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

JAGN-CM 314050

U N I T E D S T A T E S v. Technician Fifth Grade JOHN W. HULL (36907551) and Private ARTHUR L. HYMER (38659353), both of Headquarters Squadron, 46th Air Service Group.	))))))))))	FIFTH AIR FORCE Trial by G.C.M., convened at Headquarters, Fifth Air Forces, APO 710, 15 and 16 April 1946. Sentence as to each: Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW

BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

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

(As to accused Hymer:)

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Arthur L. Hymer, Headquarters Squadron, 46th Air Service Group, APO 660, did, at APO 660, on or about 9 March, 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Umeo Sakamoto, a human being by shooting him in the head with a .38 calibre, Belgian automatic pistol.

(As to accused Hull:)

CHARGE: Violation of the 92nd Article of War

Specification: In that Technician Fifth Grade John W. Hull, Headquarters Squadron, 46th Air Service Group, APO 660, did, at APO 660, on or about 9 March 1946 with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Tsurukichi Hirose, a human being, by shooting him in the head with a .45 calibre pistol.

Each accused pleaded "not guilty by virtue of insanity at the time of the offense" to the respective Charge and Specification against him which the court treated as pleas of "not guilty." Each accused was found guilty of the Charge and Specification against him, and after evidence was introduced against Hull of a previous conviction by summary court-martial for wrongfully taking and using a truck without proper authority, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentences and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, as to each accused, and pursuant to Article of War 50½, withheld the order directing the execution of the sentences.

3. The Board of Review adopts the statement of the evidence and of the law contained in the Staff Judge Advocate's Review.

4. The charge sheet shows that the accused Hull is 20 years of age and that he was inducted into the Army 28 July 1944 at Chicago, Illinois; and that the accused Hymer is 19 years of age and that he was inducted into the Army 23 April 1945 at Shreveport, Louisiana.

5. 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 as to each accused to support the findings of guilty and the sentence. A sentence either of death or life imprisonment is mandatory upon conviction of murder, in violation of Article of War 92. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22-2401 of the District of Columbia Code.

Wilmer T. Baughn, Judge Advocate

Robert J. Johnson, Judge Advocate

Gerald Fontana, Judge Advocate

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

JAGN-CM 314056

U N I T E D S T A T E S	)	PACIFIC AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at APO 323, 8 and 9 April 1946. Dismissal, total forfeitures, and confinement for eighteen (18) months. Disciplinary Barracks.
First Lieutenant CHARLES R. HEATON (O-2067850), Air Corps.	)	

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

---

1. The Board of Review has examined the record 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 93d Article of War.

Specification: In that First Lieutenant Charles R. Heaton, Headquarters, Far East Air Service Command, did, at APO 323, on or about 4 February 1946, feloniously embezzle by fraudulently converting to his own use 2,550 yen, Japanese currency, of the value approximately $170, the property of Mr. Serge Besedish, 113 Legarda Street, Manila, P.I., entrusted to him by the said Mr. Serge Besedish for the purpose of converting into pesos.

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

Specification 1: (Disapproved by reviewing authority.)

Specifications 2 to 13 (except 11): Each alleges that accused, having been restricted to the limits of APO 323, broke restriction as follows:

Specification 2: 23 January 1946, by going to Nichols Field, P.I.

Specification 3: 26 January 1946, by going to Nichols Field, P.I.

Specification 4: 27 January 1946, by going to Nichols Field, P.I.

Specification 5: 29 January 1946, by going to Nichols Field, P.I.

Specification 6: 2 February 1946, by going to 113 Legarda Street, Manila, P.I.

Specification 7: 6 February 1946, by going to the Army-Navy Club and 113 Legarda Street, Manila, P.I.

Specification 8: 9 February 1946, by going to 113 Legarda Street, Manila, P.I.

Specification 9: 11 February 1946, by going to the Wack Wack Club, Manila, P.I.

Specification 10: 13 February 1946, by going to Nichols Field, P.I.

Specification 11: (Withdrawn.)

Specification 12: 28 January 1946, by going to the Wack Wack Club, Manila, P.I.

Specification 13: 30 January 1946, by going to the Wack Wack Club, Manila, P.I.

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

Specification 1: In that First Lieutenant Charles R. Heaton, Headquarters, Pacific Air Service Command, did, at APO 323 on or about 20 February 1946, wrongfully borrow about 50 pesos, lawful money of the Commonwealth of the Philippines, from Corporal Erwin (NMI) Lehman, an enlisted man of the 1945th Engineer Aviation Utilities Company.

Specification 2: Similar to Specification 1, except that it alleges borrowing of 10 pesos on 25 February 1946 from Corporal Sidney P. Bertrand.

Specification 3: Similar to Specification 1, except that it alleges borrowing on 26 February 1946, from Corporal Robert H. Evans.

Specification 4, 5: (Findings of not guilty.)

Specification 6: In that First Lieutenant Charles R. Heaton, Headquarters Pacific Air Service Command, did, at APO 323 on or about 15 March 1946 wrongfully appear in the enlisted men's club without his insignia of rank and branch of service on his uniform.

Specification 7: Similar to Specification 6, except that it alleges offense committed on 19 March 1946.

Specification 8: In that First Lieutenant Charles R. Heaton, Headquarters, Pacific Air Service Command, did, at APO 323 on or about 15 March 1946, wrongfully drink with enlisted men of the 1945th Engineer Aviation Utilities Company.

Specification 9: Similar to Specification 8, except that it alleges offense committed on 19 March 1946.

Specification 10: In that First Lieutenant Charles R. Heaton, Headquarters, Pacific Air Service Command, having been restricted to the limits of APO 323, did, at APO 323 on or about 26 February 1946, break said restriction by going to Fort William McKinley, APO 925.

Specification 11: Similar to Specification 10, except that it alleges offense committed on 8 March 1946.

He pleaded not guilty to all Charges and Specifications, and was found guilty of all Charges and Specifications, except Specifications 4 and 5 of the Additional Charge. 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 eighteen months. The reviewing authority disapproved the finding of guilty of Specification 1, Charge II, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused was assigned to Headquarters, Far East Air Service Command, APO 323 (R. 19, 22; Pros. Ex. 4). On 18 December 1945, by a letter written by Colonel Elvin F. Maughan, Chief of Administration, Far East Air Service Command, "By Command of Major General McMullen," accused was advised that he was "administratively restricted to the area of Headquarters, Far East Air Service Command, APO 323" and that he could not leave the area without permission of the Commanding General or Headquarters Commandant. Accused acknowledged receipt of the letter by indorsement bearing the same date (R. 28-29; Pros. Ex. 5).

Accused breached this restriction on a number of occasions. On 23 January 1946, accompanied by Flight Officer Tom D. Evans, accused made two local flights (R. 31; Pros. Ex. 9). Three days later, on 26 January 1946,

accused and First Lieutenant Jack D. Willis flew from Nichols Field to Tacloban and return. The following day, 27 January 1946, the same officers flew from Nichols Field to Clark Field and return (R. 30-31; Pros. Ex. 7, 10, 11). Accused again left the area to which he was restricted, on 28 and 30 January 1946, visiting the "Wack Wack Country Club" with First Lieutenant Allen R. Lynnes (R. 22, 26-27; Pros. Ex. 4). On 29 January 1946 accused, accompanied by First Lieutenant John C. Loria, made another local flight (R. 31; Pros. Exs. 8, 12).

Accused and a "Lieutenant Fleming," on the evening of 2 February 1946, called at the home of Miss Luba Besedish at 113 Legarda Street in Manila (R. 12-13). Miss Besedish was employed as a secretary in the Supply Division, Plans and Statistics Section, Far East Air Service Command (R. 14). Miss Besedish's father, Serge Besedish, in the course of conversation during the evening, inquired if accused could exchange yen for pesos (R. 7-8). The prevailing exchange rate was 15 Japanese yen for one dollar or about 7½ yen for one peso (R. 32-33). Accused thought he could make the exchange and Mr. Besedish said he would send the money by his daughter to accused at the office the following Monday (R. 8). In accordance with the conversation, Miss Besedish, on 4 February 1946, delivered to accused some "2,006 or 2,050" Japanese yen (R. 8, 12, 13). On 5 February 1946, accused exchanged 300 yen for $20 at the Finance Office (R. 34; Pros. Ex. 13). That evening accused met Lieutenant Raymon G. Heinonen at the Officers' Club and induced him to exchange 1500 Japanese yen for 198 pesos. Accused promised to redeem the yen the next morning but when he failed to do so Lieutenant Heinonen took them to the Finance Office where he received $100 for them (R. 24-25). Accused called at the Besedish home on Wednesday evening, 6 February 1946, to escort Miss Besedish to the Army-Navy Club. He remarked to Miss Besedish that he was "still changing the money" (R. 14). The following Saturday evening, 9 February 1946, accused again called on Miss Besedish and escorted her to the Officers' Club at the Far East Air Service Command (R. 15). That evening he returned to Mr. Besedish 100 yen of the money given him for exchange because it was Chinese currency and "no good" (R. 8). Accused intimated that he had exchanged the balance for $170 but that he was afraid to carry this sum with him. He asserted that he would bring the money to Mr. Besedish the following week (R. 8, 15).

When the money was not forthcoming Miss Besedish attempted to get in touch with accused by phone but was unsuccessful (R. 15). About 12 February 1946 she requested First Lieutenant John W. Trezise, an acquaintance of accused working in the same division as Miss Besedish, to ask accused for the money (R. 15, 19, 22; Pros. Ex. 4). When Lieutenant Trezise conveyed Miss Besedish's message to accused, he stated that he had the money but had been too busy to take it to Mr. Besedish. Lieutenant Trezise suggested that he would pick up the money at accused's barracks the following morning and deliver it to Miss Besedish, to which accused agreed (R. 19; Pros. Ex. 4). Lieutenant Trezise went to accused's barracks the next morning but he was not in. He called Lieutenant Trezise later in the morning and promised to see Miss Besedish. Lieutenant Trezise went to accused's barracks at noon again but he was not there. On his bed was an envelope containing a letter

addressed to Lieutenant Trezise, and signed with accused's name, which read in par, "Give the money to Luba for me." There was no money in the envelope (R. 19-21; Pros. Exs. 1, 4).

Repeated demands were made on accused for the money and accused made several more promises to pay (R. 8, 15, 21; Pros. Ex. 4). Finally, on 28 February 1946, accused signed a promissory note in which he promised to pay to Mr. Besedish the sum of $170 on or before 10 March (R. 8-9, 11; Pros. Ex. 3). The money was never paid (R. 12). During January and February 1946, accused gambled frequently and borrowed substantial sums from fellow officers. He borrowed 300 pesos from Captain Benjamin M. West, on 26 January, 50 pesos from First Lieutenant J. Barret in the early part of February, $50 from Captain Brandon F. Jones, on 7 February, and 50 pesos from First Lieutenant John P. Burns around the middle of February (R. 22-24, 29, 58-62; Pros. Ex. 6). On 7 February 1946, accused was the banker in a poker game which wound up with the bank approximately $40 short. He gave the principal winner an IOU for this amount (R. 25-26).

In addition to the breaches of restriction previously detailed, on 11 February 1946, accused went to the Wack Wack Club with Lieutenants Willis and Loria. The three officers, on 13 February 1946, visited the Nichols Field flight line (R. 30-31). On 26 February 1946 and again on 8 March 1946, accused, Corporal Erwin Lehman, and some other enlisted men, went to the Fort McKinley Snack Bar to eat and drink beer. The enlisted men were all members of the 1945th Engineers, with which accused was working at the time (R. 36-37, 45). According to Corporal Cecil J. Coats, Jr., president of the enlisted men's club at APO 323, accused came to the club on 15 March and 19 March 1946 in the company of enlisted men (R. 44-45). Corporal Coats did not recognize accused as an officer on the first occasion because he was not wearing any insignia. The second occasion someone told Corporal Coats that accused was an officer but again accused was lacking insignia (R. 45). Accused was drinking beer at the time but was not intoxicated or ungentlemanly (R. 46).

Accused did not limit his borrowing to officers. "About the last of February" he borrowed 50 pesos from Corporal Lehman. Of this amount, 40 pesos was still owing at time of trial (R. 36-37). On 25 February 1946, Corporal Sidney P. Bertrand loaned accused 10 pesos, of which only 1 peso was subsequently repaid (R. 39). He borrowed 50 pesos from Corporal Robert E. Evans, on 25 February 1946, and never repaid it (R. 40-41). Each of the enlisted men stated that they considered the accused a personal friend and disclaimed responsibility for the charges growing out of the loans (R. 38, 40, 42).

4. Evidence for the defense: Accused took the witness stand to testify concerning the embezzlement charge (R. 47). He stated that he received 2,650 Japanese yen from Mr. Besedish, of which he returned 100 yen (R. 52). Of the 2,550 yen which he retained, 1,500 yen were exchanged as Lieutenant Heinonen related (R. 48). Accused admitted that he was in a poker game when he made

this exchange but he contended that he had 345 pesos of his own on his person at the time (R. 48, 49). The remaining 1,050 yen given him by Mr. Besedish were exchanged on 8 February by two officers leaving for Japan on temporary duty (R. 48). Accused had the total proceeds of the exchange in his wallet on 9 February but, when he kept an engagement with Miss Besedish, he left the wallet behind in his footlocker because he was afraid he might lose the money (R. 63). While bowling on 10 February he lost the wallet which contained the exchange proceeds, as well as $140 of his own money (R. 48, 50, 64). He reported the loss to the Provost Marshal the following day (R. 48).

Accused asserted that he had more money available at the time of the loss but did not repay Mr. Besedish because he did not see him. He did not go to see him because he was restricted (R. 50). He visited the Besedish home on 13 February but not after that because of the restriction (R. 4). Concerning the letter which Lieutenant Trezise found on accused's bed, he stated that this letter was not intended to be delivered (R. 51). Subsequent to the loss of the money, he called Lieutenant Trezise and asked him to deliver a note to Miss Besedish requesting her father to come over to the post (R. 48). About 16 February accused wrote home to his wife for the money and he expected to have it "very soon" (R. 49). Accused notified Lieutenant Trezise on 18 February that he was in a position to repay the money (R. 49). He never paid over the money, however, because "/he/ didn't have /his/ pocketbook" (R. 50).

Besides his testimony relating to the embezzlement charge, accused admitted that in January he visited the flight line and participated in flying. This followed receipt of a letter on 9 January inquiring why he had not put in any flying time in December (R. 63).

Warrant Officer Thomas D. Evans, Assistant Provost Marshal, corroborated accused's testimony that he had reported the loss of a wallet. Mr. Evans stated that about the middle of February, accused told him that he had lost a wallet which contained pesos received in exchange for yen belonging to a friend and also some money of his own (R. 52-53). Corporals Vincent Wagner and George A. Isnardi, and Private Clarence W. Strange, testified that when accused visited the enlisted mens' club with them, on 15 and 19 March 1946, he wore the insignia of his rank (R. 54-58). It was stipulated "that accused was not paid for the months of February and March" (R. 58).

5a. The Specification of Charge I alleges that at APO 323, on 4 February 1946, accused feloniously embezzled, by fraudulently converting to his own use, 2,550 Japanese yen, valued at $170, entrusted to him by Serge Besedish, for the purpose of conversion into pesos. The Specification is laid under Article of War 93.

> "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.

It is established that accused, while calling on the daughter of Serge Besedish, told the latter that he was in a position to exchange Japanese currency for him. Pursuant to this conversation Mr. Besedish delivered to accused, through the daughter, 2,550 Japanese yen, on 4 February 1946. The exchange rate was 15 Japanese yen to a dollar or 7½ yen to a peso. The 2,550 yen was therefore worth about $170. It is clear from the evidence that in accepting the Japanese yen from Mr. Besedish for the purpose stated, accused received it in a position of trust and that if the evidence shows that he converted the money to his use he was guilty of embezzlement.

> "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, express 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." MCM, 1928, par. 149h.

It was further established that, on 5 February 1946, accused exchanged 1,500 yen with a fellow officer for 198 pesos. Accused testified that he exchanged the remaining 1,050 yen on 8 February. Although he called at the Besedish home, on 9 February, he did not surrender the proceeds of the exchange. He represented at the time that he had left the money at his barracks because he was afraid to carry it on his person. After he failed to keep his promise to deliver the money the following week, Mr. Besedish and the daughter attempted, unsuccessfully, to get in touch with accused. They enlisted the aid of another officer on the base but, although accused freely made promises to pay, the money was never forthcoming. On 28 February, accused sent Mr. Besedish a promissory note for the $170. The sum was still owing at the time of trial.

In explanation of his failure to turn over the proceeds of the exchange, accused testified that he lost the money in a bowling alley on 10 February. Something in the nature of corroboration was contained in the testimony of an Assistant Provost Marshal that accused mentioned the loss sometime around the middle of February. Curiously, however, it appears that accused never said anything about the loss to Mr. Besedish or Lieutenant Trezise. When he was on the witness stand, accused did not explain why he was so careful about the money that he would not carry it with him when he visited the Besedish home, on 9 February, but so careless as to lose it in a bowling alley the following day. The questionable character of the excuse offered by accused is apparent. Doubt as to the truth of his explanation also arises from the fact that at the time that he exchanged the 1500 yen for 198 pesos he was just entering a poker game and because he failed to redeem the yen the following morning as he had promised the officer making the exchange. There is considerable testimony that accused engaged in several poker games about this time, that he generally lost, and that he was

borrowing from fellow officers. Under all the circumstances, the conclusion can hardly be escaped that accused gambled the proceeds away and invented the story of the loss to hide his defalcation. The holding in CM 123492, 1912-40, Dig. Op. JAG, sec. 451(17) is pertinent:

> "An officer in charge of trust funds who fails to respond with them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting."

The court-martial, which saw and heard the witnesses, saw fit to reject accused's explanation and to conclude that he had converted the money to his own use. The Board of Review perceives no reason for disturbing their findings.

Counsel for the accused argues that the evidence does not show conversion of the Japanese yen but, if anything, conversion of the pesos or dollars received in exchange. From the evidence that the Japanese yen was delivered to accused for exchange purposes and that he failed to return either the yen or the proceeds, the court-martial could conclude that he had converted the yen to his own use. The further showing that he had actually made the exchange does not preclude the finding that the yen were converted. There is other evidence in the record from which the court-martial could legitimately infer that at the time accused exchanged the yen he had the intent to convert it to his own use. If the exchange was made, not to carry out the terms of the trust, but to provide him with money to engage in a poker game, the exchange constituted a conversion of the Japanese yen.

b. Specifications 2 to 13 (excepting Specification 11) of Charge II, and Specifications 10 and 11 of the Additional Charge, allege that on thirteen different occasions between 23 January 1946 and 8 March 1946 accused breached his restriction to the area of Headquarters, Far Eastern Air Service Command, APO 323. The offenses are charged as violations of Article of War 96.

It is established that accused was restricted, as alleged, by order of the Commanding General of the Far Eastern Air Service Command. The order provided he would not leave the area without permission of the Commanding General or Headquarters Commandant. In violation of this restriction, accused went to Nichols Field to engage in flying on five occasions, to the Wack Wack Country Club three times, to the Besedish residence in Manila three times, and twice to the Fort McKinley Snack Bar. In defense of his trips to Nichols Field, he related that in January 1946 he was instructed to get in his flying time. If he received such instructions, he should have procured permission to leave the area, and in default of such authorization, he must be held to have violated the restriction. The Specifications are sustained.

c. Specifications 1 to 3, the Additional Charge, allege borrowing from enlisted men on three occasions. Specifications 6 and 7, the Additional Charge, allege appearing in an enlisted men's club without the insignia of his rank, on two occasions. Specifications 8 and 9, the Additional Charge, allege drinking with enlisted men on two occasions. All of these Specifications are laid under the 96th Article of War.

The borrowing from enlisted men was not disputed. The men involved were working with accused at the time, considered him a personal friend, and disclaimed any responsibility for the charges against him. Whatever view the enlisted men may have taken of the matter, the fact remains that such a practice has been uniformly held violative of Article of War 96. The Board of Review in CM 230736, Delbrook, 18 BR 29, 36, said:

> "The obligation that flows from indebtedness to a subordinate tends to weaken authority. It can become the cause of improper favor. It impairs the integrity of required relationships. Where there is an actual or possible duty relationship between officer and enlisted men arising from membership in the same command or from duty in the same station, camp or post, the negotiating of a loan by an officer from the enlisted man is prejudicial to good order and military discipline."

The drinking with enlisted men is also undisputed. It appears that on at least two occasions accused accompanied the enlisted men, with whom he was then working, to the enlisted men's club and drank beer with them. There is no suggestion of intoxication or ungentlemanly behavior. Although these offenses appear rather trivial, in accordance with many previous decisions of the Board of Review, they must be held to be violative of Article of War 96.

Witnesses for accused did dispute the prosecution's evidence that accused was not wearing the insignia of his rank at the time he visited the enlisted men's club. The court-martial saw fit to believe the sole witness for the prosecution as against the three witnesses for the defense. This was the court-martial's prerogative. MCM, 1928, par. 78a, p. 62. The findings of guilty of these Specifications are sustained by competent evidence.

6. War Department records show that accused is about twenty-two years of age, having been born 4 August 1924. He is a native of Missouri, where he received a high school education and subsequently worked as a gas station attendant and bookkeeper. He entered the Army as an enlisted man on 31 March 1943 and, having completed his training as an aviation cadet, was commissioned a second lieutenant in the Army of the United States on 4 August 1944, entering upon active duty on that date. On 6 January 1946, he was promoted to first lieutenant.

7. 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 is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of the violation of the 93rd or of the 96th Article of War.

Wilmot T. Baughn, Judge Advocate

Robert J. Connor, Judge Advocate

Gene D. Bolton, Judge Advocate

JAGN-CM 314056 1st Ind

JUL 22 1946

WD, 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 First Lieutenant Charles R. Heaton (O-2067850), Air Corps.

2. Upon trial by general court-martial on 8 and 9 April 1946, this officer was found guilty of embezzlement, in violation of Article of War 93; and of making a false official statement (Specification 1, Charge II), breach of restrictions (13 specifications), borrowing from enlisted men (3 specifications), appearing in an enlisted men's club without insignia (2 specifications), and drinking with enlisted men (2 specifications), all 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 eighteen months. The reviewing authority disapproved the specification alleging the making of a false official statement (Specification 1, Charge II), approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action 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.

4. The record shows that the father of a girl friend of accused entrusted him with 2,550 Japanese yen, valued at $170, for the purpose of converting it into pesos. Accused received the yen on 4 February 1946 but, at the time of the trial, on 9 April 1946, he had not returned either the pesos or the yen. Many requests were made in the interim for the return of the money, to which accused responded with varying excuses. He testified at the trial that he was carrying the proceeds of the exchange in his wallet and lost it in a bowling alley. His explanation was at variance with other testimony in the case which indicated convincingly that the money was lost by accused while playing poker.

Accused was restricted to the area of Headquarters, Far East Air Service Command. On thirteen occasions between 23 January and 8 March 1946, he breached this restriction by making flights from Nichols Field and by visiting country clubs and private residences in Manila. He also accompanied some enlisted men on two occasions when they went to an enlisted men's club to drink beer. Both times he failed to wear the insignia of his rank. He borrowed money from three of these enlisted men who were working in the same office with him.

5. The accused is presently under an approved sentence involving dismissal and total forfeitures for the offense of larceny committed on 1 December 1945 at Fort McKinley, Philippine Islands. The record of trial in that case is being submitted concurrently with this case for your consideration. There is evidence in that case that accused is an excellent combat pilot and that he participated in at least one dangerous combat mission in the Pacific theater.

6. I recommend that the sentence in this case, as in the other, be confirmed and ordered executed, but that in view of the accused's youth and combat record six months of the confinement imposed in the present case be remitted.

7. 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

(G.C.M.O. 255, 8 August 1946).

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

JAGK - CM 314071

22 AUG 1946

UNITED STATES	)	24TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Okayama, Honshu, Japan, 11 and 12 April 1946. Dishonorable discharge and confinement for three (3) years and six (6) months. Penitentiary.
Private GEORGE W. GRIGGS (6950564), Company B, 21st Infantry.	)	

HOLDING by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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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 93rd Article of War.

Specification: In that Private George W. Griggs, Company "B", Twenty-first Infantry, did, at Okayama, Honshu, Japan, on or about 31 December 1945, unlawfully enter the dwelling of Junichi Takeda, with intent to commit a criminal offense, to wit, assault and battery on the occupants thereof.

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

Specification 1: In that Private George W. Griggs, Company "B", Twenty-first Infantry, did, at Okayama, Honshu, Japan, on or about 30 December 1945, wrongfully strike Kazuo Takahashi upon his face with his fists.

Specification 2: In that Private George W. Griggs, Company "B", Twenty-first Infantry, did, at Okayama, Honshu, Japan, on or about 31 December 1945, wrongfully strike Junichi Takeda upon the face with his fists.

CHARGE III: Violation of the 69th Article of War.

Specification: In that Private George W. Griggs, Company "B", Twenty-first Infantry, having been duly placed in confinement in 21st RCT Post Stockade, Okayama, Honshu, on or about 2 January 1946, did, at Okayama, Honshu, on or about 13 January 1946, escape from said confinement before he was set at liberty by proper authority.

ADDITIONAL CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private George W. Griggs, Company "B", Twenty-first Infantry, did, at Okayama, Honshu, Japan, on or about 21 January 1946, forcibly and feloniously, against her will, have carnal knowledge of Misaka Tanaka.

The accused pleaded not guilty to all Charges and their Specifications. He was found guilty of the Specification of Charge I except the words "with intent to commit a criminal offense, to wit, assault and battery on the occupants thereof" and not guilty of Charge I, but guilty of a violation of the 96th Article of War. He was found guilty of Charges II and III and their Specifications. He was found guilty of the Specification of Additional Charge I except the words, "forcibly and feloniously against her will," substituting therefor the words "with intent to" and adding after the words "Misaka Tanaka" the words "commit an assault upon said Misaka Tanaka by willfully and feloniously striking her on the face and by removing part of her clothing, " and not guilty of Additional Charge I but guilty of a violation of the 93rd Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for twenty-two years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for three years and six months, designated the "United States" Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War might direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the finding of guilty of the Specification of Charge I and of a violation of the 96th Article of War thereunder; legally sufficient to support the findings of guilty of Charges II and III and their Specifications; legally sufficient to support only so much of the finding of guilty of the Specification of Additional Charge I and of a violation of the 93rd Article of War thereunder as involves a finding of guilty of an aggravated assault in violation of the 96th Article of War; and legally sufficient to support only so much of the sentence as approved by the reviewing

authority as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and six months in a place other than a penitentiary, Federal reformatory or correctional institution. In view of the foregoing holding only the findings in relation to Additional Charge I and its Specification and the sentence will be discussed herein.

4. The accused, under Additional Charge I and its Specification, was charged with the crime of rape in violation of the 92nd Article of War. By exceptions and substitutions, the court found him guilty of the following specification in violation of the 93rd Article of War:

> "In that Private George W. Griggs —— did, —— with intent to have carnal knowledge of Misaka Tanaka, commit an assault upon said Misaka Tanaka by willfully and feloniously striking her on the face and by removing part of her clothing."

This specification does not charge the accused with the offense of assault with intent to commit rape for the reason, regardless of what the evidence may show, that it fails to allege the vitally important element of want of consent to the contemplated carnal knowledge (MCM 1928, par. 149l, p. 179) nor can it be considered as charging the accused with the offense of assault with intent to do bodily harm, for this type assault is not a lesser included offense of rape, the specific intent required in each case being entirely different (CM ETO 4825 Gray, 4 Bull JAG 89). Furthermore, the use of the adjective "feloniously" in the Specification will not suffice to make the offense described a violation of the 93rd Article of War, for there is no allegation that a dangerous weapon was used in the so-called felonious striking (CM 107659; 125267, Dig. Op. JAG 1912-1940, s. 451 (6)). In short, the Specification fails to set out a "felonious " or other assault in violation of the 93rd Article of War. It does, however, describe adequately an "aggravated" and "indecent" assault in violation of the 96th Article of War, which assault is a lesser included offense of the crime of rape (CM 218643 Bright, 12 B.R. 103; CM ETO 4235 Bartholomew 12 B.R. (ETO) 151). Excluding from the sentence the maximum punishment allowable for the other offenses there remains a one-year period of confinement as punishment for this offense. Since a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for not more than five years is authorized upon a conviction of "aggravated " or "indecent" assault in violation of the 96th Article of War (CM ETO 12711 Olley; CM ETO 4028 Moreno, 11 B.R. (ETO) 259; CM ETO 4386, Green (1st Ind) 12 B.R. (ETO) 333; CM NATO 1703 Smotherman), the punishment directed in this case was not excessive.

5. Penitentiary confinement is not authorized for simple breaking and entering in violation of Article of War 96, for the maximum confinement

authorized is only six months (CM 220805, Peavy, 13 B.R. 73). For the same reason, it is not authorized for simple assault and battery in violation of Article of War 96 (AW 42; D.C. Code 24-401). Escape from confinement is a purely military offense and as such is not punishable by confinement in a penitentiary (CM 240973, Allen, 2 Bull JAG 378). "Aggravated" or "indecent" assaults are not expressly prescribed by any statute of the United States or by the law of the District of Columbia and thus are not punishable by confinement in a penitentiary (AW 42; CM ETO 14925, Bullock). Therefore, penitentiary confinement is not authorized in this case.

Chester T. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Abrazd, Judge Advocate

JAGK - CM 314071 1st Ind AUG 29 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General 24th Infantry Division, APO 24, c/o Postmaster, San Francisco, California.

1. In the case of Private George W. Griggs (6950564), Company "B", 21st Infantry, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon approval of only so much of the finding of guilty of the Specification of Additional Charge I and of a violation of the 93rd Article of War thereunder as involves a finding of guilty of an aggravated assault in violation of the 96th Article of War, and of only so much of the sentence as approved by you as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and six months in a place other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the record of trial, 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 314071).

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 25, D. C.

(21)

JAGK - CM 314092

24 OCT 1946

UNITED STATES v. Private MAURICE J. BISHOP, JR. (33632282), 9201 TSU-TC, MP Detachment 23, Camp Shanks, New York	NEW YORK PORT OF EMBARKATION Trial by G.C.M., convened at Camp Shanks, New York, 23 April and 9 May 1946. Dishonorable discharge (suspended), total forfeitures, and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty in part and legally sufficient to support the sentence, has been examined by the Board of Review.

2. Upon examination in the Office of The Judge Advocate General the record of trial was found legally insufficient to support the findings of guilty of the following Charge and Specification:

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

Specification: In that Private Maurice J. Bishop, Jr., 9201 TSU-TC, Military Police Detachment 23, Camp Shanks, New York, did, at the Central Y.M.C.A., Richmond, Virginia, on or about 5 March 1946, feloniously take, steal, and carry away, the following items, of some value and less than $20.00, the property of Lloyd M. Thacker:

Honorable Discharge Certificate from the Army of the United States, Enlisted Record and Report of Separation, Honorable Discharge, W.D. AGO Form 53-55
Separation Qualification Record of the United States, W.D. AGO Form 100.

3. <u>Evidence in support of above Charge and Specification.</u>

Lieutenant Clancy testified that after having warned the accused of his rights under Article of War 24, the accused made the following statement to him:

"The accused told me he left Camp Shanks on 8 February 1946 and proceeded to Richmond, Virginia. That he was due back on 13

February 1946, but failed to come back to Camp Shanks. While in Richmond, the accused stated that he stayed at the Y.M.C.A., under a fictitious name from the 9th until the 11th of March 1946, registered as Marvin Brown. To get back before that, the accused also stated that he found a brown envelope on a chair near the shower room in the Y.M.C.A. and he purloined the same. He found in the envelope discharge papers and certain other records belonging to a Lloyd M. Thacker. On the 12th of March 1946, he applied for a job at the P. Lorillard Company in Richmond, using the discharge papers that he had taken from the Y.M.C.A., to get the job. On applying for the job he was told he needed a social security card. When he knew this he went to the board and applied for and received a card, using the discharge paper he had taken at the Y.M.C.A. Then he returned to the Lorillard Company and went to work. On the afternoon of 12 March 1946, he was apprehended at the Lorillard Company by the military police in Richmond and placed in confinement in the armory in Richmond on 13 March 1946, ***" (R. 25,26).

A written statement signed by accused was also admitted in evidence, pertinent parts of which read as follows:

"On 5 March 1946, at 1400, at the Central Y.M.C.A., in Richmond, I saw a brown envelope lying near a chair and bed in a dormitory. I knew that they contained the discharge papers of an ex-serviceman and other allied papers. I took these papers because I figured that if I had them, the M.P.'s would not bother me. So I picked these papers up and carried them off with me. The name of the original owner of these papers was 'Lloyd M. Thacker'.

"I used the name 'LLOYD MARVIN THACKER' to get a Social Security Card at Richmond. I used the name 'LLOYD MARVIN THACKER' to get a job at P. Lorillard & Co., in Richmond. I showed the Honorable Discharge papers of Lloyd M. Thacker to Mr. Hoffman of that company when I applied for the job. The job was that of clerk. He told me that there were not many jobs available, but that he was impressed with my appearance, and conduct during the interview and so he gave me the job. He told me that I could work my way up to foreman because the other man who had the job was pretty old and intended to retire in about two (2) years.

"On the same day that I got the job I registered at the Y.M.C.A. I signed as both 'Lloyd Marvin Thacker' and 'Lloyd M. Thacker'. I had the discharge papers that I had taken at the Y.M.C.A. on my person at all times, except when I was picked up by the M.P.'s, when I had them in the car, in which I was taken to the Armory before they took me up to the M.P. Office. Later, however, I informed the M.P.'s where I had hidden them." (Pros. Ex. 15)

Lieutenant Clancy also testified that when, on a pre-trial investigation, he showed Prosecution Exhibit 6 (honorable discharge certificate made out

to Lloyd M. Thacker) to accused, accused admitted it was the one he had used to obtain employment in the P. Lorillard Company (R. 26). Accused made the same admission as to Prosecution Exhibit 8 (enlistment record and report of separation made out to Lloyd M. Thacker) when it was shown to him by Lieutenant Clancy (R. 27). When shown Prosecution Exhibit 10 (social security card made out to Lloyd Marvin Thacker) accused stated that he used the honorable discharge to obtain this social security card and signed the name of Lloyd Marvin Thacker on it (R. 28). At this time accused also admitted to Lieutenant Clancy that he had received the P. Lorillard Company pay roll check dated 22 March 1946 (Pros. Ex. 13) made out to Lloyd M. Thacker and had indorsed it and received the money therefor (R. 29)and that Prosecution Exhibit 11 was an application, dated 11 March 1946, for a room at the Y.M.C.A. in Richmond, Virginia, made out by him and signed by him using the name Lloyd M. Thacker (R. 28).

Corporal Paul W. Crafton testified that he went to the Military Police Battalion in Richmond and obtained custody of the accused and a manila envelope. He then returned to Camp Shanks, New York, and turned both accused and the manila envelope over to Captain Bostick (R. 36). It was stipulated between the prosecution, defense counsel and the accused that Captain Bostick, Provost Marshal of Camp Shanks, New York, received from Corporal Crafton a manila envelope containing Prosecution Exhibits 1 through 9 (R. 37). Prosecution Exhibit 7 is a separation qualification record made out in the name of Lloyd M. Thacker.

All the Prosecution Exhibits above referred to were duly admitted in evidence (R. 38,39).

4. The only question presented by the record is the sufficiency of the evidence in corroboration of the oral and written statements of accused quoted above, both of which statements amount to a full and complete confession of the larceny of the discharge papers of Lloyd M. Thacker by accused. The Manual for Courts-Martial provides that:

> "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 has been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. *** This evidence of the corpus delicti need not be sufficient of itself to convince beyond a reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. *** In a case of alleged larceny *** evidence that the property in question was missing under circumstances indicating *** that it was probably stolen *** would be a compliance with the rule." (MCM, 1928, par. 114a.)

It has been consistently held that the corpus delicti need not be established beyond a reasonable doubt aliunde the confession, but some evidence corroborative of the confession must be produced, and such evidence must touch upon the corpus delicti (CM 256407, Jaycox, 36 BR 269,277; CM 239085, Jones, 25 BR 41,43; CM 317673, Wing).

In the instant case the confessions of accused show that at the time and place alleged and while in an absent without leave status he took the discharge papers of one Lloyd M. Thacker which he found either lying near a chair and a bed in a dormitory or on a chair near the shower room of the Y.M.C.A. in Richmond, Virginia. He thereafter assumed the name Lloyd M. Thacker and used the discharge papers to procure a Social Security card in that name and to gain employment with the P. Lorillard Company. A taking and carrying away of such lost or mislaid papers under these circumstances constitutes larceny (Commonwealth v. Titus, 116 Mass. 42; Regina v. Peters, 1 C. & K. 245, Sayre 910; Wharton's Criminal Law, 12th Ed., sec. 1141).

The Board of Review is of the opinion that the record of trial contains ample evidence corroborative of these confessions and touching, if not proving, the corpus delicti. By a series of admissions made independently of the confessions at a pre-trial investigation, accused identified two of the three discharge papers he is charged with having stolen, and stated that he had used them to procure a Social Security card, likewise identified, and to gain employment in the P. Lorillard Company under the name of the owner of the papers. He also identified a pay roll check of the P. Lorillard Company made payable to him in his assumed name and an application for a room at the Y.M.C.A. in Richmond, Virginia, made out by him and signed with his assumed name. All these documents were properly admitted in evidence at the trial and serve to corroborate the confessions in every detail.

Accused, in his written confession, stated that he had the discharge papers on his person at all times until shortly before he was apprehended by the military police and that he later informed the military police where he had hidden them. Although there is no direct testimony showing accused's possession of these papers, there is evidence aliunde the confession that they were delivered to the witness Corporal Crafton by the military police who had apprehended accused. A fair inference arises, therefore, that following accused's instructions the military police found the papers hidden by him and forwarded them, along with accused, to accused's organization. This evidence also corroborates accused's confessions. There is no reason to assume that accused acquired another's discharge papers in any manner other than theft, for it is well known that such papers are of a peculiarly personal nature and are highly prized and often used by the owners thereof. Evidence aliunde the confession showing the accused to have been in possession of the allegedly stolen property under circumstances indicating that it probably had been stolen is a sufficient corroboration of a confession admitting the theft (CM NATO 2190, Venable; CM NATO 1366, Anderson;

CM 202928, Cooley, 6 BR 371; CM 210693, Alexander, 9 BR 331,336, review of cases). The above stated rule is particularly applicable in this case.

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

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Hagen, Judge Advocate

JAGK - CM 314092 1st Ind

WD, JAGO, Board of Review No. 2, 24 October 1946

TO: The Judge Advocate General

For his information.

Chester D. Silvers
CHESTER D. SILVERS
Lt Col, JAGD
Chairman, Board of Review No. 2

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

JAGQ-CM 314161

AUG 29 1946

U N I T E D S T A T E S	)	HEADQUARTERS 9TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Augsburg, Germany, 10 April 1946. Dishonorable discharge and confinement at hard labor for the term of his natural life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOHN W. DOUGLAS (34952222), Service Company, 761st Tank Battalion.	)	

REVIEW by 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 named above.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John W. Douglas, Service Company, 761st Tank Battalion, did, at Teisendorf, Bavaria, Germany, on or about 13 March 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private William O. Hobbs, Junior, a human being by shooting him with a carbine.

Accused pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. The court sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution. Private Fry testified that he was

working at the Enlisted Men's Club of the 761st Tank Battalion at Tiesendorf, Germany, on the night of 13 March 1946, as doorman and ticket taker. He knows the accused, who was in the military service, and saw accused at the club bar that night arguing with deceased. Deceased, Private William O. Hobb, Jr., was inside the bar, accused was outside the bar and they had each other by the collar. The witness parted them (R 13) and accused struck at deceased once and deceased did not attempt to strike back. Neither had a weapon at that time. Helga, a blonde, was behind the bar at that time. It was then about 2150 and accused went outside (R 14), came back to the bar a couple of minutes later and left again (R 15). After accused left deceased got his coat and said, "Well I'm going home" and went out. Deceased did not take a weapon with him and there was none behind the bar. At about 2200 the witness heard a shot, waited a couple of minutes, went to the door and saw deceased lying on the floor (R 15). This witness was recalled and testified that he did not have any weapon in his possession or control on 13 March 1946, did not give deceased a pistol that night and did not see deceased with any weapon on his person or under his control that night (R 42).

Helga Freiwang, who worked at the Enlisted Men's Club in Teisendorf waiting on tables and behind the bar (R 26), saw the accused there about nine o'clock p.m., on 13 March 1946 (R 25). She testified that she knew accused well. He was sitting at a table and Helga brought accused drinks (R 26). She served ten glasses of cognac to his table. Accused told Helga to come to him, and she told him to leave her alone. At that time Helga was in front of the bar. Later when accused was drunk he told Helga that he would shoot her if she didn't come to him. Accused gets mad quickly when he is drunk. He sent another girl to tell Helga he wanted to see her. When Helga went to accused's table he was very angry and said he would shoot her when she went home if she didn't come to him. At first there had been another person at the table with accused but later he was alone (R 27). When accused said he would shoot her, Helga searched him to see if he had a pistol and he did not. This was about ten o'clock p.m. Helga knew the deceased and Private Fry, both of whom worked at the bar. That night she saw accused and deceased arguing (R 28) at the bar. Helga at that time was at her table right next to the bar (R 29).

Sergeant Burks testified he was Sergeant of the Guard on 13 March 1946, that accused had been a member of the guard and came off duty at 1600 that day and had no occasion to have a weapon after that. The witness went to the club about 1900 that night (R 19). About 2100 accused and deceased were arguing and cursing loudly by the bar. Accused had deceased by the collar. The witness parted them and a few minutes later they were arguing again and once more the witness parted them. Deceased said to accused, "You can't come behind the bar," and accused said, "You can't tell me what to do." As they were parted the second time accused hit deceased and said, "I'll see you outside" (R 20). The witness then searched accused to see if he had a pistol and found none (R 21) and told accused to go outside. Accused said, "This man here has a pistol," pointing to deceased. The

witness testified that accused told him that Fry had passed a pistol or something that looked like a pistol to deceased (R 23); when recalled, however, he testified that accused made no such statement to him (R 43). The witness searched deceased and did not find a weapon (R 23, 24). When recalled, after accused testified, Sergeant Burks testified that he searched accused but did not search anyone else (R 43). After telling the witness that deceased had a pistol, accused backed off and said, "don't get in front of me, because my brother got shot that way" (R 23). After accused left the club the witness went to call the Officer of the Day but couldn't find him, started back to the club, and when he got to the top of the stairs saw accused standing there to the right of the door with a carbine in his right hand pointed toward the door, and it looked like his finger was in the trigger guard. Accused was alone (R 21) looking toward the door (R 25) and said, "Don't crowd me," excitedly. The witness went back down stairs to look for the Officer of the Day. When he got to the bottom of the stairs he heard a shot fired and kept right on going (R 22). He did not see deceased have a weapon at any time that night nor offer to fight accused. Deceased was busy with his duties behind the bar and was selling coca colas when accused said to him, "I'll see you outside" (R 24).

Sergeant Finley was at the club at about 2200, on 13 March 1946, standing in the middle of the floor and heard one shot (R 10), ran to the door and saw deceased lying on his back about five feet away from accused, who was on his knees with a carbine in his right hand. As soon as the witness came through the door, accused jumped up and ran down the steps holding the carbine and without saying anything (R 11).

Lieutenant Godbold, S-1 of the 761st Tank Battalion, testified that he was Officer of the Day on 13 March 1946, that at about 2200 he left the Battalion Command Post and started to the Enlisted Men's Club. On the way he met two soldiers who reported there had been a shooting. When the witness arrived at the club he found deceased and another soldier by the name of Walker lying in the vestibule of the hall of the club. Both of these soldiers were bleeding profusely at the time. The deceased was bleeding around the region of the heart. The witness had both soldiers removed (R 7). Deceased was lying about four feet from the doorway to the main room of the club (R 8). A carbine clip was lying near the body and a couple of discharged cartridge casing were within a few feet of the clip (R 9). This was about 2225, about two minutes after the shooting took place. The witness sent the two men to the Medical Detachment and then returned to the club to interview witnesses. At about 2245 accused, at the Battalion Command Post, handed his rifle to this witness and said, "I'm the man you're looking for," and "I shot the two men in question" (R 8).

Captain Madison, Medical Corps, testified that he was the Battalion Surgeon of the 761st Tank Battalion and that at 2225, on 13 March 1946, he examined the body of the deceased (R 5). He found a bullet wound in the chest about an inch to the left of the sternum, over the precordium (sic),

which made an exit on the right lateral chest, approximately three fingers breadth above the right costal margin. There had been severe hemorrhage and marked emphysema of the left chest, the bullet having entered in the area of the heart. The cause of death was gunshot wound in the chest, which damaged the right lung, the liver and possibly the heart. The wound appeared to be caused by a .30 caliber rifle bullet, and there was no evidence of powder burns on deceased's underwear (R 6).

4. Evidence for the Accused. Private Williamson was at the club on the night of 13 March 1946 and at about ten o'clock p.m. heard a shot, was told not to move, so sat there and left the club about thirty minutes later (R 31). The next day this witness found what "looked like a .45 automatic" pistol across the street from the club near the Service Company and turned it in to the charge of quarters. He didn't know from where the pistol came (R 32).

The accused, after being fully advised of his rights, elected to be sworn and testified that he was not relieved from guard duty until 1800, that he went to turn his carbine into the Armorer but could not find him, that he found his own room locked and went over to the club to find some of the other boys who lived in his room to get a key so he could put the gun in his room. In front of the door to the bar room there were eight or nine packing crates and accused put the rifle behind the crates, because guns were not allowed in the club. Accused could not find any of the boys he was looking for, stayed at the club and did quite a bit of drinking (R 34). Accused's own statement of the events immediately leading up to the shooting is as follows (R 34, 35):

> "* * * When the girl brought the drinks to our table, I told her to tell Helga, another girl who works there in the Club, to come to my table, because I wanted to talk to her, but this girl didn't answer me — well, we had a few more drinks and then I looked around and there was Helga standing there behind me and I asked her if Louise, the other waitress, had told her anything, but she didn't answer me, but turned around and started back towards the bar. I got up from the table and went after her; then she went behind the bar and I started to go through the bar door, and then this Hobbs told me that I couldn't go behind the bar, and I said: ". . . I understand that I can't go behind the bar . . .". Then I called to her behind the bar, so that she could talk to me there at the side of the bar. Then Hobbs said that I couldn't talk to her and I asked him "why?". I said: "... I've known her as long as the rest of you...", and I asked Hobbs if he was interested in her. Then Hobbs said: "...I don't give a damn

about that...you can't speak to her...'; than, as he said this, he moved back a little closer to Fry, the bartender who was behind the bar then, and I saw Fry removing the butt end of a gun from his left pocket --

"Q. Do you know that it was a gun?

"A. Yes, I saw the butt end -- I saw it as Fry was taking it out of his pocket -- so then I said: '...that's O.K....', I said: '...just as long as I know what it's all about...'. Then the Sergeant of the Guard came up to the bar and up to this time no one had made any attempt to stop us; we was close over the bar, but we hadn't made any fuss up to this time, but then the Sergeant of the Guard came up and said: '...O.K. Douglas, let's go...'. Then I told the Sergeant of the Guard that Fry had given Hobbs this gun, but the Sergeant of the Guard didn't search either of the other men, he just searched me. So, then I went with the Sergeant of the Guard to the door of the Club and Burke's girl was sitting there near the door, so we stopped there at the door and talked to the girls there for maybe about fifteen minutes. Then, as I got up to go, I saw Hobbs coming towards me, with both of his hands in his pocket; then I started for the door and Hobbs was still coming towards me, with his hands in his pocket - - but there were quite a few people dancing around him just then and he couldn't get to me very fast -- when, I was sure that he was coming for me, I said: '...go on back...', but he kept on coming -- just about that time the dance stopped and he started for me again, and when he got about to me, I pushed him away -- just there by the door into the room; I pushed him away with my left hand and I pushed him far enough away from the crates so that I could reach for my carbine -- I pushed him with my left hand and I reached for the carbine with my left hand -- I mean, with my right hand. Then, a couple of seconds later, just as I was turning around with my carbine, I saw that he was pulling something out of his pocket -- so I fired a shot quick and then we was wrestling there and after we had wrestled a little while, he let go of me and fell down on the floor. I had dropped the carbine while we was wrestling there, but when he let go of me, I reached over and picked up the gun and then I turned around and started down the steps. When I left the Club, I went over to a church a little ways

> away and sat down there in the archway of the church for about 15 minutes and then I got up and went over to the Battalion CP and gave myself up -- then the OD came in and I said: "...I'm the man you're looking for, sir...".

Accused denied that he said, "Don't crowd me" (R 36), that he threatened to kill Helga that night when she left the club (R 43), and also that he said to deceased, "I'll see you outside" (R 41). Accused testified he had been having sexual relations with Helga (R 39) and didn't know why she was angry with him. He knew deceased had a pistol, had seen Fry give it to him and saw the butt end of it when deceased put it in his pocket, "thought that he was taking it out of his pocket, so I just turned around and fired as quickly as I could" (R 38). Accused admitted that when he shot deceased at about 2200 (R 40), he knew what he was doing (R 38). "He was coming for me and I knew that he had this pistol, so I had it in my mind to get the carbine, at the time that I went through the door," and that it was about three or four minutes after he went out the door before he shot deceased. A few minutes before accused left the club he told one of the girls he had better leave before he got into trouble (R 40).

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 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. 148a, p. 164).

The evidence in this case is conclusive that accused shot Private William O. Hobbs, Jr., with a .30 calibre carbine and that Hobbs died a few minutes later in consequence of this gunshot wound inflicted by the accused. That the

accused acted with malice aforethought is established by the evidence that accused was the aggressor, that accused left the club room intending to and in fact did get his carbine from behind the crates, was seen standing with it leveled at the club room door when no one else was present, and that it was three or four minutes from the time accused left until the deceased came through the door. It is apparent that accused was motiviated by a calculated intent to prevent deceased from interfering with accused's pursuit of Helga, with whom accused was engaged in a meretricious relationship. Accused had threatened to kill Helga if she did not come to him and told deceased, "I'll see you outside." In view of the overwhelming evidence to the contrary, the court was justified in disbelieving accused's testimony denying these threats and claiming that he acted in self-defense. All witnesses other than the accused establish that neither Fry nor the deceased had any weapon that night and that deceased committed no aggressions on accused. There was a club rule against weapons and accused knew this and had left his outside. Finally the accused's own testimony that it was three or four minutes from the time he went out the door until he shot the deceased divests his claim of self-defense of all probity.

6. Accused is twenty-four years old, single and claims one dependent. His education consists of six years of grammar school. His AGCT score of 75 (Class IV) indicates low intelligence. In civil life accused was a truck driver hauling coal and freight. He was inducted 13 March 1944, came overseas 30 October 1944 and his highest grade attained is Private First Class. Accused was awarded two bronze stars for combat participation with his unit and has no previous convictions by court-martial.

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.

Seymour W. Wenfel, Judge Advocate

H. Wayne Oliver, Judge Advocate

Harold F. McDonnell, Judge Advocate

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

JUN 28 1946

JAGQ - CM 314165

UNITED STATES v. Private First Class HERBERT G. JACOBS (RA 15056622), Headquarters Company, Replacement Training Center, Fort Knox, Kentucky.	THE ARMORED SCHOOL Trial by G.C.M., convened at Fort Knox, Kentucky, 16 May 1946. Dishonorable discharge and confinement for six (6) months. Post Guard House.

HOLDING by the BOARD OF REVIEW
OLIVER, TREVETHAN and DAVIS, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, 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: Nolle prosequi.

Specification 2: In that Private First Class Herbert G. Jacobs, Headquarters Company, Replacement Training Center, did, in Hardin County, Kentucky, on or about 1 April 1946, unlawfully operate a motor vehicle on a public highway, to wit: United States Highway 31-W, in a careless manner without regard for the safety and convenience of pedestrians and other vehicles upon the highway.

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

Specification: In that Private First Class Herbert G. Jacobs, Headquarters Company, Replacement Training Center, did, at Fort Knox, Kentucky, on or about 1 April 1946, knowingly and willfully apply to his own use and benefit one government vehicle, make Plymouth 4 door sedan, model 1942, W. No.168322, of a value in excess of fifty dollars ($50.00) the property of the United States furnished and intended for the military services thereof.

Accused pleaded not guilty to, and was found guilty of, all Specifications and Charges. No evidence of previous convictions was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for two (2) years. The reviewing authority approved the sentence but reduced the period of confinement to 6 months, designated the Post Guard House, Fort Knox, Kentucky, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution. The accused was the driver of a Plymouth sedan which was under the control of the office of a Colonel Holtzworth. Colonel Holtzworth, his assistant, two general officers, their aides, and the dispatcher could authorize the use of this vehicle (R. 7, 8). As Colonel Holtzworth left his office with the Commanding General about 1745 hours on 1 April 1946, the accused was in the car in the vicinity of Headquarters and the Colonel signaled him that his office would need him no longer. Under previous instructions accused was then to return the vehicle to the motor pool. Colonel Holtzworth did not give the accused authority to take the vehicle off the post the evening of April 1st (R. 8).

About 1900 hours on 1 April 1946 a staff car was observed on the road to Elizabethtown, outside the post, proceeding at a fast rate of speed. As it passed three autos travelling in the opposite direction it side-swiped one, hit the second and then forced the third auto off the road. Two automobiles followed the staff car, until it turned down a lane and stopped. The driver of the staff car was the accused; he was the only person in the car. The accused had a trip ticket which checked with the vehicle he was driving. The vehicle was damaged (R. 9, 10, 11, 12, 14, 15).

About 1745 hours on 1 April 1946 accused was given a new trip ticket for a staff car, a late model Plymouth. Late that night the car was towed in by a wrecker (R. 18, 19). Fort Knox Administrative Regulations prohibit the operation of Government vehicles off the reservation for other than official business of training (R. 20). Judicial notice was taken of the value of the vehicle (R. 20).

4. Evidence for the defense. After the accused's rights as a witness were explained to him, he elected to remain silent (R. 21). No evidence was introduced by the defense.

5. a. Specification 2, Charge I (Reckless driving). The findings of guilty of this Specification are supported by abundant evidence in the record.

b. Specification, Charge II (Misappropriation of Government vehicle). The evidence that the vehicle which accused was driving at 1900 hours

on 1 April 1946 was the same vehicle which he was ordered to return to the motor pool at 1745 hours is not very strong. Assuming that it was the same vehicle, the record does not support a finding that his use of the automobile was unauthorized. He had a trip ticket for that vehicle in his possession and any one of six persons, other than Colonel Holtzworth, could have authorized its use. There is no direct evidence that his use of the vehicle was unauthorized nor is there any circumstantial evidence from which such an inference could reasonably have been drawn by the court. The record of trial is legally insufficient to support the findings of guilty.

c. Sentence. The offense of reckless driving, in violation of Article of War 96, is not listed in the Table of Maximum Punishments, nor is any included offense or any closely related offense so listed. The maximum period of confinement under the District of Columbia Code is three months - section 40 - 605 (c), and this is the maximum period of confinement which may be imposed by sentence of a court-martial (CM 302181, Smithey).

6. The charge sheet shows accused is 22 years of age. He enlisted at at Fort Francis E. Warren, Wyoming, 11 October 1945, for a period of three years. He had prior service from 23 September 1940 to 10 October 1945.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors injuriously affecting the rights of the accused were committed during the trial. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder, legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

Thayne Olivier, Judge Advocate

Robert E. Trewithan, Judge Advocate

Walter W. Davis, Judge Advocate

JUL 15 1946

JAGQ - CM 314165 1st Ind

WD JAGO, Washington 25, D. C.

TO: Commanding General, Headquarters, The Armored School, Fort Knox, Kentucky.

1. In the case of Private First Class Herbert G. Jacobs (RA 15056622), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder, legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period, which holding is hereby approved. For the reasons stated in the holding by the Board of Review, I recommend that the findings of guilty and the sentence be modified accordingly.

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 314165).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

GNRUJ 2d Ind

HQ, TAS, FT Knox, Ky, 22 July 1946

TO: The Judge Advocate General, War Dept, Washington 25, D.C.

Attention is invited to GCMO#56, copies enclosed. (CM 314165)

FOR THE COMMANDANT:

1 Incl added
GCMO#56

BENJ. D. WHEDBEE
Lt. Col, AGD
Adjutant General

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

JAGH - CM 314174

18 JUL 1946

UNITED STATES v. Private ARTHUR AGENS, JR., (12203813), Company C, 28th Battalion, 5th Training Regiment	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Fort McClellan, Alabama, 2 May 1946. Dishonorable discharge and confinement at hard labor for four (4) years. Federal Reformatory.

HOLDING by the BOARD OF REVIEW
TAPPY, HOTTENSTEIN, and STERN, 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that, Private Arthur Agens, Jr., Company C, 28th Training Battalion, 5th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, did, at Gadsden, Alabama, on or about 25 February 1946, feloniously take, steal, and carry away, one, five passenger Buick automobile, model 37, license number 31 D 374, motor number 43385175, the property of Mrs. A. W. Wodliff, Gadsden, Alabama, and valued at more than $100.00.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four (4) years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The prosecution introduced evidence to show that at about 10:00 p.m., 25 February 1946, a 1937 Buick sedan, motor number 43385175, owned by Mrs. A. W. Wodliff was parked in front of her apartment, 431 Turrentine Avenue, Gadsden, Alabama. At 10:15 p.m. that evening she discovered that her automobile had disappeared and she did not see it again for two weeks. She had not given accused permission to use it (R 6, 7). It was stipulated by the prosecution, defense and the accused that the value of Mrs. Wodliff's automobile was in excess of $100 (Pros Ex 1).

In a voluntary statement given to the investigating officer, accused stated that on 25 February 1946, he and Private Carl Knigge visited the town of Gadsden, Alabama, where they purchased two pints of whiskey. They also stopped at various places in the town for an "occasional drink" and about 11:00 p.m. they roamed about in search of a car. After walking several blocks they came upon an unlocked 1937 Buick sedan parked in a residential section. They entered the automobile, drove it to Fort McClellan and parked it behind the Fifth Regimental Chapel.

On 6 March 1946, Private Glen R. Bole and a companion drove to Birmingham in a 1937 Buick automobile which they obtained from a parking lot behind the Fifth Regimental Chapel at Fort McClellan (R 12, 20). Bole had asked and obtained permission from accused to use the car (R 18, 20). He testified that he had seen accused in the dispensary on 25 February at about 1:00 a.m. and that at that time accused was intoxicated (R 14, 15).

4. After his rights as a witness were explained, the accused elected to remain silent and the defense rested without introducing any evidence.

5. The witness Boles, called by the prosecution, under examination by the Trial Judge Advocate answered "I can't recall" to a number of questions. Thereupon the Trial Judge Advocate had the witness identify his signature on a statement made by him and introduced that statement in evidence, after the witness failed to respond to a question as to whether the statement refreshed his memory. Clearly the statement was not admissible as a memorandum of "facts once known but now forgotten" (MCM 1928, par 119b). Further, it is apparent from an examination of the statement that it was not offered for impeachment purposes. Its one and only purpose was to supply evidence which the witness repeatedly refused to give. The receipt in evidence of this statement was tantamount to its introduction as a sworn statement of a witness who did not testify at the trial. The rule that extra-judicial statements made by witnesses (other than the accused) who have not testified at the trial are inadmissible is too well established to require any citation of authorities. Accordingly, we have disregarded the contents of this statement in reaching our conclusion as to the legal sufficiency of the evidence.

The only competent evidence to support the court's findings of guilty is the testimony of the owner as to the theft of a certain vehicle and a confession by the accused. Although accused's confession shows that he

and Knigge took a 1937 Buick automobile from somewhere in Gadsden, Alabama, on the night in question, nowhere in the record of trial is there any direct evidence establishing that the automobile so taken was the one owned by Mrs. Wodliff as charged in the Specification hereunder consideration. Accordingly, accused's conviction of the offense charged can be sustained only if the circumstantial evidence was so compelling as reasonably to warrant the inference that the automobile accused took was the one owned by Mrs. Wodliff (MCM, 1928, pars. 78a and 112b).

The only evidence from which such an inference could be drawn is that (a) sometime before 10:15 p.m. on 25 February 1946, Mrs. Wodliff's 1937 Buick sedan was stolen while parked on Turrentine Avenue, Gadsden, Alabama, and (b) about 11:30 p.m. that same evening accused took a 1937 Buick sedan from an undisclosed location in a residential area of Gadsden. There is no evidence to show from what part of Gadsden accused took the automobile. Furthermore, from the evidence before us it appears that accused took the automobile about an hour after Mrs. Wodliff's auto had been stolen. Such evidence, indicating but a very general similarity as to place and, on the other hand, a dissimilarity as to time, was utterly insufficient to warrant an inference that accused took Mrs. Wodliff's automobile. Indeed, the dissimilarity as to time would indicate the contrary. Accordingly, we are of the opinion that this circumstantial evidence fell far short of possessing such strength as reasonably to warrant the inference that accused took the automobile belonging to Mrs. Wodliff. As we have said before, evidence such as this might well raise a suspicion as to the guilt of accused. However, findings of guilty of a criminal offense cannot be premised upon mere suspicions or probabilities (CM 233543, McFarland, 20 BR 15), but can only be sustained if the evidence, whether direct or circumstantial, is such as to exclude every reasonable hypothesis except that of accused's guilt (CM 216004, Roberts and Miller, 11 BR 69; CM 196619, Goyette et al., 3 BR 27).

6. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to sustain the finding of guilty and the sentence.

Thomas N. Tarbey, Judge Advocate

A. Lottenstein, Judge Advocate

Joseph J. Stern, Judge Advocate

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

JAGQ - CM 314187

JUN 20 1946

UNITED STATES v. Private CARL J. KNIGGE (37416255), Company C, 28th Training Battalion, 5th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama.	INFANTRY REPLACEMENT TRAINING CENTER, FT. McCLELLAN, ALABAMA Trial by G.C.M., convened at Fort McClellan, Alabama, 2 May 1946. Dishonorable discharge and confinement for three (3) years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
OLIVER, TREVETHAN and DAVIS, 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Carl J. Knigge, Company C, 28th Training Battalion, 5th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, did, at Gadsden, Alabama, on or about 25 February 1946, feloniously take, steal, and carry away, one, five passenger Buick Automobile Model 37, license number, 31 D 374, motor number 43385175, the property of Mrs. A. W. Wodliff, Gadsden, Alabama, and valued at more than $100.00.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, 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, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The prosecution introduced evidence to show that about 10 p.m., 25 February 1946, a 1937 Buick sedan, motor number 43385175, owned by Mrs. A. W. Wodliff was parked in front of her apartment, 431 Turrentine Avenue, Gadsden, Alabama. At 10:15 p.m. that evening she discovered that her automobile had disappeared and she did not see it again for two weeks. She had not given accused permission to use it (R 6, 7). It was stipulated by the prosecution, defense and the accused that the value of Mrs. Wodliff's automobile was in excess of $100 (Pros. Ex. 1).

In a voluntary statement given to the investigating officer, accused stated that he and Private Arthur Agens visited the town of Gadsden, Alabama, on or about 25 February 1946 and, after they had consumed two pints of whiskey in addition to other drinks bought at various places, they roamed the town until about 2330 hours when they came upon an unlocked 1937 Buick sedan parked in a residential section. They entered the automobile, drove it to Fort McClellan and parked it behind the 5th Regiment Chapel (Pros. Ex. 2).

Around the first part of March, Private Glenn R. Bole and a companion drove to Birmingham in a 1937 Buick automobile which they obtained from a parking lot behind the 5th Regiment Chapel at Fort McClellan (R 11). While in Birmingham one of the tires blew out and thereafter Bole and his companion were taken into custody by the police (R 13). Bole had asked Private Agens for permission to use this automobile on that occasion. He had been charge of quarters on the night of 25 February 1946 and, when Agens returned to camp late that night, he was "pretty drunk" and had asserted that he "rode back from Gadsden in a car that was parked down by the chapel" (R 14).

4. The defense introduced evidence to show that shortly after midnight, 25 February 1946, Private Verne E. Brewer saw accused enter a latrine in one of the barracks on the post, located about two blocks from the 5th Regiment Chapel. He smelled the odor of whiskey on accused's breath and observed that he spoke "like his mouth was full of mush". Accused staggered about as he sought to urinate with the eventual result that he soiled his uniform (R 15, 16).

5. Although accused's confession shows that he and Agens took a 1937 Buick automobile from somewhere in Gadsden, Alabama, on the night in question, nowhere in the record of trial is there any direct evidence establishing that the automobile so taken was the one owned by Mrs. Wodliff as charged in the Specification here under consideration. Accordingly, accused's conviction of the offense charged can be sustained only if the circumstantial evidence was so compelling as reasonably to warrant the inference that the automobile accused took was the one owned by Mrs. Wodliff (MCM, 1928, pars. 78a and 112b).

The only evidence from which such an inference could be drawn is that (a) sometime before 10:15 p.m. on 25 February 1946, Mrs. Wodliff's 1937 Buick sedan was stolen while parked on Turrentine Avenue, Gadsden, Alabama, and (b) about

11:30 p.m. that same evening accused took a 1937 Buick sedan from an undisclosed location in a residential area of Gadsden. There is no evidence to show from what part of Gadsden accused took the automobile. Furthermore, from the evidence before us it appears that accused took the automobile over an hour after Mrs. Wodliff's auto had been stolen. Such evidence, indicating but a very general similarity as to place and, on the other hand, a dissimilarity as to time, was utterly insufficient to warrant an inference that accused took Mrs. Wodliff's automobile. Indeed, the dissimilarity as to time would indicate the contrary. Accordingly, we are of the opinion that this circumstantial evidence fell far short of possessing such strength as reasonably to warrant the inference that accused took the automobile belonging to Mrs. Wodliff. As we have said before, evidence such as this might well raise a suspicion as to the guilt of accused. However, findings of guilty of a criminal offense cannot be premised upon mere suspicions or probabilities (CM 233543, McFarland, 20 BR 15), but can only be sustained if the evidence, whether direct or circumstantial, is such as to exclude every reasonable hypothesis except that of accused's guilt (CM 216004, Roberts and Miller, 11 BR 69; CM 196619, Goyette et al., 3 BR 27).

6. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

[illegible], Judge Advocate

Robert E. Trueithan, Judge Advocate

Nattie W. Davis, Judge Advocate

JAGQ - CM 314187 1st Ind JUL 1 1946

WD JAGO, Washington 25, D. C.

TO: Commanding Officer, Infantry Replacement Training Center, Fort McClellan, Alabama

1. In the case of Private Carl J. Knigge (37416255), Company C, 28th Training Battalion, 5th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, attention is invited to the foregoing holding by 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. For the reasons stated in the holding by the Board of Review, I recommend that the findings of guilty and the 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 314187).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

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

JUN 27 1946

JAGQ - CM 314205

UNITED STATES v. Private LEE F. BOCK (18247129), Squadron C, 3706th Army Air Force Base Unit.	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Sheppard Field, Wichita Falls, Texas, 16 May 1946. Dishonorable discharge and confinement for two (2) years. Southern Branch, Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
OLIVER, TREVETHAN 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 holding, 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 Private Lee F. Bock, Squadron C, 3706th Army Air Force Base Unit, did, at Sheppard Field, Texas, on or about 19 April 1946, feloniously embezzle by fraudulently converting to his own use seventy dollars good and lawful money of the United States, the property of the Western Union Telegraph Company entrusted to him by Private Vernon E. Jones Post Signal Office, Squadron C 3706th Army Air Force Base Unit and by virtue of Private Bock's assignment to duty in the Post Signal Office.

Specification 2: In that Private Lee F. Bock, Squadron C, 3706th Army Air Force Base Unit, did, at Post Signal Office, Sheppard Field, Texas on or about 21 April 1946, feloniously take, steal, and carry away one-hundred and twenty-one dollars, good and lawful money of the United States, the property of the Western Union Telegraph Company.

Specification 3: Finding of Not Guilty.

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

Specification: In that Private Lee F. Bock, Squadron C, 3706th Army Air Force Base Unit, did, at Wichita Falls, Texas on or about 14 February 1946, with intent to defraud, wrongfully and unlawfully make and utter to William E. Huff, Jr. a certain check, in words and figures as follows, to Wit:

February 14 1946 No. --

88 130
11 NATIONAL BANK OF GALVESTON TEXAS 88-130 00
Pay to the Order of Cash $ 12XX

Twelve 00/100 Dollars

Lee F. Bock ASN. 18247129
Pay to the order of First National Bank, Wichita Falls, Texas
For deposit on HUFF PAINT AND WALLPAPER CO.

And by means thereof, did fraudulently obtain from William E. Huff, Jr. twelve dollars, he the said Lee F. Bock, then well knowing that he did not have and not intending that he should have any account with The National Bank of Galveston, Texas for payment of said check.

Accused pleaded guilty to Specifications 1 and 2, Charge I, and to Charge I, not guilty to Specification 3, Charge I, and to the Specification, Charge II, and Charge II. He was found not guilty of Specification 3, Charge I, and guilty of all other Specifications and of both Charges. No evidence of previous convictions was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence, designated the Southern Branch, United States Disciplinary Barracks, Camp Hood, Texas, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution may be summarized as follows: It was stipulated that an absent witness would testify that accused made and signed a voluntary extra-judicial statement which was then admitted in evidence without objection (R 16, Ex. 5). In this statement accused admitted that on 19 April 1946 he took eighty dollars from the money in the cash drawer of the Post Signal Office, where he was employed, and spent all except five dollars. It was stipulated that an absent officer would testify that accused was assigned to Post

Signal and Base Western Union Office from 17 April 1946 until the incidents which gave rise to these charges (R 16, Ex. 6). Stipulated testimony also showed that accused was placed on duty at the Western Union desk to learn handling of telegrams and Western Union money orders, that accused had access to and frequently on 19 April entered the money order drawer in the course of business transactions, that Private Vernon Jones had accountability for the Western Union money order money, and that at the end of the day the fund checked seventy dollars short (R 17, 18; Ex. 7, 8, 9, 10). In accused's pre-trial statement (Ex. 5) he also admitted opening the Signal Office safe and taking $121.00 therefrom on 21 April 1946, a discovery of which loss was made the same day (Ex. 10).

On 14 February 1946 accused presented to William E. Huff, Jr., Wichita Falls, Texas, a check drawn to Cash and requested him to cash it, representing that a former employee of Mr. Huff's allegedly known by accused had cashed checks for him previously. The check was in the amount of twelve dollars, was signed by the accused, and was cashed for him by the witness, who identified a "photographic reproduction" of the check introduced as Prosecution's Exhibit No. 1. Accused wrote the check upon a printed check blank of "City National Bank in Wichita Falls", furnished by the witness. Accused "scratched out the city, Wichita Falls, and scratched out the word city, making it read National Bank of Galveston, Texas". He did not mention "the name of a banking firm of W. E. Moody or W. M. Moody or some such name" and did not indicate that the check would not clear through normal booking channels; nor did he tell the witness anything about putting the check through the bank. The witness deposited the check in his bank in the normal course of business and in like manner it was returned to him "marked no such account" (R 8-12, Ex. 1). A stipulation was received to the effect that an absent officer would testify that accused voluntarily made and signed a statement introduced into evidence as Prosecution's Exhibit No. 4 (R 15-16, Ex. 4). In this statement, made and sworn to on 4 March 1946, accused said that he wrote the check "drawn on the City National Bank, Galveston, Texas"; that "I have a savings account at this bank but I did not know at the time I wrote it that I could not write checks on it. About a week after I wrote the check I learned that a check could not be cashed on a savings account. I have not had a chance since then to go home to have funds transferred to take care of this check." It was stipulated that the Vice-President of the City National Bank of Galveston, Texas would testify that he does not know the accused, and that there was no account in accused's name in that bank during the one year preceding 8 March 1946 nor on that date (R 15, Ex. 3). It was also stipulated that an absent officer would testify accused voluntarily made and signed an extrajudicial statement which was then admitted in evidence (R 18, Ex. 11). In that statement accused said that "on 14 February 1946, I forged and cashed a personal check in the amount of Twelve ($12.00) Dollars at the Huff Paint and Wallpaper Company store located at 916 Scott Street, Wichita Falls, Texas," and that he would like to make restitution.

4. After being advised of his rights with reference to testifying, accused elected to make an unsworn statement substantially as follows: that the $121 of

Western Union money has been returned; that "it has been agreed, sir, that the money $45.25 is to be paid back, sir, of which last week $10.00 was sent back already" (what transaction is referred to in this last statement is not clear); that he did not tell Mr. Huff the former employee had cashed checks for him; that he made the check out before entering the store; that he told Mr. Huff "the bank the money was in, in the W. L. Moody bank and Mr. Huff was to put the bank on there, it was all agreed on"; that nothing like this has ever come up before, and the check can be made good; that "I do have money in the W. L. Moody bank in Galveston and I told that to Mr. Huff * * * that I did have money there * * *. It was to be the W. L. Moody bank." (R 19-20.)

5. Charge I and Specifications 1 and 2. The record evidence, plus the accused's pleas of guilty, abundantly sustain the findings of guilty.

6. Charge II and its Specification. The Specification alleges and the evidence proves that the accused drew the check in question upon the National Bank of Galveston, Texas. The only evidence that this check was not honored and paid was the testimony of the witness who cashed it that "In the normal course of business it was returned to me marked no such account" (R 10); and the stipulated testimony of the Vice-President of the City National Bank of Galveston, Texas, that the accused had no account there (Ex. 4). True, in one extra-judicial statement the accused said that the check was drawn on the City National Bank, Galveston, Texas (Ex. 4), but the check itself (Ex. 1) and the carefully detailed testimony of the witness who furnished the accused the blank check, watched him alter its printed face and make it out, and then cashed it for him, shows that accused did not draw the check upon the City National Bank of Galveston, Texas, but instead drew it upon the National Bank of Galveston, Texas, as alleged.

There is no evidence whatever in this record that the check was ever presented to the drawee bank - the National Bank of Galveston, Texas, nor that it was dishonored by that bank. Again, the Specification alleges, as the gravamen of the fraudulent intent charged, "then well knowing that he did not have and not intending that he should have any account with The National Bank of Galveston, Texas, for the payment of said check". There is no proof as to the nonexistence or condition of any account with that bank in the name of the accused. The check (Ex. 4) bears no stamp or other evidence of cancellation or handling by that bank. The conviction of the accused upon this Specification and Charge is apparently rested upon the theory that, from an extra-judicial statement made by him (Ex. 4), the accused intended to draw the check upon the City National Bank of Galveston, Texas, and upon the very questionable proof that it was dishonored by that bank. But we could just as reasonably lend ear to accused's statement at the trial that he intended still a third bank. The fact remains that he actually drew the check upon the National Bank of Galveston, Texas; the person who cashed it watched accused draw it in that manner and accepted it as drawn. There being no evidence

that the check was ever presented to or dishonored by the drawee bank, the findings of guilty with respect to it must be disapproved (CM 228793, Petterson, 16 BR 303; CM 266248, Hancock, 43 BR 211).

7. The charge sheet shows that accused is eighteen years and five months old, and that he enlisted, without prior service, on 11 October 1945 at Houston, Texas.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as above noted, no errors injuriously affecting the rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty as to Charge I and Specifications 1 and 2 thereof, legally insufficient to sustain the findings of guilty as to Charge II and its Specification, and legally sufficient to support the sentence.

H. Hayes Olivier, Judge Advocate

Robert C. Trevethan, Judge Advocate

Walter W. Davis, Judge Advocate

JAGQ - CM 314205 1st Ind JUL 19 1946

WD JAGO, Washington 25, D. C.

TO: Commanding General, Army Air Forces Technical Training Command, Scott Field, Illinois.

1. In the case of Private Lee F. Bock (18247129), Squadron C, 3706th Army Air Force Base Unit, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as to Charge I and Specifications 1 and 2 thereof, legally insufficient to sustain the findings of guilty as to Charge II and its Specification, and legally sufficient to support the sentence, which holding is hereby approved. Upon disapproval of the findings of guilty of Charge II and its Specification you will have authority to order execution of the sentence.

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

(CM 314205).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

51125

AG 201 - BOCK, Lee F. (Enl) 2nd Ind. 1S/lo

Headquarters, AAFTTC, Scott Field, Illinois, 29 July 1946.

TO: The Judge Advocate General, Washington 25, D. C.

First indorsement complied with.

FOR THE COMMANDING GENERAL:

N. H. HOLBROOK
Major, AGD
Asst Adj Gen

2 Incl
Incl 1 - n/c
1 Incl added
Incl 2 - GCMO No. 165 (Sextuple)

201
JA

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

(53)

JUL 18 1946

JAGQ - CM 314244

UNITED STATES v. First Lieutenant ROGER PETER NOWAK (0-1054349), Coast Artillery Corps.	UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M., convened at APO 358, 26 March 1946. Dismissal and confinement for five (5) years. Disciplinary Barracks.

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 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: (Disapproved by R.A.).

Specification 2: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 5 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, one hundred eleven (111) reams of paper of the value of about three hundred twenty one dollars and ninety cents ($321.90), property of the United States, furnished and intended for the military service thereof.

Specification 3: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 6 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, three hundred (300) reams of paper of the value of about eight hundred seventy dollars ($870.00), property of the United States, furnished and intended for the military service thereof.

Specification 4: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at

APO 75, on or about 7 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, three hundred (300) reams of paper of the value of about eight hundred seventy dollars ($870.00), property of the United States, furnished and intended for the military service thereof.

