

SPJGK - CM 302971

18 MAR 1946

UNITED STATES )

9TH INFANTRY DIVISION

v. )

Trial by G.C.M., convened at Wasserburg,  
Germany, 21 September 1945. Dismissal  
and total forfeitures. Confinement for  
five (5) years.

Second Lieutenant FRANK J. )  
HALL (O-1054259), Infantry. )

-----  
OPINION of the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates.  
-----

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: Violation of the 68th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

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

Specification: In that Second Lieutenant Frank J. Hall, Company G, 47th Infantry, did, at Scheyern, Germany, on or about 7 August 1945, with intent to do him bodily harm, commit an assault upon First Lieutenant Robert B. Vaughan, Headquarters, Second Battalion, 47th Infantry, Battalion Duty Officer, by willfully and feloniously striking the said First Lieutenant Robert B. Vaughan on the head and about the face with his hands.

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

Specification: In that Second Lieutenant Frank J. Hall, \*\*\*, did, at Scheyern, Germany, on or about 7 August 1945, wrongfully use improper and insulting language, to wit: "I'm not going to give you my pistol, you Yankee, nigger-loving son-of-a-bitch", and "You nigger-loving bastards, we will get all of you yellow-bellied bastards together and kill you with the niggers you love", and "I don't take orders from you or any bastard like you", and "You are a bastard and a cock-sucker",

arrived (R. 13) and Lieutenant Vaughan told him that accused was under arrest and directed him to take accused to his (accused's) quarters (R. 20). Accused asked to see the Officer of the Day (R. 13) and the group proceeded towards the guardhouse (R. 7,13). They had gone about 25 to 75 yards when a colored soldier came up carrying a carbine at port arms (R. 7,10,14,17,19,20,23,27,33). Accused said "he was going to shoot that damn nigger \*\*\*, there is that God-damn nigger now" (R. 14,20,23), and "I'll kill that nigger" (R. 27). He whipped out his pistol and the Sergeant of the Guard and Lieutenant Vaughan disarmed him by force (R. 14, 17,19,21,27). The colored soldier brought his carbine up to his shoulder (R. 20,21). Lieutenant Olds told the colored soldier to drop his weapon, which he did (R. 14,21,27). Lieutenant Olds then picked up the carbine, removed the fully loaded magazine and a round from the chamber (R. 21). During all this incident, accused was cursing Lieutenant Vaughan (R. 15, 18), but neither the Sergeant of the Guard nor Lieutenant Olds could recall the exact language (R. 17,22), except that Lieutenant Olds did recall that accused said, "God-damn son-of-a-bitch" (R. 24). In the opinion of the Sergeant of the Guard, accused was not drunk (R. 18), and in the opinion of Lieutenant Olds, accused was not drunk, but had been drinking (R. 22).

After this incident the officers went to the "Battalion CP" and both accused and Lieutenant Vaughan talked to the Regimental Staff Duty Officer over the telephone (R. 21,28). Upon Lieutenant Vaughan telling accused that he had been instructed to place him in arrest in quarters, accused again swung at Lieutenant Vaughan and struck him on the right ear with his fist (R. 21,28,31). Lieutenant Vaughan did not at any time strike back at accused (R. 21). Altogether accused swung at Lieutenant Vaughan ten to twenty times (R. 29), and had struck Lieutenant Vaughan five to ten times before the sentry stepped in between them (R. 28). Lieutenant Vaughan was examined by a medical officer who found that both sides of his head were bruised and who stated that in his opinion such bruises would require more than one blow (R. 34).

For the defense.

Private Gustav A. Jatzke, who at the time was a member of accused's platoon, "saw Lt. Vaughan and Lt. Hall arguing" on 7 August 1945 (R. 35). This argument became heated after a while and the two participants then "turned around and started toward the Battalion" (R. 35). At that time a colored soldier was approaching them with a carbine. The witness heard accused say, "Let me defend myself." Accused "went for his pistol \*\*\* and started to pull it out but they grabbed him" (R. 35,36). A "Lieutenant from H. Company" took the carbine "with both hands and pulled it away" from the "colored soldier" (R. 35,36,37). "The group returned to the Battalion" and witness saw nothing that transpired thereafter (R. 35). He did not hear accused "say anything to Lt. Vaughan in the way of vulgar language," nor did he see accused strike Lieutenant Vaughan at any time (R. 35,36).

After an explanation of his rights accused made the following unsworn statement:

"At the time when Lt. Vaughan-- I first encountered Lt. Vaughan, he was... he and the colored boy were coming toward me, and when they were about 50 yards, approximately, from me, the colored boy left Lt. Vaughan, and Lt. Vaughan came on down to where I was. At the time I didn't know he was the Battalion Duty Officer, and he didn't tell me so. He came up and reached out with his hand and grabbed hold of my pistol, and I shoved him away. He grabbed me around the waist and I kept shoving him away. Then, after he saw that he could not obtain my pistol, his attitude had caused me to become angry, and I asked him where the Officer of the Day was. He said he was not present. I asked for the Staff Duty Officer, and he said he wasn't there. The second encounter took place when the Sergeant of the Guard came up and told me to come with him. I immediately started up the road with the Sergeant of the Guard, and about 25 or 30 yards away I saw the colored soldier moving off to the right of the road. He had his carbine, and held it roughly in the port arms position, aimed in the general direction we were in. As soon as I saw that I called Lt. Vaughan's and the Sergeant of the Guard's attention to it. They looked at the colored boy, and when they looked back at me the colored boy raised the carbine to his shoulder, and I made an effort to obtain my pistol, which I did. I got it out and Lt. Vaughan and the Sergeant were attempting to take it when Lt. Olds disarmed the colored boy, and then I released my hold on the pistol. That's all I have." (R. 37-38)

4. The evidence fully establishes that at the time and place described in the specifications the accused used improper and insulting language toward and struck on the head and about the face with his hands his superior officer, First Lieutenant Robert D. Vaughan, while Lieutenant Vaughan was on duty and in the execution of his office as battalion duty officer. Lieutenant Vaughan was superior in rank to the accused, not only by virtue of the fact that he was a first lieutenant at the time of the occurrence of the incidents on which the charges are based whereas accused was only a second lieutenant, but by virtue of the further fact that he was battalion duty officer and was in the execution of his duties as such at the time. As stated in paragraph 134a, Manual for Courts-Martial, 1928, page 148:

"An officer is in the execution of his office 'when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage.' (Winthrop.) 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."

Lieutenant Vaughan's description of the assault upon him is confirmed to a great extent by eye witnesses and by the medical officer who examined him, and the use of contemptuous, disrespectful, improper and insulting words by accused toward Lieutenant Vaughan in the presence of other military personnel is established beyond any reasonable doubt. "Using insulting and defamatory language, without justification, to another officer or of him in the presence of other military persons or behaving towards him in an otherwise grossly insulting manner" is given in Winthrop's Military Law and Precedents (2d Ed. p. 714) as an instance of conduct unbecoming to an officer and gentleman.

The Board of Review, therefore, is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specification of Charge III, laid under Article of War 95, and of the Specification of Charge IV, laid under Article of War 64 and of the respective Charges. However, the Board of Review finds the proof legally insufficient to support the finding that accused assaulted Lieutenant Vaughan with intent to do bodily harm in violation of Article of War 93, as charged in the Specification of Charge II. Accused inflicted only minor injuries with his fist or hand on Lieutenant Vaughan's face. No instrument was employed by him and apparently no particular force was employed by accused in striking his victim. Ordinarily a blow with one's fist on the jaw or face of the person assaulted does not constitute a violation of Article of War 93, and there is nothing to indicate that accused attempted or intended "to do bodily harm" to Lieutenant Vaughan as that term has generally been interpreted (CM 290353, Rosaforte; CM 267337, Harbison, 43 B.R. 373; CM 238970, Hendley, 25 B.R.1; CM 229366, Long, 17 B.R. 125; CM ETO 1177, Combes, 4 ETO 59, 3 Bull, JAG 147, April 1944). The record therefore supports only a finding of assault and battery as a lesser included offense, but inasmuch as that offense is included in the finding of guilty of the Specification of Charge IV it would be a violation of the rule against improper duplication of charges to hold accused additionally guilty of assault and battery under the Specification of Charge II.

5. The Board of Review has given consideration to recommendations and requests for clemency submitted to the reviewing authority by various commanding officers and fellow officers of the accused and by enlisted men who served in combat under him.

6. War Department records show that accused is 24 years and 9 months of age, married, and a high school graduate. He enlisted in the Army on 21 December 1939 and attained the rank of corporal. He attended Anti-Aircraft Officer Candidate School and on 8 April 1943 he was commissioned a second lieutenant in the Coast Artillery. (According to the review by the Staff Judge Advocate he was transferred to the Infantry and was sent overseas as a replacement in January 1945.) He was assigned to the 47th Infantry on 16 February 1945, and was awarded the Combat Infantryman Badge on 16 February 1945 and the Purple Heart for wounds received on 3 March 1945.

He was promoted to first lieutenant on 16 August 1945 as a result of a battle field recommendation for outstanding performance in actual combat. Prior to entry into service he had no civilian occupation. On 25 September 1940 he was found guilty by a special court-martial of striking an enlisted man with a magazine binder and was sentenced to one month's confinement and forfeiture of \$13 of his pay.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge II and its specification but legally sufficient to support the findings of all other charges and specifications and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of violation of Article of War 64 and is mandatory upon a conviction of a violation of Article of War 95.

Thurman Meyer, Judge Advocate  
William B. Tude, Judge Advocate  
Earl W. Wingo, Judge Advocate

SPJGK - CM 302971

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Frank J. Hall (O-1054259), Infantry.

2. Upon trial by general court-martial this officer was found guilty of assaulting First Lieutenant Robert B. Vaughan with intent to do him bodily harm in violation of Article of War 93 (Specification of Charge II); and of wrongfully using improper and insulting language toward the said First Lieutenant Robert B. Vaughan, his superior officer, who was then on duty and in the execution of his office as Battalion Duty Officer, in violation of Article of War 95 (Specification of Charge III); and of striking the said First Lieutenant Robert B. Vaughan, his superior officer, who was then in the execution of his duty as Battalion Duty Officer, in violation of Article of War 64 (Specification of Charge IV). No evidence of any previous conviction 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 for five years. The reviewing authority approved the sentence but recommended that the confinement at hard labor be remitted "because of the combat record of the officer and the recommendation for clemency," and forwarded the record of trial to the Commanding General, U.S. Forces, European Theater, for action under Article of War 48. Prior to action that officer, in accordance with instructions from the War Department, forwarded the record of trial to The Judge Advocate General for action by the appropriate confirming authority.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the finding of guilty of the Specification of Charge II and of Charge II (assault with intent to do bodily harm), but legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence.

On 7 August 1945 at Scheyern, Germany, the accused, at that time a second lieutenant in the 47th Infantry, addressed improper, profane and insulting language toward his superior officer, First Lieutenant Robert B. Vaughan of the same regiment, who was then on duty and in the execution of his office as Battalion Duty Officer, and struck him on and about the face with his fist and hand. No serious injury was suffered by Lieutenant Vaughan. There is no proof that accused was drunk but there is evidence that he had been drinking.

Accused's conduct indicates clearly that he lacks the qualities

of self-control that are expected of an officer. However, he clearly demonstrated in combat that he possessed outstanding qualities as a leader and a highly commendable degree of courage. The respect and admiration for him possessed by officers and enlisted men with whom he served is well demonstrated by the various letters requesting clemency which were submitted by them to the reviewing authority. Accused's high character is likewise attested to by the field director of the American Red Cross in a letter to the reviewing authority. All of these letters are attached to the record of trial. Accused was awarded the Combat Infantryman Badge on 16 February 1945 and the Purple Heart for wounds received on 3 March 1945. He was promoted to first lieutenant on 16 August 1945 as a result of a battlefield recommendation for outstanding performance in actual combat. He is approximately 25 years of age. He has been under restriction since 21 September 1945. In view of the circumstances and his outstanding combat record, it is recommended that the sentence be confirmed but commuted to a reprimand and forfeiture of \$50 pay per month for four months and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

---

( GCMO 105, 3 May 1946).



WAR DEPARTMENT  
 Army Service Forces  
 In the Office of The Judge Advocate General  
 Washington, D.C.

SPJGN-CM 302972

U N I T E D S T A T E S	)	HEADQUARTERS BERLIN DISTRICT
	)	
v.	)	Trial by G.C.M., convened at
	)	Berlin, Germany, 30 November
Captain IRVIN S. BELGRADE	)	1945. Dismissal, total for-
(O-1757251), Medical	)	feitures and confinement for
Corps.	)	three (3) years.

-----  
 OPINION of the BOARD OF REVIEW  
 HEPBURN, O'CONNOR and MORGAN, Judge Advocates  
 -----

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Irvin S. Belgrade, Medical Detachment, 252 Engineer Combat Battalion, did, at Berlin, Germany, on or about 12 October 1945, feloniously take, steal, and carry away nine thousand (9000) Allied German Marks, value about nine hundred dollars (\$900.00), the property of Technician Grade Four Harry Callas.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence was introduced of any previous conviction. 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 might direct for a period of three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: During October, 1945, the accused was Battalion Surgeon on duty with the Medical Detachment, 252d Engineer Combat Battalion, Berlin, Germany. Sergeant Harry Callas was his medical supply sergeant and was billeted in the medical supply room adjoining the dispensary with Private First Class A. L. Webster. On 8 October accused requested Callas to loan him \$500 with which to purchase a camera. In his presence Callas removed some money from a combat boot in his room and counted out and handed accused 5000 Allied German Marks. Having failed to purchase the camera, accused returned the money that same day or the following morning.

Callas was scheduled to leave the area for redeployment at 6 a.m. 13 October. He had placed his money totalling 9000 Marks - the equivalent of \$900 - in the combat boot of his room-mate Webster. Before retiring on the night of the 12th he looked into the boot and discovered that the entire sum was gone. He and Webster searched the room without success (R. 6-8). The following morning Callas abandoned his scheduled shipment and went to the dispensary. There he overheard accused ask whether he, Callas, had gone. Callas explained to accused his reason for not going. Accused expressed his regret and offered to turn over to Callas some clothes to sell at a profit and thus recoup part of the loss. Callas rejected this suggestion and reported his misfortune to the Adjutant and Dental Officer. Later that morning he approached the accused and requested the privilege of searching his room for the lost money. Accused agreed to permit the search at 11:45 a.m. About 11:20 accused said he had to leave to attend a meeting. Callas followed him and insisted upon accompanying him to his quarters where Callas made a search of everything except a Valpack sitting above a closet. Accused would not permit Callas to examine this Valpack stating that it belonged to someone else. Accused tried to get rid of Callas, but Callas threatened that, if he were not permitted to examine the Valpack, he would call in other officers in the building. Finally accused admitted that he had taken the money, saying, "I can't tell you why I took it. It was a very personal reason - you wouldn't understand." He reached in the Valpack and removed the money and handed it to Callas. It was the same money that had been taken from Callas and consisted of ninety 100-mark Allied German notes (R. 10-11).

On 7 November 1945 accused voluntarily signed a written statement (R. 16; Pros. Ex. 2) in which he admitted that on the morning of 12 October he took the money from a combat boot in Callas' room. He claimed that he intended to return the money after the loss was discovered and that his purpose was to teach Callas not to be so careless with his valuables. The accused put the sum in the Valpack for safety but became so embarrassed and excited over Callas' strong language that he was not able to explain until the search was made. It was stipulated that the exchange value of one Allied mark is ten cents United States currency (Pros. Ex. 1).

4. The accused, having been advised concerning his rights as a witness, elected to testify in his own behalf. He related that he observed that Callas had not occupied his bed on the night of the 11th of October and, knowing where Callas kept his money, searched for and found it. He took the money intending to return it after Callas had worried a short time over his supposed loss. Tricks of a similar nature had been practiced by others in the detachment (R. 18). The accused did not need any money. In fact, he sent home \$740 on 16 October (R. 19; Def. Ex. A). He admitted that he knew Callas was expected to "ship out" the following morning (R. 19).

Captain Thomas C. Smith testified that he heard of the loss of \$900 from Callas who also told him that only his room-mate Webster and the accused knew where he kept his money. Captain Smith and another officer searched accused's quarters and found the money in the Valpack but put it back and told Callas about it (R. 21-22).

5. The accused has been found guilty of stealing 9000 Allied German Marks of the value of \$900, the property of Sergeant Harry Callas. It is undisputed that at the time and place alleged in the Specification the accused did take and carry away this sum, the property of Sergeant Harry Callas. The accused denied that he intended to deprive the owner permanently of his property. Larceny is defined as the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property (MCM, 1928, par. 149g, p. 171). Unless such felonious or evil intent exists at the time of the taking and carrying away there is no larceny. All of the elements of the offense were therefore admitted except that of the fraudulent intent.

It was shown that the accused took the money when he knew that the owner was about to be transferred away from that station for redeployment to the United States. The amount involved was considerable and therefore tempting. When Callas complained of his loss and explained that he had abandoned his shipment because of it, accused did not then disclose the fact that he had taken the money. Nor did he make any effort to report the loss through proper channels. Instead he suggested a questionable method by which Callas might recoup some of the money. It was not until the accused was cornered and could no longer avoid the discovery of the stolen money in his possession that he finally admitted the taking. The evidence is compelling and convincing that he intended to keep the money when he took it from Callas' billet. The court was justified in inferring from the circumstances that the taking and carrying away were with a fraudulent intent to deprive Callas permanently of his property. We can find no valid reason for disturbing its findings of guilt.

(324)

6. War department records show that the accused was born in the United States on 28 May 1918 of Russian parentage and is single. In 1943 he graduated in Medicine at the University of Illinois. From January 1944 until he reported for active duty on 4 March 1944 he was employed in the office of an industrial surgeon. On 23 January 1943 he was commissioned second lieutenant AUS and assigned to Medical Administration. On 4 March 1944 he was appointed first lieutenant AUS Medical Corps and ordered to active duty.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Charles Stephens, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 302972

1st Ind

Hq ASF, JAGO, Washington, D. C.

TO: The Secretary of War

7 March 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Irvin S. Belgrade (O-1757251), Medical Corps.

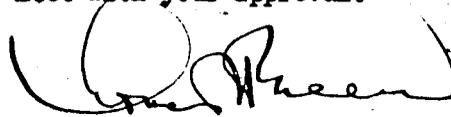
2. Upon trial by general court-martial this officer was found guilty of larceny of \$900, in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

In Berlin, Germany, accused stole \$900 from an enlisted man in his command the day before the latter was scheduled to return to the United States. He took the money from the place where its owner had secreted it in his sleeping quarters. After he was caught with the money in his possession he contended that he took it to teach the owner to be more careful with his money intending to return it. The court was fully warranted in rejecting this defense. I recommend that the sentence be confirmed and ordered executed and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to letters in behalf of accused from Colonel Charles Poletti, New York City; from Mr. Harry G. Hershenson, Attorney, Chicago, Illinois; and a letter from accused's wife, Mrs. Roselyn Belgrade, Chicago, Illinois, with inclosed character references.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

6 Incls

- 1 - Record of trial
- 2 - Form of action
- 3 - Ltr. fr. Col. Poletti
- 4 - Ltr. fr. Mr. Hershenson
- 5 - Ltr. fr. Mrs. Roselyn Belgrade
- 6 - Additional ltr. fr. Mr. Hershenson

( GCMO 71, 11 April 1946 ).



WAR DEPARTMENT  
Army Service Forces  
In The Office of The Judge Advocate General  
Washington 25, D. C.

(327)

SPJGH - CM 302973

19 APR 1946

U N I T E D   S T A T E S	)	XII TACTICAL AIR COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters, XII Tactical Air
Second Lieutenant WILLIAM J.	)	Command, APO 374, United States
EVANS (O-756525), Air Corps.	)	Army, 17, 25 and 26 July 1945.
	)	Dismissal and confinement for
	)	twenty (20) years.

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, STERN and TREVETHAN, Judge Advocates.  
-----

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charges and Specifications:  

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

CHARGE II: Violation of Article of War 61.

Specification: In that Second Lieutenant William J. Evans, 402d Fighter Squadron, 370th Fighter Group, did, without proper leave, absent himself from his organization at Site A-78, near Florennes, Belgium from about 1600 hours 18 January 1945 to about 1600 hours 20 January 1945.

ADDITIONAL CHARGE I: Violation of Article of War 58.

Specification 1: In that \* \* \*, did, at USAAF Site Y-32 on or about 6 February 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at AAF Station 392 on or about 22 May 1945.

ADDITIONAL CHARGE II: Violation of Article of War 94.

Specification 1: In that \* \* \*, did, at 79th Finance Disbursing Station, APO 772, on or about 23 March 1945, present for payment a claim against the United States by presenting to Captain J. A. Stewart, finance officer at 79th Finance Disbursing

Station, an officer of the United States, duly authorized to pay such claims, in the amount of \$230.00 for partial pay for the month of March 1945, for services alleged to have been rendered to the United States by the said Second Lieutenant William J. Evans, which claim was false and fraudulent in that the said Second Lieutenant William J. Evans was absent without proper leave from his organization during the month of March, 1945, and was then known by the said Second Lieutenant William J. Evans to be false and fraudulent.

Specification 2: In that \* \* \*, did, at AAF Station 392, on or about 3 May 1945, present for payment a claim against the United States by presenting to Major George R. Clark, finance officer at AAF Station 392, an officer of the United States, duly authorized to pay such claims, in the amount of \$319.45 for full pay for the month of April, 1945, for services alleged to have been rendered to the United States by the said Second Lieutenant William J. Evans, which claim was false and fraudulent in that the said Second Lieutenant William J. Evans was absent without proper leave from his organization during the month of April, 1945, and was then known by the said Second Lieutenant William J. Evans to be false and fraudulent.

Specification 3: In that \* \* \*, did, at AAF Station 392, on or about 12 May 1945, present for payment a claim against the United States by presenting to Major George R. Clark, finance officer at AAF Station 392, an officer of the United States, duly authorized to pay such claims in the amount of \$85.00 for partial pay for the period from 1 May 1945 to 12 May 1945, inclusive, for services alleged to have been rendered to the United States by the said Second Lieutenant William J. Evans, which claim was false and fraudulent in that the said Second Lieutenant William J. Evans was absent without proper leave from his organization from 1 May 1945 to 12 May 1945, inclusive, and was then known by the said Second Lieutenant William J. Evans to be false and fraudulent.

He pleaded not guilty to all Charges and Specifications and was found not guilty of Charge I and its Specification; not guilty of Additional Charge I and its Specification, but guilty of absence without leave from his station for the period alleged, in violation of Article of War 61 and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for twenty (20) years. The reviewing authority approved the sentence, recommended that the period of confinement be reduced to ten (10) years and forwarded the record of trial for action under Article of War 48.

3. The prosecution's evidence with respect to the offenses involving accused's unauthorized absence (Chg. II, Spec: Add. Chg. I, Spec) shows that at 1600 hours, 18 January 1945 accused absented himself without leave from his organization, the 402 Fighter Squadron, then stationed at Site A-78 and remained absent until 1600 hours, 20 January 1945 (R. 26-30; Pros. Exs. 1,2). Accused again absented himself without leave from his organization and station at Site Y-32, Zwartburg, Belgium, on 6 February 1945 and remained in that status until 22 May 1945 when he was apprehended by military personnel at Army Air Forces station in Paris, France (R. 29,30,51; Pros. Ex. 3). On 27 May 1945 he was returned to his organization, then stationed at site Y-99, Gutersloh, Germany, in a status of arrest (R. 30; Pros. Ex. 5). When interviewed on 8 June 1945 by the officer investigating the Additional Charges and after being informed of his right to remain silent, accused stated that he left because he was tired of being restricted to the post. He thought that his punishment would be the same whether he was absent three months or three days (R. 57).

In support of Additional Charge II and its Specifications involving the offenses of presenting false claims, the prosecution introduced evidence as follows:

Specification 1: Major James A. Stewart, then captain, 79th Finance Disbursing Section, APD 772, Nice, France, identified a certified copy of War Department, Finance Department Form No. 56, purporting to bear the signature and serial number of accused as an acknowledgment of the receipt by him of \$230 as partial pay and said document was received in evidence without objection (R. 41,42; Pros. Ex. 8). Major Stewart testified that he paid the sum stated on the voucher to the officer named thereon, but was unable to identify accused as that person (R. 41). The representation was made by the officer receiving the money that he had been forced down about thirty miles from Nice and that his identification papers had been lost (R. 41). He further stated to Major Stewart that he had not been paid for January and February 1945.

Specifications 2 and 3: On 4 May 1945 a person identifying himself as Second Lieutenant William J. Evans, serial number 0-756525, 402 Fighter Squadron, appeared at the Finance Office of Major George R. Clark, Army Air Forces station 392, Paris, France, submitted a voucher for pay and allowances for the month of April 1945 and received in payment therefor the net amount claimed, \$319.45 (R. 49; Pros. Ex. 7). On 12 May 1945 a person identifying himself as accused presented a partial payment voucher in the sum of \$85 for the period 1 May 1945 to 12 May 1945 at the finance office of Major Clark and received the amount requested (R. 50; Pros. Ex. 8).

In accordance with standard operating procedure, information as to the payment made on 4 May 1945 was sent to the home station of the officer named on the voucher (R. 51). On 22 May 1945 the accused appeared at the Finance

Office of Major Clark, Army Air Forces station 392. Acting upon information previously received, Major Clark called the provost marshal and then approached the accused who was at the time filling out an application for pay. When asked by Major Clark if he was "Lieutenant William J. Evans", accused replied in the affirmative, whereupon he was placed in the custody of the provost marshal. Major Clark had not seen accused prior to 22 May 1945 (R.51).

First Lieutenant Byron D. Hirsch, an officer assigned to guard accused after his return to military control, testified that on 27 May 1945 accused discussed his travels and when asked by Hirsch how he "happened to get caught" replied that he had been fleeced of some 15,000 francs by a French woman and being without funds was "caught in the process of getting another pay" (R.53,54). On 8 June 1945 accused made a voluntary oral statement to the officer investigating the Charges in which he recounted his experiences after leaving his station. He stated that he expected to be apprehended and that on two occasions when he went for his pay, he prepared for anticipated confinement by carrying with him a foreign language dictionary for study during his incarceration. He further informed the investigating officer that "if he hadn't received the money on the third or fourth time, he was going to give himself up, but receiving the money he returned to Paris" (R.57).

4. After his rights as a witness had been explained to him, accused elected to testify under oath. He testified that he is married and has two children and that he entered the service as an air cadet and was commissioned in September 1943 (R.99,106). He departed the United States in October 1944 arriving in the European Theater where he was eventually assigned to the 370th Fighter Group at Florennes, Belgium, as a fighter pilot about 1 December 1944. He flew five combat missions until grounded 1 January 1945 for violation of an off-limits directive (R.58-60). He was then assigned to duty as "alert officer" and restricted to the post for thirty days (R.61). On about 15 January 1945 he was relieved of his duties, but the restriction remained in effect. On 18 January 1945 about 1600, accused left the post with the permission of his commanding officer in order that he might go to town and bathe, facilities for this purpose being unsatisfactory at his station (R.64). He understood, however, that he was to return to the post after completing his toilet, but because of his humiliation as a result of the restriction, he obtained lodging in the town and did not return to his station until the morning of 20 January 1945 (R.64). Because he had no duties to perform, he did not report to his organization that morning and did not return to his room on the field until the afternoon of that day (R.88, 89). On 6 February 1945 at about 2 a.m., he left his organization and station without permission because of the disrepute into which he believed he had fallen (R.66,91,92). He went to the home of a friend where he had some alcoholic drinks and continued drinking until the following morning when he departed. He wandered about visiting several towns and eventually arrived in Paris (R.66).

Thereafter, about March 19, accused went to Southern France, stopping in Marseille and Nice. At the latter place he entered "the office" and made

application for pay in the amount of \$230. He did not see the Major (Major James A. Stewart), but made the request to a sergeant whom accused told he had just made a forced landing and was without funds. On a form which he was required to complete, accused set down that he had last been paid to 31 January 1945 and he thereafter received the sum of \$230 as partial payment. He did not inform the sergeant of his unauthorized absence because he knew that by so doing, his request for partial payment would not be honored. (R.66,67,95). Accused further testified that he made the request and received the partial payment there because he thought "if I could get the money it would just ease everything up and I wouldn't have to worry for awhile, and I knew that they'd send a voucher back to my home station and they would receive a notice that I was AWOL" (R.67).

Subsequent to receipt of the partial payment of \$230, accused returned to Paris, remaining there most of the time until his apprehension on 22 May 1945 (R.68). He admitted that he drew two payments from the office of Major George R. Clark, Finance Officer, the first on 4 May 1945 in the amount of \$319 and the second on 12 May 1945 in the amount of \$85 by presenting vouchers claiming those sums (R.96,97). With respect to the \$85 partial payment he identified an "Information Sheet," attached to the voucher as part of Prosecution's Exhibit 8, admitting that he had furnished the information contained therein and had signed the paper (R.97,98). An entry in this document showed accused to be on duty per secret orders, Headquarters 9th TAC, dated 28 April 1945. Accused explained that when he gave this information to the finance office at the time the request for partial payment was made, he was referring to the orders transferring him overseas, which in fact were secret (R.97). He knew that copies of all the vouchers would be sent to his home station and that the office from which he drew the money would be notified that he was absent without leave. He did not have courage to surrender himself but stated, "I just kept going to this one Finance Office there until they finally did pick me up" (R.68). Although he was not aware that Army Regulations prohibited payments to one absent without leave, he did know that he was not entitled to some of the money he drew (R.98).

5. Upon completion of accused's direct examination, the president of the court asked accused if he had ever been injured to which accused replied that in March 1944 he had been involved in an airplane accident sustaining an injury to his head and one eye. Thereupon the proceedings were adjourned with a recommendation that accused be examined by a Board of Medical Officers to determine his mental competency (R.69). On 25 July 1945, eight days thereafter, the court reconvened and heard the testimony of the psychiatric member of a board of medical officers of the 116th General Hospital, APO 350, United States Army, appointed pursuant to the aforementioned recommendation. The Board's report finding accused "free from any psychosis and capable of determining right from wrong" was received in evidence (R.71; Pros. Ex. 9). The psychiatrist testified that accused was under his personal observation for about thirty-six hours from the time of accused's admittance to the hospital on July 20, 1945, until the hearing before the medical board on the following day. During this period he conducted a psychiatric examination of accused,

consisting of two interviews totalling about one hour and a half to two hours. It was the opinion of the witness that accused was sane at the time of commission of the alleged offenses and at the time of trial (R.72). On cross-examination he testified that the proceedings before the Board of Medical officers lasted twenty to thirty minutes and that the report of said Board, which was signed by the members subsequent to the hearing, had been prepared by him prior thereto (R.73,74). Said report was erroneously dated 20 July 1945, the correct date being 21 July 1945 (R.78).

Accused, upon being recalled as a witness in his own behalf with respect to the mental examination, testified that he arrived at the 116th General Hospital on the morning of 20 July 1945 and that his interview with the psychiatrist lasted about fifty minutes. Thereafter he saw the psychiatrist only on two occasions before the Board proceedings on the following day, and on those occasions the interviews were of a summary nature, lasting not more than a couple of minutes. He contended that the Board meeting lasted ten or fifteen minutes and that the two members of the Board other than the psychiatrist each asked him one question. Accused agreed that an X-ray had been taken of his head while at this hospital. He testified that the accident he had in March 1944 resulted in his being hospitalized for twenty days and that any prolonged flying now causes a dull throbbing sensation in his head with impairment of his eyesight. At the conclusion of this testimony the law member ruled, subject to objection, that accused was mentally competent both at the time of trial and at the time of the commission of the alleged offenses and ordered the trial to proceed (R.81-85).

6. Although defense counsel sought to attack the adequacy of the examination given to determine accused's mental responsibility for the offenses committed, the findings of the Medical Board of Officers and the testimony of the psychiatrist member thereof that accused was sane both at the time of trial and on the dates the respective offenses were committed stands uncontradicted.

The prosecution's evidence, both documentary and testimonial, fully supports the court's findings of guilty of Charge II and Additional Charge I and of the respective Specifications thereof. Accused, in his sworn testimony given at the trial, admitted his unauthorized absence for the period alleged under the Specification of Additional Charge I denying only that he intended to remain permanently absent. The court, within its province, accepted accused's explanation that he had no intention of deserting the service and by appropriate exceptions and substitutions found him guilty of the lesser included offense of absence without leave for the period alleged. He further admitted his unauthorized absence from 18 January 1945 until 20 January 1945 as alleged in the Specification of Charge II, disputing only the hour of his return to duty. As the Specification alleged and the proof shows that the absence was from "about" to "about" a certain hour of the days in question, there is no material variance between the allegation and the proof.

Under Additional Charge II, accused stands convicted of presenting three false and fraudulent claims, two being for partial pay (Specs. 1,3) and the third being for pay and allowances for the month of February 1945 (Spec. 2).

Army Regulations provide that neither pay nor allowances accrue to any person in the military service during unauthorized absences of leave in excess of 24 hours unless excused as unavoidable (Par. 3a, Army Regulations 35-1420, 15 December 1939). It having been established conclusively that accused was inexcusably absent without leave from 6 February 1945 until 22 May 1945, no pay or allowances accrued to accused during that period. The evidence shows that accused had been paid for the month of January 1945, hence all that accrued to him was the earned pay and allowances for the first five days of February 1945. Without mathematical computation, it is clear that accused's pay for those five days fell far short of the amount claimed in any one of the three vouchers. The evidence for the prosecution fails to establish that accused was the officer who presented the several pay vouchers and received the amounts claimed therein, but this deficiency was supplied by the accused who in testifying at the trial admitted that he had signed the pertinent vouchers and received the funds. From what we have said above as to the inadequacy of accused's accrued earnings to warrant payment of any of the vouchers, it is clear that each of the claims when presented was false. Moreover, accused admitted that when he presented each of the three vouchers he knew that a copy would be sent to his home station and that his unauthorized absence status would thereafter be ascertained by the finance office which made payment to him. While he asserted that he did not know Army Regulations prohibited payment to one absent without leave, he did testify that his reason for not revealing his true status was that such revelation would have resulted in his requests for payment being declined. He further admitted that he knew he was not entitled to some of the money he drew. From these circumstances the court was fully warranted in inferring that when accused presented each of the false claims he was aware of their fraudulent character and accordingly the evidence is legally sufficient to support the findings of guilty of Additional Charge II and its three Specifications.

7. War Department records show accused to be 29 years of age and married. He completed high school and attended Loyola College for two years. In civil life he worked as a shopman for about one year and as a gas fitter for about eight months. He entered military service as an aviation cadet on 6 January 1943 and was appointed a second lieutenant, Army of the United States, on 1 October 1943. He received punishment under Article of War 104 on five occasions, four times for offenses committed in the United States and once for an offense committed overseas. The offenses in their chronological order are as follows: (1) cashing a worthless check at a hotel in Santa Rosa, California on 18 January 1944; (2) driving a vehicle at Chico, California on 19 July 1944 while under the influence of intoxicants; (3) failing to obey the order of his superior officer on 27 July 1944 at Chico Army Air Field, Chico, California; (4) failing to report for duty at the appointed time on 1 August 1944 at Chico Army Air Field, Chico, California; and (5) overstaying the limits of his pass on 17 November 1944 at Army Air

Forces Station 594, APO 652. His efficiency report (WD AGO Form No. 67) for the period 1 July 1944 to 31 December 1944 shows an adjectival rating of very satisfactory.

8. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 94.

Thomas M. Jaffey, Judge Advocate.  
Joseph J. Stern, Judge Advocate.  
Robert C. Trevittan, Judge Advocate.

SPJGH - CM 302973

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William J. Evans (O-756525), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his organization from 18 January 1945 to about 20 January 1945 (Chg. II, Spec.) and from his station from on or about 6 February 1945 until he was apprehended on or about 22 May 1945 (Add. Chg. I, Spec.), both in violation of Article of War 61, and guilty of presenting for payment to duly authorized finance officers of the United States three false and fraudulent claims for pay and allowances in amounts of \$230, \$319.45 and \$85, respectively (Add. Chg. II, Specs. 1,2,3), all in violation of Article of War 94. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for twenty (20) years. The reviewing authority approved the sentence, recommended that the period of confinement be reduced to ten (10) years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 18 January 1945 the accused absented himself without leave from his organization, then stationed near Florennes, Belgium, and did not return thereto until 20 January 1945. Thereafter, on 6 February 1945, accused again absented himself without leave from his organization and station, then located at Zwartburg, Belgium, and failed to return until he was apprehended in Paris on 22 May 1945. At the time of his apprehension accused was endeavoring to obtain a partial payment of pay and allowances at the finance office of Army Air Forces Station 392. He had previously obtained two payments at that office, one on 4 May 1945 in the amount of \$319.45 and the other on 12 May 1945 in the amount of \$85. Both payments were obtained by the submission of appropriate vouchers signed by accused. In addition, on 23 March 1945 accused received the sum of \$230 from the finance officer at the 79th Finance Disbursing Station, Nice, France, by presenting a partial payment voucher requesting such payment. All of said vouchers were presented during the period of accused's unauthorized absence although he had been paid the pay and allowances due him through 31 January 1945. Accused, in his testimony at the trial, admitted his absence without leave as alleged and further admitted that he signed, presented the three pay and allowance vouchers in question as alleged, and that he received the amounts requested. While he denied knowledge that Army Regulations prohibited the payment of pay and

allowances to military personnel absent without leave, he testified that he knew he was not entitled to receive some of the money he drew by presenting these vouchers.

Accused claims to have participated in five combat missions as a fighter pilot prior to being grounded 1 January 1945 for violation of an "off-limits" restriction. While he has no record of previous convictions by court-martial, War Department records show that he has been the subject of disciplinary action under Article of War 104 on no less than five occasions. Two of the offenses were of a civil nature, involving the passing of a worthless check and driving a vehicle while under the influence of intoxicating liquor. The other three offenses were strictly of a military nature and respectively involved failure to obey the order of a superior officer, failure to report for duty at the appointed time and failure to return from pass at the prescribed time. In view of accused's combat record I recommend that the sentence be confirmed but that the period of confinement be reduced to five (5) years, that the sentence as thus modified be carried into execution and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.

2 Incls  
1 - Record of trial  
2 - Form of action

THOMAS H. GREEN  
Major General  
The Judge Advocate General

---

( GCMO 131, 22 May 1946 ).

WAR DEPARTMENT  
 Army Service Forces  
 In the Office of The Judge Advocate General  
 Washington, D.C.

SPJGN-CM 302974

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

102D INFANTRY DIVISION )

v. )

) Trial by G.C.M., convened at  
 Bayreuth, Bayreuth, Bavaria,  
 Germany, 5 November 1945. To  
 be shot to death with musketry. )

) Private JOHN MALARCHOK  
 (32463682), Company B,  
 327th Engineer Combat  
 Battalion. )

-----  
 OPINION of the BOARD OF REVIEW  
 HEPBURN, O'CONNOR and MORGAN, Judge Advocates  
 -----

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John Malarchok, Company B, 327th Engineer Combat Battalion, did, at Heerlen, Holland, on or about 29 January 1945, desert the service of the United States and did remain absent in desertion until his return to his organization on or about 27 June 1945.