Specification 5: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 7 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, three hundred (300) reams of paper of the value of about eight hundred seventy dollars ($870.00), property of the United States, furnished and intended for the military service thereof.

Specification 6: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 8 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, two hundred eighty nine (289) reams of paper of the value of about eight hundred thirty eight dollars and ten cents ($838.10), property of the United States, furnished and intended for the military service thereof.

Specification 7: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 13 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, five hundred (500) reams of paper of the value of about one thousand four hundred fifty dollars ($1450.00), property of the United States, furnished and intended for the military service thereof.

Specification 8: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 17 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, five hundred (500) reams of paper of the value of about one thousand four hundred fifty dollars ($1450.00), property of the United States, furnished and intended for the military service thereof.

Specification 9: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 19 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, seven hundred eighty two (782) reams of paper of the value of about two thousand two hundred sixty seven dollars and eighty cents ($2267,80), property of the United States, furnished and intended for the military service thereof.

Specification 10: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 24 November 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Francisco Sycip, Manila, Philippine Islands, five hundred (500) reams of paper of the value of about one thousand seven hundred and fifty dollars ($1750.00), property of the United States, furnished and intended for the military service thereof.

Specification 11: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 1 December 1945, wrongfully, knowingly, and without proper authority, dispose of by delivery to Carmelo & Bauermann, Manila, Philippine Islands, twenty six (26) reams of paper of the value of about two hundred twenty nine dollars and thirty two cents ($229.32), property of the United States, furnished and intended for the military service thereof.

Specification 12: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 18 January 1946, wrongfully, knowingly, and without proper authority, dispose of by delivery to person or parties unknown, five hundred (500) reams of paper of the value of about one thousand four hundred and fifty dollars ($1450.00), property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that First Lieutenant Roger Peter Nowak, CAC, AFWESPAC Printing Plant and Publications Depot, did, at APO 75, on or about 18 January 1946, wrongfully, unlawfully and without proper authority, and with intent to defraud the United States, take, remove, and carry away from

Adjutant General's Publications Depot two tally out sheets, official records of said Adjutant General's Publications Depot, for paper delivered to Carmelo & Bauermann, the said paper being property of the United States, furnished and intended for the military service thereof.

Specification 2: (Finding of not guilty).

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and of Specifications 1 to 9, inclusive, and of Specifications 11 and 12; as to Specification 10 thereof, by exceptions and substitutions he was found not guilty of the excepted words and figures "one thousand seven hundred and fifty dollars ($1750.00)" and guilty of the substituted words and figures "one thousand four hundred and fifty dollars ($1450.00)". He was found guilty of Charge II; as to Specification 1 thereof, by exceptions and substitutions he was found not guilty of the excepted words "Carmelo & Bauermann" and guilty of the substituted words "person and persons unknown". He was found not guilty of Specification 2, Charge II. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority disapproved the finding of guilty of Specification 1, Charge I, approved the sentence but reduced the period of confinement to five years, designated the United States Disciplinary Barracks as the place of confinement, and forwarded the record of trial pursuant to Article of War 48.

3. Evidence for the Prosecution. Inasmuch as the reviewing authority disapproved the findings as to Specification 1, Charge I, and the court found the accused not guilty of Specification 2, Charge II, the evidence relating to those Specifications will not be discussed.

The accused "is in the military service of the United States and supply officer of the AG Publications Depot" (R 37).

There are five hundred (500) sheets of paper in a ream (R 9). All paper mentioned in all Specifications of both Charges was property of the United States, furnished and intended for the military service thereof (R 37).

Specification 2, Charge I: Mr. John Danon, Storage Superintendent of the AG Printing Plant (R 8), identified a tally-out dated 5 November 1945 made out by him for 55,500 sheets of white bond; this tally-out shows "Delivered to Francisco Sycip Press" (Pros. Ex. B; R 10). Accused

instructed Danon to get that amount of paper ready for delivery and that it would be picked up by Francisco Sycip Press. Mr. Sycip appeared at the warehouse, while the paper was being opened, and signed the tally-out. The paper was loaded on a truck bearing the name of Angel Jose (R 10). (55,500 sheets equal 111 reams). The value of this paper was $321.90 (R 37).

Specification 3, Charge I: Danon identified a tally-out made out by him, upon instructions of accused, dated 6 November 1945, for 150,000 sheets of white bond; this tally-out shows "Delivered to Francisco Sycip Press" (Pros. Ex. C; R 11) and was signed by Mr. Sycip. The paper was loaded on the Angel Jose truck after Sycip left (R 10, 11). (150,000 sheets equal 300 reams). The value of this paper was $870.00 (R 37).

Specification 4, Charge I: Danon identified a tally-out made by him upon accused's authority, dated 7 November 1945, for 150,000 sheets of white bond; this tally-out shows "Delivered to Francisco Sycip Press" (Pros. Ex. D; R 11) was signed by Mr. Sycip as received, and the paper was loaded on the Angel Jose truck (R 11, 12). (150,000 sheets equal 300 reams). The value of this paper was $870.00 (R 37).

Specification 5, Charge I: Danon identified a tally-out made by him under accused's instructions, dated 7 November 1945, for 150,000 sheets of white bond, signed by Mr. Sycip; this tally-out shows "Delivered to: Francisco Sycip Press" (Pros. Ex. E; R 12). Mr. Sycip received that paper (R 12). (150,000 sheets equals 300 reams.) The value of this paper was $870.00 (R 37).

Specification 6, Charge I: Danon identified a tally-out made by him to Francisco Sycip Press, upon instructions of accused, for 144,500 sheets of white bond, dated 8 November 1945; this tally-out shows "Delivered to: Francisco Sycip Press"(Pros. Ex. F; R 13); it was signed by Mr. Sycip as receiver of the paper (R 12, 13). (144,500 sheets equals 289 reams.) The value of this paper was $838.10 (R 37).

Specification 7, Charge I: Danon identified a tally-out made out by him to Francisco Sycip Press, upon accused's instructions, dated 13 November 1945, for 250,000 sheets of white bond; this tally-out shows "Delivered to: Francisco Sycip Press" (Pros. Ex. G; R 13); it was signed by Mr. Sycip (R 13). (250,000 sheets equals 500 reams.) The value of this paper was $1450.00 (R 37).

Specification 8, Charge I: Danon identified a tally-out, dated 17 November 1945, to Francisco Sycip Press, upon instructions of accused, for 250,000 sheets of white bond; this tally-out shows "Delivered to:

Francisco Sycip Press" (Pros. Ex. H; R 13); Mr. Sycip signed it as receiver of this paper (R 13). (250,000 sheets equal 500 reams.) The value of this paper was $1450.00 (R 37).

Specification 9, Charge I: Danon identified a tally-out to Francisco Sycip Press, made out by him upon accused's instructions, dated 19 November 1945, for 391,000 sheets of white bond; this tally-out shows "Delivered to: Francisco Sycip Press" (Pros. Ex. I; R 14); it is signed by Mr. Francisco Sycip as receiver (R 14). (391,000 sheets equals 782 reams.) The value of this paper was $2267.80 (R 37).

Specification 10, Charge I: Danon testified that on 24 November 1945, under accused's instructions, he tallied out to Francisco Sycip Press 500 reams or 250,000 sheets of white bond, and that Mr. Francisco Sycip signed Prosecution Exhibit J as receiver (R 14). Prosecution Exhibit J is a tally-out dated 24 November 1945, covering 500 reams of white bond, and shows "Delivered to: Francisco Sycip Press". The value of this paper was $1450.00 (R 37).

Specification 11, Charge I: Danon identified a "requisition" dated 1 December 1945, which was on his desk "where all incoming requisitions are put for me and my boys to fill out". The "requisition" (Pros. Ex. K; R 14) was for twenty-six reams of white offset to be delivered to Carmelo and Bauermann, by order of the accused. That paper was loaded on a 6x6 Army truck by Danon and his men (R 14). Prosecution Exhibit K is a paper entitled "Stock & Cutting Order", recites "Deliver to Carmelo & Bauermann the following: per order - Lt. Nowak" and lists the twenty-six reams of paper above referred to. The exhibit also bears the entry "Issued by: This paper is to be replaced within a 60 day period." The value of this paper was $229.32 (R 37). The stock-clerk of Carmelo and Bauermann testified that on 1 December 1945 he received the paper called for by Prosecution Exhibit K, affixed his signature thereto (which he identified), that an Army truck delivered the paper and that none of it has been returned to the AG Depot (R 24); that his firm prints Newsweek in Manila for distribution to the armed forces and the paper is used for covers for the magazine (R 24, 25).

Specification 12, Charge I and Specification 1, Charge II: Danon testified that paper worth $1450.00 (R 37) was delivered to Carmelo and Bauermann during January 1946; that on 18 January accused told him to issue 500 reams of white bond to Carmelo and Bauermann and that their truck would pick up the paper, and to let him know, upon arrival of the truck, before any paper was loaded; that in the afternoon a Filipino appeared inquiring for the accused; that "So I called Lieutenant Nowak by phone and told him that the Carmelo & Bauermann truck was waiting in the warehouse. Shortly after he came out and talked to the Filipino while myself and my boys loaded these five hundred (500) reams onto a 6x6"; that

he made out two tally-outs for 250 reams each for this paper, and gave them to accused; that he never received those tally-outs back; that tally-outs are supposed to be handed back to the office every day by five o'clock; and that accused told him he would have Carmelo and Bauermann sign the tally-out (R 15, 16). Accused was present while the paper was being loaded (R 17); the witness issued and signed a voucher "concerning this tally", handed it to accused and has not seen it since, (R 17, 18); that when the truck arrived he told accused it was the Carmelo and Bauermann truck, but did not inquire who the truck belonged to because accused was there; that he did not know the driver of this truck nor any truck driver of Carmelo and Bauermann (R 19, 20). Accused ordered the witness to make out these tally-outs, and he never saw them after handing them to accused (R 20); they were not turned in in the usual manner (R 22). He knew that the truck belonged to Carmelo and Bauermann because the Filipino who came to the warehouse told him that the Carmelo and Bauermann truck was there (R 23). The stock-clerk of Carmelo and Bauermann testified that he received the paper described in Prosecution Exhibit A (Specification 1, Charge I) on 25 October 1945, and that described in Prosecution Exhibit K (Specification 11, Charge I) on 1 December 1945 (R 23, 24).

A non-commissioned officer in charge of warehousing, receiving and shipping at the Army Forces Western Pacific Printing Plant testified that on 18 January 500 reams of paper were delivered to Carmelo and Bauermann; that accused "told me that he personally was going to take the tally-out sheets to Carmelo and Bauermann because the brokerage driver's signature was not valid"; and that those two tally-outs have not been returned to witness' office (R 28, 29).

The chief supply clerk of the AG Printing Plant and Publications Depot testified that no tally-out for 500 reams of paper to Carmelo and Bauermann on 18 January 1946 was ever received and that "It was never signed" (R 30).

About the middle of February the commanding officer of the Army Forces Western Pacific Printing Plant Publications Depot found in accused's quarters two tally-outs, dated 18 January 1946, to Carmelo and Bauermann, each for 250 reams of white bond paper, issued by Mr. Danon, and not signed by anyone as having received the paper. Accused had no authority to remove these records from the warehouse (R 35, 36; Pros. Exs. L & M). Papers may be taken away for official business, "for making a delivery the papers would naturally go along with the delivery, should be signed and returned" (R 37).

All paper signed for by Mr. Sycip was placed on a truck owned and operated by Angel Jose (R 15). The name was painted on a placcard attached to the truck (R 23).

No paper has been received back from Francisco Sycip or Carmelo and Bauermann (R 16, 29, 31). Carmelo and Bauermann still have the paper referred to in Specification 11, Charge I (R 24, 25). No authority was issued to anyone in the printing plant to deliver paper to civilians (R 32, 35), and the accused never sought any such authority (R 35).

4. Evidence for the accused.

The accused was advised of his rights as a witness and elected to remain silent (R 39). No evidence was offered for the defense.

5. The evidence of accused's guilt of the Charges and Specifications of which he was convicted and which were approved by the reviewing authority, is clear and conclusive. Accused's continued delivery of military paper stock worth over $12,000 to civilians wholly without authority clearly constituted wrongful disposal of property of the United States in violation of Article of War 94. The record does not disclose any personal profit derived by the accused from these transactions. Receipt of personal benefit is not an element of this offense (MCM, sec. 150i, p. 185). The retention by accused at his separate billet for a period of nearly a month of the two tally-out sheets pertaining to the paper delivery of 18 January 1946, and the fact that accused never returned these tally-outs to the Publication Depot, establishes the offense of willfully and unlawfully removing a public record in violation of Article of War 96.

In this case the prosecution challenged for cause two members of the court on the ground that they were of equal rank with the accused and the challenges were granted by the court without objection by the accused (R 3). This is not a proper ground of challenge for cause and the granting of these challenges was error. However, six qualified officers continued to serve throughout the trial as members of the court. The record does not disclose whether the two officers relieved were in fact junior to the accused. If this were the case their relief was entirely proper in accordance with the provisions of Article of War 16. In any event, the substantial rights of the accused were not prejudiced within the meaning of Article of War 37.

6. War Department records show the accused is 26 years of age, is married and has no children. He is a high school graduate, attended William and Mary College for two years and Western Reserve University for one year, majoring in physics. He left school in 1941 and from May 1941 to May 1942 was employed first as an estimator and later as sales manager by the Morgan Lithograph Company. He served as an enlisted man for seventeen months, graduated from the AntiAircraft Artillery Officers' Candidate School, was commissioned a temporary second lieutenant on 8 April 1943 and was promoted to a temporary first lieutenant on 9 July 1945.

For 32 months of commissioned service reported upon, his efficiency reports were superior for 8 months and excellent for 24 months.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. 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, as modified by the reviewing authority, and to warrant confirmation thereof. Dismissal is authorized upon conviction under Articles of War 94 and 96.

Seymour W. Wenfil, Judge Advocate.
N. Payne Olivier, Judge Advocate.
Walter W. Davis, Judge Advocate.

JAGQ - CM 314244 1st Ind

WD JAGO, Washington 25, D.C. OCT 1 6 1946

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 First Lieutenant Roger Peter Nowak (O-1054349), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongful disposal of $12,067.12 worth of paper stock, property of the United States, in violation of Article of War 94, and of unlawfully removing two tally-out sheets, public records, in violation of Article of War 96. He was sentenced to dismissal, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence, reduced the period of confinement to five years, designated a disciplinary barracks as the place of confinement and forwarded the record of trial for action pursuant to 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 as modified by the reviewing authority, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that accused was assigned as supply officer of the Publications Depot, Manila, Philippine Islands. While so assigned, and without proper authority, accused caused to be delivered to a civilian, Francisco Sycip, in ten different shipments, 3582 reams of white bond paper, Government property, furnished and intended for the military service, having a value of $10,387.80. Accused, also without proper authority, caused to be delivered to the civilian firm of Carmelo and Bauermann, in two different shipments, 526 reams of white bond and white offset paper, Government property, also furnished and intended for the military service, having a value of $1,679.32. None of this paper was paid for or returned up to the time of the trial of the accused. In connection with the last of the Carmelo and Bauermann transactions accused, who was present when the paper was loaded, took the two tally-out sheets, each for 250 reams, from the depot superintendent who prepared them, stating that he, the accused, would secure the signatures on them. Accused never returned these tally-outs and fifteen days later when he was arrested they were found at his quarters unsigned. Accused elected to remain silent and no evidence was offered by the defense.

The record of trial does not prove that accused benefited financially or otherwise from these transactions. However, a statement of Francisco Sycip contained in the investigation report asserts that Sycip delivered two diamond rings, each worth $7,000 to accused as "security" for this paper, that one of these rings was not returned and that Sycip and accused had talked of engaging in the airline business in the Philippines after the war and had discussed trying to get a franchise, planes and aviators. The investigation report further indicates that accused may at one time have worn one of the rings and may have had the regular use of a Cadillac automobile owned by Sycip. Furthermore, accused billeted at the place of business of the publication "Newsweek", a publication by which the paper delivered to Carmelo and Bauermann was used for covers. An unused deposition of a former commanding officer of accused, which accompanies the record, indicates that the commanding officer approved the delivery to Sycip on loan of 1000 reams of paper and that at one time the commanding officer instructed accused to stop wearing a ring received from Sycip.

5. Accused is 26 years of age, is married and has no children. He is a high school graduate, attended William and Mary College for two years and Western Reserve University for one year, majoring in physics. He left school in 1941 and from May 1941 to May 1942 was employed first as an estimator and later as sales manager by the Morgan Lithograph Company. He served as an enlisted man for seventeen months, graduated from the Anti-Aircraft Artillery Officers' Candidate School, was commissioned a temporary second lieutenant on 8 April 1943 and was promoted to temporary first lieutenant on 9 July 1945.

6. Representations on behalf of this accused have been made by Congresswoman Frances P. Bolton of Ohio. A personal appearance was made before the Board of Review by Mr. Gardner Abbott, an attorney from Cleveland, Ohio. Mr. Abbott, on behalf of the accused, presented oral argument and submitted an affidavit of former Captain Herman V. Bucher and a letter from Captain Waldron C. Jordan. (Thereafter Mr. Gardner again made an appearance in this case and discussed it with me personally.) All of these representations, appearances and documents have been given careful consideration.

7. The record of trial shows wrongful dispositions of Government property but does not show that accused profited thereby. The deposition by the former commanding officer of accused shows that the property was loaned with the approval of the commanding officer. I have considered the statement of Sycip. It creates a strong suspicion that accused received compensation for the property, but I doubt its accuracy

and am not, on the whole case, convinced beyond reasonable doubt that there was any fraudulent intent on the part of accused. In view of all the circumstances I recommend that the confinement be remitted and that the remainder of the sentence be confirmed but suspended during good behavior.

8. Inclosed is a form of action designed to carry this recommendation into effect, should it meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

5 Incls
1. Record of trial
2. Form of action
3. Affidavit of former Capt Bucher
4. Ltr fr Capt Jordan
5. Ltr fr Mrs. Frances Bolton Aug. 1, 1946

(G.C.M.O. 332, 31 October 1946.)

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

JAGH - CM 314251

31 JUL 1946

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Sedalia Army Air Field, Warrensburg, Missouri, 16 May 1946. Dismissal
Second Lieutenant ROBERT W. DURHAM (0-577423), Air Corps	)	

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 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: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Robert W. Durham, 92nd Troop Carrier Squadron, 439th Troop Carrier Group, did, without proper leave, absent himself from his station at Sedalia Army Air Field, Warrensburg, Missouri, from about 26 February 1946 to about 9 March 1946.

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

Specification: In that Second Lieutenant Robert W. Durham, 92nd Troop Carrier Squadron, 439th Troop Carrier Group, did, without proper leave, absent himself from his station at Sedalia Army Air Field, Warrensburg, Missouri, from about 20 March 1946 to about 29 April 1946.

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

Specification 1: In that Second Lieutenant Robert W. Durham, 92nd Troop Carrier Squadron, 439th Troop Carrier Group, did, at

Sedalia Army Air Field, Warrensburg, Missouri, on or about 15 March 1946, with intent to deceive, wrongfully and unlawfully make and utter to Sedalia Army Air Field Exchange, a certain check, in words and figures as follows, to wit: "Sedalia, Mo., 15 Mar 1946, State Bank of Laurinburg, Laurinburg, N. C., Pay to the order of Cash $25.00, Twenty-Five and no/100 Dollars, /s/ Robert W. Durham, 2nd Lt. 0-577423, 439 TC Sqdn 92", and by means thereof, did fraudulently obtain from Sedalia Army Air Field Exchange $25.00 in cash, he the said Second Lieutenant Robert W. Durham, then well knowing that he did not have and not intending that he should have sufficient funds in the State Bank of Laurinburg for the payment of said check.

Specification 2: In that Second Lieutenant Robert W. Durham, 92nd Troop Carrier Squadron, 439th Troop Carrier Group, did, at Sedalia Army Air Field, Warrensburg, Missouri, on or about 18 March 1946, with intent to deceive, wrongfully and unlawfully make and utter to Sedalia Army Air Field Exchange, a certain check, in words and figures as follows, to wit: "Sedalia, Mo., 18 March 1946, State Bank of Laurinburg, Laurinburg, N. C., Pay to the order of Cash $25.00, Twenty-Five and no/100 Dollars /s/ Robert W. Durham, 2nd Lt. 0-577423, 439 TC Sqdn 92", and by means thereof, did fraudulently obtain from Sedalia Army Air Field Exchange $25.00 in cash, he the said Second Lieutenant Robert W. Durham, then well knowing that he did not have and not intending that he should have sufficient funds in the State Bank of Laurinburg for the payment of said check.

Specification 3: In that Second Lieutenant Robert W. Durham, 92nd Troop Carrier Squadron, 439th Troop Carrier Group, did, at Sedalia Army Air Field, Warrensburg, Missouri, on or about 18 March 1946, with intent to deceive, wrongfully and unlawfully make and utter to Sedalia Army Air Field Officers' Club Mess, a certain check, in words and figures as follows, to wit: "Laurinburg, N. C., 18 March 1946, State Bank of Laurinburg, Pay to Cash or Order $10.00, Ten and no/100 Dollars /s/ Robert W. Durham, 2nd Lt. 0-577423, Provost Marshal Office", and by means thereof, did fraudulently obtain from Sedalia Army Air Field Officers' Club Mess $10.00 in cash, he the said Second Lieutenant Robert W. Durham, then well knowing that he did not have and not intending that he should have sufficient funds in the State Bank of Laurinburg for the payment of said check.

He pleaded guilty to the Charge and Additional Charge I and the Specification under each and not guilty to Additional Charge II and the three Specifications thereof. He was found guilty of all Charges, guilty of the Specifications of the Charge and Additional Charge I and by exceptions and substitutions was found guilty of Specifications 1, 2 and 3 of Additional Charge II except the words "with intent to deceive" and "fraudulently

obtain" as they appear in each of said Specifications, substituting for the words "fraudulently obtain" the words "wrongfully obtain". Evidence was received of one previous conviction by general court-martial for absence without leave from 17 May 1945 to 27 May 1945, for which the accused was sentenced to forfeit $122.00 of his pay per month for six (6) months. In the instant case he was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48.

3. The evidence for the prosecution shows that accused absented himself without leave from his organization and station at Sedalia Army Air Field, Warrensburg, Missouri on 26 February 1946 and remained absent until he returned to duty on 9 March 1946 (R 9; Pros Ex 1, 2). He again absented himself without leave from the same organization on 20 March 1946 and remained absent until 29 April 1946, when he was confined at Fort Crook, Nebraska (R 9; Pros Ex 3, 4).

Accused had an account with the State Bank of Laurinburg, North Carolina until 8 March 1946, but on that date the account was closed by a withdrawal equal in amount to the balance then standing to accused's credit with said bank. On 15 March 1946 accused wrote a check payable to "Cash" in the amount of $25.00 drawn on said bank and presented it to the Post Exchange at Sedalia Army Air Field, Warrensburg, Missouri, receiving cash for the face amount thereof. On 18 March 1946 he made and presented for payment to the same post exchange another check payable to "Cash" for $25.00, drawn on the above-mentioned bank and again received payment of the face amount. On the same date, he drew a third check payable to "Cash" on the same bank in the amount of $10.00, presented it to the Officers' Club Mess of Sedalia Army Air Field and received payment thereon. There were no funds on deposit with the drawee bank when these three checks were presented for payment and they were returned unpaid. None of the checks were redeemed by accused (R 9-13; Pros Ex 5-11).

4. After accused's rights as a witness were explained, he elected to be sworn as a witness and testified that he left his station at Sedalia Army Air Field on 21 February 1946 with authority from his commanding officer to be absent until 25 February 1946. Upon arriving in St. Louis, Missouri he attempted to communicate with his wife in Chicago by telephone, but learned that she had been injured in an automobile accident. That same night accused boarded a train for Chicago. Enroute, he gave the porter a telegram to be sent to his station requesting twelve days leave of absence in view of the emergency which had arisen. Upon his arrival in Chicago, he found his wife "just badly shaken up" and under care of a doctor. No reply was received to his request for emergency leave. However, on 7 March 1946 he received a telegram notifying him he was absent without leave. He replied to this telegram on the following day, and thereupon departed for Sedalia Army Air Field (R 14, 18, 22-24). Accused at the time was experiencing marital difficulties with his wife whom he had married in 1942. She had been unfaithful to him and was

being encouraged to leave him by her parents, who treated accused with aloofness. The conduct of accused's wife caused him great anxiety (R 15).

When accused learned that two checks which he passed had been returned for insufficient funds, he decided to go to Chicago with a view to getting funds from his wife to make the checks good. He was supposed to report to Fort Leavenworth on 20 March 1946 for the purpose of taking examinations for appointment to the Regular Army, but instead proceeded to Chicago, Illinois. Being unable to find his wife, he then went to Detroit in the hope of borrowing money from his sister-in-law in order to pay his debts. He remained in Detroit from 21 - 25 March 1946. When he was unsuccessful in this attempt to raise funds, he departed for the State of Washington, the home of his father, hitch-hiking his way. He remained with his father for about twelve days, but again being unable to borrow the needed funds, he secured transportation back to Chicago by driving an automobile for some people. Upon arriving in Chicago 27 April 1946 he called his mother who lived in Omaha and after being advised by her that the military police were seeking him, requested her to inform them that he would arrive 29 April 1946 and would turn himself in. Upon his arrival in Omaha on that day, the military policemen were on hand to meet him and he was confined at Fort Crook (R 16, 17, 25-27). He explained that his unauthorized absence from 20 March 1946 to 29 April 1946 was "to get some money in a hurry to pay the checks" (R 25). He testified, "To my way of thinking a bad check charge was a civilian offense and was rough. Absence without leave being an Army offense it was a lesser charge. I wanted to get money for checks. I borrowed $20.00 from sister-in-law (in Detroit) and took off to my father's home, that I haven't seen for fourteen years. He lives in Washington. I took off and went to see if possibly I could get enough money from him to pay up the checks." (R 17).

With respect to the insufficient fund check charges accused testified that he had made and cashed the checks in question, the first on 15 March 1946 and the other two on 18 March 1946 (R 27-29). At the time he cashed these checks he was "broke" — had "no money at all". He had a joint account with his wife in a Chicago bank, but as it was too difficult to keep track of this account, he had drawn no checks against it for about a year. He had personally never deposited any funds to the credit of this joint account. On 14 March 1946 he called his wife in Chicago by telephone and requested her to deposit $130.00 to the credit of his account with the North Carolina bank. She agreed to do so and accordingly he drew the checks in question, although before doing so he did not check to ascertain whether the deposit had actually been made. On all previous occasions similar requests had been complied with by his wife inasmuch as she received a $200.00 monthly allotment from his pay (R 15, 16, 28-30). On 18 March 1946, shortly after cashing the two checks which are the subject of Specifications 2 and 3 of Additional Charge II, he learned that two other checks which he had negotiated to the Mayfair Hotel of St. Louis, Missouri had been returned because of insufficient funds and he then knew that the checks cashed at Sedalia Army Air Field would not clear (R 16).

5. By his plea, the accused admitted his guilt of the offenses of absence without leave as alleged in the Specifications of the Charge and Additional Charge I. Aside from this plea, however, the prosecution's evidence, as well as testimony of the accused himself establish these unauthorized absences beyond reasonable doubt and the record is legally sufficient to support the findings of guilty.

The uncontradicted evidence as confirmed by the accused in his sworn testimony also establishes that on the dates and at the places alleged in Specifications 1, 2 and 3 of Additional Charge II, the accused made and uttered three checks, two in the amount of $25.00 each to the Post Exchange at Sedalia Army Air Field and one in the amount of $10.00 to the Officers' Club Mess at the same installation; that he received the proceeds of said checks in cash and that they were all dishonored when presented to the drawee bank because there were no funds on hand in accused's account.

The court, by exceptions and substitutions, acquitted the accused of making and uttering the several checks "with intent to deceive" and "fraudulently" obtaining the proceeds, but found him guilty of unlawfully making and uttering these checks and thereby "wrongfully" obtaining the proceeds knowing that he did not have and not intending that he should have funds in the bank for payment. The proof conclusively establishes that accused made and uttered these three checks and failed, without justification or proper excuse, to have any funds on deposit to pay them when presented to the drawee bank. That accused had actual knowledge of the status of his bank account is shown by his own admission that he telephoned his wife on 14 March 1946 and requested her to deposit $130 to the credit of his account in said bank. The three checks in question were made on 15 and 18 March 1946. However, he made no effort to verify that a deposit had actually been made. While the accused was acquitted of obtaining money by fraud, the court did find him guilty of an offense amounting to something more than mere careless failure to maintain a sufficient bank account. It has been said the offense involves the affirmative element of guilty knowledge of the insufficiency of the account and the negative element of the absence of intent to remedy that situation so that the checks will be entitled to payment on presentation (CM 280789, 4 Bull JAG 341, 342). Clearly the evidence establishes these elements beyond question and is legally sufficient to support the findings of guilty of these lesser included offenses.

6. War Department records show the accused to be 27 years of age and married. He completed three years of high school and then enlisted in the Regular Army in 1937. He was discharged in October 1940, at the expiration of his period of enlistment, but was recalled to active service in February 1941. Subsequently he attended Air Forces Officer Candidate School and upon graduating in April 1943, was commissioned a second lieutenant in the Army of the United States. During his commissioned service, in addition to a prior sentence imposed by general court-martial he had received punishment under Article of War 104 on two occasions. On 14

November 1944 the commanding general of Army Air Forces Eastern Flying Training Command at Maxwell Field, Alabama, imposed a reprimand and forfeiture upon accused for absence without leave. He received similar punishment imposed on 22 December 1944 by the same officer for another period of absence without leave and for issuing a check drawn upon a bank in which he had no account. The date of issuance of said check was 26 October 1944.

7. 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 96.

Thomas W. Dapper, Judge Advocate

Joseph J. Stern, Judge Advocate

Harry A. Schwegel, Judge Advocate

JAGH - CM 314251 1st Ind

WD, JAGO, Washington 25, D. C. AUG 22 1946

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 Second Lieutenant Robert W. Durham (0-577423), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absence without leave on two occasions in violation of Article of War 61 (Chg I, Spec; Add'l Chg I, Spec). The first offense covered the period from 26 February 1946 to 9 March 1946 and the second from 20 March 1946 to 29 April 1946. Further, he pleaded not guilty to the fraudulent making and uttering and obtaining the proceeds of three checks totalling $60.00 leaving, as he knew, insufficient funds in the bank to pay them, and by exceptions and substitutions was found guilty only of wrongfully making and uttering and obtaining the proceeds of the checks, knowing he had insufficient funds in the bank to pay them, in violation of Article of War 96 (Add'l Chg II, Specs 1, 2, 3). Evidence was received of one previous conviction by general court-martial on 17 July 1945 for absence without leave for ten days. In the instant case, he was sentenced to dismissal. 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 and to warrant confirmation of the sentence. I concur in that opinion.

The accused was absent without leave from his organization and station at Sedalia Army Air Field, Missouri, from 26 February 1946 to 9 March 1946. On 15 March 1946 he made and negotiated a check in the amount of $25.00 to the Post Exchange of said Air Field. On 18 March 1946 he made and passed two more checks, one in the amount of $25.00 to the same post exchange and the other in the amount of $10.00 to the Officers' Club Mess of that Air Field. All of said checks were drawn on the State Bank of Laurinburg, North Carolina, and all were returned dishonored because accused had no balance to his credit with said bank when the checks were drawn and presented for payment. They remained unredeemed at the time of trial. On 20 March 1946, after being apprised that the checks were returned dishonored, the accused absented himself without leave from his organization and remained so absent until 29 April 1946 when he was taken into custody by military police at Omaha, Nebraska, the home of his mother. The accused

attributed his difficulties to worry over marital difficulties, his wife having been unfaithful to him. He stated that the second period of unauthorized absence was occasioned by his efforts to raise funds with which to redeem the dishonored checks. During the period of his absence he travelled to Chicago, Detroit and the state of Washington seeking to make a loan from relatives in order that he might redeem the checks. He explained that he believed the check offenses to be more serious than absence without leave and for that reason decided to leave his station without authority in the hope that his mission would be successful, thus enabling him to avoid trial for the worthless checks he had issued.

There is little that can be said on behalf of this officer. Once before it appears that he issued a worthless check. That was in October 1944. Records indicate that he agreed to accept punishment under Article of War 104 for that offense and punishment was so administered. He also was the subject of disciplinary action under the same Article of War for absence without leave on two occasions and thereafter was tried by general court-martial for a subsequent absence without leave. I recommend that the sentence be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry the foregoing 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. 272, 10 September 1946.)

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

JUL 18 1946

JAGQ - CM 314258

UNITED STATES v. Staff Sergeants ALPHONZO J. ENGLISH (36162997) and ROBERT VIRGIL (34488763), Private First Class FRED OWENS, JR. (34423610), all of 657th Quartermaster Gasoline Supply Company; Corporal DANIEL E. SCOTT (36866355) and Private DAN C. HUNT (34485463), both of 4004th Quartermaster Truck Company; Corporals ELMER L. KENNEDY (36061250) and MELVIN D. DOUGLAS (34529010), Technician Fifth Grade JONATHAN LEWIS (34541545), Privates First Class THOMAS FLINT (38231418) and CLYDE McCANN (34343915), Privates NORAH PEACHES (34484989) and WILLIAM F. TURNER (34667876), all of 956th Quartermaster Service Company; Private First Class ROBERT J. DONNELL (34669115) and Private CHARLIE L. ROBISON (34648361), both of 4377th Quartermaster Truck Company; and Private MARVIN HALL (35054877), 3861st Quartermaster Truck Company.	CHANOR BASE SECTION Trial by G.C.M., convened at Charleroi, Belgium, 11, 12, 20, 21, 23, 26, and 27 February 1946. Dishonorable discharge and confinement as follows: Flint and Turner: 15 years, Penitentiary; McCann: 10 years, Penitentiary; Peaches: 8 years, Reformatory; Virgil, Scott: 7 years, Penitentiary; Douglas, Hall, Lewis, Donnell, Robison and Owens: 7 years, Reformatory; Kennedy: 4 years, Penitentiary. English and Hunt: acquitted.

HOLDING by 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 soldiers named above and submits this, its holding, to The Judge Advocate General.

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

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

Specification 1: In that Staff Sergeants Alphonzo J. English and Robert Virgil, both of the 657th Quartermaster Gasoline Supply Company; Corporals Daniel E. Scott, 4004th Quartermaster Truck Company, Elmer L. Kennedy, 956th Quartermaster Service Company, Melvin D. Douglas, 956th Quartermaster Service Company, Technician Fifth Grade Jonathan Lewis, 956th Quartermaster Service Company; Privates First Class Thomas Flint, 956th Quartermaster Service Company, Robert J. Donnell, 4004th Quartermaster Truck Company, Fred Owens, Junior, 657th Quartermaster Gasoline Supply Company, Clyde McCann, 956th Quartermaster Service Company; Privates Norah Peaches, 956th Quartermaster Service Company, William F. Turner, 956th Quartermaster Service Company, Charlie L. Robison, 4377th Quartermaster Truck Company, Dan C. Hunt, 4004th Quartermaster Truck Company and Marvin Hall, 4004th Quartermaster Truck Company, did, at or near Ghlin, Belgium; Mons, Belgium; Quaregnon, Belgium; Jemappes, Belgium and Cuesmes, Belgium and at various and sundry places between said places, between from about 3 October 1945, to about 3 November 1945, acting jointly and in pursuance of a common intent and in conjunction with each other and other civilian and military persons, both known and unknown, wrongfully and unlawfully confederate, combine, connive, conspire and agree to defraud the United States through trick, connivance, misfeasance, malfeasance, nonfeasance and divisions of spoils, through the wrongful and unlawful taking, stealing, transporting and converting to their own personal joint and several purposes, designs and profits of military clothing, equipment and supplies, property of the United States and furnished and intended for the military service thereof; and in pursuance thereof, did, at the various and divers times and places herein alleged, wrongfully and unlawfully take, steal and carry away, transport and convert such military clothing, equipment and supplies from the purposes for which they were furnished and intended to their own joint and several purposes, designs and personal profits.

Specification 2: In that Corporal Daniel E. Scott, 4004th Quartermaster Truck Company, did, at or near Mons, Belgium, on or about 22 October 1945, wrongfully take and use, without the consent of the owner, a 2½ ton, 6x6 truck, property of the United States.

Specification 3: In that Private Dan C. Hunt, 4004th Quartermaster Truck Company, did, at or near Mons, Belgium, on or

about 22 October 1945, wrongfully take and use, without the consent of the owner, a 2½ ton, 6x6 truck, property of the United States.

Specification 3: In that Private Dan C. Hunt, 4004th Quartermaster Truck Company, did, at or near Mons, Belgium, on or about 22 October 1945, wrongfully take and use, without the consent of the owner, a 2½ ton, 6x6 truck, property of the United States.

Specification 4: In that Staff Sergeants Alphonzo J. English and Robert Virgil and Private First Class Fred Owens, Junior, all of the 657th Quartermaster Gasoline Supply Company, acting jointly and in pursuance of a common intent, did, at or near Mons, Belgium, on or about 25 October 1945, wrongfully take and use, without the consent of the owner, a 2½ ton, 6x6 truck, property of the United States.

Specification 5: In that Private Marvin Hall, 4004th Quartermaster Truck Company, Technician Fifth Grade Jonathan Lewis and Private William F. Turner, both of the 956th Quartermaster Service Company, acting jointly and in pursuance of a common intent, did, at or near Mons, Belgium, on or about 22 October 1945, wrongfully take and use, without the consent of the owner, a 2½ ton, 6x6 truck, property of the United States.

Specification 6: In that Corporal Melvin D. Douglas, Private First Class Thomas Flint and Private William F. Turner, all of the 956th Quartermaster Service Company, acting jointly and in pursuance of a common intent, did, at or near Ghlin, Belgium, on or about 12 October 1945, wrongfully take and use, without the consent of the owner, a 2½ ton, 6x6 truck, property of the United States.

Specification 7: In that Corporal Melvin D. Douglas, Privates First Class Thomas Flint, Privates William F. Turner and Norah Peaches, all of the 956th Quartermaster Service Company, acting jointly and in pursuance of a common intent, did, at or near Ghlin, Belgium, on or about 13 October 1945, wrongfully take and use, without the consent of the owner a 6x6 truck, 2½ ton, property of the United States.

Specification 8: In that Corporal Melvin D. Douglas, Privates First Class Thomas Flint, Clyde McCann and Private William F. Turner, all of the 956th Quartermaster Service Company, acting jointly and in pursuance of a common intent, did, at or near Ghlin, Belgium, on or about 15 October 1945, wrongfully take and use, without the consent of the owner, a 2½ ton, 6x6 truck, property of the United States.

Specification 9: In that Corporal Elmer L. Kennedy, 956th Quartermaster Service Company, Privates First Class Charlie L. Robison, 4377th Quartermaster Truck Company and Robert J. Donnell, 4004th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at or near Jemappes, Belgium, on or about 3 November 1945, wrongfully take and use, without the consent of the owner, a 2½ ton, 6x6 truck, property of the United States.

Specification 10: In that Technician Fifth Grade Jonathan Lewis and Private William F. Turner, both of the 956th Quartermaster Service Company and Private Marvin Hall, 4004th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at or near Mons, Belgium, on or about 22 October 1945, unlawfully attempt to feloniously take, steal and carry away 1900 sweaters, of the value of $7,860.00; 1,000 pair trousers, of the value of $8,050.00 and 500 towels, of the value of $100.00, of the aggregate value of $16,010.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Staff Sergeants Alphonzo J. English and Robert Virgil and Private First Class Fred Owens, Junior, all of the 657th Quartermaster Gasoline Supply Company, acting jointly and in pursuance of a common intent, did, at or near Mons, Belgium, on or about 25 October 1945, feloniously take, steal and carry away 880 pair trousers, of the value of $7,436.90 and 1,220 pair socks, of the value of $744.20, of the aggregate value of $8,181.10, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Corporal Daniel E. Scott and Private Dan C. Hunt, both of the 4004th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at or near Mons, Belgium, on or about 22 October 1945, feloniously take, steal and carry away 2,000 pair socks, of the value of $1,207.80 and 3,700 shirts of the value of $15,309.04, of the aggregate value of $16,516.84, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Privates First Class Norah Peaches and Thomas Flint and Private William F. Turner, all of the 956th Quartermaster Service Company, acting jointly and in pursuance

of a common intent, did, at or near Mons, Belgium, on or about 7 October 1945, feloniously take, steal and carry away 1,566 pair trousers, of the value of $14,962.24, property of the United States, furnished and intended for the military service thereof.

Specification 4: In that Corporal Melvin D. Douglas, Privates First Class Thomas Flint and Clyde McCann and Privates Norah Peaches and William F. Turner, all of the 956th Quartermaster Service Company, acting jointly and in pursuance of a common intent, did, at or near Jemappes, Belgium, on or about 9 October 1945, feloniously take, steal and carry away 650 pir /sic/ trousers, of the value of $4,558.50 and 1,000 undershirts, of the value of $1,282.00, of the aggregate value of $5,842.50, property of the United States, furnished and intended for the military service thereof.

Specification 5: In that Corporal Melvin D. Douglas, Privates First Class Thomas Flint and Clyde McCann and Privates Norah Peaches and William F. Turner, all of the 956th Quartermaster Service Company, acting jointly and in pursuance of a common intent, did, at or near Mons, Belgium, on or about 15 October 1945, feloniously take, steal and carry away 560 shirts, of the value of $3,046.40; 1,498 pair boots, of the value of $10,096.52; 1,200 sweaters, of the value of $4,680.00 and 2,000 pair trousers of the value of $13,955.00, of the aggregate value of $31,777.92, property of the United States,furnished and intended for the military service thereof.

Specification 6: In that Corporal Elmer L. Kennedy, 956th Quartermaster Service Company, Private First Class Robert J. Donnell, 4004th Quartermaster Truck Company and Private Charlie L. Robison, 4377th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at or near Jemappes, Belgium, on or about 3 November 1945, feloniously take, steal and carry away 1,120 pair socks, of the value of $683.20; 300 sweaters, of the value of $1,170.00 and 660 pair trousers, of the value of $6,560.40, of the aggregate value of $8,413.60, property of the United States, furnished and intended for the military service thereof.

Specification 7: In that Corporal Melvin D. Douglas, Privates First Class Thomas Flint and Clyde McCann and Privates Norah Peaches and William F. Turner, all of the 956th Quartermaster Service

Company, acting jointly and in pursuance of a common intent, did, at or near Cuesmes, Belgium, on or about 9 October 1945, wrongfully, knowingly and without proper authority, dispose of, by delivering them to a civilian barn, 650 pair trousers of the value of $4,558.50 and 1,000 undershirts, of the value of $1,282.00, of the aggregate value of $5,842.50, property of the United States, furnished and intended for the military service thereof.

Specification 8: In that Corporal Melvin D. Douglas, Privates First Class Thomas Flint, and Clyde McCann and Privates Norah Peaches and William F. Turner, all of the 956th Quartermaster Service Company, acting jointly and in pursuance of a common intent, did, at or near Cuesmes, Belgium, on or about 7 October 1945, wrongfully, knowingly and without proper authority, dispose of, by delivering them to a civilian barn, 1,566 pair trousers, of the value of $14,962.24, property of the United States, furnished and intended for the military service thereof.

Specification 9: In that Corporal Melvin D. Douglas, Privates First Class Thomas Flint and Clyde McCann and Privates Norah Peaches and William F. Turner, all of the 956th Quartermaster Service Company, acting jointly and in pursuance of a common intent, did, at or near Cuesmes, Belgium, on or about 15 October 1945, wrongfully, knowingly and without proper authority, dispose of, by delivering them to a civilian barn, 560 shirts, of the value of $3,046.40; 1,498 pair boots, of the value of $10,096.52; 1,200 sweaters, of the value of $4,680.00 and 2,000 pair trousers of the value of $13,955.00, of the aggregate value of $31,777.92, property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to the charges and specifications against him. Motions for findings of not guilty of all charges and specifications were granted as to accused Hunt and accused English. The findings as to the other accused were as follows:

As to S/Sgt Robert Virgil -

Of Specification 1, Charge I	:	Guilty
Of Specification 4, Charge I	:	Guilty
Of Charge I	:	Guilty
Of Specification 1, Charge II	:	Guilty
Of Charge II	:	Guilty

As to Cpl Daniel E. Scott -

Of Specification 1, Charge I	:	Guilty
Of Specification 2, Charge I	:	Guilty
Of Charge I	:	Guilty
Of Specification 2, Charge II	:	Guilty
Of Charge II	:	Guilty

As to Cpl Elmer L. Kennedy -

Of Specification 1, Charge I	:	Guilty
Of Specification 9, Charge I	:	Guilty
Of Charge I	:	Guilty
Of Specification 6, Charge II	:	Guilty
Of Charge II	:	Guilty

As to Cpl Melvin D. Douglas -

Of Specification 1, Charge I	:	Guilty
Of Specification 6, Charge I	:	Not Guilty
Of Specification 7, Charge I	:	Not Guilty
Of Specification 8, Charge I	:	Not Guilty
Of Charge I	:	Guilty
Of Specification 4, Charge II	:	Guilty
Of Specification 5, Charge II	:	Not Guilty
Of Specification 7, Charge II	:	Guilty
Of Specification 8, Charge II	:	Not Guilty
Of Specification 9, Charge II	:	Not Guilty
Of Charge II	:	Guilty

As to T/5 Jonathan Lewis -

Of Specification 1, Charge I	:	Guilty
Of Specification 5, Charge I	:	Guilty
Of Specification 10, Charge I	:	Guilty
Of Charge I	:	Guilty

As to Pfc Robert J. Donnell -

Of Specification 1, Charge I	:	Guilty
Of Specification 9, Charge I	:	Guilty
Of Charge I	:	Guilty
Of Specification 6, Charge II	:	Guilty
Of Charge II	:	Guilty

As to Pfc Fred Owens, Jr -

Of Specification 1, Charge I	:	Guilty
Of Specification 4, Charge I	:	Guilty
Of Charge I	:	Guilty
Of Specification 1, Charge II	:	Guilty
Of Charge II	:	Guilty

As to Pfc Charlie L. Robison -

Of Specification 1, Charge I	:	Guilty
Of Specification 9, Charge I	:	Guilty
Of Charge I	:	Guilty
Of Specification 6, Charge II	:	Guilty
Of Charge II	:	Guilty

As to Pvt Norah Peaches -

Of Specification 1, Charge I	:	Guilty
Of Specification 7, Charge I	:	Guilty
Of Charge I	:	Guilty
Of Specification 3, Charge II	:	Guilty
Of Specification 4, Charge II	:	Guilty
Of Specification 5, Charge II	:	Guilty
Of Specification 7, Charge II	:	Guilty
Of Specification 8, Charge II	:	Guilty
Of Specification 9, Charge II	:	Guilty
Of Charge II	:	Guilty

As to Pvt Thomas Flint -

Of Specification 1, Charge I	:	Guilty
Of Specification 6, Charge I	:	Not Guilty
Of Specification 7, Charge I	:	Guilty
Of Specification 8, Charge I	:	Guilty
Of Charge I	:	Guilty
Of Specification 3, Charge II	:	Guilty
Of Specification 4, Charge II	:	Guilty
Of Specification 5, Charge II	:	Guilty
Of Specification 7, Charge II	:	Guilty
Of Specification 8, Charge II	:	Guilty
Of Specification 9, Charge II	:	Guilty
Of Charge II	:	Guilty

As to Pvt William F. Turner -

Of Specification 1, Charge I	:	Guilty
Of Specification 5, Charge I	:	Not Guilty

As to Pvt William F. Turner - (Cont'd)

Of Specification 6, Charge I	: Guilty
Of Specification 7, Charge I	: Not Guilty
Of Specification 8, Charge I	: Not Guilty
Of Specification 10, Charge I	: Guilty
Of Charge I	: Guilty
Of Specification 3, Charge II	: Guilty
Of Specification 4, Charge II	: Guilty
Of Specification 5, Charge II	: Guilty
Of Specification 7, Charge II	: Guilty
Of Specification 8, Charge II	: Guilty
Of Specification 9, Charge II	: Guilty

As to Pvt Clyde McCann -

Of Specification 1, Charge I	: Guilty
Of Specification 8, Charge I	: Guilty
Of Charge I	: Guilty
Of Specification 4, Charge II	: Guilty
Of Specification 5, Charge II	: Guilty
Of Specification 7, Charge II	: Guilty
Of Specification 8, Charge II	: Not Guilty
Of Specification 9, Charge II	: Guilty
Of Charge II	: Guilty

As to Pvt Marvin Hall -

Of Specification 1, Charge I	: Guilty
Of Specification 5, Charge I	: Guilty
Of Specification 10, Charge I	: Guilty
Of Charge I	: Guilty

Evidence of one previous conviction for unlawful discharge of a weapon in violation of Article of War 96 was introduced against accused Donnell. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for the following periods: Virgil, Scott, Douglas, Lewis, Donnell, Owens, Robison, and Hall: 12 years; Kennedy: 6 years; Peaches: 18 years; Flint and Turner: 25 years; McCann: 20 years. The reviewing authority approved the sentences but reduced the confinement in each case. The confinement as approved and the place of confinement designated by the reviewing authority for each of the accused, are as follows:

Accused	Period of Confinement	Place of Confinement (or elsewhere as the Secretary of War may direct)
Flint	15 years	Penitentiary
Turner	15 years	Penitentiary
McCann	10 years	Penitentiary
Peaches	8 years	Reformatory
Virgil	7 years	Penitentiary
Scott	7 years	Penitentiary
Douglas	7 years	Reformatory
Lewis	7 years	Reformatory
Donnell	7 years	Reformatory
Owens	7 years	Reformatory
Robison	7 years	Reformatory
Hall	7 years	Reformatory
Kennedy	4 years	Penitentiary

3. The relevant evidence will be discussed at a later point in this holding .

4. Agent Kelly of the Criminal Investigation Division was one of the principal witnesses for the prosecution. He identified statements taken from each of the accused, except the accused Donnell (R 116 to R 124, inclusive). We set forth his testimony given as to the accused Kennedy, his testimony as to each of the other accused, except Donnell, being substantially the same:

"Q I show you the Prosecution's proposed Exhibit C-1 and ask you what is that instrument?
"A That is a statement given by Cpl Elmer L. Kennedy to me.

"Q Are there any signatures appearing on prosecution's proposed Exhibit C-1?
"A Yes, Kennedy's signatures.

"Q In how many places?
"A Two places.

"Q How do you know the signatures appearing thereon are those of Elmer Kennedy?
"A Because I was present when he signed them.

"Q Did you see Elmer Kennedy sign his name on the places indicated on prosecution's proposed Exhibit C-1?
"A Yes, I did.

"Q Now I want you to please look about this room and state whether or not you recognize any person whom you know as Elmer Kennedy?

"A Yes, I do.

"Q Will you indicate his presence by pointing, and also by row and seat number?

"A Kennedy is the fourth man in the second row." (R 116, 117)

* * * *

PROSECUTION: Will the record show that in the identifications made by the witness on the witness stand thus far, his identification of Cpl Elmer L. Kennedy....in connection with that, will the record show that Elmer L Kennedy is the fourth man in the second row. * * *" (R 119).

A handwriting expert was qualified and gave his expert opinion that some of the false requisitions introduced by the prosecution were in fact written by some of the accused. The handwritings of the accused used as the basis of the comparison were in some instances that appearing on the proposed statements identified by Agent Kelly (R 146, 147, 151, 152).

In the course of the trial on the following day Agent Kelly was recalled and testified as to the circumstances surrounding the taking of the statements he previously identified. After so testifying as to the statements of two of the accused, the defense cross-examined Agent Kelly for the purpose of impeachment. He was asked to identify three of the accused and was unable to identify any one of them. Kelly admitted that he had identified them the previous day and could not explain his failure to identify them the second time (R 214, 215).

After much testimony had been taken, all the statements previously identified by Agent Kelly, with the exception of the statement of Hunt, were received into evidence. The defense then stated it wished to impeach the entire testimony of Agent Kelly "on the grounds of corruption and collusion with the trial judge advocate" (R 268). Kelly was cross-examined and again said he could not explain why he was able to identify all the accused when their statements were shown to him the previous day but was unable to identify them the second time. He denied that any system of signals was arranged with the trial judge advocate to facilitate the identification of the accused (R 269). The defense then attempted to call other witnesses to impeach Agent Kelly but the law member ruled that as the prosecution had not rested it was not the proper time for such testimony (R 270).

At the beginning of the case for the defense, the assistant defense counsel testified as follows:

"Q During the times that the prosecution's exhibits were being shown to the witness, Agt Kelly, did you observe the actions of the trial judge advocate, Captain Zechman?
"A I did.

"Q Will you tell the court what you observed as to the actions of Captain Zechman?
"A I didn't notice a thing until...I believe it was Exhibit M-1, which is the statement of Pvt Fred Owens, was introduced. It seemed that Agt Kelly.....

"PROSECUTION: I will object to the portion of the answer from that point on...where the witness gives his conslusion as to what 'it seemed'. If he saw something, let him testify to what he saw.
"LAW MEMBER: Objection sustained.

"A Agt Kelly had considerable difficulty in identifying Fred Owens; finally he did identify him correctly. I noticed at the time that he was attempting to identify Fred Owens the trial judge advocate was holding a paper in his hands in front of Agt Kelly who at that time was on the stand. He had nine fingers above the paper. It was odd that he would hold a piece of paper that way. The next exhibit was N-1; I don't recall whose statement that is, right off, but I watched the trial judge advocate that time, and if somebody can refresh my memory as to that statement....Yes, that is the statement of Jonathan Lewis. At that time Lewis was sitting in the exact position that he is now, the sixth seat in the second row. At that time when the trial judge advocate took the paper from Agt Kelly, he held six fingers above the paper in plain view of Agt Kelly. I still was not sure anything was going on, so I called the attention of Lt Edes to the matter and we watched the next two together. The next man was Pvt Peaches. When the trial judge advocate handed the paper to Agt Kelly the first time he held it in a manner so one finger was here above the paper. When he took the paper from Agt Kelly he took it so that two fingers were above the paper, indicating that Pvt Peaches sat in the first row, second seat. That is where he was sitting and is seated now. The next statement, Exhibit P-1, is that of Pvt Robison. Together we watched the trial judge advocate hand the paper to Agt Kelly so one finger was showing above the paper, indicating the first row. When he took the paper from Agt Kelly he indicated with four fingers the fourth seat. And that is where Pvt Robison was sitting and is now sitting." (R 284, 285).

Special defense counsel for three of the accused then testified as follows regarding the trial judge advocate's examination of Agent Kelly:

"Q And in addition to asking questions, did you observe the trial judge advocate do anything?
"A I did.

"Q What did you observe?
"A As the result of a conversation with Lt Miller, I watched the trial judge advocate during his procedure in entering these proposed exhibits...the last two thereof, which were Exhibits O-1 and P-1. I don't recall the name of the first one, O-1, but for P-1 it was Pvt Robison. At this time the trial judge advocate would take a statement, ask the witness, Agt Kelly, questions and would then hand to the witness, Agt Kelly, a proposed exhibit - a statement - and he would ask Agt Kelly if a signature appeared thereon and if he had seen that signature. At a period of time in there he would take the statement from Agt Kelly and then ask Agt Kelly if he would indicate to the court the defendant whose signature he had just identified. Agt Kelly would then do that. After this conversation with Lt Miller I watched the trial judge advocate and in the case of Exhibit O-1 he handled the paper with both hands while asking Agt Kelly preliminary questions with all four fingers showing on top of the paper, and then just as he handed the paper to Agt Kelly he removed all his fingers except the first or index finger of his left hand as he passed the paper to Agt Kelly. After asking Agt Kelly a few questions, he removed the paper from Agt Kelly's hands. When he removed it he reached for the paper and took it with the two first fingers of his left hand showing on top of the paper and then asked Agt Kelly to identify the accused who had signed that statement. Agt Kelly identified the man as the one who sat in the first row, second seat. I then watched the last identification, which I believe was Pvt Robison - Exhibit P-1. The same procedure was gone through. He asked Agt Kelly some preliminary questions, handled the paper in both hands, and as he passed the paper to him he took off all but the index finger of the left hand which showed plainly to Agt Kelly on top of the statement. He asked Agt Kelly some questions about the signature; he then reached and took the paper and he took it with all four fingers of the left hand showing on top of the paper in Agt Kelly's lap. Agt Kelly was then asked to identify the accused, Pvt Robison, and he correctly identified the accused as being in the first row, fourth seat. At this time I leaned forward

to the other defense counsels and put both my hands out in front of me and told them to watch the trial judge advocate's hands. That was all I observed at that time. No further statements were introduced requiring identification of any of the accused." (R 286, 287).

* * * *

(Cross-examination) "Q.---- When you demonstrated to the other members of the defense counsel with your hands as you have testified, do you remember me smiling at you?

"A I remember the startled look on your face and then the smile.

"Q And do you remember our conversation after that?

"A I do."

(Redirect examination) "Q What was the conversation you had with Captain Zechman after that?

"A After the introduction of Exhibits there was a recess entered by the court. We went to the other room which is right next door to this one. I spoke for a moment to some of the accused outside in the hall and then I went into the next room where Captain Zechman was standing with other members of the court and some witnesses. When he was by himself I approached him waving my hands, and said 'What's the idea of the business with the hands?' Captain Zechman, as nearly as I recall, said 'I had to do something; Kelly had a Hell of a hangover this morning and he couldn't identify those guys'." (R 289, 290).

The defense then requested a directed verdict of not guilty of all specifications and charges as to all accused on the grounds that the prosecution's entire case was based on the identification of the accused and their signatures and that Agent Kelly who testified to these had obviously perjured himself (R 293). The motion was denied (R 294).

Agent Kelly was recalled by the prosecution and denied any prearranged signals between himself and the trial judge advocate. He then explained his ability to identify the accused on one occasion and not on the other as follows:

"Q How were you able to identify the accused in this room on one occasion, and then when you were brought back couldn't do it over again? How do you account for that?

"A As far as our conversations outside were concerned?

"Q Tell the court exactly how it happened.

"A Well, in the beginning of the trial the captain and myself would talk during recesses right outside this door here while the defendants were standing along the corridor, and the captain would explain to me that at the next convening of the court he was going to bring up a certain group...say perhaps three or four of the accused...and we discussed those three or four of the accused at that particular time, and I tried to memorize them in my mind, just which fellows they were, such as one fellow had a field jacket on and had certain characteristics. I could remember a small group. That is really how I was able to identify them in that manner." (R 310)

On cross-examination he testified as follows:

"Q Now I wish you would tell the court a little more clearly what does the trial judge advocate mean when he says that you rehearsed the appearance of a few of the defendants at a time. What does he mean?

"A I wouldn't really call it a rehearsal. I would say more or less discussing outside the courtroom as to which group he was going to introduce next.

"Q What was that discussion?

"A The discussion consisted of the fact that he was going to introduce the testimony of some of the accused...for instance he would say 'Probably three men will be brought up in this next session; try and memorize the characteristics of those three men' which we did between us...I would recognize one and wouldn't recognize another. Those three men would be identified in the next session. That was it.

"Q I don't quite understand you. You say you would recognize one and not another. Suppose you didn't recognize one in this rehearsal, then what?

"A Then it would be pointed out to me and I would try to impress on my mind his particular characteristics.

"Q Who pointed it out?

"A Captain Zechman.

"Q Then your entire identification of these accused before the court was making an identification of the accused that you did not know but whose appearance you had rehearsed with Captain Zechman before you testified?

"A No, that is not so.

"Q But if you didn't know the accused he would point him out to you and tell you to memorize his characteristics?
"A Then I would agree that that was the fellow.

"Q Why didn't you tell the court you didn't recognize the man?
"A But I did recognize him.

"Q After someone told you that?
"A I had seen the man before, lieutenant.

"Q But you couldn't identify him now?
"A I hadn't seen him for two months." (R 312).

This testimony is not substantiated by the record, which indicates no recesses during the time when Agent Kelly identified all of the accused from the witness stand (R 116 to R 124, inclusive). In his argument on the motion, after the above testimony, the trial judge advocate stated (R 314):

> "Yes, Agent Kelly testified to the truth. I rehearsed him out in the hall and refreshed his memory as to each of the defendants, and I say that if that constitutes corruption and collusion, then we are guilty of it."

Although an issue of fact was presented as to the use of signals between the trial judge advocate and the witness Kelly, the reviewing authority considered that the use of signals was proved and, in spite of Kelly's denials and the protestations of the trial judge advocate the testimony of the defense witnesses is corroborated by the record and we regard the conclusion as inescapable that signals were used as charged. In this connection it should be noted that the trial judge advocate failed to take the stand to deny the use of signals although in argument he stated:

> "...-well, when the trial judge advocate is on trial as it were for corruption and collusion, under these circumstances even the most uninformed individual would know that a rebuttal would be forthcoming from the person who is the accused.... meaning myself. <u>So at the proper time, if the court please, I will ask to be sworn in my own behalf</u> and will also bring in the alleged perjurer, Agent Kelly, to defend himself at the proper time." (R 293, emphasis supplied.)

Three other incidents occurring during the trial lend credence to the charge made by defense counsel. In connection with the statement given

by accused Hunt to Agent Kelly, Hunt testified that when Kelly interviewed him he told Kelly that he had already made a statement to "CID Beck" and wanted that to go to court. In spite of this, Kelly insisted that Hunt sign a new statement which was not the same as the statement previously made (R 250). Argument developed as to the differences between the two statements and defense counsel asked for the original statement taken by Beck, stating he believed the prosecution had it. In reply the prosecution stated:

> "I would like to state for the record that I have no such statement, have never had or seen such a statement, and have never heard of such a statement." (R 251).

On cross-examination of Hunt the prosecution brought out that Hunt signed proposed Exhibit C-2. On redirect examination Hunt stated he signed only statements to Beck and to Kelly (R 260), and the defense then stated for the record that proposed Exhibit C-2 came from the prosecution's table. The prosecution then brought out that proposed Exhibit C-2 was apparently given to Tucker, not to Beck, as follows:

> "Q Pvt Hunt, Lt Deutsch took a paper off of the prosecution's table just as he said and handed it to you and asked if that was the statement you gave to a CID Beck, as you call him. Did you ever hear of CID Beck?
>
> "A Well, sir, I don't know if it was the same man...the right man.
>
> "Q Isn't there a name on here saying 'Willis D Tucker'?
> "A Yes, sir.
>
> "Q So you couldn't have given it to Beck, could you?
> "A I was told it was his name - CID Beck." (R 261).

While it is true that the prosecution's disclaimer of knowledge of a statement given by accused Hunt to an agent named Beck is technically correct, nevertheless in its context the disclaimer is definitely misleading.

In the course of an argument as to disregarding the testimony of Agent Kelly, the defense referred to testimony given by Kelly and stated that it was unheard of for a trial judge advocate, after a case had been referred to him for trial, remaining in touch with an agent assigned to investigate the case, taking statements over the telephone and having the statements written up for the agent. The trial judge advocate replied:

> "Certain discrepancies, if the court please. This matter was referred to me by 1st Indorsement on 13 December 1945...

> I mean 10 January 1946. That is the day, gentlemen, that I became the trial judge advocate...but I point out that at the time Agent Kelly was making this investigation I definitely was not the trial judge advocate, and so far as I was concerned I would never be the trial judge advocate if there was some other officer here who not only had the enthusiasm to be the trial judge advocate but also was willing to do all the rest of it at the same time...." (R 315; emphasis supplied).

The first indorsement of the charge sheet refers the case to "Captain Manuel Zechman, Inf (Armd) of general court-martial appointed by paragraph 11, Special Orders No. 166 Headquarters Chanor Base Section 13 December 1945." Although the case was not referred for trial until 10 January 1946, Captain Zechman, at the time Agent Kelly was making the investigation (12 to 26 December 1945 according to dates on statements taken by him and introduced as Prosecution Exhibits C-1, D-1, E-1, F-1, G-1, H-1, I-1, J-1, L-1, M-1, N-1, O-1 and P-1), had been appointed trial judge advocate of the general court-martial to which this case was referred for trial, and the misleading color of Captain Zechman's statement set forth above is unmistakable.

At the end of the prosecution's opening argument defense counsel stated:

> "If it please the court, I request that the first few statements of the defense's opening argument be taken on the record.
>
> "In his opening argument the trial judge advocate, Captain Zechman, stated before the court that he had the statements of the accused typed in his office and that Camp Blanding was mentioned in one statement as being in Georgia, and that other immaterial errors were deliberately incorporated in those statements so that the accused would correct them and initial them in order to knock out an expected defense that they might make that they had not read the statements." (R 321).

5. It is of some credit to the administration of military justice that we have been unable to find any precedent in our military law involving misconduct by a trial judge advocate at all comparable to the practices engaged in by the trial judge advocate in this case. The coaching of or signalling to a witness on the witness stand would merit the severest censure of any civilian court, and such tactics are infinitely worse when engaged in by a prosecuting attorney in a criminal action. The standard of conduct for a prosecuting attorney is well stated in 23 Corpus Juris Secundum, page 519:

"While it is the duty of the prosecuting attorney to see that the state's case is properly presented with earnestness and vigor, and to use every legitimate means to bring about a just conviction, he should bear in mind that he is an officer of the court, who represents all the people, including accused, and occupies a quasi-judicial position, whose sanctions and traditions he should preserve. It is his duty to see that justice is done. He must see that no conviction takes place except in strict conformity with the law, and that accused is not deprived of any constitutional rights or privileges. However strong the prosecuting attorney's belief may be in the prisoner's guilt, it is his duty to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, and this rule applies to counsel assisting the prosecuting attorney. The prosecuting attorney must conduct the trial in accordance with the rules of law and the rulings of the trial judge during the trial, particularly where accused is defended as a poor person."

In Berger v. United States, 295 U. S. 78, the United States prosecuting attorney was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner. The court ordered a new trial, stating that if the evidence was "overwhelming", a different conclusion might be reached. In the course of its opinion the court said (page 88):

"The United States Attorney is the representative not of an ordinary party to the controversy,but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Emphasis supplied).

Convictions have been reversed in a number of cases for the improper conduct of the prosecuting attorney. In People v. Creasy, 236 N.Y. 205, 140 N.E. 563, an important bit of documentary evidence, a letter, was admitted in evidence on the testimony of a witness that the letter was in the handwriting of the deceased. During the course of the trial, as appeared from affidavits made in support of a motion for a new trial, a handwriting expert employed by the prosecution discovered that the letter was in the handwriting of the witness, not of the deceased. The witness admitted writing the letter when questioned by an assistant district attorney. This information was not conveyed to the court and no effort was made to have the exhibit stricken from the record. In reversing the conviction the Court of Appeals said:

> "This ... in and of itself, and independent of any other error, necessitates a new trial. This was an error so fundamental, so substantial, that a verdict of murder in the first degree ought not to be permitted to stand. No one can say that a verdict of guilty would have been rendered if such evidence had not been received." (pages 569 of 140 N.E.)

See also Beck v. U.S. (CCA 8th, 1929), 33 F. (2d) 107; People v. Esposito, 224 N.Y. 370, 121 N.E. 344; People v. Paisley, 288 Ill. 310, 123 N.E. 573; People v. Wells (Calif. 1893), 34 Pac. 1087; CM 123945 (1919) Dig. Op. JAG, 1912-40, sec. 395 (55), p. 235.

It is hard to believe that an officer would so far forget his obligations as an officer and his duties as a trial judge advocate as to engage in the practices shown by this record. His actions both before and during the trial indicate a determination to convict these accused in any way possible. It is a fair inference from the record that when the case was presented to him the witnesses who took the original statements of the accused had been re-deployed and he then conceived the idea of having new statements executed before an agent who would be present at the trial. Agent Kelly seems to have been his instrument for this and his function was solely to warn the accused of their rights and secure new statements as to which he would be a witness. The trial judge advocate then made obvious errors in each of the new statements for the sole purpose of having the accused discover and correct them, thus cleverly preventing any defense that the statements had not been read. Agent Kelly, whose only connection with the case was to talk the accused into signing new statements, was understandably unable to identify them two months later, at the time of the trial. The way chosen by the trial judge advocate to overcome this obstacle by arranged signals was dishonest, a fraud upon the court and the accused. When confronted with proof of his malpractice the trial judge advocate had Agent

Kelly resume the stand to deny the malpractice and also to explain why he was able to identify the accused the first time and unable to do so the second time. Further, on two occasions the trial judge advocate made misleading statements to the court. It would have been bad enough had the trial judge advocate been a layman, untrained in the law, but when we find from War Department records that the trial judge advocate in this case is a lawyer, his deplorably base resort to deceitful trick and stratagem becomes most highly censurable. The Board of Review regrets that a member of the legal profession should stoop to such gross chicanery and palpable fraud, wandering so far from the path of professional rectitude charted by the code of legal ethics - a code which binds the conscience and steers the course of every lawyer worthy of the name. To leave unnoticed the wretched misconduct of the trial judge advocate would be to place implied approval upon trial devices so livid with infamy as to constitute, were they sanctioned, not only an irrefutable indictment of the system of military justice but also an abdication of the basic democratic concept of justice under law.

Nor can we pass in silence the extraordinary statement made by the Staff Judge Advocate in his dissent to the conclusions and recommendations of the Assistant Staff Judge Advocate who reviewed the record of trial. The reviewing officer recommended:

> "Because of the conduct of the Trial Judge Advocate it is recommended that the sentences be disapproved and the record referred for rehearing before another court."

The Staff Judge Advocate opened his dissenting opinion with these words:

> "Although I concur most heartily in the indignation of the reviewer, <u>and under normal conditions would agree with his recommendations, it is my opinion that a rehearing will result in these men being freed since an investigation has shown that a retrial is well nigh impossible</u>". (Emphasis supplied.)

6. We should like to hold the findings and sentences in this case legally insufficient solely on the ground that the sharp and dishonest practices of the trial judge advocate contributed <u>to some extent</u> to the convictions of the accused. However we are constrained by Article of War 37 and by precedent to analyze the evidence to determine the exact contribution of the dishonesty to the convictions.

Extra-judicial statements of all the accused except <u>Donnell</u> were introduced into evidence through the testimony of Agent Kelly. The confessions of the following accused were admitted in evidence over objection, the objection in each case being based on testimony given by the

accused, which, if believed, would be grounds for refusing the exhibit: Scott (R 221; Ex. I-1; R 174, 176); Kennedy (R 216; Ex. C-1; R 205, 211); Lewis (R 231 Ex. N-1; R 227, 230); Douglas (R 239; Ex. E-1; R 235, 237, 238). In view of the practices engaged in by Agent Kelly on the witness stand and his subsequent denials and explanations (which the record shows to be false), we cannot give any credence to his testimony in support of the voluntary nature of the above extra-judicial statements. It follows that they were improperly admitted into evidence.

The confession of the accused Turner was admitted into evidence over objection that Agent Kelly, who was the only witness who identified Turner's signature on the document, was disqualified (R 232; Ex. D-1). This objection should have been sustained.

The confessions of the following accused were admitted into evidence without objection: McCann (R 246, Ex. H-1); Flint (R 247; Ex. L-1); Owens (R 264; Ex. M-1); Virgil (R 265; Ex. G-1); Robison (R 268; Ex. P-1). In each case the only witness to testify that the confessions were signed by the accused was Agent Kelly. Inasmuch as this identification of each of the accused was vitiated by the fraud of Kelly and the trial judge advocate, we hold that these confessions should not have been received.

As to Hall and Peaches, each took the stand and testified that he signed the offered document. It was thereupon admitted into evidence without objection (R 225; Ex. J-1, R 245; Ex. O-1). There was no ground therefore for refusing the admission of these exhibits. Their effect will be discussed later.

As to all of the accused except Donnell, Hall and Peaches, we must apply the well-settled rule, quoted in CM 238696, White, 24 BR 321 on page 330 as follows:

> "The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C.M. 130415 (1919). (Dig. Op. JAG, 1912-30, sec. 1284; CM 237711, Fleischer)."

With this in mind we shall examine the other evidence introduced in support of each specification, disregarding the confessions improperly admitted.

Charge I.

Specification 1. This is a general specification alleging a conspiracy. No evidence specifically relating to it alone was introduced and it must stand or fall on the sufficiency of the other specifications.

Specification 2. There is no evidence with respect to this.

Specification 3. Finding of not guilty, on motion.

Specification 4. (misappropriation of a Government truck, 25 October 1945, Owens and Virgil). The evidence showed that Owens was driving truck number 6 of his organization out of a depot. The truck was full of clothing. He had a trip ticket which corresponded with the number of the vehicle and he stated that Sergeant English arranged for him to drive the truck (R 133, 134). Sergeant English testified that Owens told him he wanted to pick up the mess sergeant and that English told him to take truck number 6. English did not authorize him to haul merchandise, but English was not the dispatcher (R 319, 320). Inasmuch as English was not the dispatcher and Owens had a trip ticket made out for the truck, we do not believe that the evidence compels findings of Owens' guilt. There is no evidence connecting Virgil with this specification.

Specification 5 (misappropriation of a Government truck 22 October 1945, Lewis and Hall). Hall's extra-judicial statement (R 225, Ex. J-1) admits that he left a load of material at Depot E-1 on 22 October 1945, was approached by another soldier and asked if he wanted to make some money. Hall agreed so they went to a cafe where Hall was given a requisition which he knew to be a fake. He then drove back into the depot in his truck, handed in the requisition and was arrested. The only other evidence relating to this offense is contained in the deposition of Captain Hawes (R 125, 126; Ex. R-1). The witness states in this deposition that a Government truck was parked in front of the office but fails to connect Hall with the truck. There is thus no evidence of a corpus delicti to support Hall's confession. Lewis admitted to Captain Hawes that he was with the driver of the truck, but there is no evidence that this truck was misappropriated, except in Hall's confession, which is not admissible against Lewis. The proof is therefore insufficient.

Specifications 6, 7 and 8. There is no evidence as to these specifications.

Specification 9 (misappropriation of a Government truck on 3 November 1945, Kennedy, Robison and Donnell). The evidence showed that Kennedy and Robison made arrangements with civilians on 2 November 1945 for Robison to drive a truck to a depot the next day (R 63) and that Robison drove a truck into a depot on the date in question (R 64, 65, 70). There was no evidence that the truck was a Government vehicle, nor was there any description of it. There is no evidence further connecting Kennedy with this specification. In our opinion this falls far short of compelling evidence of misappropriation. As appears from the discussion of Charge II, Specification 6, infra, there is no competent evidence connecting Donnell with this transaction.

Specification 10 (attempted larceny of Government clothing 22 October 1945, Lewis, Hall and Turner). On 22 October 1945 Turner asked the witness Harris to write out a requisition for him. Harris complied, made out a requisition, signed "William Schumacher" to it and gave it to Turner who said he was going to take it downtown, get a stamp on it and get it fixed up (R 36, 37). The witness identified the requisition in question as Exhibit A. Exhibit A is not a genuine requisition (R 83). Hall's confession admits going to a depot on 22 October, handing in a fake requisition, and being arrested (R 225; Ex. J-1). In the deposition of Captain Hawes (R 125, 126; Ex. R-1), he states that he was the commander of sub-depot E9 on 22 October 1945, that on the afternoon of that day a clerk in the depot gave him a paper with "Requisition" printed on it, bearing number 31945 - 27-45. He saw Hall and referring to this requisition, asked: "Who are you drawing these supplies for?" Hall pointed to the second typed line of the requisition. Lewis was asked: "Did you come here with the driver of this truck?" and he replied in the affirmative. An Army truck standing in front of the office was one-third filled with bales of clothing. The bales and the nomenclature were the same as the depot stock. The requisition was further described in the deposition as "this instrument which I will mark and which we will refer to as the prosecution's proposed exhibit 'A', and which has written the word 'Requisition' and bears the number 31942-27-45, and the date of 22 October 1945". The witness did not know whether this requisition was genuine.

Prosecution Exhibit A is not genuine. It meets the scanty description set forth in the deposition but there is no further evidence that it was the requisition presented by Hall. We believe that the failure to more definitely connect the two instruments is fatal to the findings of guilty. Without sufficient evidence to establish this, there is no corpus delicti to support Hall's confession. There is no proof that the false requisition procured by Turner was used in an attempt to obtain Government clothing. Lewis' connection with the transaction is extremely vague.

Charge II.

Specification 1 (larceny of Government clothing 25 October 1945, Virgil and Owens). A tally-out, Prosecution Exhibit S (R 99), shows items issued against a requisition, Prosecution Exhibit Z (R 109). Prosecution Exhibit Z is a false requisition received in the regular course of business (R 109). A handwriting expert testified that, based on comparison with Prosecution Exhibits D and M-1 (R 264), Owens signed the tally-out, Prosecution Exhibit S (R 146, 147). On 25 October 1945, the date of the requisition and the tally-out, Owens was seen driving a truck away from a depot, and bales of clothing were in the truck (R 132). A few minutes later Owens' truck was parked in front of military police headquarters and Owens was inside. He admitted having possession of Prosecution Exhibit U-1, which is a carbon copy of a requisition (R 135). The contents of the truck generally conformed to the requisition (R 137). Prosecution Exhibit U-1 appears to be a carbon copy of Exhibit Z, although there is no evidence of this.

The handwriting expert based his opinion on comparison with Prosecution proposed Exhibit D, which was never received into evidence (R 51) and Exhibit M-1, which was a statement stated by Agent Kelly to have been signed by Owens, and which, for reasons heretofore stated, must be disregarded. Therefore there is no basis for the handwriting expert's opinion and testimony that Owens signed the tally-out, Exhibit S, and this evidence cannot be considered. The remaining evidence is not compelling. There is no evidence connecting Virgil with this offense.