ADDITIONAL CHARGE I: Violation of the 69th Article of War.  
 (Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

ADDITIONAL CHARGE II: Violation of the 58th Article of War.

Specification: In that Private John Malarchok, Company B, 327th Engineer Combat Battalion did, at Passau, Passau, Bavaria Germany on or about 24 August 1945, desert the service of the United States and did remain absent in desertion until his return to the 102d Infantry Division Stockade at Bayreuth, Bayreuth, Bavaria Germany on or about 26 October 1945.

He at first pleaded not guilty to all of the Charges and Specifications. Upon completion of the prosecution's case he changed his plea as to the Charge and Additional Charge II and their respective Specifications, pleading not guilty to the charges of desertion but guilty, with reference to the Specification of the Charge, of "absence without leave from 29 January to 15 April 1945, 23 April to 15 May 1945, and from 4 June to 11 June 1945" and with reference to the Specification of Additional Charge II, guilty of "absence without leave from 24 August to 1 September 1945." All of the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and its Specification except the words and numbers "27 June 1945," substituting therefor the words and numbers "15 April 1945," guilty of Additional Charge I and its Specification, guilty of Additional Charge II and its Specification except the words and numbers "26 October 1945," substituting therefor the words and numbers "1 September 1945"; of the excepted words, not guilty, but guilty of the substituted words. 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 disapproved the findings of guilty of Additional Charge I and its Specification, approved only so much of the findings of guilty of Additional Charge II and its Specification as involved a finding of guilty of absence without leave from 24 August 1945 to 1 September 1945 in violation of Article of War 61, approved the sentence, and forwarded the record of trial for action pursuant to Article of War 48 with a recommendation that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life.

3. The competent evidence for the prosecution in support of the findings of guilty as approved by the reviewing authority may be summarized as follows: On 29 January 1945 Sergeant Graham B. Wade of the 102d Infantry Division went to the 36th Replacement Battalion, APO 872, U. S. Army, for replacements. He was provided with a list of the replacements contained in a Special Order of that battalion dated 27 January 1945 (Pros. Ex. 1) relieving those named therein from duty with that battalion and assigning them to the 102d Infantry Division. Accused's name appeared thereon and when Wade called his name out some one answered, "Here," and got on the truck. He did not know the accused and could not say whether he was present then or not (R. 6-8). Accused was assigned by the 102d Infantry Division to Company "B", 327th Engineer Combat Battalion (Pros. Ex. 2). On 31 January 1945

accused was entered in the Morning Report of that battalion as "Fr asgd not yet jd (102d Inf Div RC) to AWOL 0900 29 Jan 45" (Pros. Ex. 3).

On 24 August 1945 accused was in the 110th Evacuation Hospital in Passau, Germany, and at 8 o'clock he was reported as missing. A search was made but he could not be found (R. 11-12, 13).

4. Upon the completion of the prosecution's case defense counsel changed the accused's plea of not guilty to Charge I to a plea of not guilty of "desertion" but guilty of absence without leave from 29 January 1945 to 15 April 1945, from 23 April to 15 May 1945, and from 4 June to 11 June 1945; and, as to Additional Charge II, not guilty of "desertion" but guilty of absence without leave from 24 August to 1 September 1945 (R. 14-15). It was stipulated that the accused was absent from 29 January to 15 April 1945, when he reported to the 726th Field Hospital where he remained for eight days. He was again absent without leave from approximately 23 April until apprehended by Military Police in Brussels on 17 May 1945. He remained in custody until 4 June when he again absented himself and was returned to custody on 11 June. It was also stipulated that accused absented himself from 24 August until 1 September 1945 when he was apprehended (Def. Ex. A). The accused stated in court that he fully understood the meaning and effect of his plea of guilty. Having been fully advised concerning his rights as a witness, the accused elected to testify in his own behalf in defense of Additional Charge I (R. 16). As the findings of guilty of that Charge and its Specification were disapproved by the reviewing authority, it would serve no good purpose to summarize his testimony.

5. The reviewing authority has approved the findings of guilty of Additional Charge II only so far as those findings involve a finding of guilty of absence without leave from 24 August, 1945 to 1 September 1945 in violation of Article of War 61. Such findings as approved are fully supported by the accused's plea of guilty and by the testimony of the witnesses showing accused's absence without proper leave from his station at Passau, Bavaria, Germany, on 24 August 1945. His subsequent return to military control on 1 September 1945 was established by a stipulation to that effect. No further discussion is deemed necessary.

With reference to the Charge and its Specification, the accused has been found guilty of deserting the service of the United States at Heerlen, Holland, on or about 29 January 1945 and remaining away in desertion until 15 April 1945. The prosecution introduced evidence tending to show that accused absented himself without leave on 29 January 1945 while en route from the 36th Replacement Depot to the 102nd Infantry Division. The findings of guilty, however, are not dependent upon this evidence since, in addition, accused entered a plea of guilty and joined in a stipulation of fact. The plea and stipulation show

an unauthorized absence from 29 January 1945 until 15 April 1945, dates which coincide with the findings. Desertion of the nature charged here is defined as absence without leave accompanied by the intention not to return (MCM, 1928, par. 130, p. 142). Both elements are essential to the offense. Unless an intent not to return to his place of duty exists at the inception of, or at some time during, the absence the soldier can not be a deserter, whether his purpose is to stay away a definite or an indefinite length of time. The accused's absence took place in time of war, in a foreign country in or near which hostilities were raging, and admittedly continued for a period of two months and 17 days. By stipulation it was shown that the accused was habitually absenting himself without authority and usually returned to duty only when apprehended. From these circumstances the court was justified in inferring the accused's intent not to return to his place of duty and he was therefore guilty of desertion (CM ETO 17697, Hopkins, CM ETO 16880, Ferrara; CM ETO 18200, Davis).

\*\*\* Accused's unauthorized absence for the period shown under prevailing conditions, without explanation, is wholly consistent with the court's inference that at some time during the period of his absence he intended not to return. The fact that he surrendered in uniform, and possibly wore it throughout his absence, is without significance as it is well known that a man of military age is safer from inquiry by the police if in uniform rather than in civilian clothes. Where there was submitted competent proof of a substantial nature that the accused was absent without leave for 37 days from his organization under existing conditions, the burden was cast upon him to go forward with the proof -- the 'burden of explanation' -- and show that, during the period of his unauthorized absence he intended to return to the service  
\* \* \* (Bull JAG, June 1944, Sec. 416(9) CM ETO 1629. (1944)).

6. The Charge Sheet shows the accused is 28 years of age and was inducted on 26 August 1942 at Newark, New Jersey.

7. The court was legally constituted and had jurisdiction over the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty/ <sup>as approved by the reviewing authority</sup> and the sentence and to warrant confirmation of the sentence. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58).

Earle Hephurn, Judge Advocate.  
Robert Johnson, Judge Advocate.  
Samuel Morgan, Judge Advocate.

SPJGN-CM 302974

1st Ind

Hq ASF, JAGO, Washington, D. C.

TO: The Secretary of War

18 March 1946

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private John Malarchok (32463682), Company B, 327th Engineer Combat Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charges and Specifications as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence be confirmed but in view of the recommendation of commutation by the reviewing authority and the cessation of hostilities that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

3 Incls

- 1 - Record of trial
- 2 - Dft. of ltr. for sig. Sec. of War
- 3 - Form of Executive action

---

( GCMO 223, 15 July 1946).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

(343)

SPJGK - CM 302975

8 MAR 1946

UNITED STATES )

HEADQUARTERS COMMAND  
UNITED STATES FORCES EUROPEAN THEATER

v. )

Trial by G.C.M., convened at Wiesbaden,  
Germany, 23, 30 and 31 July and 1  
August 1945. Dismissal and total for-  
feitures. Confinement for three (3)  
years.

Second Lieutenant SHELDON  
M. MACHLIN (O-1649311),  
Signal Corps. )

-----  
OPINION of the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates  
-----

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specifications: In that Second Lieutenant Sheldon M. Machlin, 3264th Signal Service Company (Photo) in conjunction with Technician Fourth Grade Charles J. Halloran, Technician Fifth Grade Alvin A. Sarver, and Technician Fifth Grade Forest C. Blankenship, each of 3264th Signal Service Company (Photo), did, at or near Ahrweiler, Kreis Ahrweiler, Germany, on or about 27 May 1945, without the consent of the owner, wrongfully, by means of threats and intimidation, take and carry away from the possession of First Lieutenant Alexander J. Wedderburn for his own use and benefit, approximately ten (10) rifles and fifty-five (55) pistols, of a total value of more than fifty (\$50) dollars, property of First Lieutenant Alexander J. Wedderburn.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence, but recommended that the portion thereof "dealing with" confinement be remitted, and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. Prior to action by the Commanding General, United States Forces, European Theatre, his powers, statutory or otherwise,

in so far as they pertain to courts-martial, including the power of confirmation of sentences of general courts-martial and including powers conferred in time of war by Articles of War 48, 49, 50, 50 $\frac{1}{2}$  and 51, were terminated 19 January 1946 by direction of the President, and in accordance with instructions contained in a cable from the War Department, dated 19 January 1946, as clarified by a cable from the War Department, dated 21 January 1946, the Commanding General, United States Forces, European Theatre, forwarded the record of trial to The Judge Advocate General for action by the confirming authority or other appropriate action.

3. For reasons hereinafter stated, the Board of Review holds that the court was not legally constituted and that therefore the proceedings were void. In view of this holding, consideration of the evidence will be omitted.

4. It appears from the record of trial that the court convened at 0845 hours 23 July 1945. The legally appointed law member is not accounted for as either present or absent (R. 2). Major James B. Anderson was present, sworn, and sat as law member (R. 2). Major Anderson was not included as either member or law member in the detail for the court, published in paragraph 16, Special Orders 175, Headquarters Special Troops, 12th Army Group, 26 June 1945 (as amended prior to 24 July), did not disclose that he was not a member of the court, and was not challenged. Accused was arraigned, and thereafter counsel for defense made a motion "to strike the specification for the reason that it purports to set forth either the offense of robbery or the offense of larceny, each of which is properly chargeable under the 93rd Article of War, and therefore excluded by the wording of the Articles of War themselves from the 96th Article of War" (R. 4). The record continues as follows:

"Argument was submitted on the motion.

"The court was closed.

"The court was opened.

"Law Member: Subject to objection by any member of the court the motion is denied.

"Defense: May I make a statement for the record at this point?

"Law Member: You may.

"Defense (Lt. Huff): I am the regularly appointed defense counsel in this case. I have had some six years civilian experience as a practicing attorney, and for more than two years in the army have served constantly as Trial Judge Advocate or defense counsel in special and general courts. I am unable to determine the nature of the charge made against the accused from the specification alleged. I do not know whether he is charged with robbery or larceny or some other crime undetermined, and for that reason I am unable to properly defend him in this case. Therefore I request that I be excused and that other counsel be retained for his defense.

"The court was closed.

"The court was opened.

"President: The court has decided to excuse the defense counsel

and will you make your statement for the record, Lieutenant Davis, and then put the proper motion before the court.

"Lt. Davis (Assistant Defense Counsel): As the assistant defense counsel due to the ruling that the court has just made excusing the defense counsel it will be my duty to defend the accused and not being entirely familiar with the facts and surrounding circumstances I make a motion at this time to adjourn the court until a later date until the proper defense has been arranged.

"President: The motion is granted for a continuance and the court will adjourn until 30 July 1945.

"The court then at 9:15 o'clock A.M. on 23 July 1945 adjourned to meet at 9:30 o'clock A.M. on 30 July 1945." (R. 5)

On 24 July Major Anderson was detailed as law member of the court, vice the previously appointed law member, who was relieved as member and law member (Par. 10, SO 203, Hq. Special Troops, 12th Army Group, 24 July 1945; R. 1).

On 26 July Major Anderson was relieved as member and law member and another officer, not previously a member of the court, was detailed as law member thereof (Par. 20, SO 205, Hq. Special Troops, 12th Army Group, 26 July 1945; R. 1).

On 30 July the court reconvened at 0930 hours, and the Trial Judge Advocate announced that on some unspecified date Major Anderson "was designated," in a manner not shown by the record, "as the Defense Counsel," and "on Sunday, 29 July 1945, Major Anderson requested of the Trial Judge Advocate that the case be continued from the time originally set by the court, to-wit: 0930 hours, 30 July 1945, to 0830 hours, 31 July 1945" (R. 6). Thereupon, the court adjourned, and reconvened at 0830 hours 31 July (R. 6). The new law member was present, was not challenged after opportunity therefor had been duly accorded to both sides, was sworn, and the trial proceeded with Major Anderson thereafter serving as defense counsel (R. 6, et seq.).

5. It thus appears that Major Anderson, without any authority whatsoever, acted as member and law member during the arraignment, and deliberation on and determination of three interlocutory questions. He had not been appointed pursuant to the provisions of Article of War 8, the law for appointing general courts-martial. It has been repeatedly held that where an individual without authority sits as a member of a general court-martial and takes part in all proceedings, including findings and sentence, such proceedings are thereby invalidated (CM 265840, Brown; CM 239497, Goggan, 49 ER 290; CM 238607, Mashburn, 24 ER 308; CM 218157, Beadle, 11 ER 383). An order published subsequent to such a trial detailing the unauthorized individual as a member of the court, does not operate nunc pro tunc to validate his presence at the trial (Mashburn, Beadle, supra).

The Manual for Courts-Martial, 1928, clearly contemplates that

unauthorized individuals shall not sit as members of a court-martial at any time after the court is sworn: "Among the grounds of challenge for cause are \*\*\* Second: That he is not a member of the court" (Par. 58e, MCM, 1928, p. 45). "If it appear \*\*\* that a member is subject to challenge on any ground stated in clauses first to fifth of 58e, \*\*\* such member will be excused forthwith" (Par. 57b, id., p. 44) (underscoring supplied). Where an unauthorized individual was sworn and sat as a member for part of the proceedings, during which accused was arraigned and pleaded to the general issue and six witnesses testified thereon, and such individual was then detailed as a member, was not thereafter sworn, and participated in the remainder of the trial, counsel for defense having waived "any irregularity that there might be on account of this inadvertence" (failure to detail the individual as a member prior to trial), the Board of Review held in part that,

"The court as thus constituted was without jurisdiction because an officer who was not detailed as a member, Lieutenant Forrest, participated in its proceedings and thereby rendered them null and void" (CM 152563 (1922), Stone, 365 (1) Dig Op JAG 1912-40, p. 170).

Every part of the proceedings must be conducted before a responsible, duly constituted court, appointed according to law. Thus, in a case where a member of a general court-martial was disqualified because he was the accuser, and retired from the court after sitting solely for the purpose of passing upon "a so-called plea to the jurisdiction of the court, based upon alienage," the findings and sentence subsequently pronounced by the court were held to be illegal and void, "even though he (the accuser) did not participate in them and even though the accused, after the adverse resolution of his so-called plea, pleaded guilty to the charge and specification" (CM 142341 (1920), 365 (7) Dig Op JAG 1912-40, p. 173).

6. The Board of Review holds that the participation of Major Anderson, who was not detailed a member of the court, in that part of the proceedings during which accused was arraigned and interlocutory questions were ruled upon by the court, rendered the entire proceedings null and void.

7. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the findings and sentence.

Norman Mayo, Judge Advocate  
William B. Hester, Judge Advocate  
Earl W. Wings, Judge Advocate

SPJGK - CM 302975

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: Commanding General, Headquarters Command, U. S. Forces European Theater.

THRU: Commanding General, U.S. Forces European Theater, APO 757, c/o Postmaster, New York, New York.

1. In the case of Second Lieutenant Sheldon M. Machlin (O-1649311), Signal Corps, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50 $\frac{1}{2}$ , and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action and for such further action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing opinion and this indorsement. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows:

(CM 302975).

1 Incl  
Record of trial

THOMAS H. GREEN  
Major General  
The Judge Advocate General

21-22-23-24-1-2-3		
20	<b>OUT</b>	4
19		5
18	<b>30 AVR 1946</b>	6
17		7
16	<b>JAGD</b>	8
15-14-13-12-11-10-9	<b>USPET</b>	



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington 25, D. C.

(349)

SPJGH - CM 302998

12 APR 1946

UNITED STATES	)	ARMY SERVICE FORCES
	)	NINTH SERVICE COMMAND
v.	)	LOS ANGELES 54, CALIFORNIA
Second Lieutenant JOHN W. HAYNE (O-1017020), Infantry.	)	Trial by G.C.M., convened at 1909 Service Command Unit, Los Angeles, California, 29 January 1946. Dismissal, total forfeitures and confinement at hard labor for seven (7) years. Southwestern Branch, Disciplinary Barracks.

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, STERN and TREVETHAN, Judge Advocates.  
-----

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant John W. Hayne, Attached Unassigned 1909 Service Command Unit, Southern District, Los Angeles, California (Formerly 36th Tank Battalion, 8th Armored Division, Camp Polk, Louisiana), did, at Camp Polk, Louisiana, on or about 25 November 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Los Angeles, California, on or about 11 December 1945.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for ten (10) years. The reviewing authority approved the sentence, remitted three (3) years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. As evidence of initial absence of accused, it was stipulated between the prosecution, defense counsel and accused that if a properly authenticated extract copy of the morning report of the accused's organization, 36th Tank Battalion, 8th Armored Division, Camp Polk, Louisiana, were available in court, it would show "That 2nd Lieutenant John W. Hayne, O-1017020, absented himself without leave from his organization and station on or about 25 November 1943" (R.6,7; Pros. Ex.1). Dudley I. Hutchinson,

a special agent of the Federal Bureau of Investigation, apprehended accused in Los Angeles, California 10 December 1945. At the time of his apprehension accused was dressed in civilian clothes and made a statement to Hutchinson that he was absent without leave (R.7,8).

The defense introduced no evidence and the accused, after a full explanation of his rights as a witness in his own behalf, elected to remain silent (R.8,9).

5. The accused's plea of guilty together with prosecution's evidence clearly establish his unauthorized absence from 25 November 1943 to 11 December 1945, terminated by apprehension as alleged and fully support the court's findings of guilty. Accordingly, the record of trial is legally sufficient to support the findings of guilty and the sentence.

6. War Department records show accused to be 27 years of age and married. He was inducted into military service in March 1941 and upon graduation from Officers Candidate School, Armored Force, Fort Knox, Kentucky, was commissioned a second lieutenant, Infantry, Army of the United States, 20 March 1943 and ordered to active duty. He is a high school graduate and attended Bates College and Bergen Junior College for four and one half ( $4\frac{1}{2}$ ) years but did not graduate. Prior to induction accused was engaged in teaching music and directing choruses and choirs, earning \$1500 per annum.

7. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 58.

Thomas M. Tappay, Judge Advocate.  
Joseph J. Stern, Judge Advocate.  
Robert C. Trevethan, Judge Advocate.

SPJGH - CM 302998

1st Ind

Hq ASF, JAGO, Washington 25, D. C. 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John W. Hayne (O-1017020), Infantry.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of desertion commencing 25 November 1943 and terminating by apprehension 11 December 1945, in violation of Article of War 58. He was sentenced to dismissal, total forfeitures and confinement for ten (10) years. The reviewing authority approved the sentence, remitted three (3) years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. Accused deserted his organization and station at Camp Polk, Louisiana, on 25 November 1943 and remained absent in desertion until apprehended in Los Angeles, California, 11 December 1945 by an agent of the Federal Bureau of Investigation. I recommend that the sentence be confirmed but that the period of confinement be reduced to five (5) years, that the sentence as thus modified be carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.

2 Incls

- 1 - Record of trial
- 2 - Form of action

  
 THOMAS H. GREEN  
 Major General  
 The Judge Advocate General

---

( GCMO 195, 21 June 1946 ).



WAR DEPARTMENT  
In the Office of The Judge Advocate General  
Washington, D. C.

JAGH - CM 307000

22 JUL 1946

UNITED STATES )

XXI CORPS

v. )

) Trial by G. C. M., convened at  
) Backnang, Germany, 7 September  
) 1945. To be shot to death  
) with musketry.

) Private BENJAMIN MILLER  
) (34940247), Battery B,  
) 350th Field Artillery  
) Battalion )

-----  
OPINION of the BOARD OF REVIEW  
TAPPY, HOTTENSTEIN and STERN, Judge Advocates  
-----

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

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

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

Specification: In that, Private Benjamin Miller, Battery "B", 350th Field Artillery Battalion, did, at Ober Aspach, Hall, Wurttemberg, Germany, on or about 26 June 1945 behave himself with disrespect toward Captain MACK MCGEE, his superior officer by saying to him, "I'll walk," or words to that effect and contemptuously turning from, and leaving him while he was talking to him the said Private Benjamin Miller.

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

Specification: In that Private Benjamin Miller, Battery "B", 350th Field Artillery Battalion, having received a lawful command from Captain MACK MCGEE, his superior officer to get into a truck, did, at Ober Aspach, Hall, Wurttemberg, Germany, on or about 26 June 1945, willfully disobey the same.

ADDITIONAL CHARGE: Violation of the 69th Article of War.

Specification: In that Private Benjamin Miller, Battery "B", 350th Field Artillery Battalion, having been duly placed in confinement in the unit Stockade, 350th Field Artillery Battalion, Neuenstein, Chringen, Wurttemberg, Germany on or about 29 June 1945, did, at Neuenstein, Ohringen, Wurttemberg, Germany, on or about 30 June 1945 escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence was received of two previous convictions by special court-martial, one for failure to obey a lawful order received from his superior officer, in violation of Article of War 96, said offense having been committed on 6 January 1945, and the other for absence without leave for less than one day on 9 April 1945, in violation of Article of War 61. 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. On 22 September 1945 the reviewing authority, the Commanding General of the XXI Corps took the following action, which was published in General Court-Martial Order No. 28, Headquarters XXI Corps as of that date:

"In the foregoing case of Private Benjamin Miller, 34940247, Battery B, 350th Field Artillery Battalion, the sentence is approved, but it is mitigated to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten (10) years. As thus modified, the sentence will be duly executed, but the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. The Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, is designated as the place of confinement."

Thereafter the record of trial was examined in the Branch Office of The Judge Advocate General with the European Theater and returned without action to the reviewing authority by letter dated 4 October 1945, signed by the Assistant Judge Advocate General of the Branch Office (BOTJAG - E 250-452) recommending corrective action by reason of the legally ineffectual attempt to commute the death sentence imposed. In view of a hearsay statement made by the trial judge advocate to the court with respect to the sanity of accused, it was also recommended that accused be afforded an examination by a board of officers convened under AR 600-500 to determine his mental responsibility at the time of the alleged offenses and at the time of the trial, before the new action was taken. The XXI Corps which was a part of the 7th Army Command was inactivated (30 September 1945) before action could be taken on the recommendations of the Assistant Judge Advocate General and on 14 January 1946, the Commanding General of

the 7th Army as "officer commanding for the time being" under the provisions of Article of War 46, took the corrective action recommended after a Board of Medical Officers found accused to be mentally responsible.

He approved the sentence and forwarded the record of trial pursuant to Article of War 48 recommending that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for five (5) years and that the dishonorable discharge be suspended. Before the confirming authority, the Commanding General of United States Forces, European Theater, could take action under Article of War 48, the power so to do was withdrawn and the record of trial was accordingly forwarded to the Office of The Judge Advocate General, Washington, D. C.

3. The evidence for the prosecution shows that on 26 June 1945, Captain McGee of the 350th Field Artillery Battalion while on the way from his battery area to battalion headquarters, encountered the accused who was a member of Battery B, 350th Field Artillery Battalion, walking on the highway (R 6). The captain was riding in a jeep and was accompanied by Staff Sergeant Highsmith (R 8). Knowing accused to be a prisoner, McGee stopped the vehicle and asked accused what he was doing there. According to Captain McGee accused replied that he "just took a walk", whereupon the captain ordered him to get in the jeep. Accused glared saying, "No! You can shoot me if you want to. I will walk", and turned away. Captain McGee then said, "Miller, I am giving you a direct order to get in this jeep", but accused again replied that he would walk, turned away and left (R 7, 8). Upon reaching battalion headquarters Captain McGee preferred charges against the accused (R 7).

On 29 June 1945 the accused was a prisoner in the 350th Field Artillery Battalion Stockade, then located at Ober Aspach, Germany. The following day the battalion moved to Neuenstein, Germany and a temporary unit stockade was set up there. Accused was placed in confinement in this stockade, which consisted of a small inclosure made of wire. During the night of June 30 - July 1, the accused absented himself without permission from this stockade, which was guarded at the front gate (R 10, 11, 12). One of the enlisted men, a trustee, observed accused leaving the stockade about 8:30 p.m. by the back gate and reported accused's departure to Captain McGee (R 12, 13, 14). At the time of the escape the sentinel was walking his post "in front of the stockade -- out on the street". Captain McGee searched the stockade and the surrounding area about 11:00 p.m. but could not find accused and did not again see him until about noon on July 1. At that time the accused had returned to the stockade (R 15, 16, 17).

At the conclusion of the prosecution's case in chief, the trial judge advocate made the following statement to the court:

"PROSECUTION: The prosecution would like to make a statement for the record regarding the mental condition of the accused.

During the preparation of the case some doubt was expressed as to the mental capacity of the accused. Both the Defense Counsel and myself questioned members of the organization to which the accused belonged who had frequent contact with the accused to estimate what his mental capacity was. As a result it was directed that an examination be made by the Unit Surgeon. The Unit Surgeon told me, in the Defense Counsel's presence, that the accused might be subject to epileptic fits but was not a psychopathic case and was, in fact, sane in that he did know the difference between right and wrong. Our own findings in talking with members of the unit coincided with the Unit Surgeon's findings of sanity."

The defense counsel neither affirmed nor denied this statement.

4. After his rights as a witness were fully explained accused elected to be sworn and testified that he had no recollection of having committed the offenses of which he was charged. He knew he was supposed to be in the stockade but did not recall leaving it. The incident which occurred when Captain McGee stopped him on the road was completely unknown to him. So too was a prior absence without leave with which he was once charged. "All the fellows" wanted him to "play crazy" when he went to a psychiatrist so he might be discharged from the army but he refused. Accused knew his name, grade, organization and station, where his home was and what school he had attended. He also knew that he had a child born on the "same day Japs bombed Pearl Harbor" (R 19-22).

5. The prosecution's evidence in no manner contradicted by the defense, amply established the commission of the offenses charged and is legally sufficient to support the findings of guilty and the sentence. The only question requiring consideration is the statement of the trial judge advocate to the court with respect to accused's sanity as set forth in paragraph 4 above which was hearsay and improper. The issue of sanity was not raised by the defense, although except for the assertions of the trial judge advocate the court might well have inquired further into the existing mental condition of the accused. Having failed so to do, the reviewing authority (the officer commanding for the time being), pursuant to the provisions of paragraph 87b of the Manual for Courts-Martial (p. 74, sub-par. 3), took "appropriate action" as stated therein by causing a medical board of officers to be convened to examine into the sanity of the accused. The board thereafter submitted its report finding the accused to be mentally responsible for his acts at the time of the offenses and at the time of trial. This report dated 24 December 1945, appears among the related papers attached to the record of trial. It purports to cover the period of examination extending from 8 December 1945 to 24 December 1945 and sets forth the following:

"3. b. Mental Examination:

(1) Attitude and General Behavior: Prisoner has a

neat and tidy appearance. He readily answers questions and has a polite attitude.

(2) Mental Activity: He does not show evidence of retardation. No speech defect disclosed.

(3) Stream of Thought: He discusses his past history and his present offense in a normal conversational manner. His replies are adequate, coherent and relevant.

(4) Emotional Status: His mood is in keeping with his statements. He realizes his guilt pertaining to the present offenses and he is remorseful. He volunteers the information that he will do everything in his power to restore himself to a respectful citizen.

(5) Content of Thought: No abnormal ideas, delusional trends, hallucinations, phobias or obsessions are disclosed.

(6) Sensorium: He is oriented for time, place and persons. No impairment is disclosed for memory of either recent or remote events. His AGCT score is IV-68 and his general knowledge is in keeping with his schooling and his work level. He denies having had any kind of fits or spells since confinement in this Disciplinary Training Center.

#### 4. CONCLUSIONS:

a. Diagnosis: This prisoner is of dull normal intelligence. The history reveals temper tantrums which do not constitute insanity. Syphilis of the central nerves is excluded through the negative laboratory tests of the spinal fluid of 9 December 1945. He is not psychotic (insane).

b. Statement of Responsibility: General prisoner Miller is sane and responsible at present and it may reasonably be assumed that he was sane and responsible at the time of the offenses and at the time of the trial. He is able to differentiate between right and wrong."

Accordingly the officer commanding for the time being, as reviewing authority, approved the sentence and forwarded the record of trial pursuant to Article of War 48.

The counterpart of the provision in the 1928 Manual, supra, relating to action by the reviewing authority in matters of this kind is found in paragraph 219(h) of the 1921 Manual. That paragraph describes in detail what action the reviewing authority may take with respect to determining

the mental responsibility of an accused who has been convicted by court-martial. The procedure therein indicated is in no manner inconsistent with the statement in the 1928 Manual but is rather explanatory of it. It is a reasonable construction that the "appropriate action" contemplated is that set forth in the above-mentioned paragraph of the 1921 Manual, which reads as follows:

"(h) In any case of conviction of an accused by any court-martial, whether or not any question of mental defect or mental disease or derangement became an issue or was raised or suggested at the trial (or if the question was raised or suggested at the trial, but disregarded by the court), the reviewing authority, or the confirming authority if there be one, may of his own motion at any time before taking final action on the record (and in cases forwarded for consideration by the Board of Review and the Judge Advocate General under A. W. 50<sup>1</sup>/<sub>2</sub>, either or after such consideration, or pending it), in his discretion, cause a medical board to be convened to examine the accused and report in the same manner contemplated in paragraph 76c, supra, for the purpose of advising and assisting him in his decision as to the proper action to be taken upon the record. If, in view of such report when made, he shall disapprove the sentence in whole or in part, or any finding either in whole or in part, he will state in his action that such disapproval was on that ground; and in case he disapproves the sentence on such ground he may properly take any such action concerning the accused as is contemplated in paragraph 76c, supra.

NOTE.--No findings or sentence of a court-martial need ever be disapproved solely because of failure to comply with any of the provisions of this Paragraph, since the reviewing or confirming authority may always remedy such defect by availing himself of the advice of a medical board under subparagraph (h), supra."

In view of the foregoing, the action of the reviewing authority in approving the sentence after exercising an abundance of caution to assure himself that accused was mentally responsible, was proper.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The death sentence is authorized in time of war upon conviction of a violation of Article of War 64.

Francis W. Laffey, Judge Advocate  
H. H. Hostenstein, Judge Advocate  
Joseph J. Stern, Judge Advocate

JAGH - CM 307000

1st Ind

WD, JAGO, Washington 25, D. C.

AUG 11 1946

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Benjamin Miller (34940247), Battery B, 350th Field Artillery Battalion, APO 758.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused is described as being 26 years of age with a total educational background of six (6) years, spent in the primary grades. In his Army General Classification Test he scored only 68, placing him in Grade IV. At the time of commission of the instant offenses, active hostilities with the enemy in that theater had ceased. In his action approving the sentence, the reviewing authority recommended that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for five years and that the execution of the dishonorable discharge be suspended until the soldier's release from confinement. I recommend that the sentence be confirmed but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years and that the sentence as thus commuted be carried into execution, but that the execution of the dishonorable discharge be suspended until the soldier's release from confinement. I further recommend that an appropriate disciplinary training center in the European Theater be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such recommendation meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

3 Incls

- 1 - Record of trial
- 2 - Draft ltr for sig of S/W
- 3 - Form of action

---

( GJMO 297, 7 Oct 1946 ).



WAR DEPARTMENT  
Army Service Forces  
In the Office of The Judge Advocate General  
Washington, D.C.

(361)

SPJGK - CM 307001

15 APR 1946

UNITED STATES )

THIRD INFANTRY DIVISION

v. )

Trial by G.C.M., convened at Reinhardshausen,  
Germany, 21, 22 and 24 September 1945.

Private C. D. MERCY )  
(38329953), 4049th Quarter- )  
master Truck Company. )

To be hanged by the neck until dead.

-----  
OPINION of the BOARD OF REVIEW  
MOYSE, KUDER and WINGO, Judge Advocates.  
-----

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

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

CHARGE I: Violation of the 92d Article of War.

Specification: In that Private C. D. Mercy, 4049th Quartermaster Truck Company, did, at Sipperhausen, Kries Fritzlär-Homberg, Germany, on or about 9 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Lisa Waldeck.

CHARGE II: Violation of the 93d Article of War.

Specification: In that Private C. D. Mercy, 4049th Quartermaster Truck Company, did, at Sipperhausen, Kries Fritzlär-Homberg, Province of Hessen-Nassau, Germany, on or about 091315 April 1945, unlawfully enter the dwelling of Frau Lisa Waldeck, with intent to commit a criminal offense, to wit, rape therein.

ADDITIONAL CHARGE: Violation of the 92nd Article of War.

Specification: In that Private C. D. Mercy, 4049th Quartermaster Truck Company, did near Rohersheim, Germany, on or about 13 August 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Elizabeth Schmidt.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of one previous conviction was introduced for absence without leave for three days in January 1945, for which accused was sentenced to forfeiture of \$25 of his pay for one month. In the present case he was sentenced to be

hanged by the neck until dead, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, U. S. Forces European Theater, for action under Article of War 48. Prior to action by the Commanding General, United States Forces, European Theater, his powers, statutory or otherwise, in so far as they pertain to courts-martial, including the power of confirmation of sentences of general courts-martial and including powers conferred in time of war by Articles of War 48, 49, 50, 50 $\frac{1}{2}$  and 51, were terminated 19 January 1946 by direction of the President, and in accordance with instructions contained in a cable from the War Department, dated 19 January 1946, as clarified by a cable from the War Department, dated 21 January 1946, the Commanding General, United States Forces, European Theater, forwarded the record of trial to The Judge Advocate General for action by the confirming authority or other appropriate action.

### 3. Summary of the evidence.

#### a. For the prosecution.

- On 9 April 1945

(1) /at approximately 1400 an American negro soldier came toward a house about 1-1/2 kilometers from Sipperhausen, Germany, occupied by Frau Lisa Waldeck, Elisa Kirchoff and several other German civilians and their children. Frau Waldeck helped her son to open a garden door and saw the negro soldier coming across a meadow (R. 73). As the negro soldier, who was identified as accused in the court room as he sat among five other negroes (R. 12), came nearer, Frau Waldeck closed the door leading to the outside of the house and a window that was near the door (R. 78,93). Accused beat on the door with what sounded like the butt of a rifle (R. 28,56, 79). Frau Waldeck saw one foot enter the house through the window next to the door and then ran upstairs to a room in the attic and hid behind a couch with her 6-year old son (R. 79,89). Accused followed Frau Waldeck upstairs to the attic and discovered her behind the couch (R. 79). Accused was armed with a rifle, a pistol and a knife (R. 14,64). Accused pointed his rifle toward Frau Waldeck and directed her to go downstairs (R. 79,80).

In the meantime, Kaethe Wengst and her two sisters, who occupied apartments in the house where Frau Waldeck lived, jumped from a second story window to the ground and went to Ostheim, Germany, reported the incident to white American soldiers of the Military Police in Ostheim and then went in search of a doctor (R. 15,29).

Accused told Frau Waldeck that he wanted some eggs and that he was looking for a soldier (R. 81,90). In descending the stairs, Frau Waldeck and her son, followed by accused, stopped before the kitchen door of Frau Kirchoff's apartment. Frau Waldeck knocked on the door and told Frau Kirchoff that accused only wanted eggs (R. 55,56,81).

Frau Kirchoff opened the door and got accused a basket of 40 to 50 eggs, but accused waved them away (R. 56,81). Other children had run into another room, and accused put Frau Waldeck's son in the room with them and closed the door (R. 57,81). Accused then required Frau Kirchoff and Frau Waldeck to undress in the kitchen by pointing his rifle towards them "ready to fire" (R. 57,58,81,82). Frau Kirchoff completely disrobed, and Frau Waldeck took off all her clothing except a shirt and a slip (R. 58,82,83). Accused was very rough and yelled at the two women (R. 83). After they were undressed accused said something which the women could not understand and rolled his tongue around his lips "like a goat" (R. 59,83). Accused indicated that Frau Kirchoff should lie on a couch in the kitchen, but as they went towards the couch he saw the bedroom of the apartment and told her to put on a shirt (R. 83). Accused then required the two semi-nude women to go into the bedroom ahead of him. They went because he made them go with the rifle (R. 59). In the bedroom, accused showed Frau Kirchoff how she was to stand with her face to the wall away from the bed (R. 60,83,84). He then told Frau Waldeck to "lay" down on the bed and when she replied, "No," he seized her by the arm and she "had to lay" down (R. 84). Accused did not "force" Frau Waldeck to lie on the bed, but she did so because she was afraid. Accused "was threatening all the time with his rifle" (R. 84). Accused took his rifle from his shoulder, opened his belt and pants and inserted his penis into Frau Waldeck's sexual parts (R. 85). She did not resist accused because she was scared. She "was scared she would get beat or something else" (R. 85). After approximately three minutes of sexual intercourse, accused withdrew his penis from Frau Waldeck's sexual parts, closed his trousers, buckled his belt and went downstairs. Frau Waldeck did not at any time bite, kick, strike or scratch accused, and cooperated with him in the act of intercourse (R. 91-92). She cooperated with him because she was scared and because she thought "it wouldn't hurt so much" if she did so (R. 92). She did not consent to the intercourse and it was against her will (R. 88). Frau Kirchoff, who had been standing with her face to the wall, heard the sounds of a belt being unbuckled, a bed mattress squeaking, and moaning (R. 60).

After accused had left the room, the women looked out the window and saw that other American soldiers had arrived. They were all white. Frau Kirchoff put on a dress and Frau Waldeck dressed completely. About ten minutes later the white American soldiers came into Frau Waldeck's kitchen and asked her "what was going on." They reported to them that accused had been threatening them with a rifle and that he had had sexual intercourse with her (R. 87). Accused reported to the white American soldiers that there was a German soldier in the area and the white soldier and the negro made a search of the barn and other places around the house (R. 64,68). Frau Kirchoff's nephew, a discharged German soldier, was in the house when the negro soldier entered. He walked out and gave himself up to the white soldiers when they came (R. 66). He was dressed in civilian clothing (R. 19,45). He was taken away with the negro American soldier and the white American soldiers when they left the house (R. 46). He had not been outside of the house prior to the time accused came (R. 47).