Specification 2 (larceny of Government clothing 22 October 1945, Scott). The only evidence connecting Scott with this specification is that his handwriting appears on tally-outs which show clothing issued against a false requisition. This is no proof of asportation of the property and is not sufficient evidence. Further, the evidence is contradictory, the requisition in question appears to be dated 25 October 1945 and the tally-outs (Pros. Ex. W & X) are dated 22 October 1945.

Inasmuch as the accused Peaches was found guilty of six of the remaining seven specifications of Charge II, it is appropriate to discuss his confession at this point. He was found guilty of the following specifications (in conjunction with other accused):

Specification 3 alleging larceny of Government clothing on 7 October 1945.

Specification 4 alleging larceny of Government clothing on 9 October 1945.

Specification 5 alleging larceny of Government clothing on 15 October 1945.

Specification 7 alleging wrongful disposal of Government clothing on 9 October 1945.

Specification 8 alleging wrongful disposal of Government clothing on 7 October 1945.

Specification 9 alleging wrongful disposal of Government clothing on 15 October 1945.

There is no evidence connecting Peaches with any of these offenses except his confession (R 245; Ex. O-1), which we held, supra, was properly admitted. In the confession he admits that on or about 12 October 1945 he drove his truck to Depot E-9, presented a requisition which had been given to him by one of the other accused, and, after it was filled, drove the truck to a barn where it was unloaded by civilians. There is no corpus delicti for offenses committed on 12 October 1945. Offenses were committed before and after that date, but we cannot say which, if any, were referred to in Peaches confession. In our opinion the confession is not supported by evidence of a corpus delicti.

Specification 3 (larceny of Government clothing 7 October 1945, Peaches, Flint, Turner). A tally-out, Prosecution Exhibit O (R 115) shows the issue of clothing on Prosecution Exhibit N (R 114), which is a false requisition (R 94). The handwriting expert gave his opinion that the tally-out was signed by Flint (R 147, 148). This opinion was based on comparison of the writing on the tally-out with the writing appearing on Prosecution Exhibits C (R 43), L-1 (R 247), T-1 and S-1 (R 129). This does not establish asportation, and is not proof of such character as to compel a finding that accused is guilty of larceny of the items listed in the tally-out.

There is no evidence connecting Peaches and Turner with this offense.

Specification 4. No evidence connects any of the accused with this specification.

Specification 5 (larceny of Government clothing 15 October 1945, Flint, McCann, Peaches and Turner). Tally-outs, Prosecution Exhibits J, K, L (R 90) and M (R 93) show that the various items of clothing listed in Prosecution Exhibit B were issued (R 87). Exhibit B is a false requisition (R 84). It was procured by Turner (R 37, 38). In the opinion of a handwriting expert, Turner signed the tally-outs, Exhibits K and L (R 147); and Flint signed the tally-out, Exhibit M (R 147, 148).

The expert opinion as to Turner's handwriting was based on Prosecution Exhibits Q-1 and D-1. Exhibit Q-1 is an adjusted service rating card, introduced as an official Army record. There is no testimony that it was signed by Turner, nor is there a certificate by the custodian that it is what it purports to be (R 124, 125). This exhibit was improperly admitted. Exhibit D-1 is an extra-judicial statement admitted on the testimony of Agent Kelly (R 232). It cannot be considered. Thus there is no competent evidence on which the testimony of the expert could have been based and his testimony cannot be accepted. Proof that Turner procured a false requisition and that articles were apparently issued upon it, is not compelling evidence that he was guilty of the larceny of those articles.

Evidence that Flint's writing appears on one of the tally-outs is not compelling evidence of guilt, since the tally-out alone does not prove asportation, and the same would apply as to Turner even had it been competently proved that he signed tally-outs. No evidence indicates that McCann and Peaches were concerned in this transaction.

Specification 6 (larceny of Government clothing 3 November 1945, Kennedy, Robison, Donnell). Evidence establishes that a false requisition, Prosecution Exhibit Y (R 107), was prepared on the evening of 2 November 1945 with the knowledge, and to some extent, the assistance, of Kennedy and Robison (R 72, 75, 76, 77, 79) and arrangements were made for Robison to drive a truck to a depot the next day (R 63). However, the false requisition was not given to either Kennedy or Robison, but to a civilian named Ledent (R 63, 78). Robison, driving a truck, was directed to the depot and entered it. Another truck was following him but there was no evidence that the other truck went into the depot (R 64, 65, 70). The false requisition was received in the regular course of business (R 107) and Prosecution Exhibit V (R 105) is a tally-out for the items shown on the requisition (R 114). In the absence of evidence that Kennedy and Robison had possession of the false requisition, or had any connection with this offense other than stated above, the proof of their guilt is not compelling.

The prosecution attempted to show that the signature "Robert Donnell" on Exhibit V is that of the accused Donnell (R 147). Inasmuch as the testimony of the handwriting expert was based on purported handwriting of Donnell's not admitted into evidence (R 51; proposed Ex. E), it cannot be considered. Again, even though it be assumed that Donnell signed the tally-outs, that does not prove asportation of the property.

Specifications 7, 8 and 9. There is no evidence relating to these specifications in the record.

7. The charge sheet shows the age and service of the accused as follows: Virgil, age 34, inducted Camp Shelby, Mississippi 13 December 1942;

Scott, age 29½, inducted 8 July 1943 at Detroit, Michigan; Kennedy, age 26, inducted East St. Louis, Illinois 26 June 1942; Douglas, age 22, inducted Camp Forrest, Tennessee 6 February 1943; Lewis, age 25, inducted Camp Blanding, Florida 27 January 1943; Donnell, age 22½, inducted Greensboro, North Carolina 11 March 1943; Flint, age 28, inducted Abilene, Texas 2 November 1942; Owens, age 24, inducted Camp Shelby, Mississippi 9 September 1942; McCann, age 26, inducted Camp Shelby, Mississippi 13 August 1942; Peaches, age 22½, inducted Camp Shelby, Mississippi 1 December 1942; Turner, age 23½, inducted Fort Bragg, North Carolina 25 February 1943; Robison, age 22½, inducted Newberry, South Carolina 12 March 1943; Hall, age 21, inducted Fort Hayes, Columbus, Ohio 19 March 1943. None of the accused had prior service.

8. The court was legally constituted and had jurisdiction of the persons and the subject matter. For the reasons stated the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty and the sentences as to each of the accused.

Seymour W. Wurfel, Judge Advocate.

N. Mason Olive, Judge Advocate.

Walter H. Davis, Judge Advocate.

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AUG - 6 1946

JAGQ CM 314258 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Western Base Section, United States Forces, European Theater, APO 513, c/o Postmaster, New York, N. Y.

1. In the case of Staff Sergeant Robert Virgil (34488763) and Private First Class Fred Owens, Jr. (34423610), both of 657th Quartermaster Gasoline Supply Company; Corporal Daniel E. Scott (36866355), of 4004th Quartermaster Truck Company; Corporals Elmer L. Kennedy (36061250) and Melvin D. Douglas (34529010), Technician Fifth Grade Jonathan Lewis (34541545), Privates First Class Thomas Flint (38231418) and Clyde McCann (34343915), Privates Norah Peaches (34484989) and William F. Turner (34667876), all of the 956th Quartermaster Service Company; Private First Class Robert J. Donnell (34669115) and Private Charlie L. Robison (34648361), both of 4377th Quartermaster Truck Company; and Private Marvin Hall (35054877), 3861st Quartermaster Truck Company, attention is invited to the foregoing holding by 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. For the reasons stated in the holding by the Board of Review, I recommend that the findings of guilty and the sentence be vacated.

2. Although the evidence, including the extra-judicial statements of most of the accused, which was received by the court is strongly indicative of guilt, the misconduct of the prosecution as analyzed in the holding was of such damaging character that I have no alternative other than to concur in the conclusions of the Board of Review. It has always been the duty of a trial judge advocate of a court-martial to prosecute fairly and honestly. While his primary duty is to prosecute, any act inconsistent with a genuine desire to have the whole truth revealed is prohibited. It is unthinkable that a trial judge advocate would resort to any device which perpetrates a fraud upon a court or results in unfairness to an accused person. Manifestly, misconduct of the kind indicated cannot be overlooked because of any difficulty the Government may encounter in the prosecution of its criminal actions.

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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 314258).

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.

JAGK CM 314296

15 AUG 1946

UNITED STATES v. Staff Sergeant FRED E. LESCALLETT (33729284), Company C, Second Engineer Training Battalion, Army Service Forces Training Center, Fort Belvoir, Virginia.	MILITARY DISTRICT OF WASHINGTON Trial by G.C.M., convened at Fort Belvoir, Virginia, 7 and 8 May 1946. Dishonorable discharge and confinement for seven (7) years. Penitentiary.

HOLDING by the BOARD OF REVIEW

SILVERS, McAFEE and ACKROYD, 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 found guilty of larceny of Government property of the value of $13.85, in violation of Article of War 94 (Specification 1, Charge I), and of wrongfully detailing enlisted men to leave their posts without passes for the purpose of repairing used cars (Specification 1, Charge II), of wrongfully accepting money from enlisted men for passes (Specification 2, Charge II), of wrongfully striking five enlisted men (Specifications 3, 4, 5, 6, 7, Charge II) and of unlawfully and under false pretenses accepting $56.00 from enlisted men as a wedding present while being bound by an existing marriage and not intending to become married (Specification 8, Charge II), all 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 for seven years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. The only question for consideration is the legality of the designated place of confinement. The reviewing authority apparently considered a United States Penitentiary the appropriate place of confinement in view of the findings of guilty of Specifications 2 and 8 of Charge II. Specification 2, as affected by the exceptions of the findings, reads as follows:

"In that Staff Sergeant Fred E. LesCallett, Co. "C", 2nd Engineer Training Battalion, ASFTC, Fort Belvoir, Virginia, did, at Fort Belvoir, Virginia, on or about the months of February and March 1946, wrongfully and unlawfully abuse his authority as Platoon Sergeant of the 1st Platoon, Co. "C", 2nd Engineer Training Battalion, ASFTC, Fort Belvoir, Virginia, by accepting money for the privilege of receiving passes from the following members of said organization in the following amounts to wit: Pvt. Leland S. Hoskins, $5; Pvt. Dewey W. Stokes, $2; and Pvt. Jack H. Minnick, $5."

The said Specification 8, as affected by the exceptions and substitutions of the findings, reads as follows:

"In that Staff Sergeant Fred E. LesCallett, Co. "C", 2nd ET Bn, ASFTC, Fort Belvoir, Virginia, did, at Fort Belvoir, Virginia, on or about 28 February 1946, wilfully and unlawfully and under false pretenses, accept from (certain named enlisted men, specific amounts) of "C" Co, 2nd ET Bn, ASFTC, Fort Belvoir, Virginia, a contribution of fifty-six dollars ($56.00) more or less, lawful currency of the United States of America, all of said persons being in the military service of the United States, said gifts being as a wedding present when he the said Staff Sergeant Fred E. LesCallett was bound by an existing marriage and did not intend to become married."

Article of War 42 provides in pertinent part:

"* * * no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental limits of the United States, * * * or by the law of the District of Columbia, * * * and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year."

It therefore, becomes necessary to examine the mentioned specifications, as modified by the exceptions and substitutions of the findings, in the light of applicable Federal or District of Columbia statutes. It is, of course, unnecessary to consider the evidence adduced in respect thereto, for insofar as such evidence reveals matters outside the proper scope of such specifications, it is immaterial and the accused can only be punished for the offense as charged or for an offense included in that charged.

As to Specification 2, Charge II:

Section 117 of the Criminal Code of the United States (18 USC 207) provides that:

> "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; * * * shall ask, accept, or receive any money, * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be * * * imprisoned not more than three years * * *." (Underscoring supplied.)

The Criminal Code of the United States also provides (18 USC 753f) that all persons convicted of an offense against the United States shall be committed to the custody of the Attorney General who shall designate the place of confinement, except that any sentence of imprisonment punishable by imprisonment for a term of one year or less shall not be served in a penitentiary without the defendant's consent.

According to paragraph 9, AR 615-275, 2 September 1944, in effect when the offense described in the specification under discussion was committed, passes could be granted only by the commanders or the chiefs of any forces, services, commands or installations commanded by, or the appropriate command of a general officer, the commanders of posts, camps, stations, and military installations, and the commanders of regiments, groups and separate units to the enlisted men under their command. Any of the above officers could delegate to "such officers of his command," as might be necessary, the authority to grant passes for periods not exceeding three days. It is apparent, then, that the accused in this case had no authority whatsoever "as Platoon Sergeant" to grant the passes for which he was found to have received illegal remuneration. Thus, he was not acting "in any official authority" in so doing nor was his decision in "any matter" which might "by law be brought before him in his official capacity" influenced by such renumeration. (See Thomson v. United States, 37 App. D. C. 461.) Although the act of which he was found guilty under Specification 2, Charge II, was a plain violation of Article of War 96, due to the military aspect

of the case, it was not a violation of the above quoted Federal statute. Therefore, penitentiary confinement is not warranted under the finding of guilty of this Specification. This is so even though the punishment authorized for the offense described in the mentioned Federal statute may be considered as a guide in fixing the maximum punishment for the offense committed here, neither this latter offense nor one closely related thereto being found in the Table of Maximum Punishments, Manual for Courts-Martial, 1928. (See CM 272944, Wilburn, 4 Bull. JAG 90; CM NATO 1406, Bell, 3 BR (NATO-MTO) 91.)

As to Specification 8, Charge II:

The District of Columbia Code (22-1301) provides that:

"Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, * * * shall, if the value of the property or the sum or value of the money or property so obtained * * * is $50 or upward, be imprisoned not less than one year nor more than three years * * *." (Underscoring supplied.)

The District of Columbia Code (24-401) also provides that where the sentence is imprisonment for more than one year it shall be in the penitentiary.

Here the accused was found guilty of a specification alleging that he wilfully and unlawfully "did accept" a gift "under false pretenses" whereas the above quoted District of Columbia statute is intended to punish one who, with intent to defraud, "obtains" something of value "by any false pretense." The phrase "accept under false pretenses" is not the equivalent in meaning of the phrase "obtain by false pretenses." The latter is active, the former passive. The latter bears a connotation of cause and effect in that the accused actively participated in the false pretenses in question and that the person wronged relied on them and would not have given up his property without them, whereas in the former case the accused need not have participated in the hoax at all and the false light in which the accused had been cast need not have been the determining factor in the transfer of possession. Therefore, although the conduct of which the accused was found guilty under this Specification was clearly a violation of Article of War 96, due to the military factors involved, and the offense committed may be considered closely related to that of "obtaining money or other property under false pretenses," for which the maximum punishment is found in the Table of Maximum Punishments, Manual for Courts-Martial, 1928, it was error to rely on the mentioned District of Columbia statute as authority for penitentiary confinement. It is, therefore, unnecessary to consider the further question as to whether the use of the words "wilfully and unlawfully," as used in the Specification, are equivalent in legal effect to the words "with intent to defraud," as used in the District of Columbia Code.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years in a place other than a United States Penitentiary.

Christy D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Eckstrand, Judge Advocate

JAGK - CM 314296 1st Ind AUG 23 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Military District of Washington, Room 5-B-518, The Pentagon, Washington 25, D. C.

1. In the case of Staff Sergeant Fred E. LesCallett (33729284), Company C, Second Engineer Training Battalion, ASF Training Center, Fort Belvoir, Virginia, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years in a place other than a penitentiary, which holding is hereby approved. Upon designation of an appropriate place of confinement other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the record of trial, 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 314296).

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 314335

26 JUN 1946

UNITED STATES v. Private CHARLES R. SIMPSON (13214855), Company B, 4th Training Regiment	)	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Fort McClellan, Alabama, 2 May 1946. Dishonorable discharge and confinement at hard labor for one (1) year and six (6) months. Branch Disciplinary Barracks, Camp Gordon, Georgia

HOLDING by the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, Judge Advocates

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

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

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

Specification: In that, Private Charles R. Simpson, Company B, 27th Training Battalion, 4th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, did, without proper leave, absent himself from his organization at Fort McClellan, Alabama, from about 0300 hours, 24 March 1946 until about 0530 hours, 24 March 1946.

CHARGE II: Violation of the 69th Article of War.

Specification: In that Private Charles R. Simpson, Company B, 27th Training Battalion, 4th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, having been duly placed in confinement in Ward 54, Regional Hospital, on or about 19 March 1946, did at Ward 54, Regional Hospital on or about 24 March 1946, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Charles R. Simpson, Company B, 27th Training Battalion, 4th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, did at Headquarters Company No. Two (#2), IRTC, Supply Depot, on or about 24 March 1946, feloniously take, steal, and carry away: One (1) Battle Jacket; One (1) shirt wool O. D; One (1) trousers, wool O. D; One (1) belt; One (1) cap, wool O. D; and Eight Dollars ($8.00) in cash, valued over Twenty Dollars ($20.00), the property of Private First Class Jackson B. Alexander.

The accused pleaded guilty to all Charges and Specifications and after the meaning and effect of said plea had been explained to him, stated that he desired it to stand. No evidence of previous convictions was introduced. The accused elected to make an unsworn statement through defense counsel, the substance of which amounts to a plea for clemency. After both sides had rested, the law member directed that the Specification of Charge III be amended to charge the accused only with the larceny of $8.00, the property of the person named in the Specification. He further directed that the following Charge and Specification be added:

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

Specification: In that Private Charles R. Simpson, Company B, 27th Training Battalion, 4th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, did at Headquarters Company No. Two (#2), IRTC, Supply Depot, on or about 24 March 1946, feloniously take, steal, and carry away: one (1) Battle Jacket; one (1)shirt wool O. D.; one (1) trousers, wool O.D; one (1) belt; one (1) cap, wool O.D; of the value of more than twenty dollars ($20.00), but less than fifty dollars ($50.00), issued for use in the military service of the United States.

The court found the accused guilty "Of all Specifications (as amended)" and "Of all Charges (as amended)" and sentenced him to dishonorable discharge, total forfeitures and confinement at hard labor for one (1) year and six (6) months. The reviewing authority approved the sentence designated the Southeastern Branch, United States Disciplinary Barracks, Camp Gordon, Georgia, or elsewhere as the Secretary of War may direct as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The prosecution's evidence together with accused's plea of guilty is legally sufficient to support the findings of guilty of Charges I and II and the Specification under each. It is also legally sufficient to support the findings of guilty of Charge III and the Specification thereunder as amended by the law member, though the procedure adopted in so amending the Specification was irregular and improper. In view of the fact that this action reduced the grade of the offense, thereby resulting in accused's favor it cannot be considered prejudicial to his substantial rights. However, when the law member added a new Charge and Specification, containing matter

which he had striken from the Specification of Charge III, as a violation of the 94th Article of War, his action was gross error highly prejudicial to the substantial rights of accused.

Even had the court by substitutions and exceptions found the accused guilty of larceny of the money from the person as alleged in violation of Article of War 93 and guilty of the theft of other articles of property of the United States issued for use in the military service in violation of Article of War 94, so much of the findings thereof as related to the theft of United States property could not stand. This is true for two reasons. First, such substitution would be unauthorized, for larceny of property of the United States issued for use in the military service in violation of Article of War 94 is an offense containing elements which are not included in the offense of simple larceny denounced by Article of War 93 (CM 186919), Sec 451 (43)Dig Ops JAG 1912-40). Second, when the court made its finding with respect to the Specification of Charge III, it had exhausted its authority to make a further finding under the original Specification, and was not authorized to find accused guilty of a second and separate offense under the original specification. Moreover, the accused was not under the original specification put on notice that he would be called upon to defend himself against the offense alleged in the Specification of Charge IV. Accordingly the finding of guilty of Charge IV and the Specification thereof cannot be sustained.

4. For the reasons above stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge IV and its Specification, legally sufficient to support all other findings of guilty and legally sufficient to support the sentence.

13 JUL 46 AM

DISPATCHED
WAR DEPARTMENT
J.A.G.O.

On Leave, Judge Advocate.

R Hottenstein, Judge Advocate

Joseph J Stern, Judge Advocate

(112)

JUL 12 1946

JAGH - CM 314335 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding Officer, Infantry Replacement Training Center, Fort McClellan, Alabama

1. In the case of Private Charles R. Simpson (13214855), Company B, 27th Training Battalion, 4th Training Regiment, I concur in the holding of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Charge IV and its Specification be disapproved. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50½, you will have authority to order execution of the sentence.

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

(CM 314335)

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

201-SIMPSON, Charles R. (Enl) GNRMJ 2nd Ind DCT/esh
(12 Jul 46)
HEADQUARTERS, IRTC, Fort McClellan, Alabama, 22 July 1946

TO: The Judge Advocate General, War Department, Washington, D. C.

Complied with.

FOR THE COMMANDING GENERAL:

GRADY W. BUTLER
Major, Infantry
Actg Asst Adjutant General

2 Incls:
1-Record of Trial
2-GCMO #304 (6 copies)

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

JAGH - CM 314374

24 OCT 1946

UNITED STATES	)	SEATTLE PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Fort Lawton, Washington, 8 and 23 May 1946. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant FRANCIS J. McCARREN (0-1950904), Transportation Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SCHWAGER, 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 the 85th Article of War.

Specification: In that 2nd Lieutenant Francis J. McCarren, Transportation Corps, Army of the United States, was, at Camp McCoy, Wisconsin, on or about 16 April 1946, found drunk while on duty as troop train commander of main 12069, Seattle, Washington to Camp McCoy, Wisconsin.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one (1) year. 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 from 14 to 16 April 1946, accused was the troop train commander of a train en route from Fort Lawton, Washington, to Camp McCoy, Wisconsin (R 25-27; Pros Ex 1, 2). When the train arrived at Sparta, Wisconsin, on the night of 16 April, personnel from Camp McCoy boarded the train, obtained the tickets for the movement

from accused's compartment and turned them over to the conductor (R 31, 43). When they entered the accused's compartment, he was slumped down in a seat with the lower part of his body stretched out on the floor. He was holding a liquor bottle in his right hand and his answers, in response to their questions, were incoherent. Two whiskey bottles, both nearly empty, were found in the luggage rack of his compartment, and the compartment had a strong odor of whiskey (R 36, 43). Three witnesses who saw him at that time testified that, in their opinion, he was drunk (R 29, 31, 43). Also, four witnesses who saw accused a short time later, when the train arrived at Camp McCoy, testified that he was drunk (R 33, 35-36; Pros Ex 8). He was unable to leave the train without assistance and it was necessary for an officer stationed at Camp McCoy to complete the paper work for the trip because of accused's drunken condition (R 51).

4. The accused, after having been apprised of his rights as a witness took the stand in his own defense and testified under oath that his duties had prevented him from getting any sleep on the night of 15 April (R 72, 87), that he had not been drinking on the evening of 16 April and was not intoxicated but was very sleepy (R 87, 93, 95, 97-99). Accused further stated that the prosecution witnesses were mistaken in their belief that he was drunk (R 93, 95, 97), and that the whiskey bottles found in his compartment were those confiscated by him from soldiers on the train and emptied into the commode in his compartment (R 71).

On cross-examination, the prosecution read excerpts from the testimony of four witnesses at the pre-trial investigation (R 93-94, 96, 98) and asked accused if he had heard the testimony, and if he had cross-examined the witnesses. The defense's objection to these questions was overruled, but the law member warned the court that the accused was under no obligation to cross-examine the witnesses at the investigation (R 96-98).

Through his counsel, accused submitted an unsworn statement relative to his military service (R 100-101). Received in evidence were two letters from accused's prior commanding officers, dated 13 May 1944, recommending that he be promoted from technician fifth grade to warrant officer, junior grade (Maritime) (Def Ex D and E). Also, a deposition showing that accused was not intoxicated when the train left St. Paul was introduced (Def Ex A). Three witnesses testified as to the good character of accused (R 58, 60, 63) and it was stipulated that his 66-1 Form showed efficiency ratings of 4.7 and 4.9, for the period from 1 July to 18 November 1945 and that he was not rated from 19 November to 31 December 1945 (R 68).

5. At the outset of the trial, the defense counsel, after reading to the court a copy of a letter written by accused on 2 May 1946, tendering his resignation for the good of the service in lieu of trial by court-martial, requested a continuance pending final action thereon. When this request was denied by the court, the defense entered a plea in bar of trial on the ground that the accused had a right to resign for the good of the service in lieu of trial.

The motion was properly denied. A tender of resignation does not divest the court of its jurisdiction to hear and determine the case, inasmuch as a resignation is not effective until accepted (par 6b, AR 605-275; par 5a, AR 35-1620; par 4, AR 35-1740; Winthrop's Military Law and Precedents, 2nd Ed, p 652).

The court erred in overruling the defense's objection to the reading, by the prosecution, of statements taken at the pre-trial investigation. However, three of the four witnesses whose testimony was thus read had previously testified at the trial, either in person or by deposition, and the statement of the fourth one, who did not testify at the trial, added nothing to the evidence against the accused. The statements were read for the purpose of showing that the accused declined to cross-examine the witnesses when they testified before the investigating officer, although their testimony was inconsistent with that of accused when he testified in his own defense at the trial. The law member twice warned the court that the accused was under no obligation to cross-examine these witnesses. The court's error in permitting the statements to be read did not, therefore, prejudice the substantial rights of the accused.

6. The evidence clearly establishes that the accused was on duty on the evening of 16 April 1946 and the allegation that accused was drunk is supported by the testimony of seven persons who observed his actions and condition on that evening. Other than accused, who flatly denied that he was drunk, no one who was present at the time in question had any doubt but that he was drunk on duty, as alleged. There is, therefore, ample evidence to support the finding of guilty.

7. The accused is 28 years of age, unmarried and has completed three years of high school. The records of War Department show that he was inducted 15 February 1943 and served as an enlisted man until 12 June 1945, when he was discharged to accept a commission. He was graduated from Transportation Corps Officer Candidate School, appointed a second lieutenant, Army of the United States and ordered to active duty 13 June 1945. On 22 March 1946, he was found guilty by a general court-martial of being drunk and disorderly in a public place and sentenced to be reprimanded and to forfeit $100.00 of his pay per month for four (4) months.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. 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 mandatory and confinement and forfeitures are authorized on conviction of a violation, in time of war, of the 85th Article of War.

A. Gottenstein, Judge Advocate

Wellemar A. Self, Judge Advocate

Henry A. Kluczyk, Judge Advocate

JAGH - CM 314374 1st Ind

WD, JAGO, Washington 25, D. C. NOV 7 1946

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 Second Lieutenant Francis J. McCarren (0-1950904), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty in violation of Article of War 85, and 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 (1) year. 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 and to warrant confirmation of the sentence. I concur in that opinion.

The accused, on the evening of 16 April 1946, while on duty as troop train commander of a train enroute from Fort Lawton, Washington, to Camp McCoy, Wisconsin, was unable to perform his duties due to his drunken condition. It was necessary for personnel from Camp McCoy to search his compartment for the tickets covering the movement and to complete the paper work for the trip. Seven witnesses testified that, in their opinion, he was drunk and two nearly empty whiskey bottles were found in his compartment, which smelled strongly of liquor. Accused explained his condition by testifying that he was over tired, not having slept on the previous night, and that the whiskey bottles had been confiscated by him from some of the enlisted men on the train and emptied into the commode in his compartment. At Camp McCoy, it was necessary for him to be helped from the train into a staff car.

On 22 March 1946, accused was found guilty, less than one month prior to the commission of the instant offense, by a general court-martial of being drunk and disorderly in a public place and sentenced to be reprimanded and to forfeit $100.00 of his pay per month for four (4) months.

I recommend that the sentence be confirmed but that the unexecuted portion of the sentence pertaining to confinement be remitted and that the sentence as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry the foregoing 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

(G.C.M.O. 350, 15 November 1946.)

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

DEC 26 1946

JAGQ - CM 314402

UNITED STATES v. Private ROBERT L. HEFFNER (15196780), 6th Troop Carrier Squadron	HQ PACIFIC AIR SERVICE COMMAND UNITED STATES ARMY Trial by G.C.M., convened at Fort William McKinley, 22-24 April 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
DICKSON, OLIVER and BOYLES, Judge Advocates

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

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

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Robert L. Heffner, 6th Troop Carrier Squadron, did, at APO 351 on or about 7 November 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Manila, Luzon, Philippine Islands, on or about 1 April 1946.

CHARGE II: Violation of the 92nd Article of War.

Specification: In that Private Robert L. Heffner, 6th Troop Carrier Squadron, did, at Manila, Luzon, Philippine Islands, on or about 26 March 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Daniel A. Kelly, a human being, by shooting him with a pistol.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. With three-fourths of the members of the court present at the time the vote was taken concurring the accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, or

such other place as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. As to the Specification and Charge I: Evidence for the Prosecution. A true copy of the guard report of Nielson Field, P.I., for 7-8 November 1945 was introduced without objection (R 6, 7; Pros. Ex. 1). The report contained the entry "Pvt. Robert L. Heffner escaped from stockade between hrs of 2030 and 0800 this date". Accused was arrested by Lieutenant Pelgen of the Manila CID at about 1930 on 1 April 1946 on board a ship which was due to sail from Manila about 12 hours later (R 72-75). In a pre-trial statement voluntarily made the accused stated he went AWOL from his organization on 11 November 1945, and that he spent the subsequent time on various islands in the Philippine Group (Pros. Ex. 21). In another pre-trial statement made voluntarily the accused said he escaped from confinement between the 5th and 11th of November 1945 while serving a special court-martial sentence; that he traveled around the Philippine Islands thereafter; that on 1 April 1946 he was apprehended aboard the SS FAIRFAX, which he had boarded, by answering to the name of a missing seaman, with the intention of going home on that vessel; and that he had Army, Navy and civilian clothes with him when apprehended (Pros. Ex. 22).

Evidence for the Defense. After being warned of his rights as a witness, accused testified under oath that he escaped from the guardhouse in November 1945 while serving a special court-martial sentence and thereafter went to various islands in the Philippine Group (R 104, 105); that he was apprehended by the CID aboard the SS FAIRFAX which he had boarded under the name of an absent seaman (R 110, 114), with the intention of going to Washington, D.C., to turn himself in to the military authorities and report "about some of the things that had been going on over here" (R 116).

4. As to the Specification and Charge II. Evidence for the Prosecution. Following his escape from confinement in November 1945 accused went to Samar Island with Charles Ford and the victim Kelly (R 21). Before the war Kelly owned a bar in Pasay, and he and Ford had been held in the same concentration camp by the Japanese for three years (R 21). Kelly was a black market operator (R 22, 31). While in Samar they met one Neal (R 21), a merchant marine (R 24). During January, 1946, enmity developed between accused and Kelly and there was considerable trouble between them (R 23). Kelly told Neal, "Whitey (accused) had better watch his step, it's either going to be him or me" (R 30). Kelly told Ford, "I don't like Heffner (accused)"; also, that some day Heffner and Kelly would tangle, and "It's either going to be me or Whitey" (R 22). On one occasion in Samar Kelly removed the cartridges from accused's gun and asked Neal to back him up if he went after accused. Kelly said he was out to get accused first. Neal at one time said something to accused about Kelly's threats (R 30). Ford, Neal, Kelly and accused all returned to Manila in

March 1946 (R 23). Kelly and his wife lived on the lower floor at 36 Tolentino Street (R 12, 13), and the second floor was occupied by a Philippine Army Captain and family (R 13, 14). Neal and Ford testified that Kelly always carried a gun (R 22, 30, 31), although Neal did not see Kelly with a gun on 26 March 1946 (R 31).

On the night of 26 March 1946 Neal went to the house of one Agby, looking for Kelly (R 8). Agby lived at 80 Tolentino Street (R 7). Neal there became involved in a heated argument with Kelly over some things he accused Kelly of stealing (R 25, 31). Ford was standing outside Agby's house. During the argument accused came to Agby's house at 2000-2100 (R 8, 9, 25). Accused said "Kelly, I want to talk to you"; Kelly replied "I want to talk to you, too" (R 25).

Kelly, Neal and the accused then left Agby's house, and Kelly and accused turned right down the street toward Kelly's house at 36 Tolentino Street (R 8, 10, 18, 22, 25, 26). Neal joined Ford and they walked away in the opposite direction to the left (R 18, 19, 22, 26). The Philippine Army captain's daughter, Gloria Tuason, was upstairs and heard three or four shots (R 13, 16), followed in about three minutes by the exclamation "Oh!, Oh!, Oh!" (R 14, 16) from the street in front of the house; and after about a three minute interval she heard five or six more shots (R 14). Later she went out on the front porch and looked down and saw Kelly lying face up in front of the house less than a yard from the front door (R 15). The Tuason's houseboy, Jose Espador, who was upstairs, also heard a group of three shots, followed by the shout "Oh" three times, and then a volley of six shots (R 46, 47). He recognized the voice which shouted "Oh" as Kelly's (R 47). Jose went downstairs in about half an hour and saw the body of Kelly lying close to the front of the building (R 47, 48). Agby remained in his home at 80 Tolentino Street after Neal, Kelly and accused departed. About a minute after they left Agby heard a scream from the direction of Kelly's home (R 8), and "Following that, maybe three screams, one after another, following that shots" (R 8). About two or three minutes after they left his house, Agby heard three consecutive shots, then after an interval of about a minute there were five more shots (R 9, 10). When Agby heard the screams he looked out and saw Neal standing alone by the lamp post in front of Agby's house (R 9).

Kelly's wife testified that she did not know of any ill-will between Kelly and the accused. On the night of 26 March 1946 she was in bed at 36 Tolentino Street when she heard eight shots outside the door. The shots were all in succession (R 37-39). On direct examination she testified that she did not hear any "talk or anything" outside the door (R 39). On cross-examination her pre-trial statement was introduced to the effect that she heard her husband arguing with a Filipino just before the

shooting (Def. Ex. A; R 40). Neal and Ford both testified that Neal found Ford in front of Agby's home and walked off in a direction opposite to that taken by Kelly and the accused. After walking 3 or 4 blocks, 300-400 yards, they heard shots in the direction from which they had come (R 18, 19, 22, 26). They heard one rapid fire volley of "about four or five" (R 19), or "two or three" (R 22), or "five or six" (R26) shots. They continued on to the Blue Jay Bar (R 19, 23, 26). Between half an hour and an hour later Ford and Neal entered the Merchant Marine Mate Bar and found accused there (R 19, 27). Accused was sitting at a table with two or three unknown Americans (R 20, 27, 29). Ford and Neal joined them (R 20, 27). Accused said he had shot Kelly (R 29). Accused borrowed a handbag from Pacita, a waitress at the Mate Bar, sometime between 2200 and midnight on 26 March 1946 (R 28, 60, 62). Accused went outside and when he returned he gave the bag back to Pacita. It was heavy and she could feel guns, she thought three guns, in the bag. Accused warned Pacita not to open the bag (R 59). Later accused took the bag outside again and when he returned and gave it to Pacita the bag was no longer loaded (R 60). On cross-examination Pacita testified that accused and two other Americans each had a pistol and each placed their pistol in her bag (R 64). Between 11 and 12 on the night of 26 March 1946 accused went to the home of Ismael de Guzman and gave him a .45 caliber pistol, which looked like Prosecution Exhibit 13, and told him to take care of it. De Guzman kept the pistol in his home until he turned it over to a CID agent at a later date (R 68-70). Accused spent the night of 26 March 1946 at Pacita's home (R 61). Three other companions of accused stayed at Pacita's home the same night; these four were all together at the Merchant Marine Mate Bar (R 62). Accused used Pacita's bag as a hiding place for pistols carried by himself and his two companions again on the nights of 27 and 28 March 1946 (R 61, 64).

CID Agent Frazer and two other agents were called to the scene of the shooting on the night of 26 March 1946. They found 5 bullets near the scene as follows (R 32-34):

Two bullets taken from ground directly under body - marked Prosecution Exhibit 5 for Identification (Pros. Ex. 10);

One bullet found inside of room near front - marked Prosecution Exhibit 6 for Identification (Pros. Ex. 11).

One bullet found by head of victim on top of ground - marked Prosecution Exhibit 7 for Identification (Pros. Ex. 12).

Bullet found inside the room near rear - marked Prosecution Exhibit 8 for Identification (Pros. Ex. 13).

It was stipulated that the above described five bullets were turned over by Agent Frazer to Detective Villasin, who in turn passed them on to Lieutenant Cabe (R 53).

At the autopsy of Kelly's body on 27 March 1946 by Captain Hawk two bullets were found in the body and one was found on the table when the body was being lifted after the autopsy (R 43). These three bullets were placed in a box marked Prosecution Exhibit 9 for Identification (Pros. Ex. 14), and were turned over by Captain Hawk to Lieutenant Denton, the Navy provost-marshal (R 43). It was stipulated that Prosecution Exhibit 9 for Identification (Pros. Ex. 14) came to Lieutenant Cabe in the same condition as when in the hands of Lieutenant Denton (R 53). It was further stipulated that the .45 caliber pistol which accused gave to de Guzman on the night of 26 March 1946 remained in de Guzman's possession and in the same home until obtained by Detective Galvez from de Guzman (R 82). Detective Galvez turned the same pistol over to CID agent Clingan (R 82). It was stipulated that Lieutenant Cabe received the pistol, Prosecution Exhibit 17 for Identification (Pros. Ex. 19), Serial No. 1145642, from Agent Clingan on 3 April 1946 (R 53). Lieutenant Cabe kept this pistol in his personal custody (R 56).

Lieutenant Cabe, a ballistics expert, testified that he received the eight exhibit bullets in the manner described above and marked them as follows (R 54):

> The two bullets contained in Prosecution Exhibit 5 for Identification (Pros. Ex. 10) were marked DAK-4 and DAK-5.
>
> The bullet contained in Prosecution Exhibit 6 for Identification (Pros. Ex. 11) was marked DAK-1.
>
> The bullet contained in Prosecution Exhibit 7 for Identification (Pros. Ex. 12) was marked DAK-2.
>
> The bullet contained in Prosecution Exhibit 8 for Identification (Pros. Ex. 13) was marked DAK-3.
>
> The three bullets contained in Prosecution Exhibit 9 for Identification (Pros. Ex. 14) were marked DAK-6, DAK-7 and DAK-8.

Cabe fired four test bullets from Prosecution Exhibit 17 for Identification (Pros. Ex. 19) and then used the comparison microscope with the following results (R 54, 55).

Exhibit bullets DAK-2, DAK-3, DAK-4 and DAK-6 were fired from the pistol marked Prosecution Exhibit 17 for Identification (Pros. Ex. 19).

Exhibit bullets DAK-1, DAK-5, DAK-7, and DAK-8 were not fired from Prosecution Exhibit 17 for Identification (Pros. Ex. 19), but were fired from a different .45 calibre weapon.

Two of the bullets removed from the corpse (those marked "12" and "13" and were two of those contained in Prosecution Exhibit 9 for Identification (Pros. Ex. 14), (R 43), and marked DAK-7 and DAK-8) were not fired from Prosecution Exhibit 17 for Identification (Pros. Ex. 19) (R 55, 57). The third bullet, DAK-6, contained in Prosecution Exhibit 9 for Identification (Pros. Ex. 14) was fired from Prosecution Exhibit 17 for Identification (Pros. Ex. 19).

Captain Hawk, a medical officer, testified that he performed an autopsy on Kelly's body on the morning of 27 March 1946. He was asked to describe in layman's terms the cause of death of the body autopsed. His answer was:

> "... I found six perforated wounds on the surface of the body in the right upper extremity. One, bullet in the superior anterior left chest wall passed through the soft tissue through the axilla leaving the body superiorly along the vertebral border of the scapula. There was another bullet (two) which penetrated the body in the left anterior chest wall, 4 cm. off the left nipple, penetrated the left lung, left the body superiorly through the scapula in the skin 6 cm. superior to the inferior angle of the scapula. The third bullet entered the right anterior chest wall at the level of the sixth rib mid-cavicular line, penetrated the thoracic cavity of the right lung and left the body posteriorly at the level of approximately the ninth vertebra. The fourth bullet entered the abdomen at the right upper quadrant along the inferior costal right margin, perforated the left lobe of the liver, then through the diaphram to the left ventrical and stopped in the eighth thoracic vertebra. The fifth bullet entered the interior abdominal wall midway between the crest of the ilium a distance of approximately 11 cm. leaving the body in the eleventh interspace superiorly 6 cm. from the vertebral column. The sixth bullet entered the anterior middle portion of the upper third of the humerus approximately 6 cm. from the seromion, penetrated the soft tissues, leaving the arm in the superior lateral surface at the level of the insertion of the body in the tricaps." (R 42).

With reference to Prosecution Exhibit 9 for Identification (Pros. Ex. 14), he testified that the bullets labelled "12" and "13" (DAK-7 and DAK-8) were found in the body, and that the third bullet (DAK-6) was found on the table

when the body was lifted after the post-mortem (R 43). He testified in regard to the two bullets found in the body (DAK-7 and DAK-8) that "One of these bullets came from the 8th dominal /sic/ vertebra which penetrated the heart and the other one entered the sixth interspace"; and that "One of them entered the skin just beneath the border chest wall of the right chest and lodged in the eighth thoracic cavity, penetrated the heart. The other one that stayed in the body entered the chest wall at the 6th interspace" (R 43). Only one bullet penetrated the heart. The immediate cause of death was the one through and through wound of the left ventrical (R 44). Two of the six bullets which hit the body would have caused immediate death, but the bullet which passed through the left ventrical was the positive cause of death. "It was the one that we could say that he could have died with that wound". Five of the wounds could have caused death eventually (R 44). Prosecution Exhibit 3, autopsy protocol of the victim Kelly, was received without objection (R 42). The autopsy stated that the victim was dead on arrival at the 89th Station Hospital at 2320 on 26 March 1946, with clinical diagnosis of "multiple penetrating wounds of chest and abdomen, gunshot". Course of the six bullets was set forth in the autopsy as:

> "COURSE OF THE BULLET: (1) The bullet in the left superior lateral anterior chest wall measures 1 cm. in diameter with a black area surrounding the wound edges measuring about 2 cm. in diameter. The bullet penetrates the skin, subcutaneous tissue, pectoralis major muscle, passes through the axilla, the mid-portion of the scapula, infra spinatous muscle leaving the skin 3 cm. from the vertebral border and 6 cm. superior to the inferior angle of the scapula.
>
> (2) A bullet enters the anterior chest wall 4 cm. medial to the left nipple, through the 4th interspace, enters the pleural cavity, passes through superior portion of the lower lobe of the left lung, leaves the pleural cavity through the posterior chest wall by passing through the 5th rib about 7 cm. from the midline just lateral to the posterior angle, it leaves the body along the inferior border of the scapula.
>
> (3) There is a bullet wound of the right anterior chest wall in mid-clavicular line at the level of the 6th rib, the bullet penetrates the skin, subcutaneous tissue, fractures the 6th rib 2 cm. lateral to the chondro costal junction, enters the anterior chest wall, passes through the lower lobe of the right lung and leaves the right pleural cavity through the posterior wall at the level of the 6th rib.
>
> (4) The bullet wound in the right upper abdominal quadrant 3 cm. from the midline along the inferior border of the right costal margin. The bullet passes through the skin, subcutaneous tissue and the right rectus muscle, perforates the superior portion

of the left lobe of the liver, passing through the diaphragm midline, enters the pericardial cavity, passes through the left ventricle and leaves the pericadial cavity along the left border of the 8th thoracic vertebra. There is a simple comminuted fracture of the body of the 8th thoracic vertebra.

(5) The bullet enters the skin midway between the inferior (right) costal margin and the crest of the ileum alon /sic/ the axillary line, travels 10 cm. in the subcutaneous tissue just lateral to the 11th interspace, leaving the body 10 cm. from the posterior midline, at the level of the 11th interspace.

(6) There is a penetrating wound of the right upper arm anterior and inferior to the acromion process measuring 1.5 cm. in diameter. The bullet passes through the head of the humerus and leaves the arm on the posterior lateral surface about 4 cm. superior to the insertion of the body of the triceps muscle." (Pros. Ex. 3).

Following his arrest on shipboard on 1 April 1946 accused was taken to Bilibid prison in Manila. On the morning of 3 April 1946 accused voluntarily told CID agent Clingan "They told me there were eight bullets and I only shot him five times" (R 81). Accused made three extra-judicial statements, all of similar tenor, after having been advised that he need not make a statement and without threats or promises (R 73, 76, 77, 84, 86, 87). In one of them, Prosecution Exhibit 21, accused said:

"... I have been in the Army since May 11, 1942 until this date. On November 11, 1945, I went AWOL from my organization. During the time I have been AWOL I have been in and around Manila and on various Islands of the Philippine Group. Some of the islands I have been from are Luzon, Samar, Masbate and Leyte. When I first came to Manila during April, 1945, I met an American by the name of KELLY and became friends with him. On one of my trips to the islands I went to Samar with KELLY and I came back to Lucena with KELLY using a parao as transportation.

"Q. While you were in Samar, did you have any trouble with KELLY?
"A. Yes sir.

"Q. What was that trouble?
"A. An argument with the family that I was living with. He tried to boss everybody around.

"Q. Did KELLY steal anything from you while you were in Samar?
"A. Not many.

"Q. After you got back to Manila, did you have any trouble with KELLY?
"A. No sir.

"Q. Did you miss a .32 caliber pistol?
"A. Yes sir, along with a box with some savings and important papers in it.

"Q. Did you suspect KELLY of having stolen the revolver and the box from you?
"A. I knew it was KELLY, by the 13 and 20 people, you can't believe wrong. He told them all not to tell where it went.

"Q. On the night of the 26th of March 1946, which was a week ago last Tuesday, did you have any trouble with KELLY?
"A. I was asking all about the box and staff and he lied about it.

"Q. What time on the 26th of March 1946 and whereabouts did you see KELLY?
"A. I saw him at the house about half block from his house on Tolentino street.

"Q. Was that house #80 Tolentino street?
"A. Yes it was.

"Q. Was the house that KELLY was living in with his family #36 Tolentino street?
"A. Yes sir, it was.

"Q. Approximately what time of the night did you see KELLY at #80 Tolentino street?
"A. Around eight o'clock or a quarter to eight.

"Q. Tell in your own words how you happened to go to see KELLY that night.
"A. I want to find out what he did with the things he had stolen from another fellows on the ship and whereabouts of my gun and box and why did he write a letter and sign my name and asked for money from another American in Samar saying that I needed it. He told me that this was all a lie and that everybody was lying to me. He said that I was crazy if I believed all what they told me.

"Q. Prior to your contacting KELLY at #80 Tolentinn street on the night of the 26th of March, 1946, where had you been and what had you done?

"A. I had decided to look up for KELLY and have an understanding with him as soon as possible. Before I went to see him, I knew of a Filipino by the name of FELIPE who had a .45 caliber pistol. I went to see FELIPE at his house near the Yellow Bar at Culi-Culi, and I asked him if I could borrow his pistol. He asked me what I wanted the pistol for and I told him I was going to see KELLY and have an understanding with him. He asked me if I needed any help and he can send three Filipinos along to assist me. I told him, 'No, all I want is the weapon'. He gave me the weapon along with one extra magazine.

"Q. Is the pistol that Felipe gave you the pistol that was shown to you yesterday of the slide and by a scratch over the #1145642?
"A. It is.

"Q. After receiving the weapon and extra magazine from Felipe, where did you go?
"A. Back to the Merchant Marine Mate Bar.

"Q. What did you do in the Merchant Marine Mate Bar?
"A. I had a few drinks in the Merchant Marine Mate Bar, how many I can't say.

"Q. From the Merchant Marine Mate Bar, where did you go?
"A. I went looking around for KELLY, I was told he lived near the Pop's Soft Drinks Factory.

"Q. When you found KELLY at #80 Tolentino Street, what was he doing and what did he say to you?
"A. I found him there in the rear of the house; he was arguing with another American by the name of NEAL who was a friend of mine. I told KELLY that I wanted to see him and he replied to me, 'I wanted to see you too'. KELLY and I then descended the steps from the house, went around and in front the house and down the road to KELLY's house which was approximately a half block away from #80 Tolentino Street.

"Q. What were you doing while you and KELLY were walking towards his house?
"A. We were talking about the staff he had stolen and he said that he had never taken it.

"Q. Did you have the gun in your pocket at the time that you have borrowed from Felipe?
"A. No sir, it was in my shirt.

"Q. Was it loaded and the hammer cocked?
"A. Yes sir.

"Q. When had you loaded this weapon?
"A. I loaded it before I ever went looking for him because I knew he had my gun. He had made a statement to NEAL that he was going to turn me in because that was the only way to get me out of the way. He had wanted Neal to go with him to turn me in when he had got out of the sail boat after coming up from Samar.

"Q. What happened when you entered the yard in front of KELLY's house?
"A. I asked him about the gun and the letter he had written and he told me I was crazy too, and he walked towards the house.

"Q. How far away from him were you at this time?
"A. I was walking right behind him about six or seven feet.

"Q. What happened then?
"A. At the time KELLY turned around, he dropped his hands to his side and I pulled the .45 caliber pistol that I had inside my outshirt and shot him.

"Q. How many times did you shoot him?
"A. I don't know, I just kept pulling the trigger until the weapon did not fire anymore.

"Q. Did you see any of these shots strike KELLY?
"A. The first one must have hit him because he fell after, I don't know if any more hit him or not.

"Q. What did you do after KELLY?
"A. I ran out in the alley and started walking.

"Q. By alley, do you mean the street in front of KELLY's that is known as Tolentino?
"A. I do.

"Q. After walking down Tolentino street, where did you go?
"A. I went back to the Merchant Marine Mate Bar.

"Q. What did you do after you got in the Merchant Marine Mate Bar?
"A. I went over and sat down, then I went over to a girl that I know by the name of Pacita who was a hostess in the Merchant Marine Mate Bar and I asked her for her pocket purse which was a large red one. She gave me her pocket purse and I put the gun that I had shot KELLY with in the pocket purse

along with two other guns that friends of mine who were merchant seamen had given me after I entered the Merchant Marine Mate Bar.

"Q. How did you happen to get these guns from the two merchant seamen?
"A. I knew then that they were carrying weapons and after the trouble I just have, I had thought that it was best to get rid of our weapons.

"Q. What did you do after getting rid of the weapons?
"A. I sat around and drank for a while, then I went down to the Yellow Bar. I then asked for the pocket purse from Pacita again and took the three weapons from them, gave the two weapons back to the merchant seamen and took the weapon that I had shot KELLY with which belong to Felipe, and I went down to the Yellow Bar. From the Yellow Bar, I went to Felipe's house and gave him back his weapon.

"Q. What did you do after you gave the weapon back to Felipe?
"A. I went back to the bar and drank beer.

"Q. Did you tell Felipe that you have shot KELLY?
"A. No sir.

"Q. Did Felipe asked you any questions as to why some of the ammunitions were gone?
"A. I did not recollect, but I think he knew why it was gone. He should, because he wanted to give him the man to do it with himself."

Felipe Reynaldo denied that accused gave him a pistol on the night of 26 March 1946 (R 66).

Agby testified that he did not see a gun in Kelly's possession during the argument (R 11), and no weapon was found at the scene of the homicide or on the victim's body (R 37). In none of his extra-judicial statements was accused asked about a second pistol. Lieutenant Pelgren testified that one or two days after the 5th (April) he told accused that information had been received that more than one gun had been used at the time of the killing (R 91). Lieutenant Pelgren told accused that a .45 caliber pistol was being sought and accused stated that it was probably one of the three guns he gave Pactia and it could be found aboard a ship (R 92, 93). Accused further stated that the second .45 caliber pistol had been given him after the shooting by a merchant seaman at the Merchant Marine Mate Bar. Accused reiterated that he had only one gun at the time of the homicide and did not tell Lieutenant Pelgren that the .45 caliber pistol aboard the ship was directly involved in the homicide (R 93). One

of accused's friends by the name of Woody (R 91) was found aboard the SS FAIRFAX on 1 April 1946 in possession of a .38 caliber Japanese pistol (R 95). Accused stated that the .45 caliber pistol might belong to a blond, curly-headed fellow known as Samuel (R 91, 95).

Evidence for the defense: Clitis W. Butler testified that he had seen Kelly almost daily since 1945 and had never seen Kelly without a firearm. Kelly was "trigger - happy", a dangerous character, and fired his weapon frequently around the neighborhood for no reason at all (R 119).

Recalled as a defense witness, Ford testified that while they were on Samar Kelly told Ford that accused had better watch out, it would be "him or me", and that he never saw Kelly without a gun (R 121). Neal testified that Kelly had made the same remark to him twice, and reiterated the incident on Samar in which Kelly removed the cartridges from accused's gun and asked Neal "Will you back me up if I go after Whitey?" (R 122). Neal also testified that he mentioned Kelly's threats to accused (R 123).

Accused testified that he first met Kelly in April 1945 (R 104). Kelly brought some guns to the house where both Kelly and accused lived in September 1945. As a result accused received a special court-martial and was sentenced to six months confinement, from which he escaped in November 1945 (R 104, 105). Accused then went to Samar with Kelly, Neal and Ford (R 105). Kelly always carried a gun (R 105, 113). He had trouble with Kelly in Samar and found out about five days before the party returned to Manila that Kelly had emptied accused's gun. En route to Manila Kelly stole a box containing personal property belonging to accused. After they reached Manila accused was informed that Kelly had stolen a number of items of personal property from merchant seamen with whom accused was acquainted (R 106). Kelly had also threatened to turn accused in as a deserter (R 116). On the night of 26 March 1946 accused started out to see Kelly about the property Kelly had stolen from merchant seamen (R 106). He stopped at a bar first where he had 5 to 10 beers (R 116, 118). He met a merchant seaman named Woody at the bar (R 118). Accused did not discuss the matter with Woody at that time (R 117). Leaving the bar alone, accused want to 80 Tolentino Street where he found Kelly (R 106, 117). Accused told Kelly he wanted to see him and Kelly replied that he wanted to see accused also (R 106). They left Agby's home at 80 Tolentino Street and went towards Kelly's house at 36 Tolentino with Kelly in front. Accused had a gun in his shirt which he had borrowed from Felipe Reynaldo, a native employee at a nearby bar (R 106, 110). They talked as they walked along and accused did not see Kelly with a gun although he believed Kelly had one (R 107, 113). As they turned into Kelly's yard they were walking together and accused asked Kelly about the stolen property and an argument ensued (R 107). Kelly told accused he was crazy to believe all those people, they were all liars. Kelly then dropped his hands to his side (R 107). Accused thought Kelly was going to pull a gun and shoot him. Accused then pulled his gun from his shirt (R 107, 109), fired at Kelly as rapidly as the gun would

shoot (R 112) and kept shooting until the gun quit clicking (R 108) and until he couldn't fire any more (R 115). Kelly fell on the first shot (R 108, 115) grabbing a pole and falling straight down (R 113); Accused thought he fired five shots (R 115). Accused started running (R 108). Kelly was lying on the ground and yelling "Oh" when accused left and was still alive (R 108, 112). Accused went to the Merchant Marine Mate Bar where he placed his gun, as well as a Japanese luger and another .45 caliber pistol belonging to merchant seamen named Woody and Johnny, in Pacita's bag (R 109, 111). He did not have either of the merchant seamen's weapons with him when he shot Kelly (R 109). He had only the pistol which he had borrowed from Felipe (R 109, 111, 117) when he shot Kelly. Later that night he removed the three pistols from Pacita's bag and gave two back to the merchant seamen owners (R 109). After visiting a second bar he took the pistol with which he shot Kelly to Felipe's home and gave it back to him (R 109, 110). Then he and a friend named Johnny took Pacita home (R 110). He was subsequently apprehended by the CID on a ship on which he intended to sail with the intention of surrendering at Washington, D. C. (R 116, 117). None of his four extra-judicial statements refer to two guns in his possession when he shot Kelly because he only had one gun at that time (R 111). The first accused knew that two guns were involved in the homicide was on the occasion of his final questioning by Lieutenant Pelgren of the CID (R 111). Johnny and Woody who owned two guns placed in Pactia's bag were on the same ship on which he was apprehended (R 114).

5. The pre-trial statement of accused, his testimony in open court, and the other evidence in the record of trial definitely establish his guilt of Charge I and the Specification thereunder. His escape from confinement on 7 November 1945 and subsequent activities covering a period of nearly five months warranted the court in finding that accused did absent himself without leave with intent not to return and was, therefore, in desertion.

With respect to Charge II and the Specification thereunder, the record of trial discloses that accused and deceased were unfriendly, that deceased had stolen considerable personal property from accused; that deceased had caused him to be court-martialed in September 1945 (R 104); that deceased had threatened to turn accused in as a deserter; that accused had been informed that deceased had stated, with reference to the accused, that "Its either going to be him or me"; that accused knew deceased was in the habit of carrying a gun; that on the night of the 26th he went to look for deceased to straighten some things out, to have an understanding with deceased, and armed himself with a borrowed .45 cal. pistol and an extra magazine clip for that purpose; that he sought out deceased and after some argument with him relative to stolen personal property accused drew his gun and shot at deceased until the gun stopped firing; that deceased fell at the first shot, yelling "Oh"; and that deceased died the same day.

6. Murder is the unlawful killing of a human being with malice aforethought, 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 (par. 148a, MCM, 1928). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death, and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard for human life. "Malice in law does not necessarily mean hate, ill will or malevolence, but consists in any unlawful act, wilfully done, without just excuse or legal occasion, to the injury of another person" (Wharton's Criminal Law, 12th Ed., Sec. 146). Malice is presumed from a deliberate unlawful act against another person, of such character as to show an abandoned and malignant disposition, as where an injury is caused by violence" (Ib, Sec. 148). It is inferred from all the facts of the case, as a presumption of fact (Ib. Secs. 159, 438, 439). Malice aforethought imports premeditation (Allen v. U.S., 164 U.S. 492, 41 L. Ed. 528, 17 S. Ct. 154). "Premeditation and deliberation, as an element of murder, consist in the exercise of the judgment in weighing and considering and forming and determining the intent or design to kill. In this connection the word 'premeditation' means simply entertainment by the mind of an intent or design to kill"; and, being established, the length of time it existed is immaterial — the homicide will be murder (Wharton's Criminal Law, 12th Ed., Sec. 420). "It involves a prior intention to do the act in question. It is not necessary, however, that this intention should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act, as if it entered ten years before" (Ib., Sec. 507). The evidence clearly establishes that accused with malice aforethought shot deceased. The only aspect of the case giving us any difficulty is whether accused actually killed deceased; that is to say, whether deceased died in consequence of the wounds received at the hands of accused. The evidence in this respect shows that eight shots were fired, six of them striking the deceased. Five of the wounds could have caused death eventually. Two of them would cause immediate death. The immediate cause of death was internal hemmorhage produced by one bullet which entered the left ventrical and went out the back of the heart.

The expert ballistics evidence shows that four of the eight bullets were fired from the gun used by accused in the shooting, and the remaining four were fired from a different .45 caliber pistol. That evidence also reveals that there was no microsopical evidence to prove that the two bullets which would or could have caused "immediate death" were fired from the gun used by accused.

Whether any or all of the shots fired by accused caused, or contributed to, the death of deceased was a matter to be determined by the court in considering the evidence as a whole. The medical officer testified that any one of 5 of the 6 bullets that struck deceased could have caused his

death. Viewing the evidence in the light most favorable to accused it definitely appears that at least one of the shots fired by accused could have caused the death of deceased, and that in addition thereto, at least one other of the shots of accused also wounded the deceased. In State v. Francis, 152 SC 17; 149 S.E. 348, in which case the same point of law was discussed, the court said:

> "This court cannot say which of the wounds received by the deceased caused his death, nor can it say which of the wounds contributed to that death. Under the testimony of Dr. Foster, at least four of the wounds were sufficient to produce death. If either was sufficient to produce death, then that wound in all likelihood also had some effect in hastening the death of the deceased. And, too, some of the wounds not described by the physician as death wounds may have contributed in some way to the bringing about of the death of Mr. Langford. All these matters under our law were clearly for the determination of the jury.
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> * * * *
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> "If at the moment of death it can be said that both injuries were contributing thereto, the responsibility rests on both of the actors. The law does not measure the effects of the several injuries in order to determine which is the more serious and which contributed in the greater measure to bring about the death. Although one of the assailants may be said to have contributed to death in a less degree than the other, he is not for that reason deemed to be less guilty or less punishable. So one of two persons who cause the death of another by shooting is guilty of homicide if the wound inflicted by him contributed to or hastened the death, although alone it might not have been fatal. 13 R. C. L. par. 53, p. 748."

Again, in Bennett v. Commonwealth, 150 Ky. 604; 150 S.W. 806, the court said:

> "Based upon a number of medical treatises, and upon no evidence in the record, appellant argues that, even though he [Joe Bennett] shot, the wound inflicted by him in front was not a fatal wound, and that the wound in the back, inflicted by Maynard Bennett, as is claimed, was the fatal wound. Therefore, he says, the trial court erred in instructing the jury to find him guilty if he shot Lawson 'so as to cause or hasten his death,' because, he says, although he shot Lawson, it was not his, but his brother's shot which caused the death. In other days, when the punishment of crime was hampered far too much by legal refinements and abstruse learning, there would have been a place, perhaps, for the

argument; but it can find no place now. Reason and justice have superseded these impractical and much abused rules of former days. These brothers, according to the testimony, both shot Lawson in the one encounter. The law will not stop, in such a case, to measure which wound is the more serious, and to speculate upon which actually caused the death. In many such cases the commonwealth would be helpless; for each defendant would go free because it could not be proven against him that his wound was the fatal one. Whether one actually inflicts the fatal found, or contributes to or hastens the death in some minor way, he is guilty of the crime. And whether he hastens the death must be for the jury. The instruction was right. Hopkins v. Com. 117 Ky. 941, 80 S.W. 156, 4 Ann. Cas. 957."

In the light of the above holdings the court, considering all the evidence, was entirely warranted that the wounds inflicted by the accused either caused or contributed to the death of the deceased.

It is to be noted that the record of trial discloses without contradiction that accused fired at and shot the deceased. It follows, therefore, that accused is charged with the burden of proving that his shots did not kill, or cause or contribute to the death of deceased. Normally, the burden of proof is on the prosecution; but

"It has been ruled that 'if a person receives a wound wilfully inflicted by another, which might cause death, and death actually follows, the burden is on him who inflicted it to show that it did not cause the death'. Hughes Criminal Law & Procedure Sec 87" - Walker v. State 116 Ga. 537 - 67 LRA 426. See also State v Briscoe 30 La. Ann. 433; Edwards v. State 39 Fla. 753; 23 So 537.

"But when it is made to appear that the accused wounded or injured the deceased, the burden of proceeding shifts, it seems, and defense must prove, if such is its contention, that death was the result of other injuries than those inflicted by the accused." 13 Ruling Case Law 747.

The only evidence presented which might be construed as bearing on this point, which would be taken advantage of by the accused, is the testimony of the ballistic expert. Assuming that the court gave full credence to such testimony, it still falls far short of sustaining the burden of proof placed on accused.

7. Accused is 22 years of age and unmarried. The charge sheet shows that accused enlisted 11 May 1942 at Patterson Field, Ohio, for the duration and six months.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors 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 life imprisonment is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Sections 454 and 567, Title 18, United States Code, and by Sections 2401-2404, Title 22 of the District of Columbia Code.

Charles M. Dickson, Judge Advocate

H. Wayne Olive, Judge Advocate

James S. Parker, Judge Advocate

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

JAGK - CM 314404

23 SEP 1946

UNITED STATES v. Private TRAVIS O'NEAL (39255146), 4068th Quartermaster Service Company.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 29 April 1946. To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Travis O'Neal, 4068th Quartermaster Service Company, in conjunction with Private Thomas H. Shadrix, Battery B, 36th Field Artillery Battalion, did, at or near Uhlwiller (Alsace) France, on or about 16 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill a male human being, known only as "Andrea", by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Specification and the Charge. All the members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

The accused was one of a group of American soldiers who during the month of June 1945 were absent from their organizations and were living among the local inhabitants in and around Wittersheim, Alsace, France. Other members of this group included one Calvin Andre Honaker (the deceased), referred to in the record as "Andre"; Thomas Shadrix, referred to in the record as "the big Thomas"; Thomas Wrightsel, referred to as "the little Thomas", and a soldier known only as "James" (R. 12,15). Shadrix, or "big Thomas" was about six feet in height, weighed 200 pounds (R. 60),

wore sergeant's stripes, and was the dominating influence, or "boss" of the group (R. 49). The soldiers made their headquarters at the farmhouse of the Crique family, consisting of Madamoiselles Maria and Cecille Crique, their father and mother and two brothers. Shadrix and Wrightsel had arrived in May (R. 12) and Shadrix claimed to be engaged to Cecille Crique (R. 22). Andre, James and accused arrived early in June 1945 (R. 15-16,27). Andre spoke French and was able to talk quite freely with Cecille. Shadrix became jealous of Andre and expressed his dislike for him because he talked too much (R. 52). On 10 June 1945 the accused had an altercation with Andre in a restaurant located in a village near Wittersheim. Maria Crique, who was in the restaurant, testified that the negro, referring to accused, grabbed Andre by the arm, pulled him out of the bench, hit him several times and took the jeep and drove off (R. 9). This incident appears to have been soon forgotten and the accused and Andre remained on friendly terms (R. 52,54). On 15 June 1945 at about three o'clock in the afternoon accused and Shadrix left the Crique home (R. 10,16). They returned about eleven o'clock that night and aroused Andre from bed in order to get him to help them with a vehicle which Shadrix, who was drunk, had wrecked (R. 10,17,22). About three o'clock in the morning Shadrix and accused returned to the Crique house without Andre (R. 11,18,41). They awakened Wrightsel and James and told them that they had killed Andre (R. 41-42). Accused said he had hit Andre on the head twice with an axe (R. 42). All four, Shadrix, accused, Wrightsel and James then left the house (R. 11,18,41,43). They drove around that night and at about ten o'clock the next night they drove to the field where Shadrix and accused had left Andre in order to bury him (R. 43,45). When they found Andre he was not dead and Wrightsel asked him if he was all right. Andre replied that he wanted to go to a doctor. Shadrix said, "No, I am going to shoot him" (R. 43,56). In his confession which is hereinafter set forth in detail the accused contends that at this point he said, "No, don't shoot him." Thomas Wrightsel, who had been tried and convicted for misprision of a felony, prior to the trial of this case, and who had been promised immunity from further prosecution, excepting perjury or false swearing, testified that he heard accused tell Shadrix not to shoot Andre (R. 37,56). Wrightsel then turned and went back to the jeep which was a short distance away and as he reached it he heard a shot. Shadrix was holding a pistol which he had taken from James who in turn had acquired the pistol from accused (R.59). Shadrix thereupon called Wrightsel and James over to where the body was lying and the four lifted Andre's body into one of their two jeeps and drove to a field about three miles away (R. 45). The four then took Andre, still alive and breathing, out of the jeep and laid him on the ground (R. 47,58), and Shadrix, James and accused dug a hole (R. 45). James and Wrightsel removed part of Andre's clothes and then they placed him in the open grave. Shadrix said, "I'll make sure you're dead, you bastard," and hit him over the head three times with a shovel (R. 48). They thereafter covered up the body and went away (R. 45).

On 18 June 1945 Cecille Crique saw the accused and "he was wearing other clothes and civilian shoes." She asked him as to the whereabouts of Andre and accused told her that Andre was dead in a field many kilometers away. He further stated that "big Thomas is not a good comrade. He stole my clothes" (R. 19).

On 19 June 1945 a French farmer reported that he had found the grave of a man in his field near the village of Uhlwiller (R. 35). On 21 June an agent of the Criminal Investigation Division and some officers, accompanied by the accused who was under arrest, went to the field and dug up the body of Andre (R. 66). An autopsy showed that he had died as a result of a gunshot wound in the head (R. 64, Pros. Ex. D).

After having been duly advised of his rights under the 24th Article of War, the accused made two statements to members of the Criminal Investigation Division at Nancy, France (R. 68-70, Pros. Exs. E-F). In his first statement, given on 24 June 1945, he told of his first meeting with the deceased, Andre, their subsequent meeting with Shadrix and Wrightsel and related Shadrix's jealousy of Andre concerning the affections of Cecille Crique and asserted that Shadrix killed Andre while the two were alone (Pros. Ex. E).

On 29 June 1945 Wrightsel was apprehended and questioned by the Criminal Investigation Division. After being confronted by Wrightsel and hearing his version of the crime, the accused, on 1 July 1945, made his second statement or confession which is set forth in detail as follows:

"HEADQUARTERS
EUROPEAN THEATER OF OPERATIONS
Office of the Theater Provost Marshal
Criminal Investigation Branch
APO 887

SUPPLEMENTARY STATEMENT OF: Pvt Travis O'Neal DATE: 1 July 1945.

A.S.N. 39255146 ORGANIZATION: 4068 Q.M. Service Co., APO 758, U.S. Army.

TAKEN BY: Dan Robbins, Agent 5th C. I. Detachment.

PLACE: C.I.D. Office, Nancy, France

Pvt. Travis O'Neal, it is my duty to inform you of your rights at this time. It is your privilege to remain silent. Anything you say may be used against you in the event that this investigation results in a trial. Do you thoroughly understand your rights. I do To

SIGNATURE: Pvt Travis O'Neal

STATEMENT:

Having been informed of my rights under the 24th Article of War by Agent Dan Robbins ; I do hereby make the following statement of my own free will and accord, without there having been

made to me, either threats or promises, and knowing that anything I say may be used against me, I do say as follows:

My statement of the 24th of June 1945, is true up to the day of the murder of the white American soldier called Andrea.

On the 15th of June 1945, the man I always called Big Tom, I am now told his name to be Pvt. Thomas H. Shadrix, [and I went to Strassbourg, France to get a load of gas to sell to the civilians.] Pvt. Shradix drove the weapons carrier and I followed him in a jeep. Pvt. Shradix loaded the weapons carrier with the gas while I was on a street about 3 miles away in a cafe. When Pvt. Shadrix had the load of gas he came by the cafe and I followed him in the jeep. I wish to state that Pvt. Shadrix did not have the gas when he came by the cafe, he had already sold the gas and then came by for me. I followed Pvt. Shadrix in the jeep and when some distance past Whittersheim, Pvt. Shadrix ran the weapons carrier into a tree. After the accident Pvt. Shadrix got in the jeep and I drove to Ceciles home in Whittersheim where we were going to get some help to get the weapons carrier free from the tree. Andrea was at the house, so we asked him to help us. Shadrix asked Cecile for a sledge hammer, Andrea said 'I'll get the axe. After Andrea got the axe he wanted to drive the jeep. Shadrix wouldn't let Andrea drive, so Andrea said I'll get in the back of the jeep. I then said 'That's alright I'll sit in the back. Before Andrea came out with the axe, Pvt Shadrix told me Andrea is getting the axe to kill you. I got in the back of the jeep. He also said (Pvt. Shradix) when I touch you on the leg that is the signal for you to hit him over the head, I don't like him anyway, he talks to much to Cecile. I have the axe in the back of the jeep, Pvt Shadrix is driving and Andrea is sitting in the front seat. We drove for about 10 minutes, when Pvt. Shadrix tapped me on the leg. It was about 2230 hours 15 June 1945, when I was sitting in the jeep with the axe and struck Andrea over the head twice. After I struck him over the head Andrea slumped over the seat. Then Shadrix and I took Andrea out of the jeep and laid him down in the grass in a field. Pvt. Shadrix said, I am going to shoot him, I told him not to shot him that Andrea is dead. Shadrix kept insisting on shooting him, but I finally talked him out of shooting him. I knew he wasn't dead when we laid him down in the field. Before we left Shadrix kicked him in the head about 3 times.

We left Andrea in the field and went back to Cecile's house and got James and Pvt. Wrightsel, then went to Severne, France, where we stayed until about 4 or 5 o'clock in the afternoon. Pvt. Shadrix said, let's go by and see if Andrea is dead. We went back to where Andrea was lying and saw that he wasn't dead yet.

It was still light out and afraid that some one may see us, we left and came back about 2400 hours, the 15 June 1945. We went out in the field and saw Andrea lying on his side, I said Andrea, he said yea, then I asked him 'Are you dead', and he said 'No'. Andrea also said 'What did you do this to me for'. I then asked him if he wanted to go to a doctor and he said Yes. Shadrix said, 'Let me shoot the Bastard.' James, Wrightsel and I said No, don't shoot him. Shadrix took the pistol he had in his hand and knelt down facing Andrea and held the pistol about 12 inches from him and fired a shot into his head, some where in the forehead above the eyes. After he shot him he picked him up and put him in the jeep, I think Shadrix drove the jeep with Andrea in it. We followed him in our other jeep, and when about 1 kilometer outside of a little town called Uhwiller we stopped on a side road. The four of us took Andrea out of the jeep and placed him on the ground. The other three men dug the hole just off the road with a G*I shovel. After the hole was finished, the four of us carried him and placed him in the hole. After we had Andrea in the hole, Pvt. Shadrix said, I don't think this bastard is dead, and with that beat him in the face with the shovel. The other three men covered him over with the dirt and I put grass on the grave. Shradix and Wrightsel took his shoes and trousers off Andrea before they buried him. The four of us drove away in both jeeps. On 17 June 1945, the four of us slept in a farm house and when I woke up I found that the other three men had taken my trousers and shoes. It was the next night I was arrested by a Captain from the Air Corp.

I am now shown a 'UNIQUE' make pistol .32 caliber that I bought from a French soldier and it's the same gun that Pvt. Shadrix took away from Wrightsel, who took it from the glove compartment from my jeep. I identify this gun as the one Shadrix shot Andrea in the head.

I am now shown an axe and it is the same one Andrea put in the jeep on 15 June 1945, and the same one I struck him over the head with.

I have read the foregoing statement aloud in the presence of witnesses and the foregoing statement has been read aloud to me in the presence of witnesses, I know the meaning of an oath and know that it is a crime to swear to a false statement. I do swear each and every part of this statement to be the truth to the best of my knowledge and belief.

SIGNED: Pvt Travis O'Neal

Subscribed and sworn to before me this 1st day of July 1946.

Robert E. deLautour
2/nd Lt, CMP
Summary Court."

4. No witnesses were called by the defense and the accused, after having his testimonial rights fully explained to him, elected to remain silent.

5. The specification describes the deceased as "Andrea." The confession of accused describes him in like manner. The testimony of the French witnesses who knew him and in whose homes he had lodged positively identified him by his picture as the person they knew as Calvin Andre Honaker and he is referred to by such witnesses as "Andre." No material variance resulted thereby since "Andrea" and "Andre" are shown to have been one and the same person, Calvin Andre Honaker. And further, accused could not have been misled since he describes the deceased as "Andrea" in his confession (CM 225896, Smyth, 14 BR 371). The introduction of the confession of accused was not objected to by the defense since it was proven to have been voluntarily made, however, the defense contended that since the evidence shows that Calvin Andre Honaker died as a result of a gunshot wound in the head, inflicted by Thomas Shadrix, the accused cannot be legally convicted of the murder of the deceased. This is the only question requiring serious consideration. It is fundamental in the law that when two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual who contributes to the wrongdoing is in law responsible for the whole, the same as though performed by himself alone (Clark's Crim. Law, 108, 1 Bishop Crim. Law, 8th Ed., sec. 629).

It is also firmly established in our law that where one assailant strikes a blow which is not fatal and a confederate follows it up with a fatal blow, both are principals in the homicide (Wharton's Criminal Law, Vol. 1, sec. 255).

The above principles are set forth in the case of State v. Jenkins (94 American Decisions 132, 14 Richardson's Law 215) wherein the court stated,

> "All who are present concurring in a murder are principals therein, and the death, and the act which caused it, is in law the act of each and all. There is no distinction in the regard of law in the degrees of their guilt, or the measure of their punishment, or the nature of their offense, founded upon the nearness or remoteness of their personal agency respectively. An indictment charging it as the act of a particular individual of the party will be well sustained by evidence that any other of them gave the fatal stroke, or that it was given by some one of them, though it does not appear by which: Mackolley's case, 9 Coke, 67 b; Sissinghurst House Case, Hale, 461; 1 Russell on Crimes 537."

And again, Mr. Justice Story in United States v. Ross (16 Federal Cases, 196), stated the same principles of law as follows:

"If a number of persons conspire together to do an unlawful act, and death happen from anything done in the prosecution of the design, it is murder in all who take part in the transaction. *** More especially will the death be murder, if it happen in the execution of an unlawful design, which, if not a felony, is of so desperate a character, that it must ordinarily be attended with great hazard to life; and a fortiori, if death be one of the events within the obvious expectation of the conspirators. Fost. Crown Law, 261, 351-353." (See CM 248793, Beyer, 50 BR 21)

When the evidence is examined in the light of the above principles of law it becomes apparent that accused cannot shield his guilt behind the proof that Shadrix fired the fatal shot.

The specification alleges that the accused, in conjunction with Private Thomas H. Shadrix, did "with malice aforethought, willfully *** kill" one Andre by shooting him with a pistol. It is only necessary to sustain the findings of the court, that the proof show that the fatal shooting of the deceased resulted from the concerted action of the group of which the accused was a part or that he aided, abetted, counseled, commanded, induced, or procured its commission. All such persons described in the last sentence above are principals under the Federal law (35 Stat. 1152; U.S.C. Title 18, sec. 550). Now, it is said by both Wrightsel in his sworn testimony and accused in his confession that accused told Shadrix not to shoot Andre. If accused did express disapproval of the shooting it would appear most inconsistent with the other facts and circumstances and the court-martial was justified in rejecting this testimony. Accused had already struck the deceased two blows on the head with an axe, he and Shadrix had left Andre in a field to die, then the group had gone back to bury him in order to conceal the crime. When they found him alive accused says he told Shadrix not to shoot deceased. But if it be true that accused did say, "don't shoot Andre", in order to emancipate himself from criminal responsibility for the murder, all but completed, it was necessary that he do all in his power to prevent the shooting of the victim. A mere disapproval of the shooting is not enough (Wharton's Criminal Law, Vol. 1, 12th Ed., sec. 267). And again, shooting is only one known and accepted method of killing another. It does not appear that either accused or his confederates objected to the striking of Andre with the shovel while they placed him in the grave. The acts of accused belie his contention that he disapproved the shooting. He participated to some extent in every phase of the unlawful killing of Andre from his striking of the blows with the axe to the placing of his body in the grave. All that happened to deceased before and after the shot was fired, up to the point of actual death, played a part in bringing about Andre's death and the participation in any one of these things was in law a participation in the murder. Murder is the unlawful killing of another with malice aforethought. Malice is simply an intention to cause another's death (par. 148, MCM, 1928). Whether death was finally brought about by the wielding of the axe, the pistol shot or

the blows of the shovel is of no major importance since it is proven that accused and Shadrix set out to kill and did kill their intended victim. The contributions of each are attributable to both.