Private Woodrow Boswell, a witness for the prosecution, testified that on 9 April 1945, shortly after the noon meal, he was camouflaging a half-track when his company commander ordered him to take him to a house approximately one and one-half miles away. They stopped the half-track approximately 75 yards from the house, dismounted and ran towards the house. As they went around the house, they met a negro American soldier whom the witness identified in open court as accused, distinguishing him from five other negro soldiers (R. 97). There were also about four German women and a German civilian man near the house standing together. Accused said nothing about the civilian man who was with the women. The women "seemed just about scared to death" (R. 97). Accused told Private Boswell that there was a German soldier in the area and, upon accused's suggestion, they made a search of the barn which was near the house. When they found nothing there, accused took Private Boswell to a little hill approximately 100 yards from the barn. At the hill, accused suggested that Boswell search the left side of the hill and he would search the right side. When Boswell cut across the hill toward the right he saw accused walking very fast toward some woods approximately 300 yards away (R. 99). Boswell returned with his commanding officer to the house and found two military policemen there with accused. The German women were still in the yard. One of them only had on a slip. Two of the women were crying and shaking their fists toward the accused (R. 101). When accused asked a Private Dorfman, who was present, what was going on, and Dorfman replied that "one of these women have been raped" accused stated, "what would I want to rape these white women for? All you got to do is lay a little money on the barrel" (R. 101). Accused stated to Boswell's commanding officer that he came to the house looking for eggs and saw a German soldier there (R. 102). Accused was not excited when Boswell and his commanding officer arrived (R. 104). There were still German soldiers in the vicinity (R.105). The military policemen and accused's commanding officer took accused away with them in one direction, and Boswell drove his half-track back to camp in another direction (R. 107).

(2) On 13 August 1945, accused was in confinement in the 3rd Infantry Division Stockade located at Ziegenhain, Germany. At approximately 1400 on that date accused and fifteen or sixteen other prisoners in the stockade were taken to a rock quarry in a truck to load several trucks with crushed stone. At the quarry, the prisoners started loading one of the trucks by hand, while the other trucks were loaded by German civilians. Accused did not have a shovel and just stood around (R. 113). His guard noticed him standing by a concrete pillar at approximately 1500 but did not see him afterwards (R. 113-114). When the guard looked for him later, he was gone and the trucks returned to the stockade without accused (R. 114). At the time accused disappeared, he was dressed in fatigues and a helmet liner, and was wearing a raincoat. The fatigues were marked with the letter "P" in white paint on the back and on the knees of the trousers (R. 125).

At about 1700 on 13 August 1945 (R. 127), Margaret Schmidt and Elizabeth Schmidt, sisters, who reside in Trysa, Germany, started towards Rohersheim, Germany, to visit their mother (R. 127,138). The girls were

wearing raincoats, and were walking along a railroad track that runs between Trysa and Rohersheim through a station called North Zeigenhain (R. 127,139). At a point where the railroad is bridged by an overpass, between North Ziegenhain and Rohersheim, the two girls were stopped by a negro American soldier whom both of them identified as accused in open court as he sat among five other colored soldiers (R. 128,139). Accused came out of some bushes and met the girls directly beneath the overpass. He carried a stick about one and one half to two inches in diameter, and about two and one half to three feet long (R. 128,140). By threatening the girls with his stick and by motioning with his finger, he indicated to the girls that they were to take off their raincoats (R. 128,129,140). Then, keeping the stick raised over his head in such a manner that the girls thought he would strike them he required them to raise their dresses and take off their "panties" (R. 129,140).

When accused sought to compel the two girls to open their dresses Margaret Schmidt pretended to start unbuttoning her dress, while Elizabeth Schmidt refused to comply (R. 129,141). Thereupon, accused started to unbutton Elizabeth's dress for her, and while he was so occupied, Margaret took the opportunity to escape by running away towards Rohersheim. Accused swung the stick at Margaret but failed to hit her, and when both of the girls started yelling, accused choked Elizabeth (R. 129,141). He told Elizabeth to lie down twice (R. 142). When she declined to do so, he hit her over the head with the stick, rendering her "dizzy" and not completely conscious. After having spread the raincoats on the track, accused laid Elizabeth on the coats (R. 142). He then came to her. His pants were unbuttoned and his penis was erect. He placed his private parts into hers and had intercourse with her (R. 143). Elizabeth did not resist accused because she was incapable of resisting (R. 142). The act of sexual intercourse was very painful at first, but later she lost all senses (R. 143). Then she heard steps and believed accused left her. She did not see him go, but heard steps coming and going (R. 144). She believed two other negroes then came and had intercourse with her. How long she remained lying on the ground, she did not know. Eventually, she tried to get up, walked a few steps, but "couldn't make it." When she reached another bridge she remained sitting until an American car came with soldiers in it. They appeared to know what had happened and asked where the negroes were (R. 145).

When Margaret escaped from the accused, she ran towards Rohersheim and stopped a German civilian car. She went back to a bridge with the car and met an American M.P. car. They took her back and found her sister Elizabeth, sitting on a stone crying. Elizabeth's eyes were red, her hair was disheveled, and her dress was open. She talked about three negroes (R. 130). The M.P.s then took Elizabeth and Margaret to their mother's home in Rohersheim (R. 131).

At approximately 2100 on 13 August 1945, Elizabeth Schmidt was carried in to see a doctor by American soldiers from a jeep. She was unable to

walk, was pale, and was suffering from a slight shock. There was fresh blood on her undergarments. An examination of her genital organs revealed blood in the vagina and slight cuts at the mouth of the uterus. The wounds to Elizabeth Schmidt's genital organs could have been caused by a male genital organ (R. 159). In the opinion of the doctor, the blood in the vagina indicated that its presence was probably the result of recent sexual intercourse (R. 160). A smear failed positively to reveal the presence of sperm (R. 160). No examination was made of any other parts of the girl's body (R. 161).

Sometime after supper on 13 August 1945, the soldier who had been accused's guard and a Corporal Ford were loading water in cans at a water point near the stockade at Zeigenhain, Germany. They saw a negro soldier walking up the street and "hollered" to him. The soldier was Mercy. He told the other soldiers he had been asleep (R. 115,123). There was a great deal of conflict as to when Mercy arrived at the water point and when he entered the stockade. Estimations varied from "between 6 and 7" in the afternoon to between "7 and 8." Accused twice told Private First Class Ponsipp, at the M.P. Stockade, that he arrived back at the stockade at exactly 6:35 in the evening instead of after 7:00 o'clock, as Ponsipp believed he had (R. 171).

At an identification parade, held at the stockade on 14 August 1945, Elizabeth and Margaret Schmidt identified accused as the negro who accosted them from seven or eight negroes in the parade (R. 132,134,135, 165,192).

b. For the defense.

Accused's squad leader testified that he had known accused since February, 1945; that accused had a good reputation as to character and for truthfulness; that he was a cheerful worker and never got into any trouble in the company; and that he did not know of accused's having ever been tried by court-martial (R. 194,196).

After he had been fully advised of his rights relative to becoming a witness, accused elected to be sworn and testify in his own behalf.

Accused stated that while he was engaged in a transportation mission, his truck broke down and had to be repaired on the road. Thereafter he got lost and ran into Sipperhausen, Germany. As he was turning around he saw three or four men dressed in German uniforms run across a field. He jumped out of his truck and followed the three Germans, who, in the meantime, had run into a big barn behind a house. He went into the barn and searched it for 15 minutes or more and, as he came out of a door of the barn, a half track drove up with a captain, a warrant officer, a corporal and a Private Dorfman in it (R. 199). After accused had told them what he was doing there, i.e., looking for Germans, the captain directed

them to deploy and search the place while he searched the house. Accused was ordered to go to the right while the corporal was to go down the center. They did not find any Germans, so the corporal turned back to the house and accused went to the corner of some woods where his truck was and found two M.P.'s with a truck load of German prisoners of war. When accused told them what he was doing there, they got on his truck and drove back to the house. When they arrived at the house there was an M.P. officer and enlisted man there with the captain. The captain "was going around getting names on a pad." When accused told the captain that he did not know where his unit was located, the M.P.'s ordered the captain to take accused to his unit. The M.P.'s then took a German soldier away whom the captain had found in a latrine in the house (R. 200). When they arrived at accused's company, on order of his commanding officer, accused was taken to an M.P. Stockade and then back to the house where he had been searching for the German soldier. He was taken into the barn and a sergeant examined his underwear. He was then returned to an M.P. stockade. He was never inside the house and did not have intercourse with Frau Waldeck (R. 202).

On 13 August 1945, accused was a prisoner in the 3rd Division Stockade. With other prisoners he was sent on a detail to the Quartermaster in the morning. In the afternoon, he went out with fifteen other prisoners and about four guards to a gravel pit. It was raining and the truck had a "tarp" on it. The convoy of about ten or fifteen trucks went by the stockade and accused borrowed a raincoat. Accused stated that "if I am not mistaken, it was about 3 o'clock" when the detail arrived at the gravel pit (R. 203). He looked at his watch because they "knocked off" at 4:30 and he wanted to see how long he would have to wait. Some Germans were there and the detail did not load the trucks. Accused spent his time picking berries. Then he went into a machine shop and watched a German at work. Suddenly one of the Germans came to him and pointed and accused saw that the trucks were moving away. One of the Germans pointed the direction of Zeigenhain to him. He started walking and came to a village where he asked of the people "Ziegenhain." The people "seemed to be frightened and most Germans are afraid of colored people" (R. 205). An old man walking across the road with some sheep pointed out the direction of Ziegenhain to him. Finally he arrived in Ziegenhain in back of the jail. He then walked to a water point and was directed to the front of the jail. As he walked up the road toward the front of the jail, the sergeant who had been his guard recognized him and told him that a search was being conducted. Accused replied that he did not come back the way they went out (R. 205). He was then taken to the jail and locked in his cell.

On the morning of the following day, on 14 August, an investigating officer, an interpreter and two German girls came to the office at the jail and called accused into the office. The interpreter asked him a number of questions and he was then taken back and locked up (R. 206). At about 1:30 or 2:00 o'clock in the afternoon accused was lined up with seven or eight other colored soldiers, accused being the third from the end. The two German girls came out of a door behind the formation and walked around in

front of the formation. They were afraid to come close to the negroes and the interpreter pulled on accused's arm while pointing to two watches and two rings which accused was wearing. The girl pointed but did not say anything. When she left, accused was moved to the end and another girl came out. She looked at all of the soldiers for a long time and the interpreter "pulled her down closer to the end" of the formation where accused was standing (R. 207). Accused arrived in Ziegenhain at 6:15 and at the stockade at 6:35. The first time he ever saw Elizabeth and Margaret Schmidt was when they came to the jail on the morning of 14 August 1945 with the investigating officer and an interpreter (R. 209).

On cross-examination accused stated he had been picked up by the F.B.I. in Louisiana, but was turned loose; that he had been in jail and that he had been tried by military courts several times (R. 210). On the morning of 9 April he got lost in Sipperhausen and ran into a field. He definitely saw some "Polacks or French or something," and three men in German uniforms running across the fields toward the barn in back of the house (R. 213). Accused did not talk to the Poles and was not close to them. He only saw them pointing. Accused declined to describe the uniforms of the three Germans except that they were blue green. He could not say how close to the house they came. He had a carbine with him which "could have been ready" to fire and was armed with a knife (R. 215). Accused did not see any women until after the other soldiers came. He and the warrant officer searched in the hay (R. 216).

Accused went directly to the barn after seeing the German soldiers and had been searching it a couple minutes when the other soldiers came up (R. 217). At the direction of the captain he went to the left toward his truck and found M.P.'s there. When he came back to the house there were women all around but he did not know how many women were there or what their condition was. The Captain did not say why he wanted accused's name (R. 218). Accused was not certain of whether the witness Boswell was the Corporal who was present at the house or not. Boswell was the first person who asked him what was going on (R. 219). Accused did not know whether the woods came up to the house or not. He did not know how far his truck was from the house. He never had any conversation with Boswell after the M.P.'s took him back to the house (R. 220). He did not know whether the women were crying or not. The Captain took his name because he thought accused was AWOL. No question of rape was discussed until Private Dorfman mentioned it back at accused's company. He never made any statement to Boswell with reference to "what would I want to rape a white woman for, all you have to do is lay the money on the board." He never said anything about eggs (R. 222, 243).

Because he was in the back of a truck with a "tarp" on it, accused did not know how he got out to the gravel pit on 13 August 1945, but did know that the detail arrived there at exactly 1500 (R. 224-225). It was exactly 1815 when he arrived at the edge of Ziegenhain and exactly 1835 when he entered

the jail (R. 227). He denied having seen a railroad track between the gravel pit and the town of Ziegenhain (R. 233). He was unable to estimate any time of his activities on the afternoon of 13 August except that he arrived at the gravel pit at 1500, at the edge of Ziegenhain at 1815 and at the jail at 1835 (R. 237). He was positive he never crossed a railroad track. The first time he ever saw Elizabeth and Margaret Schmidt was in the jail office with the investigating officer and his interpreter (R. 239). He did not shoot at the German soldiers whom he saw running across the field at Frau Waldeck's house because they were not resisting. He did not know whether his gun was loaded but it had a magazine in it (R. 243). He did not know how many American soldiers came to the house of Frau Waldeck, but did know that Boswell, a captain, a warrant officer, a Private Dorfman and some M.P.'s were there (R. 246). At Frau Waldeck's house, the Captain did not take anyone's name except accused's. The Captain did not tell accused why he wanted his name (R. 244).

On examination by a member of the court accused was unable to make any estimations of time except the time he was in the barn at Frau Waldeck's house (ten or fifteen minutes) (R. 254) and the times of 1500, 1815 and 1833 on 13 August 1945. He denied that he told anybody he had been asleep on the afternoon of 13 August up at the gravel pit (R. 261).

c. For the court.

Margaret and Elizabeth Schmidt were recalled by the court and testified that they went to the Stockade at Ziegenhain on 14 August 1945 in the afternoon (R. 264,268). They were not at the stockade in the morning of that date at all (R. 266). The only time they saw accused on that date was in the stockade yard (R. 265,269). At no time was accused brought into the jail office while they were present with the investigating officer and interpreter in such office (R. 266,269).

4. In the opinion of the Board the record of trial fully supports the findings by the court that accused raped both Frau Lisa Waldeck and Fraulein Elizabeth Schmidt on the dates and at the times respectively set forth in the specifications, and that he unlawfully entered the home of Frau Waldeck on the date specified for the purpose of committing rape therein, his action thus constituting the crime of housebreaking.

"Rape" is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's female organs by the male genital organ is sufficient carnal knowledge. While force and want of consent are indispensable in rape, the force involved in the act of penetration is alone sufficient where there is in fact no consent. The woman is required to take such measures to frustrate the execution of the man's designs as she is able to exercise and as are called for by the circumstances (MCM, 1928, par. 148b, p. 165).

"Housebreaking" is "unlawful entering another's building with

intent to commit a criminal offense therein.

"The offense is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that such place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit a felony. The intent to commit some criminal offense is an essential element of the offense, and must therefore be alleged and proved, in order to support a conviction of this offense" (MCM 1928, par. 149e, p. 169).

The testimony of Frau Waldeck and the other women who were present at her house when accused entered it on 9 April 1945, corroborated in part by the testimony of Private Boswell, clearly established beyond any reasonable doubt accused's guilt of housebreaking and of the rape of Frau Waldeck. There is nothing in the record of trial which in any way weakens the effect of this testimony. Although it was admitted by Frau Waldeck that she did not offer accused any physical resistance, proof of her lack of consent to the act of intercourse was not negatived thereby. The testimony showed that accused entered the house armed with a rifle or carbine, a pistol and a knife and that he accompanied his orders both to Frau Waldeck and the only other woman occupant of the house who did not escape with threats to use the carbine. Frau Waldeck testified that she submitted to his demands through fear that he would use the weapon against her and against Frau Kirchoff. The rule applicable in this situation is aptly and properly expressed in Winthrop's Military Law and Precedents, 2d Edition, page 678:

"It is not essential that the force employed consist of physical violence; it may be exerted in part or entirely by means of other forms of duress or by threats of killing or of grave bodily harm or other injury \*\*\*."

The offense against Frau Waldeck was committed under circumstances similar to that in CM ETO 3933, Ferguson et al., in which the Board used the following language:

"Although the girl may not have forcibly resisted, 'such non-exculpatory evidence is but one facet of the complete evidentiary matrix, which cogently reveals that the woman had been reduced to a state of submission by accused's threatening and menacing use of firearms and other lethal weapons. Under such influence she ... submitted to intercourse ...' This was rape."

The rape of Elizabeth Schmidt was likewise proved beyond any reasonable doubt unless the witnesses were to be deemed unworthy of belief. The Board sees no reason to disregard the positive testimony adduced and to believe the accused's rambling and contradictory statement. The accused violently struck Fraulein Schmidt and had sexual intercourse with her as she lay in a semi-conscious condition. Accused's actions unquestionably establish the element of force and destroy any contention of consent on her part.

Accused's defense consisted solely in a general denial. As to the rape of Frau Waldeck and the unlawful entry of her home with intent to commit a criminal offense he admitted that he was in the place at which the two crimes were committed, but denied both that he had had intercourse with Frau Waldeck and that he had unlawfully entered her home. As to the rape of Elizabeth Schmidt he denied that he had even seen her or Margaret Schmidt on the date of the offense. He attempted to bolster the defense by the production of one witness who testified as to his previous good character. His halting and conflicting testimony on the witness stand, the irreconcilable inconsistency between his testimony and that of disinterested witnesses and the certainty of his identification fully warranted the court, and warrants this Board in disregarding accused's protests of innocence. The court clearly did not believe the accused, nor does this Board.

There are no errors or irregularities in the record which injuriously affect the substantial rights of the accused. Accused put his good character at issue, and while numerous questions were asked him on cross-examination for the purpose of discrediting him, the Board is of the opinion that the prosecution did not go beyond the bounds of legal propriety in doing so.

5. The Charge Sheet shows that accused is approximately 25 years of age and that he was inducted into the Army on 22 October 1942 without prior military service. According to the review by the staff judge advocate of the reviewing authority, he departed the United States for foreign service on 4 December 1944, and had no combat experience. The record discloses that his home was in Louisiana.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92.

Samuel Mays, Judge Advocate  
William B. Kuder, Judge Advocate  
Earl W. Wings, Judge Advocate

SPJGK - CM 307001

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

MAR 27 1946

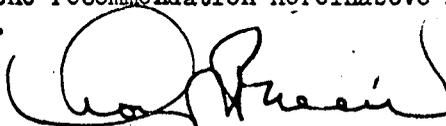
TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private C. D. Mercy (38329953), 4049th Quartermaster Truck Company.
2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was found guilty of rape (two specifications) in violation of Article of War 92 and of housebreaking in violation of Article of War 93. He was sentenced by the court, all members present concurring, to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, U. S. Forces European Theater, for action under Article of War 48. That officer did not take action upon the record, but in view of the interim suspension of his confirming powers and in accordance with instructions contained in a cable from the War Department, dated 19 January 1946, as clarified by a cable from the War Department, dated 21 January 1946, forwarded the record of trial to The Judge Advocate General for action by the President.
3. The evidence shows that at about 2 o'clock in the afternoon, 9 April 1945, the accused approached and forced his way into a house near Sipperhausen, Germany, occupied by several German families. He was armed with a rifle or carbine. Three women who were in the house escaped by jumping from the second floor. Accused forced two remaining women to disrobe, and under threats of bodily harm to both succeeded in having sexual intercourse with one, Frau Waldeck, who desisted from opposing accused's desires through fear of bodily harm to herself and her companion. On 13 August 1945 accused was in confinement at a division stockade at Ziegenhain, Germany. During the afternoon of that day he disappeared from a stone quarry to which he had been taken with other prisoners to load trucks. At about 5 o'clock he came out of some bushes near a railroad pass between North Ziegenhain and Rohersheim and accosted two young German women, whom he threatened with a stick and ordered to disrobe. One succeeded in running away. He choked the other, Elizabeth Schmidt, struck her over the head with the stick, laid her on raincoats which he had spread on the tracks, and had sexual intercourse with her. In both instances the intercourse was against the will of the victim. Accused was identified by both of his victims.
4. Accused has seen no combat service. He was inducted into the service on 22 October 1942, and between 5 February 1943 and October 1943 was convicted of various offenses, twice by a summary court, and twice by a special court. On 22 December 1943 a general court-martial convicted him of two absences

without leave, escape from confinement, breach of restriction, appearing in public wearing a master sergeant's chevrons, and having a falsely made official enlisted man's pass in his possession with wrongful intent. The court sentenced him 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. This sentence was approved by the reviewing authority, but the dishonorable discharge was suspended. On 23 October 1944 the unexecuted portion of the sentence was suspended as of 2 November 1944. According to the review by the Staff Judge Advocate he departed the United States for foreign service on 4 December 1944 and on 27 January 1945 joined the organization of which he was a member at the time of the commission of the offenses of which he was found guilty. On 16 January 1945 he was found guilty by a summary court of absence without leave from 9 January 1945 to 11 January 1945 and was sentenced to forfeiture of \$25 of his pay.

5. While accused's guilt was clearly established, it is my opinion that in view of all the circumstances, and, in particular, the abnormal conditions which then existed, the offenses were not so heinous as to require the imposition of the death penalty. I, therefore, recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life, and that a United States penitentiary be designated as the place of confinement.

6. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

- 3 Incls  
1. Record of trial  
2. Drft ltr sig S/W  
3. Form ex action

---

(GCMO 182; 14 June 1946)\*



WAR DEPARTMENT  
 In the Office of The Judge Advocate General  
 Washington 25, D.C.

SEP 12 1946

JAGQ - CM 307002

UNITED STATES )

XXIII CORPS )

v. )

Private JAMES A. PARHAM )  
 (32765163), 312 Quarter- )  
 master Battalion. )

Trial by G.C.M., convened at  
 Bad Wildungen, Germany, 27 De-  
 cember 1945 and 10 January 1946.  
 To be hanged by the neck until  
 dead.

OPINION of the BOARD OF REVIEW  
WURFEL, OLIVER and MCDONNELL, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private James A. Parham, Headquarters, 312 Quartermaster Battalion, then 3192nd Quartermaster Service Company, did, at or near Marburg, Germany, on or about 19 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Sergeant Jim A. Quimby, 518th Military Police Battalion, a human being, by shooting him with a U.S. 30 cal. carbine.

Specification 2: In that Private James A. Parham, Headquarters, 312 Quartermaster Battalion, then 3192nd Quartermaster Service Company, did, at or near Marburg, Germany, on or about 19 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private First Class Robert M. Poe, 518th Military Police Battalion, a human being, by shooting him with a U.S. 30 cal. carbine.

The accused pleaded not guilty to, and was found guilty of, both Specifications and the Charge. Evidence of one previous conviction of absence without leave in violation of the 61st Article of War and of two breaches of arrest in violation of the 69th Article of War was introduced in evidence.

The accused was sentenced to be hanged by the neck until dead, all the members of the court present concurring therein. The staff judge advocate held the record of trial legally insufficient to sustain the findings of guilty of murder, but legally sufficient to sustain a single finding of guilty of assault with intent to murder both the deceased. The reviewing authority thereupon returned the record of trial to the court and directed that it reconvene for reconsideration of its findings and sentence, stating in his letter to the president of the court that the record of trial "has been examined and found legally insufficient to support the findings and sentence, though amply sufficient to sustain findings of the lesser included offense of assault with intent to murder, and an appropriate sentence therefor: Maximum, DD, TF, and CHL for 20 years for each assault". The court reconvened pursuant to this order and adhered to its former findings and sentence. Thereafter the reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution. On 19 November 1945 part of the 3192nd Quartermaster Service Company was billeted at 41 Hindenburgring at the south edge of the town of Marburg (R 7). A building about fifty feet away (R 11) directly across the street, number 46, was used as the orderly room and headquarters of this Service Company. At that point the street is about 24 feet wide, the sidewalk in front of number 41 is seven feet wide and the building is flush with the sidewalk. Number 41 is a building with three stories, a basement and an attic. Two rooms on each of the three floors face the street and each room has two windows facing the street (R 9) and there is one attic window (R 12). It is 18 feet from the sidewalk to the ledge of the windows on the second floor, 30 feet to the ledge of the windows on the third floor (R 10) and 44 feet to the attic window (R 12). The sidewalk in front of number 46 is seven feet wide and that building is about ten feet back from the sidewalk (R 12). Number 46 has three windows each facing the street on the lower and second floors and two more in the attic and its total height is about 40 feet (R 11). At 2255 on 19 November 1945 a detail from Company "A" of the 518th MP Battalion, including the deceased Sergeant Jim A. Quimby and Private First Class Robert M. Poe, initiated a raid upon this billet. All MPs were in regular uniform with field jackets and MP brassards, helmets and colors (R 8). The accused, then a member of the military service, was assigned to the 3192nd Quartermaster Service Company (R 6, 13, 28, 43, 93). Accused and Privates Head, Alston and Howell were billeted in the left room (facing the street) on the third floor of number 41 (R 14, 28, 29). Head came off guard at eight PM, had a drink and went to his room. Freeman came in and took Head's .45 pistol away from him about 8:30 PM (R 23) or 10 PM (R 112). Freeman took the pistol away because Head had been drinking quite a lot but was not drunk (R 110). Head and Alston and their two girls were in their room (R 18,20).

Accused left with his overcoat to go on guard duty at 10 PM (R 26), or 11 or 11:30 PM (R 28) and the MPs came before accused got out of the building (R 26). "When they hollered 'MPs' girls were running all over" and two more girls ran into the left front room on the third floor (R 20). Accused came back up and said the MPs were downstairs and then went back downstairs and got a carbine (R 28, 29), or "came back into the building to get his carbine" (R 26). Head was asleep in his bed (R 21, 25) and "woke up when they hollered MPs" (R 22, 25) and the girl he was with tried to get away (R 22). Accused came back into the room with a carbine (R 16, 25, 28), turned off the light (R 24, 25) and said he was going to shoot and see how many he could get (R 29). Head could see accused because the moon was shining into the room (R 25) and Alston was on his own bed right close to accused and could see him (R 32). Head said to the accused, "Don't shoot" (R 18, 26). Alston told accused there was no need to shoot (R 29). Accused put the clip in the carbine, opened the right side of the double window on the left side of the room (R 16), got up on his knees on Head's bed beside the window, leaned out the window, "shuffled" the carbine and it did not fire (R 17, 18, 29, 30). "The next time he (accused) fired four times down out the window, and that is when I (Head) looked out and I saw two people laying down out there" (R 17). The only time Head looked out the window was immediately after accused fired (R 22). At that time Head was in his room (R 14) standing behind accused (R 18) and saw accused shoot (R 15, 18). From the position accused was in, Alston stated "It looked to me like it was pointed out the window, towards the ground, but the room was dark" (R 29). On cross-examination Alston testified that "— the rifle could be pointed in the air because the bed was almost about a foot from the window. The bed was here about a foot from the window, and he was up on his knees like this, and the rifle was pointing out. It could have been pointing up because the bed was even with the window." But Alston was on his bed and "I never looked at all" at the time accused fired (R 32). He saw no muzzle flash from accused's gun (R 34). Accused without saying a word (R 25) left the room and went to another room in the back of the building where Lee, Tate, Ingram and Jones were. Head followed accused into this other room and there heard accused say "I got two of the son-of-a-bitches". Accused was then wiping off the outside and in the chamber of the rifle (sic) (R 17, 18, 30). In about five minutes accused put two empty shells in the heater and left with the carbine, and two empty shells were found on the floor the next morning (R 19). Head returned to his room and sat on his bed and stayed there until the CID told them to fall out (R 23, 24). Head saw no one else in his room that night with a carbine or pistol (R 23). Alston saw no one else with a carbine in the room (R 33, 34). No one else looked out of or shot out of that window that night (R 23, 30, 33, 34). From the time the MPs came until the two men were killed Head heard about eight or nine shots fired all together and could not tell where those shots were coming from outside of those

that came from this room. "---- there was some fired down on the street all along" (R 22). Head also testified there were four or five shots before the four accused fired and afterwards "there was some more fire" (R 24). There was a lot of noise going on down on the first floor about what they would do to the MPs, and abusive remarks (R 27). Alston stayed in the room until the CID ordered him to fall out. While the MPs were there Alston heard four shots all together "but they were downstairs". "I heard definitely two, and there were some more but I couldn't swear where the shots came from" (R 33). "I heard definitely two shots" when the accused shot from the bed beside the window (R 29).

Marina Scherk testified that she was on the ground floor when the MPs came, went out in the yard and at about 10:35 PM went to accused's room on the left front of the third floor (R 35), sat down on a bed and found accused, Alston, Head and four other girls there. Accused left the room and came back about five minutes later with a carbine (R 36). Accused placed a clip of ammunition in the carbine and then pulled the switch, knelt on the bed and looked out the window. Then "two or three comrades entered the room". One of them, Lee, had a carbine and the other one a pistol. Lee looked out the window and immediately left the room.

The motors of vehicles were heard driving up. Accused looked out the window, scolded about the MP and then, kneeling on a bed, fired "three or four" shots out the window (R 37) one right after the other. Accused then left the room to take the carbine away, came back immediately and told Marina to get under the bed, that he thought one MP was dead (R 38, 39). She did not hear any shots fired before she saw accused fire (R 41), but just at the same time accused fired or immediately thereafter some other shots were fired from the street (R 41, 42). This witness was in accused's room from the time the MPs arrived about 10:30 or 10:45 PM until 12:15 AM and accused fired the shots "past eleven" (R 39) but she had no watch and did not know the exact time (R 40).

Private Howell testified that he Jones, Tate and Ingram were in their room on the back of the third floor, that the lights were on, that he heard "several" shots fired, that a minute or two later accused came into their room cleaning a carbine and said "I got two of them. I saw them when they fell but I don't know whether they are dead or not" (R 44, 46). Someone told accused to take the carbine out of the room (R 45). The shots, "more than four", were all fired close together (R 46). Tate testified he was in the back room, heard "a good many" shots, then accused came into the room rubbing the stock of a carbine with a rag and said "I got two. I seen two fall". Somebody told accused to go out (R 48) and he did (R 49), taking the carbine with him (R 50). Corporal Jones testified he was in the back room (R 51), heard several shots fired rapidly, that immediately afterwards accused came in with a carbine and a rag (R 52), and "said he

got two of the Goddam MPs and seen them when they was going down" (R 51, 53). Jones told accused to take the carbine out and accused immediately walked out with it (R 54).

Sergeant Williams testified he was at the corner of the building in front of a weapons carrier parked with two wheels on the sidewalk, heard "about twelve shots" fired (R 55) rapidly (R 58); when the first shot was fired he looked up and saw a flash from a rifle come from the third floor window (R 56) of accused's room (R 60), which was dark (R 61). Williams then immediately took cover at the side of the building, then the "volley shot" was fired (R 61); he could see the concrete flash up around him, hear the slugs hit the street, and was the last one to run into the building (R 57). He saw Lieutenant Wilcox, the commanding officer of the 3192nd Quartermaster Service Company, run across the street and hit the ground (R 57, 60). There were no shots before he saw the flash from accused's window (R 61). When the group of shots was fired he was beside the building and could not see the windows upstairs (R 58, 59). He had shot his pistol before the MPs arrived. He heard soldiers hollering at MPs and there was considerable confusion. He did not know anyone got hit until after the shooting was over. It did not seem to Williams that the one shot fired before he took cover hit any person on the street. He saw no flashes from the group of shots (R 59). There was a lighted street light about twenty yards from the building (R 61, 62).

Sergeant Send of Company A, 518th MP Battalion was a member of the party that raided the billet of the 3192nd Quartermaster Service Company (R 62). All members of the party were in uniform with MP helmets and brassards (R 63), and some were armed with carbines (R 67). Sergeant Send was squatting at the rear of a jeep where he could see the entrance of number 41 across the street. When the first shot was fired the flash did not come from a window (R 67); it looked to him like there was a flash in front of a weapons carrier (R 67, 69) which was parked in front of number 41 (R 66). There was a brief pause (R 63). The two deceased were standing at that time. Then a volley of shots were fired (R 70) and during the volley (R 65) he saw the two fall (R 64). The number of shots in this volley was "approximately half a clip from a carbine", but Send could not see where they came from nor tell whether they were from a pistol or a carbine (R 69). Sergeant Quimby fell about five or six feet from the wall of the building and at the rear of the weapons carrier with his feet on the sidewalk and his head in the street and did not move. Private Poe fell about 12 or 14 feet from the wall of the building between the rear of the weapons carrier and the middle of the street and rolled over (R 64, 66, 68). One of them called for help (R 63) and Send picked up Private Poe (R 64). Send "made an order to our men who could hear me to cease firing" and "I told the men in the billets to hold their fire, that I was going to pick up the wounded man" (R 63, 64). Lieutenant Caliguiri testified this weapons carrier was parked partly on the sidewalk and partly on the curb at the left edge of the building facing the street and the top was off (R 10). The two deceased were the only ones injured that night (R 11).

Sergeant Lara of Company A, 518th MP Battalion was called as a reinforcement on the raid and was standing even with the hood front of the weapons carrier and between it and the building talking to some of the negro soldiers when one shot went off (R 74). He did not know where it came from but thought it was a carbine (R 76). Lara turned around and started to the rear of the truck (R 74). When he was even with the rear wheel on the sidewalk a volley of six or eight shots rang out and he crawled under the rear end of the truck. He then saw Sergeant Quimby lying about four feet away and the other one in the middle of the street flat on his back. Just before he went under the truck Lara had seen Quimby standing (R 75). He did not hear any other shots fired. All of the shots in the volley were not from the same gun (R 76). Private Haines was walking behind the two deceased at about 11:30 that night (R 77), saw them fall during the burst of six or eight shots (R 78) and did not know from what direction the shots came (R 79). Private Newcomer "heard approximately five or six shots and saw two men falling on the street". He drove Poe to the 280th Station Hospital and also saw Quimby at the hospital (R 80).

Captain Hobach, M.C., was on duty at the 280th Station Hospital and about midnight examined Quimby who died in his presence at 0018 20 November 1945 (R 82, 83). Captain Noto, M.C., examined Poe who died in his presence at 0025 (R 84, 85). Captain Curran, M.C., performed autopsies on both deceased. As to Quimby, he testified the cause of death was gunshot wound which perforated one of the main arteries in his pelvis from which he bled to death.

"On Quimby the bullet entered the left side of his chest in the back, about an inch inside the angle of his shoulder blade, and went through the muscles of his back in a straight course downward and knicked the tips of the bony processes on his vertebra, last four vertebra. From there it hit the brim of the pelvis, large bone here in the back, and ricocheted anteriorly out through his pelvis and came out right above his pubic hair, and in its course it severed this major artery from which he bled to death, and severed the small bowel and large bowel in several places." (R 86).

The bullet "went almost straight down" (R 87). In Poe's case, the cause of death was hemorrhage from his lungs and liver. The bullet hit major blood vessels in passing through these organs from which he bled to death (R 91). The bullet entered the right side of his back perforating the lower lobe of his right lung and his liver, passed down through the muscles of the abdominal wall and lodged near his scrotum in the peritoneum. He removed the bullet slug which was similar to a .30 caliber bullet (R 88). Neither body had powder burns (R 91). The bullet that struck Quimby went more straight down than the one in Poe (R 89). Only one bullet struck Quimby (R 91). The top of Poe's ear was torn off but it could not be

determined whether this was caused by a bullet (R 92).

4. Evidence for the defense. Lieutenant Wilcox, Commanding Officer of the 3192nd Quartermaster Service Company, was standing in the middle of the street at the far end of the building in front of number 45 or 47 when the first shot was fired. This shot appeared to come from the other end of the billets (R 94). Wilcox then went down in front of number 41 by the weapons carrier. He then heard a volley of four shots but did not see from where they came and fell to the sidewalk in front of the building. After that he was quite sure another shot went right by him and struck a gatepost. Wilcox then went to the headquarters building (R 95) and bumped into two colored soldiers in the hallway as he came through the door. Later, CID agents took four carbines from the 3192nd Quartermaster Service Company (R 96).

Thea Fassbinder was under a blanket on a third floor rear balcony on the back of one of the billets of the 3192nd when the MPs arrived. She "first heard two shots being fired and then several shots from a machine gun. I believe ... and pieces from the ceiling fell down" (R 97, 98). Erika Laube was placed in a car by the MPs and about twenty minutes later eight or ten shots were fired, she could not tell from where, and she saw the man in the middle of the street fall (R 99). Augusta Kefferpuetz was sitting in the same car and heard five or six shots fired, but could not count them too well because they were fired so quickly, and saw the two men fall (R 100, 101). Gertrude Feldgen was in the room of a sick soldier on the third floor of building number 45 when the MPs came. She went to the third floor rear balcony on the back of the house, heard several shots fired and some pieces came from the roof. She believed the shots came from the street (R 101, 102).

Corporal Global was charge of quarters and was in the orderly room that night (R 104). He heard one shot and about five minutes later heard more shots which he believed to be more than five shots. He ran to the basement of number 46 and stayed there (R 105). Lieutenant Bietz was in charge of the MP raiding party. They collected two-thirds of a barracks bag full of pistols, knives and ammunition found in the billets. He found four carbines two of which were found on the third floor (R 107). A fifth carbine was found by CID agent Bensell in the right front seat of the weapons carrier parked half on the sidewalk at the right edge of number 41 as you face the building. The entrance to number 41 is on the right side of the building and not on the street (R 113, 114). There was no top up on the weapons carrier. The next morning a sixth carbine was brought from the billet to Lieutenant Bietz by a colored soldier (R 115). Of all the weapons picked up only one smelled as though it had been fired. That was one of the carbines picked up on the third floor (R 108).

After his rights as a witness in his own behalf were fully explained to him, the accused elected to remain silent (R 116).

5. 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 and 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 accused which manifests a reckless disregard of human life (40 CJS, sec. 44, p. 905, sec. 79b, pp. 943-944).

The proof required to support a finding of guilty is laid down in the Manual for Courts-Martial as follows:

"(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that death took place within a year and a day of such act); and (b) that such killing was with malice aforethought" (MCM, 1928, par. 148a, p. 164).