6. The accused is 30 years of age and was inducted into the Army at Los Angeles, California, on 3 September 1942.

7. 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. 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. Death or imprisonment for life is mandatory upon a conviction for murder in violation of Article of War 92.

Robert D. Silverstein, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert J. Schwarzl, Judge Advocate

JAGK - CM 314404 1st Ind

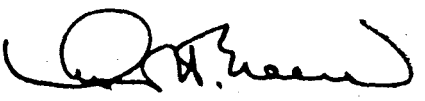
WD, JAGO, Washington 25, D. C. OCT 21 1946

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 Travis O'Neal (39255146), 4068th Quartermaster Service 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 thereof. The homicide was without any justification. Accused is a colored soldier. Shadrix and the other two soldiers involved are white. Shadrix was the leader of the group, all of whom were absent from their organizations and living among French civilians. Shadrix became jealous of the deceased over a French girl and induced accused to strike him on the head with an axe, leaving him in a field to die. The wound inflicted at this time was not fatal. On the following night when accused, Shadrix and others went to the field to bury him and found that the deceased was still alive, Shadrix shot him in the head with a pistol causing his immediate death. There is some evidence that accused protested the shooting, but he continued as a party in the venture until the body was buried after the shooting. Accused viciously attacked deceased, but the shot which caused the death was fired by another. Accused was legally responsible for all that occurred, but he was of low mentality and acted only as the cats-paw for a more vicious character. One soldier of the group which participated in the homicide, who turned state's evidence, received a sentence of only two years confinement. I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the natural life of accused, that a U. S. penitentiary be designated as the place of confinement, and that the sentence as thus commuted be carried into execution.

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 action meet with approval.



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 341, 13 November 1946.)

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

JAGK - CM 314444

11 SEP 1946

UNITED STATES v. First Lieutenant PERRY G. SESSOMS, JR. (0-828551), Air Corps.	FIFTEENTH AIR FORCE Trial by G.C.M., convened at Sioux Falls Army Air Field, Sioux Falls, South Dakota, 6 and 7 May 1946. Dismissal, total forfeitures and confinement for one (1) year.

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

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1. The Board of Review has examined the record of trial in the case of the above named officer 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 First Lieutenant Perry G. Sessoms, Jr., Air Corps, Attached Squadron A, 211th Army Air Forces Base Unit, did, at Sioux Falls Army Air Field, Sioux Falls, South Dakota, on or about 22 February 1946, feloniously embezzle by fraudulently converting to his own use certain furniture, fixtures and/or equipment of the value of about Fifty Dollars ($50.00) and on or about 26 February 1946, feloniously embezzle by fraudulently converting to his own use certain furniture, fixtures and/or equipment of the value of about Four Hundred Fifty-four Dollars and Fifty Cents ($454.50), to-wit:

Eleven (11) miscellaneous writing desks and tables of the total value of about Twenty-five Dollars ($25.00); thirty-three (33) miscellaneous hand made tables, mess hall type of the total value of about Forty Dollars ($40.00); two (2) wardrobe type, clothes lockers of the total value of about Eight Dollars ($8.00); twenty five (25) lawn chairs of the total value of about Forty-five Dollars ($45.00); three (3) davenports with cushions of the total value of about Twenty-four Dollars ($24.00); six (6) lounge chairs (salvage) of the total value of about Fifteen Dollars ($15.00); twelve (12) straight back chairs of the total value of about Twenty-four Dollars ($24.00); twelve (12) floor lamps,

different types (salvage) of the total value of about Twelve Dollars ($12.00); six (6) smoker stands (salvage) of the total value of about Three Dollars ($3.00); ten (10) miscellaneous steel beds or cots of the total value of about Fifteen Dollars ($15.00); one (1) three-quarters size bed of the total value of about Four Dollars ($4.00); thirty (30) large and small, Oak and Mahogany, chests of drawers of the total value of about One Hundred and Twenty Dollars ($120.00); nine (9) dressers broken (salvage) of the total value of about Eighteen Dollars ($18.00); thirty-one (31) small cushions of the total value of about Fifteen Dollars and Fifty Cents ($15.50); five (5) chests of drawers, (salvage) of the total value of about Ten Dollars ($10.00); eighty-five (85) venetian blinds, assorted sizes of the total value of about One Hundred and Five Dollars ($105.00); one (1) andirons set of the value of about Twelve Dollars ($12.00); one (1) steel cot of the value of about One Dollar and Fifty Cents ($1.50); two (2) three-quarters size springs of the total value of about Four Dollars ($4.00); one (1) lounge chair, (salvage) of the value of about ($1.00) One Dollar and one (1) blue non-coil springs of the value of about one Dollar ($1.00); totalling to a value of about Five Hundred Four Dollars and Fifty Cents ($504.50), the property of the Sioux Falls Army Air Field Officers Mess, entrusted to him by the said Sioux Falls Army Officers Mess.

Specification 2: In that First Lieutenant Perry G. Sessoms, Jr., Air Corps, ***, did, at Sioux Falls Army Air Field, Sioux Falls, South Dakota, on or about 15 February 1946, feloniously embezzle by fraudulently converting to his own use certain furniture, fixtures and/or equipment, to-wit:

Two (2) walnut desks, 36x60, executive type; two (2) chairs, oak swivel, w/o arms; one (1) speed-o-print mimeograph duplicating machine, model L 73472; one (1) Temeo gas heater no. 1242-12000; one (1) Burroughs adding machine, hand operated, no. 3-381954; two (2) stapling machines, hand operated; twelve (12) trays, plastic serving, 14" x 21" and one (1) green-gray rug, 20" x 30", totalling to a value of about One Hundred Forty-three Dollars ($143.00), property of the Sioux Falls Army Air Field Officers Mess, entrusted to him by the said Sioux Falls Army Officers Mess.

Specification 3: In that First Lieutenant Perry G. Sessoms, Jr. ***, did, at Sioux Falls Army Air Field, Sioux Falls, South Dakota, on or about 21 February 1946, feloniously embezzle by fraudulently converting to his own use one (1) Jumbo Parade coin machine of the value of about Sixty-Five Dollars ($65.00)

and two (2) drapes of the value of about Two Dollars and Fifty Cents ($2.50) each, totalling to a value of Seventy Dollars ($70.00), the property of the Sioux Falls Army Air Field Officers Mess, entrusted to him by the said Sioux Falls Army Officers Mess.

Specification 4: In that First Lieutenant Perry G. Sessoms, Jr., ***, did, at Sioux Falls Army Air Field, Sioux Falls, South Dakota, on or about 19 February 1946, feloniously embezzle by fraudulently converting to his own use one (1) chest of drawers of the value of about Five Dollars ($5.00) and four (4) cabinets of the value of about one Dollar ($1.00) each, totalling to a value of Nine Dollars ($9.00), the property of the Sioux Falls Army Air Field Officers Mess, entrusted to him by the said Sioux Falls Army Officers Mess.

Specification 5: In that First Lieutenant Perry G. Sessoms, Jr., ***, did, at Sioux Falls Army Air Field, Sioux Falls, South Dakota, on or about 19 February 1946, feloniously embezzle by fraudulently converting to his own use one (1) dish carrying cart-tray of the value of about Fifteen Dollars ($15.00), kitchen equipment of the value of about Ten Dollars ($10.00) and dishes of the value of about Eighteen Dollars and Fifty Cents ($18.50), totalling to a value of Forty Three Dollars and Fifty Cents ($43.50) the property of the Sioux Falls Army Air Field Officers Mess, entrusted to him by the said Sioux Falls Army Officers Mess.

Specification 6: In that First Lieutenant Perry G. Sessoms, Jr., ***, did, at Sioux Falls Army Air Field, Sioux Falls, South Dakota, on or about 28 February 1946, feloniously embezzle by fraudulently converting to his own use two (2) pool tables of the combined value of about Two Hundred and Seventy-five Dollars ($275.00), the property of the Sioux Falls Army Air Field Officers Mess, entrusted to him by the said Sioux Falls Army Officers Mess.

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

Specification: In that First Lieutenant Perry G. Sessoms, Jr., ***, did, at Sioux Falls Army Air Field, Sioux Falls, South Dakota, on or about 15 February 1946, wrongfully, knowingly, and without proper authority, sell to the Lee Products Company, 316½ West Ninth Street, Sioux Falls, South Dakota, one (1) Underwood Typewriter, serial number S-5594739, of the value of about Sixty Five Dollars ($65.00), property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, 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 only so much of the findings of guilty of Specifications 1 to 6 inclusive of Charge I and Charge I as involved findings of guilty of wrongful disposition of the property alleged in violation of Article of War 96, excepting however the words "one (1) Temeo Gas Heater, No. 1242-12000" and "two (2) stapling machines" substituting therefor "one (1) stapling machine" as to Specification 2; approved the finding of guilty of the Specification, Charge II, except the word "knowingly" and approved the finding of guilty as to Charge II. He approved the sentence but reduced the period of confinement to one year and forwarded the record of trial for action under the provisions of Article of War 48.

3. Evidence for the Prosecution.

On some date prior to 5 February 1946 the accused became custodian of the funds and property of the Officers Club, Sioux Falls Army Air Field, South Dakota. The Sioux Falls Air Field was in the process of being inactivated and arrangements were being made to dispose of the Club's property (R. 47).

On 5 February 1946 a meeting was held of the Board of Governors of the Officers' Mess, Sioux Falls Army Air Base, Sioux Falls, South Dakota (as appointed by par. 8, SO No. 30, 5 Feb 1946), of which the accused was a member, and as shown by the minutes thereof the following pertinent resolution was adopted:

> "b. Lt. Sessoms proposed that inventory be taken on all remaining Club property, the property segregated into two lots, the useable separate from that which is salvage, and to give the useable property to the Childrens Home of Sioux Falls. The motion was made by Lt. Sessoms, seconded by Major Brown and unanimously carried upon vote. The remaining property would be all salvage which will be turned over to Captain Shofe, Salvage and Reclamation Officer, for such disposition as can be made, preferably negotiable sale.
>
> "c. These transactions, when complete, will materially reduce the physical assets of the Officers' Club." (R. 68, Pros. Ex. 16.)

At the suggestion of the prosecution the court took judicial notice of the provisions of AR 210-50 dated 20 January 1945 and more particularly thereof to paragraph 12 authorizing the establishment, maintenance and operation of funds of clubs and similar associations for the welfare of military personnel; the control and supervision thereof, insofar as is

consistent with Army Regulations, by a Board of Governors and appropriate committees, and paragraph 24 concerning the disposition of property of such welfare funds. Briefly summarized, paragraph 24(a) provides that property (other than cash and securities) of such funds, which become surplus will be redistributed among other welfare funds to the greatest possible extent and under the conditions prescribed therein; may be sold to individuals or organizations under the provisions of pertinent orders, regulations and instructions prescribed by the Commanding General of the Army Air Forces or Army Ground Forces concerning the manner in which such sales are to be conducted; may be declared unserviceable by the fund council or board and disposed of to the best advantage after appropriate entries have been made in the fund records and the proceedings of the fund council or board. The proceeds of any sales of surplus property are required to be deposited to the credit of the fund having title thereto.

On 22 February 1946, Frederick J. Buckmiller, a second-hand furniture dealer of Sioux Falls, South Dakota, visited the Sioux Falls Army Air Base and was shown certain items of property in Building 300 which accused told Buckmiller was property of the officers' club which he was offering for sale (R. 11). Buckmiller agreed to buy the property for a total sum of $504.50, made a down payment of $50, and on 26 February paid the balance of $454.50 by check payable to accused. He was given an itemized bill of sale and accepted delivery of the property by Army truck (R. 15,20; Pros. Exs. 1-5). The property purchased by Mr. Buckmiller is shown to be those items mentioned in Specification 1 of Charge I (R. 15; Pros. Ex. 4). On 15 February 1946 Mr. George M. Ziter of Lee Products Company, Sioux Falls, South Dakota, at the invitation of accused, visited the Sioux Falls Army Air Field where he purchased certain items of property for the total sum of $208 paying therefor by check made payable to accused (R. 23). The property was represented by accused as being surplus property of the officers' mess and included an Underwood typewriter, Serial No. 5594739. The typewriter is described in the Specification, Charge II, and is proven to have been U. S. Government property, issued to the Courts and Boards Section, but which had been surveyed as lost. There is no evidence as to how it became confused with the property of the officers' club (R. 31,39,41; Pros. Exs. 9-10). The other items purchased by Mr. Buckmiller are described in Specification 2 of Charge I, excepting therefrom however the Temeo gas heater and one stapling machine (R. 24-25, Pros. Ex. 6).

On 19 and 21 February 1946 Mr. David D. Myers, Route 4, Sioux Falls, South Dakota, purchased from the accused property of the officers' club listed in Specifications 3 and 4, Charge I, paying accused therefor by separate checks in the sums of $70 and $9 (R. 37-38; Pros. Exs. 7,8).

On or about 19 February 1946 Mr. Lawrence C. Kyriakos, a cafe manager of Sioux Falls, South Dakota, purchased from accused at the Sioux Falls

Army Air Field the dishes and kitchen equipment listed in Specification 5, Charge I, property of the officers' mess and paying accused by check the sum of $43.50 therefor (R. 50-51, Pros. Ex. 12).

On or about 28 February 1946 Mr. Clifford Bell of Sioux Falls, South Dakota, purchased from accused certain items of personal property belonging to the officers' club including two pool tables (see Spec. 6, Chg. I), for which he paid the sum of $275.00. The pool tables were delivered to Mr. Bell by some soldiers and one Ralph C. Reda, a civilian. A check in the total sum of $290 was issued by Mr. Bell to Reda which included the price paid for the pool tables and this check was indorsed and cashed by Reda at the Northwest Security National Bank, Sioux Falls, South Dakota (R. 54-55; Pros. Ex. 13).

Captain Herbert R. Shofe, Air Corps, surplus property officer of the Sioux Falls Army Air Base, testified that prior to 3 April 1946 he was salvage officer of the base and that no property of the officers' mess was ever turned over to him whether designated as salvage or surplus. He did recall, however, that accused had turned in some quartermaster equipment (R. 70).

The prosecution called as a witness Mr. Ross Hunt, Assistant Cashier of the National Bank of South Dakota, who testified that accused had an account at his bank for the months of January and February 1946. A transcript of the ledger sheet purporting to show accused's banking transactions for the month of February 1946 was offered in evidence but on objection thereto by the defense this evidence was excluded (R. 67).

At the close of the case for the prosecution the defense moved for a finding of not guilty on the ground that the Government had failed to establish by any evidence any of the allegations of the charges and specifications and particularly as follows: "That the evidence showed that accused was placed in charge of the property, that he openly sold the property and that there was no evidence of fraud on his part." After hearing argument of counsel the President announced that subject to objection of any member of the court the motion was denied (R. 71).

For the defense.

The accused did not elect to testify in his behalf (R. 82) but it wasclearly established on cross-examination of all the witnesses that the sales of the property mentioned in the specifications were conducted by accused during business hours, in the open and that no concealment, subterfuge or artifice was practiced in effecting such sales of the property. The accused fully advised the purchasers that the property belonged to the officers' club and that he as the club officer was disposing of same as surplus (R. 17,27,39,52,58). With regard to the

typewriter mentioned in the Specification, Charge II, Private Myron W. VanPeursem testified that he and accused checked the Quartermaster list of Government property and could not find this item listed. The accused then stated "if it wasn't on the quartermaster records it would be Club property" and he would be authorized to sell it (R. 77).

Major Frank W. Hess, Air Corps, 234 Base Unit, Clovis, New Mexico, a witness for the defense, testified that he was officer in charge of the Officers' Mess, Sioux Falls Army Air Field, during the period 18 November 1945 to 15 February 1946, and that during this period of time and subsequent thereto the Sioux Falls Army Air Field was in the process of being inactivated and arrangements were being made for the disposition of the property of the officers' mess or officers' club fund (R. 71). Major Hess stated that he had sold some of the property of the officers' mess in order to take care of a preexisting indebtedness and that there was a shortage in the funds at the time he was transferred. The accused had become his assistant club officer and custodian of the fund sometime prior to February 1946 and when Major Hess was transferred he turned the "club fund" over to the accused and instructed him "to dispose of all excess property the best he could to better the Club fund" (R. 73). The witness further testified that some of the property of the officers' club had been turned over to a church and orphan societies and that "we were going to sell the salvage property" (R. 72). He asserted on cross-examination that he had received permission to sell the property "from Captain Dwyer, let's see, Captain Ries from Second Air Force Property Board, and verbally through Colonel Oliver" (R. 73). Major Hess had no knowledge of the provisions of AR 210-50, but just told accused to dispose of the property as he saw fit (R. 74).

Before Major Hess had been called as a witness in this case there had been received in evidence, on motion of the prosecution, a duly authenticated deposition of Major Wesley Paul Ries, AC, Metamora, Ohio, showing that during February 1946 this officer was Chief, Post Exchange Section, Personnel Service Section, A & S Division, Headquarters 2nd Air Force, Colorado Springs, Colorado. The pertinent questions and responses thereto are as follows:

> "Fourth interrogatory: On or about the first of February 1946, did you visit Sioux Falls Army Air Field in pursuit to your above mentioned duties?
>
> "Answer: Yes.
>
> "Fifth interrogatory: Do you recall making any verbal statement to Major Frank W. Hess, Officer-in-Charge of the Sioux Falls Army Air Field Officers Mess Property, or to First Lieutenant Perry G. Sessoms, Jr., Assistant Officer-in-Charge of said Officers Mess Property regarding the disposition of Officers Mess Property?

"Answer: Yes.

"Sixth interrogatory: In the event that you made such verbal statement referred to in interrogatory number five, will you repeat the verbal statement made as closely as you can recall.

"Answer: A statement was made by me to either Major Hess or Lt. Sessoms that Second Air Force installations scheduled to remain intact were not asking for any more property but an inventory should be taken of all remaining property and a Board of officers appointed to determine its condition and copy should be forwarded to Second Air Force for disposition. Property categoried excellent or good could not be disposed of without prior approval of C.A.F. and Hq. Second Air Force unless it was transferred to other Army Air Force installations. Property categoried fair and poor could be disposed of by public sale or sealed bids. Any other property that could not be sold should be turned over to the Base Salvage Officer.

"Seventh interrogatory: If you made such verbal statement, was it substantially as follows: Second Air Forces installations have all the Sioux Falls Army Air Field Officers Mess Property they want. The thing for you to do is to get rid of the remaining property - sell it, give it away, dispose of it as you see fit.

"Answer: No. The only statement made by me was the same as answer to Sixth interrogatory" (R. 64, Pros. Ex. 14).

4. Charge I and its Specifications.

In Specifications 1 to 6, inclusive, of Charge I accused is alleged to have feloniously embezzled by fraudulently converting to his own use the property described therein in violation of the 93rd Article of War. The reviewing authority approved only so much of the findings of guilty of these specifications and the charge "as involve findings of wrongful disposition of the alleged property to the prejudice of good order and military discipline under Article of War 96." Thus, in effect, the accused, having been charged with embezzlement of certain property, was found guilty of wrongful disposition of the same. Since neither the court nor the reviewing authority is empowered under the Articles of War to find an accused guilty of an offense different in nature or identity from that charged, both being limited to a finding based on the offense charged in the specification or upon a lesser offense necessarily included in that charged (MCM, 1928, par. 78c; AW 47), it becomes necessary to determine whether "wrongful disposition" is an offense lesser than and necessarily included in the offense of embezzlement. In the leading case on this subject (CM 211260, Grochowiak, 10 BR 43), the Board of Review, after a thorough discussion of pertinent state and Federal court decisions, came to the conclusion that, "If each of two offenses contains an element not found in the other, it is obvious that neither can be included in the other." In that case the question of double jeopardy was involved. In the instant case, however, since the reviewing authority purported to find accused guilty of a lesser included offense, the only question presented is whether the offense so found contains an element not included in the offense charged. Stated otherwise, is it necessary to prove a wrongful disposition in every

embezzlement? The solution to this problem lies in an examination of the elements of the two offenses involved.

According to the Manual for Courts-Martial the elements necessary to be proved in embezzlement are (a) that the 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 (MCM, 1928, par. 149h; Moore v. United States, 160 U.S. 268).

Black's Law Dictionary defines the words "dispose of" as follows:

> "To alienate or direct the ownership of property, as disposition by will. Used also of the determination of suits. Called a word of large extent. *** To exercise finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of. *** Often used in restricted sense of 'sale' only, or so restricted by context."

The words "dispose of" and "disposition" are not unknown to military law. They are generally found in context as descriptive of offenses against Government property in violation of the 83rd, 84th and 94th Articles of War. As used in the ninth paragraph of Article of War 94, the words "dispose of" are used in apposition to the words "steals," "embezzles," "misappropriates," "applies to his own use," and "sells," all of which have been held to set out offenses separate and distinct from each other (CM NATO 1135; Morning; CM ETO 9784, Green; CM ETO 13707, Housel; see CM 243287, Poole, 27 BR 321, 325). The various offenses described in the 84th Article of War, one of which involves "wrongful disposition," have also been held to be separate and distinct from each other (CM 224730, Atkins, 14 BR 175; CM 217868, Shiedinger, 11 BR 329,338; CM 138679, Frisbie). In the Frisbie case, it was held that the words "dispose of" might mean any one of many acts, such as to arrange, to find a place or use for, to have the control or ordering of, to dispose of troops, pawn, barter, give away, burn, destroy, to determine the fate of, mortgage, and many others, and that to wrongfully dispose of property in a manner not stated was a separate and distinct offense from wrongfully selling such property, selling being but one mode of disposing of property. It was said of the words "dispose of" that, "Standing by themselves without qualification these words have no legal signification."

Having in mind, however, the fact that the offense of wrongful disposition of Government property as found in the ninth paragraph of Article of War 94 appears along with and separate from the offenses of larceny, embezzlement, misappropriation, misapplication, and wrongful sale of such property, it would seem that Congress intended the words "dispose of" in

that Article to cover that class of cases where the offender wrongfully divests himself, although perhaps only temporarily, of possession, custody or control of such property, without regard as to whether in the first instance such possession, custody or control was obtained in a lawful or unlawful manner, in short, where he wrongfully relinquishes, parts with or gets rid of such property (Winthrop's Mil. Law and Prec., 2d Ed., p. 708). Although the instant case arises under Article of War 96 and the property in question is not Government property, there is no reason to suppose that the reviewing authority intended that the words "wrongful disposition" as used by him should have any other meaning and the evidence clearly shows such a disposition and only such a disposition. On principle, the offense of wrongful disposition should not vary according to the particular Article of War under which it is laid.

Although every embezzlement includes a fraudulent and, therefore, a wrongful, conversion, it does not necessarily follow that every embezzlement includes a wrongful disposition. That form of conversion which is an element of embezzlement is antecedent to whatever disposition may be made of the property, although perhaps only momentarily so, the disposition being merely evidence of the preceding wrongful conversion (Winthrop's Mil. Law and Prec. p. 705). Such wrongful conversion is a wrongful exercise of dominion over the property in question. It is a state of mind existing simultaneously with an unauthorized assertion of control over the property affected, a "converting to one's own use" in legal terminology. A wrongful disposition by sale, pledge, gift, barter or otherwise may, and often does, follow but the conversion and, if the other elements are present, the embezzlement may be complete without such wrongful disposition. Indeed, the wrongful conversion may be a wrongful retention of the property or other wrongful application to the offender's own use (CM 271265, Weed, 46 BR 79, 86; CM ETO 14456, Fowler). Thus, in CM ETO 1538, Rhodes, where the Specification charged the accused with having embezzled Government property by fraudulently converting it to his own use "by selling the said goods and retaining the proceeds therefrom" the Board of Review said:

> "The phrase contained in the Specification 'by selling the said goods and retaining the proceeds therefrom' is surplusage. The offense of embezzlement was sufficiently alleged without the inclusion of the mentioned phrase. No proof of the same was required in order to sustain the charge (Grin v. Shine, 187 U.S. 181,189,195, 47 L.Ed. 130,136,138; Jewett v. United States 100 Fed. 832,837; CM ETO 764, Copeland and Ruggles; CM ETO 895, Davis et al)."

It may with like logic be said that no proof of any other kind of disposition is necessary to sustain a charge of embezzlement. Furthermore, it may be observed that although it is true that a wrongful disposition may in itself amount to a wrongful conversion (see CM 252620, Watterson, 34 BR 95,101) it is also true that one may be found guilty of a wrongful disposition of property which he has obtained by a larceny thereof and may in addition be found guilty of the larceny (CM NATO 1135, Morning, CM ETO 9784, Green, supra). It is axiomatic that one cannot be found guilty of embezzlement of such property (MCM, 1928, par. 149h; CM 215861, Tomalenas, 11 BR 61).

Manifestly, therefore, the offense of wrongful disposition is considered as having elements different than those found in both larceny and embezzlement.

For the foregoing reasons, the Board of Review is of the opinion that the offenses of embezzlement and wrongful disposition are separate and distinct offenses, one from the other, regardless of the particular Article of War under which they may be laid, that the offense of wrongful disposition cannot be considered lesser than and necessarily included in the offense of embezzlement and that the record of trial is legally insufficient to support the findings of guilty of Charge I and Specifications 1 to 6, inclusive, thereunder as approved by the reviewing authority.

5. Charge II and its Specification.

The ninth paragraph of Article of War 94 provides that any person subject to military law, "who *** wrongfully or knowingly sells or disposes of any ordnance *** or other property of the United States ***" shall suffer the prescribed penalties. The typewriter described in the Specification of Charge II is shown to have been Government property, issued to the Courts and Boards Section, lost from said section and surveyed as lost property. The evidence does not show conclusively that accused knew he was selling a Government-owned typewriter. He assumed that he had a right to sell it as club property because it was not listed as Quartermaster property. On the other hand, the evidence does not show that the typewriter was listed as club property. It has been held in a long line of opinions that

> "When a criminal intent is necessary to constitute the offense, and that intent is dependent on a knowledge of particular facts, then ignorance or mistake as to such facts, honest and real, not superinduced by the fault or negligence of the party doing the act, relieves from criminal responsibility" (32 LRA (N.S.) 747) (underscoring supplied).

It has already been shown that the accused had no authority to sell the club property, therefore such careless and reckless disregard for the rights of the true owner, whoever it may have been, would not bring the sale of the typewriter within the above rule. Had he been authorized to sell the property of the club, an honest mistake as to identity of the typewriter would create an entirely different problem for consideration. By excepting the word "knowingly" from the approved findings of guilty of the Specification, Charge II, we construe the action of the reviewing authority as recognizing the fact that the accused may not have been cognizant of the fact that it was Government property. The words "wrongfully and without proper authority" however remained in the pleading and are sufficient to bring the act denounced within the purview of Article of War 94. (See CM 248081, Novitch, 31 BR 107,111.)

6. The records of the War Department show that the accused is 22 years of age and married. In 1942 he graduated from Rocky Mount, North Carolina, High School, ranking high in his class, and on 1 February 1943

enlisted as a cadet in the Air Corps. After completion of cadet training he was on 15 April 1944 commissioned a second lieutenant, Army of the United States. He served overseas with the 8th Air Force where he was awarded the Distinguished Flying Cross and Air Medal with several Oak Leaf Clusters thereto. He was returned to the United States in June 1945 and subsequently assigned to the Sioux Falls Army Air Field.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors or irregularities other than those noted herein 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 insufficient to support the findings of guilty of Charge I and its Specifications and legally sufficient to support the findings of guilty of Charge II and its Specification and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94.

Chester D. Silvers, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert J. Hayes, Judge Advocate

JAGK - CM 314444 1st Ind NOV 1 5 1946

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 the opinion of the Board of Review in the case of First Lieutenant Perry G. Sessoms, Jr. (O-828551), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the embezzlement of certain items of personal property of the Officers Club, Sioux Falls Army Air Field, Sioux Falls, South Dakota (Specs. 1 to 6, Chg. I), in violation of Article of War 93 and of the wrongful sale of a typewriter, property of the United States, in violation of Article of War 94 (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 a period of three years. The reviewing authority approved only so much of the findings of guilty of Specifications 1 to 6 inclusive, Charge I, and Charge I as involved wrongful disposition of the property alleged in violation of Article of War 96, approved the findings of guilty of the Specification, Charge II, except the word "knowingly," approved the sentence but reduced the period of confinement to one year 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 of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specifications and legally sufficient to support the findings of guilty of Charge II and its Specification and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence.

On some date prior to 5 February 1946 the accused became custodian of the funds and property of the Officers' Club, Sioux Falls Army Air Field, South Dakota. The Sioux Falls Field was being inactivated and arrangements were being made to dispose of the club's property. There was a shortage in the funds of the club when the accused took over the funds and property from Major Frank W. Hess, AC, accused's predecessor as Club Officer. Major Hess claimed to have had authority from certain officers of the 2nd Air Force to separate the club property into serviceable and unserviceable and to sell such as he could to the best interest of the club fund. He testified he had sold some of the club's property. At a meeting of the Board of Governors of the club held on 5 February 1946 a motion was made by accused and unanimously adopted authorizing him to turn over to Captain Shope, the Field's salvage officer, all unserviceable property of the Officers' Club, and to give to the Sioux Falls Orphans' Home the serviceable

property. None of the club property was turned over to the salvage officer and the record does not show that accused gave any of the same to the orphans' home. However, he sold various items of furniture, fixtures and equipment to certain individuals of Sioux Falls, South Dakota, for a total sum of $986, together with a Government owned typewriter which had become confused with club property in an unknown manner. It was not shown conclusively that accused knew the typewriter was Government owned. The typewriter was sold for the sum of $65.00. The accused at all times represented to the purchasers that he was selling property of the Officers' Club and the sales were made in the open and during business hours at the Sioux Falls Army Air Field. The record does not indicate what disposition accused made of the proceeds of these sales, but he received the proceeds when the sales were made.

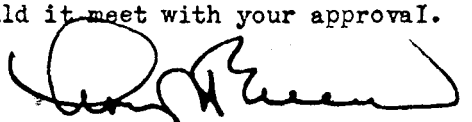
4. Accused is 22 years of age and married. He graduated from high school in 1942. On 1 February 1943 he enlisted as a cadet in the Air Corps and was commissioned a second lieutenant, AUS, on 15 April 1944. He served overseas with the 8th Air Force and was awarded the Distinguished Flying Cross with cluster and the Air Medal with several clusters. His citations indicate he performed valuable service as a bomber pilot. In June 1945 he was returned to the United States and subsequently assigned to the Sioux Falls Army Air Field.

5. In view of the fact that the only legal finding remaining is that of having wrongfully disposed of one Government typewriter not knowing it to be Government property, I recommend that the sentence as approved by the reviewing authority be disapproved and a rehearing authorized so that accused may properly be put on trial for the many and serious wrongful dispositions of property shown by the evidence in this case and for the embezzlement of the proceeds of such wrongful dispositions.

6. Consideration has been given to the following communications on behalf of accused: Four letters and inclosures thereto from Honorable Harold D. Cooley, House of Representatives, dated 10, 15 and 24 May 1946; two letters and inclosures thereto from Congressman Cooley dated 12 and 19 June 1946; copy of letter of Congressman Cooley to Brigadier General Charles F. Born, Commanding General, 15th Air Force, Colorado Springs, Colorado; letter from Mr. W. S. Wilkinson, Rocky Mount, North Carolina, dated 15 May 1946; letter of 17 May 1946 from Honorable John H. Kerr, House of Representatives; letter from Mr. Tom Kirby, Sioux Falls, South Dakota, dated 18 June 1946; brief forwarded by Mr. Kirby on 14 August 1946; and a letter from Congressman Cooley dated 2 September 1946.

7. Inclosed is a form of action designed to carry into effect the

foregoing recommendation should it meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

10 Incls
1. Record of trial
2. Form of action
3. Four ltrs and incls fr Hon H D Cooley to TAG, one undated, others dated 10,15, 24 May 1946
4. Two ltrs and incls thereto fr Hon H D Cooley to Col H D Hoover, 12 and 19 June 1946
5. Cpy ltr of Hon H D Cooley to CG, 15th Air Force
6. Ltr fr Mr W S Wilkinson, Rocky Mt, NC, 15 May 1946
7. Ltr fr Hon John H Kerr, H of R
8. Ltr fr Mr Blaine Simons
9. Brief filed by Mr. Kirby
10. Ltr fr Hon H D Cooley to Col H D Hoover, 2 Sep 1946

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

19 Jul 1946

JAGN-CM 314572

UNITED STATES v. Private JESS E. LITTLE (34821358), 100th Station Complement Squadron (Sp), Headquarters Group, IX Air Force Service Command, APO 66	)	IX AIR FORCE SERVICE COMMAND Trial by G.C.M., convened at Erlangen, Germany, 29 May 1946. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, 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 61st Article of War.

Specification: In that Private Jess E. Little, 100th Station Complement Squadron (Sp), Headquarters Group, IX Air Force Service Command, APO 66, US Army, did, without proper leave, absent himself from his station, the 9th Airdrome Squadron, Headquarters Group, IX Air Force Service Command, APO 151, US Army, Brunswick, Germany from about 11 May 1945 to about 4 December 1945 and from the 100th Station Complement Squadron (Sp), Headquarters Group, IX Air Force Service Command, APO 66, US Army, Erlangen, Germany from about 4 December 1945 to about 21 March 1946.

He pleaded guilty to, and was found guilty of, the Charge and the Specification. 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 five years. The reviewing authority approved the

sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, but withheld the order directing execution of the sentence pending action under Article of War 50½.

3. Although the Specification alleges two separate and distinct offenses, accused made no objection to it. Since it clearly apprized him of the offenses charged no injury to the substantial rights of accused appears to have resulted from the duplicitous character of the pleading. CM 202601, Sperti, 6 B.R. 171, 207; CM 268259, Stevens, 44 B.R. 241,253.

By pleading guilty to the Specification accused admitted the offenses charged.

> "*** If the alleged wrongful act is duly set forth in a specification with such particularity that the language used therein embraces an offense defined and designated as such by law, the commission of such an offense is confessed by a plea of guilty and conviction thereon must follow." CM 248032, Johnston, 31 B.R. 91, 95.

However, if it is otherwise shown that the plea of guilty was improvidently entered or if evidence inconsistent therewith was subsequently introduced, the case will be treated on review as though a plea of not guilty was entered. 1912-40 Dig. Ops. JAG, sec. 378(3).

The prosecution did not rest its case upon accused's plea of guilty but proceeded to offer evidence in support of the Specification. The evidence, entirely of a documentary character, shows that accused absented himself without leave from his organization, the 9th Airdrone Squadron, on 10 May 1945; that he was transferred while absent without leave to the 100th Station Complement Squadron on 4 December 1945; and that he returned to military control on 21 March 1946.

It is apparent from the proof that accused was in an absent without leave status continuously from 10 May 1945, the date he absented himself, to 21 March 1946, the date of his return to military control. His absence for this period constituted but a single offense.

> "*** Absence without leave (A.W. 61); desertion (A.W. 58); and fraudulent enlistment (A.W. 54) are not continuing offenses and are committed, respectively, on the date the person so absents himself, or deserts, or first receives pay or allowances under the enlistment." M.C.M., 1928, Par. 67.

The evidence being inconsistent with accused's plea of guilty to two absences without leave during the period in question, the case must be considered as though a plea of not guilty had been entered.

4. Since the proof establishes that accused absented himself without leave from the 9th Airdrone Squadron on 10 May 1945 and remained absent without leave until 21 March 1946, that part of the Specification alleging an absence without leave for the lesser period from 10 May 1945 to 4 December 1945, is sustained. There is, however, no proof that accused was absent without leave from the 100th Station Complement Squadron from 4 December 1945 to 21 March 1946. The offense is not sustained by proof of an order transferring him in an absent without leave status to that organization and an extract copy of the morning report of that organization showing that he did not join and was dropped as absent without leave. It was so held under a similar state of facts in C.M. ETO 11518, Rosati, where the Board of Review (ETO) said:

> "*** we cannot hold that accused is presumed to have notice of an order issued transferring him in an absent without leave status (Cf. Winthrop's Military Law and Precedents (Reprint, 1920), p. 575). It is therefore our opinion that there is no proof by which it can be inferred that accused had notice that he should report to this company, and therefore none that he was under a duty to be there. How could we hold him for absence without leave from a command to which he is not shown to have known he must report?***"

It is clear that the status of absence without leave is not interrupted by an administrative transfer of the person in that status to another organization. Such a transfer does not terminate the existing absence without leave from the transferring organization or create a new absence without leave from the transferee organization. The original absence without leave is not terminated until the accused has returned to military control. CM 281498, 4 Bull. JAG 277. In this case, however, the orginal absence without leave is alleged to have terminated on the date of the transfer and consequently absence without leave only to that date can be sustained.

5. For the foregoing reasons the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification as involves a

finding that accused absented himself without leave from his station, as alleged, from 11 May 1945 to 4 December 1945; and legally sufficient to support the sentence.

Wilmot T. Baughn, Judge Advocate

Robert J. O'Conners, Judge Advocate

Gerald T. O'Hara, Judge Advocate

JAGN-CM 314572 1st Ind
WD, JAGO, Washington, D. C.
TO: Commanding General, IX Air Force Service Command, APO 66, c/o Postmaster, New York, New York.

1. In the case of Private Jess E. Little (34821358), 100th Station Complement Squadron (sp), Headquarters Group, IX Air Force Service Command, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that only so much of the finding of guilty of the Specification be approved as involves a finding that the accused absented himself without leave from his station, as alleged, from 11 May 1945 to 4 December 1945. Upon disapproval of the excepted portion of the findings of guilty, you will have authority to order the execution of the sentence.

2. In view of all the circumstances and the nature of the offense and in order that the sentence may be brought within the standards of the post war clemency program, it is recommended that the execution of the dishonorable discharge be suspended until the soldier's release from confinement and that the period of confinement be reduced to four 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 314572).

s/ Thomas H. Green

THOMAS H. GREEN
MAJOR GENERAL
The Judge Advocate General

1 Incl
Record of trial

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

JAGK - CM 314581

26 JUN 1946

UNITED STATES v. Technician Fourth Grade ERNEST R. PAYTON (36468070), 542d Signal Heavy Construction Company.	UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M., convened at APO 358, c/o Postmaster, San Francisco, California, 9 April 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fourth Grade Ernest R. Payton, 542nd Signal Heavy Construction Company, did, at or near Santa Mesa Estate, on or about 28 February 1946, forcibly and feloniously, against her will, have carnal knowledge of Benita Tan y Santos.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence was introduced of one previous conviction by summary court-martial for unlawfully operating a government vehicle at an excessive rate of speed in violation of Article of War 96, for which he was sentenced to forfeit $10 of his pay. In the instant case he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor "for the term of your natural life." The reviewing authority approved the sentence, designated the U.S. Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of

Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, section 2801, District of Columbia Code.

William B. Tuder, Judge Advocate

Gilbert E. Mahony, Judge Advocate

Earl W. Wingo, Judge Advocate

3 20 NOV

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

JAGQ - CM 314583 SEP 24 1946

UNITED STATES	)	
	)	AAF PROVING GROUND COMMAND
v.	)	
	)	Trial by G.C.M., convened at
Second Lieutenant WILLIAM E.	)	Eglin Field, Florida, 9 May
McMASTER (0869012), Air Corps	)	1946. Dismissal.

OPINION of the BOARD OF REVIEW
WURFEL, OLIVER and McDONNELL, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant William E. McMaster, Air Corps, Squadron B (Administrative) 610th Army Air Forces Base Unit, was, at Crestview, Florida, on or about 30 March, 1946, in a public place, to wit: Davis's Bar, Crestview, Florida, drunk and disorderly while in uniform.

Accused pleaded not guilty to the Charge and Specification, was found guilty of the Specification, not guilty of the Charge but guilty of a violation of the 96th Article of War. Evidence of one previous conviction of issuing five different checks totaling $275.00 without sufficient funds in violation of Article of War 96 was introduced. The accused 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.

B. R. Williams, a bartender, at the time of the incident, employed at the War Camp Tavern in Crestview, Florida, identified the accused (R 11) and testified he saw accused and a major on 30 March 1946, between 12:30 and 1:00 a.m. (R 11, 15) at Davis's Bar, also known as Crestview

Bar, a public place (R 11, 15). There were about fifteen civilians present at Davis's Bar (R 20). Accused, in uniform, was "moderately drunk" and had three mixed drinks - highballs - during the time the witness observed him (R 15, 16, 20). The major with the accused was "drunk and loud" (R 12, 13), and "the drunker of the two" (R 17). A woman, Odessa Darnelle, came and sat between both officers, who made room for her, and "the first thing I knew both (officers) were on the floor, lying on their backs." (R 12, 17, 19). The major said "he was a Nazi." (R 13). The witness recalled seeing accused on the floor again after a discussion with Kennedy, a bartender, and observed them shaking hands and the accused saying, "Let's forget it." (R 13). After "a little chaos at the bar," in which accused was not involved, the witness, with police consent (R 13), and because both "Were too drunk" (R 17), twice attempted to take both officers home in his car (R 14) but returned each time at the behest of the major (R 14). Upon their second return to the Crestview Bar, both officers were taken into custody by the civil police (R 15).

J. D. Kennedy, bartender at the Crestview Bar, identified accused and testified that he saw him at the Crestview Bar, a public place (R 64) "around the end of March * * * on Saturday morning * * * between 12:30 and 1:00 a.m." (R 21). Accused had come in with a major and "ordered a drink;" His "appearance was fine." (R 22). The witness served him one drink, but "he drank a couple of more drinks after that," which "some civilian bought for him." (R 22, 25). Accused was "drinking too much to be his actual self." (R 24). An argument developed (R 22). The witness requested both officers to "quiet down" (R 23). Accused talked loudly (R 23), and about 2:00 a.m. (R 62), when asked to quiet down or leave (R 62), said, "By God, I do not have to shut up * * *." The accused rose to his feet with "hand in his right pocket." The witness, who "did not know his intention when he got to his feet," struck him. (R 23, 62). He took accused to the door, told him not to return (R 62). Accused "was drunk." (R 63). He returned and apologized (R 63). Kennedy refused to serve any more drinks to the officers, because "they had enough," but someone bought accused another drink (R 63), Between 4:30 and 5:00 the witness separated a civilian and the accused who were arguing and had "started again." (R 64). The witness believed a fight was imminent (R 66). Later both officers were removed by the civil police (R 64).

Walker G. Barrow, an assistant fire chief and a city marshal special officer, identified accused (R 26, 31) and testified that on 30 March 1946, about 4:45 a.m. (R 31), responding with the police in answer to a call that a "free-for-all" was on at the Crestview Bar (R 30) he found "a civilian and one of the officers in a dispute," the precise one of whom he did not remember. Accused "pushed a fellow back and told him to get the hell out of the way." (R 28). Accused "was drinking pretty heavy" (R 28, 29); He "was drunk" (R 29), although he walked without assistance (R 29). As police sought to remove the major, the accused, "under the influence of intoxicants" (R 29), started toward the major, saying, "The damned civilians can't do this to us. We are officers." (R 27). The witness restrained the accused by "hooking arms" with him to

keep him from interfering with the arresting officers. Accused's actions were "more or less interfering or wanting to interfere and raise a disturbance." (R 29).

James C. Barrow, jailer and policeman of Crestview (R 31), identified accused (R 32) and testified that he saw him on the date alleged about four in the morning at the Crestview Bar when he responded to a call (R 32). There was no disturbance when he arrived (R 32, 34). Two civilians were removed from the Bar. The accused was at the bar, "liquored up." (R 32, 33). When arrested "for being drunk" (R 35), the accused did not resist (R 33), but he was assisted out of the police car upon arrival at the Military Police jail (R 34).

E. E. Whiddon, Chief of Police of Crestview, Florida, identified accused (R 36) and testified he saw him at the Crestview Bar on the date alleged about five in the morning when he responded to a call with Clee Barrow and Walker Barrow (R 36). There were ten or twelve people present (R 39). Walking to the end of the bar, he heard J. D. Kennedy, the bartender, say, "I'll have no fighting in here," as he pulled a civilian away from the two officers there (R 36). The accused sat on a stool at the bar. Both officers "had a drink sitting in front of them" (R 37). Kennedy informed the chief that "the two officers had been giving trouble ever since they had been in there," and requested they be removed. (R 37). The chief and Clee Barrow forcibly assisted the major out (R 38). Barrow "called the lieutenant because he was tussling with the major (R 39). The major insisted on driving his car, but the chief told them "neither was in condition to drive." (R 37). "They were drunk." (R 39). The accused "was not too well balanced. He was a little staggery and his speech was broken" (R 37). Williams (R 11) took the officers in the car, since "they could not drive their car" (R 37). There was half a quart of whiskey in the major's car (R 38). A civilian and one Odessa Darnelle (R 12, 17, 19), the latter "very drunk" (R 40), were put into the police patrol, at which time Williams drove back, the major standing on the outside of the coupé, one foot on the running board (R 38). Both officers started back to the bar, were cautioned not to re-enter. The major said, "I am an officer. You can't arrest me." (R 38). The chief arrested both because "they did not leave the bar. They were too drunk to drive their automobile." (R 38). He turned them over to the Military Police on charges of "drunk and disturbing the peace" (R 40,41).

Sampson Hart, owner of a bar and cafe, identified accused (R 41) and testified that he saw him on a stool at the bar with a major at the Crestview, a public place (R 44), between 12:00 and 1:00, "a month or so back." (R 42, 43). "I could tell he was drinking." (R 42). Standing behind accused (R 45) he heard the bartender say, "I have heard enough of that," and saw him "knock down the major and then the lieutenant" (R 42). Then they were "knocked on the floor and shoved out the door" both were "Wobbling and staggering." (R 44). Accused "was drunk" (R 44). Hart "heard him curse" but he was uncertain who cursed (R 46). He saw accused talking with Odessa Darnelle (R 43). The major had said to this witness, "Where was you during the war, you 4-F son-of-a-bitch?" (R 47). Both officers rose from the floor (R 46) and were removed. "hen they got

outside the door, one of them said to Kennedy, "We are officers and you son-of-bitch civilians can't do like that." (R 43). Both left but returned in 15 or 20 minutes (R 43).

Corporal Richard H. Sossei, Squadron D (Security) 610th Army Air Forces Base Unit, Eglin Field, Florida, identified accused and testified he saw him on the date alleged about "six in the morning," when the city police brought him to the Military Police jail (R 48). Accused "was drunk and staggered" (R 48), "he could not talk plainly" (R 49), and "was in no condition to walk around the streets or drive a car." (R 49). Accused's uniform "was not properly pressed and not too clean." (R 49). Both the major and accused "were in very bad shape" (R 50), although accused left the patrol wagon unassisted (R 50). The witness took no blood tests of accused for alcohol (R 50), but "I could smell it." (R 51). Accused was scratched on the face, as though "someone dug him." (R 51). When the witness and the assistant provost marshal went to the Bar to get the major's car, they found a quart bottle of whiskey on the seat, three-quarters full. (R 49, 51).

Charlie Day, a farmer, also bartender at the Crestview Bar, identified accused as the person at the bar on the date alleged "between 12:00 and 1:00" (R 52). The witness tended bar till 1:00 and remained until 4:45, but noticed no unusual acts of accused, although he called the police because "it looked like there might be trouble" caused, among others, by Odessa Darnelle, who "was pretty drunk" (R 53), and several who "were drinking pretty heavy." (R 53). Accused "was not drinking any more than the rest." (R 54). Odessa "jerked both officers off the stools" (R 54, 55, D-Ex 1). He did not see accused acting disorderly or hear him curse (R 55) or fight anyone (R 56), although he saw Kennedy "knock the accused on the floor." (R 56).

Captain William H. Morris, Corps of Military Police, Squadron D (Security) 610th Army Air Forces Base Unit, Eglin Field, Florida, identified accused and testified he saw him in the Military Police guardhouse about 10:30 or 11:00 a.m. (EST). (R 57, 58, 59). Accused was asleep on a bed. Captain Morris shook him to awaken him (R 57). Accused was "in a dazed condition; his hands were shaking." (R 58). He "was not drunk at that time of morning." (R 60). It did not appear possible that accused's condition was the result of an accident (R 60). His uniform was wrinkled (R 59), though that could have resulted from his sleeping in his clothes. (R 59). No blood tests for alcohol were made (R 59). It was not standard procedure (R 60).

The deposition of Odessa Darnelle was offered and admitted in evidence without objection (R 61, Pros-Ex A). She identified accused, did not know his name, but remembered seeing him and the major at the Crestview Bar on the date alleged. "Accused was almost drunk; he staggered, talked loud and used a lot of profanity in the bar." There were about twelve people there, including enlisted men, all of whom could hear. Accused asked her "to go out to his car." He cursed but "I wouldn't want to say the words he used." She recalled Kennedy's hitting accused, who "couldn't fight back." Accused could have fought

back "if he had been himself." "He was too drunk to fight." She pulled accused from the stool; the police were called; and the officers were removed. Later she was taken to jail. At the time of the deposition she had been sentenced to five years imprisonment (Pros.- Ex A).

4. Evidence for the Defense.

Mr. Leon Bishop, owner and operator of the Magnolia Bar in Fort Walton, Florida, about 32 to 35 miles from the Davis Bar in question (R 66, 68, 69), identified accused and testified that on 29 March 1946, the accused and the major ate dinner at his bar at about 7 or 8 (R 66). Afterwards, till at least 1:30 a.m. (CST), both officers remained there, the accused in the game room shooting dice, the major at the bar (R 67). Accused "was definitely sober." (R 67).

Luther Clary, real estate broker in Fort Walton, identified accused (R 68) and testified he saw him on the night of 29 March and on 30 March 1946 at the Magnolia Bar game room till about 12:45 (CST), from whence accused went to the bar at about 1:00 a.m.(R 68, 69). Accused was not drunk, but "he had some drinks," and "seemed in complete control of his mental and physical faculties." (R 69).

E. E. Whiddon, Chief of Police of Crestview, previous prosecution witness (R 35-41),testified that Odessa Darnelle's reputation for morality and for truth and veracity was bad (R 70, 71) and that so far as believing her under oath "if she was drunk I would not believe her, but if she was sober I would." (R 70, 71). On the morning of 30 March 1946 at Davis's Bar she was drunk when arrested and he "did not believe what she said about what happened at Davis's Bar." (R 70). Charlie Day, a previous prosecution witness (R 52-56), testified that Odessa Darnelle's reputation for truth and veracity was bad and that he would not believe her under oath (R 72).

A stipulation was offered and accepted by the court without objection (R 72, 73) that if the Clerk of the Circuit Court of Okaloosa County, Crestview, Florida, were present in court he would testify that Odessa Darnelle was sentenced to State Prison on May 4th for a period of 5 years for breaking and entering (R 72, 73); that she was considered "one of the worst prostitutes in the country," jailed at least once "on suspicion of relations with negroes," twice guilty of vagrancy, and "one of the worst characters" known to the State Attorney (R 73).

The accused, advised of his rights as a witness, was sworn at his request and testified (R 74) that with Major Van Swayck he had dinner in the Magnolia Bar at about 8:00 on the evening of 29 March (R 74, 74). He drank a Martini before dinner (R 75). Following dinner, he played dice in one club room of the Bar, remained there about two hours, until between 11:00 and 11:30, came out to the bar, talked with the major and several others, had two drinks, and went to the other club room, where he stayed

until 1:00. He came out, talked to several people, stopped at a table and danced a couple of times, returned to the bar and talked with the major. He had one drink at the table and two at the bar (R 75). He had been drinking Scotch and water (R 78). Leaving the Magnolia Bar in the major's car between 1:30 and 2:00, they left for a certain Martin's Bar in Crestview, but drank nothing on the way. He admitted that one evening before they had placed almost a full quart of liquor behind the front seat of the major's car, but did not know it was back there that night (R 76). Martin's Bar being closed, they proceeded to return to town, saw lights on at the Crestview Bar and entered. It was about 2:30 Standard Time (R 76). He denied entering there at 12:30 (R 77). He ordered a Scotch and water (R 77). Odessa Darnelle, whom he had never before seen (R 84), sat on the corner stool at the bar. He had possibly two or three more drinks while sitting there, "a total of either three or four drinks in the place"(R 77, 78). He offered to buy Odessa a drink, but she refused. He did not ask her to go out to the car with him (R 78, 84). She pulled him and the major off the stools (R 78). She was "fairly on the way to being pretty high." (R 78). He sat drinking and talking for about two hours, during which time there had been a "heated discussion" among a group of people and Major Van Swayck (R 78, 79). He tried to "calm things down." Kennedy, the bartender, to whom he had not been talking at all, said, "I have had enough of this," came around the bar toward him. Accused stood up with both hands in his pockets, waiting for Kennedy, who struck accused, knocked him off balance, so that he fell to the floor (R 79). Although angry, accused did not fight back but went out, returned later, and shook hands with Kennedy (R 79). They left after four (R 79), because the city police had requested them to leave to avoid "being in the middle of trouble in the place" if it started (R 80). He and the major entered Williams' car and started away, although the major dissented (R 80), insisting he wanted his car keys. They returned, the major started for his car but appeared to be going towards the bar when a policeman grabbed him and admonished him to leave. They left again, but the major insisted again on returning for his car keys (R 80) at which time both were taken by the police to the Military Police station (R 80, 81). It was about 6:30 a. m. (EST). Accused got out of the police wagon unassisted and remained there for about two hours (R 81). Accused is Executive Officer of Squadron B (Administrative) 610th AAF Base Unit, commanded by Captain Wood, the accuser on the charge for which accused was tried (R 81, 82). Accused continued as Executive Officer up to the time of trial. He stated there were three investigations made of the charges (R 82). On the third investigation, he stated, he was given no opportunity to offer testimony or to call witnesses in his behalf. Said the accused:

> "I went to Crestview with him (Captain Murphy, investigating officer) one day about noon and he requestioned almost all of the witnesses that were called in today. He questioned them in my presence and allowed me to interpose objections for them to sign. That was the extent of the investigation. * * * He more aptly phrased what they said. Some of the people are not so coherent. It is difficult to get coherent

testimony out of them. He allowed either myself or the person he questioned to interpose any objections we wanted to" (R 82).

He considered Odessa Darnelle drunk at the time of the investigation, and the investigation officer "decided not to include her testimony." (R 94).

5. The testimony of six witnesses indicates beyond a reasonable doubt that the accused was drunk and disorderly while in uniform in a public place at the time and place alleged. The Manual For Courts-Martial, paragraph 145, page 160 provides:

> "On an issue of drunkenness, admissible testimony is not confined to a description of the conduct and demeanor of the accused, and the testimony of witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion."

The drunken condition of accused from the time he was removed from the Bar till his incarceration at the Military Police jail is established by Corporal Sossei and Captain Morris. The accused himself testified under oath that he had about ten drinks.

The defense disputes the time that accused entered the Bar. The Specification as drawn alleges "on or about 30 March 1946" as the time of the offense and is a sufficient allegation as to time. The time of accused's entrance of the bar is immaterial.

The accused was in uniform. He conducted himself in such a drunken and disorderly manner in a public place in the presence of civilians and enlisted men as to cause his arrest by civil authorities, his transportation through the public streets in a patrol wagon, and his detention for some hours in a Military Police jail. Engaging in unseemly altercations or brawls with civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public is conduct unbecoming an officer and a gentleman. So also is drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused; so also is defiance of, or gross disrespect toward, the civil authorities. (Winthrop, 1920 Reprint, pages 717, 718).

The court, in the exercise of its judgment and based upon the facts presented to it, concluded that the offense alleged was a violation of Article of War 96, a lesser included offense of that charged. It is the opinion of the Board of Review that the evidence is legally sufficient to establish the offense of being drunk and disorderly in uniform in a public place in violation of Article of War 96.

6. War Department records show the accused is 24 years old, single, attended Mississippi State College for two years, and worked for the United States Engineer Department, Keesler Field, Mississippi, before being inducted on 24 October 1942 at Camp Shelby, Mississippi, was appointed an Aviation Cadet on 15 June 1943, and was discharged to accept a commission on 23 February 1944. Accused entered active duty as a Second Lieutenant, Air Corps, on 24 February 1944. He has served consecutively from 11 April 1944 to the date of his trial as an assistant production line maintenance officer, engineering officer, and executive officer. His efficiency reports in chronological order are: "Excellent," "Excellent," "4.6," "3.7," "Unknown" and "Unknown." He was convicted by a General Court-Martial at Eglin Field, Florida, on 4 February 1946, for fraudulently obtaining money by making and uttering five checks totalling $275.00 which were dishonored because of insufficient funds, and was sentenced to be reprimanded and to forfeit one hundred dollars per month for six months. The General Court Martial Order in that case characterized this sentence as being grossly inadequate.

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 thereof.

Seymour W. Wenfil, Judge Advocate.

N. Wayne Clive, Judge Advocate.

On Leave, Judge Advocate.

JAGQ-CM 314583 1st Ind

WD, JAGO, Washington, D. C. SEP 2 8 1946

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 Second Lieutenant William E. McMaster (0-869012), Air 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 96. 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. 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 thereof. I concur in that opinion.

4. The evidence indicates that the accused while drunk spent a period of more than four hours from about 12:30 AM to about 5:00 AM on 30 March 1946 in a public bar in the company of a known prostitute, engaged in continued drinking, loud, profane and argumentative conversation, in brawling with a bartender, on several occasions fell or was knocked to a prone position on the barroom floor, and engaged in profane resistance when civilian police officers endeavored to take him home before finally being compelled to arrest the accused. At least a dozen civilians and some enlisted personnel were present while this display was in progress.

5. War Department records show the accused is 24 years old, single, attended Mississippi State College for two years, and worked for the United States Engineer Department, Keesler Field, Mississippi, before being inducted on 24 October 1942 at Camp Shelby, Mississippi. He was appointed an Aviation Cadet on 15 June 1943, and was discharged to accept a commission on 23 February 1944. Accused entered active duty as a Second Lieutenant, Air Corps, on 24 February 1944. He has served consecutively from 11 April 1944 to the date of his trial as an assistant production line maintenance officer, engineering officer, and executive officer. His efficiency reports in chronological order are: "Excellent," "Excellent," "4.6," "3.7," "Unknown" and "Unknown." He was convicted by a General Court-Martial at Eglin Field, Florida, on 4 February 1946, for fraudulently

obtaining money by making and uttering five checks totalling $275.00 which were dishonored because of insufficient funds, and was sentenced to be reprimanded and to forfeit one hundred dollars per month for six months. The General Court Martial Order in that case characterized this sentence as being grossly inadequate.

6. I recommend that the sentence be confirmed and carried into execution.

7. Inclosed is a form of action designed to carry this recommendation into effect, 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

(G.C.M.O. 304, 14 October 1946).

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

JAGK - CM 314629

26 SEP 1946

UNITED STATES	)	SEVENTH ARMY
v.	)	Trial by G.C.M., convened at Fort McPherson, Georgia, 3 June 1946. Dishonorable discharge and confinement for life. Penitentiary.
Private EDWARD H. ROBINSON (34228693), Company B, 461st Signal Heavy Construction Battalion.	)	

REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Edward H. Robinson, Company B, 461st Signal Heavy Construction Battalion, did, at Namur, Belgium, on or about 13 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technical Sergeant Walter B. Turner, Company B, 461st Signal Heavy Construction Battalion, a human being by shooting him with a carbine.

CHARGE II: (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to both charges and their specifications. He was found guilty of Charge I and its specification and not guilty to Charge II and its specification. Evidence of three previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for life. The reviewing authority approved the sentence, designated the "United States Penitentiary, Atlanta, Georgia, or elsewhere as the Secretary of War may direct," as the place of confinement, and forwarded the record of trial for

action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC 452,454).

Chester D. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Hipsman, Judge Advocate

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

JAGH - CM 314640 7 NOV 1946

UNITED STATES	)	XII TACTICAL AIR COMMAND
v.	)	Trial by G.C.M., convened at Neubiberg, Germany, 22 May 1946. Dismissal.
Second Lieutenant BENJAMIN L. OPENSHAW (O-935586), Air Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, 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: In that 2nd Lt. Benjamin L. Openshaw, 798th Air Material Squadron, 548th Air Service Group, did at or near Army Air Forces Station Horsching, Linz, Austria, on or about 6 May 1946 wrongfully leave local flying area and flew in mountainous areas in an L-5 type aircraft in violation of Flying regulations this base, as quoted from 70th Fighter Wing TWX F-341-E, dated 4 Feb 1946, QUOTED, (1) "Local area for L- Type areas should be approximately the area of a circle with and eight mile radius. (2) There will be absolutely no flying of L-Type aircraft in mountainous areas."

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

Specification: In that 2nd Lt Benjamin L. Openshaw, 798th Air Material Squadron, 548th Air Service Group, did at Army Air Forces Station Horsching, Linz, Austria, on or about

6 May 1946 with intent to deceive investigating officer make an offical statement, QUOTE: "While flying an "L" type aircraft 6 May 1946 in the vicinity of Lake Attersee at an altitude of 2000 feet my engine started cutting out" which statement was known by the said 2nd Lt. Banjamin L. Openshaw to be untrue.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of all 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 and forwarded the record of trial for action under Article of War 48.

3. On 4 February 1946, there was issued by the 70th Fighter Wing a directive setting forth flying regulations for "L" type aircraft which provided in pertinent part as follows:

"1. Group commanders are requested to submit to this headquarters a local flying area for all L-type aircraft. Local area for L-type areas should be approximately the area of a circle with an eight mile radius.

"2. There will be absolutely no flying of L-type aircraft in mountainous areas."

This directive was received and posted on the operations bulletion board at the Horsching Army Air Base, near Linz, Austria, where accused was stationed (R 7-8; Pros Ex 2).

On 21 April 1946, First Lieutenant Edward M. Cumbie, an instructor pilot at Horsching Army Air Base, accompanied accused in an L-5 army aircraft on an orientation flight for the purpose of showing accused the boundaries of the area designated, within which this type of airplane was permitted to be flown. Accused piloted the plane and Cumbie, as instructor pilot, pointed out the boundaries, which were easily discernible by geographical barriers, and enclosed an area of an approximate eight-mile radius in which there were no mountains.

It was stipulated by the prosecution, the defense and the accused that if First Lieutenant Myron Swingle, 79th Fighter Group, Horsching, Austria, were present he would testify as follows:

"At approximately 1020 on the sixth of May, 2nd. Lt. Openshaw came up to Operations and asked to fly L-5 083. After, checking with Engineering as to whether or not the ship was in. I told him he could have the said aircraft. He took off from Horsching at approximately 1025 and I called the take off in the 70th Fighter Wing. He was

scheduled to land at 1200 and 2nd Lt. Skiermansky a Bombadier rode in the back seat" (R 6; Pros Ex 1).

At about 1130 hours on 6 May 1946, Sergeant Deloian of the Horsching Air Base was at Weisenbach, a little town near Lake Attersee. He noticed a plane flying high and circling overhead with its motor accelerating and deaccelerating. The plane circled three times and on the fourth time it landed in a little field nearby, damaging one of its propeller blades. Deloian then drove over to the plane and recognized accused as the pilot and Lieutenant Skiermanski as the passenger. Weisenbach is about fifty-five road miles and about forty air miles from the Horsching Air Base(R 9-10; Pros Ex 4).

Lieutenant Skiermanski testified that he met the accused on the morning in question and asked him if he could go flying with him. The witness and the accused went up in the L-5 and after flying a short time, landed near Weisenbach in a mountainous region (R 11).

After hearing that a plane was overdue, Major Davis, the operarions officer of Horsching Air Base, asked Lieutenant Cumbie to start "action on the aircraft" (R 12). Later that evening, and after the plane had been found, Major Davis was appointed to investigate the incident. At 2300 hours, 6 May 1946, he called the accused and warned him of his rights in accordance with Article of War 24, whereupon the accused made the following voluntary statement, which was properly received in evidence as Prosecution Exhibit 4 (R 13):

> "While flying an 'L' type aircraft 6 May 1946 in the vicinity of Lake Attersee at an altitude of 2000 feet my engine starting cutting out. I turned on the carburetor heat which did not seem to help the engine. I then started using the primer and the engine would catch for a few seconds at a time. I then headed for what appeared to be the best forced landing area which appeared to be near the mountains. The first pass over the field I used my primer to help keep the engine running. The next two passes the engine ran without the primer. These passes were made so as to pick the most suitable landing spot. On the fourth pass I landed. Although the engine was running well at the time I did not think it wise to attempt to leave a forced landing site which I had already examined when there were no other suitable fields in the vicinity. Before I could stop the airplane I ran up to a depression in the field. I then gunned the engine to avoid knocking off the landing gear as it hit the other side. Having attained more speed after crossing the depression I had to use an excessive amount of brake in order to avoid hitting a building at the end of the field. That caused the plane to nose up slowly. One prop blade hit the ground, splintered, and then the engine stopped."

On 8 May 1946, the accused saw Major Davis and confessed that his first statement was false, that he had no engine trouble on 6 May 1946 when he landed near Lake Attersee (R 14). The accused also approached Lieutenant Colonel Robertson on the 8th of May, who at the time was deputy base commander. Before anything was said, Lieutenant Colonel Robertson asked the accused if he had already been warned of his rights under Article of War 24. The accused answered in the affirmative and then told the witness that he took off and flew out of the flying area. He also said that when he came back, he heard people say he had better have a good excuse for being there, so he made the statement that he had had engine trouble and landed—but now he wanted to make a clean breast of the whole thing. He further stated that the statement he had given to Major Davis on 6 May 1946 was untrue (R 16-17). The accused appeared to be very excited and confused following the incident (R 18) and Lieutenant Colonel Robertson believes that this condition may have caused the accused to make erroneous statements on 6 May 1946 (R 18-19).

4. The accused, after having been duly warned as to his rights to testify, elected to remain silent (R 24). Lieutenant Colonel Ben Brown of the 357th Fighter Group, testified that he had known the accused in the United States and had presented him with a letter of commendation for his excellent work as a flight officer (R 21; Def Ex A). Major Davis also testified as to the character of the accused. He stated that he considered the accused rated above the average officer in the performance of his duties (R 22). The accused's 66-2 showed an average efficiency rating of 4.3 (R 23).

5. The accused pleaded guilty to the Specification of Charge I and to Charge I. The Specification alleged that the accused flew an L-5 aircraft outside a certain specified area in violation of an existing order. It was established that a directive issued by the 70th Fighter Wing was received by the Horsching Army Air Base and that it was placed on the Operations Bulletin Board at the base. The directive, among other things, stated that:

> "a. Local area for L-Type areas should be approximately the area of a circle with an 8 mile radius.
>
> "b. There will be absolutely no flying of L-Type aircraft in mountainous regions."

It was proved that on one occasion the accused was taken up in an aircraft and shown the limits of the area, within which L-5 aircraft were permitted to fly from the Horsching Air Base, in conformity with the directive. Subsequently on 6 May 1946, accused landed at or near the town of Weisenbach, in the American occupied zone of Austria, approximately forty air miles from the air base and in a mountainous region.

On the evening of 6 May 1946, after the incident had been reported, Major Davis, who had been designated to investigate the accident, called accused to his office. After being duly warned of his rights under the 24th Article of War, he made a statement to Major Davis that while flying an "L" type aircraft on 6 May 1946, in the vicinity of Lake Attersee at an altitude of 2000 feet his engine started cutting out and as a result he landed in a nearby field. Two days later accused admitted that this statement was untrue, that he had had no engine trouble on 6 May 1946 and had not been forced to land at Lake Attersee as he had previously stated.

His false official statement to Major Davis, who had been designated to investigate an incident involving the accused, was conduct unbecoming an officer and a gentlemen, in violation of Article of War 95. While it was meritorious on the part of the accused to confess to such an act, it in no way affected the legality of the finding of guilty by the court of the Specification of Charge II and Charge II, regardless of what may have motivated his confession.

6. War Department records show that accused was approximately 21 years of age at the time he committed the offenses, unmarried and that his mother is living in Warthington, Indiana. He completed three years of high school before entering the service as a private, Air Corps, on 27 September 1943. On 27 May 1944, he became an aviation cadet, a flight officer on 15 April 1945 and a second lieutenant, Army of the United States on 26 February 1946. He entered upon overseas service on 6 April 1946.

Five members of the court requested the reviewing authority to exercise clemency because of accused's youth and prior excellent military record. Consideration has been given to a letter dated 26 July 1946, from Honorable Gerald W. Landis, House of Representatives and a memorandum dated 15 July 1946 from Lieutenant General Eaker, both recommending clemency on behalf of the accused.

7. The court was legally constituted and had jurisdiction of the person 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. A sentence of dismissal is mandatory upon a conviction of a violation of Article of War 95 and authorized upon a conviction of a violation of Article of War 96.

_____, Judge Advocate

Wilderman A. Lolf, Judge Advocate

Stan J. Flanagan, Judge Advocate

JAGH - CM 314640 1st Ind

WD, JAGO, Washington 25, D. C. NOV 2 1946

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 Second Lieutenant Benjamin L. Openshaw (O-935586), Air Corps.

2. Upon trial by general court-martial accused pleaded guilty to Charge I and its Specification (breach of flying regulations in violation of Article of War 96) and not guilty of Charge II and its Specification (making a false official statement in violation of Article of War 95). The court found him guilty of all Charges and Specifications and sentenced him to dismissal. 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.

At approximately 1025 hours on 6 May 1946 at Horsching Air Base, Austria, the accused took off in an L-5 aircraft. Permission for the flight had been requested and obtained from base operations and accused was to return at approximately 1200 hours. A TWX directive from the 70th Fighter Wing prescribed that the local flying area for L-Type aircraft should be an area in the vicinity of the base with an eight mile radius and that there should be "absolutely" no flying of L-Type aircraft in mountainous areas.

On 21 April 1946 the boundaries of the area in which L-Type aircraft could be flown were pointed out to accused by an instructor pilot of the base.

At approximately 1130 hours on 6 May 1946, the accused landed his aircraft on a small field at Weisenbach, Austria, a little town near Lake Attersee, which was about fifty-five motor miles and forty air miles from Horsching Air Base, in a mountainuous area. In landing, the aircraft nosed up causing one propeller blade to hit the ground and splinter.

Upon being questioned by the investigating officer on 6 May 1946, accused made and signed a statement in which he said "while flying an L-Type aircraft 6 May 1946 in the vicinity of Lake Attersee at an altitude of 2000 feet my engine started cutting out." On 8 May 1946, the accused saw the investigating officer again and confessed that his first statement was false and that he had no engine trouble on 6 May, when he landed near Lake Attersee.

4. Five members of the court petitioned the reviewing authority to exercise clemency on the basis of accused's youth and prior excellent military record. Consideration has been given to a letter dated 26 July 1946 from Honorable Gerald W. Landis, House of Representatives and a memorandum dated 15 July 1946 from Lieutenant General Baker, both recommending clemency on behalf of the accused.

5. Accused deliberately made a false statement and dismissal is an appropriate punishment therefor. I recommend that the sentence be confirmed but in view of accused's youth (20 9/12 years of age), his excellent prior service and the recommendation for clemency as shown above, I recommend that the execution of 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.

CM 314640
314640

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 364, 6 December 1946.)

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

JAGK - CM 314671

24 SEP 1946

UNITED STATES)	UNITED STATES ARMY FORCES CHINA
)	
v.)	Trial by G.C.M., convened at Shanghai, China, 18 April 1946. Dismissal, total forfeitures and confinement for one (1) year.
)	
Captain WENDELL HARDING)	
(O-580800), Air Corps.)	

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

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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.

Specification 1: In that Captain Wendell Harding, Air Corps, Headquarters, UnitedStates Forces, China Theater, then assigned to 1369th Army Air Forces Base Unit, China Wing, India China Division, Air Transport Command, did at Shanghai, China, on or about 27 December 1945, with intent to defraud, wilfully, unlawfully and feloniously pass as true and genuine a certain aircraft travel ticket in words and figures as follows:

ATC-PT41 ARMY AIR FORCES
AIR TRANSPORT COMMAND C 909849

TWM
FLIGHT 153 V O I D
D. D. 27 DEC TICKET

Pursuant to provisions of existing regulations, the following named individual is authorized to travel on aircraft operated for, by or under the control of the Air Transport Command between stations shown hereon, and shall be subject to all established rules and regulations. Deviations from the normal course of travel to accomplish official business will be honored only when such deviations are noted hereon.

COMMANDING GENERAL
AIR TRANSPORT COMMAND
(SEAL)

Priority Identification No.
4-SHA- 1503 - WDP

GP 2

PINCHOS SZPIRO
Passenger's Name (Print)

Civ		
Grade or Title	Serial Number	Arm, Service or Organization

Weight of Passenger 165	No. Pieces of Baggage 1	Baggage Weight: Authorized 65	Actual 65

GOOD FOR ONE-WAY PASSAGE

FROM SHA TO PPG

VIA XXX	Via XXXXX	Via XXXX
Via AND RETURN	Via XXXXXX	Via XXXX

JAMES L. KING	CAPTAIN	ATC
Issued By (Signature)	Grade	Organization
SHA	26 DEC 45	
Station Issuing	Date Issued	

This ticket will be surrendered upon arrival at final A.T.C. destination

3(1) 5109

NOTE: FORM WILL BE PREPARED IN INDELIBLE PENCIL, INK OR TYPEWRITER

a writing of a private nature, which might operate to the prejudice of another, which said ticket was, as he, the said Captain Wendell Harding, Air Corps, then well knew, falsely made and forged.

Specification 2: (Specification 2 varies materially from Specification 1 only with respect to the number of the ticket, the name and description of the passenger).

Specification 3: In that Captain Wendell Harding, ***, did, at Shanghai, China, on or about 29 December 1945, wrongfully, without authority and for private gain cause United States Government aircraft transportation from Shanghai to Peiping China, to be furnished to Pinchos Szpiro and Michael Zaslawski, civilians not members of the United States Forces.

He pleaded guilty to and was found guilty of the charge and all specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year.. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of evidence and law contained in the Staff Judge Advocate's review.

4. War Department records show that at the time of the commission of these offenses the accused was 29-7/12 years of age. He is married and supports a dependent mother. He graduated from high school and attended Marshall College for two and one-half years. He enlisted in the Air Corps on 22 December 1939 and became a technical sergeant. On 14 September 1942 he was appointed warrant officer, junior grade. He attended officer candidate school and upon graduation was appointed and commissioned a temporary second lieutenant, Army of the United States, on 24 July 1943. He received a temporary promotion to the rank of first lieutenant on 12 November 1943, and another temporary promotion to captain on 1 October 1944.

5. 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.

Clinton D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ackroyd, Judge Advocate

JAGK - CM 314671 1st Ind

WD, JAGO, Washington 25, D. C. SEP 28 1946

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 the opinion of the Board of Review in the case of Captain Wendell Harding (0-580300), Air Corps.

2. Upon trial by general court-martial the accused pleaded guilty to and was found guilty of, willfully and unlawfully and with intent to defraud, issuing two tickets for travel by Government aircraft, knowing them to be falsely made and forged and of wrongfully and without authority and for private gain causing Government aircraft transportation from Shanghai to Peiping, China, to be furnished to two civilians, all 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 may direct, for a period of one year. 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 Staff Judge Advocate's review, which is adopted by the Board of Review. 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 specifications and charge and the sentence and to warrant confirmation thereof.

During the month of December 1945 the accused was on duty with the Priorities and Control Office, Kiangwan Air Base, Shanghai, China. On or about 26 December 1945 the accused gave to Mrs. Gallia Karpenko, a civilian, two Government air transportation tickets, which tickets were made out for use by two civilians. Mrs. Karpenko delivered the tickets to the civilians whose names appeared thereon and received therefor $500.00. The accused received $250.00 of this money and permitted Mrs. Karpenko to keep the remaining $250.00. Government transportation from Shanghai to Peiping, China, was obtained by the civilian on 29 December 1945. No money was ever received by the Traffic and Control Office in connection with these tickets. The accused made an unsworn statement to the court wherein he stated that he left school to provide a home for a member of his family. He tried to become a flying cadet but was unsuccessful because of a physical defect. He enlisted in the Air Corps and again tried to become a flying cadet but again could not pass the physical examinations. At the outbreak of war he was a technical sergeant, a year later he was appointed warrant officer and was married. In July 1943 he was commissioned

a second lieutenant and promoted to first lieutenant in November 1943. He received overseas orders in December 1943 and spent 21 months duty overseas in China. The Air Transport Command records show that he did a good job in China and he believes that is why he received his captaincy. He has had six years in the Army without a mark against his record. He had no excuse except he became infatuated with Mrs. Karpenko. He realizes that he was wrong and asked the court to be understanding and lenient.

4. There is nothing in the record to justify the acts of the accused. His actions clearly demonstrate that he is not worthy of his commission. I recommend that the sentence be confirmed and carried into execution and that a United States Disciplinary Barracks be designated as the place of confinement.

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

CM 314671
314671

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 311, 18 October 1946.)

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

JUL 25 1946

JAGQ - CM 314680

UNITED STATES v. Private EVERETT L. WILLIAMS (42081360), Company "B", 1332nd Engineer General Service Regiment.	UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M., convened at Headquarters, Base X, AFWESPAC, APO 358, 15 May 1946. Death by hanging.

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 above named and submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Everett Williams, Company B, 1332nd Engineer General Service Regiment, did, at North of Manila, Luzon, Philippine Islands, on or about 3 April 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Dewey C. Joyner, a human being, by shooting him with a pistol.

CHARGE II: (Withdrawn).

Specification: (Withdrawn).

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction, for absence without leave while on guard duty, 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 pursuant to Article of War 48.

3. Evidence for the prosecution.

A photograph of a colored man was introduced into evidence as Prosecution Exhibit A (R 7) and every important witness for the prosecution

identified the man depicted in the photograph as the victim in the shooting hereinafter discussed. Two witnesses identified the photograph and also referred to the victim as "Joyner" (R 11, 14). The accused's confession refers to his victim as "Deway Joyner" (R 17, Ex. D). We are of the opinion that the deceased was correctly identified as Dewey C. Joyner, as alleged in the Specification, and we shall so refer to him throughout this opinion to avoid confusion.

During the night of April 2-3, 1946, the witness Manley was outside the Top Hat Club. The girl with whom he was talking screamed, went inside, "and when she came back, she told me what happened." Manley then went inside and saw Joyner sitting at a table. Joyner said: "I am going to kill all the whores over here before the night is over." As he left the club, this witness "met the girl that had a fight and a Filipino". The latter asked the witness to accompany him and the girl to the dispensary. On the way they met a soldier who asked the girl what had happened. The girl told him, and also replied to the question "who did it?", although the witness did not hear the reply. The soldier pulled out an automatic pistol and left with it in his hand. He entered the club. Two minutes later the witness heard a shot. Manley knew Joyner's name "because I heard it from the girl who had a fight with him", (R 9, 10, 11).

Another witness saw accused come into the bar of the Top Hat Club, where Joyner was, with a .45 calibre pistol in his hand. He described the occurrence as follows:

> "He tapped Joyner on the shoulder and said, 'Why did you beat Mercy for?' Before Joyner realized what was happening, this man swung him around and shot him in the middle of the chest. He fell to the floor." (R 11).

This witness also testified that accused told Joyner to die after firing the shot, testimony being:

> "He spoke three cross words: 'God damned it, die! die! die!" (R 12).

Witness Curry testified that he does not know and could not recognize the accused in court, and would not recognize the man who did the shooting if he saw him again, and never saw him before (R 14). However, this witness was present at the Top Hat Club when the shooting occurred, and substantially corroborated the other eye-witness account, as follows:

"--- on or about 11 o'clock there was a girl and Joyner had a fight someway between the two and after that happened, on or about 1 o'clock this man who shot Joyner appeared from the front of the building, walked in from the wrong side of the bar where Joyner was and tapped him on the shoulder and asked him where he hit Mercy and then shot him. The man Joyner fell. - - - - Joyner wasn't given much time before he was shot" (R 14).

This witness heard the man who did the shooting tell Joyner to die (R 14).

Joyner had no weapons and made no threatening motions toward the accused (R 12, 15). Early in the morning of 3 April 1946 a medical officer examined the body of Joyner, lying on the floor, and pronounced him dead. The officer looked into his pockets and did not notice any weapons (R 16). An autopsy was performed on the body. Examination revealed a bullet hole in the left chest, and that the bullet passed through the aorta. This wound caused death (R 8). After accused had been warned of his rights, he voluntarily signed an extra-judicial statement, which was admitted in evidence as Prosecution Exhibit D. Relevant portions of the statement read as follows:

"On the evening of 2 April 1946 at about 2000 hours I went to the Top Hat alone. I met Mercy there. She is a Filipino girl and I don't know her last name. I had some whiskey that a fellow gave me and Mercy drank with me.

"I went outside with Mercy and when we came back in Deway Joyner was there. Deway was trying to get Mercy to go outside and have sex relations with him. She didn't want to go.

"I asked him to stop because Mercy was my girl and he stopped then.

"Mercy and Joyner and I stayed together there and talked. The three of us were outside. Then Mercy went back in and Deway and I followed her in a little later.

"Then I went outside to relieve myself and when I got back, Joyner was talking to Mercy and was pulling her by the hand. He was trying to get her to go outside with him and she didn't want to go. I went over and told him he ought not to try to do that and I pulled him by the hand and he stopped.

"Then I took a drink and Deway and I left. We went up to the camp and we went down to 'B' company area. I went to the latrine and when I got out he was gone.

"I started back down the road toward the Top Hat. When I got down to where the driveway goes off the road into the Top

Hat I met Mercy. Bill, the fellow who owns the Top Hat was with her and so was another soldier -- a short fellow whose name I don't know.

"Mercy was bleeding from the head. I asked what was the matter. Bill shined his light on me and told me to give him my gun. At that time my gun was in my right-hand pocket. I put my hand in my pocket but I didn't pull out my gun. Then I asked Mercy who beat her and she said Deway beat her and cut her. I said I was going up to see him and went on up to the Top-Hat.

"I went in the front door. The front room was dark and I didn't see if anyone was in there. I saw Mary sitting behind the bar. Deway was standing up in front of the bar. He was facing Mary..

"As soon as I walked into the bar room I pulled out my gun. I had a US Army .45 cal. automatic pistol. There were four bullets in it.

"I asked Deway what he beat Mercy for and patted him on the left shoulder with my left hand. He jumped back from the bar. I was afraid that he was going to shoot me so I fired one shot at him. He didn't say anything but fell to the floor and I walked out. I didn't say anything after I shot him.

"I went out the front door and cut across the fields to the main road. Then I started down the main road toward Manila.

"I didn't meet anybody until two MP's came up the road toward me in a jeep. They stopped as they came up to me and asked me for my pass. I just started walking up the road. The MP on the right side of the driver's seat got out and hollered 'Halt'. I stopped and he came up to me and started to search me. When he felt of my gun I turned around and ran. I ran about 15 or 20 yards to where the sideroad runs into the old Army Dump and turned and ran up that road into the dump. I missed my gun when I ran up that road. I thought the MP had the gun but it might have fallen out of my pocket when I was running. The MP's shot at me. I think it was two times.

"I went all the way around the camp to a little shack that nobody lives in which is across the fields from the Top-Hat. I had put a bottle of whiskey in there the day before that and I got the bottle and drank all of it. I didn't sleep that night. I just drank and smoked. I didn't have anything to eat. It was a large bottle of whiskey. I wandered across the fields until the Filipinos picked me up. It was after daylight.

"When I shot Deway I thought he had a gun on him. About three o'clock that afternoon I had seen him with a gun. It was a German made revolver. He had been carrying that for some time."

4. Evidence for the defense. After the accused's rights as a witness were explained, he elected to remain silent. No evidence was offered by the defense (R 18).

5. Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. MCM, 1928, paragraph 148a, page 1 62. The evidence discloses that accused became enraged over Joyner's abuse of a girl, sought out Joyner and deliberately shot him with a pistol, telling him to die. It is hard to imagine a clearer case of murder. There is not a shred of evidence tending to show that accused shot in self-defense, except in accused's confession, and even if his statement should be wholly believed, it does not establish the defense. Accused states therein, "As soon as I walked into the bar room I pulled out my gun." Accused was looking for trouble. Joyner's apparent assault on the girl, Mercy, was not even made in the presence of the accused and does not constitute legal provocation for the action of accused. The record shows ample "cooling time", while accused was walking from outside on the driveway where he saw Mercy into the Top Hat and over to the bar where he shot the deceased.

6. The charge sheet shows accused is approximately 22 years of age and was inducted 2 December 1943 at Camden, New Jersey. He had no prior service.

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.

Seymour W. Wenzel, Judge Advocate

Thomas Olivier, Judge Advocate

Walter W. Davis, Judge Advocate

JAGQ - CM 314680 1st Ind

WD JAGO, Washington 25, D. C. AUG 8 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 Everett L. Williams (42081360), Company B, 1332d Engineer General Service Regiment.

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.

3. In this case the deceased struck a girl with whom the accused was friendly. As the girl was proceeding from the bar in which the attack occurred to a dispensary, she met the accused outside on the road and told him of the incident. Accused thereupon drew a pistol, entered the bar, asked the deceased why he had struck the girl and then shot him fatally with the pistol. After firing the shot accused stated to the deceased "God damned it, die! die! die!". In a voluntary confession accused said

> "I asked Deway what he beat Mercy for and patted him on the left shoulder with my left hand. He jumped back from the bar. I was afraid that he was going to shoot me so I fired one shot at him."

4. The accused is a colored soldier 22 years of age who was inducted 2 December 1943 at Camden, New Jersey. He had no prior service. The report of a thorough psychiatric examination is included in the papers accompanying the record of trial. The Board of Medical Officers concluded that from a medico-legal point of view the accused was at the time of the crime and at the time of the examination free of any mental defect, disease or derangement which would interfere with his legal responsibility or prevent him from aiding in his own defense. The diagnosis of the accused was "psychopathic personality with asocial and amoral trends". The Board also pointed out that the accused is an individual of limited mental reserves; and when such an individual is placed under stress his judgment is such and his behavior is so impulsive that while he may understand the immediate consequences of his actions, he may not be able to understand the more far-reaching moral consequences. It was the opinion of the Medical Board that this factor should be taken into consideration on the question of punishment in the event the accused was convicted.

5. In view of all the circumstances I do not believe the death penalty is required. I recommend that the sentence be confirmed but commuted to

dishonorable discharge, forfeiture of all pay and allowances due or to become due, confinement at hard labor for the term of the natural life of accused, that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement, and that the sentence, as thus commuted, be carried into execution.

6. Consideration has been given to representations made on behalf of the accused by the Honorable Chas. A. Wolverton, and also to letters from accused's sister and veterans organizations appealed to by accused's sister.

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 approval.

CM 314680

THOMAS H. GREEN
Major General
The Judge Advocate General

7 Incls
1. Record of trial
2. Dft ltr for sig S/W
3. Form Executive action
4. Ltr fr Rep Wolverton 26 June 46 w/incls
5. Ltr fr Rep Wolverton 28 June w/incl
6. Ltr fr Rep Wolverton 15 July
7. Ltr fr Mr. Weickhardt 19 July w/incl

(G.C.M.O. 266, 3 September 1946).

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

JAGN-CM 314729

JUL 9 1946

UNITED STATES v. Private HARRY D. BOYKIN (13228034), Company "A", 2nd Training Battalion, First Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama.	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Fort McClellan, Alabama, 28 May 1946. Dishonorable discharge and confinement for one (1) year. Federal Reformatory.

HOLDING by the BOARD OF REVIEW

BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

2. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement.

The confinement adjudged by the court and approved by the reviewing authority is for a period of one year. It is well settled that confinement in a Federal correctional institution or reformatory is authorized only when confinement in a penitentiary is authorized by law. CM 220093, Unckel, 49 BR 121; CM 225822, Parish, 49 BR 215; CM 241390, Martin, 26 BR 293. Under Article of War 42 confinement in a penitentiary is not authorized unless the period of confinement authorized and adjudged is more than one year.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal reformatory or correctional institution.

Walbert T. Baughn, Judge Advocate
Robert J. O'Connor, Judge Advocate
Gerald J. O'Hara, Judge Advocate

JAGN-CM 314729 1st Ind JUL 17 1946

WD, JAGO, Washington, D. C.

TO: The Commanding General, Headquarters, Infantry Replacement Training Center, Fort McClellan, Alabama

1. In the case of Private Harry D. Boykin (13228034), Company "A", 2nd Training Battalion, First Training Regiment, Infantry Replacement Training Center, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal correctional institution or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory, you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. 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 314729).

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.

JAGN-CM 314736

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, 25 April 1946.
Second Lieutenant DANIEL B.	)	Dismissal, total forfeitures,
O'LOUGHLIN, JR. (0-1108213),	)	and confinement for five (5)
Infantry.	)	years.

OPINION of the BOARD OF REVIEW
SCHINDLER, HOTTENSTEIN and O'HARA, Judge Advocates

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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. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.
(Nolle prosequi).

Specification: (Nolle prosequi).

CHARGE II: Violation of the 96th Article of War.
(Nolle prosequi).

Specification: (Nolle prosequi).

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

Specification 1: (Nolle prosequi).

Specification 2: In that Second Lieutenant Daniel B. O'Loughlin, Jr., Prisoner of War and Displaced Persons Division, Office of Military Government for Germany (U.S.), did, at Paris, France, on or about August 31, 1945, present for payment,

a claim against the United States by presenting a voucher to Major R. O. Steele, Finance Department, a finance officer at 6th Finance Disbursing Section, U. S. Army, Paris, France, an officer of the United States Army, duly authorized to pay such claims, in the amount of $100.00, for service pay and 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 and then known by the said Second Lieutenant Daniel B. O'Loughlin, Jr., to be false and fraudulent.

Specification 3: In that * * *, did, at Paris, France, on or about September 12, 1945, present for payment, a claim against the United States by presenting a voucher to Lieutenant Colonel W. Knobeloch, Finance Department, a finance officer at 42d Finance Disbursing Section, U. S. Army, Paris, France, an officer of the United States Army, duly authorized to pay such claims in the amount of $50.00, for service pay and 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 and then known by the said Second Lieutenant Daniel B. O'Loughlin, Jr., to be false and fraudulent.

Specification 4: In that * * *, did, at Paris, France, on or about September 14, 1945, present for payment, a claim against the United States by presenting a voucher to Lieutenant Colonel W. Knobeloch, Finance Department, a finance officer at 42d Finance Disbursing Section, U. S. Army, Paris, France, an officer of the United States Army, duly authorized to pay such claims, in the amount of $100.00, for service pay and 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 and then known by the said Second Lieutenant Daniel B. O'Loughlin, Jr., to be false and fraudulent.

Specification 5: In that * * *, did, at Paris, France, on or about September 17, 1945, present for payment, a claim against the United States by presenting a voucher to Lieutenant Colonel W. Knobeloch, Finance Department, a finance officer at 42d Finance Disbursing Section, U. S. Army, Paris, France, an officer of the United States Army, duly authorized to pay such claims, in the amount of $40.00, for service pay and 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 and then known by the said Second Lieutenant Daniel B. O'Loughlin, Jr., to be false and fraudulent.

Specification 6: In that * * *, did, at Paris, France, on or about September 22, 1945, present for payment a claim against the United States, by presenting a voucher to Lieutenant Colonel W. Knobeloch, Finance Department, a finance officer at 42d Finance Disbursing Section, U. S. Army, Paris, France, an officer of the United States Army, duly authorized to pay such claims, in the amount of $50.00, for service pay and 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 and then known by the said Second Lieutenant Daniel B. O'Loughlin, Jr., to be false and fraudulent.

Specification 7: (Nolle prosequi).

Specification 8: (Nolle prosequi).

Specification 9: In that * * *, did, at Marseille, Bouches du Rhone, France, on or about October 28, 1945, present for payment, a claim against the United States by presenting a voucher to Major Ivy J. Shuman, Finance Department, a finance officer at 32d Finance Disbursing Section, U. S. Army, Marseille, Bouches du Rhone, France, an officer of the United States Army, duly authorized to pay such claims, in the amount of $150.00, for service pay and 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 and then known by the said Second Lieutenant Daniel B. O'Loughlin, Jr., to be false and fraudulent.

Specification 10: In that * * *, did, at Marseille, Bouches du Rhone, France, on or about October 31, 1945, present for payment, a claim against the United States by presenting a voucher to Major Ivy J. Shuman, Finance Department, a finance officer at 32d Finance Disbursing Section, U. S. Army, Marseille, Bouches du Rhone, France, an officer of the United States Army, duly authorized to pay such claims, in the amount of $200.00, for service pay and 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 and then known by the said Second Lieutenant Daniel B. O'Loughlin, Jr., to be false and fraudulent.

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

Specification 1: (Nolle prosequi).

Specification 2: Same as Specification 2, Additional Charge I.

Specification 3: Same as Specification 3, Additional Charge I.

Specification 4: Same as Specification 4, Additional Charge I.

Specification 5: Same as Specification 5, Additional Charge I.

Specification 6: Same as Specification 6, Additional Charge I.

Specification 7: (Nolle prosequi).

Specification 8: (Nolle prosequi).

Specification 9: Same as Specification 9, Additional Charge I.

Specification 10: Same as Specification 10, Additional Charge I.

He pleaded 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 five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence introduced by the prosecution was in the form of a stipulation that proper witnesses would testify under oath to each of the allegations contained in the Specifications. This stipulation set out at length the facts to which they would testify but since, as we have said, it follows the form of the Specifications we need not set it out in detail here. It should be noted, however, that the stipulation stated that the witnesses would testify "that the accused knew, or should have known, that such claim was in excess of pay and allowances due him" (Underscoring supplied).

4. After an explanation of his rights accused elected to remain silent (R. 9). It was stipulated by and between the prosecution, defense, and accused that competent and admissible documentary evidence would show, and competent witnesses would testify to, the following facts. Accused, one of four children, was born on 11 December 1917. He is a college graduate, having attended St. Joseph's College, Baltimore, Maryland, and Ohio Weslyan University, Ohio. After he was graduated from college he was employed first by the National Catholic Charities and then by the Public Sales Department of the City Gas Department of

Richmond, Virginia. He was chiefly engaged in promotional activities.

He enlisted in the United States Army on 8 July 1939 and during his enlisted service rose from the rank of private to master sergeant. During the early part of the war he was assigned to the Air Corps and participated as flight engineer in a raid which resulted in the destruction of the first Japanese submarine off the coast of California, on 25 December 1941. He was recommended for Officer Candidate School "with enthusiasm" by his group commander and with a character rating of "excellent" and an efficiency rating of "superior." Despite the fact that he requested withdrawal of his application for Officer Candidate School in order to volunteer for active combat service in the Pacific he was ordered to report to the engineer Officer Candidate School and was commissioned a second lieutenant on 23 December 1942. He entered upon overseas service on 18 April 1944. In December of 1944 he volunteered for infantry training when he learned that there was a shortage of infantry officers and was detailed to infantry on 30 April 1945.

During his enlisted service he was never subject to any disciplinary action and was awarded the Good Conduct Medal. As an officer he received seven ratings of "excellent," five of "very satisfactory," and was reprimanded once under the 104th Article of War for violation of motor vehicle regulations. He is entitled to wear the European Theater of Operations Ribbon with battle stars for his participation in the Northern France and Western Europe campaigns.

There is attached to the stipulation a letter, dated 26 December 1945, from the Commandant of the Paris Detention Barracks where accused was detained and who requested his services when he became available. This letter commended accused for his exceptionally good behavior and for the "fine manner" in which he performed his duty as Personnel Supervisor. He volunteered for this work and his services were invaluable.

5. As pointed out above the stipulation contained the statement that accused "should have known" that the vouchers which he presented were false and fraudulent. To make out a violation of Article of War 94 in this case it is not enough that accused "should have known" the vouchers were fraudulent but he must in fact know. However, since accused pleaded guilty and there is nothing in the record to indicate that this plea was improvidently entered, it is not material that the prosecution's evidence is insufficient to prove the allegations of the Specifications.

6. War Department records add nothing to the statement of accused's career outlined above.

7. 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 and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and dismissal, total forfeitures, and confinement at hard labor for life are authorized upon conviction of a violation of Article of War 94.

Irwin Schindler, Judge Advocate.

A. Lottenstein, Judge Advocate.

Gerard A. Hart, Judge Advocate.

JAGN-CM 314736 1st Ind
WD, JAGO, Washington 25, D. C. SEP 6 1946
TO: The Under Secretary of War

1. Pursuant to Executive Order 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Daniel B. O'Loughlin, Jr. (0-1108213), Infantry.

2. Upon trial by general court-martial this officer, after pleading guilty, was convicted of knowingly presenting for payment on seven separate occasions a false and fraudulent claim against the United States, in violation of Articles of War 94 and 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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 thereof.

The record shows that on seven separate occasions between 31 August 1945 and 31 October 1945 accused presented for payment vouchers for pay and allowances totaling $690 which he knew to be false and fraudulent.

4. The frauds perpetrated are serious, but I believe the term of confinement adjudged is somewhat excessive. I recommend that the sentence be confirmed but that the period of confinement be reduced to two years and that a United States Disciplinary Barracks be designated as the place of confinement.

5. Consideration has been given to letters from accused's father, Mr. Dan O'Loughlin, dated 27 July 1946 and 17 August 1946 and 3 Sept 1946.

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

5 Incls
1 - Record of trial
2 - Form of action
3 - Copy of letter to Mr. Dan O'Loughlin
4 - Ltr. fr. Mr. O'Loughlin dated 17 August 1946
5 - Ltr fr Mr O'Loughlin dated 3 September 1946

(G.C.M.O. 279, 12 September 1946.)

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

JAGK - CM 314746

1 7 FEB 1947

UNITED STATES	)	FIFTH ARMY
	)	
v.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, 20 May 1946. Dismissal.
	)	
First Lieutenant ALLEN M. GARFINKLE (O-1049484), Coast Artillery Corps.	)	

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

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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 94th Article of War.

Specification 1: In that First Lieutenant Allen M. Garfinkle, AUS, Detachment No. 1, Separation Center, 1613 Service Command Unit, did, at Camp Grant, Illinois, on or about 1 December 1945, knowingly and willfully misappropriate one gallon of anti-freeze solution of the value of about $2.95 property of the United States, furnished and intended for the Military Service thereof.

Specification 2: In that First Lieutenant Allen M. Garfinkle, ***, did, at Camp Grant, Illinois, on or about 24 December 1945, knowingly and willfully misappropriate one turkey of the value of about $6.75, property of the United States, furnished and intended for the Military Service thereof.

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

Specification: In that First Lieutenant Allen M. Garfinkle, ***, did, at Camp Grant, Illinois, on or about 20 September 1945, with intent to deceive Captain George Dolbear, Finance Officer, Camp Grant, Illinois, officially state in the written memoranda signed by the said First Lieutenant Allen M. Garfinkle and submitted by him to Captain George Dolbear, Finance Officer, Camp Grant, Illinois, for the purpose of converting 500 Belgium francs and 40 Netherlands guilders into United States currency, that the source of which the said currency was acquired is his pay and allowances and that he returned to the United States on 5 August 1945, which statement was known by the said First Lieutenant Allen

M. Garfinkle to be untrue in that he did not receive the said 500 Belgium francs and 40 Netherlands guilders as pay and allowances and that he did not return to the United States on 5 August 1945.

He pleaded not guilty to and was found guilty of all charges and specifications. 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 pursuant to Article of War 48.

3. Evidence for the prosecution

Concerning Specification 1 of Charge I

On or about 1 September 1945 the accused was transferred to the 1613 Service Command Unit, Camp Grant, Illinois, his duties including that of supply and mess officer of the Headquarters Detachment (R. 78,130). Mr. Edward Kleyla, formerly private in accused's Detachment, testified that at about 0800 hours 1 December 1945, while he was in the Detachment supply room at Camp Grant, the accused directed him to take some anti-freeze out of a Government truck which was parked "just outside" the room and to put it in the radiator of accused's car which was also parked nearby. Kleyla complied with accused's request by procuring a three-gallon bucket, draining anti-freeze from the truck, and pouring the solution into the radiator of accused's car. Kleyla did this because, as he said, he had been taught to obey orders (R. 79,80). First Lieutenant John A. Rongen, CMP, Camp Grant, Illinois, testified that on 1 December 1945 as he was passing the Detachment supply room he noticed Private Kleyla pouring something from a 12-quart pail into the accused's car which was parked near a "GI" truck. Lieutenant Rongen was busy and did not stop to investigate the incident (R. 88,89). Mr. Paul W. Riesberg of Urbana, Illinois, formerly supply sergeant of Headquarters Detachment, Camp Grant, Illinois, testified that during November and December 1945 he was supply sergeant of Headquarters Detachment, Camp Grant, Illinois; that on the morning of 1 December 1945 he parked a Government truck near the supply room. Riesberg had been driving this particular truck for about a month, had previously put a gallon of "anti-freeze or Prestone" in the car and on 28 November checked the radiator and found it to be full. After parking the truck at the supply room Riesberg drove the truck "down the road" and the engine became alarmingly hot. He examined the radiator and found it to be very low on anti-freeze. The anti-freeze which he had placed in the truck belonged to the Government (R. 73-77). It was stipulated that one gallon of the anti-freeze solution mentioned had a reasonable market value of about $2.95 (R. 91).

Concerning Specification 2, Charge I

Sergeant Charles E. Butler, First cook of Headquarters Detachment, 1612 Service Command Unit, testified that on 24 December 1946 the Detachment had 17 turkeys in the ice box at the mess hall in preparation for the troops'

Christmas dinner. The accused entered the mess hall, conversed with Private First Class Mason, the third cook, and the two went to the ice box where Mason removed a turkey, dressed and wrapped it, and shortly thereafter handed it to the accused who left with the turkey by way of the rear door (R. 94). Nine turkeys were prepared for the Christmas dinner and the remaining seven were served during the following week (R. 101).

Private First Class A. J. Mason, the third cook, testified that on the morning in question, 24 December 1945, the accused came to him in the mess hall and said, "Do you know how to clean a turkey?" Mason replied in the affirmative. The accused went to the ice box, selected a turkey and had Mason clean the bird. The witness stated that the following then occurred:

> "I gets the turkey and brings him over to the table, and he gives me some brown paper and says, 'Wrap him up.' I wrapped him up in the paper. He takes him and walks out of the door" (R. 105,106).

By stipulation it appeared that the value of the turkey was $6.75 (R. 111).

Concerning Charge II and its Specification

It was stipulated that if Captain Leonard C. O'Brien, AGD, Assistant Chief of Military Personnel at Camp Grant, Illinois, were present in court he would testify that he was the custodian of accused's personnel records and that accused's WD AGO Form No. 66-1 showed that during the period 13 June 1945 to 5 September 1945 accused was on duty as a student officer at Fort Benning, Georgia, and that the total period of accused's foreign service was from 6 March 1943 to 30 June 1944 in the Canal Zone (R. 63,64).

Over objection of the defense there was introduced in evidence a copy of "Memorandum for Exchange of Foreign Currency" dated 20 September 1945, which copy was certified as being a true copy by Second Lieutenant K. T. Hayes, JAGD, Post Judge Advocate, Camp Grant, Illinois. This document is in words and figures as follows:

"OFFICE OF THE FINANCE OFFICE
CAMP GRANT, ILLINOIS
MEMORANDA FOR EXCHANGE OF FOREIGN CURRENCY

Garfinkle, Allen, M., 1st Lt., Inf. — 20 September 1945
(Name, Grade and Arm of Service of Payee) — (Date)

COUNTRY	UNIT	TOTAL UNITS	RATE OF EXCHANGE	VALUE IN U.S. CURRENCY
Belgium	Franc	500	.022845	$11.42
Netherlands	Guilder	40	.377415	15.10
			TOTAL	$26.52

A TRUE COPY:

/s/ K. T. Hayes
K. T. HAYES
2nd Lt, JAGD
Post Judge Advocate

By my signature hereunder affixed I acknowledge receipt of the exchange above described and certify that the currency was legitimately acquired and not taken from the country of origin in contravention of any War Department instructions or currency control laws and/or regulations of the United States; that said currency was unavoidably brought into the United States; that I returned to the United States on 5 August 1945; that the source and rate at which the said currency was acquired are, viz:

Source: Pay & Allowances
Rate: Belgium .022845; Netherlands .377415
Home Address (Civilians)

/s/ Allen M. Garfinkle
(Signature of Payee)

ALLEN M. GARFINKLE
(Name of Payee--Print or Type)

Approved by:

1st Lt., 1613 SCU, O-1049484
(Grade, Organization & Serial No.)

Cp Grant Fm 675 (20 June 45)" (R. 53, Pros. Ex. 1)

Lieutenant Colonel Eric A. Rundquist, CAC, who conducted an investigation in this case identified the memorandum as being the copy of an original, or duplicate original, which he received from Captain Dolbear, the Finance Officer, and during April 1946 had turned over to Lieutenant Hayes (R. 28-35). The original bore the signature of accused (R. 29,33).

Technician Fourth Grade Arthur Broderson, General Court-Martial Personnel, Fort Sheridan, Illinois, testified at length concerning the original memorandum which he stated was signed by the accused and which he had seen on numerous occasions, particularly in April 1946. On 18 April he placed this document with the file in accused's case in a steel cabinet in his office and on the following Monday the entire file was gone (R. 9-16).

Staff Sergeant Charles D. Rowland, assigned to the finance office at Camp Grant, Illinois, prior to his discharge on 7 March 1946, stated that Prosecution Exhibit 1 was a true copy of the currency exchange forms used in the office in "September," that the "mimeographed" portion was on the form and that information inserted thereon "the dates, and so forth, and the name of course came from the man." The witness testified that accused signed two of the completed forms, one of which was sent to the finance

officer in New York and the other was retained in the files. Sergeant Rowland further testified that for the purpose of exchange, currency acquired in gambling was illegally acquired. He could not state with certainty whether the accused read the memorandum before he signed it (R. 42-59).

Captain C. F. Dolbear, Post Finance Officer at Camp Grant, identified Prosecution Exhibit 1 as the form regularly used by his office in making currency exchanges and stated further that on 6 February 1946, at a preliminary investigation the accused "asked me to testify that he had approached me the time he converted the foreign currency and had told me that he won at gambling, and was it all right for him to convert it. I told him that I could not do that, that it was not true" (R. 65,66). Captain Dolbear had given the signed copy of Prosecution Exhibit 1 to Colonel Rundquist in "January" and had never seen it again (R. 67,68).

Without objection on the part of the defense, the prosecution introduced in evidence a letter from the Finance Office, U.S. Army, 2 Lafayette Street, New York, New York, to Major William Glassner, the trial judge advocate, dated 24 April 1946 and signed by First Lieutenant L. F. DeWolf, Jr., Assistant Finance Officer, which stated that the certificate supporting exchange of foreign currency for First Lieutenant Allen Garfinkle was not of record in that office "inasmuch as during the period in question certificates were forwarded together with Netherlands currency to the Central Disbursing Officer, Continent, APO 633, c/o Postmaster, New York" (R. 50, Pros. Ex.2).

4. For the defense

It was stipulated by the parties as follows: (a) "That the U.S. currency exchanged for the foreign currency does not exceed in value the current value at that time"; (b) that on 31 December 1945 the efficiency rating given to Lieutenant Garfinkle by his Commanding Officer, and an efficiency report forwarded on the basis of that rating through channels to the Adjutant General's Office in Washington, "showed his rating was excellent"; (c) "that the manner of performance as reflected by Form 66-1 of the accused showed him rated as superior and excellent during the course of his military service" (R. 121-122).

Accused, his rights as a witness having been explained to him, elected to testify under oath in his own behalf. He stated that he was 29 years of age, a graduate of the University of Chicago with BA and MBA Degrees. In August 1942 he enlisted in the Army as a private. He was sent to Officer Candidate School and upon graduation in January 1943 he went to the Panama Canal Zone as Platoon Commander of Battery G, 88th Coast Artillery, Anti-Aircraft. He was returned to the United States in October 1943 and after various assignments he was transferred to Camp Grant, Illinois, on 1 September 1945. The accused stated that he acquired about $26 worth of foreign money in card and "crap" games on the night of 19 September 1945. On the following

day he went to the Finance Office and requested Private First Class Rowland to convert it for him. Rowland inserted some forms in the typewriter and proceeded to fill in the blank spaces. When accused informed Rowland that the money was won at gambling Rowland hesitated and said he would have to see an officer. The accused asserted that at this point Rowland called over to Captain Dolbear and asked for instructions. Captain Dolbear asked if there was much of it and when informed of the amount said, "That's all right. *** Well maybe I will win it back." Accused asserted that he merely looked at the amount on the memorandum and did not bother to read anything else, "and I just signed it and that was all." He then got the money, $26.52, "and went out" (R. 131,133). With reference to the anti-freeze accused stated that he did not ask Private Kleyla to put it into his car and did not know he had done so. He exhibited a check in the amount of $13.48 dated 16 November 1945 which he had issued to "Edward Kleyla" and stated that the check was for service rendered in repairing his car and "he (Kleyla) also had a gallon of anti-freeze in his car." This check was admitted in evidence over objection of the prosecution and identified as Prosecution Exhibit 2 (R. 135-137).

With regard to Specification 2 of Charge I accused stated that he was Executive Officer, Supply Officer and Mess Officer of the Detachment. As mess officer he was interested in seeing that the Christmas meal was adequately prepared and on 24 December 1945 he made several trips to the mess hall. He checked the turkeys and found there were eighteen. He had attempted to purchase a turkey at home, Rockford, or in the commissary, but for various reasons was unable to do so. The accused testified as follows concerning the turkey which the enlisted men said he took from the mess hall:

> "I hadn't got one. I walked in there the morning of the 24th and I was discussing this with these cooks here, and I said, 'I wish we could get a turkey; my wife would like to have one.' Mason suggested, 'We got lots of turkeys. There is not going to be anybody here. Why don't you take one of these?' I said, 'Well, I don't want to do that.' Well, he said, 'Well, I can get it ready for you.' So I told him to go ahead and clean one. *** He cleaned one right away. *** He pulled the turkey out of the ice box and said it was cleaned, wrapped it up with some paper he had and gave it to me. I then took that turkey and placed it back in the ice box." (R. 140-141)

He testified further that he had intended to go to the commissary and replace this turkey. When asked specifically if he took the turkey accused replied, "I did not take it, so I did not do this" (R. 143,145). On cross-examination the trial judge advocate asked the accused if the check he gave Sergeant Kleyla (Def. Ex. 2) included payment for a gallon of anti-freeze, to which accused replied, "It may have been. He had anti-freeze in the car, and when he showed me these parts the anti-freeze was with them"(R. 146). Accused did not know from what source Sergeant Rowland procured the date "5 Aug 1945"

on the Memorandum for Exchange of Currency, but asserted that he did not read the memorandum. He was then asked, "Are you in the habit of signing documents without reading them?" to which he replied, "I signed hundreds of documents while at Grant, yes." He admitted that he had never been out of the States, save for the period of time spent in the Canal Zone as shown by the records (R. 158,159). The accused testified at length concerning his domestic difficulties, which is best summarized by the following statement, "I can only say the fact of domestic pressure caused me to weaken when I should not, but I did not commit any act which I should not have done" (R.162).

Comment

The prosecution proved by abundant, competent and convincing evidence that accused, at the time and under the circumstances alleged, caused an enlisted soldier under his command to drain at least a gallon of anti-freeze solution from a Government truck and pour it into the radiator of his private car; that he took a turkey from the refrigerator of the Detachment mess and departed with same and that he converted Belgian francs and Netherlands guilders of a total value of $26.52 into American money upon signing a certificate or memorandum to the Finance Officer that such foreign currency

> "was legitimately acquired and not taken from the country of origin in contravention of any War Department instructions or currency control laws and/or regulations of the United States; that said currency was unavoidably brought into the United States; that I returned to the United States on 5 August 1945; that the source and rate at which the said currency was acquired are, viz: Pay and allowances."

Accused contends that he did not ask Sergeant Kleyla to put the anti-freeze into his car and that he did not know the sergeant had done so. This incident occurred, according to the testimony, on 1 December 1945. Yet, accused introduced in evidence a check for $13.48 which he executed to Kleyla on 16 November 1945 and which he asserted was for mechanical work on his car and may have included the anti-freeze. To assume that accused paid the sergeant in November for anti-freeze which the sergeant took from a Government truck 14 days later would pre-suppose a highly imaginary transaction. In fact it is not susceptible of belief. Even if he did pay Sergeant Kleyla for taking Government property he would yet be liable in law for the misappropriation. The sergeant had no authority to sell Government property and there is no reason to believe he would voluntarily take the anti-freeze from a Government truck and pour it into the radiator of accused's car without his knowledge, consent or request. In regard to the misappropriation of the turkey, the accused says that he took it, walked around the room and put it back in the refrigerator. The overwhelming testimony of the cooks is to the contrary and we can reasonably reach no other conclusion. It can be presumed that the anti-freeze, taken from a Government truck, and the turkey, taken from the ice box of a company mess, was Government property, furnished and intended

for the military service thereof. (2 Wharton's Criminal Law, sec. 1174, p. 1494; Underhill's Criminal Evidence, sec. 508, p. 1028; CM 248966, Fazio, 3 BR (ETO) 31).

Accused admitted signing the Memorandum for Exchange of Currency and, by further admissions showing that he could not have returned from overseas as stated therein and that the source of the currency was from gambling, the statements in the memorandum are conclusively proven to have been false. He attempted to meet this evidence by asserting that he never read the memorandum and that the personnel of the Finance Office acquiesced in the transaction. This is to say that he did not know the facts, and that the wrong was condoned in the same breath. The signing of the memorandum with intent to deceive the finance officer is patent on the face of the record. It is presumed that a falsehood is engendered by an intent to deceive (CM 297459, Woodson, 8 BR (ETO) 17). An accused, be he officer or enlisted man, cannot escape criminal responsibility for his false official statement by merely stating that he did not read what he signed (CM 220269, Cox, 12 BR 373,379; CM 318313, Davis).

Although it is conceded that the foreign currency was exchanged at the lawful rate fixed at the time of the transaction, this circumstance has no bearing on the offense. The exchange of foreign currency, whatever the rate, was made conditioned upon certain facts and circumstances certified to in the memorandum for exchange. It was conslusively proven that the statements certified to were false, and the circumstances are compelling that accused knew they were false and that they were made with the intent to deceive. Defense counsel objected strenuously to the introduction in evidence of the copy of the Memorandum for Exchange of Foreign Currency dated 20 September 1945 on the ground that the original was the best evidence, was shown to have been in existence and should have been produced at the trial. The record shows that the trial judge advocate made diligent effort to locate an original signed copy. One of these signed copies was with the complete file which disappeared from the office of the staff judge advocate and the other appears to have been sent to Europe. For the court to have delayed the trial of this case further in order to locate one of the signed original copies would have worked great hardship upon both the prosecution and the defense, this being especially so in view of the fact that accused admitted having signed the memorandum. Counsel for accused cites Milver Land Company v. Houston (142 So. 410) and Liddon v. Board, etc. (175 So. 806) as authorities for the proposition that the copy of the memorandum introduced was not the best evidence and not admissible. A careful examination of those cases discloses that neither is in point on the question presented in this case. Both relate to the admissibility of parol evidence as establishing the contents of alleged documents. In the present case a certified true copy of the signed document was introduced.

> "The best evidence rule is that the highest degree of proof of which the case from its nature is susceptible must, if accessible, be produced" (32 Corpus Juris Secundum, sec. 777, p. 701; underscoring supplied).

The prosecution accounted for the two signed copies, proved that they were in fact signed and that they were inaccessible, one having been removed with the files from the office of the staff judge advocate and the other having been transmitted overseas.

> "If a writing has been lost or destroyed or if it is otherwise satisfactorily shown that the writing cannot be produced, then the contents may be proved by a copy or by oral testimony of witnesses who have seen the writing" (MCM, 1928, par. 116a, p. 119).

In any event, since the accused did not deny the existence of the document but admitted that he signed it no prejudicial error resulted in the admission of the certified true copy.

It is contended that prejudicial error resulted from the trial judge advocate having cross-examined accused concerning certain statements bordering on a confession which accused had allegedly made to Colonel Rundquist during the investigation of the case (R. 152-154). Colonel Rundquist, before interrogating accused, had advised him of his rights under the 24th Article of War and nothing appears in the record of trial tending to indicate that whatever answers accused may have made as a result of such questioning had been other than voluntary in nature. An unsigned copy of a written statement allegedly signed by accused was excluded apparently on the ground that it was not the best evidence (R. 112-114). Since such statement was not excluded because of a showing that it may have been involuntarily made, this case is easily distinguishable from CM 270425, Stevenson, 45 BR 267,283, in which cross-examination based on the contents of an involuntary confession was held improper, and we are of the opinion that the cross-examination of this accused as to the statements made by him to Colonel Rundquist was clearly permissible.

There having been no proof that the original written statement of accused had been lost or destroyed, Colonel Rundquist's testimony as to its contents on direct examination (R. 114,115) would have been inadmissible upon objection thereto by the defense (CM 216397, Fleming, 11 BR 139,141). However, the failure of the defense to object to such testimony constituted a waiver of the right to insist upon production of the best evidence of accused's statements and such testimony could properly be considered by the court (CM 216904, Frankie, 11 BR 183,188).

5. War Department records show that accused is 30 years of age and married. He graduated from Hastings College of Law, University of California, in 1937 and the University of Chicago, School of Business Administration, in 1941. On 13 August 1942 he enlisted in the Army and after completing a course at the officer candidate school at Camp Davis, North Carolina, was, on 7 January 1943, commissioned a second lieutenant, CAC (AUS). From 6 March 1943 to 23 September 1943 he was on duty with the 88th Coast Artillery (AA)

Regiment in the Canal Zone. The remainder of his assignments have been in the continental United States. On 27 March 1945 he was promoted to first lieutenant. WD AGO Form 66-1 is not available, but it was stipulated that accused's ratings for his entire military career were either "Excellent" or "Superior."

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 94 and mandatory upon conviction of a violation of Article of War 95.

(On Leave), Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Lloyd, Judge Advocate

JAGK - CM 314746 1st Ind

WD, JAGO, Washington 25, D. C. FEB 3 1947

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 the opinion of the Board of Review in the case of First Lieutenant Allen M. Garfinkle (O-1049484), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of knowingly and willfully misappropriating one gallon of anti-freeze of a value of $2.95, and one turkey of the value of $6.75, both property of the United States furnished and intended for the military service thereof, and of falsely stating in a writing to the Finance Officer, Camp Grant, Illinois, with intent to deceive, that 500 Belgian francs and 40 Netherlands guilders were acquired for pay and allowances and that he returned to the United States on 5 August 1945, which statement accused knew to be untrue. 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 pursuant to 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 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.

On 1 December 1945 the accused ordered a sergeant under his command to drain anti-freeze from a Government truck parked near his private sedan and to put the anti-freeze in his sedan. The sergeant complied by getting a three-gallon pail, draining anti-freeze from the truck and pouring it into the radiator of the sedan. The driver of the truck had previously placed a gallon of anti-freeze in the truck and after the drainage the truck ran hot and he was compelled to refill the radiator.

On 24 December the accused, who in addition to his other duties was the Detachment mess officer, went to the mess hall and directed a cook to take from the refrigerator a turkey and to clean it for him. The cook cleaned the turkey, wrapped it for accused who "left with it by the rear door." The accused admitted taking the turkey but contended that he replaced it in the refrigerator. Neither the cook nor others in the mess hall corroborated his statement that he returned the turkey. On 20 September 1945 the accused applied to the Post Finance Officer, Camp Grant, Illinois, for exchange of 500 Belgian francs and 40 Netherlands guilders to American money. He signed a Memorandum for Exchange of Foreign Currency, stating that the foreign currency was acquired through pay and allowances and that

he returned from overseas on 5 August 1945. Accused admitted that the statements were false but stated that he did not read the memorandum, and that he told the Finance Officer that the money was acquired by gambling. He asserted that the Finance Officer said that it was all right, that he (the finance officer) might win it back. The testimony of the accused is in direct contradiction to that of the other witnesses, both officer and enlisted personnel.

4. Although the amount of Government property misappropriated is not of great value, the circumstances of the case are such as to compel the conclusion that he is unfit to be an officer and should be dismissed the service. I recommend that the sentence be confirmed and carried into execution.

5. Inclosed is a form of action designed to carry into effect 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

(G.C.M.O. 68, 10 March 1947.)

(GCMO. 183, 23 May 1947.)

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

JAGK - CM 314775

11 JUL 1946

UNITED STATES v. Private LOUIS R. RICHARDSON (35232180), 3440th Quartermaster Truck Company, US Forces, European Theater.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 18 April 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
KUDER, McAFEE and ACKROYD, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Louis R. Richardson, 3440 Quartermaster Truck Company, did, at Marseille, France, on or about 20 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Private Percy J. Lowe, a human being, by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence was introduced of two previous convictions by summary court-martial, one for absence without leave from about "1800 1 July 45 to about 0530 2 July 1945" in violation of Article of War 61, and one for applying to his own use and benefit a truck without authority in violation of Article of War 96. In the instant case he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor "for the term of your natural life." The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the

accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452,454).

William B. Kuder, Judge Advocate

C. E. McAfee, Judge Advocate

Elbert E. Ackroyd, Judge Advocate

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

JAGH - CM 314864 5 SEP 1946

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 21 May 1946. Dishonorable discharge (suspended), and confinement for five (5) years. Disciplinary Training Center
Private JOHN KENNEY (36735899), Attached Unassigned Headquarters Company, 1st Staging Area Battalion	)	

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

1. The record of trial of the above-named soldier having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private John Kenney, attached unassigned Headquarters Company, 1st Staging Area Battalion, then of Company "G", 179th Infantry, did, without proper leave, absent himself from his command at Carroceto Sector, Italy, from about 10 March 1944 to on or about 30 November 1945.

After submitting a plea in bar of trial under the Statute of Limitations, which plea was overruled by the court, he pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen (15) years. The reviewing authority approved the sentence, remitted ten (10) years of the period of confinement imposed, ordered execution of the sentence as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until

the soldier's release from confinement and designated the MTOUSA Disciplinary Training Center, or elsewhere as the Secretary of War may direct, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 1418, Headquarters, Peninsular Base Section, APO 782, 18 June 1946.

3. The only substantial question presented by the record is whether the trial was barred by Article of War 39, it being evident that the arraignment of accused occurred more than two years after the date of the commission of the offense alleged.

4. Accused was arraigned on 21 May 1946. The evidence shows that he absented himself without leave from his command (Company "G", 179th Infantry, United States Army) on 10 March 1944 and "came under military control" on 30 November 1945.

At the trial accused pleaded the Statute of Limitations (AW 39) in bar of trial. The plea was overruled by the President (in the absence of the law member), without objection by any member of the court.

The 39th Article of War provides in pertinent part:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: * * * Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid period of limitation: * * *."

The period of limitation begins to run on the date of the commission of the offense. Absence without leave is not a continuing offense and is committed on the date the person absents himself (par 67, MCM, 1928 (Cor. 4-20-43)).

When an accused pleads the Statute of Limitations in bar of trial, and when it appears from the record that the statutory period of limitations as to time has elapsed between the date of the alleged offense and the date of arraignment, the burden devolves upon the prosecution, if it proposes to combat the plea, to prove such absence or other impediment as will except the case from the operation of the statute. The burden is not upon the defense to prove that no such impediment existed, and unless such impediment existed the plea should be sustained (CM 149051; CM 150340; CM 150341; CM 154086; Dig Op JAG, 1912-40, Sec 396 (3)).

The trial judge advocate contended that the plea in bar should be overruled because accused was outside the jurisdiction of the United States during the time he was absent without leave.

A mere allegation to the effect that the whereabouts of the offender was unknown to the military authorities during the interval of more than two years which had elapsed since the offense, is not a good averment of a "manifest impediment" in the sense of the article (R 35640, Oct. 1874; Dig Op, JAG, 1912, p 171, 172).

Other than the mere assertion that accused was outside the jurisdiction of the United States, the prosecution did not prove, or attempt to prove, an absence or other impediment as would except accused's case from the operation of the Statute of Limitations. The Board of Review, therefore, is of the opinion that the court erroneously overruled accused's plea in bar of trial.

It cannot be said under all the circumstances of the case, that accused intended to or did waive his rights in the premises by his plea of not guilty. He pleaded not guilty only after his plea in bar of trial was overruled by the court. Such being the case his trial upon this specification, in plain violation of the 39th Article of War, was erroneous and unauthorized. This rule conforms to the opinion of the Board of Review previously expressed (CM 313057, Siwy).

5. The charge sheet shows that accused is 30 years of age and that he was inducted at Chicago, Illinois, on 22 February 1943, to serve for the duration of the war plus six months. He had no prior service.

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

A. Hottenstein, Judge Advocate

Waldemar U. Iglf, Judge Advocate

Henry A. Kleinfeldt, Judge Advocate

JAGH - CM 314864 1st Ind

WD, JAGO, Washington 25, D. C. SEP 27 1946

TO: The Under Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and Executive Order No. 9556, dated 26 May 1945, is the record of trial in the case of Private John Kenney (36735899), Headquarters Peninsular Base Section.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and recommend that the findings of guilty and the sentence be vacated and all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, 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

(G.C.M.O. 316, 22 October 1936).

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

JAGH - CM 314876

DEC 4 1946

UNITED STATES	)	THIRD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Bad Wildungen, Germany, 16
Private EDWARD J. ROLLINSON	)	February 1946. To be hanged
(11116322), Company B, 139th	)	by the neck until dead.
Airborne Engineer Battalion	)	

OPINION of the Board of Review
HOTTENSTEIN, SOLF and FLANAGAN, Judge Advocates

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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 92nd Article of War.

Specification: In that Private Edward J. Rollinson, Company B, 139th Airborne Engineer Battalion, did, at or near Broich, Germany, on or about 23 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premediation kill one Herman Wolk, a human being, by shooting him with a pistol, or other firearm.

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

Specification 1: In that Private Edward J. Rollinson, Company B, 139th Airborne Engineer Battalion, did, at or near Broich, Germany, on or about 23 May 1945, with intent to do him bodily harm, commit an assault upon Johann Leipertz by shooting him in the shoulder with a dangerous weapon, to wit, a pistol or other firearm.

Specification 2: In that Private Edward J. Rollinson, Company B, 139th Airborne Engineer Battalion, did, at or near

Broich, Germany, on or about 23 May 1945, with intent to do her bodily harm, commit an assault upon Christine Leipertz by shooting her in the hand with a dangerous weapon, to wit, a pistol or other firearm.

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

Specification: In that Private Edward J. Rollinson, Headquarters Third Infantry Division, did, without proper leave absent himself from the Third Infantry Division Stockade, Ziegenhain, Germany on about 23 December 1945 and did remain absent until he was returned to military control on or about 16 January 1946.

ADDITIONAL CHARGE II: Violation of the 69th Article of War.

Specification: In that Private Edward J. Rollinson, Headquarters Third Infantry Division, having been duly placed in confinement in the Third Infantry Division Stockade, Ziegenhain, Germany, on or about 22 December 1945, did, at 2000 on or about 23 December 1945, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of two previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that the sentence be commited to dishonorable discharge, total forfeitures, and confinement at hard labor for life.

3. Evidence for the prosecution. Original Charges I and II and Specifications thereof:

On 23 May 1945, Herr Johann Leipertz and his wife, Christine, occupied a house in Broich, Germany (R 7, 17, 20). With them resided Walter Riebe and the deceased, Herbert Wolk, two former German soldiers who had been discharged from the German army about 1 May 1945 and now worked for Herr Leipertz (R 13-14, 17, 19, 31). At about 1300 hours on that date, Herr Leipertz and Riebe, having had their noon meal, retired to the bedroom and went to sleep on the couch (R 7, 17). Shortly thereafter, accused entered the house, threatened Frau Leipertz with a pistol and demanded that she go driving with him in a car. She refused. Accused then asked, "Are there German soldiers here?" to which she replied, "No, there are only civilians here" (R 21-22). Thereupon accused, with his pistol in his hand rushed past Frau Leipertz, entered the room where her husband and Riebe were sleeping and awakened them. Accused poked his pistol

into Riebe's ribs and said, "You are a German soldier. Are you SS? Show me your papers" (R 21-22). Riebe, who was wearing civilian clothes, sat up on the couch and asked Herr Leipertz' daughter to bring his papers to him (R 8, 18, 27). The papers were handed over to the accused, who immediately placed them in his pocket (R 8, 18). Accused threatened Riebe with his pistol, causing him to run out of the room and flee from the house for help. As he left, accused fired a shot at him but Riebe was not hit (R 9, 18, 22). Riebe was unarmed at the time (R 18). Immediately after Riebe's flight, Herr Leipertz was ordered to get up off the couch and he and his wife were escorted outside by the accused. On the way out, accused shot the Leipertz' dog (R 9). Accused searched for Riebe but could not find him. Then, while Herr Leipertz and his wife were standing at the gate of the house, accused turned around and shot Leipertz in the right shoulder. At the time, accused was ten to fifteen meters away. Accused then entered the house next door (R 9-10, 15, 22, 28). While he was inside, Frau Leipertz, who was in the street, stopped an American vehicle and spoke to the soldiers riding in it. In the midst of the conversation, accused came out of the house which he had entered a short time before, approached the vehicle and threatened the soldiers with his pistol. The soldiers got into the car and drove away (R 28-29). Accused returned to Leipertz' house. As he entered, Frau Leipertz, who was standing at the gate, saw the deceased, Herbert Wolk, looking out of the upstairs window of her house (R 29). At that point, Herr and Frau Leipertz went to the nearby home of Frau Meurer in order to bandage Herr Leipertz' wounded shoulder (R 10-11, 23).

Shortly thereafter, the accused, accompanied by Wolk, arrived at the Meurer home and smashed in the window of the front door with his pistol. Frau Meurer came to the door where the accused pointed his pistol at her and demanded, "Open the door." He smelled of liquor and appeared to be drunk (R 33-37). In reply, she said, "The door can't be opened, come in the back way" (R 33). Accused and Wolk went to the rear of the house where they were met by Frau Meurer. She and Wolk were then ordered into the house by the accused. Once inside, the accused threatened her with his pistol and asked her where the girl was. He was informed that she did not have a girl. The accused then pointed his pistol at Wolk and fired two shots (R 34-35). Wolk was unarmed (R 38). When the first shot was fired, Wolk put his hand to his stomach and "yelled" (R 35). The two shots were heard by Herr and Frau Leipertz, who were at the time in a room of the Meurer home near the hallway where this was happening. Immediately after, Wolk entered their room screaming and fell down on a bed in the room. He was bleeding heavily and the bed was immediately covered with his blood (R 11, 24). Frau Leipertz pulled his legs on the bed. As this was taking place, Herr Leipertz looked out of the window and saw accused standing there peering in (R 12). Frau Leipertz moved toward the bed where Wolk lay. Simultaneously, the accused raised his pistol and fired several shots through the window, one of them striking Frau Leipertz on the middle finger of her left hand (R 11-12, 24-25).

Between 1400 and 1500 hours of that same day, Dr. Johann Rath arrived at the Meurer home in response to a call. While there, he examined the body of a man and found a gunshot wound on the upper leg of the body. In the doctor's opinion, death had resulted from the loss of blood occasioned by puncturing the main artery by the bullet. In his opinion the man had died about one hour prior to the examination (R 39-42). While Dr. Rath conducted the examination, Frau Leipertz was present (R 25-26, 41). Although the doctor did not know the deceased, Frau Leipertz testified that the man he examined and pronounced dead was Herbert Wolk (R 26, 40). After the examination, Dr. Rath examined and bandaged a fresh wound on the hand of Frau Leipertz (R 26, 41).

With regard to Additional Charges and Specifications thereof, the evidence for the prosecution is summarized as follows:

On 22 December 1945, accused was confined in the Third Division Stockade (R 43). He met and spoke to another stockade prisoner, Private Smith, and asked Smith if he wished to leave the stockade. Smith replied that he did not care to go since he expected to be out in a short time (R 46-47). The next day, accused and Private Smith again had a conversation inside the stockade and Smith agreed to leave the stockade with the accused. On the evening of 23 December, the accused and Private Smith escaped from the stockade through one of the windows (R 47). There was a bar missing from the window which was on the ground floor so they climbed through and jumped to the ground (R 48-49). Although the accused and Private Smith had talked about a hacksaw, Private Smith had not cut the bar nor had he seen the accused cut it (R 48). After leaving the stockade, they went to Ziegenhain where they "split up," Smith going on to Frankfurt alone (R 49). On the night of the escape, Sergeant Rataj, who was in charge of all administrative details of the stockade and responsible for all incoming and outgoing prisoners, received a report from the charge of quarters. Sergeant Rataj immediately conducted a bed check of the prisoners and discovered that two of them, namely the accused and Smith, were missing (R 43). A search was made of the cell block and the stockade but the accused was not found (R 44). The witness found a place where the bars had been sawed off and a ladder was found leading over the wall (R 43-44). The accused had no authority to leave the stockade (R 45).

It was orally stipulated by the prosecution, the accused and the defense that the accused was returned to military control at Paris, France on 15 January 1946 (R 50).

4. Evidence for the defense:

Walter Riebe was recalled as a witness for the defense and testified that the accused was excited and smelled of liquor at the time of the incident (R 51).

Herr Leipertz, also recalled as a witness for the defense, testified that he thought the accused was drunk because the accused looked "as if he had been drinking" heavily (R 52-53).

Captain Edward S. Holcomb, a Medical officer and division neuro-psychiatrist of the Third Infantry Division, testified that he had examined the accused shortly before the trial. The examination revealed that the accused, at the time of the offense and at the time of the trial, had a mental defect which the witness diagnosed as a constitutional psychopathic state. He has subnormal intelligence; his judgment is markedly impaired; he is a chronic alcoholic and is emotionally immature (R 53-54). Accused is more susceptible to the effects of alcohol than a normal individual. On cross-examination he testified that at the time of the incident, the accused knew the difference between right and wrong and was capable of adhering to the right (R 54). On redirect examination the witness stated that, in common with most psychopaths, the accused gave a history of losing his temper very easily. The accused is emotionally less stable than the average person (R 55).

The accused, after his rights as a witness had been fully explained, elected to take the stand as a witness and testified under oath substantially as follows: On 23 May 1945, accused was in Broich, Germany (R 56-57). There, he met some German civilians and began drinking with them (R 56-57). They drank from six to seven bottles of wine which accused had brought to the house (R 57). Herr Johann Leipertz was one of the civilians present and was drinking with accused during the morning (R 59). Together Leipertz and accused drank quite a bit of liquor and conversed with each other for about an hour and a half or two hours (R 60). During the course of the morning several of the bottles of wine were stolen (R 57). Accused, noticing that the wine was missing, questioned the others concerning it (R 57). At that time, a small boy, who was present, told the accused in English that the others did not know where it was but that they desired that accused search the house if it would satisfy him as to their lack of guilt in the matter (R 58, 66). Accused and another German then left the house and walked to a nearby residence for the purpose of searching for the wine (R 60). The German civilian voluntarily accompanied accused as they went from the one house to the other (R 61). On reaching the second house, accused and the man entered through the back door (R 61). There accused began to search (R 61). In the course of his search, accused came to one room in the house and started to go in (R 61, 65). The man, who had accompanied him, attempted to prevent accused from entering the room (R 58, 61, 65). As the fracas progressed, an elderly man with a mustache attempted to intervene (R 61-62, 65). He was holding a bottle in his hand and came at accused. Accused disengaged himself from the struggle, stepped back, pulled out a P-38 pistol, which he was carrying, and shot at both men (R 58, 61-62, 64, 65). Accused then went outside the house and walked over to one of the windows on the ground floor of the house (R 58, 68). There, through the window, he saw the elderly German (R 58). The man took a "whack" at accused and accused fired at him (R 58). Accused then left the house and shortly thereafter was arrested by the Military Police (R 58). Although accused remembers almost everything that happened during the day, he does not remember firing a shot at a German standing in the street, nor did he remember ever seeing Frau Meurer or Frau Leipertz at any time before the trial.

For the Court:

Herr Johann Leipertz was recalled as a witness for the court (R 66). On the morning of 23 May 1945, at about 0700 hours, he and Riebe had gone into the fields near their home (R 67). They worked in the fields until about noon at which time they returned to the house for dinner (R 67). Leipertz stated that he did not at any time drink with accused (R 66-67). He further testified that he had never seen accused before until the time that accused walked into the bedroom of the Leipertz home during the early afternoon of 23 May 1945. He further stated that he did not at any time have a quarrel with accused, nor did he at any time approach accused holding a bottle in his hand (R 67). Frau Leipertz upon being recalled as a witness for the court testified that on the morning of 23 May 1945, Herr Leipertz and Herr Riebe left the house going in the direction of the potato field (R 68-69). Herr Leipertz returned to the house at about 1230 hours that day (R 68). Frau Leipertz was present in the Leipertz home all morning and did not at any time during that period see accused (R 68). To the best of her knowledge her husband never drinks intoxicating liquor (R 68). Accused was not at any time on 23 May 1945 present in her house with Herr Leipertz drinking wine or anything else (R 68).

5. Specification, Original Charge I: The accused is charged with the murder of Herbert Wolk. The Specification alleges that the accused:

> "* * * did, at or near Broich, Germany, on or about 23 May 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Herbert Wolk, a human being, by shooting him with a pistol, or other firearm."

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought." The word "unlawful" as used in this definition means "without legal justification or excuse." A justifiable homicide is "a homicide done in the proper performance of a legal duty." An excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner or which is done in self-defense or a sudden affray * * *." The definition of murder requires that the death of the victim "* * * take place within a year and a day of the act or omission that caused it * * *" (par 148a, MCM, 1928). The most distinguishing characteristic of murder is the element of "malice aforethought." The Manual for Courts-Martial defines malice aforethought in the following terms:

> "Malice aforethought - malice does not necessarily mean hatred or personal ill-will toward the person killed, nor the 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; * * *" (par 148a, MCM, 1928). (Underscoring supplied.)

Indicative of authorities supporting the principles set forth in the Manual for Courts-Martial are the words of Chief Justice Shaw, who in the leading case of Commonwealth v. Webster (5 Cush. 296, 52 Am. Dec. 711) explains the meaning of malice aforethought as follows:

"* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred and revenge, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart, regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * *

"* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (underscoring supplied).

The authorities to the same effect are manifold and further citation thereof would be superfluous.

When the evidence is examined in the light of the above concepts, it becomes apparent that the accused is guilty as charged. The specification alleges that the accused, with malice aforethought, feloniously killed the deceased by shooting him with a pistol. The evidence discloses that the accused, after threatening several unarmed German civilians with a pistol and shooting one of them in the shoulder, escorted the unarmed and defenseless deceased, at the point of a pistol, to the home of a neighbor and there shot and killed him. In law, it is murder, malice being presumed from the use of a deadly weapon (par 112a, MCM, 1928), when death is caused by the intentional and unlawful use of such weapon in a manner likely to cause death, provided that there are no circumstances serving to mitigate, excuse or justify the act. In order for an implication of malice to arise from the use of a deadly weapon, it must appear that its use was unlawful, intentional or deliberate (29 Corpus Juris, Sec 74, pp 1099-1101). In the instant case, the version of the homicide related by all the witnesses fails to disclose any circumstances to excuse or justify the accused's acts. On the contrary, the use of a deadly weapon against the unarmed and defenseless deceased as alleged in this case appears to have been an intentional, deliberate and cold blooded homicide.

Self-Defense.

It is apparent that the defense relied heavily on the doctrine of self-defense, upon the theory that a reasonable man, placed in a position similar to that portrayed by the accused in his uncorroborated testimony, would consider himself in imminent danger of bodily harm, and thus be justified in shooting in self-defense. But the rule stated in the Manual for Courts-Martial is qualified by the important principle that, before a person may take a life in defense of his own, he must have retreated, if not in his own house, as far as he safely can (par. 148a, MCM, 1928). It is noted that the accused was armed with a pistol and his alleged assailants were not. The accused, himself, testified that he "backed off" prior to drawing his weapon and firing at the deceased. Clearly, the way was open for him to retreat from the house and thus avoid the killing. Instead, he chose to remain and settle the quarrel in his own way. In any event, the question of self-defense was a question of fact for the members of the court who had an opportunity to watch the demeanor of the various witnesses and the accused on the witness stand. The determination of that question against the accused is fully supported by the evidence.

Intoxication.

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. 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 (par 126a, MCM, 1928).

The German witnesses to the killing testified that the accused appeared to have been drinking. One of those witnesses, Johann Leipertz, testified that the accused appeared to have been drinking heavily. Captain Holcomb, the division neuropsychiatrist, testified that the accused was more easily affected by liquor than the average person. Nevertheless, the accused's testimony is inconsistent with the theory that he was so drunk at the time of the offense as to be incapable of entertaining a specific intent. On the contrary he testified to having consciously and intentionally fired at the deceased, although he stated that the shooting was in self-defense. He evidenced sufficient memory as to time, places, and events to negative any inference that he did not know what he was doing. It is significant that all the witnesses who testified that accused smelled of liquor also stated that he was nevertheless able to walk without staggering, and that he was also able to articulate well enough to be understood, even though he spoke to them in German. His act of demanding to see the identification papers of Riebe, whom he found in the house when he entered, clearly demonstrates accused's ability to use judgment and reasoning at the time.

Evidence of intoxication falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime charged, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act. It was for the court in the present case to determine the degree of accused's intoxication on the basis of all the evidence before it. There was substantial evidence to support a finding that accused at the time of the offense was capable of forming the purpose and intent to kill and that finding should not be disturbed on review (CM 294675, Minnick, CM ETO 12855).

Sanity.

There remains for consideration whether the medical testimony adduced in this case creates a reasonable doubt as to the accused's mental responsibility at the time of the offense.

The legal standard of mental responsibility under military law is stated in the Manual for Courts-Martial as follows:

> "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (5th subpar of par 78a, p 83, MCM, 1928).

The standard for determining mental responsibility in military law includes not only the concept involved in the traditional right and wrong test, but also the more liberal concept involved in the so-called

irresistible impulse test. The first concept recognizes that a person without appreciation of rightness or wrongness of an act cannot have a criminal mind or formulate a criminal intent. The second concept recognizes that, if a person, because of mental illness, is deprived of the power of choice or volition, he does not possess the mental attitude and freedom of choice essential to criminal responsibility (Par 2, Technical Bulletin, MED 201, WD, 1 Oct 45). The mental responsibility of the accused is a question of fact, and the burden is upon the prosecution to prove beyond a reasonable doubt that he is mentally responsible for the offense. He is presumed, however, to have been in fact sane at the time of the offense until a reasonable doubt as to his sanity at that time appears from all the evidence. This presumption merely supplies in the first instance the required proof of the capacity of the accused to commit the crime charged, and authorizes the court to assume at the outset that he is mentally responsible for his act. When evidence tending to prove that the accused was not mentally responsible for the alleged offense is introduced either by the prosecution or by the defense, or, in an appropriate case, on the court's own initiative, and such evidence creates a reasonable doubt as to the sanity of the accused, he is entitled to an acquittal (CM 294675, Minnick, supra); the burden, however, of producing evidence of insanity is not upon the prosecution, but upon the defense (MCM, 1928, par 112a, p 110; Davis vs U.S., 160 U.S. 469; Davis vs U.S., 165 U.S. 375; Hotema vs U.S., 186 U.S. 413).

The findings of the court in the present case that the accused was guilty of the offenses charged imports a finding that the accused was mentally responsible at the time of the killing. This finding should not be disturbed upon review if there is substantial evidence in the record to sustain it.

Prior to the trial, the accused was examined by Captain Holcomb, the division neuropsychiatrist, who was called as a witness for the defense. He testified that as a result of his examination he found that at the time of the offenses the accused had a mental defect which the witness diagnosed as a constitutional psychopathic state. He has subnormal intelligence; his judgment is markedly impaired; he is a chronic alcoholic and is emotionally immature. However, on cross-examination he testified that at the time of the offense the accused knew the difference between right and wrong and that he was capable of adhering to the right. He further testified that the accused, as well as most psychopaths, loses his temper very easily and is emotionally less stable than the average person.

The substance of the medical testimony was that, although the accused suffered from a mental and emotional defect, such defect did not render him incapable of distinguishing right from wrong and of adhering to the right.

Accordingly there was substantial evidence to sustain the court's finding that the accused was at the time of the offenses so far free from mental defect, disease or derangement as to be able concerning

the acts charged to distinguish right from wrong. There is nothing in the record to suggest that although accused was aware of the moral quality of his act, he was unable to adhere to the right (CM 271889, Barbera, 1st Ind, 46 BR 216; CM 294675, Minnick, supra; CM 284633, Farrington, CM ETO 3717; CM 244490, Peace, 29 BR 209).

Accordingly the Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of the Specification of Charge I.

6. Specifications 1 and 2, Original Charge II, respectively aver that the accused committed assaults, with intent to do them bodily harm, upon Johann Leipertz and Christine Leipertz, by shooting them with a dangerous weapon, to wit, a pistol, in violation of Article of War 93. The evidence introduced by the prosecution clearly established a prima facie case which was not contradicted by the defense. As for the ability of accused to form the specific intent necessary to commit these assaults and his mental responsibility therefor, see the discussion of intoxication, and sanity, supra.

7. The Specification of Additional Charge I. Upon this specification accused was found guilty of absence without leave from on or about 23 December 1945 until on or about 16 January 1946.

The testimony of Private Smith, who accompanied the accused, and of Sergeant Rataj, Provost Sergeant of the Stockade, sufficiently established the beginning of accused's absence without leave. The condition of absence without leave having once been shown to exist may be presumed to have continued, in the absence of evidence to the contrary, until accused's return to military control (MCM, 1928, par 130a). It was stipulated that accused was returned to military control in Paris, France, on 15 January 1946. The court was, therefore, warranted in finding that the absence of accused terminated "on or about" 16 January 1946. The finding of guilty of the Charge and Specification herein are adequately supported by the evidence.

8. The Specification of Additional Charge II avers that the accused, having been duly placed in confinement escaped therefrom before he was set at liberty by proper authority, in violation of Article of War 69. In order to establish accused's guilt under this specification, it was incumbent upon the prosecution to show that accused was duly placed in confinement, and that he freed himself from restraint of his confinement before he had been set at liberty by proper authority (MCM, 1928, par 139h). The evidence adduced by the prosecution clearly established that on 22 December 1945 the accused was confined in the Third Infantry Division Stockade. His confinement therein is presumed to have been legal (MCM, 1928, par 139h). On the evening of 23 December 1945, at about 2000 hours, the accused and another stockade prisoner were missing. An examination of the cell block shortly thereafter revealed that a bar of the cell block had apparently been cut and a

ladder was found leading over the wall. It was shown that the accused was not authorized to leave the stockade. In the opinion of the Board of Review the finding of guilty of the Specification of the Additional Charge II is fully supported by the evidence.

9. The allied papers attached to the record of trial show that Lieutenant Colonel Jesse C. Drain, Jr., who sat as president of the court, was the officer who, on 5 February 1946, forwarded the additional charges with the recommendation that "accused be tried by general court-martial." The record shows that the trial judge advocate failed to disclose this fact to the court. When the members of the court were asked to state any facts which they believed to be grounds of challenge, by either side, against any member, Lieutenant Colonel Drain remained silent. He was not challenged for cause or peremptorily and the accused affirmatively stated that he did not object to any member present.

There is no indication that Lieutenant Colonel Drain was legally incompetent to serve on the court. He was neither the accuser nor a witness for the prosecution (AW 8) and he was not the investigating officer.

The indorsement forwarding the charges may be considered as a routine expression of an opinion that the charges were of a character proper for trial by a general court-martial which does not amount to an opinion as to the guilt of the accused (CM 167584, Sullivan; CM 219582, Braden). The presence on a court of an officer who has forwarded the charges recommending trial by general court-martial is not ipso facto prejudicial error. The test is whether, looking at the record as a whole, the substantial rights of the accused have been prejudiced (CM 232864, Carso).

In our opinion it is error for the officer who forwards charges recommending trial by court-martial to sit as a member of the court without disclosing that fact. He should either disqualify himself voluntarily if he had formed an opinion concerning the guilt of the accused, or, if he has formed no such opinion, he should announce his connection with the case so that both sides may have sufficient knowledge upon which to base a decision whether he should be challenged for cause or peremptorily. Although the papers accompanying the charges were available to the defense (par 41e, MCM, 1928), his failure to interpose a challenge does not constitute a waiver of Lieutenant Colonel Drain's disqualification. (CM 187588, Errigo; CM 187576, Lanfair; CM 187781, Starks, Sayles)

Nevertheless, after a review of the entire record it cannot be said that the substantial rights of the accused were injuriously affected by the error noted.

It does not appear that Lieutenant Colonel Drain had access to the original charges which pertained to murder and assault, or to the allied papers attached thereto.

The original Charges had been served on the accused on 25 January 1946. The additional charges which Lieutenant Colonel Drain forwarded were not prepared until 28 January 1946. Accordingly no inference may be drawn that Lieutenant Colonel Drain had any prior knowledge of, or that he expressed any opinion with respect to, the original charges.

The evidence in support of every element of the Additional Charges was clear and compelling. It is well settled that where the evidence for the prosecution is compelling, participation in the trial by an officer who forwarded the charges recommending trial by general court-martial is not considered to have injuriously affected the substantial rights of the accused under Article of War 37 (CM 210612, Maddox; CM 203923, Jones; CM 203802, Braman; CM 200942, Cole; CM 200328, Boutiller; CM 190127, Hammond; CM 190115, Treat; CM 188240, Mercer et al).

10. Accused is 21 years of age and enlisted 9 November 1942 at Boston, Massachusetts, with no prior service, to serve for the duration of the war and six months.

In the allied papers accompanying the record is a psychiatric report which includes the following brief personal history of the accused:

> "* * * There is no evidence of hallucination, delusion, phobia, or obsession other than a confirmed hate of all Germans. He was well oriented in all spheres of time, place, and persons and his memory for both recent and remote events was within normal limits. Both insight and judgment were markedly impaired. A psychometric test revealed that his mental age was 11 years.
>
> "Family history and early childhood development were significant. He was brought up in a home early disturbed by the death of the father. He was further raised by his mother and step-father. He wet the bed until the age of about 11 and has been a chronic nail-biter all his life. In childhood he had temper tantrums and was unruly. He disliked school and refused to attend regularly. He frequently played truant and was finally 'requested to leave' by the principle when he was in the 3rd year of High School.
>
> "In civilian life he was frequently in difficulty with the law. He has been arrested '7 or 8' times but denies spending more than a night in jail. Most of his offenses were for being drunk and disorderly but one charge was 'beating up a policeman'.
>
> "In military service he continued to have conflicts. He has been court-martialed three times for charges of being drunk and disorderly and AWOL. He was sentenced

6 months confinement for each of the three courts-martial. He has been a steady drinker of alcoholic beverages to the degree of drinking 'all I can get'. He has been drunk on numerous occasions and invariably becomes involved in physical and mental conflict with his companions. He also smokes excessively.

"This soldier has been living by his own rules and regulations for many years. He is emotionally unstable, emotionally immature and does not profit from his past experiences. He is anti-social, has markedly impaired judgment and performs acts without thinking of the consequences. In addition he does not have the benefit of an average intelligence. Therefore this soldier is being diagnosed as a Constitutional Psychopathic State with emotional immaturity and alcoholism, chronic."

11. The court was legally constituted and had jurisdiction of the person 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 and the sentence and to warrant confirmation thereof. The death penalty is authorized upon conviction of murder in violation of Article of War 92.

A. Lottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Jerry J. Hanagan, Judge Advocate

JAGH CM 314876 1st Ind

WD, JAGO, Washington 25, D. C. MAR 3 1947

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 Edward J. Rollinson (11116322), Company B, 139th Airborne Engineer Battalion.

2. Upon trial by general court-martial this soldier was found guilty of the murder of Herbert Wolk, a German civilian, in violation of Article of War 92; of assault upon two German civilians with intent to do bodily harm by shooting them with a pistol, in violation of Article of War 93; of absence without leave from 23 December 1945 to 16 January 1946, in violation of Article of War 61; and of escape from confinement on 23 December 1945, in violation of Article of War 69. He was sentenced to be hanged by the neck until dead. All the members of the court present at the time the vote was taken concurred in the sentence. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48, recommending that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life.

3. 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 view of all the circumstances, including the recommendation of the reviewing authority, accused's susceptibility to alcoholic drink, his intoxicated condition, his fixed hatred for all Germans, and the fact that the offenses were committed by a combat soldier about fifteen days after the termination of hostilities with Germany, 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 the term of the natural life of accused, 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.

4. Consideration has been given to a copy of a letter from Mr. Roger Robb and Mr. John W. Jackson, attorneys for the accused, addressed to the Secretary of War, dated 22 November 1946, and inclosures thereto pertaining to the accused's mental condition.

JAGH CM 314876

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 recommendation hereinabove made, should such recommendation meet with your approval.

3 Incls
1. Record of trial
2. Dft ltr for sig USW
3. Form of Executive action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 97, 18 March 1947.)

WAR DEPARTMENT
In the Office of The Judge Adv ate General
Washington 25, D. .

JAGK - CM 314884

3 OCT 1946

UNITED STATES v. Private JAMES H. KEITH (38667606), 795th Engineer Dump Truck Company.	UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M., convened at General Engineer District, APO 75, 24 April 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James H. Keith, 795th Engineer Dump Truck Company, then 1364th Engineer Dump Truck Company, did, at the 1364th Engineer Dump Truck Company area, on or about 16 February 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician 5th Grade Bouford Moreland, a human being, by striking him on the head with a hammer.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the U.S. Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

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

imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC 452,454).

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Litchfield, Judge Advocate

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

JAGK-CM 314899

4 OCT 1946

UNITED STATES	)	SIXTH ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Presidio of San Francisco,
Captain GEORGE W. DOUGHERTY	)	California, 27 May 1946.
(0-1319728), Infantry.	)	Dismissal.

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 I: (Withdrawn by order of reviewing authority.)

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

Specification 1: In that Captain George William Dougherty did, at San Francisco, California, on or about January 7, 1946, wrongfully and unlawfully make and utter to Richelieu Hotel, San Francisco, California, a certain check, in words and figures, to wit:

Monterey Office
Bank of America
National Trust and Savings Association
San Francisco, Calif., Jan 7th, 1946

Pay to the order of Cash $6.00
Six and no/100---------- Dollars

George W. Dougherty

and by means thereof, did fraudulently obtain from Richelieu Hotel the sum of $6.00 (Six Dollars) he, the said Captain George William Dougherty, then well knowing that he did not have and not intending that he should have any account with the Bank of America for the payment of said check.