There is no question that the death of both deceased was proximately caused by gunshot wounds, nor that accused with cold-blooded malice aforethought attempted at least four times to kill these two individuals. The only question requiring close examination is whether bullets fired by the accused were the ones which struck deceased. The evidence as to the time element and the number of bullets fired is both conflicting and confused but is by no means irreconcilable. Whether accused fired the first shot is immaterial since it is undisputed that after the first shot was fired both deceased were still standing. It is also undisputed that immediately upon the volley being fired both of the deceased fell and did not rise again. Whether the volley consisted of four or more shots is immaterial for it was at the beginning of the volley that both deceased fell. In this view of the evidence it becomes immaterial how many shots were in fact fired after the first four. All witnesses as to the source of at least the first four shots in the volley, which came after the first shot was fired, fall into two groups, namely those who could not say from where they came and those who were positive that they came from the carbine shot by the accused. There is evidence to the effect that after the volley a single shot was fired which went by the Service Company commanding officer and struck a gate post in front of number 46 but by this time both deceased had fallen. There is also evidence that bullets struck the roof of the balcony at the rear of building

number 41 away from the street. To assume that these bullets continued on up and over the house and then sharply down so as to strike the deceased who were standing near the front wall of a more than 44 foot high building would be to replace fact with fantasy. Other than this there is no evidence that shots other than the volley were in fact fired. The foregoing analysis is confirmed by other uncontroverted evidence. The only shots the evidence shows to have been fired from above the street level that night were those fired by the accused. Only bullets fired from almost overhead could have travelled the fatal courses revealed by the autopsy. The bullet that killed Quimby was travelling almost straight down, that which killed Poe was almost but not quite so straight down. This would necessarily have been true of shots fired by accused from his position at the window thirty feet above the street, keeping in mind that Quimby was closer to the side of the building than Poe. Immediately after accused ceased firing Head looked out the window and saw both deceased lying in the street, again establishing that any shots fired thereafter were immaterial. Accused was armed with a .30 caliber carbine. The slug removed from Poe was similar to a .30 caliber. Of all the carbines collected from the billet that night only one smelled as though it had been fired. That accused fired his carbine at least four times that night is well established. Finally the obscene and brutal declaration made by the accused almost immediately after he stopped shooting to the effect that "I got two of the son-of-a-bitches. I saw them when they fell but I do not know whether they are dead or not", whether considered as part of the res gestae or as a simple admission, eloquently establishes the accused as the firer of the fatal shots. It was definitely proved that only the two deceased and no one else was hit that night. With this evidence before it the court properly found accused guilty of murdering these two MPs while they were engaged in the discharge of their official duties.

6. Accused is 22 years of age, and was inducted into the service at Newark, New Jersey on 12 February 1943. For his previous offenses of three absences without leave and two escapes from confinement accused was on 30 July 1945 sentenced by a Special Court-Martial to confinement at hard labor for six months and forfeiture of \$18.67 of his pay per month for a like period. The character of accused's prior service is shown as "unknown".

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the rights of the 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 the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

*Samuel W. Wurdell*, Judge Advocate  
*Th. Thayer Oliver*, Judge Advocate  
 \_\_\_\_\_, Judge Advocate  
 On Leave

JAGQ CM 307002

1st Ind.

WD, JAGO, Washington 25, D.C.

OCT 15 1946

TO: The Under Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private James A. Parham (32765163), 312th Quartermaster Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. Accused was present in a troop billet in Germany which was being raided by a detail of military police, apparently because of the presence of a considerable number of women in the billet. Accused obtained a carbine, returned to his third floor room, said he was going to shoot and see how many he could "get", aimed out of the window and fired at least four shots. Two military policemen, members of the raiding party who were in the street below, fell at once and later died from bullet wounds. Immediately after the shooting accused said in substance, "I got two of the Goddamn MPs and seen them when they was going down." Shots other than those traced to accused were fired during the disturbance. A bullet extracted from the body of one of the deceased was of a type which might have been fired from accused's weapon.

Before the reviewing authority took action upon the record of trial the record was returned to the court by his headquarters by a communication apparently prepared by his staff judge advocate, stating in substance that upon examination the record of trial had been found legally insufficient to support the findings and sentence because it had not been shown that the fatal shots were among those fired by accused. The view was expressed that the record was legally sufficient to support findings of guilty of lesser included offenses of assaults with intent to murder, and a sentence appropriate for those offenses. Reconsideration of the findings and sentence was directed. The Court reconvened, reconsidered its findings and sentence and adhered thereto. The reviewing authority thereupon approved the sentence and forwarded the record for confirming action.

Proof that the fatal shots were fired by accused rests on strong circumstantial evidence and spontaneous admissions by accused. Guilt is in my mind proved beyond any reasonable doubt.

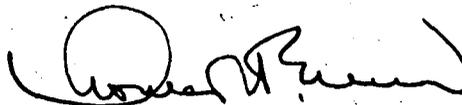
4. Accused is 22 years old and was inducted into the service at Newark, New Jersey, on 12 February 1943. On 26 December 1944 in England accused was found guilty by general court-martial of statutory rape on a

sixteen year old girl and was sentenced to six months confinement at hard labor and the forfeiture of \$40 per month for a like period. In adjudging this sentence the court considered three previous convictions the nature of which are not shown. On 30 July 1945, accused was found guilty by special court-martial of three absences without leave and two escapes from confinement and was sentenced to confinement at hard labor for six months and the forfeiture of \$18.67 per month for a like period.

5. Consideration has been given to letters received on behalf of the accused from his mother with a note of transmittal by Mrs. Eleanor Roosevelt. Correspondence from Mr. Franklin H. Williams, Assistant Special Counsel, N.A.A.C.P., Legal Defense and Educational Fund, Inc. was also considered.

6. This case involves the deliberate murder by accused of two military policemen committed in resistance to the policemen while they were engaged in their official duties. Guilt is established but in view of the doubts entertained by the staff judge advocate and expressed in the communication to the court directing reconsideration, and in the light of all the circumstances of the case, I do not believe execution of the sentence to death would be justified. I accordingly recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of accused, that the sentence as thus commuted be carried into execution, and that a U.S. penitentiary be designated as the place of confinement.

7. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

6 Incls

1. Record of trial
2. Dtf ltr for sig USW
3. Form of Executive action
4. Ltr fr mother of accused
5. Ltr fr Mrs. Eleanor Roosevelt
6. Ltr fr Mr. Franklin H. Williams

( G.C.M.O. 338, 8 Nov 1946 ).



WAR DEPARTMENT  
In the Office of The Judge Advocate General  
Washington 25, D. C.

JAGH CM 307003

27 AUG 1946

UNITED STATES )

SEVENTH ARMY

v. )

Technicians Fifth Grade FRANK  
HAMILTON, Jr. (35124736) and  
EPHRIAM B. McDANIEL (34221249),  
and Private First Class JOE  
RUSK (38479838), all of 645th  
Quartermaster Truck Company. )

Trial by G.C.M., convened at  
Heidelberg, Germany, 5, 6 and  
8 October 1945. Hamilton:  
Death by hanging, McDaniel and  
Rusk: Dishonorable discharge  
and confinement for life.  
Penitentiary, Lewisburg,  
Pennsylvania.

OPINION of the BOARD OF REVIEW  
TAPPY, STERN and SCHWAGER, Judge Advocates

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

2. The accused were tried by joint and common trial upon the following Charges and Specifications:

CHARGE I: Violation of the 92d Article of War.

Specification 1: In that Technician Fifth Grade Ephriam B. McDaniel, 645th Quartermaster Truck Company, did, at or near Zolstock, Germany, on or about 21 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Margareta Schmitt.

Specification 2: In that Technician Fifth Grade Ephriam B. McDaniel, 645th Quartermaster Truck Company, did, at or near Zolstock, Germany, on or about 21 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Mathilde Messinger.

Specification 3: In that Technician Fifth Grade Frank Hamilton, Jr., 645th Quartermaster Truck Company, did, at or near Zolstock, Germany, on or about 21 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Margareta Schmitt.

Specification 4: In that Technician Fifth Grade Frank Hamilton, Jr., 645th Quartermaster Truck Company, did, at or near Zolstock, Germany, on or about 21 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Mathilde Messinger.

Specification 5: In that Private First Class Joe Rusk, 645th Quartermaster Truck Company, did, at or near Zolstock, Germany, on or about 21 April 1945, forcibly and feloniously, against her-will, have carnal knowledge of Fraulein Lydia Messinger.

Specification 6: In that Private First Class Joe Rusk and Technician Fifth Grade Frank Hamilton, Jr., both of 645th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at or near Zolstock, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Herman Messinger, a human being, by shooting him with a pistol.

CHARGE II: Violation of the 93d Article of War.

Specification 1: In that Technician Fifth Grade Ephriam B. McDaniel, Technician Fifth Grade Frank Hamilton, Jr., and Private First Class Joe Rusk, all of 645th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at or near Saarwellingen, Kreis Saarlautern, Germany, on or about 21 April 1945, wrongfully and unlawfully enter the dwelling of Herr Josef Schmitt, with intent to commit a criminal offense, to wit: - rape therein.

Specification 2: In that Private First Class Joe Rusk and Technician Fifth Grade Frank Hamilton, Jr., both of 645th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at or near Saarwellingen, Kreis Saarlautern, Germany, on or about 21 April 1945, wrongfully and unlawfully enter the dwelling of Herr Herman Messinger, with intent to commit a criminal offense, to wit: - rape therein.

Specification 3: In that Technician Fifth Grade Ephriam B. McDaniel, Technician Fifth Grade Frank Hamilton, Jr., and Private First Class Joe Rusk, all of 645th Quartermaster Truck Company, acting jointly and in pursuance

of a common intent, did, at or near Saarwellingen, Kreis Saarlautern, Germany, on or about 21 April 1945, in the nighttime feloniously and burglariously break and enter the dwelling house of Josef Conrad, with intent to commit a felony, viz: - larceny therein.

Each accused pleaded not guilty to all offenses with which he was charged. After the prosecution rested, a defense motion for a finding of not guilty was sustained as to accused Rusk with respect to Specification 3 of Charge II. Accused Hamilton and McDaniel were found guilty of all offenses with which they were charged except with respect to Specification 3 of Charge II the court by exceptions and substitutions found them jointly guilty of the lesser included offense of housebreaking. The accused Rusk was found guilty of Charge I and Specification 5 thereof but not guilty of all other offenses with which he was charged. No evidence was introduced of any previous convictions. Three-fourths of the members present at the time the vote was taken concurring, sentenced the accused Rusk and McDaniel to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of their natural lives. All of the members present at the time the vote was taken concurring, sentenced the accused Hamilton to be hanged by the neck until dead. In the case of Rusk and McDaniel the reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and as to each withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$ . In the case of accused Hamilton the reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that Herr Josef Conrad of Saarwellingen, Germany, was roused from his sleep about 11:30 p.m., 20 April 1945 by a commotion at the door of his house. His son and he departed through a window and ran to the home of a neighbor. As they left the house Conrad heard a shot and the sound of wood and glass being broken in the house. Upon returning to his home some forty minutes later, Conrad found the house ransacked, with articles of clothing strewn about the floor. The bedroom door had been broken during his absence. In the morning he discovered that a Wittler bicycle, which he had placed in the basement of his house early the night before, was missing. At the trial Conrad identified with certainty a bicycle frame as being a part of the same bicycle which had been taken from his home (R. 10-17).

At about 1:00 a.m., 21 April 1945 Herr Josef Schmitt of Zolstock, Germany, which is located four or five kilometers north of Saarwellingen, was awakened by a knock at his door (R. 16, 18). Zolstock is a small community consisting of only seven houses (R. 54). Upon opening the door, Schmitt was confronted by three colored soldiers

wearing American uniforms. One struck him on the head with a pistol and stripped him of his clothing (R. 18, 28, 29). At the point of a gun two of the negroes forced him to accompany them across the street to the dwelling of Herman Messinger, while the third entered the Schmitt home and went to the bedroom, where Margareta Schmitt, the wife of Josef Schmitt, was sleeping. Schmitt heard his wife scream (R. 19, 33).

After reaching the Messinger home and knocking on the door, Schmitt, who was then nude, was heard to say "Herman, Herman help me" (R. 20, 37). The door was opened by Lydia Messinger, the daughter of Herman Messinger and as she appeared in view one of the colored soldiers pointed a pistol at her breast and tore her clothing off. She ran to her father's bedroom, calling "Father, help me", but was followed by one of the negroes. Herman Messinger and his wife, Mathilde Messinger, age 50, were in this room. Mr. Messinger was lighting a lamp as Lydia and the negro entered the room. The latter struck Herman Messinger and then shot him (R. 37, 38, 153, 154). Herman Messinger died of a bullet wound on 21 April 1945, the bullet having entered on the left side at the third rib and passed through the body, severing the aorta to imbed itself at the fifth rib on the right rear side (R. 152; Pros Ex H). Both women screamed as the shot rang out. Mrs. Messinger seized the hand which held the pistol, but was beaten about the body and released her hold. She went to her husband who lay on the floor. He "made only one sound" (R. 155, 156). According to Lydia the negro who had been standing by the door with Schmitt then entered the bedroom (R. 38). The man who had shot her father stripped her of the rest of her clothing and she was dragged out of the house by the other negro to a meadow about 40 or 50 meters away (R. 38, 39, 40, 157, 166). There he placed his pistol on the ground and opened his trousers, but as he did so Lydia grabbed the pistol, ran a short distance and pointing it at him, pulled the trigger. The gun failed to fire and Lydia was quickly subdued when her assailant overtook her. He wrested the pistol from her grasp, pushed her to the ground and although she screamed and pleaded, he had sexual intercourse with her which lasted about twenty minutes. He held the gun in his right hand near her shoulder throughout the act. Thereafter he returned her to the house, entered with her and through an open window called out "Jerry." His call was answered from the Schmitt home and shortly he was joined there by the negro who had fired the shot in the bedroom. The two negroes engaged in conversation with each other for a short time and then left; Lydia ran to her father's room and felt his pulse. He was "half cold" (R. 40-44). She ran to the home of a neighbor and upon hearing the sound of a motor starting, rushed to the window and saw a truck starting up. It was on the road about 50 to 100 meters from where she stood and she heard the voices of three or four men. Lydia testified the men in the truck were negroes and that the truck was moving in the direction of Lebach, which is about 2 kilometers north of Zolstock (R. 16, 43, 53, 54). Lydia was seen by a doctor the next morning, but he did not examine her. He only gave her some medicine (R. 44, 45).

At the time Lydia Messinger's assailant led her from the house, Mr. Schmitt and Mrs. Messinger were compelled at pistol point by the negro who had shot Mr. Messinger to go to the Schmitt home (R. 21, 22, 157). Schmitt was forced to lie on the kitchen floor of his home while the negro who had brought him back engaged alongside him in sexual intercourse both with Mrs. Messinger and Schmitt's wife. The negro who had remained at the Schmitt home during the absence of his two companions also engaged in sexual intercourse with Mrs. Schmitt and Mrs. Messinger in Schmitt's presence (R. 21-35, 57). During these acts, Mr. Schmitt was subjected to blows from the pistols every time he made a move from his prone position (R. 25, 35).

Mrs. Margareta Schmitt, age 44, the wife of Josef and the mother of three children, had her first encounter with the rapists immediately after her husband first answered the door. One of the men came to the bedroom and entered the bed in which she was lying. She beat him and screamed, but he pointed a pistol at her, laid on her and forced her legs apart. He then had sexual intercourse with her which lasted about fifteen minutes (R. 56, 57). While the act was in progress Mr. Schmitt and Mrs. Messinger were brought to the Schmitt's home by the other negro. Mrs. Schmitt was subsequently pulled by her assailant into the kitchen, where she saw her husband, Mrs. Messinger and another negro soldier. She was turned over to this negro and her original assailant took Mrs. Messinger toward the bedroom. There in the presence of her husband, who lay naked on the floor, the second negro held her tight and had sexual intercourse with her, although she hit and pushed him. She testified she was then too exhausted to do more. This act lasted about five to seven minutes, during which the negro who assaulted her struck Mr. Schmitt on the head with a pistol each time he attempted to rise (R. 57, 58). She was then turned back to the soldier who had first raped her and he again had sexual intercourse with her in the bedroom. Mrs. Schmitt testified she could struggle no more. From about 1:00 a.m. to about 2:30 a.m., she was forced to submit to these two men "four, five or six times", her assailants alternating in the several attacks. She stated that the one who first assailed her had intercourse with her three times in the house and the second had such relations twice. Thereafter she was taken out of the house to a shack in front of the Messinger's home and her first assailant again began his fourth act of sexual intercourse with her, which was not completed because he was called away by the second negro who had raped her (R. 59-62). The two men went toward an auto, which she observed as it was moving in the direction of Lebach (R. 62).

Mrs. Messinger, upon entering the Schmitt's household, was turned over to the negro who had first ravished Mrs. Schmitt. He dragged her to the chaise lounge and although she struggled with her hands, he forced her down and had sexual intercourse with her (R. 158). Upon completion of the act, she was turned back to the man who had brought

her to the Schmitt's home and he had sexual intercourse with her twice, once in the bedroom and once in the kitchen in the presence of Mr. Schmitt, who was lying on the floor. The two negroes left after the last act was completed and Mrs. Messinger, who had been nude, put on Mr. Schmitt's shirt and ran to the nearest house about 500 meters away. There she observed that the hour was 2:45 a.m. She estimated that the elapsed time covered by the three acts of sexual intercourse with her was over an hour. Later she was carried back to her home and there saw her daughter crying bitterly (R. 158-163).

None of the victims was able to identify any of the accused at the time of the trial, although it appears that the offenses were committed on a bright, moonlight night (R. 42, 157). There was unanimity of agreement with respect to the description of the three assailants. The man who shot Messinger and later had sexual relations with Mrs. Messinger and Mrs. Schmitt was described as being "stout and extremely black", of average height though shorter than the man who accompanied him to the Messinger's home and later raped Lydia Messinger (R. 20, 39, 154). Lydia's assailant was described as being "big and slender", colored "brown, not black" (R. 20, 40, 45). The negro who first attacked Mrs. Schmitt and thereafter had sexual intercourse with Mrs. Messinger was referred to as "a black man, but not completely black", of "average height" (R. 56), lighter colored than Mrs. Schmitt's second assailant, but taller and not as heavy (R. 58). The descriptions of the three accused read into the record by defense counsel were as follows:

<u>Accused</u>	<u>Height</u>	<u>Weight</u>	<u>Complexion</u>
McDaniel	About 5' 7 $\frac{1}{2}$ "	About 157	Light
Rusk	About 6' 1 $\frac{1}{2}$ "	About 195	Dark
Hamilton	About 5' 6 $\frac{1}{2}$ "	About 190 or 195	Dark

(R. 172).

Mr. Schmitt was of the opinion that the three soldiers were drunk. His conclusion was based solely on the fact that they all smelled of cognac and schnapps (R. 32, 33). Lydia testified that the two with whom she came in contact that night were "very drunk" (R. 44) while Mrs. Messinger was quite certain her two assailants, who reeked strongly of alcohol, were "rather" drunk (R. 164). In the opinion of Mrs. Schmitt, the same two men were very drunk (R. 63).

On or about 9 May 1945 Agent Robert Lowers of the 10th Criminal Investigations Division, assigned to investigate the case, saw a bicycle frame in the orderly room of the 645th Quartermaster Truck Company at

Bonn, Germany (R 124, 126). The accused were all members of this organization. A key which Josef Conrad had turned over to Lowers fitted a lock which was found attached to the springs in the seat of the frame and said frame, having previously been identified by Conrad as a part of the bicycle taken from his home on the night of 20 April 1946, was received as evidence against accused Hamilton and McDaniel (R 124, 13; Pros Ex A). Thereafter on 20 and 21 May 1945 each of the accused made a voluntary statement to Lowers, after a full explanation of their rights (R 64-73) and said statements were received in evidence over objection of the defense (R 122, 123; Pros Ex B, C, D).

These statements contain certain contradictions and discrepancies in their relation to each other, but clearly show that the accused were together on the night in question and that all three participated in events similar to those described by the victims. Each statement was received with the admonition by the law member that its contents would be considered only as against its maker. All show that on 20 April 1945 Hamilton, McDaniel and Rusk left their camp at Birkenfeld, Germany in a truck driven by Rusk and went to a village near Bouzonville, France where they obtained three or four bottles of cognac. The time of departure from camp according to Hamilton was 6:30 or 7:00 p.m. Rusk said it "was after chow and not dark". Rusk bought three quarts of cognac and they drank, starting back to camp according to McDaniel at about 10 or 11 o'clock. Rusk did not know what time it was then and Hamilton did not undertake to state. There remained about one and a half bottles of cognac. Rusk had some trouble with the truck and stopped three times to fix a loose exhaust pipe. On the third stop, he left the truck and defecated.