Specification 2: (Finding of guilty disapproved by reviewing authority.)

Specification 3: (Finding of guilty disapproved by reviewing authority.)

Specification 5: (Finding of guilty disapproved by reviewing authority.)

Specification 6: (Finding of guilty disapproved by reviewing authority.)

NOTE: Specifications 4, 7, 8 and 9 differ materially from Specification 1 only in the date, amount and name of company who cashed the checks as indicated below:

Specification	Date	Amount	Company Cashing Check
4	26 Jan 1946	$15.00	Crystal Lounge
7	12 Feb 1946	$20.00	Shomers Inc.
8	12 Feb 1946	$25.00	Bellevue Hotel
9	13 Feb 1946	$25.00	Bellevue Hotel

He pleaded not guilty to, and was found guilty of, the Charge and all Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due and to become due. The reviewing authority disapproved the findings of guilty of Specifications 2, 3, 5 and 6 and approved only so much of the sentence as provided for dismissal from the service and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

As to Specification 1.

Mrs. Florence Honan, Chief Clerk of the Richelieu Hotel, identified a check for the sum of $6.00 drawn on the Bank of America, payable to cash, and signed George W. Dougherty. This check was given by the accused to the Richelieu Hotel for room rent. Upon presentation of this check to the drawee bank payment was refused. This check has not been paid (R. 10; Pros. Ex. 1).

As to Specification 4.

William M. Smith, an employee of the Crystal Lounge, identified a check for the sum of $15.00 drawn on the Bank of America, payable to cash, signed George W. Dougherty, and indorsed George W. Dougherty, Captain, Infantry, 01319728, Presidio of Monterey. This check was handed to the witness by the accused and the witness gave the accused $15.00. The check was presented to the bank and returned unpaid in the usual course of business. At the time of trial this check had not been paid (R. 17, 18; Pros. Ex. 3).

As to Specification 7.

William S. Black, Manager of Shomers, Inc., identified a check in the sum of $20.00, drawn on the Bank of America, payable to cash, signed George W. Dougherty, and indorsed George W. Dougherty, Captain, Infantry, 01319728, Presidio of Monterey, California. This check was given for merchandise amounting to $9.19 plus Federal tax. The difference between the amount of the purchase and the amount of the check was returned to the customer in cash. The accused looked like the man who gave him the check. Upon presentation of this check to the drawee bank payment was refused (R. 23, 24, 25; Pros. Ex. 6).

As to Specification 8 and 9.

Mrs. Minerva Warrick, an employee of the Bellevue Hotel, identified a check in the sum of $25.00 on the Bank of America, payable to cash, signed George W. Dougherty, and indorsed George W. Dougherty, 01319728, Captain, Infantry (R. 28; Pros. Ex. 7). She also identified another check in the sum of $25.00 drawn on the Bank of America, payable to cash, signed George W. Dougherty and indorsed George W. Dougherty, 01319728, Captain, Presidio of Monterey, California (R. 29; Pros. Ex. 8). She further testified that the accused signed the checks in her presence and that she gave the accused $25.00 in cash for each check. Neither check was ever paid (R. 28, 29, 30). Prosecution's Exhibit 7 is referred to in Specification 8 and Prosecution's Exhibit 8 is referred to in Specification 9.

Staff Sergeant Glenn Rasche, Criminal Investigation Section, testified that he had seen the accused sign his name a number of times and would recognize the signature of the accused. Sergeant Rasche then examined Prosecution's Exhibits 1, 2, 3, 6, 7, 8 and 9 and stated that in his opinion the signatures appearing on each exhibit was the signature of the accused (R. 33, 35).

N. P. Hasselo, Manager of the Monterey Branch of the Bank of America, testified by deposition that Captain George W. Dougherty or Captain George William Dougherty did not have an account with his bank between 7 January 1946 and 26 January 1946 (Pros. Ex. 11). Aloysius Dettling, Pro-Assistant Cashier, Market-New Montgomery branch of the Bank of America, testified by deposition, that the records of the bank show that neither George W. Dougherty nor George William Dougherty ever had an account with the bank (Pros. Ex. 12).

It was stipulated that the following statement, made by the accused before the trial, is correct:

> "I have no account whatsoever, in any Bank of America either at Monterey, California, or any place, therefore, I realize that any check drawn against the Bank of America was drawn despite the fact that I did not have an account at such bank" (R. 40).

4. Evidence for the defense.

Captain Rush B. Faville, Medical Corps, Neuropsychiatric Services, Letterman General Hospital, testified that the accused had been a patient in his ward at Letterman General Hospital since 15 February 1946. He had observed the accused daily (R. 45). The accused was in a closed neuropsychiatric ward (R. 49). In his opinion the accused's condition was such that it would have been possible that the accused was suffering from a condition bordering on loss of memory or amnesia for the two months prior to his entry into the hospital (R. 48). It is impossible to determine whether or not the accused was actually suffering from amnesia during this period. In his (Captain Faville's) opinion, between 7 January 1946 and 13 February 1946, the accused knew right from wrong and was able to choose the right (R. 49). This witness testified as to the mental condition of the accused as follows:

"Q. In your opinion, Captain Faville, will you tell the court, Captain Faville, what the usual symptoms of amnesia are?

"A. That is a hypothetical question. Symptoms would usually be that the patient, a man, or subject, would discover that he had been someplace there and had done something of which he had no memory. There are no actual symptoms in that he has any better feelings, or that it is a lapse of memory, so that the first occasion he knows about is usually when he is either reminded that he has done something in the past or, if he suddenly has a recovery of his memory, he discovers himself in unusual surroundings and cannot explain how he got there, that is, roughly, the symptomology. Usually there are scattered or cloudy memories at various times during that period. It is not an absolute or complete loss of memory. There are little episodes that face him, with that difficulty, and he will remember" (R. 51).

"TJA: The fact that a person is suffering from amnesia affect their knowledge of right and wrong?

"A. Was the question 'did it' or 'could it'?

"TJA: Would it normally, say, since it is a hypothetical question.

"A. I believe it could very easily.

"TJA: Does, normally, a person suffering from amnesia also lose his ability in distinguishing right from wrong?

"A. While he is suffering?

"TJA: Yes.

"A. I believe that ordinarily he would not" (R. 52).

"LM: Have you examined the accused as to his capacity to tell right from wrong on January 7 1946, January 25, January 26, and February 12, February 13?

"A. No, sir, not on those specific dates. I have to be specific as to those dates? We didn't know those dates at the time of our examination. We did cover the period from the alleged offense to the time he was admitted to our ward.

"LM: From the alleged offense, those are the dates of the offenses, January 7, 25 and the other three. Did he know right from wrong?

"A. It was our opinion that he did, yes, sir.

"LM: And he was able to choose the right?

"A. That's right.

"LM: Can you say whether he knows right from wrong today?

"A. Yes, sir, I believe he does.

"LM: He can adhere to the right?

"A. He can adhere to the right" (R. 49-50).

The accused, having been warned of his rights, elected to be sworn as a witness in his own behalf. He testified that he was 41 years of age. His profession is that of attorney and he had practiced his profession for 16 years before entering the Army. He has been in the Army since 5 October 1942. After thirteen weeks of basic training he was sent to the Infantry School at Fort Benning and commissioned a second lieutenant on 20 May 1943. He was sent to Camp Croft and served a short time as a platoon leader, after which he was assigned to the Staff Judge Advocate's Office. He acted as trial judge advocate of general and special courts-martial. About 1 November 1944 he was ordered to the Military Government School at Charlottesville, Virginia, for a six-weeks' course and upon completion thereof he was ordered to Northwestern University Civil Affairs Training School for a six-months' course. On 1 July 1945 he was ordered to the Presidio of Monterey, California. He is unable to account for his actions between 7 January 1946 and 15 February 1946, as he has no recollection of his actions between these dates. He has no knowledge or recollection of signing the checks presented in evidence but the checks appear to bear his signature (R. 54, 55, 56). On cross-examination, the accused stated that he drinks moderately but not to the extent that it interferes with his duties (R. 60). He never missed a day of duty because of drinking and he never used drugs (R. 71).

5. The evidence in this case is clear and convincing that the accused did at the times and places alleged in Specifications 1, 4, 7, 8 and 9 issue the checks described in the specifications and did receive money, merchandise or services in return therefor, and that the checks had never been paid.

The main question presented by the case may be stated as follows: Was the accused's mental condition such that, at the time of the issuing the checks, he was capable of distinguishing right from wrong and of adhering to the right?

Paragraph 78a, Manual for Courts-Martial, provides in part:

"*** A person is not mentally responsible for the offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right * * *."

The accused neither admits nor denies issuing the checks set forth in the specifications of Charge II. He merely states that he is unable to remember anything concerning his actions for the period 7 January 1946 to 15 February 1946. He has no recollection of signing any of the checks presented in evidence, but the checks appear to bear his signature.

Captain Faville, Medical Corps, Neuropsychiatric Services, testifying for the defense stated that normally a person suffering from amnesia would not lose his ability to distinguish right from wrong and that in his opinion, both at the time of the trial and during the period between 7 January 1946 and 13 February 1946, the accused knew right from wrong and was able to choose the right. The fact that a person may be suffering from amnesia is not in itself a defense to a criminal action. The condition must be such that the accused cannot distinguish between right and wrong and cannot adhere to the right. This is a question of fact to be decided by the court and the court by its finding of guilty determined this question against the accused (CM 260476, Hays, 39 BR 371; CM 225837, Gray, 14 BR 346). In issuing the checks involved in this case, the accused used his correct name, rank, serial number and station. Upon all the evidence the court was justified in concluding that he was mentally responsible in all particulars, that he was capable of having the criminal intent involved in the offenses charged and that at the time thereof he knew right from wrong and could adhere to the right.

6. War Department records show that the accused is 47 years of age and married. He is a high school graduate and studied six years at Ohio State University but did not graduate because of illness. His major subjects were American history and law. From 1924 to September 1942 he practiced law at Toledo, Ohio, and earned an annual income of $7500.00. On 22 September 1942, he was voluntarily inducted into the Army for the purpose of competing for selection as an officer candidate. Upon completion of basic training, he attended officers' candidate school at the Infantry School, Fort Benning, Georgia, and upon graduation was commissioned and appointed a temporary second lieutenant, Infantry, Army of the United States, on 20 May 1943. He was given a temporary promotion to the grade of first lieutenant on 29 December 1943 and to the grade of captain on 18 July 1944. He graduated from the School of Military Government, Charlottesville, Virginia, and the Civil Affairs Training School at Northwestern University.

7. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Christy D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Hoyd, Judge Advocate

JAGK - CM 314899 1st Ind

WD, JAGO, Washington 25, D. C. OCT 1 5 1946

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 the opinion of the Board of Review in the case of Captain George W. Dougherty (0-1319728), Infantry.

2. Upon trial by general court-martial this officer was found guilty upon nine specifications of making and uttering nine checks with intent to defraud in violation of Article of War 95. No evidence of any previous conviction 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 disapproved the finding of guilty as to four specifications (Specifications 2,3,5 and 6), approved only so much of the sentence as provided for dismissal from the service and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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. I concur in that opinion.

Between 7 January 1946 and 13 February 1946 the accused made and uttered five separate checks to various firms in San Francisco, California. The checks ranged from $6.00 to $25.00. For each check the accused received service, merchandise or money and in one case merchandise and money. Upon presentation of these checks payment was refused because the accused did not have an account at the drawee bank. The checks were never paid. Accused's only explanation of his conduct is merely that he does not remember his actions during this period of time. It was proven that during this period the accused knew right from wrong and could adhere to the right.

4. The actions of the accused in knowingly issuing a number of checks upon a bank wherein he did not have an account clearly warrants dismissal. I therefore 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 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

(G.C.M.O. 327, 30 October 1946.)

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

APR 16 1947

JAGQ - CM 314919

UNITED STATES	)	FOURTH ARMY
v.	)	Trial by G.C.M., convened at Fort Crockett, Texas, 3-4 April 1946. "Dishonorable discharge" and confinement for three (3) years.
First Lieutenant CHARLES C. B. BONNER (O-513992), Corps of Engineers.	)	

OPINION of the BOARD OF REVIEW
HICKEY, SCHENKEN and PARSONS, 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 61st Article of War.

Specification: In that 1st Lieutenant Charles C. B. Bonner, attached unassigned to Reception Station Number Fourteen, Camp Beale, California, did, without proper leave, absent himself from his station at Camp Beale, California from about 24 July 1945 to about 30 November 1945.

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

Specification: In that 1st Lieutenant Charles C. B. Bonner, attached unassigned to Reception Station Number Fourteen, Camp Beale, California, did, at Fort Worth, Texas, on or about 18 August 1945, with intent to defraud, wrongfully and unlawfully make and utter to The Fort Worth National Bank, a certain check, in words and figures as follows, to wit:

"Long Beach, Calif
~~Fort Worth, Tex.~~ 8 - 18 1945 No _____

BANK OF AMERICA
~~THE FORT WORTH NATIONAL BANK~~ 37-5
4th & Pine Sts.

Pay to Cash- - - - - - - - - - - - - - - - - - OR ORDER $500.00
3294
Five Hundred & no/100 DOLLARS

Chas C B Bonner
1st Lt C.E. O-513992"

and by means thereof, did fraudulently obtain from the said The Fort Worth National Bank the sum of $500.00, lawful money of the United States, he, the said 1st Lieutenant Charles C. B. Bonner, then well knowing that he did not have and not intending that he should have any account with Bank of America, 4th & Pine Streets, Long Beach, California, for the payment of said check.

He pleaded not guilty to and was found guilty of both Specifications and Charges. No evidence of any 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 three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Inquiry into sanity of accused: Upon arraignment defense counsel requested that the court inquire into the sanity of accused and the court directed that such inquiry be made. The prosecution introduced the proceedings of a board of three medical officers which met pursuant to proper authorization at Fort Crockett, Texas, on 20 March 1946, for the purpose of conducting a thorough psychiatric examination of accused (Pros. Ex. 1; R 8). This board found:

a. That the patient is sane and able to determine right from wrong.

b. Though sane, he has not been able to refrain from the wrong.

c. He is able to conduct his defense and cooperate with his counsel intelligently.

Each member of the board, one of whom was a psychiatrist, testified in support of the board's findings. Accused had been under observation by the board members during a three months period from about 19 December 1945 to 20 March 1946 (R 12, 44, 66, 81). The board held its first meeting on

2 January 1946 at Fort Crockett, Texas (R 14) and at that time the board was doubtful of accused's ability to adhere to the right. As a result accused was transferred to Camp Swift, Texas, for further observation (R 69, 87A). At Camp Swift accused was found sane and able to distinguish right from wrong, but because of his character and behavior disorder it was believed that his chances of "refraining from the wrong" in the future were slight (Def. Ex. A; R 65). The senior member of the Fort Crockett board, an eye, ear, nose and throat specialist, testified both that accused was not sane and of unsound mind (R 9) and that accused was sane (R 18, 19) and that accused has not been able to refrain from the wrong as to both offenses charged (R 18, 19). Captain Laughlin, a psychiatrist and member of the board, testified that accused was sane and responsible (R 46, 57, 65) but was unable to refrain from wrong (R 46, 51). On cross-examination Captain Laughlin testified that it would be possible, but very difficult for accused to refrain from wrong, but accused could refrain from wrong if he chose (R 49, 50, 51, 53). The third member of the board testified that accused was sane and responsible but unable to refrain from wrong (R 67, 87). All three board members testified that accused should be diagnosed as a pathological personality with an anti-social personality (R 8, 52, 71, 85). Dr. McConnell, a civilian psychiatrist with about 25 years experience, testified that he interviewed accused for about three-quarters of an hour on the morning of the trial (R 29, 37). Witness had sufficient time to justify his conclusion to the effect that accused could adhere to the right and refrain from wrong at the time of the offenses charged (R 30, 41). Dr. McConnell testified that accused is responsible for his acts and can adhere to the right if he so desires (R 32). At the conclusion of the inquiry the court found that at the time of the commission of the alleged offenses accused was not suffering from any mental disease or defect and directed the trial to proceed (R 97).

4. Evidence for the prosecution: Initial unauthorized absence of accused was shown by duly authenticated extract copy of the morning report of Reception Station No. 14, 1918 SCU, Camp Beale, Calif., reciting:

> "M/R 14 Dec 1945 Bonner, Charles C.E. 0513992, 1st Lt, Atchd Unasgnd enroute to jd 23 June not jd, 30 day emer lv per par 13 SO 173 ATC Pacific Div 1503d AAF Base Unit Hamilton Fld Calif; enroute to join to AWOL 2400 24 July." (Pros. Ex. 3, R 99)

It was stipulated that accused returned to military control at Houston, Texas, on 30 November 1945 (Pros. Ex. 4; R 99).

Mr. David P. Dean, testified, that on 18 August 1945, accused came to Mr. Dean's office in Fort Worth, Texas. Witness had served in the same Army unit with accused on the Pacific Coast in 1944. Accused was in uniform and they discussed former Army acquaintances. Accused mentioned a pipeline project in which he was interested and stated that he needed money to return two Mexican officials to Mexico (R 101, 107) and asked witness to cash a check (R 100). Believing accused to be perfectly reliable (R 109) witness escorted accused to the Fort Worth National Bank where accused drew a check in the amount of $500 (R 104) on the Long Beach, California, branch of the Bank of America (Pros. Ex. 5; R 103). Witness indorsed the check and accused cashed the check in the presence of witness at the Fort Worth National Bank (R 100, 102). This check was later returned to witness marked "account closed" and witness made it good. Witness has not been reimbursed for his loss of $500 and has not seen accused between 18 August 1945 and the time of trial (R 103, 107).

The stipulated testimony of Mr. J. A. Cozby was received (Pros. Ex. 6; R 113) to the effect that as Vice President and Cashier of the Fort Worth National Bank on 18 August 1945 he cashed a check in the amount of $500, drawn by accused on the Bank of America, Long Beach, California, indorsed by D. P. Dean; that he gave accused $500 for the check which was subsequently returned to the bank and charged to the account of D. P. Dean.

The stipulated testimony of Mr. B. N. Boynton was received (Pros. Ex. 7; R 113) to the effect that he is Pro-Assistant Cashier of the Long Beach Main Office of the Bank of America and was in charge of accused's account; that accused's account was opened on 3 May 1943 for $272.27 and closed by service charges on 22 August 1944, and said account has never been reopened; that the account was closed long prior to receipt of accused's $500 check (Pros. Ex. 5).

Major James E. Thomas, trial judge advocate as well as investigating officer in this case, testified that after warning accused of his rights under Article of War 24 accused made a sworn statement to him. In this statement (Pros. Ex. 8; R 116), received without objection, accused confessed that he was absent without leave from 24 July 1945 to 30 November 1945. He admitted securing $500 in Fort Worth, Texas, on 18 August 1945 by means of a check drawn on the Bank of America, Long Beach, California, and indorsed by David P. Dean. He claimed that he had made tentative arrangements to have certain money deposited in the Bank of America but did not have confirmation that this deposit had been made on 18 August 1945 when he cashed the $500 check.

5. Evidence for the defense: Accused testified that he served overseas in World War I as a provisional regular Army officer, resigning in November 1919. Between wars he spent most of his time in Mexico in the oil and ranch business. Being rejected for enlistment at the outbreak of World War II he spent a lot of time and money trying to promote the construction of a pipe-line across Mexico. He was commissioned a first lieutenant and entered on active duty 26 February 1943. After service with the Coast Artillery on both the Atlantic and Pacific Coasts he was transferred to the Corps of Engineers and served for several months in the same unit with Mr. David Dean. He was then sent to Hawaii as a casual and returned to the United States after about six months. He received a 30-day emergency leave in order to attend to critical business affairs and was to report at Camp Beale, California, on 24 July 1945 at the expiration of his leave (Def. Ex. E; R 143). Accused went to Los Angeles at the start of his leave and saw a Mr. Harold Pauley, who was interested in accused's proposed pipe-line across Mexico (R 144). Accused asked Pauley for $5000 in connection with the pipe-line and Pauley promised to deposit $5000 to accused's account provided Washington was interested in the pipe-line deal (R 145); accused had every reason to believe the money would be deposited (R 145). Accused spent the remainder of his leave in Mexico and Texas. At Dallas, Texas, he sent telegrams on 21 July, 22 June, 23 June, 1945 to the Commanding Officer, Camp Beale, California, requesting a 10-day extension of his leave (Def. Exs. F, G, H; R 148). Receiving no reply he registered with the Provost Marshal at Dallas on 24 July 1945 (R 149). He then went to Washington, D. C., for three days. Returning to Texas he went to Mr. Dean's office in Fort Worth on 18 August 1945 to interview Mr. Dean about the proposed trans-Mexico pipe-line. At accused's request Mr. Dean had a check cashed for accused (R 150).

Accused expected that Pauley had made a deposit in the Bank of America (R 150, 151). Accused testified that he did not hide from the military authorities while absent (R 153) and did not know that the $500 check was worthless until arrested in Houston (R 151). Until the day of trial accused assumed the check had been made good by members of his family (R 151, 152).

In cross-examination accused admitted that he received telegraphic notification about 26 or 27 July 1945 from Camp Beale, California, that his request for extension of leave was denied (Pros. Ex. 9; R 157) and admitted that he was absent without leave as charged (R 163, 164), that he had made no effort to return to military control and had no excuse for not surrendering to military authorities (R 168). When accused saw Mr. Pauley late in June in California he expected Pauley to make a deposit to his credit in two or three days (R 178). On 18 August 1945 accused had no confirmation from either Pauley or the Bank of

America that such a deposit had been made (R 159, 161); in fact accused suspected that such deposit had not been made (R 161). Accused knew that the proposed pipe-line project was a dead issue with the arrival of V-J Day (R 155). Accused does not know why he gave Mr. Dean the check and "supposed" he received the money from the Fort Worth National Bank (R 162).

6. The preliminary question of accused's sanity was very thoroughly investigated by the court. The only question in dispute as to accused's mental responsibility was as to his ability to adhere to the right. Three medical officers testified in support of their prior findings as an examination board that accused was sane and able to determine right from wrong but was unable to refrain from wrong. Their testimony to this effect was seriously impeached on cross-examination since the senior board member flatly contradicted himself by testifying that accused was both sane and insane. The only member of the board with psychiatric experience after testifying that accused was unable to refrain from wrong admitted that accused could refrain from wrong if he chose to do so. A civilian psychiatrist testified for the prosecution that accused was mentally responsible and could refrain from wrong. On this conflicting evidence the court found that accused was not suffering from any mental disease or defect at the time the offenses were committed.

It was held in CM 219575 Mathis, 12 BR 297, that a court is not bound by the findings of a medical board as to the sanity of an accused, the function of the board being entirely advisory. On the whole record it is our opinion that the ruling of the court in the present case was proper and finds, in effect, that accused could adhere to the right at the time of the offenses alleged. Subsequent to the trial accused was examined by a board of medical officers at Brooke General Hospital. The board, consisting of two neuropsychiatrists and the acting clinical director examined the accused over a period of fifty-seven (57) days and found as follows:

> "1. THAT this officer was at the time of the alleged wrongful acts, namely, AWOL from 24 July 1945 until 30 November 1945, and passing a worthless check, so far free from mental defect, disease or derangement, as to be able, concerning the particular acts charged, to distinguish right from wrong.
>
> "2. THAT this officer was at the time of the alleged wrongful acts, namely, AWOL from 24 July until 30 November 1945, and passing a worthless check, so far free from mental defect, disease or derangement, as to be able concerning the particular acts charged to adhere to the right.

"3. THAT at the time of his trial, on or about 3 April 1946, this officer did have the mental capacity to understand the nature of court martial proceedings and intelligently to conduct or to cooperate in his defense.

"4. THAT at this time this officer is so far free from mental defect, disease, or derangement, as to be able both to distinguish right from wrong and to adhere to the right."

7. That accused was absent without leave from 24 July 1945 to 30 November 1945 is fully proven by the evidence consisting of accused's confession and extract copies of the morning report entries of accused's organization showing initial absence on 24 July 1945 and the stipulation that accused returned to military control on 30 November 1945. As a witness in his own behalf accused admitted the unauthorized absence charged. The record is legally sufficient to support the findings of guilty of Charge I and its specification.

It was necessary for the prosecution to prove in support of the specification of Charge II that the accused obtained at the time and place alleged, the sum of $500 from the party defrauded by uttering a check upon a bank with which the accused kept no account and which accused knew would not be paid (Wharton's Criminal Law, 12th Ed., Sec. 1427).

In proof of the offense the prosecution showed through witness Dean that accused drew a check at Fort Worth, Texas, on 18 August 1945, on the Long Beach, California, Branch of the Bank of America and payable to cash in the amount of $500. It was proven that accused secured the accommodation indorsement of Mr. Dean and then uttered the check to the Fort Worth National Bank, receiving $500 in cash therefor from Mr. J. A. Cozby, Vice President and Cashier of said bank, It was further proven that accused's account with the Long Beach, California, Branch of the Bank of America had been closed for nearly one year prior to 18 August 1945. In defense, accused testified that a Harold Pauley had impliedly promised to deposit $5000 to accused's account with the Bank of America but accused admitted that he suspected the deposit had not been made. Accused's belief that such a deposit would be made was predicated on a pipe-line project which accused admitted was a dead issue on and after V-J Day. V-J Day occurred on 14 August 1945 and accused uttered the worthless check 4 days later on 18 August 1945. It thus appears that accused was properly convicted of making and uttering a worthless check well knowing that it was worthless and fraudulently obtaining $500 from the Fort Worth National Bank by means of said worthless instrument. The fact that the accommodation indorser ultimately bore the

loss rather than the Fort Worth National Bank does not in any manner lessen the guilt of the accused. See 35 CJS, False Pretenses, Sec. 21, and cases therein cited, where it is stated that the offense of uttering worthless checks is completed, if it has been committed at all, when the making or delivery of the check takes place and it is immaterial whether payment or restitution is subsequently made. The record is legally sufficient to support the findings of guilty of Charge II and its specification.

8. Major James E. Thomas, the trial judge advocate, was also the investigating officer and testified as a witness for the prosecution. This practice has been held acceptable (CM 282496 (1945); 54 BR 383).

The court sentenced the accused "to be dishonorably discharged the service, etc.". The sentence, though inappropriate in the case of a commissioned officer, is in all respects legal, CM 249921, Maurer, 32 BR 229.

9. Following his general court-martial accused became depressed and was described as having suicidal thoughts and slurred speech. On 19 April 1946 accused was admitted to the Brooke General Hospital, Fort Sam Houston, Texas, by transfer from the Station Hospital, Fort Crockett, Texas. On 11 June 1946 a Disposition Board at Brooke General Hospital reported: "No disease found".

10. War Department records show that accused is 52-4/12 years old and without dependents. He attended Texas A & M for two years and the University of Texas for two years but did not graduate. He served as a lieutenant with the Field Artillery of the 5th Division both in the United States and France in World War I from about May, 1917 to November 1919. He was commissioned provisionally in the Regular Army during World War I but resigned about November, 1919. From 1919 to 1943 accused engaged in the oil and ranch business in Texas and Mexico. On 22 February 1943 he was appointed a First Lieutenant, AUS, and assigned to the CAC. He served in the Antiaircraft Artillery at various posts on the East and West Coasts until 20 May 1944, when he was detailed in the Corps of Engineers and assigned to duty with an Engineer Oil Field Battalion. He served in Hawaii for about 6 months and was returned to the United States in June 1945. His efficiency reports are not available. In his confession accused admitted uttering numerous other worthless checks aggregating more than $400 while absent without leave.

11. 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 thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61 and 96.

Albert D. Kenney, Judge Advocate

Carlton E. Schenken, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 314919 1st Ind

WD, JAGO, Washington 25, D. C. APR 25 1947

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 the opinion of the Board of Review in the case of First Lieutenant Charles C. B. Bonner (O-513992), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 24 July 1945 to 30 November 1945, in violation of Article of War 61, and of fraudulently making and uttering and obtaining the proceeds of a worthless check in the sum of $500 at Fort Worth, Texas, on 18 August 1945. He was sentenced "to be dishonorably discharged the service", to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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 thereof. I concur in that opinion.

4. The evidence shows that on 24 July 1945 accused failed to report after expiration of a 30-day emergency leave, and remained absent for a period of four months and six days. During the period of absence accused procured an ex-Army friend to indorse a check. Upon the strength of this indorsement accused on 18 August 1945 cashed a check for $500.00 at the Fort Worth National Bank. The check was drawn on the Long Beach, California branch of the Bank of America. Accused's account at the latter bank had been closed on 22 August 1944, and had never been reopened. Accused testified that he had a promise from a man in Los Angeles to deposit $5,000 to accused's credit, contingent upon accused interesting the United States Government in a proposed pipe-line across Mexico. Accused had no confirmation of the deposit of any money to his credit in the Bank of America.

5. Accused is 52 years old and had a good record in the first World War. His record as a civilian appears clear and his military record was good prior to this offense. With regard to accused's sanity the court determined that he was not suffering from any mental disease or defect at the time of the alleged offenses. Subsequent findings by a board of medical officers at a General Hospital confirmed the findings of the court.

6. I recommend that the sentence be confirmed, but that one year of the confinement be remitted and that the sentence as thus modified be carried into execution. I further recommend that a United States Disciplinary Barracks be designated as the place of confinement.

7. Inclosed is a form of action designed to carry this recommendation into effect, 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. Report of Bd of Med Officers

(G.C.M.O. 152, 2 May 1947.)

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

JAN 15 1947

JAGQ - CM 314931

UNITED STATES)	XII TACTICAL AIR COMMAND
)	
v.)	Trial by G.C.M., convened at Headquarters XII Tactical Air Command, APO 62, U. S. Army, 20 June 1946. Dismissal.
First Lieutenant RAYMOND E. HENRY (O-826661), Air Corps.)	

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 1st Lt. RAYMOND E. HENRY, Headquarters and Headquarters Squadron XII Tactical Air Command, did without proper leave absent himself from his command at Bad Kissingen, Germany, from about 28 February 1946 to about 20 April 1946.

Specification 2: In that 1st Lt. RAYMOND E. HENRY, Headquarters and Headquarters Squadron XII Tactical Air Command, did without proper leave absent himself from his command at Bad Kissingen, Germany, from about 27 April 1946 to about 8 May 1946.

Specification 3: (Finding of Not Guilty).

Accused pleaded not guilty to all Specifications and the Charge. Defense counsel's motion, made after the prosecution rested its case, that Specification 3 "be stricken" because of insufficient evidence was sustained and the court announced that that Specification would "be stricken from the charges". Although ineptly phrased, the motion and the court's action thereon constituted a finding of not guilty of Specification 3. No evidence of previous convictions was introduced. Accused was found guilty "of all the specifications and charge". This language must necessarily be taken as a finding of guilty of only Specifications 1 and 2 and the Charge, in view of the prior action with reference to Specification 3. He was sentenced to be dismissed the service and to be fined $1000.00. The reviewing authority approved the sentence but remitted the fine, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Prosecution introduced in evidence an official copy of paragraph 2, S.O. No. 41, dated 16 February 1946, issued by Headquarters VIII Fighter Command, AAF Sta. 375 A.P.O. 636, relieving the accused from assignment to 2224th Quartermaster Trk Co. Avn. and assigning him to Headquarters XII Tactical Air Command, Bad Kissingen, Germany, and stating "EDCMR- 23 Feb 46" (R 11; Pros. Ex. 3). This document was introduced by the prosecution during the examination of a prosecution witness "merely to show that the paper was received by the witness from several officers reporting to this command" (R 11).

Prosecution introduced in evidence, over objection of defense, "A certified true copy" of what purports to be an extract copy of a morning report of Headquarters and Headquarters Squadron, XII Tactical Air Command, submitted at Bad Kissingen, 23 March 1946, the entry pertaining to the accused stating "Asgd Not jd fr Hq VIII Ftr Comd eff 28 Feb 46 ******* per par 2 SO 41 Hq Ftr Comd AWOL /S/ Laurence O Anderson Capt Air Corps" (R 6; Pros. Ex. 1). Major William R. Gunter, present commanding officer of Headquarters and Headquarters Squadron, XII Tactical Air Command, testified that he certified this instrument as a certified true copy of an extract copy of the morning report; and identified his signature thereon (R 6). The Morning Report Clerk of the organization testified that he does not know the accused (R 8); that he made the entry in copy of the extract copy (Pros. Ex. 1) from information "taken from a Special Order from VIII Fighter Command"; that he got the information to make the extract "from the Morning Report"; that he made the entry in the morning report "from this Special Order, sir, and information given by A-1" (R 9). An officer of the A-1 Section of Headquarters XII Tactical Air Command identified the above-mentioned Special Orders, and testified that the accused did not report on or about 23 February 1946; that she "sent a TWX to USAFE inquiring what date his arrival was to be", and received in reply "a verbal communication which was vague and indefinite"; that she first called USAFE on 15 March and the TWX was sent on the 23rd of March "because of his status of AWOL"; that she first saw accused about 20 May 1946; and that "he actually reported to me on the 23rd of May" (R 11, 12).

An extract copy of the morning report of Headquarters and Headquarters Squadron XII, Tactical Air Command, submitted at Bad Kissingen, was introduced. It contains an entry for 17 May 1946 pertaining to accused reading "AWOL to arrest in quarters 1200 hours", which entry, as well as the certificate to the extract, is signed "William A. Gunter, Major, AC" (R 6, 7; Pros. Ex. 2). The first time Major Gunter saw the accused was about the 20th of May when he went to accused's quarters to see him (R 7). He did not have any knowledge of any delay en route or leave being granted accused prior to 15 April (R 7). "There is something of a

delay in route when you transfer from one station to another" (R 8).

Private Eddie Robbins, of the London CID office, testified that he saw accused in London during the first part of March, at which time accused "stated that he was a little late on his orders" (R 13); that accused did not say that he was AWOL (R 14); that he again saw accused in London on 20 April 1946 and "asked him why he had not gone to Germany. He told me that he had lost his baggage and also that he was trying to get some money for his transportation"; that he then got an officer and they took accused to MP Headquarters (R 13); that "we did locate some" of accused's baggage but not all of it (R 14); that he told accused "it was advisable to leave London" (R 14); that he again saw accused in London on 4 May 1946, at which time "I asked him for his papers and he showed me his orders", which orders were dated 27 April and "I believe that it came from Burton-Wood"; that on this occasion "I asked him why he had not gone to Germany and he said he could not get transportation. I told him to come with me to MP Headquarters and we would try to get him transportation out of London by plane or boat" (R 14); and that at all the various times the accused was cooperative in every way and never gave any trouble (R 15).

Sergeant Di Pietro, a military policeman, testified that he and Lieutenant Heinzelman saw accused in London on 8 May 1946; that the officer asked accused "to accompany us to the Military Police Headquarters. When we got down there he was booked and placed under arrest"; that accused was picked up because "It seemed he had been given an order to go back to the outfit and the order was given to pick him up if he was seen"; that the order to report to another station "was a verbal order by one of our officers"; and that accused was cooperative and gave no trouble (R 16).

First Lieutenant Price testified that on 21 April 1946 he was personnel officer at the 140th Military Police Company in London; that on that day he saw accused in the MP Operations Office and talked to him but does not remember their conversation (R 17); that on 10 May 1946 he took accused into custody and delivered him to the commanding officer at Breton-Wood (R 17); that accused "was booked as being AWOL"; that he had accused in custody about six hours but does not remember their conversation except that accused mentioned he had been looking for his other baggage (R 18).

Captain Eads, 979th Military Police Company, Wiesbaden, testified that accused was picked up about 2230 on 14 May in the Continental Hotel in Wiesbaden; "We had orders to pick him up and hold him and contact the MP's at XII Tactical Air Command"; and that accused gave no reason for his being wanted (R 19).

4. For the Defense.

The same officer from the A-1 Section of Headquarters XII Tactical Air Command who testified for the prosecution was called as a defense witness. She testified that she has seen before "this paper that has been marked for identification as Defense's Exhibit A"; that it assigned five officers to the command; that it is dated 16 February 1946 and shows the EDCMR of those officers as 23 and 28 February 1946 (R 20); that those officers reported between the 4th and 16th of March, except the accused; that during the time of those orders there were delays in transportation between England and the Continent for two reasons: (1) transportation, and (2) the VIII Fighter Command was closing out which necessitated officers having a specific duty continuing in a particular section despite the EDCMR; that she doesn't know whether accused had such a duty which would require him to remain on duty in England (R 21); and that when such delays did occur "Sometimes that was verified verbally from USAFE" (R 22).

It was stipulated that an absent officer would testify "That Lieutenant Raymond E. Henry's character is excellent and above reproach; he has always been a fine officer; his combat record is remarkable; in the course of 38 missions in a P-51 type aircraft Lieutenant Henry was awarded the Distinguished Flying Cross and the Air Medal with four oak leaf clusters" (R 22).

Accused elected to remain silent (R 22).

5. With respect to Specification 1, the defense raised objection to the acceptance in evidence of the certified true copy of the morning report (Pros. Ex. 1). The objection thereto was overruled and the report admitted. Lengthy discussion and a determination as to the admissibility of the certified true copy of the morning report is deemed unnecessary inasmuch as the evidence to sustain Specification 1 is not dependent thereon. The accused, by virtue of Special Order 41, dated 16 February 1946, Headquarters VIII Fighter Command (Pros. Ex. 3), was relieved from duty with that organization and assigned to Headquarters XII TAC Air Command, Bad Kissingen, Germany, with EDCMR as of 23 February 1946. It is satisfactorily shown that accused had knowledge of such orders in that upon his being approached in London, in the first part of March, by Military Police, he stated that "he was a little late on his orders" (R 13-14). Inasmuch as the special order of 16 February 1946 stated an EDCMR as of 23 February 1946 it may be presumed that accused was aware that his failure to report to his new organization on or about that date would result in his being carried as absent without leave. That accused did not report to his new station as ordered is shown by the testimony of the officer in charge of assignment and transfer of officers at that station. This officer testified that the first time she saw accused was on 20 May 1946 and that he did not report in to her until 23 May 1946 (R 10-12). During the period of the absence as charged accused was observed in London on two occasions and on 20 April 1946 accused "turned himself in" in London (R 13). It is the opinion of the Board of Review that exclusive of the morning report there is sufficient evidence in the record to support the finding of guilty as to Specification 1.

As to Specification 2, the evidence merely shows that in London on 4 May 1946 the accused displayed some undisclosed type of orders issued at "Burton-Wood" and dated 27 April; that accused in response to inquiry by Military Police said he had not gone to Germany because he could

not get transportation; and that on 8 May 1946 accused was placed under arrest at Military Police Headquarters in London. It was shown that on 10 May 1946 accused was taken into custody in London and "booked as being AWOL", but this was after the alleged termination of the unauthorized absence charged in Specification 2; and, moreover, simply to charge a person with an offense constitutes no proof thereof.

Such evidence is insufficient to legally support the finding of guilty of Specification 2. It is conceded that the record raises a suspicion to indicate the commission of such an offense by accused, but the Board of Review held in CM 197408, McCrimmon, 3 BR 111; CM 206522, Young, 8 BR 271; CM 207591, Nash and Morris, 8 BR 359; and CM 267760, Lawrence, 44 BR 113, that:

> "While we may be convinced of the guilt of the defendant we cannot act upon such conviction unless it is founded upon evidence, which under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * * *. It would be dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens (Buntain v. State, 15 Texas, App. 490)."

6. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors injuriously affecting the substantial 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 insufficient to support the finding of guilty of Specification 2, but is legally sufficient to support the findings of guilty of Specification 1 and the Charge, and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of a violation by an officer of Article of War 61.

W H Johnson Jr, Judge Advocate

(DISSENT), Judge Advocate

Frank S Baker, Judge Advocate

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

JAN 15 1947

JAGQ - CM 314931

UNITED STATES	)	XII TACTICAL AIR COMMAND
v.	)	Trial by G.C.M., convened at Headquarters XII Tactical Air Command, APO 62, U. S. Army, 20 June 1946. Dismissal.
First Lieutenant RAYMOND E. HENRY (O-826661), Air Corps.	)	

DISSENT by DICKSON, Judge Advocate

1. The majority opinion finds that the record of trial is legally insufficient to support the findings of guilty of Specification 2. With this I concur. The majority opinion finds that the record of trial is legally sufficient to support the findings of guilty of Specification 1 and the Charge. From this I am compelled to dissent.

2. The majority opinion states that accused was aware that his failure to report to his new organization on or about the EDCMR "would result in his being carried as absent without leave". The opinion, however, further states that a determination of the admissibility of the morning report is unnecessary "inasmuch as the evidence to sustain specification 1 is not dependent thereon". The opinion concludes "It is the opinion of the Board of Review that exclusive of the morning report there is sufficient evidence in the record to support the finding of guilty as to Specification 1". With this conclusion I cannot agree.

3. In view of the above it is necessary to consider only the question of the sufficiency of the evidence to establish that accused "did without proper leave absent himself from his command at Bad Kissengen, Germany, from about 28 February 1946 to about 20 April 1946". The evidence is not sufficient if it fails "to exclude every reasonable hypothesis except the one of defendant's guilt".

4. The fact that the absence was not authorized cannot be based on the morning report because it was not introduced in evidence. It cannot be based upon a duly authenticated extract copy of the morning report because such was not introduced in evidence:

Prosecution introduced in evidence, over objection of defense, "A certified true copy" of what purports to be an extract copy of a morning report of Headquarters and Headquarters Squadron, XII Tactical Air Command, submitted at Bad Kissingen, 23 March 1946, the entry pertaining to the accused stating "Asgd Not jd fr Hq VIII Ftr Comd eff 28 Feb 46 ****** per par 2 SO 41 Hq Ftr Comd AWOL /S/ Laurence O Anderson Capt Air Corps" (R 6; Pros. Ex. 1). Major William R. Gunter, present commanding officer of

Headquarters and Headquarters Squadron, XII Tactical Air Command, testified that he certified this instrument as a certified true copy of an extract copy of the morning report; and identified his signature thereon (R 6). The Morning Report Clerk of the organization testified that he does not know the accused (R 8); that he made the entry in copy of the extract copy (Pros. Ex. 1) from information "taken from a Special Order from VIII Fighter Command); that he got the information to make the extract "from the Morning Report"; that he made the entry in the morning report "from this Special Order, sir, and information given by A-1" (R 9).

Prosecution's Exhibit 1 shows that the morning report entry was signed by "Laurence O. Anderson, Captain, Air Corps" and that the certificate of Authentication was signed by Captain Anderson. Then there appears on the exhibit the following: "A certified true copy: William A. Gunter, Major, A.C." The replica of Prosecution Exhibit 1 in the investigating officer's papers shows that Major Gunter appears as the signatory of the original morning report entry and that he executes the authenticating certificate. Then follows this curious addition: "A true copy Glen T. (Bowen), Second Lieutenant A.C., Adj. Hq. & Hq. Sq. XII TAC". There is no explanation of the contrast between Prosecution Exhibit 1 and its replica in the accompanying papers. Prosecution Exhibit 1 should not have been admitted in evidence and it has no probative value in establishing that accused's absence was unauthorized.

It has been held that a morning report is a "public record" within the meaning of the Manual (CM 226521, Thomas). The rule of paragraph 116a of the Manual authorizing the introduction in evidence of copies of War Department records is an exception to the best evidence rule. As an exception it may not be extended by implication beyond its express terms (CM 227831, Gregory 15 BR 375). It is manifest that the language above quoted only permits the introduction in evidence of duly authenticated copies of the original record. It does not and can not authorize the introduction of a copy of a copy of the original. To so hold would extend the use in evidence of a "copy of a copy" ad infinitum, and would in truth destroy all basis for the validity of the exception itself. Clearly such a violation of the exception to the best evidence rule is not simply a matter of improper and invalid authentication; for the authentication, as such, of the copy of the original document merely vouchsafes that the copy truly and accurately reflects the original. A certification upon a paper that it is a true copy of a copy of the original record does not in any way involve the question of the authentication of the copy of the original. Therefore, the defect in prosecution exhibit 1 was not subject to attack on the ground of insufficient authentication and a failure to predicate objection on that ground did not waive or cure the defect. Moreover, with respect to the entry itself, it appears from the record that the morning report clerk, who does not know the accused, made the entry from information taken "from this Special Order, sir, and information given by A-1". The Special Orders (Pros. Ex. 3) merely assigned accused to the organization; and "information given by A-1" was hearsay. It is obvious that the

entry was based wholly upon hearsay pure and simple. Nor does the fact that in March the accused stated in London that "he was a little late on his orders" constitute any evidence that he absented himself without leave on 28 February as alleged; he did not say at that time that he was AWOL. The fact that on 20 April, when asked in London why he had not gone to Germany, the accused said he had lost his baggage and was trying to get some money for transportation is likewise no evidence either that he was AWOL at that time or that he went AWOL on the date alleged.

5. The evidence exclusive of the morning report does show that the Hq. VIII Fighter Command under date of 16 February 1946 issued Special Order No. 41 which relieved accused from assignment to 2224th Qm. Truck Co. Avn and assigned him to Hq. XII Tact. Air Comd, Bad Kissingen, Germany. The item relating to the accused reads as follows (Pros. Ex. 3) "1st Lt. (1055) Raymond E. Henry 0826661 AC (99) 40 Mo Cat IV (31 Jul 46) EDCMR 23 Feb 46". However, the evidence further shows that on 4 May 1946 accused was in possession of other orders dated 27 April 1946 issued by "Burton-Wood". The record is silent as to the contents of these orders.

6. Unquestionably the evidence establishes that the accused was absent from his command at Bad Kissingen, Germany, until he reported there on or about 20 May 1946 but this fact alone is not sufficient. The vital question remains unanswered. Was such absence <u>without proper leave</u>. On what date did the absence become unauthorized? What is there in the record to show that it ever became <u>unauthorized</u>? I do not think there is anything. In any event the evidence is just as consistent with the hypothesis that the absence was authorized as it is that it was unauthorized.

7. The accused did not report to his new station until on or about 20 May 1946, yet the court held that the absence from 11 May to 14 May was not shown to have been unauthorized (R 20). The accused was absent from his command at Bad Kissingen from 27 April to 8 May and yet the majority opinion says that the evidence is insufficient to show that such absence was unauthorized.

8. We know that accused was in London on 4 May and at that time had new orders probably dated 27 April and issued by Burton-Wood. A witness for the prosecution testified as follows (R 14);

"Q. What were your duties on 4 May 1946?
"A. I was still with the CID Office in London, sir.

"Q. And did you meet Lieutenant Henry on the 4th of May 1946?
"A. Yes, sir.

"Q. Will you tell the court about that meeting with him?
"A. It was in the American Red Cross Club at about 11:30 in the evening. I asked him for his papers and he showed me his orders. I believe they were dated the 27th of April. I asked him why he had not gone to Germany and he said that he could not get transportation. I told him to come with me to MP Headquarters and we would try to get him transportation out of London by plane or boat. So we went to MP Headquarters and I turned him over to Lieutenant Heinzelman who was on duty there.

"Q. Was any kind of report made on Lieutenant Henry there at MP Headquarters?
"A. I was in and out of the office, sir, I don't know truthfully.

"Q. Did you say this order was dated the 27th of April that he showed you?
"A. Yes, sir.

"Q. Did you read it?
"A. Yes, sir.

"Q. Do you recall the Headquarters from which that order was issued?
"A. I believe that it came from Burton-Wood.

"Q. Do you know what organization issued it?
"A. No,sir, I am sorry I don't.

"Q. On the first time that you met Lieutenant Henry in March did Lieutenant Henry state to you that he was AWOL?
"A. No, sir, he didn't state that he was AWOL, he stated that he was a little late on his orders".

9. A witness for the prosecution in charge of assignment and transfer of officers at XII TAC testified in part as follows:

"Q. Can you tell what Lieutenant Henry's EDCMR was on that order?
"A. According to my information here he was to have arrived here on 23 February 1946.

"Q. Did he report to you on or about the 23rd of February 1946?
"A. No, he did not.

"Q. Did you make any inquiry as to his failure to report on or about that date?
"A. Yes, sir, I did.

"Q. What inquiry did you make?
"A. I sent a TWX to USAFE inquiring what date his arrival was to be.

"Q. Did USAFE make any reply to that communication verbal or otherwise?
"A. They made a verbal communication which was vague and indefinite.

"Q. Do you know of anyone authorizing Lieutenant Henry a delay enroute, a leave, or an extension of time?
"A. No, sir, I don't. (R 11).

* * *

"Q. Do you know when those officers reported to you at this Headquarters?
"A. Approximately between the 4th and 16th of March with the exception of Lieutenant Henry.

"Q. Now of your own knowledge did these officers report after the EDCMR date?

"Prosecution: I object to that. Those officers appearing on this order are not the topic at hand. They are not being tried here.

"Law Member: Subject to any objection by court-members the objection is sustained. It is hearsay evidence.

"Q. Do you know of your own knowledge what date Captain Killian reported to this headquarters?

"Prosecution: I object to that. It is of no importance on what date he reported here.

"Law Member: What do you intend to show by this line of questioning?
"Defense: That it was impossible for him to report in compliance with the EDCMR date on the order.

"Prosecution: That would have no bearing at all on this case.

"Law Member: The matter is irrelevant. The objection is sustained.

"Q. During the time of this order do you know the condition of transportation between England and the Continent?
"A. There were delays for two reasons, one: transportation; two: closing out of the Eighth Air Force.

"Q. This order is from the VIII Fighter Command.

"Member: You stated Eighth Air Force was closing out, did you mean VIII Fighter Command?

"A. Yes, sir, the VIII Fighter Command.

EXAMINATION BY COURT

"Questions by members:

"Q. In closing out the VIII Fighter Command what would cause a delay in the officers reporting who were assigned to this command?
"A. Officers having a specific duty necessitating their continuing in a particular section.

"Q. They remained in their sections despite EDCMR?
"A. Yes, sir.

"Prosecution: Do you know whether or not Lieutenant Henry had such a duty that would require to remain on duty in England?
"Witness: I don't know, sir.

"Q. I would like to know when that happened were you notified that they would not arrive in accordance with that date?
"A. Sometimes that was verified verbally from USAFE." (R 21-22).

10. When USAFE was asked "what date his arrival was to be" "They made a verbal communication which was vague and indefinite." During the time of this order "There were delays for two reasons, one: transportation; two: closing out the VIII Fighter Command". "They remained in their sections despite EDCMR". Defense made an attempt to prove "That it was impossible for him to report in compliance with the EDCMR date on the order". The law member ruled "The matter is irrevelant. The objection is sustained". The record is silent as to what directions were given the accused in the new orders of 27 April 1946.

11. I am of the opinion that the record of trial is legally insufficient to show that accused's absence from 28 February 1946 to 20 April 1946 was unauthorized. The sentence of dismissal is not legal.

Charles M. Dickson, Judge Advocate.

JAGQ - CM 314931 1st Ind

WD, JAGO, Washington 25, D. C. FEB 18 1947

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 the opinion of the Board of Review in the case of First Lieutenant Raymond E. Henry (0-826661), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from about 28 February 1946 to about 20 April 1946 (Spec. 1) and from about 27 April 1946 to about 8 May 1946 (Spec. 2), in violation of Article of War 61. He was sentenced to be dismissed the service and to be fined $1000.00. The reviewing authority approved the sentence but remitted the fine, 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 finding of guilty of Specification 2, but is legally sufficient to support the findings of guilty of Specification 1 and the Charge, and the sentence, and to warrant confirmation thereof. I concur in that opinion.

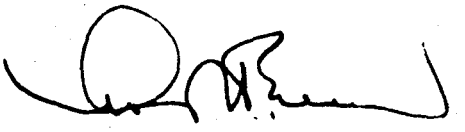
4. The evidence shows that accused absented himself without leave from his command from 28 February 1946 to about 20 April 1946. By special orders accused was ordered to report to a new station at Bad Kissingen, Germany on or before 23 February 1946. He was stationed in England at the time the Special Orders were issued. He failed to report to his new station until about 20 May 1946 and in the interim period was seen on at least two occasions in London, by the military police, to whom he admitted being late on his orders. On 20 April 1946 he "turned himself in" to the military police in London.

5. War Department records show that accused is 25-9/12 years of age and unmarried. He completed one year of University training, enlisted in May 1942, was assigned to duty in Iceland in June of 1942, and after 10 months there was selected for return to the United States for pilot training. After completing his training and being granted a temporary appointment as second lieutenant, AUS, on 12 March 1944, he was assigned to the 8th Air Force in England where he served as a fighter pilot, flying 38 missions. He was promoted to 1st lieutenant 21 March 1945. He was awarded the Distinguished Flying Cross and the Air Medal with four Oak Leaf Clusters. His efficiency ratings are as follows: from 1 July 1944 to

31 December 1944, Excellent; from 1 January 1945 to 30 June 1945, Very Satisfactory; from 1 July 1945 to 31 December 1945, Unknown. He was given punishment under Article of War 104 for misuse of a Government vehicle by allowing an enlisted man to drive while under the influence of liquor. It is shown by papers appended to the record that accused absented himself without leave from Camp Kilmer, New Jersey, on 29 August 1946, and had not been apprehended by 31 October 1946. It appears that he is still in an AWOL status.

6. By his misconduct, the accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution.

7. Inclosed is a form of action designed to carry this recommendation into effect, should it meet with your approval.



CM 314931

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 49, 27 February 1947.)

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

JAGK-CM 314935

6 NOV 1946

UNITED STATES	)	SECOND ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort George G. Meade, Maryland,
Captain RUSSELL E. GIFT	)	7 June 1946. Dismissal and
(O-521445), Infantry.	)	total forfeitures.

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

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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 61st Article of War.

Specification 1: In that Captain Russell E. Gift, Headquarters, Personnel Center, 1322d Service Command Unit, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland, from about 9 March 1946 to about 18 March 1946.

Specification 2: In that Captain Russell E. Gift, Headquarters, Personnel Center, 1322d Service Command Unit, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland from about 18 March 1946 to about 3 April 1946.

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

Specification: In that Captain Russell E. Gift, Headquarters, Personnel Center, 1322d Service Command Unit, having received a lawful order from Lieutenant Colonel Philip R. Winebrener, an officer who was then in the execution of his office, to report to Lieutenant Colonel John T. Byrne, Post Executive Officer, on the morning of 19 March 1946, did, at Fort George G. Meade, Maryland, on or about 19 March 1946, fail to obey the same.

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

Specification: In that Captain Russell E. Gift, Headquarters, Personnel Center, 1322d Service Command Unit, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland from about 30 April 1946 to about 8 May 1946.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for nine months. The reviewing authority approved the sentence, remitted the confinement and forwarded the record of trial pursuant to the provisions of Article of War 48.

3. Evidence for the prosecution.

On or about 5 March 1946 the accused was given forty-eight hours' leave by verbal orders of his commanding general. These orders were transmitted to the accused by Lieutenant Colonel Philip R. Winebrener, the executive officer of the Personnel Center, Fort George G. Meade, Maryland (R 10, 11). On 7 March 1946, Lieutenant Colonel Winebrener directed Captain LePore, the assistant adjutant of the Separation Center, Fort George G. Meade, Maryland, to contact the accused at his home and direct him to report back to Fort Meade immediately (R 10, 12, 29). On 7 March 1946, Captain LePore contacted the accused by telephone at his home in Chambersburg, Pennsylvania, informed him that he was to report back to Fort Meade immediately. Captain LePore also informed the accused that his orders transferring him to an overseas station had been cancelled and that the accused was to report to either Lieutenant Colonel Winebrener or to Captain LePore at Headquarters Personnel Center. The accused replied that he understood the orders but that it was impossible for him to obtain transportation and that he would be unable to return to the post until about 10:30 on the following day (R 28, 29, 30). The accused had been occupying a room in the Bachelor Officers' Quarters. These quarters also contained the mess hall. On 7, 8, 9 and 11 March 1946, Captain LePore searched the Bachelor Officers' Quarters and was unable to find the accused (R 30, 31, 36, 41). Captain LePore did not see the accused until 24 May 1946 (R 33). At about 8:30 p.m., 18 March 1946, the accused called Lieutenant Colonel Winebrener on the telephone and Colonel Winebrener requested the accused to come to his quarters. The accused complied and he and Colonel Winebrener talked about the accused's absence from the post and the accused stated that he had been in Washington. Thereupon Colonel Winebrener ordered the accused to report to Lieutenant Colonel John T. Byrne, the Post Executive Officer, on the morning of 19 March 1946 (R 14, 19). The accused did not report to Lieutenant Colonel John T. Byrne on 19 March 1946 (R 28; Pros Ex 1). Lieutenant Colonel Winebrener did not see the accused on 19 March 1946. He ordered Captain LePore to make a search for the accused. The next time Lieutenant Colonel Winebrener saw the accused

was sometime in April 1946 (R 15). On 3 April 1946 the accused was in the office of Lieutenant Colonel John T. Byrne, the Post Executive Officer, at which time he stated that he had returned voluntarily, and that he had been within the general area of the post at all times and in uniform (R 28; Pros Ex 1). On 30 April 1946, Captain LePore, acting upon orders, searched the Bachelor Officers' Quarters and was unable to find the accused (R 32). The accused was returned to military control on 8 May 1946 and placed in the Regimental Hospital for treatment (R 52; Pros Ex 5).

Major Stephen E. Gaule, Post Inspector, Fort George G. Meade, Maryland, interviewed the accused on 4 April 1946, at which time the accused was warned of his rights under the 24th Article of War. He stated to the Post Inspector that about 8 March he had received a telephone call and orders directing him to report back to the post. When he reported back to the post, Lieutenant Colonel Winebrener ordered him to report on the following day to Colonel Byrne, the Post Executive. He did not report to Colonel Byrne but left the post. During the time he was absent from the post he was absent without authority (R 60, 61).

4. For the defense.

On 24 May 1946, the accused was restricted to the limits of Personnel Center Area, by orders of the Post Executive (R 65, 66). This restriction was not punishment under Article of War 104 (R 70). From 1 January to the latter part of February 1946 the Personnel Center was experiencing difficulties with their messes. This increased the duties of the accused and caused him to work exceedingly long hours (R 68, 69). Colonel John P. Crehan testified that during January and February 1946 he was deputy commander of the Personnel Center, Fort George G. Meade, Maryland. He was the commanding officer of the accused. During this time the Separation Center was separating about 1200 soldiers a day. All of the messes were placed under the supervision of the accused. There were ten company type messes and one officers' mess. The job to be done required long hours of work and the accused gave "unstintingly of his time and effort in the attention to the messes" (R 72). Captain Irving Kass, Medical Corps, Fort George G. Meade, testified that he had been practicing psychiatry under the direction of the Army. Within the last year he had examined about a thousand cases of what is generally called "combat fatigue." He stated that it was possible for a person to develop a neurosis without experiencing combat and that the accused has some schizoid development. He has a low resistance and poor tolerance to anxiety. The accused is a person who gives to the best of his ability and when he gets into one form of trouble or another he immediately loses his sense of values, develops an anxiety neurosis and "gallops off" (R 83-86).

After being duly advised of his rights as a witness, accused elected to remain silent (R 92).

5. In support of the charges and specifications alleging absence

without leave for the periods 9 March 1946 to 18 March 1946, 18 March 1946 to 3 April 1946, 30 April 1946 to 8 May 1946, and failure to obey a lawful order of his commanding officer, it was shown that prior to 7 March 1946 the accused was given leave by verbal orders of his commanding general. At the time of granting this leave he was under orders to proceed to the European Theater. Thereafter, on 7 March 1946, the accused was notified by telephone that his orders were cancelled and that he was to return to his organization at Fort George G. Meade and report to Lieutenant Colonel Philip R. Winebrener or to Captain Nicholas A. LePore. He did not report to either officer as ordered. Captain LePore searched the Bachelor Officers' Quarters on March 7, 8, 9 and 11 but could not find him. The accused appeared at the quarters of Lieutenant Colonel Winebrener on the night of 18 March 1946, at which time he was given an order to report to the Post Executive on 19 March 1946. He did not comply with this order. On 19 March 1946, a search was made of the Bachelor Officers' Quarters but the accused could not be found. Likewise, it was shown that the accused could not be found on 30 April 1946. He was not seen in the area by the officers in charge of the accused's organization. On 8 May 1946 the accused was placed in the hospital. It is to be noted that at all times mentioned herein accused did not have any specific assigned duties. He had been relieved from duty pending overseas transfer. When these orders were cancelled it was the duty of the accused to return to his organization and await assignment. The fact that he did not return to the organization; that he was not at headquarters for assignment and was not on his post is ample proof to support the findings of guilty of absence without leave from his organization as charged (CM 260183, Godley, 39 BR 168). The condition of absence without leave, having once begun, is presumed to continue until accused's return to military control (MCM, 1928, par 130a; CM 276461, Lukmkuhl, 48 BR 348).

The court received in evidence extract copies of five morning reports from the accused's organization. Defense counsel contended that such extract copies were inadmissible as evidence, however, in view of the fact that other competent evidence established the unauthorized absence of the accused, the admission of the extract copies of the morning reports did not prejudice any substantial rights of the accused (CM 235717, Bickmore, 22 BR 222).

At the arraignment of the accused the defense entered a plea in bar of trial contending that on 24 May 1946 accused had been restricted to the limits of the War Department Personnel Center, Fort George G. Meade, Maryland. The court properly overruled this plea. Pending trial by court-martial the commanding officer may impose such restraint upon the accused as the circumstances require (MCM, 1928, par 19; CM 273060, Carrillo, 46 BR 368). The accused was performing some duty while under restriction to the Personnel Center but such status was not a full and complete restoration to duty so as to amount to constructive condonation of his acts.

6. War Department records show the accused to be 38-5/12 years of age and married. He completed two years of high school but did not graduate. Since enlisting in the Army in 1926 he has completed over 18 years of service, the majority of his duties being cook and mess sergeant. At the time of his commission as a second lieutenant in the Army of the United States he was a master sergeant. He was appointed and commissioned a temporary second lieutenant , Army of the United States, 15 May 1943. On 16 December 1944 he received a temporary promotion to first lieutenant and a temporary promotion to Captain 5 December 1945. His efficiency report for the period 1 July 1944 to 31 December 1944 is "Excellent" and for the period 1 January 1945 to 31 December 1945 it is "Superior."

7. 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 Articles of War 61 and 96.

Christy A. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schwarz, Judge Advocate

JAGK - CM 314935 1st Ind

Wd, JAGO, Washington 25, D. C. NOV 21 1946

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 Captain Russell E. Gift (O-521445), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from his organization on three separate occasions for a total of 33 days, in violation of Article of War 61, and of failing to obey a lawful order of his superior officer given in execution of his office 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 for nine months. The reviewing authority approved the sentence, 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. 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.

The record shows that the accused was being transferred overseas. Prior to reporting to the port of embarkation he received 48 hours leave on verbal orders. His overseas assignment was cancelled and he was ordered to report back to his station. He remained absent without leave for nine days before reporting to his station. When he reported to his commanding officer he was ordered to report to the Post Executive on the following morning. He failed to obey this order and again went absent without leave for a period of 16 days. Prior to trial upon these charges he was absent without leave for another period of eight days, after which he was placed in the hospital. He was ill at the time of his return.

4. Consideration has been given to the recommendations of Lieutenant Colonel Philip R. Winebrener, the accuser in the case, the first indorsement to this recommendation and additional recommendation by Brigadier General C. G. Helmick. Consideration has also been given to the second indorsement, the recommendation of Major General M. S. Eddy. Brigadier General C. G. Helmich also personally called at the Office of The Judge Advocate General in connection with his recommendations. It appears from General Helmick's recommendation that the accused has been in charge of the Consolidated Mess, Fort George G. Meade, since his trial and that during this time the accused performed excellent service in the face of many difficulties.

5. I recommend that the sentence be confirmed but in view of the recommendations for clemency, the relatively short periods of absence without leave, his long period of military service, and all the circumstances of the case, I further recommend that the forfeitures be remitted and that the execution of the sentence as thus modified be suspended during good behavior.

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

CM 314935

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Lt Col Philip R Winebrener, w/1st and 2d ind thereto

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 362, 6 December 1946.)

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

JAGK - CM 314939

22 AUG 1946

UNITED STATES	HEADQUARTERS YOKOHAMA BASE
v.	Trial by G.C.M., convened at Headquarters, Yokohama Base, APO 404, 1 May 1946. EACH: To be hanged by the neck until dead.
Corporal BILLIE B. GREENE (34529637) and Private First Class BILL HARRIS (34668053), both of 4296th Quartermaster Gasoline Supply Company.	

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

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1. The record of trial in the case of each of the soldiers 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 Corporal Billie B. Greene, 4296th Quartermaster Gasoline Supply Company, APO 503, and Private First Class Bill Harris, 4296th Quartermaster Gasoline Supply Company, APO 503, acting jointly, and in pursuance of a common intent, did, at APO 503 on or about 1850 hours, 21 January 1946, with malice aforethought, willfully, feloniously, unlawfully, and with premeditation kill one Private First Class Isma Lubliner, 347 TC Harbor Craft Co., APO 503, a human being by shooting him with a rifle.

Each accused pleaded not guilty to, and was found guilty of the Charge and Specification. No evidence of previous conviction was introduced as to either 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 for action under Article of War 48.

3. Evidence for the prosecution.

At "about" 7:25 p.m. on 21 January 1946, at the Tsurumiono Geisha House district, Private First Class Isma Lubliner was shot in the chest while standing in the courtyard outside the entrance of a geisha house. Two

shots had been fired and, at the time, there were about fifteen people in the courtyard, Japanese geisha girls and American soldiers (R. 6-11). It was dark but there was a street light in the courtyard which gave off enough light to recognize a person ten feet away (R. 12). Private Lubliner was taken to the 334th Station Hospital, where he died at 12:15 a.m., 22 January 1946, as a result of a gunshot wound in the chest (R. 14,15). A "slug" was found in a wall in the geisha district and two empty carbine cartridges were found near an alley at the end of the geisha house courtyard where it "looked like the fence was partly broken down" (R. 18,19). About 3:00 p.m. on 21 January 1946, both accused, negro soldiers, were in the geisha house known as Wakamatsu-ya in the company of Noriko Sato and Fumiko Maezawa, Japanese geisha girls (R. 20,21). These girls knew the accused Corporal Greene as "Johnny" and the accused Private First Class Harris as "Bill." Noriko Sato's nickname was "Juny" and Fumiko Maezawa's nickname was "Utiko" (R. 24,25). When the two accused first arrived at the Wakamatsu-ya geisha house, on 21 January 1946, Noriko Sato and Fumiko Maezawa were standing in front of the house. They asked the two geisha girls to "go upstairs with them" and forced them "to follow after" by pulling the girls by their arms (R. 25). When the party of four arrived at the room occupied by the two girls, "Johnny" asked Noriko Sato to take off her kimono but she refused because of the cold. After she had refused three times "Johnny" shot a pistol "towards" the girls, neither of whom was hit. Fumiko Maezawa told Noriko Sato to take off her kimono, as the soldiers had asked her to do, and just as she had started to comply she saw "Johnny" fire another shot. She then "thought it was just useless" and "crawled into bed" and "slept" with "Bill". While she was "sleeping" the military police came. The two girls then left the room and "Bill" and "Johnny" followed the military police outside to the front of the house. When the military police asked her who shot the gun she pointed toward "Johnny" and said that "Johnny" had shot. At this time "Johnny" gave her "a very stern look" and she could see that "his eyes were mad when he kept staring at me." Fumiko Maezawa led the military police back into the house and took them "to the same room where they were." Noriko Sato then went to "a family house" and hid there (R. 26,27). Sometime after 6:00 p.m. that evening, while accompanying one "Jimmy" to his barracks, she again met "Bill and Johnny," "standing in the middle of the road." She saw them "hide a carbine in back," "one per person" and "they had a can." "Johnny" asked her what she had said to the Military Police and she told him that she had said nothing. She then left for "Jimmy's" camp. When she saw the accused with the "carbine" it was dark but the weapon was "not a long rifle, but a short rifle," about three feet long. The weapons each soldier had seemed alike (R. 28, 29, 31). About an hour after she reached "Jimmy's" house, "Johnny" arrived. He had no weapon with him and spent the night there. "Johnny" had fired a pistol in her room that afternoon and Bill had not been armed (R. 32,33).

Each of the accused, having been duly warned of his rights under Article of War 24, made a sworn, signed statement purporting to cover

the participation of each in the fatal shooting of Private Lubliner. The statement of the accused Harris was admitted in evidence as Prosecution Exhibit 2 and the statement of the accused Green was admitted in evidence as Prosecution Exhibit 3 (R. 34-41). Since these statements are in substantial accord with the testimony given on the witness stand by the respective deponents, they will not be discussed herein.

4. Evidence for the defense.

The accused, Private First Class Harris, having been informed of his rights as a witness, elected to testify under oath (R. 42). On 21 January 1946, he started to drink about 8:00 a.m. and consumed about a pint of Japanese gin, six or seven bottles of American beer, and about three large bottles of Japanese beer. He was with the accused Corporal Greene most of the time throughout the day. About 9:00 a.m. he and accused Corporal Greene went to "the geisha district." This geisha district was the same as that referred to by a prosecution witness as the Tsurumiono Geisha House district where Private First Class Isma Lubliner was shot (R. 43,44). They left about 10:00 a.m. and returned about 1:30 p.m. Accused Harris saw "Juny" standing at the door of a geisha house and asked her "to go in the room." When she refused, accused Greene pulled out his pistol and said, "Come in, let's go" to her and "the other girl." They were in the room about half an hour when the military police told them to come out. They then went out in "the area" and the military police asked them if they had any weapons, to which they replied that they did not. The geisha girl "Utiko" kept pointing at the accused Greene and saying that he had a pistol and had been shooting and finally pulled the military police back into the room. The military police came out with a pistol and got in a jeep and left without arresting anyone (R. 45, 46, 47). Accused Harris and Greene then went back to their company arriving there about 4:30 p.m. Later, accused Greene told accused Harris that "he was going to get that damned Utiko for telling the military police where his pistol were" and asked accused Harris to "go with him over there." Accused Harris agreed and they left the room they shared with each other about 6:00 p.m. They proceeded first to the guard barracks, where accused Greene got a carbine and some ammunition therefor. Accused Harris did not take a weapon. He "was sober enough to realize what was happening" (R. 48, 49). About 200 yards from the geisha district they met "Juny" and one Evans ("Jimmy") in a 6 x 6 truck. Accused Harris, at this time, had a "gas" can in his hand. The can was about half full and he had taken it with him because accused Greene "told me that we was going out together, and he wanted me to have something, if I am going to be with him." They left "Juny" and "Jimmy" and proceeded to the geisha district where accused Harris poured some "gas" out on the ground and lit it. The two accused then looked around the geisha area for "Utiko." Accused Greene saw a girl he said looked like "Utiko," whereupon accused Greene put his carbine up to his shoulder and fired twice (R. 49,50). Accused Harris then left and ran back to the company. About five or ten minutes after he got back to his room, accused Greene came in and said that he, Greene, "shot at her" but "didn't know whether he got her or not" (R. 51,52).

On cross-examination accused Harris testified that he and accused Greene had arrived at the geisha house district that evening at 6:30 or 6:45 p.m., for "it was just dark." Accused Greene had told him to "get some gas, we may need some gas. If I happen not to see her, we will set the place on fire." The military police put out the fire. At the time accused Greene fired the carbine he was pointing it "up in the geisha district yard" and was standing in the alleyway near the courtyard "where the fence had been torn down." There were quite a few people standing in the yard at the time. Accused Harris "heard somebody holler" after the shots were fired. "There was a crowd of people hollering." Accused Harris knew before he went to the geisha house that accused Greene was going there to shoot "Utiko." There were some lights in the yard but they did not illuminate the whole yard. On examination by the court, accused Harris testified that he made no effort to dissuade accused Greene from shooting nor did he make any attempt to talk accused Greene out of going to the geisha house. He did not intend to set fire to the houses when he ignited the gasoline but poured the gasoline on the ground and lit it so he would "be through with what he [accused Greene] wanted me to do" (R. 53-60).

The accused Corporal Greene, having been informed of his rights as a witness, elected to testify under oath (R. 60). On 21 January 1946, he started drinking about 7:30 a.m. and had some gin and some beer. About 8:30 a.m. he and the accused Harris left their company area to go to the geisha house district. There he met a girl named "Didi" and took her back to his house with him, accompanied by the accused Harris. Around 2:30 p.m. both accused again went to the geisha district, for the accused Harris "wanted to get a girl to take over to the house." There they found "Utiko" and "Juny" and went to the girls' room. When accused Greene removed the pistol he was carrying with him, it went off. Thereafter they laid down until "the police came and got us up." The two accused left the geisha area about 4:15 or 4:30 p.m. and went back to their company area. The accused Harris called upon the accused Greene at the house where he had the girl "Didi" and asked accused Greene to come over to accused Harris' room. When accused Greene arrived at this room, he noticed two carbines lying on the bed. One had a magazine in it and other did not. Accused Harris asked for ammunition and accused Greene got five rounds but did not give it to accused Harris, for accused Harris said that "he was going to burn down the geisha house district" and accused Greene thought that expression meant shooting (R. 61-64). When both accused left the room, accused Greene carried the carbine without the magazine with him. He had the five rounds of ammunition in his pocket and there were no rounds in the chamber of the carbine. He went with Harris because he "wanted to see the excitement." He had no intention of contributing to the "excitement." On the way to the geisha house district, they met "Juny" and "Jimmy" and at this time accused Harris had his carbine but accused Greene had left his on a nearby rock. Arriving at the geisha house district, accused Harris first went through the entrance and in a little while accused Greene saw

a flame. The military police came and put the flame out. Accused Harris had some "gas," but accused Greene did not see him set the fire. They then continued "right around" the geisha district until they came to an opening in the fence surrounding it. Accused Harris went in this entrance saying he was going to look for "Utiko" and told accused Greene to remain outside with the "rifles" and if anyone came to throw a rock. Accused Greene picked up a rock. Accused Harris returned and announced that he had not seen "Utiko." They then went around the fence to another opening and "ran by the opening *** to keep from anyone seeing us." After they got by the opening accused Harris stopped and put his rifle to his shoulder. Accused Greene threw the rock and started to run. He ran because he was "excited." He did not fire a shot but heard two shots fired, at which time he was about 20 or 25 yards away from accused Harris. The accused "weren't too drunk but we were still feeling good, I suppose." Accused Greene ran back to his quarters where he met accused Harris. Accused Harris asked him to clean his, Harris' "rifle" and accused Greene ran a patch through it. Accused Greene had fired no shots that night. The only time he tried to dissuade accused Harris was when he saw him "with the rifle to his shoulder," at which time he "threw a rock in the crowd and tried to give them a little warning before there was trouble." He did not think accused Harris was going to shoot until he saw him with the rifle to his shoulder (R. 65-69).

On cross-examination accused Greene testified that his pistol was accidentally discharged when he was in the geisha girls' room in the afternoon and that he thought he fired the pistol on purpose at some other time while in the room, to test the safety. He did not fire the pistol to make the girls take off their clothes. He was in bed with "Utiko" and accused Harris was in bed with "Juny." When the military police came to the door "Utiko" told him to give her the pistol, which he did. She put it under the mat in the room where they were. They all put on their clothes and went outside and "Utiko" tried to tell the military police that accused Greene had been shooting. Utiko then took a military policeman by the hand and led him back into the room. Accused Greene did not see the pistol in the possession of the military policeman when he came out, but was later told by one Evans that the military police had the pistol. He thought that "Utiko" had shown "them" where she put the pistol but "didn't mind it." He was not angry with her. He did nothing to scare either one of the girls (R.70-74). Accused Harris had told accused Greene that he "had a place he wanted to burn down," but he had not mentioned the geisha district as being that place until after they met Evans and "Juny" on the way to the geisha district. Accused Harris then had told him, "We are going to the geisha district, burn the damned thing down." Accused Harris already had the gasoline can at that time and accused Greene helped him carry it. After the military police had put out the flame, accused Harris cursed and said that the military police "wouldn't stop his rifle from shooting" (R. 74-77). When accused Harris went into the geisha

area to find "Utiko" accused Greene was supposed to throw a rock if the military police came back, as a warning so that they could leave the geisha area. Accused Harris did not say why he was looking for "Utiko" and he did not take his carbine with him when he went to look for her. The pistol the military police had taken that afternoon belonged to accused Greene, but accused Harris carried it most of the time and, after the military police had taken it, accused Harris "cursed pretty bad" and said, "he would burn it down tonight." He also talked about "what a rotten girl" "Utiko" was for telling the military police where the pistol could be found. After accused Harris returned from his search for "Utiko," each accused picked up a carbine and walked around to a little alley. When they got to "the entrance," they could see "a big gang of people," so they ran past it to keep from being seen. After accused Greene got past the entrance, he saw accused Harris with his rifle up to his shoulder. Accused Greene then threw a rock as near the crowd as he could and started to run. He threw the rock to warn the crowd but did not really think that accused Harris was going to shoot. He heard two shots when he was about 20 or 25 yards away from accused Harris and kept on running. Accused Greene could not say that accused Harris had his "rifle" pointing towards the crowd "but the crowd was the only thing I could see down there to be shooting at, if he was going to shoot at anything." The patch accused Greene ran through accused Harris' carbine, after they got back to their quarters, came out dirty, as though the weapon had been fired (R. 77-83).

5. It appears from the Charge Sheet that the charges in this case were referred for trial on 12 April 1946 to the trial judge advocate of a general court-martial appointed by paragraph 1, Special Orders No. 47, Headquarters, Yokohama Base, dated 26 April 1946, and were served on each of the accused on 16 April 1946. Thus the case purported to be referred for trial to a court which had not then been appointed. This court actually tried the case, the "copy" of the order of reference to trial appearing on page 4a of the record bearing the date "1 May 1946," the date of the commencement of the trial. The accused were not prejudiced by this apparent irregularity, for the action of the reviewing authority in approving the sentence as to each accused was, in effect, a ratification of the actual reference of this case to the legally constituted court which tried it. (CM ETO 393, Caton, 3 Bull. JAG 54; CM ETO 13319, Beets.)

6. 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." In discussing the term "malice" the Manual (pp. 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. ***"

Justice Holmes, while Chief Justice of the Massachusetts Supreme Judicial Court, had occasion to say,

"Reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification." (Commonwealth v. Chance, 174 Mass. 245, 252.)

Thus it has been held that where a deadly weapon is used in a manner likely to cause death and death actually results from such use, the law will presume malice from the act (see MCM, 1928, par. 112a), as where the accused fired into an occupied public house (CM ETO 5764, Lilly, 15 BR (ETO) 341), or fired through a thin partition into a room occupied by sleeping soldiers (CM ETO 7815, Gutierrez, 4 Bull. JAG 179). It is not necessary in such cases to show that the accused harbored a specific intent to kill any particular person located in the vicinity of the deceased or in the line of fire, but if it does appear that the speeding bullet or other deadly missile carried malice towards a person other than deceased, it is an axiom of the common law that such malice will be constructively applied to the homicide which actually occurred (Gore's case, 9 Coke, 81a; CM ETO 5764, Lilly, supra).

From the foregoing discussion of the law, the conclusion is inescapable that the accused in this case are each guilty of the crime of murder and this is so even though the testimony of each be taken at its face value. According to the testimony of accused Harris, accused Greene fired the shot into the crowd in the courtyard of the geisha house district which, according to the plain implication of all the circumstances, resulted in the death of Private Lubliner. According to the testimony of accused Greene, accused Harris fired the fatal shot. However, considering the judicial admissions of both accused, there is ample evidence that they proceeded together to the scene of the homicide at the geisha house district equipped with a lethal weapon (or weapons) and a can of gasoline, each intending, in concert with the other, to engage in vicious and unlawful acts thereat in reprisal for the Geisha girl "Utiko" having aided the military police in discovering

accused Greene's pistol. Accused Harris, according to his testimony, accompanied accused Greene on a mission in which the latter had expressed the intent to "get that damned Utiko" and accused Greene, according to his testimony, joined accused Harris in an expedition to "burn down" the geisha house district, remaining with the joint enterprise even after Harris had cursed the military police for putting out the fire and had said that they "wouldn't stop his rifle from shooting." Therefore, whatever view may be taken of the evidence, it is apparent that each accused was at least an aider and abettor to the other and is chargeable, as such, as a principal party to the offense committed. (CM 266724, McDonald, 43 BR 291). If a number of persons conspire together to do any unlawful act which, although not amounting to a felony, is of so desperate a character that it must ordinarily be attended with great hazard to life, and death occurs as a result of anything done in prosecution of the unlawful design, then all who take part in the transaction are guilty of murder. This being so, it is unnecessary to determine which of the accused fired the fatal shot, for evidence that it was fired by some one of them, while in the execution of the unlawful design, though it does not appear by which one, is sufficient to sustain the findings of guilty as to each (CM 248793, Beyer, 50 BR 21, 37).

7. The Charge Sheet shows that the accused Corporal Greene is 21 years of age and that he was inducted into the Army at Camp Forrest, Tennessee, on 12 February 1943, without prior military service; that the accused Private First Class Harris is 23 years of age and that he was inducted into the Army at Fort Bragg, North Carolina, on 27 February 1943, without prior military service.

8. According to the Staff Judge Advocate's review each accused was given a psychiatric examination by a competent medical officer who found that each was sane.

9. The court was legally constituted and had jurisdiction over each accused and of the offense. No errors injuriously affecting the substantial rights of either 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.

Charles F. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Lloyd, Judge Advocate

JAGK - CM 314939 1st Ind

WD, JAGO, Washington 25, D. C. SEP 6 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 Corporal Billie B. Greene (34529637) and Private First Class Bill Harris (34668053), both of 4296th Quartermaster Gasoline Supply 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 as to each accused and to warrant confirmation thereof. Under all the circumstances of the case, I am of the opinion that the death penalty is not required. I therefore recommend that the sentence as to each accused 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 each accused, and that a U. S. penitentiary be designated as the place of confinement.

3. Consideration has been given to a letter dated 15 July 1946 from Mrs. Mavis Tyson, Knoxville, Tennessee, mother of accused Corporal Greene, containing a plea for clemency on his behalf, transmitted by the Honorable Kenneth McKellar, United States Senator from Tennessee; to a letter from Mrs. Mavis Tyson, dated 5 August 1946, inclosing letters testifying to the good character of accused Corporal Greene from E. N. Washburn, J. W. Carlisle and Faris M. Freeman, all of Bostic, North Carolina; and to a letter from the Honorable John Jennings, Jr., Member of Congress from Tennessee, written on behalf of accused Corporal Greene.

4. 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

6 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form of Ex action
4. Ltr fr Mrs Mavis Tyson 15 July 46
5. Ltr fr Mrs. Mavis Tyson, 5 Aug 46, w/incls
6. Ltr fr Hon John Jennings, MC

(G.C.M.O. 301, 11 October 1946).

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

JAGH - CM 314953

14 NOV 1946

UNITED STATES	)	SIXTH ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Presidio of San Francisco,
Major WILLIAM M. BERRY	)	California, 17 June 1946.
(O-482249), Corps of	)	Dismissal.
Engineers	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, 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 95th Article of War.

Specification 1: In that Major William M. Berry, CE, attached unassigned Headquarters Company, 1927 Service Command Unit, Presidio of San Francisco, California, did, at San Francisco, California, on or about February 11, 1946, with intent to defraud, wrongfully and unlawfully make and utter to Snug Harbor Tavern, San Francisco, California, a certain check in words and figures as follows, to wit:

"No. 15 WILLIAM M. BERRY

11 February 1946

Pay to the
order of Cash $20.00

Twenty and no/100 Dollars Cents

To FIRST NATIONAL BANK
in Spokane
28-5 SPOKANE, WASHINGTON

/s/ William M. Berry
Major CE, O-482249
c/o Post Engr, Presidio
of San Francisco"

and by means thereof, did fraudulently obtain from Snug Harbor Tavern, San Francisco, California, the sum of $20.00, he the said William M. Berry, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank in Spokane, Spokane, Washington, for the payment of said check.

Specification 2 through 10, inclusive, are identical in form with Specification 1 except as to dates, places, amounts and persons or organization defrauded. The variations are as follows:

Spec.	Date	Amount	Place	Organization or Person Defrauded
2	12 Feb	$20	San Francisco, Calif	Snug Harbor Tavern
3	21 Feb	20	San Francisco, Calif	Snug Harbor Tavern
4	26 Feb	15	San Francisco, Calif	Snug Harbor Tavern
5	3 Mar	15	San Francisco, Calif	Snug Harbor Tavern
6	22 Jan	20	San Francisco, Calif	Joe & Pete's Cafe
7	23 Jan	20	San Francisco, Calif	Joe & Pete's Cafe
8	(Finding of not guilty).			
9	1 Feb	15	San Francisco, Calif	Bridge Club
10	28 Feb	5	San Francisco, Calif	Officers Club

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

Specification: In that Major William M. Berry, attached unassigned Headquarters Company, 1927 Service Command Unit, Presidio of San Francisco, California, did, without proper leave absent himself from his organization at Presidio of San Francisco, California, from about March 2, 1946, to about March 26, 1946.

The accused pleaded not guilty to, and was found guilty with minor exceptions and substitutions of, all Charges and Specifications excepting Specification 8 of Charge I, of which he was found not guilty. Evidence of two 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 only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. In support of the check offenses alleged in the ten Specifications of Charge I, it was shown that the accused had an account with the First National Bank of Spokane, Washington, for more than two years prior to the offenses (R 79; Pros Ex 12). Ten photostatic copies of checks drawn on the bank and purporting to bear the signature of accused as maker were received in evidence without objection (Pros Ex 1-10). All of the aforementioned

checks were returned to the payees with accompanying slips marked either "Insufficient Funds" or "Account Closed" (R 16-20, 28-32, 36-38, 43). The checks (Pros Ex 1-5) alleged in Specification 1 to 5, inclusive, were made payable to cash and in each instance, the accused received cash (R 15-22) from Mr. John Morris, the owner of Snug Harbor Tavern. Prior to cashing the checks the accused had cashed a large number of other checks at the Snug Harbor Tavern. Some of these checks had been returned unpaid (R 23). The checks (Pros Ex 6-8) in Specifications 6 to 8, inclusive, were made payable to cash and in each instance, the accused received cash (R 28-32) from Mr. Peter Alioto, the owner of Joe and Pete's Tavern. With respect to the check of $5.00, Specification 8, Mr. Alioto agreed to hold that check with the understanding that the accused would pick up the check later on (R 31). This check was never put through any bank for collection (R 33). The check (Pros Ex 9) covered in Specification 9 was made payable to the Bridge Club and was cashed by Mr. Emanuel Black, the owner of that club on 1 February 1946. The accused received the sum of $15.00 at the time the check was cashed (R 37). The check (Pros Ex 10) in Specification 10 was made payable to the Officers Club at the Presidio and given in payment for the occupancy of bachelor officer quarters at Presidio (R 43). The check was deposited for collection and subsequently returned by the bank for insufficient funds (R 43-44). The total amount of the checks which accused issued and which were returned because of insufficient funds was $150.00.

The prosecution introduced evidence to show that accused absented himself without leave from his organization, Headquarters Company, 1927 Service Command Unit, Presidio of San Francisco, California, from 4 March 1946, to about 26 March 1946 (R 55-56). The accused admitted leaving his organization on 4 March 1946 (R 89). By paragraph 7, Special Orders 41, dated 26 February 1946, Army Service Forces, Ninth Service Command, Presidio of San Francisco, the accused was transferred to the Separation Center, Fort Leavenworth, Kansas (Pros Ex 17). These orders were revoked by verbal order of the post commander of the Presidio of San Francisco on 28 February 1946 (R 52, 55; Pros Ex 2). The accused disregarded a verbal order not to leave his organization until new orders were issued and left the Presidio on 4 March 1946 (R 89). On 26 March 1946, accused reported at the Amarillo Air Base, Amarillo, Texas.

The accused's bank balance with the First National Bank of Spokane, Washington, was insufficient to cover any of the ten checks when they were presented for payment between 11 February 1946 and 4 March 1946. All of said checks were returned unpaid by the drawee bank (Pros Ex 12). The accused prior to the trial redeemed all of the foregoing checks.

4. After his rights as a witness were fully explained, accused elected to be sworn and testified that he is 51 years of age and has been in the regular army for 29 years, 25 years of which was enlisted service and 4 years commissioned service.

During the period of enlisted service the accused was never in any trouble or had he ever been tried by court-martial. For more than two years he had an account in the First National Bank of Spokane, Washington (R 79). After allotments had been deducted from his pay, the balance remaining averaged more than $300.00 monthly and was sent by the Finance Office directly to the bank (R 80). The accused's wife who received a monthly allotment of $250.00 per month also had an account in the same bank. On 12 February 1946, Mrs. Berry's $250.00 allotment check was erroneously deposited in the accused's account (R 80; Pros Ex 13). Prior mistakes had been made by the bank with respect to deposits and withdrawals in both accounts (R 80). The $250.00 was transferred to Mrs. Berry's account the following month after a deposit of $311.32 had been credited to the officer's account (R 80; Pros Ex 14). The bank notified the accused of the error and that $250.00 had been withdrawn from his account and deposited in his wife's account (R 81). The accused's wife agreed to permit him to retain the $250.00 in his account (R 81). He did not communicate with the bank with respect of this agreement, thinking that his wife would do so. During the same month of February 1946, the accused's wife drew a $50.00 check which was mistakenly paid out of his account. The $50.00 was replaced in the accused account the following month when the bank discovered the error. The accused was in the habit of obtaining "a quick loan" from the bank, when he was not certain of getting a monthly bank statement. This was done on three separate occasions. The accused would send a letter to the bank and advise the bank to deposit $50.00 or $100.00 to his account. The bank would deposit the money less a service charge and then send the accused a promissory note to sign together with a deposit slip showing that the amount of the note less the service charge had been deposited. On 4 April the accused received a statement and a draft for $7.40 from the bank advising him that his account had been closed (R 83).

On 28 February 1946 the accused was called to the office of the Post Executive Officer at Presidio, who informed him that orders had been cut under which he was to proceed to Fort Leavenworth. Later that same day the executive officer advised him of a telephone call that had been received from Fort Lewis that his property account had not been closed at that station (R 83). The executive officer never mentioned revoking the orders to proceed to Fort Leavenworth except to say that if the clearance from Fort Lewis was held up too long then new orders would have to be issued and a new date set to go to Fort Leavenworth. The accused went to see the executive officer the next morning, 1 March 1946, but was informed that he was not in and would probably be out of the office all morning (R 84). The accused phoned the executive officer at about 1100 hours that day and inquired about his orders. The executive officer was not in but the commanding officer of the post cut in on the line and said no further word had been received from Fort Lewis. On Monday morning, 4 March 1946, the accused telephoned the executive officer who informed him that a clearance had been received from Fort Lewis on

Saturday, 2 March 1946, at about 2 or 3 p.m. The executive officer advised accused that there was nothing wrong in his leaving the post (R 85). The accused packed his car and went to see the executive officer who stated he did not know whether or not the accused should go ahead and take a chance on reaching Fort Leavenworth within the time specified in his orders. The accused then said, "How about me checking out and wiring in for a new date?" To this question the executive officer did not say, "Yes or no" (R 85). The first time the accused had knowledge that his orders had been revoked was a telegram from Fort Leavenworth advising him of that fact and that he should return to the Presidio.

5. The uncontradicted evidence amply demonstrates that the checks described in Specification 1 through 10 of Charge I were made and uttered by accused, as alleged, that he received the proceeds thereof and that said checks, except the $5.00 check described in Specification 8, were dishonored when presented to the drawee bank because of insufficient funds in accused's account. The accused's bank statements for January, February and March 1946, show three deposits in sums of $250.00, $311.32 and $50.00, respectively. However, the day after the latter two deposits were credited to the accused's account, his balance was $8.38 and within five days after the $250.00 deposit, the balance was $11.38. It is noted that the $250.00 deposit which was erroneously deposited in the accused's account augmented rather than depleted the balance of his account. Even with the $250.00, the accused's balance for that month was insufficient to meet the checks drawn against the account. From these facts and circumstances, the court was fully warranted in inferring that the accused intended to defraud the payees of these several checks and accordingly the evidence is legally sufficient to sustain Charge I and Specifications1 through 10 thereof, except Specification 8 of which the accused was found not guilty.

The evidence clearly substantiates the absence without leave as alleged in Charge II and the Specification thereunder. A direct order was given to the accused not to leave his organization until new orders were issued authorizing his travel to Fort Leavenworth. The accused admitted he left his organization and did not report in person to Fort Leavenworth but turned himself in at Armarillo Air Base, Armarillo, Texas, on 26 March 1946. It is significant to note that twenty-two days elapsed from the time that the accused left the Presidio of San Francisco until his return to military control. In view of the above, little credence is given to the accused statement that he had permission to leave his organization on 4 March 1946.

6. On 18 December 1945, the accused appeared before a reclassification board which found that he was inefficient, that he performed his duties in an unsatisfactory manner, and recommended that he be honorably discharged as an officer. The report of the board further stated that Major Berry made a favorable impression in his appearance before the board.

The accused has a record of two previous convictions by general court-martial. On 13 April 1945, he was found guilty of violations of the 96th and 61st Articles of War and sentenced to a reprimand, restriction for two months and forfeiture of one hundred dollars ($100) per month for six (6) months. On 4 September 1944, he was found guilty of violations of the 96th Article of War and sentenced to a reprimand and forfeiture of one hundred dollars ($100) per month for six (6) months.

7. War Department records show that the accused is 51 years of age, married, and has one child, a married daughter. His formal education ended upon the completion of three years of high school. He had completed more than twenty-five years of enlisted service prior to his appointment as a captain on 11 July 1942. His highest rank as an enlisted man was master sergeant and his character rating was excellent. There is appended to the file a letter from the accused's wife, Catherine L. Berry, addressed to the President of the United States, requesting that her husband be placed on the inactive list so that he may be retired rather than dismissed from the service.

8. The court was legally constituted and had jurisdiction of the person 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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War and is authorized upon a conviction of Article of War 61.

A. L. Lottenstein, Judge Advocate

Wallenson A. Self, Judge Advocate

Peter J. Hanagan, Judge Advocate

JAGH - CM 314953 1st Ind

WD, JAGO, Washington 25, D. C. DEC 2 1946

To: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Major William M. Berry (O-482249), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of making and uttering nine checks totalling $150.00 without sufficient funds in violation of Article of War 95 and absence without leave from 4 March 1946 to 26 March 1946 in violation of the 61st Article of War. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as provided for dismissal 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 of Review that the record of trial is legally sufficient to support the sentence.

Major Berry was attached unassigned to Headquarters Company, 1927 Service Command Unit, Presidio of San Francisco, California, pending the issuance of travel orders to proceed to Fort Leavenworth, Kansas, for separation from the service. Major Berry had appeared before a reclassification board at the Presidio of San Francisco on 18 December 1945. The board found that he was inefficient, and had performed his duties in an unsatisfactory manner. A recommendation was made that he be honorably discharged as an officer.

After travel orders had been published but before Major Berry had left for Fort Leavenworth, a telephone call was received from Fort Lewis, Washington, that Major Berry had failed to clear his property account at that station. Major Berry was informed that his travel orders were revoked and new orders would be issued as soon as a clearance was received from Fort Lewis. The executive officer of the Presidio of San Francisco advised Major Berry that it would be necessary to obtain a new separation date from Fort Leavenworth. The clearance from Fort Lewis was received at the Presidio of San Francisco on 2 March 1946. The accused learned of the clearance on 4 March 1946 and that afternoon he left the post, presumably for Fort Leavenworth without waiting for new orders and contrary to the express orders of the post executive officer. The accused turned himself in at the Amarillo Air Base, Amarillo, Texas, on 26 March 1946.

Between 22 January 1946 and 3 March 1946, nine checks which Major Berry had issued were returned to the payees for either "Insufficient funds" or with the notation "account closed." During this period the accused did not have sufficient funds to cover the payment of any of the checks. The accused redeemed all of the checks prior to the trial. However, there is evidence in the file that Major Berry had been in difficulties for similar offenses at Fort Lewis.

After his rights as a witness were explained, the accused elected to testify in his own behalf. He stated that he allotted $250.00 each month to his wife. The balance of his pay, which averaged more than $300.00 monthly, was deposited by the Finance Officer in his account in the First National Bank of Spokane, Washington. The allotment check of $250.00 was also sent by the Finance Officer to the same bank where his wife had an account in the name of Mrs. William M. Berry. On 12 February 1946, Mrs. Berry's allotment check of $250.00 was erroneously deposited by the bank in Major Berry's account. The bank notified Major Berry of the mistake and its intention to withdraw the $250.00 from his account the following month. This was done although Major Berry stated he spoke to his wife and obtained her consent to leave the money in his account. Major Berry admitted that he had not notified the bank of the arrangement he had made with his wife with respect to the $250.00 check. During the same month of February 1946, Mrs. Berry drew a check in the sum of $50.00 and the bank erroneously charged Major Berry's account with the amount of that check. The following month the bank replaced the $50.00 in Major Berry's account. On 4 April 1946, Major Berry received from the bank a check in the sum of $7.40 and a notification that his account had been closed.

It is significant to note that the mistake of the First National Bank of Spokane, Washington, in depositing the $250.00 allotment check augmented rather than depleted Major Berry's account during the month of February 1946.

The uncontradicted evidence amply demonstrates that the accused made and uttered nine checks totalling $150.00, which checks were dishonored because of insufficient funds in his account. The absence without leave was clearly established by competent evidence.

4. This 51 year old officer had completed twenty-five years enlisted service prior to his appointment as a captain on 11 July 1942. His highest rank as an enlisted man was that of master sergeant. Consideration has been given to a letter from the accused's wife, Catherine L. Berry, addressed to the President of the United States, requesting that her husband be placed on the inactive list so that he may be retired rather than dismissed from the service.

5. The accused has a record of two previous convictions by general court-martial. On 4 September 1944, he was found guilty of violation of the 96th Article of War and sentenced to a reprimand and forfeiture of one hundred dollars ($100) per month for six (6) months. On 13 April 1945, he was found guilty of violations of the 96th and 61st Articles of War and sentenced to a reprimand, restriction for two months and forfeiture of one hundred dollars ($100) per month for six (6) months.

6. In view of all the circumstances including the accused's service of more than twenty-nine years, I recommend that the dismissal be suspended during good behavior.

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

CM 314953

2 Incls.
1- Record of Trial
2- Form of Action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 368, 9 December 1946.)

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

JAGK - CM 314985

10 OCT 1946

UNITED STATES	)	UNITED STATES FORCES IN AUSTRIA
	)	
v.	)	Trial by G.C.M., convened at Vienna, Austria, 6 May 1946.
	)	
Captain HYMAN VERNOSKY (0-451546), Signal Corps	)	Dismissal, total forfeitures and confinement for eighteen months

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

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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 96th Article of War.

Specification 1: In that Captain Hyman Vernosky, Signal Section, Headquarters United States Forces in Austria, did, at Vienna, Austria, on or about 12 February 1946, wrongfully and unlawfully hold and possess about $473.00, currency of the United States, in violation of paragraph 2a, letter AG 1210 OpGA, Headquarters European Theater of Operations, United States Army, dated 25 September 1944, subject: "Prohibition against Circulating, Importing or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except through Official Channels."

Specification 2: In that Captain Hyman Vernosky, ***, did, at Vienna, Austria, on or about 12 February 1946, wrongfully and unlawfully transfer and deliver, outside of official channels, to Captain David Nusbaum, 63d Signal Operation Battalion, $100.00, currency of the United States, in violation of paragraph 2a, letter AG 1210 OpGA, Headquarters European Theater of Operations, United States Army, dated 25 September 1944, subject: "Prohibition against Circulating, Importing or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except through Official Channels."

Specification 3: In that Captain Hyman Vernosky, ***, did, at

Vienna, Austria, during the period from about 15 October 1945 to about 8 February 1946, wrongfully engage in commercial transactions for his own personal gain, to wit: the purchase and resale at a profit of about 27 cameras to American military personnel, said activities being of a nature tending to interfere with and hamper the full and proper discharge of said Captain Vernosky's official duties.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for eighteen months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48 with the recommendation that the sentence be commuted to a fine in the amount of $2,000.00.

3. The Board of Review adopts the statement of evidence and law contained in the Staff Judge Advocate's review.

4. War Department records show that accused is 34-1/2 years of age and unmarried. He enlisted in the Army as a private at Fort Monmouth, New Jersey, on 12 July 1934 and was commissioned a second lieutenant in the Army of the United States on 30 September 1941. He was promoted to first lieutenant on 16 May 1942 and to captain on 27 December 1943. His last efficiency report, 7 January 1946, shows a rating of "Excellent." Previous reports show one superior and one excellent rating. He has had approximately three years overseas service and on 15 September 1945 was awarded the bronze star medal for meritorious achievement with military operations in North Africa and Italy from August 1943 to July 1945.

5. 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. 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 96.

Chester D. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Schwab, Judge Advocate

JAGK - CM 314985 1st Ind

OCT 2 3 1946

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 the record of trial and the opinion of the Board of Review in the case of Captain Hyman Vernosky (O-451546), Signal Corps.

2. Upon trial by general court-martial the accused was found guilty of wrongfully and unlawfully having in his possession about $473.00 United States currency in violation of paragraph 2a, letter AG 1210 OpGA, Headquarters European Theater of Operations, United States Army, dated 25 September 1944; transferring $100.00 United States currency in violation of the same orders, and engaging in commercial transactions by purchasing and reselling about 27 cameras, all 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 eighteen months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, with the recommendation that the sentence be commuted to a fine of $2,000.00.

3. A sumary of the evidence may be found in the Staff Judge Advocate's review, which is adopted by the Board of Review. 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 thereof.

On 12 February 1946 a search was made of accused's quarters, Apartment 31 at 81 Lerchenfelder, Vienna, Austria, and the following property, which accused later certified as belonging to him, was found: 6 cases "10 in 1" rations, 1 case "K" rations, 1 case "C" rations, 2 boxes 5 rations, 1-1/2 cases ARC prisoners package, 35 packages foodstuffs (U.S. Government issue), 62 cases foodstuffs (U.S. Government issue), 1 pistol (Mauser), 1 pair binoculars (U.S. Government issue), 3 cameras, 2 radios, 1 pair silk stockings, $473.00 American money, 3393 Austrian schillings, 126,100 Hungarian Pergos, 200 Swiss Francs, 11 marks, 40 French Franks, 10 Moroccan Francs, 3 brooches, 1 Swiss watch, 1 bracelet, 7 pieces Italian jewelry, 1 cigarette lighter, 2 billfolds (personal papers, etc.). At the time of the search several civilians were in the apartment, including a woman whom accused testified was ill and needed a warm place to stay and who was living in the apartment. Immediately after the search the investigators summoned accused to his apartment and searched him. They took from his person 33 postal money orders totaling $2940.00, his currency control book, two personal checks for $80 and $73, respectively, and a

traveler's check in the sum of $100, 13 postal money order receipts, all bearing dates from October 1945 to January 1946 and totaling $1,128.50. The total of money and money orders exceeded $5,000. The accused was thereupon placed in confinement. At an investigation conducted by an agent of the Criminal Investigation Division on 19 February 1946, and after he had been advised of his rights, accused stated that the money orders and checks found in his possession were the receipts from approximately 25 cameras which he had bought and sold to military personnel since he entered the European Theater, and that the $473.00 in United States currency was part of a total of $550.00 which one Leslie Schwarz had given him to give to Schwarz's sister should she be in Vienna. He produced a card allegedly from Schwarz reminding him to deliver the money. Captain David Nusbaum, Medical Detachment, 63rd Signal Operations Battalion, testified that in the latter part of October 1945 accused loaned him a $100 bill which he returned in the form of another $100 bill a few days later. Four officers testified that they had purchased cameras from accused.

The accused testified that he sold only 12 to 15 cameras and that all the camera transactions were without profit to him and conducted merely as a matter of accommodation to various officers; and that the money order receipts represented an accumulation of all his overseas pay and that he was holding the $550 to turn over to the sister of the Mr. Schwarz. Over the period of time covered by all these transactions he had drawn $90.05 pay for October 1945, $87.90 for November 1945, $90.05 for December 1945, and $89.30 for January 1946, or a total of $357.30.

4. This officer enlisted as a private at Fort Monmouth, New Jersey, on 12 July 1934. He had previously worked in various retail stores as a clerk. He was appointed a second lieutenant, AUS, in September 1941, first lieutenant in May 1942, and captain in December 1943. Of three efficiency ratings in his record two are excellent and one is superior. He has spent three years overseas and was on 15 September 1945 awarded the Bronze Star Medal for meritorious achievement with military operations in North Africa and Italy from August 1943 to July 1945.

5. The proof fully demonstrates accused's utter disregard for orders and directives forbidding commercial transactions and exchange of currency. Although there was found in his apartment a considerable amount of Government property the evidence does not show, nor was he charged with selling, Government property. The court-martial was justified in rejecting accused's testimony tending to show that he was merely befriending others and acting through charitable impulses. The unusually large sums of money and money orders in his possession, together with the other circumstances, raises a strong inference that the sales were for profit as found by the court. There has been no apparent loss to the United States. I believe the sentence is too severe. Although commutation of the sentence to a fine of $2,000 is recommended by the reviewing authority, I recommend that the sentence be confirmed, that the forfeitures and confinement be remitted, and that the sentence as thus modified be suspended during good behavior.

6. Consideration has been given to a letter of Mr. Arthur E. Johnson, Commissioner of Police, Burrough of Interlaken, Monmouth, New Jersey, dated 24 May 1946, addressed to the President and recommending clemency for accused; letter of 8 April 1946 from Senator H. Alexander Smith to the Secretary of War and letter of 27 May from Honorable James C. Auchincloss, Member of Congress, addressed to me and requesting information concerning the case.

On 9 September 1946, Mr. Charles Silber, Attorney, 744 Broad Street, Newark, New Jersey, appeared before the Board of Review, made oral argument, and filed a brief on behalf of the accused.

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

CM 314985

6 Incls
1. Record of trial
2. Form of action
3. Ltr fr Mr. Johnson dtd 24 May 46
4. Cpy ltr fr Sn H. Alexander Smith
5. Ltr fr Hon James C Auchincloss
6. Brief filed by counsel for acc'd

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 336, 1 November 1946.)

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

JAGH-CM 314994

11 OCT 1946

UNITED STATES	)	CONTINENTAL BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Mannheim, Germany, 18 April and 4 June 1946. Dismissal and total forfeitures.
	)	
Second Lieutenant JOHN C. MOWERY (O-2029527), Quartermaster Corps.	)	

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

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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 85th Article of War.

Specification: In that 2nd Lieutenant John C. Mowery, 341st Quartermaster Depot Company, 504th Quartermaster Battalion, was, at Mannheim, Germany, on or about 9 March, 1946, found drunk while on duty as Depot Officer of the Guard.

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

Specification: In that Second Lieutenant John C. Mowery, 341st Quartermaster Depot Company, 504th Quartermaster Battalion, was, at Mannheim, Germany, on or about 12 March 1946, drunk and disorderly at a company meeting attended by officers and enlisted men of the 341st Quartermaster Depot Company.

The accused pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of all

Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to forfeit $75 of his pay per month for six (6) months. The reviewing authority returned the record of trial to the court for proceedings in revision with instructions to revoke its previous void sentence and adjudge an appropriate one, on the grounds that a sentence to dismissal is mandatory upon conviction of a violation of Article of War 85 where the offense was committed in time of war. Thereupon, the court revoked its previous sentence and sentenced the accused 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 evidence for the prosecution is summarized as follows:

The accused is in the military service of the United States and was a member of the 341st Quartermaster Depot Company, stationed at Mannheim, Germany (R. 6). On 9 March 1946, accused was scheduled to serve as officer of the guard at the Mannheim Quartermaster Depot beginning at 1800 hours (R 6-7; Pros Ex 1). At 1730 hours on 9 March 1946 accused was seen in the mess hall of his organization and appeared to have been drinking, although he was not drunk. At 1800 hours on that date, he went on duty as officer of the guard (R 15-16, 21). At 2130 hours the accused entered the Headquarters of the 59th Base Depot (R 15). Captain Troia, the officer of the day and Private First Class Perry, charge of quarters, were present at that time. Captain Troia testified that accused staggered and fumbled through some letters in his pockets. His breath smelled of intoxicating beverage (R 15). Perry testified that when accused entered the office he was intoxicated (R 12) and that accused stated that he had been drinking while on duty (R 13). As a result of his intoxicated condition, Captain Troia relieved the accused as officer of the guard (R 16). The guard report showed that accused was relieved because he was feeling ill (R 15; Pros Ex 2), but Captain Troia testified that he indicated illness as the reason for accused's relief because, "I did not think it would look very well to put down that the individual was relieved because he was intoxicated and have enlisted personnel talk about it" (R 16). Shortly after he was relieved as officer of the guard, accused went to a Saturday night dance which was being held in the company mess hall. He appeared to a witness to be intoxicated. He drew a .45 caliber pistol and pointed it at the band because the band would not play a particular number (R 10-11).

On the evening of 12 March 1946, First Lieutenant Morris B. Carlson, the company commander, gave a lecture to the entire company assembled in the mess hall on venereal disease, drinking and general company policy (R 9, 11, 19, 20). During the course of the lecture mumbling and moaning was heard from the rear of the room (R 19). Upon investigation it was found that the noises were made by accused (R 20), who was sitting at a table against the wall "spread out on a chair

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

JAGH-CM 314994

11 OCT 1946

UNITED STATES	)	CONTINENTAL BASE SECTION
v.	)	Trial by G.C.M., convened at Mannheim, Germany, 18 April and 4 June 1946. Dismissal and total forfeitures.
Second Lieutenant JOHN C. MOWERY (O-2029527), Quartermaster Corps.	)	

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

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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 85th Article of War.

Specification: In that 2nd Lieutenant John C. Mowery, 341st Quartermaster Depot Company, 504th Quartermaster Battalion, was, at Mannheim, Germany, on or about 9 March, 1946, found drunk while on duty as Depot Officer of the Guard.

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

Specification: In that Second Lieutenant John C. Mowery, 341st Quartermaster Depot Company, 504th Quartermaster Battalion, was, at Mannheim, Germany, on or about 12 March 1946, drunk and disorderly at a company meeting attended by officers and enlisted men of the 341st Quartermaster Depot Company.

The accused pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of all

Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to forfeit $75 of his pay per month for six (6) months. The reviewing authority returned the record of trial to the court for proceedings in revision with instructions to revoke its previous void sentence and adjudge an appropriate one, on the grounds that a sentence to dismissal is mandatory upon conviction of a violation of Article of War 85 where the offense was committed in time of war. Thereupon, the court revoked its previous sentence and sentenced the accused 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 evidence for the prosecution is summarized as follows:

The accused is in the military service of the United States and was a member of the 341st Quartermaster Depot Company, stationed at Mannheim, Germany (R. 6). On 9 March 1946, accused was scheduled to serve as officer of the guard at the Mannheim Quartermaster Depot beginning at 1800 hours (R 6-7; Pros Ex 1). At 1730 hours on 9 March 1946 accused was seen in the mess hall of his organization and appeared to have been drinking, although he was not drunk. At 1800 hours on that date, he went on duty as officer of the guard (R 15-16, 21). At 2130 hours the accused entered the Headquarters of the 59th Base Depot (R 15). Captain Troia, the officer of the day and Private First Class Perry, charge of quarters, were present at that time. Captain Troia testified that accused staggered and fumbled through some letters in his pockets. His breath smelled of intoxicating beverage (R 15). Perry testified that when accused entered the office he was intoxicated (R 12) and that accused stated that he had been drinking while on duty (R 13). As a result of his intoxicated condition, Captain Troia relieved the accused as officer of the guard (R 16). The guard report showed that accused was relieved because he was feeling ill (R 15; Pros Ex 2), but Captain Troia testified that he indicated illness as the reason for accused's relief because, "I did not think it would look very well to put down that the individual was relieved because he was intoxicated and have enlisted personnel talk about it" (R 16). Shortly after he was relieved as officer of the guard, accused went to a Saturday night dance which was being held in the company mess hall. He appeared to a witness to be intoxicated. He drew a .45 caliber pistol and pointed it at the band because the band would not play a particular number (R 10-11).

On the evening of 12 March 1946, First Lieutenant Morris B. Carlson, the company commander, gave a lecture to the entire company assembled in the mess hall on venereal disease, drinking and general company policy (R 9, 11, 19, 20). During the course of the lecture mumbling and moaning was heard from the rear of the room (R 19). Upon investigation it was found that the noises were made by accused (R 20), who was sitting at a table against the wall "spread out on a chair

intoxicated" (R 11). After accused fell asleep he was removed from the mess hall by Lieutenant Graf and an enlisted man (R 9, 20).

4. No witnesses were called by the defense. After being duly warned of his rights as a witness, the accused elected to remain silent (R 24-25).

5. The Specification of Charge I alleges that accused was found drunk while on duty as officer of the guard on 9 March 1946. The elements of proof as stated in the Manual for Courts-Martial are:

"(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).

The evidence shows that accused was detailed as officer of the guard on 9 March 1946 and that he entered on duty as officer of the guard at 1800 hours. At 2130 hours the officer of the day found that he was so intoxicated that he was unfit to continue his duties. The accused admitted that he had been drinking while on duty. The officer of the day accordingly relieved him as officer of the guard. Several witnesses testified that he staggered and that his breath smelled of intoxicating liquor during the period while he was on duty. A short time after he was relieved as officer of the guard, accused appeared at a dance given by his company. He was in a drunken condition and threatened the band with his .45 caliber pistol because it would not play a number requested by him.

In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge I and the Specification thereof.

6. In view of accused's plea of guilty to Charge II and its Specification, the record of trial is legally sufficient to support the findings of guilty of Charge II and the Specification thereof.

7. As noted above the court sentenced the accused to forfeit $75 of his pay per month for six (6) months. The reviewing authority returned the record of trial to the court for appropriate corrective action in view of the court's failure to adjudge dismissal which is mandatory upon a conviction of the offense alleged.

In proceedings in revision the court revoked its previous sentence and sentenced the accused to dismissal and total forfeitures.

Article of War 85, in pertinent part provides:

"Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; * * *."

The power of a reviewing authority to return a record of trial for reconsideration of a sentence less than the mandatory sentence fixed by law is expressly recognized in Article of War 40, which provides in pertinent part:

> "* * * No authority shall return a record of trial to any court-martial for reconsideration of — * * *.
>
> (d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had."

Accordingly the action of the reviewing authority in returning the record of trial for reconsideration of the sentence was proper (CM 225639, Raymond, 14 BR 311, 314).

8. Records of the War Department show that the accused is 45 years old and lives in Pittsburgh, Pennsylvania. He is married but is separated from his wife. He has three children 15, 19, and 21 years of age. Prior to entering the Army, he was construction inspector employed by the Carnegie Illinois Steel Corporation and by the City of Pittsburgh. Accused was inducted on 18 August 1942. He attended the Engineer Officer Candidate School but did not graduate. He was given a direct commission as a second lieutenant, Army of the United States, on 18 September 1945 while on duty in Belgium and was assigned to the 341st Quartermaster Depot Company. His WD AGO Form 66-1, shows his efficiency ratings as follows:

30 Oct 1945 to 22 Nov 1945	"4.00"
23 Nov 1945 to 12 Dec 1945	"1.00"
13 Dec 1945 to 31 Dec 1945	"2.8"
1 Jan 1946 to 26 Jan 1946	"1.0"
29 Jan 1946 to 14 Mar 1946	"1.8"

Consideration has been given to a letter dated 15 July 1946 from Mr. Charles E. Weickhardt, Chief, Discharge Review Section, Veterans of Foreign Wars of the United States, Washington, D. C.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 mandatory upon a conviction of Article of War 85 where the offense is committed in time of war and is authorized upon a conviction of Article of War 96.

A. J. Gottenstein, Judge Advocate.

Waldemar A. Solf, Judge Advocate.

[illegible], Judge Advocate.

JAGH - CM 314994 1st Ind

WD, JAGO, Washington 25, D. C. NOV 1 2 1946

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 Second Lieutenant John C. Mowery (0-2029527), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty on 9 March 1946, in violation of Article of War 85 (Chg I, Spec) and of being drunk and disorderly in uniform at a lecture given to enlisted men on 12 March 1946, in violation of Article of War 96 (Chg II, Spec). No evidence of previous convictions was introduced. He was sentenced to forfeit $75 of his pay per month for six (6) months. The reviewing authority returned the record of trial to the court for reconsideration of the sentence for the reason that the court failed to adjudge a sentence to dismissal which is mandatory upon a conviction of violation of Article of War 85, if the offense is committed in time of war. The court revoked its previous sentence and sentenced the accused 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. 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 9 March 1946, the accused was detailed as officer of the guard. At 1730 hours, thirty minutes before he was to go on duty, it was apparent to one witness that he had been drinking, but not to the extent that he was unable to perform his duty. At 2120 hours, after the accused had entered on his duty as officer of the guard, the officer of the day found that he was so drunk that he was unfit to continue his duties. Accused admitted to the officer of the day that he had been drinking while on duty. The officer of the day, accordingly relieved him as officer of the guard.

On 12 March 1946 the accused was very drunk at a lecture given by the company commander to the assembled company. Accused was found in the rear of the room "spread out on a chair," intoxicated and mumbling and moaning. Another officer and an enlisted man removed him from the room.

4. Consideration has been given to a letter dated 15 July 1946 from Mr. Charles E. Weickhardt, Chief, Discharge Review Section, Veterans of Foreign Wars, Washington 5, D. C.

5. In view of all the circumstances including the nature of the sentence originally imposed by the court, I recommend that the dismissal be suspended during good behavior and that the forfeitures be remitted.

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

CM 314994

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 365, 6 December 1946.)

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

JAGK - CM 315024

3 OCT 1946

UNITED STATES	)	TWENTIETH AIR FORCE
v.	)	Trial by G.C.M., convened at Headquarters Twentieth Air Force, APO 234, c/o Postmaster, San Francisco, California, 3, 7 and 11 June 1946. Dishonorable discharge, total forfeitures and to be hanged by the neck until dead.
Private GARLON MICKLES (38510084), 2280th Quartermaster Truck Company.	)	

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

1. The record of trial in the case of the above-named soldier 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 92nd Article of War.

Specification: In that Private Garlon Mickles, 2280th Quartermaster Truck Company, did, at the Nurses Area, Air Transport Command, Guam, Marianas Islands, on or about 3 April 1946, forcibly and feloniously, against her will, have carnal knowledge of Miss Frances Gitnick, Civilian Employee, United Seamens' Service.

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

Specification: In that Private Garlon Mickles, ***, did, at the Nurses Area, Air Transport Command, Guam, Marianas Islands, on or about 3 April 1946, feloniously take, steal, and carry away one ladies wrist watch, value of more than $50.00, the property of Miss Frances Gitnick, Civilian Employee, United Seamens' Service.

CHARGE III: Violation of the 69th Article of War.

Specification: In that Private Garlon Mickles, ***, having been duly placed in confinement in the Harmon Field Stockade, APO 264, on or about 1 May 1946, did, at the Harmon Field Stockade, APO 264, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to Charges I and II and the specifications thereto, guilty to Charge III and the specification to this charge, however, this plea was changed to not guilty by the court. Evidence of two previous convictions by special courts-martial was considered. He was found guilty of all charges and specifications. All the members present at the time the vote was taken concurring, he was sentenced "to be dishonorably discharged from the service, to forfeit all pay and allowances due and to become due, and to be hanged by the neck until dead, at such time and place as the reviewing authorities may direct." The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

While en route to Japan as a civilian employee of the United Seamen's Service, Miss Frances Gitnick, on 1 April 1946, experienced transportation difficulties and was required to spend several days on the Island of Guam, Marianas Group. The authorities at Harmon Field provided her with quarters in the nurses' area near the station hospital (R. 10). The area, containing quonset huts, was protected by a high wire fence and by guards who were posted at the front and rear of the area (R. 21-30). At about 2230 hours on the night of 2 April 1946 Miss Gitnick retired to her assigned quarters and went to sleep. As had been her custom she retained on her arm a lady's gold wrist watch which she had worn for several years and which had a value of more than $50.00 (R. 10,72). At approximately 0200 in the morning of 3 April 1946, in response to a call from the charge of quarters, Captain Jimmie L. Keahey, ANC, went to the quarters of Miss Gitnick and found her in a semi-conscious state suffering from wounds on the head and face. Her right eye was swollen and black, her lips were swollen and she was vomiting. No other person was in her room when Captain Keahey found her and she could not "remember anything" (R. 68). The wrist watch which was on Miss Gitnick's arm when she retired was missing (R. 10). She was taken directly to the station hospital where Captain Leonard W. Charvet, of the hospital staff, made a complete physical examination of Miss Gitnick. The results of this examination were as follows:

> "*** Along the side of the head and about the right eye there was a tremendous bruise or hematoma, a cut with a great deal of extravasation of blood. The entire eye was swollen and shut. There was, in addition, a small laceration over the right side of the eye in the supra-arbital region. There was also a small laceration of the back of the head with a moderate bump or hematoma. There was a great deal of tenderness over the entire right side of the head along the eye and the temporal and parietal bones. Examination of her eyes revealed no direct trauma except for bruises. Her nose also was markedly swollen and discolored, with the discoloration extending over to the left side. The nose itself was shoved to the right side of the face and the

internal nares, or inside of the nose, was filled with a good deal of fresh bleeding as well as smeared and drying blood. An examination of her mouth showed the upper right incisor tooth was knocked off at the gum. The lower right incisor was knocked completely out with just a socket left, oozing fresh blood. Her lips were bruised and swollen. The nasopharynx and mouth likewise contained a great deal of fresh and old dark blood, and while I was examining her, the patient vomited a great deal of blood that had trickled down into the stomach while she was in an unconscious state. The immediate examination of the skull gave no evidence of depressed skull fractures, but because of the extreme tenderness, it seemed a clinical diagnosis should be made of the skull. X-rays were taken; the X-ray plates showed multiple fractures. There was a linear fracture in the frontal bone right, a fracture of the maxillary bone of the right side of the face, and the temporal bone of the skull had a stellate linear fracture which radiated out in three or four lines from the force of the blow. An examination of the heart, lungs and abdomen and extremities showed that the rest of the body was normal. An examination of the female organs revealed that the entrance to the vagina and surrounding area were smeared with what appeared to be vaginal contents; that material was not yet dry. The entrance to the vagina was red and irritated. The vagina contained no lacerations. The vagina and posterior fornix were filled with a mucoid-like discharge which had every appearance of being a mixture of semen and normal vaginal content. I took smears, both from the vagina itself and from outside of the vagina. All these smears contained human spermatazoa. The slides from the inside of the vagina showed sperm both living and dead. The slides from the outside showed only dead sperm. The patient was given emergency treatment and taken to the ward for further definitive care.

"Q. From your observation of the sexual organs at that time, can you state as to how long before the examination the intercourse had taken place?

"A. I can give a fairly good estimate but cannot state accurately. The length of viability of spermatazoa depends upon their inherent vitality and upon conditions in the vagina itself. However, from experience with past copulatory vaginal specimens one can say that in the vagina of a healthy type, the sperm will remain motile and viable for a period of perhaps from two to four hours. In addition, in this case, the vagina was still smeared with the contents of the vagina. This discharge was still in a -- shall we say -- not liquid, but in an undried state. These discharges normally, in a fastidious woman, are removed, but if allowed to remain will ordinarily dry within three to four hours. Therefore, I would say that intercourse had taken place within two to four hours prior to my examination." (R. 48-49)

On the afternoon of 1 May 1946 a colored soldier, identified as the accused, parked a weapons carrier in front of the store of Mr. Antonio B. Duenas, Barrigada Village, Guam, and entered the store carrying a wrist watch in his hand. He offered to sell the watch to some girls who were inside the store but Norberto James P. Muna, a native of the village, told him that "we don't need any watch" (R. 66). Accused started to enter a bedroom adjacent to the store and Mrs. Duenas called for her husband who armed himself with a rifle and ran the soldier out of the village. Mr. Duenas then drove the weapons carrier to Military Police headquarters and made a report of the incident. A trip ticket showing accused's name as the driver was found in the compartment of the weapons carrier (R. 67-70; Pros. Ex. 6). When Mr. Duenas returned to his store he found a wrist watch lying at the foot of a stairway (R. 63). This wrist watch was identified as being the property of Miss Gitnick (R. 10,17; Pros. Ex. 1). The weapons carrier had been returned at about 1530 hours and at about 1600 hours accused reported that the weapons carrier had been stolen (R. 16). He was taken into custody by First Lieutenant Stanley K. Haggerty, Headquarters and Headquarters Squadron, VI ASAC, and confined in the Harmon Field Stockade (R. 17). Late that evening, 1 May 1946, Captain Robert W. Fox, VI ASAC, the Provost Marshal, in company with Lieutenant Haggerty and several police investigators went to the stockade and interrogated accused. Both Captain Fox and Lieutenant Haggerty advised him of his rights regarding self-incrimination (R. 18). Captain Fox read to accused Article of War 24, explained the meaning of the Article and accused stated that he understood it. They showed accused the watch and also a hat he was alleged to have lost while in the village. After some hesitation accused requested to talk privately with Captain Fox. No force or threats were employed during the interrogation and no promises were made to accused (R. 32). Captain Fox was well acquainted with accused, had previously recommended him for the job at the depot as a Class A prisoner and he had done a good job. They went to a private room and the accused told the Captain "about the rape of the girl" (R. 37). The officers and police investigators thereupon took accused to the nurses' area and told him to "go entirely through the enactment himself. We would follow" (R. 32). Accused walked to the rear of the area and stopped at a point in the fence near a palm tree. Captain Fox described the subsequent events as follows:

> "A. Yes, that's true. So when he said there had been a board nailed to the tree, I asked the investigator on the outside to examine the tree to see if there were any nail holes in the tree. They took a flashlight and examined the tree and there were two nail holes. At that time I told them to wait a minute. I looked around and found a board on the inside and handed it over the fence. Mickles then climbed on the board and climbed over the fence. When he was inside I asked him to keep on going right through his motions and then asked him to point out where he had picked up the rock. He went to a point near the quonset and pointed to the ground. I picked up -- I can't remember whether I

picked up a rock or whether one of the investigators did -- and asked him if it was approximately the same size. He said it was. We put it in his hands. At that time he went directly to the hut where Miss Gitnick lived and went inside. When we were inside, Mickles walked directly to the room in which she had been attacked. After he got inside, we were inside the doorway, he pointed to the bed in which she was sleeping. I asked Mickles which end of the bed her head had been on; he pointed to the end of the bed nearest the wall. We then asked him to show us how he had struck the girl. He took the rock, held it over his head in two hands and said he had struck the girl on the left side of the head. I asked how many times he struck her. He said twice. I asked him to describe the girl. He said she was short and slim. I asked him the color of her hair; he said dark. I then asked Mickles where he had obtained the watch. He said he took it off her wrist. I asked him which wrist and he said the right wrist. He said he remembered definitely because she was lying on her back and he remembered her hand hanging partly over the edge of the bed and he took it off her wrist. I asked him how he had taken it off and he said he unsnapped it. He also said it had two elastic bands or black cloth or black string bands.

"Q. During any part of this procedure did you touch Mickles?

"A. No, I did not.

"Q. Did you indicate in any way what he was supposed to do?

"A. No, sir, I did not other than to ask questions.

"Q. You got out of the jeep and went in front of the crowd?

"A. Mickles went first, the rest of us followed." (R. 33-34)

The parties then returned to the stockade and Lieutenant Haggerty asked accused to make a written statement. A typewriter was procured and Lieutenant Haggerty again advised accused of his rights, telling him that he did not have to make a statement and that if he did it could be used for or against him. He prepared the statement as related to him by accused, after which it was signed by the accused in the presence of four witnesses and sworn to before Lieutenant Haggerty as investigating officer. The statement was received in evidence as Prosecution Exhibit 2 (R. 22,24). Briefly stated, the accused confessed that at about midnight on 2 April 1946 he went over the fence at the rear of the nurses' quarters, picked up a coral rock about the size of a grapefruit, tiptoed to the hut where a small rather thin and dark haired girl was sleeping, struck her on the head twice with the rock, lifted her gown and had intercourse with her. After about 15 minutes he removed a wrist watch from her right arm and left the area. On 1 May 1946 he went to Barrigada Village to sell the watch to the natives and when chased by one of them he dropped the watch. He denied that he was drunk on the night he assaulted the girl and asserted that he

had consumed no more than two or three beers (R. 24, Pros. Ex. 2).

Two enlisted men who were well acquainted with accused testified that they had seen him in possession of a lady's wrist watch similar to Prosecution Exhibit 1 (R. 42,45).

On 5 May 1946, at a roll call of prisoners in the stockade it was found that the accused was missing. He had not been authorized to leave. On 9 May 1946 he was returned to confinement (R. 25,36).

Captain Lloyd C. Sullivan, Jr., MC, 119th Station Hospital, a witness for the prosecution, testified that he had been trained for and specialized in neuropsychiatric work, that he had made an examination of accused on or about 20 May 1946 and in his opinion the soldier was sane. "He answered questions clearly, talked freely, his memory was intact, there were no hallucinations, delusions or illusions" (R. 52). The witness admitted on cross-examination that he had not followed TB Medical Bulletin 201 nor had he read the bulletin (R. 56).

On 7 June 1946 the court-martial hearing this case adjourned in order that a Board of Medical Officers might be appointed to determine the sanity of accused. Special Orders No. 155, Headquarters 20th Air Force, dated 8 June 1946, appointed Captain James E. Alexander, MC, Lieutenant Robert E. Switzer, MC (USN), and Captain Irving F. Enquist as members of the board. On 11 June 1946, when the court reconvened, Captain Enquist submitted the report of the board which was received in evidence as Prosecution Exhibit 8. He also submitted the results of a Kahn test which showed a negative finding and which was received in evidence as Prosecution Exhibit 9 (R. 75). The board found the accused to be a borderline mental defective, but

> "*** was sufficiently sound of mind at the time of the alleged wrongful act to be able to determine right from wrong and to determine the wrongful nature of the act. He is now of such sound mind as to be able to understand the proceedings of his trial and to intelligently cooperate in his defense" (Pros. Ex. 8).

4. <u>For the defense.</u>

No witnesses were presented by the defense, and the accused after being duly advised of his rights, elected to remain silent (R. 79). Counsel, however, offered in evidence three exhibits which were, without objection, made a part of the record. The first defense exhibit is a letter dated 3 June 1946, written by the accused to the President of the court-martial requesting that Lieutenant Colonel George Cechmanek, AC, be relieved as his defense counsel. Special orders were issued relieving Colonel Cechmanek and appointing another officer in his stead (R. 15). Defense Exhibit 2 is the written report of psychiatric examination of accused made on 20 May 1946 by Captain Claude Sullivan, MC. The defense procured a stipulation that "a neuropsychiatric consultation on Private Garlon Mickles conducted by

Captain William H. Fries reads identically with a neuropsychiatric consultation on Private Garlon Mickles conducted by Captain Lloyd C. Sullivan" (R. 61). Both the oral testimony of Captain Sullivan and his written report show the accused to have been legally sane at the time of the offense and the trial (R. 53, Def. Ex. 2).

Defense Exhibit No. 3, a photostatic copy of accused's AGD Form No. 20 Qualification Card, was introduced, as it was contended, to show that accused was illiterate (R. 60). Examination of this card reveals that the soldier's signature thereon is legible, that he is a qualified truck driver and this average Army General Classification Test score is shown to be approximately 60. An "X" mark appears in Column "8" after the word "Illiterate."

5.. The following well-established principles of law govern the evidentiary situation disclosed by the record:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> "The offense may be committed on a female of any age.
>
> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par. 148b, p.165).

> "Carnal knowledge of a woman who is asleep is without her consent, and is rape. And sexual intercourse with a female who has fainted and lost consciousness without consenting is rape" (52 C.J. 1023-1024).

> "Likewise, violence inflicted by the man on the woman, producing unconsciousness, or overcoming her mind by fright or brutal conduct, will render his carnal act rape, though she makes no resistance." (Roberson's Ky. Crim. Law and Procedure, 2d Ed., sec. 548, p. 752; 2 Bishop Crim. Law, sec. 1125(2)).

When Miss Gitnick fell asleep in her quarters on the night of 2 April 1946 her lady's Wittnauer wrist watch was on her arm. When she was found by the charge of quarters some three or four hours later, in a dazed and wounded condition that watch was missing. The external portions of her body showed conclusive evidence of violence. At least two soldiers who knew accused saw him in possession of a lady's watch of similar description at various times after the incident and on 1 May he attempted to sell this watch to some of the natives of nearby Barrigada Village. That the genital organs of this young woman had been penetrated and that such acts had been accomplished by great force and brutal injury is established beyond doubt by the medical examination conducted not more than four hours

after she fell asleep which revealed severe wounds on her face and head together with the presence of living and dead spermatozoa in her vagina. The foregoing, coupled with the voluntary confession of accused that he was the person who assaulted and penetrated the private parts of Miss Gitnick leave no element lacking necessary in establishing a most brutal offense of rape.

The court-martial in this case and the reviewing authority took every reasonable precaution to determine that accused was sane and thus legally responsible for his acts. He was examined by at least two qualified psychiatrists and the fact that their findings are couched in identical language is not prejudicial to accused. The report of the Board of Medical Officers, while stating that accused is of borderline mental capacity shows conslusively that he was sane both at the time of the offense and the trial. There is some evidence that the accused is illiterate, but illiteracy has never been considered as a defense to rape.

6. The charge sheet shows the accused to be 19 years of age and that he was inducted 29 June 1943 at Little Rock, Arkansas. Photostatic copy of his AGO Form #20, Soldiers Qualification Card, shows his date of birth as 8 September 1923, which, if correct, would render him 23 years old. The Staff Judge Advocate recites his age to be 19 years. His qualification card further shows him to be 5 feet 10 inches in height and weighing 119 pounds. Accused was born in Lee County, Arkansas, attended school to the eighth grade, and worked as a laborer in the cotton fields and as a truck driver. He is unmarried and claims no dependents.

7. 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. 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. Death or imprisonment for life is mandatory upon a conviction of rape in violation of Article of War 92.

Charles D. Silberg, Judge Advocate

Carlos E. McCafee, Judge Advocate

Elbert E. Abegglen, Judge Advocate

JAGK - CM 315024 1st Ind

WD, JAGO, Washington 25, D. C. OCT 29 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 Garlon Mickles, 38510084, 2280th 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 thereof. Accused, colored, was found guilty of the rape on Guam of a white woman, a civilian employee of the United Seamens' Service. The rape was a brutal one and I believe that the imposition of the death sentence is justified. I therefore recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to a letter dated 10 August 1946 from Neodia Robinson, 2202A Clark Avenue, St. Louis, Missouri, the mother of accused, and addressed to the President, inclosing a letter from her son and containing a plea for clemency in his behalf; memorandum of 19 August 1946 from Honorable Forrest C. Donnell, U.S. Senate, to The Adjutant General, and inclosing a copy of a letter from Neodia Robinson; two letters from Mr. Franklin H. Williams, Assistant Special Counsel, N.A.C.P., 20 W. 40th Street, New York, New York, addressed to The Judge Advocate General, and dated respectively 23 July and 13 August 1946, the latter inclosing two letters from soldiers stationed on the Island of Guam at the time of the offense, requesting commutation of the sentence to life and addressed to the President.

4. 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

6 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form of Ex action
4. Ltr fr Neodia Robinson, dtd 10 Aug 46
5. Memo fr Sen Forrest C. Donnell, dtd 19 Aug 46, w/incl
6. 2 ltrs fr Franklin H. Williams, dtd 23 July and 13 Aug 46, w/incls

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(G.C.M.O. 353. 21 November 1946.)

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

JAGH - CM 315055

29 NOV 1946

UNITED STATES v. Corporal JAMES NORMAN (34951904), 3664th Quartermaster Truck Company	)	UNITED STATES ARMY FORCES, WESTERN PACIFIC Trial by G.C.M., convened at Headquarters Base X, Army Forces, Western Pacific, APO 358, 16 May 1946. To be hanged by the neck until dead.

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

1. The record of trial in the case of the above-named soldier 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 the 92nd Article of War.

Specification: In that Corporal James Norman, 3664th Quartermaster Truck Company, did at APO 75 on or about 1 April 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premedation kill one Melitona Rarela, a human being by cutting her with a knife.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction by summary courts-martial was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On the night of 1 April 1946, the accused and Melitona Rarela, a Filipino girl, walked up to Guard Post #1 in the Walled City Area of Manila, where Private Carl W. Kelly, the guard, and Benjamin Sunga, a

Filipino, known as Billy Boy, were having a conversation (R 52). The accused asked Kelly where would be a good place to "pom pom" (have sexual intercourse with) the girl. Billy Boy then spoke to the girl in a foreign language, after which all four walked up to the old aquarium in the Walled City Area (R 55-56). They entered a room on the top of the aquarium and there met Private Joe Nelson, who was also known as John, and a Filipino named Jose de la Rosa (R 56; Pros Ex B). The room was used for living quarters by Billy Boy and Jose. Kelly received permission from the accused to have sexual intercourse with the girl and after engaging her thus for about ten minutes came out of the room, whereupon the accused went into the room and started to have sexual intercourse with her (R 25). Kelly and Nelson had a drink of whiskey and then Kelly handed the bottle to the accused, who was on the bed with the girl (R 25). The accused took a drink after which Kelly left the room and returned to his post (R 25). The two Filipinos left the room and the accused continued to engage the girl for about an hour. After a while the girl begged the accused to get off of her. When the accused would not let her up, she started to cry, whereupon the accused hit her and said "woman stop." The accused hit her a second time and Nelson then went downstairs (R 26). Shortly thereafter the accused, holding the girl by the arm, came down the stairs. Nelson followed the accused and the girl at a distance of about five feet and said to the accused, "How about the woman?" The accused replied that, "When he got through with her she wouldn't be no good to him nor anybody else" (R 26). He took her into the tunnel under the aquarium and put her down on the floor and again started to have sexual intercourse with her (R 27). Nelson was standing about five or six feet away. The girl asked the accused to let her up to "make water." She got up and started to go away when the accused said, "No, don't go away woman" (R 27). While the girl was in the act of urinating, the accused pulled a knife out of his pocket and struck the girl, who fell and started to scream (R 27). The accused struck her again and she started bleeding (R 28). "He then jumped back on her to start pom pom" (R 28). This lasted for ten or fifteen minutes, after which the accused stabbed the girl, in the neck and chest, and then cut out her private organs and placed them on her stomach (R 28). He turned the girl over and repeatedly stabbed her in the back. The accused then got up and said to Nelson, "Lets go." While walking away from the body the accused remarked, "I told you when I git through with her she wouldn't be no good to you nor anybody else" (R 28). Nelson further testified that accused had been drinking "pretty hard" but he was not drunk (R 29).

On 2 April 1946, Doctor Mariano B. Lara, Chief Medical Examiner of the Manila City Police, performed an autopsy on the body and identified a photograph of the deceased as being the same woman upon whom the autopsy was performed (R 6-7). He found twenty wounds all over the body, the most significant being "a trunk-splitting incision from the base of the neck down" (R 7). There was "an extripation of the external genital including the whole hairy portion of the pubic region" (R 7). In the

opinion of the medical examiner, the deceased died as a result of shock from the many multiple stab wounds, and that the "trunk-splitting incision" was done after she was dead (R 9-10; Pros Ex B).

On 15 April 1946, the accused was interrogated by John S. Walls, Special Agent, CID, Homicide Bureau of Army Forces, Western Pacific Headquarters. The accused made a sworn written statement to Agent Walls (R 49; Pros Ex C), as follows:

> "I next met her on pay night, April 1, 1946, down at Walled City, near the TC Camp. I owed a little store near my camp, a lot of money (P41.00). When I got my pay, I paid them P27.00. The woman in the store gave me a quart of whiskey which I did not pay for. I knew some men in the Walled City and I went there to see them. While there, I met this woman. The whiskey was all gone when I met her. I had drank practically the whole bottle and I was pretty drunk. I asked her where she was going. She made some reply that I did not understand. I asked her if I could pom pom her and she said yes. She said she will take me to her house. I came out of the camp at 3498 and walked down to where there was a guard whom I now know as KELLY. She stopped and talked to KELLY. She was going to take me to a house. KELLY told us where the house was at. The girl and I went into the house. KELLY came in right behind us. A Pvt. NELSON from my company was sitting outside the house. She asked a Filipino about the room and he took us upstairs. KELLY came and he asked me to let him pom pom her. I agreed. Then he left and I started to pom pom the girl. She hit me and pushed me off and said "get out". She ran downstairs and I followed behind her. NELSON was at the bottom of the stairs. I grabbed her in the arm and she jerked loose. I went to grab her as she started to go towards another house. She hit me and I hit her and she fell down. NELSON was there at this time. I started to pom pom her again. I used rubbers when I pom pom the girl. Then she and I got to fight about her running off. I had a GI knife, a pocket knife with a black handle. I took it out of my pocket and opened it up. I hit her again and she wanted to hit me back, so I cut her. I don't remember where the first place was that I cut her. I was angry and I kept cutting her. I was out of my head and I don't remember how I cut her. I don't remember what I did while she was dying. I did not know I had killed her. NELSON was there all the time, and he watched me cut the girl. NELSON and I left together and left the girl lying on the floor. I forgot what I told NELSON as we left. I don't remember when I got back to camp. I threw the knife away but I do not know where. This is all I have to say."

Prior to the introduction into evidence of this statement, which was objected to by the defense, the accused elected to be sworn, took the stand and testified with respect to the voluntary nature of his confession. He

stated that he told Agent Walls of the CID that he did not wish to make a statement. Agent Walls then told the accused if he did not make a statement he would probably be hung (R 44). Further, that Walls said he would do all he could to help accused out; that accused had no chance of winning and the best thing for him to do was to make a statement, which would probably save his life (R 43-46).

Agent Walls testified that the statement was taken on the 15th of April 1946 at the Homicide Bureau of the Detective Division of the Manila Police Department. Prior to making the confession, the accused was duly warned of his rights. He was not threatened in any way nor were any promises made to him. Agent Walls stated that he had talked to the accused in the afternoon of the 15th of April, at which time accused admitted killing the deceased but could not remember all of the details. The accused was returned to his cell to think it over and that evening Agent Walls again saw him, at which time he was again warned of his rights under the 24th Article of War. The statement was then taken in the presence of a civilian detective, two other CID agents and two military police officers (R 36-42).

Private Kelly identified a picture of the deceased (R 52; Pros Ex A) and stated that she was the same woman he saw in the company of the accused in the Walled City Area on the night of 1 April 1946. He also identified the accused by a gold tooth in the front of his mouth and burns on his hands (R 55). Kelly admitted having intercourse with the deceased on 1 April 1946.

Francisco Madrid, photographer, CID laboratory, Army Forces, Western Pacific Headquarters, saw the body of the deceased in the aquarium and took the photograph (Pros Ex A) at the City of Manila morgue on 2 April 1946 (R 14).

Gregorio Leonardo, of 1121 Singalong, Manila, testified that the deceased lived in his house and that her name was Melitona Rarela. He last saw the deceased alive on 1 April 1946, when she left the house to go to a show (R 19).

4. Technician Fifth Grade Earl Davis, a member of accused's company, was called as a witness for the defense and testified that he saw the accused at about nine o'clock on the night of 1 April 1946 in a tent in the company area. The accused and five or six other soldiers were drinking whiskey out of a quart bottle, which was only partially full. He further testified that the accused was not drunk at that time (R 61).

The accused, after having been duly warned of his rights as a witness, elected to remain silent (R 63-A).

5. The allied papers attached to the record of trial show that on 9 May 1946, the accused was examined by a Board of Medical Officers which found as follows:

"a. The diagnosis is: No disease found.

"b. That the soldier at the time of the alleged offense was so far free from mental defect, disease or derangement so as to be able concerning the particular action charged to distinguish right from wrong. He was so far free from mental defect, disease or derangement so as to be able concerning the actions charged to adhere to the right. He is now so far free from mental defects, disease or derangement so as to be able to intelligently cooperate in his defense."

The allied papers indicate that in the jurisdiction where accused was tried (Headquarters, United States Army Forces Western Pacific), it was customary to conduct pre-trial sanity examinations in cases of this type. No question relative to accused's mental responsibility at the time he committed the offense was raised at the trial. However, in the court's findings of guilty of the offense alleged, there were implied included findings that accused was sane at the time of the commission of the offense. Based upon all the evidence and the medical officers' report, above, the Board is of the opinion that the court was fully justified in so finding.

As to the voluntary nature of accused confession there is a conflict in the testimony introduced relative thereto. The agent who took the confession stated, under oath, that accused was duly warned of his rights as provided by Article of War 24, that he was not threatened in any way nor were any promises made to him and that the confession was entirely voluntary on the part of the accused. On the other hand, the accused, who elected to be sworn as a witness for the specific purpose of testifying as to the nature in which the agent conducted his investigation at the time he made the statements, testified that he told the agent that he did not wish to make a statement, whereupon, he was told that if he did not make a statement he would probably be hung. He further testified that the agent promised to do all he could to help accused out and that the best thing for accused to do was to make a statement which would probably save his life.

After hearing the testimony of both witnesses the law member overruled the defense's objection to the introduction of the confession on the ground that it was involuntarily made, and admitted it into evidence as Prosecution Exhibit C.

As to his action on this question, the Board feels that since the law member was in a position to observe the demeanor of the two witnesses, to evaluate the relative weight to be given to their conflicting statements, his ruling should not be disturbed.

There is some evidence which shows that the accused had been drinking prior of the offense. However, both Private Nelson and Corporal Davis testified that accused was not drunk on the evening the crime was com-

mitted. The accused, in his confession, said that he was "pretty drunk" but then proceeded to relate in detail the events which transpired just prior to and during the commission of the crime.

It is a general rule of law that voluntary intoxication 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 crime (MCM, 1928, par 126a, p 136; Hopt v. Utah, 104 U.S. 631, 26 L.Ed. 873; Director of Public, Prosecutions v. Beard, (1920) A.C. 479, 12 ALR 846). Evidence of intoxication falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime charged and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act. It was for the court in the present case to determine the degree of accused's intoxication on all the evidence before it. There was substantial evidence to support a finding that accused at the time of the offense was capable of forming the purpose and intent to kill, and that he intentionally killed the deceased. The evidence does not disclose the existance of facts which would justify the Board in disturbing that finding.

6. The accused is charged with the murder of Melitona Rarela. The Specification alleges that the accused:

> "* * * did at APO 75 on or about 1 April 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premedation kill one Melitona Rarela, a human being by cutting her with a knife."

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought." The word "unlawful" as used in this definition means "without legal justification or excuse." A justifiable homicide is "a homicide done in the proper performance of a legal duty." An excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner or which is done in self-defense or a sudden affray * * *." The definition of murder requires that the death of the victim "* * * take place within a year and a day of the act or omission that caused it * * *" (par 148a, MCM, 1928).

The elements of proof in this case are as follows:

> "(a) That the accused killed Melitona Rarela, as alleged; that she 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."

All the elements of murder, as listed above, have been proved beyond any doubt. Not only does the evidence conclusively show that the accused

committed the crime of which he was charged but also that it was perpetrated in a most brutal manner. The record is entirely devoid of any extenuating facts.

7. Accused is 23 years of age and was inducted on 7 March 1944 at Fort Benning, Georgia, with no prior service, to serve for the duration of the war and six months.

In the allied papers accompanying the record is a report of a Board of Medical Officers which includes the following relative to accused's personal history:

> He is single and comes from an average colored family from Georgia. His father and mother are both living but separated in 1940 primarily because the father was "running around" with other women. Accused finished the fourth grade in school when he was 15 years of age. He was "pretty thick-headed" and missed school usually because he had to work on the farm.
>
> At the age of fifteen he began driving a truck for a coal yard. After six months he quit because he considered the coal dust injurious to his health. Later he worked as a truck driver in Norfolk, Virginia for one year and subsequently did farm work. Between 1941 and 1944 he worked as a driver for a mason contractor.
>
> He began drinking at the age of sixteen and gradually increased his amount of alcohol. He now, according to his statement, drinks whenever he can get it, usually up to a pint at a time. He is able to drink his share of liquor without becoming drunk sooner or to a greater extent then the others in his company. He states that he has always been able to handle himself while under the influence of liquor.
>
> He denies any conflict with the law in civilian life except for school truancy which was necessitated by economic conditions at home. He gives a history of good hetero-sexual adjustment. His military adjustment has been good with but one summary court-martial against him for driving in excess of the speed limit.

8. The Board has considered a letter dated 3 September 1946, addressed to the President of the United States by Sadie Norman and Silas Norman, parents of the accused, and accompanying affidavits of Sadie Norman, Silas Norman, W. L. Lucas and Joe Hill, all of Scottdale, DeKalb County, Georgia, asking clemency on behalf of the accused.

9. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the 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 to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92.

[signature], Judge Advocate

Waldemar A. Solf, Judge Advocate

[signature], Judge Advocate

JAGH CM 315055 1st Ind

WD, JAGO, Washington 25, D. C. JAN 16 1947

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 Corporal James Norman (34951904), 3664th 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 thereof.

3. Accused, a colored soldier, was found guilty of the murder of a Filipino woman, a prostitute, in the Walled City Area of Manila, Philippine Islands. The offense was a heinous one. I recommend that the sentence be confirmed and carried into execution.

4. Consideration has been given to a letter, dated 3 September 1946, from Silas Norman and Sadie Norman, Post Office Box 166, Scottdale, Georgia, the parents of accused, addressed to the President, inclosing their affidavits, as well as affidavits from Joe Hill and W. L. Lucas.

5. 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. Dft ltr sig USW
3. Form of action

(G.C.M.O. 15, 28 January 1947.)

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

JAGK - CM 315080

27 AUG 1946

UNITED STATES	THIRD INFANTRY DIVISION
v.	Trial by G.C.M., convened at Bad Wildungen, Germany, 1 March 1946. To be hanged by the neck until dead.
Private First Class WILLIAM H. PARKER (39383034), Company K, 15th Infantry.	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class William H. Parker, Company K, 15th Infantry, did, at Giessen, Germany, on or about 4 September 1945, forcibly and feloniously, against her will, have carnal knowledge of Edith Riess, a female under 16 years of age.

Specification 2: In that Private First Class William H. Parker, Company K, 15th Infantry, did, in the vicinity of Gleiberg, Germany, on or about 4 September 1945, forcibly and feloniously, against her will, have carnal knowledge of Edith Riess, a female under 16 years of age.

He pleaded not guilty to and, three-fourths of the members present at the time the vote was taken concurring, was found guilty of the Charge and both specifications. No evidence of previous convictions was introduced. All the members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial under the provisions of Article of War 48 with the recommendation that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life.

3. The evidence for the prosecution was as follows:

Edith Riess, a 12-year old German girl residing with her mother at Rodheimerstrasse 47, Giessen, Germany, testified that on the evening of 4 September 1945 she and her girl friend Gertrud Peppler were sitting on a wall in front of her aunt's house when an American soldier came along the street and asked them "where a certain girl lived at Rodheimerstrasse 54" (R. 6,7). The soldier "had on a field jacket and four or five stripes on his sleeve." As he approached them Edith noticed that he appeared to have small feet (R. 7) and she "believed" that he had a mustache (R. 14). The two girls joined the soldier and walked a short distance, but he stated that two girls "were not good" and Gertrud Peppler, the younger of the girls, agreed to remain at a corner of the street while Edith "showed" the soldier to the street number he was seeking (R. 7,18). Near the end of the street a woman named Josefa Ofenloch observed Edith and the soldier and asked Edith where she was going so late at night. Edith replied that she only wanted to show the soldier a house. The house number as described by the soldier was not located and Edith told him that there were no more houses. He said, "Yes there are some more"and pointed to a "little garden house." (R. 8). The soldier led Edith across some open ground and came to the edge of a bomb crater. The soldier then gave the girl two packages of cigarettes telling her that he was giving them to her for showing him the place. He went into the bomb crater and insisted that she go with him. She hesitated, stating that there was no house there, but he replied, "Yes, there is a house, it is just on the other side" (R. 8). The soldier then forcibly took her into the crater, struck her in the face and compelled her to lie down. She screamed and he forced weeds into her mouth. He then took off his pants, removed her underclothes and "then he pulled out his penis and put it in me. First he tried with his finger" (R. 9). She pushed him away but he kept coming back and her face hurt so badly she was afraid he would hit her again. She could not remember how long he stayed on top of her but stated that it could have been half an hour, an hour or three quarters of an hour. When he had finished he said, "Now, that is good." (R. 10) The soldier then led her by the hand out of the bomb crater and into a farmyard. She heard her mother calling for her but the soldier threatened her and she kept quiet. He gave her an orange and led her across a railroad track and into a field near a village called Gleiburg, Germany. Edith Riess testified that the following occurred in this field:

"A. We came to an apple tree, and he said he wanted to see if there were still any apples on it.
Q. Continue.

A. He said there were no apples there and he wanted to rest for a little while, then he told me to sit down too, and then he did it again.
Q. Tell us in detail what he did again.
A. He pulled down my pants -- pulled off my pants again and took out his penis and put it in me again.
Q. Did you do anything to defend yourself?
A. Yes.
Q. What did you do?
A. He tried to put his finger in me but I pushed away his hand.
Q. What else did you do to defend yourself?
A. I kept trying to get away from him, but I didn't succeed.
Q. Did you cry out?
A. I yelled just a little bit. I was afraid he would hit me again." (R. 11)

After this occurrence the soldier looked at his watch, said it was 11:30 and then took the girl to a barn near a village which she later learned was Rodheimer. The soldier left her alone for a few minutes and returned with two blankets. The soldier and Edith spent the remainder of the night in this barn. She stated that he slept but she could not sleep for pains in her face (R. 12). The following morning the soldier left telling Edith to wait and he would bring her something to eat, but she went down a street and met Frau Dinter who put her on a train and took her to her home in Giessen. At about 10:30 her mother took her to Dr. Ploch (R. 13). Edith Riess identified the accused as the soldier who had committed the afore-mentioned acts with her and although she thought he had a mustache yet his face looked the same. On cross-examination she admitted she had at first failed to identify accused in a line of soldiers but after she had been told that he might have shaved off his mustache she identified him and was positive accused was the man (R. 17).

Gertrud Peppler, the girl who was with Edith Riess on Rodheimerstrasse at about 8:30 on the evening of 4 September 1945 when the soldier came along, positively identified accused as the person with whom Edith went away, however, she stated that the soldier wanted to locate house No. 45 and that he was wearing a shirt but no field jacket (R. 19).

Josepha Ofenloch, Rodheimerstrasse 49, Giessen, Germany, testified that shortly after 2100 on the evening of 4 September 1945 she saw Edith Riess and an American soldier with a mustache going along the street. The soldier had a jacket "hanging over his shoulder." She stated that she was sure accused was that soldier (R. 24), however, on cross-examination she admitted that she had previously "picked out" another soldier (R. 24).