From this point on there are certain disparities in the respective statements. Accordingly, except where the statements are in accord as to the events recited, we undertake to summarize the contents of each statement only as it applies to its maker.

Hamilton said he went to a house "up a little lane". It was late and he was sleepy. He did not know the name of the town. McDaniel accompanied Hamilton to this house and receiving no response to their knocking on the front door, Hamilton fired either two or three shots into the front door with a P38 pistol. McDaniel went around the house and entered through a window. Hamilton did likewise and upon finding a bicycle therein, they took it and, according to McDaniel, placed it on the truck. Then they left and stopped near some houses on the side of the road; Hamilton and McDaniel went up to one of these houses and knocked on the door. The latter stated that a man came to the door while Hamilton said the door was open and when he walked in a man and woman were there.

According to Rusk's statement, Hamilton and McDaniel had departed when he returned to the truck after defecating and he did not again see either of his companions until he drove the truck down the road a short distance to a point where there were four houses. There he joined Hamilton whom he

saw standing at the door of a house in the company of a civilian man who was naked. Hamilton's own statement shows that he made the man get down on the floor, but as the man said "Mademoiselle", and pointed across the street, they both went there. Prior to leaving, Hamilton told the woman to remove her clothes. Rusk said he accompanied Hamilton and the nude man to the house across the street. The door was answered by a woman clad in night clothing. Hamilton asked her for some eggs and she went back in the house. Then, according to Hamilton, a man came to the door "looked at us and went back into a room". Hamilton followed him into the house. The man picked up a chair but Hamilton warded off the blow and the lady who had been at the door struck at him with her fists and scratched his neck with her finger nails. The man again attempted to strike him with the chair, whereupon Hamilton "shot at him". The man fell forward and Hamilton pushed him back on the bed.

After the shooting he asked the woman for sexual intercourse and when she seemed not to understand, he placed his hand on her private parts and she laid on the bed where the man he had shot was lying. Then Hamilton had sexual intercourse with her. He said "I didn't even have to threaten her with my pistol". According to Hamilton's statement, the naked man "from the first house" had gone. He had sexual relations with this woman a second time, and after Rusk came back with the truck, Hamilton joined him and they departed for camp.

Rusk, in detailing the events, stated that after Hamilton entered the second house, another "girl came to the door and she stripped off her clothes". Rusk "went inside the door where the naked man was inside". He saw two women, one was an old lady and she was crying. He then went outside and when he looked around, the heavy-set man was gone. He left and got the truck, drove it by the house, picked up Hamilton and started for camp. He recalled nothing at all about a bicycle, or having intercourse with any woman that night. He admitted having a P38 pistol that night but stated that he had since sold it. He did not believe he had fired the pistol.

McDaniel's statement shows that a man came to the door of the house at which he and Hamilton appeared after leaving Rusk. Then a girl came out in the hall and McDaniel entered asking her about "zig-zig". His gun was in his pocket. When she did not appear to understand what he was saying, he indicated that he desired to engage in sexual intercourse with her. He observed the "big heavy-set man of the house" was naked and on the floor of the hallway. McDaniel and the woman went to the bedroom and he had intercourse with her. She did not resist nor offer any help. His act was interrupted by a shot, but after investigating, he returned and completed the sexual intercourse, leaving the house when he had finished. As he was engaged with this woman he saw another woman in the hallway. Upon departing from the house, McDaniel and Rusk met and picked up the truck, after which they drove back for Hamilton

and then started for camp. The accused Hamilton and Rusk agreed that while enroute to camp a French guard stopped the truck by firing a shot at it. After some conversation between him and Rusk, they were permitted to proceed. McDaniel's statement also refers in a general way to the incident. He remembered hearing a shot and that Rusk stopped the truck. Then they went on back to camp.

On 13 June 1945 the investigating officer interviewed the three accused at the Fifteenth Army Stockade, first informing them fully of their rights under the 24th Article of War. He had with him the three statements hereinabove summarized, and at the request of one or more of the accused read the statements to them. The accused indicated that they desired to make certain changes in their statements and accordingly the investigating officer made a memorandum of the changes desired. He returned on the following day and obtained a voluntary supplementary statement from each (R 130-133). He asked each accused whether the Criminal Investigation Division's men had used any force or threats or made any promises in obtaining the original statements and in each instance the reply was in the negative (R 141, 142, 146). The supplemental statements were received in evidence over objection of defense counsel (R 150, Pros Ex E, F, G).

While not considered as evidence against Rusk, Hamilton's supplemental statement shows that Rusk was the man who accompanied him and the nude man to the house where Hamilton fired at the man who threatened him with the chair. (Hamilton in his first statement had named McDaniel, not Rusk). He asserted that there he had intercourse with the woman on only one occasion instead of twice as stated in the original statement. He had fired the gun accidentally during the struggle with the man holding the chair.

Rusk in his statement reasserted that he had accompanied Hamilton across the street from the first house and that the naked man had gone with them. The two ladies who came to the door were lightly dressed. He denied as previously stated by him, that he saw a girl come to the door and "strip off her clothes". He further denied that he entered this house, admitting only that he entered the one from which the nude man was taken.

McDaniel's supplementary statement contains no material changes.

4. Prior to the receipt in evidence of the statements made by the accused to the Criminal Investigation Division agent (Pros Ex B, C, D), each accused took the witness stand for the sole purpose of showing that said statements were involuntary. Hamilton testified that he was interviewed by agent Lowers on 20 May 1945, who said he had come to "get a confession" (R 108). Hamilton replied that he had no confession to make since he had done nothing. Thereupon Lowers told accused he would explain the 24th Article of War to him and proceeded to read from the "top of that

sheet". Then he told Hamilton it would be best for him to make a statement because Lowers knew Hamilton's gun killed a man and "it would go mighty bad on me in court if I didn't go ahead and tell what happened". He contended that he didn't understand the warning that was read to him, although he recalled he was told he did not have to make any statement and that it would be better for him to make a statement (R 107-116).

Rusk testified that he was asked questions about the case for about an hour before his rights were explained to him. He could not recall whether he answered any of the questions during that period, but thereafter his rights were explained and he was asked whether he desired to make a sworn statement. He replied that he did not because anything he "would say would be hearsay". He thereafter made the statement when the agent informed him that by making it the "jury would be easier" on him (R 117-121).

McDaniel stated he was interviewed on 21 May 1946 at the Fifteenth Army Stockade by Lowers and two other agents. McDaniel had just left Rusk and Hamilton. Lowers said "sit down and tell us all about it". When he replied that he knew nothing, Lowers said he was telling a "Goddam lie" (R 99). One of the other agents jumped up, putting his hand on his pistol, but did not remove it from the holster (R 99, 106). They talked loud, so he agreed to make a statement, fearing that if he did not, force would be used (R 100).

All of the foregoing assertions as to the use of force, threats or promises were categorically denied by agent Lowers during his direct and cross-examination (R 66, 73, 86, 87, 89, 93).

5. After the prosecution rested, defense counsel moved for findings of not guilty of all Charges and Specifications as to each accused. The motion was sustained only insofar as it concerned accused Rusk in connection with Specification 3 of Charge II and as to him a finding of not guilty of this Specification was entered. The rights of the accused with respect to testifying as witnesses in their own behalf were fully explained and each elected to remain silent.

6. Under the approved findings of guilty the accused Hamilton stands convicted of the murder of Herman Messinger, of the rape of Mrs. Messinger and Mrs. Schmitt and of three separate offenses of housebreaking. (Chg I, Specs 3, 4, 6; Chg II, Specs 1, 2, 3). The accused Rusk was found guilty only of the rape of Mrs. Messinger's daughter, Lydia (Chg I, Spec 5) and the accused McDaniel was found guilty of raping Mrs. Messinger and Mrs. Schmitt, in addition to being found guilty of two housebreaking charges viz: the Schmitt and Conrad homes (Chg I, Specs 1, 2; Chg II, Specs 1, 3).

We observe at the outset that all the convictions must stand or fall upon a determination of the question whether or not the accused's state-

ments were freely and voluntarily made. All of the victims were unable to identify their assailants and Josef Conrad, from whose home the bicycle was taken (Chg II, Spec 3) at no time saw any of the persons who entered his home on the night in question. Patently, the prosecution and the defense were well aware that these statements were the crux of the case for the evidence relating to the manner in which they were taken consumes half the record of trial. The court itself went to great lengths in questioning the various witnesses before accepting the statements in evidence. As it was within its province to judge of the credibility of the witnesses, the fact that the court chose to believe the witness Lowers and to disbelieve the testimony of the three accused on the question of the voluntary character of the statement is not a matter which we are privileged to examine upon appellate review (CM 152797, MQM 1928, p. 216). The record contains ample evidence to support the court's ruling that said statements were voluntarily made and to warrant their admission in evidence.

Considering the crimes in their chronological order, the testimony of Josef Conrad of Saarwellingen, shows that he hurriedly left his home in terror about 11:00 p.m. on the night of 20 April 1945. He had been awakened by a commotion at his door and left through a window. The reason he chose this seemingly strange procedure before ascertaining the identity of the visitors is suggested by the stricken statement of the witness that "he thought it was the negroes again". While we believe this testimony was admissible to show his state of mind, its deletion from the record was of no material consequence. At any rate, upon returning to his house some time later, Conrad found that a bicycle had been taken. In their statements Hamilton and McDaniel admit that they entered through the window of a house on that night and took a bicycle. The description of this bicycle as testified to by Conrad was similar to the description given by McDaniel in his statement. Moreover, the bicycle frame seen in the accused's organization was identified by Conrad as a part of the bicycle which was taken from his home. While the offense charged was burglary, the evidence shows that ingress to the house was made through an open window and the court properly found the accused Hamilton and McDaniel jointly guilty of the lesser included offense of housebreaking (Chg II, Spec 3).

The evidence next shows that about two hours after the raid on the Conrad home, three colored soldiers appeared at the home of Mr. Josef Schmitt in the village of Zolstock, Germany, which is four or five kilometers north of Saarwellingen. For the next hour and a half terror was the order of the day. When they departed after their orgy of crime, one man lay dead, another had been subjected to the degradation of having to witness the violation of his wife, and no less than three women had been raped. The description of the three marauders and the acts of each as recited by the victims when compared with the relation of events as set forth in the statements of the accused leaves no doubt that these witnesses had reference to Hamilton as the man who shot and killed Mr. Messinger and later had sexual intercourse with Mrs. Messinger and Mrs.

Schmitt in the latter's home; that they meant McDaniel when they described the second man who had such relations with both of said women, also in the Schmitt home; and that they had reference to Rusk as the assailant who removed Lydia Messinger from her home and thereafter sexually penetrated her person. It is true that there was some disparity between the succession of events related in the three statements and those testified to by the prosecution witnesses. For example, Hamilton's statement indicates that he did not return to the Schmitt's house, and that the only woman with whom he could have had sexual relations was Mrs. Messinger. McDaniel's admission as to engaging in intercourse is limited to one such incident with a woman who could have been no one but Mrs. Schmitt and, of course, Rusk denied having such relations at all. However, through these statements and the descriptions of the three assailants stated by the several prosecution witnesses, each was inextricably connected with the crimes with which each was charged. It was for the court to reconcile these discrepancies and the fact that in so doing it chose to reject as untrue such parts of the accused's statements as were inconsistent with the testimony of the prosecution witnesses was a matter entirely within its province.

Briefly recapitulating, then, the evidence with respect to the several alleged rapes and the murder of Herman Messinger, it is conclusively established that about 1:00 a.m. on 21 April 1945 the three accused appeared at the home of Mr. Josef Schmitt in Zolstock, Germany, aroused Mr. Schmitt from his sleep and when he appeared at the door in response to their knocking, stripped him of his clothing. At pistol point, Hamilton and Rusk compelled him to go with them across the street to the home of Herman Messinger, while McDaniel slipped into the Schmitt's home, went to the bedroom where he found Mrs. Schmitt and by brandishing his pistol, compelled her to submit to sexual intercourse with him. Arriving the Messinger home, Hamilton and Rusk compelled Schmitt to call to his friend, Herman Messinger and when the door was answered by the daughter Lydia, Hamilton grabbed her and partially stripped her of her night clothing. When she ran in fright to her father's bedroom Hamilton followed her. Herman Messinger, aroused by the commotion, was in the act of lighting a lamp when Hamilton entered the room, struck him and fired point-blank at him with a pistol. The bullet found its mark and Mr. Messinger fell, mortally wounded. Death apparently occurred within a very short time after the shooting. Mrs. Messinger, who had been an eye-witness to the slaying and Mr. Schmitt were then marched back to the latter's home by Hamilton, still wielding the pistol. Lydia, who had also witnessed the shooting, was taken over by Rusk, forcibly removed from the house and compelled to accompany him to a nearby meadow. There, by brandishing a gun, he forced her to submit to sexual intercourse with him and succeeded in accomplishing penetration. In the meantime, Hamilton upon reaching the Schmitt's home with his quarry, compelled Mr. Schmitt to lie on the kitchen floor while he and McDaniel engaged in sexual intercourse, both with Mrs. Schmitt and Mrs. Messinger. Some of the acts were committed in the kitchen alongside Mr. Schmitt, and some took place in the bedroom. McDaniel and Hamilton traded the two women several times in the appeasement of their lust and the evidence that each succeeded in penetrating both women is so convincing as

to leave no room for doubt. Indeed, there is evidence of so many penetrations by McDaniel, that had he experienced an ejaculation each time, the testimony would have been unbelievable. However, neither of his victims testified that he had an emission on any of these occasions and some of his penetrations appear to have been successive variations of a single incident of sexual relations. Notwithstanding the fact that the victims of the several rapes were German women and fully realizing all that such facts may indicate, nevertheless unimpeached evidence of a most substantial quantity does establish commission of the various acts alleged.

It is apparent that the acts of sexual intercourse were not committed with the consent of any of the females involved. They submitted only after substantial resistance to their respective assailants, all of whom displayed pistols in connection with their overtures. Submission to sexual intercourse under such circumstances does not constitute consent. The evidence amply supports the court's findings of guilty with respect to these offenses (Chg I, Specs 1, 2, 3, 4, 5).

Accused Hamilton alone was found guilty of the murder of Herman Messinger. That he fired the shot which resulted in the death of Messinger is undisputed. Indeed accused admits that he entered the house, followed Messinger to the bedroom and shot him when he swung a chair at the accused. Death was almost instantaneous the bullet having severed the aorta.

Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought does not necessarily connote hatred or personal ill will. Its existence is established by proof either of an actual intent to take life or of intent to inflict grievous bodily harm upon any person or knowledge that the act which causes death will probably cause grievous bodily harm (MCM, 1928, par 148a, QM 281750, Rubit). The evidence conclusively establishes that accused shot Messinger with a pistol and that Messinger expired as a result of the wounds he received. From these facts the court was entitled to conclude that accused intended to inflict grievous bodily harm upon the victim which in turn established the requisite malice aforethought unless it be held that the killing was committed in self-defense or while accused was too drunk to entertain that intent.

Hamilton contended in his statement that he fired the shot accidentally when Messinger sought to strike him with a chair. The latter contention is disputed both by Mrs. Messinger and by her daughter Lydia, both of whom testified that the deceased was in the act of lighting a lamp when Hamilton struck him and then fired. Even accepting Hamilton's version of what occurred, self-defense was not thereby established. "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;" (MCM, 1928, par 148a). When Hamilton unlawfully entered the house to see, as he put it, what the man was going to do, he thereby divested himself of the legal right of self-defense. That right actually accrued to the decedent, not to the

accused.

The only other ground therefore, upon which the accused might defend is that he was at the time too drunk to entertain the specific intent, upon which the charge of murder was bottomed. It is a general rule of law that voluntary drunkenness is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense (MCM, 1928, par 126a). But such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act (ibid.). The only evidence of drunkenness on the part of accused was that testified to by the several victims. However that may be, it was for the court to determine initially whether the accused Hamilton was so drunk at the time he killed Mr. Messinger as to deprive him of the mental capacity to entertain the specific intent requisite to a finding of guilty of that offense. From all the evidence, including the extra judicial statement of the accused and the testimony of the prosecution witnesses as to his acts, the court was justified in concluding that Hamilton was not so far under the influence of intoxicating liquor at the time of the fatal shooting as to be unable fully to comprehend what he was doing. Accordingly in our opinion the evidence is legally sufficient to support the findings of guilty as to Specification 6 of Charge I.

What we have said above with respect to drunkenness as affecting specific intent applies equally to the several housebreaking charges of which the accused were found guilty. We have already covered the offense alleged in Specification 1 of Charge II (housebreaking, home of Josef Conrad). We did not there consider the question of drunkenness as affecting the ability of the accused Hamilton and McDaniel to form the specific intent of committing larceny, but we may here dispose of that question by citing the following rule:

"In those jurisdictions recognizing the defense of intoxication in certain crimes which require the burden of proof to show such intoxication as to prevent the forming of a required intent rests upon the defendant, which he must meet by a preponderance of the evidence" (20 Am. Jur., Evidence, Sec 1261).

The record of trial contains no evidence whatsoever that either accused McDaniel or Hamilton was drunk when they entered the home of Josef Conrad and stole his bicycle.

As to the housebreaking charges involving entry into the Messinger and Schmitt homes, we conclude as we did in connection with Hamilton's murder of Mr. Messinger, that the evidence falls far short of establishing that any of the accused were so drunk as to have been unable to form the specific

intent required, in this case, rape. The court found accused Hamilton and accused McDaniel jointly guilty of unlawfully entering the Schmitt's home with intent to commit rape and found Hamilton alone guilty of committing a similar offense in so entering the Messinger home. The evidence was in conflict as to whether Rusk had entered the latter home and the court within its province found him not guilty of that offense. The evidence as discussed above in connection with the rape of Mrs. Messinger and Mrs. Schmitt amply supports the court's findings of guilty of the housebreaking offenses involving these two homes (Chg II; Specs 1, 2).

7. The charge sheet discloses that the accused Hamilton was 23 years of age, the accused Rusk 27 years of age and the accused McDaniel 26 years of age at the time the offenses were committed. Hamilton was inducted into the service on 9 June 1941, Rusk on 14 August 1943, and McDaniel on 4 May 1942.

8. The court was legally constituted and had jurisdiction of the three accused and the offenses charged. No errors injuriously affecting the substantial rights of any of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support all findings of guilty and the sentence as to each accused. A sentence of either death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

Thomas N. Tapp Judge Advocate  
Joseph J. Stern , Judge Advocate  
Henry A. Schwager Judge Advocate

JAGH - CM 307003

1st Ind.

SEP 24 1946

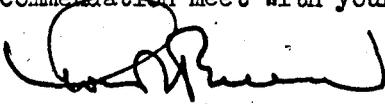
WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Technician Fifth Grade Frank Hamilton, Jr. (35124736), 645th Quarter-master Truck Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Accused murdered a German civilian by deliberately and without warning shooting him with a pistol, after entering the home of said person in the night time with intent to commit rape therein. After the shooting he compelled the wife of the murdered man to accompany him to the home of another German across the street and there by threat of armed force compelled her and another woman to submit to sexual intercourse with him. However, in view of extenuating and mitigating circumstances of the case, I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of the accused, that the sentence as thus commuted be carried into execution and that an appropriate United States penitentiary be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such recommendation meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

3 Incls

- 1 - Record of trial
- 2 - Draft ltr for sig S/W
- 3 - Form of action

(As to accused McDaniel and Rusk, GCMO 287, 27 Sept 1946).  
(as to accused Hamilton, GCMO 319, 23 Oct 1946).