Helena Riess, housewife, Rodheimerstrasse 47, the mother of Edith Riess, testified that her daughter was approximately 1 meter, 50 centimeters in height and weighed 80 or 90 pounds; that when she found Edith on the morning of 5 September 1946 her face was swollen and covered with blood and that she was unable to open one eye (R. 26).

Dr. Fritz Herman Ploch, 21 Goethe Strasse, Giessen, Germany, testified that at about 11:30 a.m. on 5 September 1945 he made a physical examination of Edith Riess. He found the following:

> "The child was about 150 centimeters tall. In the hair small particles of leaves and hay were. A pain, without any certain results, behind the left ear, most likely a small blood clot. Below each eye discoloration as large as the fingertips and shaped in a half moon. Both eyelids were swollen and painful. Nose is broad, the root of the nose and the back of the nose painful. Broken nose could not be identified. Fresh blood cuts on both cheeks, on the nose and on either side of the nose. Also on the forehead and on the chin. A trace of blood going from the nose diagonally across the left cheek. A blood clot about as big as a one-mark piece between the eyes. Above the right eye two small scratches about as big as the head of a pin. The mouth cannot be opened altogether since there is pain in the right joint of the jaw. Nothing can be noted on teeth or tongue. Scratches on the left side of the face and on the neck; her dress was torn in several places, mostly in the top part and the skirt was covered with blood. Traces of blood were on both hands. On the last joint of the first finger of the right hand a wound about a centimeter long, clean edges.
>
> Q. What was the result of your examination of her private parts?
> A. The large lips were swollen and painful. The whole entrance is red and swollen. The tissues from the opening towards the back are torn about two and a half centimeters. The edges are bloody and slimy. Because of the small size of the parts an exact examination was not possible in the home of this girl. I therefore sent her to the hospital.
> Q. As a result of this examination what is your opinion regarding the fact of whether she had had intercourse recently or not?
> A. It is certain that a great force had been exerted on the sex organs.
> Q. Are you of the opinion that some object actually penetrated the opening?
> A. At the large lips, yes.

Q. You examined also the small lips of the vagina?
A. Yes; they were red and swollen.
Q. Would it have been possible for the lips to have been in such condition without penetration?
A. I can't say exactly since the swelling could have been caused by something just pushing in front of it and not penetrating it.
Q. Was the opening on this girl normal for a girl of her size?
A. Yes, for her age.
Q. And was the opening large enough to have permitted entry of a normal sized penis?
A. No.
Q. Would it have been possible for the entrance of just the head of a normal sized penis into the large lips only?
A. In the larger lips, yes.
Q. In your opinion was some object actually inside those large lips?
A. I believe so.
Q. How recently before the examination that you made?
A. That is hard to say. The tear in the tissues between the entrance and theback part was fresh.
Q. Was it a matter of hours, days or a week?
A. Hours." (R. 28,29).

For the defense.

Captain Edward S. Holcomb, MC, Third Medical Battalion, Division Neuropsychiatrist, a witness for the defense, testified that he had examined the accused and that he found him to have subnormal intelligence, psychopathic trends, and alcoholism. He knew right from wrong and had the ability to adhere to the right (R. 32).

The defense counsel then offered the following stipulation:

"DC: We have agreed on a stipulation that I would like to read orally to the court. The reason I am not giving it here is because it has some stuff that I don't think is admissible in its present form. It is hereby agreed by and between the trial judge advocate, defense counsel and the accused that if Stanley W. Stephenson, Jr., Captain, CE, were present in court he would testify as follows: On the 5th of September, 1945, at 1900 hours, about, the third platoon of the company was lined up under my orders for an identification check by the eleven year old girl Edith Riess of Giessen, Germany, who was reported to have been

raped and forced to spend the night in the platoon area. This was a check list formation with three men being absent. No one present was identified by the girl. On September 6, 1945, at about 1800 hours, a second formation was ordered with the men who were missing from the first formation being present. Edith Riess failed to identify anyone at this formation at the first inspection. A little girl who was with Edith Riess just prior to the raping, upon having been warned that the man may have shaved his mustache, immediately identified William H. Parker, 39383034, as the man who had accosted the two girls in the town of Giessen between the hours of 1900 and 2000 hours on the evening of 4 September 1945, and who had gone away with Edith Riess. Parker was then taken alone before Edith Riess by the undersigned. She was asked if she could identify Parker without his mustache as the man who had raped her. She said that was he. In my opinion the identification was positive and unquestionable. Is that agreed?

"TJA: Yes.

"DC: The defense has no other witnesses at this time.

"LM: Just a minute. Subject to objection by any member of the court, I rule that the stipulation will be accepted. Do you join in this stipulation that has just been read, Parker?

"ACCUSED: Yes, sir. I was in this line twice when this girl came by and she didn't identify me." (R. 33,34)

The law member explained to accused his testimonial rights and he elected to have his defense counsel read an unsworn statement. Briefly summarized, the statement recites that accused was inducted into the Army in 1942, had been overseas three years, he had 98 points when the war ended and he had made application to be relieved from duty but the application had been rejected; his father and mother had died while he had been in the Army and his two older brothers had been killed in the Pacific. He did not know why the girl had "picked" on him as the one who hurt her and thought if he had been allowed to go home he would not be in trouble now. He did not remember ever seeing the girl until she came to his company and he had signed some papers without knowledge of their contents because the Criminal Investigation Division man told him he would be hanged by two o'clock if he refused. He had no education beyond the third grade and could not read or write well and was asking his defense counsel to make the statement instead of being a witness. (R. 36).

No further material evidence was presented by either prosecution or defense.

4. "Rape is the unlawful carnal knowledge of a woman by force and without her consent.

"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

* * *

"Proof. - (a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent." (MCM, 1928, par. 148b, p. 165) (Underscoring supplied.)

"Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceased resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape. *** Nor is it necessary that there should be force enough to create 'reasonable apprehension of death.' But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance of all resistance." (1 Wharton's Criminal Law, 12th Ed., sec. 701, pp. 942-943) (Underscoring supplied.)

5. A reasonable evaluation of the evidence in this case leads to no other conclusion than that the girl Edith Riess was on the evening of 4 September 1945 assaulted and overpowered by a soldier and that the soldier, by the use of force and by putting her in fear, on two occasions, penetrated at least the outer portions of her vagina. The evidence concerning the second offense, occurring under the apple tree, if taken alone would not appear conclusive that there was no consent, however, it must be remembered that shortly before this the girl had been assaulted and raped. Considering her age and ability to resist, it would be reasonably expected that she would offer less resistance on this occasion. If the girl's testimony were wholly rejected yet the sworn statement of Dr. Ploch as to the physical condition of the girl on 5 September 1945 would lead any reasonable person to believe that the girl had recently been raped. Her bruised and scarred body and the condition of her private parts would not appear consistent with any theory that she had voluntarily entered into the acts of which she complained. Then, the condition of her private parts establish beyond any reasonable doubt that there was forcible penetration, even though as the doctor stated such penetration could not extend to her inner opening or tube. Evidence must be weighed in the light of common sense and human experience and there is no basis for any belief that this 12-year old girl, for any

ulterior motive or even by being influenced by her superiors, would or could create out of her imagination such sordid and offensive conduct as is shown herein, making herself the victim of the offenses. As to minor details her testimony differs in some respects with that of her friend Gertrud Peppler. Edith stated that the soldier wore a field jacket with stripes on his sleeve. The Peppler girl stated he wore a shirt but no jacket. Josepha Openloch stated that the soldier had a jacket hanging over his shoulder. Both Edith Riess and Josepha Openloch testified the soldier had a mustache. While these three witnesses identified the accused as the soldier who was with the girl on the evening in question such discrepancies in their testimony as has been noted only tend to add weight to the credibility of their statements. The soldier could have readily removed any jacket he was wearing and could have also shaved off his mustache to conceal his identity. It will be noted that the offense occurred on the night of 4 September 1945 and that trial was had on 1 March 1946.

On 5 September 1945 as is shown by stipulation offered by the defense she failed to identify the accused Parker (without his mustache) as the person who had attacked her. However, on the following day, 6 September 1945 she did identify accused and it was agreed that Captain Stephenson, accused's company commander, would state if he were present in court that in his opinion the identification was positive and unquestionable. The admissibility of the Captain's opinion as to the identification might under other circumstances, be challenged but the defense offered the stipulation, the accused himself concurred therein, and we do not consider any prejudicial error resulted thereby. Nor was accused's privilege against self-incrimination violated by compelling him to exhibit himself in the presence of Edith on 6 September 1945 for the purpose of identification (Vol. 1 Wharton's Criminal Evidence, Sec. 266, p. 328).

6. The Charge Sheet shows that the accused is 26 years of age and was inducted on 7 January 1942.

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

confirmation thereof. Death or imprisonment for life is mandatory upon a conviction of rape in violation of Article of War 92.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Schroyer, Judge Advocate

JAGK - CM 315080 1st Ind

WD, JAGO, Washington 25, D. C. SEP 6 1946

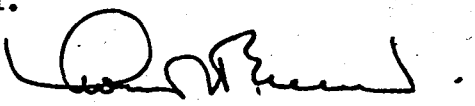
TO: The Under Secretary of War

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 First Class William H. Parker (39383034), Company K, 15th Infantry.

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 thereof. I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for 25 years, and that a U. S. penitentiary be designated as the place of confinement.

3. Consideration has been given to the following communications in behalf of the accused, which accompany the record of trial: Letter from Honorable Charles R. Savage, House of Representatives, dated August 6, 1946, addressed to The Judge Advocate General; letter from Mr. Savage dated March 28, 1946, addressed to The Adjutant General; letter from Mrs. A. G. Parker, aunt of accused, dated July 6, 1946, addressed to the President; letter from Mrs. S. M. Dunbar, aunt of accused, dated July 6, 1946, addressed to the President; and letter from Miss Rachel Parker, sister of accused, dated July 1, 1946, addressed to the President.

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 action meet with approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

8 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form of Ex action
4. Ltr fr Hon Charles R. Savage, 6 Aug 1946 to TJAG
5. Ltr fr Hon Charles R. Savage, 28 March 1946 to TAG
6. Ltr fr Mrs. A.G. Parker
7. Ltr fr Mrs. S. M. Dunbar
8. Ltr fr Miss Rachel Parker

(G.C.M.O. 296, 7 October 1946.)

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

JAGK - CM 315105

26 SEP 1946

UNITED STATES	)	SEATTLE PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Fort Lawton, Washington, 14 and 21 June 1946. Dismissal.
	)	
First Lieutenant HARRISON P. ROCHON (O-1593809), Transportation Corps.	)	

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

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1. The Board of Review has examined the record of trial in the case of the above named officer 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 95th Article of War.

Specification: In that First Lieutenant Harrison P. Rochon, Transportation Corps, 447th Port Company, Camp George Jordan, Washington, was, at Seattle, Washington, on or about 2 May 1946, in a public place, to wit: The Boston Cafe, disorderly while in uniform.

CHARGE II: (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. No evidence of any previous conviction 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 "only so much of the sentence as provides for dismissal from the service" and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Mrs. Margaret Nickerson testified that on the night of 1 May and the early morning of 2 May 1946 she was on duty as a waitress in the Boston Cafe, Seattle, Washington. About 12:30 a.m. on 2 May 1946, the accused and his brother entered the cafe and sat down in one of the booths provided for customers. Mrs. Ray Lambert and Miss Dolores Knight, also customers of

the cafe, were sitting in the next booth, directly in back of accused. The partition between the two booths was about shoulder high. At the time there were about seven other customers in the cafe, all of them being enlisted members of the armed services. Witness noticed nothing unusual about accused's actions when he first came into the cafe. Accused "had the uniform on." Accused called witness to his booth and asked her if Mrs. Lambert and Miss Knight "had any boy friends" to which she replied in the affirmative and said that the "boy friends" would come to the cafe later. Accused talked to the two women and they asked him several times to leave them alone and informed him that they did not want to be bothered with him. Accused said to Miss Knight, "I'll bet you have a mother at home who is a whore just like you." Miss Knight then took a glass off the table, broke it, jumped out of the booth, and told accused, "You can take that back right now. No one is going to talk to me like that." Accused also jumped out of his booth. He had a jackknife in his hand, with both blades open and showing. He held the knife at his side, but at no time did he make an effort to attack Miss Knight with it. Witness did not know whether or not Miss Knight had part of the broken glass in her hand at this time. Witness then went "next door" to call the police. When accused's argument with Miss Knight had come to an end he walked up and down the cafe, brandishing his knife in front of all the customers and saying that "there wasn't a man in the house big enough or man enough to throw him out over a bitch like that." Accused's brother tried to get the accused to sit down, which accused would not do, and also tried to get him to leave the cafe. Accused did not leave until the city police came in and took him away. The whole incident lasted ten or fifteen minutes. Accused "moved just like any ordinary person would move. He seemed to know what he was doing ***. He didn't stagger at any time" (R. 23-41).

Miss Ellen Timerman, cashier and waitress at the Boston Cafe, testified that she first noticed accused when she heard Mrs. Lambert ask him to turn around and mind his own business. Witness then went to accused's booth and asked him not to bother the women. At this time she noticed an open knife grasped in accused's hand, the blade being five or six inches long. Later, while behind the counter where she worked, she heard a glass break and, looking up, saw accused and Miss Knight jump out of their respective booths and face each other. Accused's brother was between the two and said, "they had better get out of there." Accused came up to the cashier and paid the check and while he was doing that he walked back and forth two or three times and "just asked anyone in the place to do anything or say anything to stop him." Accused and his brother were taken into custody just as they stepped out of the cafe. Witness would say that accused "had been drinking, but he wasn't drunk or anything." He was wearing the bars of a lieutenant (R. 41-52).

Mrs. Marilyn Lambert testified that while she and Miss Knight were seated in a booth in the Boston Cafe about midnight or the early morning of 2 May 1946, accused and a civilian (accused's brother) entered the cafe

and sat down in a booth next to theirs. Accused and his brother started talking to the two women. Mrs. Lambert and Miss Knight told the accused and his brother several times to "turn around" and leave them alone. Accused told them that he did not care much about the girls in the United States and wished he was back overseas, that they were "very homely" and that their mothers were about the same and called them "a couple of whores." Miss knight then broke her drinking glass, threw the part remaining in her hand at the accused, and came out of the booth, telling the accused "he had better mind his own business." Accused stood up about the same time Miss Knight did and had an open knife in his hand. An argument ensued between accused and Miss Knight, during which the accused's brother was trying to get him to leave. Accused finally went up to the cashier to pay the check, the open knife still in his hand, turned around and said, "there wasn't a person in the place could do anything about it," and was "backing out" when the police came. Witness did not hear the accused talking in any other language except English, heard no remarks as to the accused being colored, and the only remark she made which might have angered accused was to the effect that she "didn't think very much of officers and wouldn't go out with them." Accused made no effort to cut Miss Knight with the knife (R. 53-66).

Miss Dolores Knight testified that she and Mrs. Lambert had been in the Boston Cafe about twenty-five minutes when accused and his brother arrived and sat down in the booth next to theirs. After accused had talked to the waitress he attempted to strike up a conversation with the two women. They paid no attention to him until he remarked how homely they were and that he thought their mothers were too. They then told accused to "turn around and mind his own business. Thereafter accused's brother came up to their booth and told them not to pay any attention to accused because he had been drinking. Later, accused said that witness and Mrs. Lambert were "only a couple of whores." Witness and accused then got out of their respective booths, both at approximately the same time. As accused "went to leave" he turned to his brother and said, "We don't have to worry about that bitch." Witness saw an open knife in his hand at that time, broke her drinking glass on thetable, called the accused "a dirty son of a bitch," and threw the pieces of the glass remain-in her hand at him. Accused, addressing the patrons of the cafe, said, "There isn't any man who will come forward and fight me man to man." A sailor stepped forward, but witness warned him to keep away. Accused was "up by the door" when the police came. There were about twenty-three or twenty-four people in the cafe during this occurrence. Witness did not hear accused conversing in any language other than English and made no remarks about his race. Accused made no effort to cut witness (R. 73-87).

William Lange, a Seattle police officer, testified that at approximately 12:50 a.m. on 2 May 1946 he went to the Boston Cafe in response to a call. He saw the accused "just inside" the cafe. Accused admitted he had a knife and witness took one from him. Accused appeared to be normal, "although he had been drinking," and was "not drunk enough to stagger."

He was "mad" and his brother was trying to calm him down (R. 66-67). Steven Stearns, agent in charge of investigations, Fort Lawton, testified that, pursuant to his duties, he interviewed the accused relative to this case. The accused, having been warned of his rights under the 24th Article of War, stated to Agent Stearns that he had become involved in an altercation with two girls at the Boston Cafe and that in the course of that altercation he had been threatened with a water glass by one of the girls, a Miss Knight, and that he had drawn a knife from his pocket in self-defense. Accused also stated, "I think, insofar as I am concerned, my conduct was that unbecoming an officer from a military standpoint" (R. 87-91).

Evidence for the defense.

The accused, having been warned of his rights, elected to be sworn as a witness in his own behalf. He testified that at approximately midnight on 2 May 1946 he and his brother entered the Boston Cafe and sat down in a booth next to that occupied by Mrs. Lambert and Miss Knight. While he and his brother were conversing in French, he overheard Mrs. Lambert say to Miss Knight, "What are those two talking about?" Mrs. Lambert then said she thought accused and his brother must be speaking in Spanish, whereupon Miss Knight said, "No, it couldn't be Spanish. They look too much like two niggers." Accused turned around and said to Miss Knight, "When you have statements like that to make I prefer you not to make them in my presence." Miss Knight replied, "What are you going to do about it if I do make them in your presence?" Accused said, "I am not going to do anything about it. I am asking you not to make them in my presence," to which Miss Knight replied, "I am going to make any statement I want to and nobody is going to do anything about it." In the meantime Miss Knight had broken off the top of her drinking glass on the edge of the table. Accused saw her coming out of the booth towards him with the glass in her hand so he slid out of his booth and came to his feet. It "dawned upon" him that he had a knife in his pocket so he took the knife out and opened it. Miss Knight then stopped and threw the glass at his face. He "ducked" the glass and it crashed against a table in the center of the cafe. At the time she threw the glass at him, Miss Knight called him a "son of a bitch." He made no effort to advance towards her. He felt that he was in danger of having great bodily harm done to him by Miss Knight when she was advancing upon him with the broken glass in her hand. After she threw the glass he put his knife back in his pocket and at no time thereafter did he challenge the other persons in the cafe. He did not call Miss Knight a whore and made no derogatory remarks concerning her mother nor did he make any remarks concerning how homely the two women were. He did not engage Mrs. Lambert or Miss Knight in conversation until the latter had made the remark about "niggers" and he did not engage the waitress in conversation concerning the two women. The cashier did not come over to his booth and ask him to stop talking to the women. His brother did not urge him to leave the scene and said nothing either to him or Miss Knight during the

incident. He had about three "drinks" between six and eight-thirty that evening but did not feel them. At the time he gave the statement to Agent Stearns concerning his conduct at the Boston Cafe being unbecoming to an officer he meant that such conduct would be unbecoming under normal circumstances, but he had found himself placed under abnormal conditions that night and did not think that his actions were unbecoming an officer. He did not withdraw from the cafe sooner because he was acting in self-defense (R. 94-109).

Captain Thomas J. Usher, 447 Port Company, Camp George Jordon, Seattle, Washington, testified that the accused was a member of his command and that he had known him for approximately four months. Accused conducted himself "the way an officer should in camp at all times. On duty his work is excellent." He would consider accused as being a desirable officer to have in his company (R. 111). Captain Martin W. Peterson, Transportation Corps, Fort Lawton, Washington, testified that accused had been under his command for approximately one month. He would say that accused's reputation as a soldier was excellent and would desire to have him in his company as a soldier (R. 114).

5. As to the Special Pleas.

Accused, before pleading to the general issue, offered a plea in abatement to Charge I and its Specification on the ground that (1) the Specification did not charge an offense in that it failed to set out the specific conduct of the accused alleged to be in violation of the 95th Article of War and on the ground that (2) the Boston Cafe mentioned in the Specification was not a public place. Accused also offered a plea in bar of trial on the ground that he had been convicted in the police court of the City of Seattle for the same disorderly conduct made the basis of the charges and specifications in this case. The law member, subject to objection by any member of the court, overruled both special pleas.

Since the specification to Charge I follows exactly the form set out in the Manual for Courts-Martial, 1928, the first objection of the accused thereto was properly overruled (MCM, 1928, Appendix 4, page 253). It is neither necessary nor desirable to set out evidence in the specification, a statement in simple and concise language of the facts constituting the offense being sufficient (MCM, 1928, par. 29). In support of the second ground for the plea in abatement counsel for accused cited the case of Goff v. Savage (122 Wash. 194, 210, P. 374) in which it was held that a statute of the State of Washington prohibiting discrimination against persons in certain enumerated kinds of places of business and "other places of public accomodation and amusement "did not preclude a drug store proprietor from refusing to sell a soft drink at a soda fountain to a negro, said statute being intended to apply only to places of a public character to which entrance is gained by payment of an admission fee as distinguished from a place of trade to which the public are generally invited but whose subsequent

treatment is dependent upon mutual agrement between proprietor and customer. Defense counsel argued from this that in the State of Washington a "cafe" is not a "public place." Social legislation of the above type is a familiar example of the present day trend to extend the common law prohibition against discrimination existing in the case of innkeepers and common carriers to other types of business patronized by the general public. However, the term "public place" as used in the Manual for Courts-Martial in the discussion of the 95th Article of War (MCM, 1928, par. 151) is not restricted in definition to the technical niceties of the common law or the shifting sands of social legislation. In military law a "public place" may be defined as a place frequented by the public, or some of the public, or as a place open to the public view. It need not be a place available to the whole public without discrimination as in the case, under the common law, of an inn or a common carrier or as in the case of a public way or park. Thus it has been held that an armory, a dispensary, a porch visible from a public road, a hotel room, the bar of an officers' club and a house of prostitution may be considered public places (CM 250293, Riley, 32 BR 311,318). Also, it has heretofore been held by the Board of Review that a "cafe" is a public place (CM 269105, Kolick, 45 BR 1,5). It is obvious, then, that the plea in abatement in the instant case is without merit.

Since accused was found not guilty of Charge II and its specification, the plea in bar of trial on the ground of former jeopardy - autrefois convict - will be considered only in relation to Charge I and its specification. Accused complains, in short, that since he has already been convicted in the police court of the City of Seattle for his allegedly disorderly conduct in the Boston Cafe on 2 May 1946, he should not now be tried again for the same acts before a general court-martial. However, neither the Fifth Amendment to the Constitution nor Article of War 40 forbids a second trial based upon the same acts, their prohibition being directed only to a second trial for the same offense. Here the offenses are quite distinct, for the police court did not and could not try accused for the purely military offense of conduct unbecoming an officer and a gentleman (In re Stubbs, 133 Fed.1012). Furthermore, the offense for which the accused was tried by general court-martial is, as a matter of law, different from that which may have arisen from the same acts under the law of the State of Washington or its political subdivisions, for it is well settled that where the same acts constitute a violation of both Federal and state law each violation is a separate offense. Therefore, trial in a state court for a violation of state law does not bar a subsequent trial by court-martial based upon the same acts in so far as they constitute a violation of an Article of War. (Grafton v. United States, 206 U.S. 333,353; CM 234118, Reis, 20 BR 243, 249; CM 199465, Lichtenberger, 4 BR 81,83; 135 A.L.R. 57; United States v. Lanza, 260 U.S. 377; MCM, 1928, par. 68).

As to Charge I and its Specification.

There can be little doubt that the conduct of accused in the Boston Cafe in the early morning hours of 2 May 1946 was unbecoming his position as an officer in the Army of the United States. While in the uniform of an officer and in the presence of enlisted men and civilians he persisted in

paying unwelcome attentions to two women seated in the booth next to him. Upon being rebuffed by them, he resorted to vile, provoking and insulting language. An argument ensued between accused and one of the women during the course of which he threatened the other customers of the cafe with a knife, his actions being so violent that an employee of the cafe called upon the civilian police for assistance. Accused was not drunk and seemed to know what he was doing at all times. There were no mitigating circumstances to his disgraceful conduct and in thus dishonoring the uniform he was wearing and the service he was representing at the time of his turbulent acts, he exhibited himself as morally unworthy to remain a member of the honorable profession of arms. Although accused categorically denied his complicity in the events leading up to the disturbance and stated that he drew his knife in self-defense, the evidence against him was so overwhelming and was corroborated from so many different sources that it is difficult indeed to give any credence whatsoever to his exculpatory affirmations. The Board of Review finds no reason to disturb the findings of the court that accused was guilty as charged.

6. War Department records show that accused, a colored officer, is 26 years of age and is married. He is a high school graduate and attended Louisiana Rural Normal School for two years, obtaining therefrom a teacher's certificate. He also attended Southern University for one and one-half years. He entered the service on 19 January 1941 and served as an enlisted man, reaching the grade of master sergeant, until, having successfully completed the officer candidate course at the Quartermaster School, he was commissioned and appointed a temporary second lieutenant in the Army of the United States on 2 July 1943. He was promoted to the temporary grade of first lieutenant on 16 March 1945. He served overseas in the European Theater from 23 July 1944 to 26 November 1945 and is entitled to wear the European, Africa, Middle East campaign ribbon with one bronze service star for the Rhineland campaign. His efficiency rating for the period July 1944 to June 1945 is "superior."

7. The court was legally constituted and had jurisdiction over the accused and of the offense. 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 mandatory upon conviction of a violation of Article of War 95.

Chester T. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ackroyd, Judge Advocate

JAGK - CM 315105 1st Ind

OCT 1 4 1946

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 the opinion of the Board of Review in the case of First Lieutenant Harrison P. Rochon (0-1593809), Quartermaster Corps.

2. Upon trial by general court-martial the accused was found guilty of being disorderly while in uniform in a public place in violation of the 95th Article of War. No evidence of any previous conviction 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 "only so much of the sentence as provides for dismissal from the service" 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 as approved by the reviewing authority and to warrant confirmation of the sentence.

Accused, a colored officer, in the company of his brother, was seated in a booth in the Boston Cafe in Seattle, Washington, in the early morning hours of 2 May 1946. He was in uniform and wearing insignia of rank. There were several enlisted men and a number of civilians present in the cafe at this time. Accused persisted in paying unwelcome attentions to two women seated in the booth next to him. Upon being rebuffed by them, he resorted to vile, provoking and insulting language. An argument ensued between accused and the two women during the course of which he threatened the other occupants of the cafe with a knife, his actions being so violent that an employee of the cafe called upon the civilian police to quell the disturbance. Accused had been drinking but was not drunk. He was taken into custody by the civilian police as he attempted to leave the cafe.

4. The accused is 26 years of age and is married. He is a high school graduate and attended Louisiana Rural Normal School for two years, obtaining therefrom a teacher's certificate. He also attended Southern University for one and one-half years. He entered the service on 19 January 1941 and served as an enlisted man, reaching the grade of master sergeant, until, having successfully completed the officer candidate course at the Quartermaster School, he was commissioned and appointed a temporary second lieutenant in the Army of the United States on 2 July 1943. He was promoted to the temporary grade of first lieutenant on 16 March 1945.

He served overseas in the European Theater from 23 July 1944 to 26 November 1945 and is entitled to wear the European, Africa, Middle East campaign ribbon with one bronze service star from the Rhineland campaign. His efficiency rating for the period July 1944 to June 1945 is "superior."

5. The conduct of accused was disgraceful. I recommend that the sentence as approved by the reviewing authority be confirmed and 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

(G.C.M.O. 315, 18 October 1946.)

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

AUG 28 1946

JAGQ-CM 315165

U N I T E D S T A T E S	)	HEADQUARTERS WESTERN BASE SECTION
v.	)	Trial by G.C.M., convened at Antwerp, Belgium, 1 June 1946. Dismissal and total forfeitures.
First Lieutenant ROBERT C. PALMER (O-1110705), Company "B", 147th Engineer Combat Battalion.	)	

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 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 61st Article of War.

Specification: In that First Lieutenant Robert C. Palmer, Camp Top Hat, Antwerp, Belgium, did, without proper leave, absent himself from his station at Camp Top Hat, Antwerp, Belgium, from about 8 April 1946 to about 28 April 1946.

Accused pleaded guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction of being absent without leave for three days, in violation of Article of War 61, was introduced. The accused 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. The reviewing authority approved the sentence but remitted that portion thereof providing for confinement at hard labor and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution. Accused, after being fully advised of his rights in open court, elected to plead guilty to the Charge and Specification (R 5, 6). Accused stipulated he was in the military service and that on the dates in question was stationed at Camp Top Hat, Antwerp, Belgium (R 6, 7).

4. Evidence for the Accused. The accused through defense counsel made the following unsworn statement:

> "The accused entered the military service of the United States in 1942 and after being commissioned and coming overseas he found that his wife had left his home and child. His wife was committed to a work house for four months. He has received no mail since 1945 and that one letter was from his uncle informing him that his child was living with his aunt. The weight of these family problems has been responsible for his drinking to excess and he feels that all of his difficulties are from this. These facts are offered as an unsworn statement, not to avoid cross-examination, but simply because the statement by the accused would be embarrassing. They are offered by the defense for any weight that they may have in influencing the Board to show clemency in this case" (R 7, 8).

5. The accused's plea of guilty is sufficient to establish his guilt of the offense of being absent without leave from his station from 8 April 1946 to 28 April 1946, in violation of Article of War 61, CM 236359, Tindell, 2 Bull. JAG 270.

6. War Department records show the accused is twenty-six years of age, married and has one child, for whom he maintains a $50 monthly allotment. Accused is a high school graduate, and had a normal happy childhood. In civil life he was a railroad brakeman. Accused enlisted on 3 July 1942, was commissioned a temporary second lieutenant, Corps of Engineers, on 17 February 1943, and promoted to temporary first lieutenant on 5 October 1943. His efficiency ratings are available only for the period 1 July 1944 to 1 July 1945, during which time they were "Excellent." Accused explained his misconduct to a medical officer by saying that there was no job for him to do for over a month. Prosecution Exhibit "4" (R 8) is a general court-martial order, dated 18 March 1946, approving a sentence of $75 forfeiture upon a conviction of the accused of violating Article of War 61 by being absent without leave from his station at Camp Top Hat, Antwerp, Belgium, from 27 January 1946 to 30 January 1946. Accused fully presented his family difficulties at the previous trial in mitigation of that offense. In the present case, the record of trial shows that the court adjourned from 1045 to 1400 on the day of trial because of the unexplained absence of the accused, although he had been notified by the trial judge advocate and defense counsel of the date and place of trial and to appear at 1000 (R 3).

7. The court was legally constituted and had jurisdiction of the person and the subject matter. 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 thereof. Dismissal is authorized upon conviction under Article of War 61.

Seymour W. Wurfel, Judge Advocate

N. Hazen Oliver, Judge Advocate

Harold F. McDonnell, Judge Advocate

JAGQ - CM 315165 1st Ind

WD, JAGO, Washington, D. C. SEP 6 1946

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 First Lieutenant Robert C. Palmer (0-1110705), Company "B", 147th Engineer Combat Battalion.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, being absent without leave for twenty days, in violation of Article of War 61. 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. The reviewing authority approved the sentence but remitted that portion thereof providing for confinement at hard labor 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 thereof. I concur in that opinion.

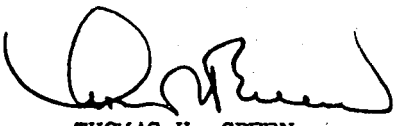
4. The record of trial shows that while stationed at Camp Top Hat, Antwerp, Belgium, accused absented himself without leave from 8 April 1946 to 28 April 1946. After pleading guilty, the accused through counsel made the following unsworn statement: "The accused entered the military service of the United States in 1942 and after being commissioned and coming overseas he found that his wife had left his home and child. His wife was committed to a work house for four months. He has received no mail since 1945 and that one letter was from his uncle informing him that his child was living with his aunt. The weight of these family problems has been responsible for his drinking to excess and he feels that all of his difficulties are from this * * *."

5. War Department records show the accused is twenty-six years of age, married and has one child, for whom he maintains a $50 monthly allotment. Accused is a high school graduate, and had a normal happy childhood. In civil life he was a railroad brakeman. Accused enlisted on 3 July 1942, was commissioned a temporary second lieutenant, Corps of Engineers, on 17 February 1943, and promoted to temporary first lieutenant on 5 October 1943. His efficiency ratings are available only for the period 1 July 1944

to 1 July 1945, during which time they were "Excellent." Accused explained his misconduct to a medical officer by saying that there was no job for him to do for over a month. Prosecution Exhibit "4" (R 8) is a general court-martial order, dated 18 March 1946, approving a sentence of $75 forfeiture upon a conviction of the accused of violating Article of War 61 by being absent without leave from his station at Camp Top Hat, Antwerp, Belgium, from 27 January 1946 to 30 January 1946. In the present case, the record of trial shows that the court adjourned from 1045 to 1400 on the day of trial because of the unexplained absence of the accused, although he had been notified by the trial judge advocate and defense counsel of the date and place of trial and to appear at 1000 (R 3).

6. I recommend that the sentence as modified by the reviewing authority be confirmed but suspended during good behavior.

7. Inclosed is a form of action designed to carry this recommendation into effect, 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

(G.C.M.O. 280, 12 September 1946.)

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

AUG 16 1946

JAGQ - CM 315215

UNITED STATES v. Private FRED W. RESSEL (12237784), Air Corps Unassigned-attached Squadron T, 3502d AAF Base Unit (Technical School), Chanute Field, Illinois.	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Chanute Field, Illinois, 3 July 1946. Dishonorable discharge and confinement for six (6) months. Post Guardhouse, Chanute Field, Illinois.

HOLDING by 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 named above and submits this, its holding, to The Judge Advocate General.

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

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

Specification: In that Private Fred W Ressel, Air Corps Unassigned Attached, Squadron T, 3502d AAF Base Unit, TS, did, without proper leave, absent himself from his station at Chanute Field, Illinois, from about 27 May 1946 to about 8 June 1946.

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

Specification: In that Private Fred W Ressel, Air Corps Unassigned Attached, Squadron T, 3502d AAF Base Unit, TS, did, at Effingham, Illinois, on or about 4 June 1946, wrongfully have in his possession, one 1937 Ford, property of Mr. Alphonse Wesselman.

The accused pleaded guilty to, and was found guilty of, the Specification of Charge I and of Charge I. Accused pleaded not guilty to, and was found guilty of the Specification of Charge II and of Charge II. Evidence of one previous conviction for absence without leave for fourteen days was introduced. Accused was sentenced to be dishonorably discharged the service,

total forfeitures of all pay and allowances due or to become due, and to be confined at hard labor for three (3) years. The reviewing authority reduced the period of confinement to six (6) months and, as thus modified, approved the sentence, designated the Post Guardhouse, Chanute Field, Illinois, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of the Specification and of Charge I and to support a sentence of one month and nine days' confinement and the forfeiture of two-thirds pay for a like period.

4. The finding of guilty as to Charge II and its Specification and so much of the sentence as is predicated upon Charge II is not legally sufficient and must be reversed. This conclusion is impelled for the sole reason that the specification, as drawn, does not state an offense and does not inform the accused of the nature of the offense with which he is charged. So far as the evidence is concerned, the accused in a voluntary extra-judicial affidavit, stated (R 9; Pros. Ex. 4):

> ". . . We arrived in Effingham, Illinois, about the 5th of June, and Frazee left us off, and, while I was drinking a cup of coffee, which, I believe, was about 2300 that evening, Private Parks stole a car. I came out of the store, and Parks said, 'Get in.' I did, and we started heading for Fairfield, Illinois. Shortly after we left Effingham, Parks and I picked up Frazee, who was standing in the road beside the 1935 Plymouth, which at this time was out of commission. A short time after this, we rented a cabin and the three of us spent the remainder of the night in this cabin. At about noon, we arrived at Fairfield. We spent the day driving around Fairfield, The next day the car needed repairs to the fuel pump, and while we were in the filling station I made out a check payable to Private Parks and forged the signature of James Frazee on the check, which was in the amount of $33.47. We used the money for food, gas, oil, and also a new fuel pump. . . ."

Accused is not charged with the offense of receiving stolen property, in violation of Article of War 96 (MCM, 1928, p. 256; 4 BR 153, Southern, CM 199672). Nor is accused charged with larceny or embezzlement of the car, in violation of Article of War 93. Accused is not charged with operating a motor vehicle without the owner's consent, commonly known as "joy riding" (CM 199062, Doiron, 3 BR 317, 319). The Specification of Charge II by reciting ". . . did . . . wrongfully have in his possession,

one 1937 Ford, property of Mr. Alphonse Wesselman," and no more, failed to allege any criminal offense cognizable by military or civil law. This allegation is entirely consistent with a mere civil trespass of wrongfully being in the car without any intent to take, misappropriate or drive it in any manner at all. It is also consistent with an honest but erroneous belief by the accused that he was rightfully in possession of the car. For example, any hitchhiker assumes the driver of a car who gives him a ride is rightfully in possession of it. If the car is in fact stolen the hitchhiker, whether driving or just riding, might be said under some circumstances to be in wrongful possession of the car, as well as the one who picked him up. However, if he has acted in good faith the hitchhiker is guilty of no criminal offense by reason of his presence in the car or his mere "possession" thereof.

5. The Board of Review, accordingly (49 BR 117, Smith, CM 219028), holds the record of trial legally insufficient to support the finding of guilty of Charge II and its Specification, but legally sufficient to support the finding of guilty of Charge I and its Specification, and to support only so much of the sentence as imposes confinement at hard labor for one month and nine days and forfeiture of two-thirds pay for a like period (Par. 104c, MCM, 1928, p. 96).

Seymour W. Wenfel, Judge Advocate.

N. Wayne Olive, Judge Advocate.

Harold F. McDonnell, Judge Advocate.

JAGQ CM 315215 1st Ind

AUG 22 1946

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Army Air Forces Technical Training Command, Scott Field, Illinois

1. In the case of Private Fred W. Ressel (12237784), Air Corps Unassigned Attached Squadron T, 3502d AAF Base Unit (Technical School), Chanute Field, Illinois, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification, but legally sufficient to support the findings of guilty of Charge I and its Specification and to support only so much of the sentence as involves confinement at hard labor for one month and nine days and forfeiture of two-thirds pay for a like period, which holding is hereby approved. Under the provisions of Article of War 50½ upon disapproval of the findings of guilty of Charge II and its Specification and so much of the sentence as is in excess of confinement at hard labor for one month and nine days and forfeiture of $33.33 per month for a like period, you will have authority to order execution of the sentence.

2. When copies of the published order in this case are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. 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 315215).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

61801

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

JAN 2 1947

JAGQ - CM 315316

UNITED STATES v. Private GEORGE L. RENEAU (34148788), Headquarters Company, XXIII Corps, United States Forces, European Theater.	THIRD INFANTRY DIVISION Trial by G.C.M., convened at Bad Wildungen, Germany, 15 February 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private George L. Reneau, Hq. Co., XXIII Corps, did, at Bad Wildungen, Germany, on or about 19 January 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill Private First Class Francis E. Mercier, Hq Co., XXIII Corps, a human being, by shooting him with a pistol.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions by special court-martial for violation of Article of War 61 was introduced. With three-fourths of the members of the court present at the time the vote was taken concurring, the accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Board of Review adopts the statement of the evidence in the Staff Judge Advocate's review.

Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. The death must take place within a year and a day of the act that caused it (MCM, 1928, par. 148a). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (Wharton's Criminal Law (12 Ed.) Vol. 1, sec. 426).

The record of trial clearly establishes that accused, following an argument with deceased which apparently terminated with no ill feeling, deliberately shot deceased who died shortly thereafter as a result of the gunshot wounds. There were several eyewitnesses to the actual shooting. The defense attempted to prove a degree of drunkenness such as would negative the requisite malice. Medical testimony, however, established that although accused was a chronic alcoholic he can, and could at the time of the offense, distinguish right from wrong and adhere to the right. The position taken by the defense was clearly not sustained by the evidence. No legal justification or excuse for the shooting appears in the record.

4. The court was legally constituted and had jurisdiction over the accused and the offense. Considerable immaterial and irrelevant testimony appears to have been admitted but such did not injuriously affect the substantial rights of the accused within the meaning of Article of War 37. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence. A sentence of death or life imprisonment is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42, recognized as an offense of a civil nature and punishable by penitentiary confinement for more than one year by sections 452 and 454, Title 18 of the Criminal Code of the United States.

On Leave
_____, Judge Advocate

Charles M. Dickson, Judge Advocate

James S. Parker, Judge Advocate

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

JAGH-CM 315347 4 NOV 1946

UNITED STATES v. First Lieutenant JOHN W. RAMSBOTTOM, JR. (O-1574125), Quartermaster Corps.	)	OKLAHOMA CITY AIR TECHNICAL SERVICE COMMAND Trial by G.C.M., convened at Tinker Field, Oklahoma City, Oklahoma, 18 June 1946. Dismissal, total forfeitures and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, 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: In that First Lieutenant John W. Ramsbottom, Jr, 4832nd Army Air Forces Base Unit, 832nd Army Air Forces Specialized Depot, Pauline, Kansas, did, at Topeka Army Air Field, Topeka, Kansas, on or about 13 April 1946, feloniously take, steal and carry away the following described golf equipment: One (1) driver, value about $3.75; one (1) brassie, value about $3.75; one (1) exploder, value about $3.00; one (1) putter, value about $3.00; one (1) No. 2 iron, value about $5.50; one (1) No. 3 iron, value about $5.50; one (1) No. 4 iron, value about $5.50; one (1) No. 5 iron, value about $5.50; one (1) No. 6 iron, value about $5.50; one (1) No. 7 iron, value about $5.50; one (1) No. 8 iron, value about $5.50; one (1) No. 9 iron, value about $5.50, and one (1) black leather golf bag, value about $7.50; total value about $65.00, property of Captain Carl W. Steinkamp, Jr.

CHARGE II: Violation of the 95th Article of War.
Specification: In that First Lieutenant John W. Ramsbottom, Jr, 4832nd Army Air Forces Base Unit, 832nd Army Air Forces Specialized Depot, Pauline, Kansas, did, at Topeka Army Air Field, Topeka, Kansas, on or about 13 April 1946, feloniously take, steal and carry away the following described golf equipment: One (1) driver, value about $3.75; one (1) brassie, value about $3.75; one (1) exploder, value about $3.00; one (1) putter, value about $3.00; one (1) No. 2 iron, value about $5.50; one (1) No. 3 iron, value about $5.50; one (1) No. 4 iron, value about $5.50; one (1) No. 5 iron, value about $5.50; one (1) No. 6 iron, value about $5.50; one (1) No. 7 iron, value about $5.50; one (1) No. 8 iron, value about $5.50; one (1) No. 9 iron, value about $5.50, and one (1) black leather golf bag, value about $7.50; total value about $65.00, property of Captain Carl W. Steinkamp, Jr.

He pleaded not guilty to, and was found guilty of, both Charges and Specifications. Evidence of one 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 at such place as the reviewing authority may direct for three years. The reviewing authority approved the sentence but remitted two years of the confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: It was stipulated that the accused was in the military service of the United States and assigned to the 4832d Army Air Forces Base Unit, 832d Army Air Forces Specialized Depot, Pauline, Kansas (R 8).

Captain Carl W. Steinkamp testified that he is a member of the 594th Army Air Forces Base Unit, Air Transport Command, Topeka, Kansas (R 8). Captain Steinkamp's organization and that of the accused were separated physically by a public highway. Steinkamp was quartered in BOQ 403, on the Topeka Army Air Field , and because accused's organization had no separate Bachelor Officers' Quarters, the accused occupied a room in the same BOQ. Accused's room was on the same floor, three rooms from that of Captain Steinkamp (R 9-10). Captain Steinkamp was the owner of a set of golf clubs which consisted of a driver, spoon, exploder, putter, eight registered Bobby Jones irons, and a black leather golf bag (R 10, 12-14), which witness identified and which were received in evidence as Prosecution Exhibits A to M, inclusive (R 13-15). The witness usually left the golf clubs in his unlocked room in the BOQ. On or about 12 April 1946, Captain Steinkamp departed his station on a regularly scheduled trip and was gone for about seven days. Upon his return, he noticed that his set of golf clubs was missing (R 10). After he made inquiry among the officers at the BOQ as to whether any of them had borrowed the set of golf clubs and

received negative answers, he posted a notice on the bulletin board of the officers' club requesting the return of the clubs and reported the loss to the Provost Marshal (R 11, 15). On or about 20 April, he purchased a set of golf clubs from the accused, at which time he mentioned to the accused that he had lost a set of clubs (R 11, 36). Accused expressed sympathy over Captain Steinkamp's loss of his golf clubs (R 11). At a later date, Captain Smallwood asked Captain Steinkamp for a description of his lost golf clubs. Shortly thereafter on 15 May 1946, Captain Smallwood informed him that his golf clubs could be found locked up in a tool crib in Warehouse No. 8, at the Specialized Depot where the accused was stationed (R 12). Thereupon Captain Smallwood, Captain Bartol, Provost Marshal of the 594th Army Air Forces Base Unit, Captain Meyer, Provost Marshal of the 832d Army Air Forces Specialized Depot, and the witness proceeded to Warehouse No. 8 where the missing golf clubs were found in a tool crib (R 12-13). The witness identified Prosecution Exhibits A to M as his property, as the same set of golf clubs and golf bag which were missing from his room and as the property which was located and identified by him in Warehouse No. 8 on 15 May 1946 (R 14).

In cross-examination Captain Steinkamp stated that he did not post a notice of the loss of his clubs in the daily bulletin or any other publication but only on the bulletin board of the officers' club (R 15-16).

On redirect examination he testified that neither on 12 April 1946, nor at any time subsequent thereto, did he authorize the accused or anyone else to remove the golf equipment from his room in the BOQ (R 24-25). He further testified that he had obtained from his sister the registration number of his clubs and that he had checked Prosecution Exhibits E to L, inclusive, and found that they bore the same registration numbers (R 27).

Mr. Albert E. Howard, a civilian employee at the 832nd Army Air Forces Specialized Depot, testified that he was in charge of the tool crib at Warehouse No. 8, and that the accused had an office in that building (R 28). On or about 15 April 1946, the accused brought a set of golf clubs and a golf bag and asked the witness if he could leave them there. The witness replied, "Yes, sir." Thereupon accused placed the set of golf clubs in an open bin. Later because the property was in the way the witness moved the clubs behind the bin and hung them up. The set of golf clubs remained there for about a month (R 29). Accused occasionally worked with the clubs but never took them out (R 30). The witness stated that there was plenty of room in accused's office to store the clubs and bags (R 34). About thirty days after accused had brought the clubs to the warehouse, four officers came to the warehouse and got them (R 30).

Captain John W. Smallwood, a member of accused's organization, testified that he lives in the same BOQ with accused and Captain Steinkamp (R 35). On 20 April 1946, he played golf with accused. After the game they both returned to the BOQ and entered into a conversation with Captain Steinkamp, who remarked that he had lost a set of golf clubs and did not know whether

they had been borrowed or stolen while he was away on a trip (R 36). Steinkamp mentioned that his clubs were registered Bobby Jones Irons. The witness heard accused express sorrow over the loss of such valuable clubs and stated that if he ever learned of their location he would tell Captain Steinkamp because the accused had a set of golf clubs stolen from him and he hated such action. About two weeks later, the witness learned that the accused had a set of registered Bobby Jones clubs for sale. Since the witness had played golf with accused, who had not used such clubs, and since he knew Captain Steinkamp had lost a set of Bobby Jones clubs he became suspicuous of accused and asked Steinkamp for a description of his lost clubs (R 37). The next morning the witness and a Mr. Chandler went to Warehouse No. 8, where they found the golf clubs. The witness then reported the incident to Captain Steinkamp (R 38). On cross-examination he testified that he had seen no notice on his organization's bulletin board that anyone had lost a set of golf clubs nor that anyone had found a set (R 40).

Captain Leland B. Haber, a member of the 594th Army Air Forces Base Unit, testified that on 13 May 1946, the accused told him that he had a set of golf clubs locked up at the depot, which accused would sell for $65.00. The following day the witness telephoned accused and offered him $65.00 for the clubs, but the accused stated that he now wanted $75.00 for them. The deal was not closed and the witness did not see the clubs which were offered for sale (R 45).

Mr. Charles M. Decker, a civilian employee who works in Warehouse No. 8, testified that in April or May, 1946, the accused offered to sell him a set of golf clubs (R 48). He saw the clubs in Warehouse No. 8; there were ten irons (some of which were Bobby Jones clubs), two woods and a black leather bag. Accused asked $65.00 for the clubs (R 49, 51). The day after the clubs were removed from Warehouse No. 8 (16 May 1946), the accused called the witness by telephone and told him that the clubs did not belong to him. He said that he had found them in his car but did not know how they had gotten there (R 51).

On 15 May 1946, Captain Steinkamp, Captain Smallwood and Captain Dominio A. Bartol, Provost Marshal of the 594th Army Air Forces Base Unit, went to the office of Captain Raymond A. Meyer, Provost Marshal of the 832nd Army Air Forces, Specialized Depot (R 53, 59). All four officers rode to Warehouse No. 8 where they found a set of golf clubs consisting of a black bag, ten irons and two woods, in a tool crib (R 59). Captain Steinkamp identified the golf clubs as his property. Captain Bartol and Captain Meyer then got into an official car and proceeded to look for accused. The accused was located in the salvage yard and was engaged in casual conversation by Captain Bartol and Captain Meyer (R 54, 60). Accused was asked if he had any golf clubs for sale. In reply accused said something about a red golf bag (R 54, 60). Accused was then informed that a set of golf clubs was found in Warehouse No. 8 and he was then warned of his rights against self-incrimination in accordance with Artide of War 24

by Captain Bartol (R 55, 61). Captain Bartol then stepped aside a few paces and Captain Meyer continued the conversation (R 56-61). Captain Meyer then mentioned that some clubs had been stolen and "It looked as though he may have been in trouble again" (R 61). He then asked the accused "Did you steal these clubs?" The accused replied, "Yes, I did" (R 56, 58-59, 61). The accused stated to Captain Meyer that he had become intoxicated one evening and picked up the clubs while in that condition and that on several occasions later he intended to return the clubs (R 62).

Mr. Paul Blakely, a professional golfer, testified that he had seen Prosecution Exhibits A to M, inclusive. In his opinion the spoon and the driver were worth $4.50 each and that the putter, exploder and eight irons were worth $5.00 each. The golf bag was appraised as being worth $40.00. The total value of the golf equipment was $99.00 (R 19-24).

4. The defense recalled Captain Steinkamp, who testified that the clubs which he had bought from accused were not Bobby Jones clubs, but they were registered clubs (R 63-64). After his rights as a witness were explained to him the accused elected to remain silent (R 64).

5. In our deliberations upon this record, careful consideration has been given to a brief filed by Mr. David A. Fegan of Morris, KixMiller and Baar, attorneys for the accused. Oral arguments by Mr. Fegan were heard by the Board of Review. Numerous assignments of error have been made, all of which have been considered by the Board. However, only those requiring comment are discussed below.

6. It was urged that the law member was biased and prejudiced against the accused, that he had prior knowledge of the case, and knowledge of a previous court-martial proceeding against the accused.

The defense elected to challenge the law member on the ground that he had knowledge of facts which were prejudicial to accused, that he had discussed the case with the accused and with the personnel of the prosecution (R 3). The law member was sworn as a witness, questioned as to his competency and testified that he had discussed matters pertaining to the date of trial with the prosecution, but that he had not discussed the case on its merits, and he had not discussed what witnesses should be called, with the prosecution. About a week before the trial the accused came to see the law member, who was also legal assistance officer and began to discuss the charges which were pending against him. The witness informed the accused that he was the law member of the court which would try him, but accused continued talking to him. He testified that the accused did not state any matters which were unfavorable to him. He further testified that he could and would brush aside from his mind any prior knowledge of the case, and render a fair and impartial finding based on the evidence.

During the course of the examination, the defense counsel asked the law member if he had any previous occasion to know the accused's name. He replied in the affirmative. Thereupon defense counsel asked what the occasion

was and the law member replied, "It came to my attention some three months ago when the court reporter and Captain McCarthy went to Topeka, Kansas, to try another case involving the accused" (R 4-5).

The court, following the procedure prescribed by paragraph 58f, Manual for Courts-Martial, 1928, denied the challenge (R 5).

It is the function of the court to determine the existence or non-existence of the alleged grounds of challenge and its decision should not be interfered with unless clearly erroneous or unless disqualification appears as a matter of law.

The record does not reflect bias on the part of the law member and it shows that he made consistently proper rulings. In the brief filed on behalf of the accused it is alleged that the law member overruled a defense objection to improper comment by the trial judge advocate that the defense had introduced no evidence and that guilt must be inferred thereby. Since closing arguments were not reported in the record of trial, the only substantiation for this allegation is an affidavit submitted by the accused which is attached to the brief. If the trial judge advocate had commented improperly on accused's failure to take the stand, it would have been the duty of the defense counsel to insist that such error be reflected in the record. Accused was represented by regularly appointed defense counsel, a lieutenant colonel, regularly appointed assistant defense counsel, and Mr. Bliss Kelly, a civilian attorney. The record was examined by Lieutenant Colonel Pearson, the regularly appointed defense counsel before it was authenticated. Accordingly, we assume that the record properly reflects the proceedings and consequently we are not justified in further considering the alleged error.

7. It was, of course, improper to permit any reference to accused's previous trial by court-martial to come before the court prior to a finding of guilty. Two such instances occurred during the trial.

a. The law member when questioned by the defense as to when he first heard accused's name mentioned, testified that accused's name came to his attention some three months before the trial when the court reporter and the trial judge advocate went to Topeka to try a case involving the accused.

b. Captain Meyer testified that when he questioned the accused about the stolen golf clubs he said, "It looks like you are in trouble again."

The reference by the law member to previous court-martial proceedings was in answer to a series of insistant questions put to him by the defense counsel on voire dire examination. It does not appear to us that the accused

can now complain of an answer made at the insistence of the defense. Since the defense had already invited the court's attention to the accused's previous trial, Captain Meyer's reference thereto did not prejudice accused's substantial rights.

Improper knowledge of previous convictions, has been held to be error, but not prejudicial to the substantial rights of accused within the meaning of Article of War 37, where the evidence in support of the alleged offense is clear and compelling (CM 243215, Hilliard, 27 BR 305, 308-309).

8. The specifications of Charges I and II aver that the accused on or about 13 April 1946, took, stole and carried away certain golf equipment, of a total value of about $65.00, the property of Captain Carl W. Steinkamp, Jr., in violation of Articles of War 93 and 95.

Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein (MCM, 1928, par 149g, p 171).

The elements of proof as discussed in the Manual for Courts-Martial are: "(a) The taking by the accused of the property as alleged; "(b) the carrying away by the accused of such property; "(c) that such property belonged to a certain other person named or described; "(d) that such property was of the value alleged, or of some value; and "(e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value" (MCM, 1928, par 149g, p 173).

The evidence shows that a set of Bobby Jones golf clubs which were the property of Captain Steinkamp disappeared from his unlocked room in the Bachelor's Officers Quarters at the Topeka Army Air Field, while he was on a trip between 12 April 1946 and 19 April 1946. On 15 April 1946, accused had possession of these clubs and brought them to a warehouse where he asked a civilian to keep the clubs for him. Thereafter accused sold another set of golf clubs to Steinkamp, who told him that his set of Bobby Jones clubs was missing. Accused expressed his sympathy over the loss of Steinkamp's clubs, but did not mention the clubs which he had placed in the warehouse. On at least two occasions accused offered to sell a set of golf clubs which he had locked up in the depot, for $65.00 or $75.00. Mr. Decker, one of the prospective purchasers, inspected the clubs both at the warehouse and at the trial. He testified that the golf equipment offered for sale by the accused was similar to Prosecution Exhibits A to M.

After the clubs had been found by Captain Steinkamp and two Provost Marshals, the accused was questioned. After his rights against self-incrimination were explained to him, he admitted that he had stolen the clubs, but

stated that he was drunk at the time and that he intended to return the clubs.

The day after the clubs were found, the accused telephoned one of the prospective purchasers and told him that he could not sell the clubs because they did not belong to him; that he had found them in his car but did not know how they had gotten there.

Competent testimony established the value of the property in excess of the amount alleged in the specification.

It was contended by counsel for the defense that the prosecution did not prove that the accused intended to deprive the owner permanently of his property.

In our opinion the court was amply justified in inferring that the accused intended to deprive the owner permanently of his property, from his negotiations for the sale of the property, from his failure to disclose his possession of the clubs to Captain Steinkamp when the latter discussed the loss of the clubs with him and from his failure to return the golf clubs voluntarily to their owner. His statement to Mr. Decker that the clubs did not belong to him, made after he had been questioned by a Provost Marshal about the clubs, was clearly a self serving declaration.

In his statement to Captain Meyer, the accused stated that he had become intoxicated and picked up the clubs while in that condition.

Whereas it is true that a conviction for larceny cannot stand if the evidence shows that the accused was so drunk that he was incapable of entertaining a specific intent to deprive the owner permanently of the property (CM 151742, Dig Op JAG, 1912-40, Sec 451 (40), p 325), nevertheless, even though the court had believed that the accused was drunk at the time he took the clubs, it would still be warranted in finding him guilty of larceny, since the evidence shows that he made no attempt to return the property to its owner after returning to sobriety. In CM 228274, Small, 16 BR 115, the Board of Review stated:

> "In the ordinary case the intent is present at the time of the taking, but larceny may be committed by wrongful taking and a subsequently formed intent permanently to deprive the owner of his property. In this case the court * * * considered that he was too drunk to have the required intent at the time of the wrongful taking * * * but that his subsequent conduct indicated an intent * * * to keep the automobile" (II Bull JAG 12).

The defense further contends that the prosecution failed to prove that the accused took the golf clubs by trespass.

It is well settled that unexplained personal possession of recently stolen property creates a presumption of guilt of larceny (CM 197704, Purcell et al; CM 202976, Baker et al; CM 211769, Brown; CM 151886, Owens et al; Dig Op JAG, 1912-40, Sec 452 (10)). Accused's possession of the property within a week after it disappeared from Captain Steinkamp's room, his attempt to sell it to Mr. Decker after he was told by Steinkamp that his clubs were missing, and his confession that he had stolen the property, amply justified the court in finding the accused guilty of Charge I and its specification. In our opinion the uncontroverted evidence is such as to practically compel a conviction.

9. The specification of Charge II alleges the same conduct as was alleged in the specification of Charge I, as a violation of Article of War 95. There was no duplication of charges against the accused in alleging the same conduct as offenses under both Articles of War 93 and 95, inasmuch as one is an offense of a civil nature and the other is a purely military offense (CM 218924, Foster, 12 BR 173; CM 275518, Linville, 48 BR 61). Accordingly, the record of trial is legally sufficient to support the findings of guilty of the specification of Charge II.

10. War Department records show that the accused is 27 years of age, has been twice married and has one child. He is paying alimony to his first wife at the rate of $50.00 per month. He attended the New Bedford Textile College for two years and is a graduate of the New England Conservatory of Music. His civilian occupation is machinist and tool maker. He enlisted in the Army on 27 March 1940 and attained the grade of corporal as an enlisted man. He completed the Quartermaster Corps Officers' Candidate School and was commissioned a second lieutenant, Army of the United States, on 3 July 1942. He was promoted to first lieutenant on 22 March 1943. On 31 January 1946, he was found guilty by a general court-martial of unlawfully selling and disposing of government property of a total value of $100.68, in violation of Article of War 96. He was sentenced to forfeit $116.67 of his pay per month for six (6) months. The reviewing authority approved the sentence and ordered it into execution (CM 307218, GCMO #2, Hq, Oklahoma City Air Technical Service Command, 14 February 1946).

11. In addition to the brief filed on behalf of the accused by Mr. Fegan of Morris, KixMiller and Baar, the Board of Review has considered the following communications pertaining to clemency on behalf of the accused:

Letter from Senator Claude Pepper, dated 29 August 1946, which inclosed a letter from the accused, dated 23 August 1946, and a copy of a letter from Mr. Bliss Kelly, civilian defense counsel, dated 22 July 1946, to Lieutenant Colonel Ethan R. Pearson, regularly appointed defense counsel; memorandum for The Judge Advocate General from the War Department Legislative and

Liaison Division (WD SLL/997-1725), dated 13 September 1946, which transmitted photostatic copies of letters received by Senator Leverett Saltonstall from accused, Mr. Bliss Kelly and Mr. John W. Ramsbottom, 232 North Street, New Bedford, Massachusetts, the accused's father; letters from Senator David I. Walsh, dated 26 August 1946 and 7 October 1946; letters from accused's father, Mr. John W. Ramsbottom, dated 25 September 1946 and 12 October 1946.

12. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed. 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 to dismissal and confinement is authorized upon conviction of a violation of Article of War 93 and dismissal is mandatory upon conviction of a violation of Article of War 95.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 315347 1st Ind

WD, JAGO, Washington 25, D. C. DEC 2 1946

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 First Lieutenant John W. Ramsbottom, Jr. (O-1574125), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of larceny of certain golf equipment, of a total value of about $65.00, the property of a fellow officer, in violation of Articles of War 93 and 95 (Chgs I, II; Specs). Evidence of one previous conviction was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three (3) years. The reviewing authority approved the sentence but remitted two (2) years of 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 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. I concur in that opinion.

Accused is a member of the 832nd Army Air Forces Specialized Depot, Pauline, Kansas, and the accuser, Captain Carl W. Steinkamp, Jr., is a member of the 594th Army Air Forces Base Unit of the Air Transport Command, Topeka, Kansas. The areas of the two organizations are physically separated by a public highway. There are no bachelors officers' quarters facilities at the 832nd Army Air Forces Specialized Depot and for that reason the accused was occupying the same bachelors officers' quarters with the accuser at the 594th Army Air Forces Base Unit. Captain Steinkamp was the owner of a set of golf clubs and a golf bag valued by him at $135.00, which he kept in his unlocked room at the bachelors officers' quarters. On or about 12 April 1946, Captain Steinkamp left his station on a scheduled air evacuation trip and upon his return to his quarters about a week later, discovered that his golf clubs and bag were missing. On the following morning he reported his loss to the Provost Marshal at his station. On or about 20 April 1946, Captain Steinkamp learned that the accused had a set of golf clubs at his room in the bachelors officers' quarters which were for sale. Captain Steinkamp approached the accused and purchased this set of clubs from him. During the conversation Captain Steinkamp informed the accused that he had lost a set of registered

Bobby Jones golf clubs and the accused expressed his sympathy with him over the loss. On 13 May accused offered Captain Steinkamp's golf clubs and bag for sale to Captain Leland Haber for $75.00 and later to a civilian, Charles M. Decker, for $65.00. Sometime later Captain Steinkamp was informed by another officer that his set of stolen golf clubs could be found locked up in a tool crib in Warehouse No. 8 at the Specialized Depot where the accused was stationed. Upon receipt of this information Captain Steinkamp accompanied by Captain Smallwood, his informer, Captain Bartol and Captain Meyer, the Provost Marshal of the accused's organization, proceeded to Warehouse No. 8, where the stolen golf equipment was found and immediately identified by Captain Steinkamp. Captain Steinkamp and Captain Smallwood were left in charge of the golf outfit while the two Provost Marshals made a search of the area and found the accused. The officers engaged the accused in a casual conversation and finally asked him whether he had a set of golf clubs and a golf bag at the depot for sale. When accused stated that he had a red golf bag for sale, he was fully advised of his rights under the 24th Article of War and was then asked whether he had stolen the golf outfit, to which question he replied in the affirmative. The stolen golf clubs and golf bag are shown by competent evidence to be of a total fair cash market value of $99.00.

4. Consideration has been given to a brief filed on behalf of accused by Mr. David A. Fegan of Morris, KixMiller and Baar, attorneys for the accused. Oral argument by Mr. Fegan was heard by the Board of Review. In addition thereto, consideration has been given to the following communications pertaining to clemency on behalf of accused: Letter from Senator Claude Pepper dated 29 August 1946, which inclosed a letter from the accused dated 23 August 1946, and a copy of a letter from Mr. Bliss Kelly, civilian defense counsel, dated 22 July 1946, to Lieutenant Colonel Ethan R. Pearson, regularly appointed defense counsel; memorandum for The Judge Advocate General from the War Department Legislative and Liaison Division (WD SLL/997-1725) dated 13 September 1946, which transmitted photostatic copies of letters received by Senator Leverett Saltonstall from accused, Mr. Bliss Kelly and Mr. John W. Ramsbottom, 232 North Street, New Bedford, Massachusetts, the accused's father; letters from Senator David I. Walsh dated 26 August 1946, and 7 October 1946; letters from accused's father, Mr. John W. Ramsbottom, dated 25 September 1946 and 12 October 1946.

5. On 31 January 1946, the accused was found guilty by a general court-martial of unlawfully selling and disposing of government property of a total value of $100.68, in violation of Article of War 96. He was sentenced to forfeit $116.67 of his pay per month for six (6) months. The reviewing authority approved the sentence and ordered it into execution.

6. I recommend that the sentence as modified by the reviewing authority

be confirmed and carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

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

CM 315347

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 369, 11 December 1946.)

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

JAGK - CM 315354

23 SEP 1946

UNITED STATES v. First Lieutenant JOSEPH H. FLACK (O-1178144), Field Artillery.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 10 June 1946. Dismissal, total forfeitures and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, 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 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Joseph H. Flack, 19th Antiaircraft Artillery Group, having taken an oath in a trial by General Court-Martial of Private First Class Samuel Drozic before a competent tribunal that he would testify truly, did, at Antwerp, Belgium, on or about 23 April 1946, willfully, corruptly, and contrary to such oath testify in substance that he did not authorize the said Private First Class Samuel Drozic to drive a certain United States Army vehicle and that he did not sign the name and designation "Lt.Col. A.C. Bushwald, Adj." on a certain Driver's Trip Ticket, which testimony was a material matter and which he did not then believe to be true.

CHARGE II: Violation of the 94th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1 of Charge I, of Charge II and its Specification, and of Charge III and its Specification. He was found guilty of Specification 2 of Charge I with exceptions, and guilty of Charge I as set forth below:

> "Of Specification 2, Charge I, Guilty except the words 'and that he did not sign the name and designation 'Lt. Col. A.C. Bushwald, Adj.' on a certain Driver's Trip Ticket'
> "Of the excepted words, not Guilty, of the substituted words, Guilty, of Charge I, Guilty."

No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct for three (3) 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.

On 6 March 1946 accused was motor officer of the 19th AAA Group, Camp Tophat, Belgium, having under his control a 2-1/2 ton 6 x 6 truck number 4469173 (Pros. Ex. A, 10-11, 13). On 23 April 1946 one Private First Class Samuel Drozic of the 19th Antiaircraft Artillery Group was tried by a general court-martial upon a charge of a violation of the 94th Article of War, the specification of such Charge reading, in part, that he (Pfc Drozic) did "*** on or about 6 March 1946, knowingly and wilfully misappropriate a two and one-half (2½) ton truck ***." (Pros. Ex. A, 4). The court, in the Drozic case, was appointed under competent authority and by competent orders (R. 7). Accused was called as a witness for the prosecution in the Drozic case and, having been regularly sworn (Pros. Ex. A, 10) he testified under oath, in part, as follows:

> Question by Trial Judge Advocate: "Did you, on or about the 6th of March, 1946, authorize the accused to take vehicle No. 4469173 from the motor pool?"

Answer by accused (Lt. Flack): "No." (Pros. Ex. A, 11).

The accused did, in fact, on 6 March 1946, order Private First Class Drozic to drive said truck outside the motor pool described, and gave him a trip ticket directing him to "transfer supplies from Top Hat to Paris, France." This is established by the stipulated testimony of Private First Class Drozic (R. 8), the trip ticket (Pros. Ex. B), and the admission of accused both in his testimony in this case (R. 26-27; Pros. Ex. C) and in his prior testimony given in the Drozic case (Pros. Ex. A, 16-19).

4. Evidence for the defense.

It was stipulated that if Lieutenant Colonel Van Bibber was present he would testify as follows:

> "That the accused worked for him for about four or five months. That the accused's performance of his duties was of superior calibre and the accused exhibited traits of superior calibre" (R. 20).

The accused, after having been advised as to his testimonial rights, elected to be sworn as a witness to testify relative to Specification 2, Charge I. He testified in substance as follows: That he was in combat with a "line outfit" from August 1944 until VE Day and was awarded a Bronze Star Medal "for holding an OP down for two months and being shot at continually" (R. 22, 32); that he had given false testimony in the Drozic case but that he had voluntarily retracted such statements later in the same case (R. 22-23, 24); that he was put in a hospital five or six days before the Drozic trial for tests to determine the presence or absence of tuberculosis; that he first learned he might have tuberculosis about 18 April 1946 (R. 22, 24, 26); that at the time of the Drozic trial, respecting his physical and emotional condition:

> "*** I was emotionally and physically upset. I truthfully don't think I was in my right mind at the time. I was nervous, I was under the impression I had t.b. and then being taken off the orders to be taken back to the States as a medical patient all sort of came together at one time that morning before the trial" (R. 23).

That during the trial, and particularly after his initial testimony -

> "*** I was under a terrific pressure. I didn't know what to do. I didn't know where to turn. *** I was so confused." (R. 26)

> "*** I was, I might say, on the horns of a dilemma. Maybe it will explain the reason I didn't make the decision I did until

such a late time. I am 35 years old. The preceding nine years before I came into the Army I have gone to school. I left high school after completing my first year. I was out for two years, had a chance to go back when the depression came and finish high school. I took three more years. Times were still tough and I went to work for three years. I worked my way through college and a year of law school. That was four years ago. You see, I had my future to think of too, because if I got out of the Army with a bad record I couldn't go back to professional school with a bad record. Another thing, my mother and father are good people. I can't go back to them with a bad record, that is the kind of people they are. Then, on the other hand this Drozic was facing a suspended ten-year sentence and a possibility of five or six more years at this court martial and I had to decide between the two of them. *** I almost made me crazy. I am sure I was out of my head at times" (R. 32-33).

5. The offense of perjury is defined as:

"*** the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry" (MCM, 1928, par. 149i).

The testimony in this case clearly and conclusively proves each and every element of the crime as thus defined and there is no shred of evidence in the record which might lead to a contrary conclusion. In fact the accused admits that his testimony in the Drozic case was false. The only defense advanced by accused is predicated upon the proposition that later in the same trial he corrected his false testimony, and thereby purged himself of the criminal offense originally committed.

The rule of law announced by the United States Supreme Court in the case of United States v. Norris (300 U.S. 564, 81 L. Ed. 808) is applicable in this case. It was held therein that "Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness' statement has once been made" and retraction of such statement, and an admission of its falsity, prior to the completion of the hearing in which it was originally made is no defense to a prosecution therefor. (See also CM NATO 154, Armstrong, 1 BR (NATO-MTO) 97, 3 Bull, JAG 12).

The fact that an accused retracted his false testimony shortly after it was given and in the same case is a mitigating circumstance which may be considered by the confirming authority but it does not condone or purge the offense (CM 271737, Chafin, 46 BR 180).

The defense in this case relied upon the rule of law laid down in the case of United States v. Norris (86 Fed. (2d) 379 (Circuit Court of

Appeals)), which case was followed by CM 220746, Wallings (13 BR 59), (also reported in 1 Bull, JAG 22). It is noted that the case of United States v. Norris (300 U.S. 564, 81 Law Ed. 808) is the same case as reported in 86 Federal (2nd) 379, and is an appeal from that decision. The Supreme Court reversed the Circuit Court of Appeals. Therefore the case reported in 86 Federal (2nd) 379 and CM 220746, Wallings (13 BR 59) should no longer be followed.

6. War Department records show that the accused is 34-10/12 years of age and married. He is a high school graduate and completed five years of college at the University of Pittsburgh. He received a BA in Political Science in 1941, after which he completed one year of post graduate work in law. His work record discloses various positions held while attending school. He completed "CMTC Blue Course" 1932, completed ROTC Basic 1939; inducted 16 July 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, 25 February 1943; promoted to first lieutenant, Army of the United States, 16 February 1945. The extent of his overseas duty does not appear but on 11 April 1945 he was awarded the Bronze Star Medal for "meritorious service in connection with military operations against the enemy in ETO from 29 January 1945 to 18 February 1945."

7. The court recommended suspension of the confinement adjudged, because of the accused's physical condition and because he had recanted his perjury. The reviewing authority recommends remission of the confinement solely because of accused's physical condition.

8. The court was legally constituted and had jurisdiction over the accused and of the offense. 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 93.

Charles F. Silvus, Judge Advocate.

Carlos E. McAfee, Judge Advocate.

Gilbert E. Ashcroft, Judge Advocate.

JAGK-CM 315354 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 25, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of First Lieutenant Joseph H. Flack (0-1178144), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of perjury, in violation of Article of War 93. He was sentenced to dismissal, total forfeitures and confinement at hard labor 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 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 sentence as approved by the reviewing authority. The accused deliberately perjured himself as a witness before a court-martial. Later in that trial, after it became apparent that the falsity of his testimony would be established, the accused admitted his perjury. This admission by him resulted in the acquittal of the soldier then being tried. In his trial for perjury the accused defended upon an erroneous interpretation of law, to wit, that his action in admitting his perjury in the same proceedings wherein his offense occurred, absolved him of liability therefor.

4. The accused is 34-10/12 years of age and married. In 1941 he received a BA in political science from the University of Pittsburgh, after which he completed one year of post graduate work in law. He completed CMTC Blue Course in 1932 and ROTC Basic in 1939. He was inducted into the Army on 16 July 1942 and appointed and commissioned a temporary second lieutenant in the Army of the United States 25 February 1943. He received a temporary promotion to first lieutenant on 16 February 1945. He was awarded the Bronze Star Medal for meritorious service against the enemy in ETO from 29 January 1945 to 18 February 1945. The Staff Judge Advocate's review shows that he was in combat from August 1944 to the cessation of hostilities in Europe and that he is also entitled to three battle stars.

5. The court recommended that the sentence, insofar as it provides for confinement, be suspended due to the fact that the accused was suffering from tuberculosis and that he had recanted his perjury. The reviewing authority recommends that the confinement be remitted because of the physical condition of the accused.

Accused's deliberate perjury, recanted only when it became apparent that his falsity was detected, mark him as unfit to be an officer. Dismissal alone would, under the circumstances, appear to be sufficient punishment. I recommend that the sentence be confirmed, that the confinement and forfeitures be remitted, and that the sentence as 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

(G.C.M.O. 331, 31 October 1946.)

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

JAGK - CM 315386

8 AUG 1946

UNITED STATES	)	88TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Gorizia, Italy, 26 and 27 June 1946. Dishonorable discharge and confinement for life. Penitentiary.
	)	
Private JUAN N. MALDONADO (42233820), 88th Quartermaster Company.	)	

REVIEW by the BOARD OF REVIEW

SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Juan N. Maldonado, 88th Quartermaster Company, did, at Udine, Italy, on or about 2 June 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Degano, Emilia, a human being, by shooting her with a pistol.

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

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's Review.

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

Chester L. Silva, Judge Advocate

C. E. McAfee, Judge Advocate

Albert Bethany, Judge Advocate

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

JAN 15 1947

JAGQ - CM 315403

UNITED STATES v. Second Lieutenant ARTHUR B. DRILLING, JR. (0-1334834), Infantry.	25TH INFANTRY DIVISION Trial by G.C.M., convened at Osaka, Honshu, Japan, 17 June 1946. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
JOHNSON, DICKSON and BOYLES, 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 69th Article of War.

Specification: In that Second Lieutenant Arthur B. Drilling, Jr., Company B, 4th Infantry, having been duly placed in arrest in quarters on or about 1730 25 April 1946, did, at APO 25 (Osaka, Honshu, Japan) on or about 1620 26 April 1946 break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that Second Lieutenant Arthur B. Drilling, Jr., Company B, 4th Infantry, (then 491st Replacement Company, 70th Replacement Battalion, 11th Replacement Depot) did at or near Okazaki, Honshu, Japan, on or about 23 February 1946, with intent to deceive the Commanding Officer, 11th Replacement Depot, APO 352, officially state in a certificate to said Commanding Officer that he had secured Postal Money Orders and Personal Transfer Orders totaling three hundred dollars ($300.00) during the period 31 January 1946 to 25 February 1946, which statement was known by the said Arthur B. Drilling, Jr. to be untrue in that he had secured Postal Money Orders and Personal Transfer Orders in the total sum of seventeen hundred fifty dollars ($1750.00) during said period.

Specification 2: In that Second Lieutenant Arthur B. Drilling, Jr., Company B, 4th Infantry, was, in a public place, to wit, the regimental area of the 4th Infantry encampment at APO 25 (Osaka, Honshu, Japan) on or about 1730 25 April 1946, drunk while in uniform.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. The accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge II as involves a finding of guilty of drunk in uniform in a public place in violation of Article of War 96. The sentence was approved and the record of trial forwarded for action pursuant to Article of War 48.

3. Evidence for the Prosecution.

On 25 April 1946, Lieutenant John M. Gilligan was ordered by his battalion commander Major Robert S. Kennedy to go to the officers' club and bring the accused to the quarters of Colonel Powers, the regimental commander (R 13). Lieutenant Gilligan testified that he went to the officers' club at about 1715; that accused was on a divan with his eyes closed; that he was very drunk; that his balance was impaired; that he could not talk straight; that he took accused to the room of Colonel Powers; and that accused smelled of liquor (R 31). In the opinion of Lieutenant Gilligan, the accused at the time he entered Colonel Powers' room, was "very drunk and I think he could not understand anything said to him" (R 32). There was no sign of disorder or damage at the club.

Accused's physical condition according to the testimony of Major Kennedy, who was present in the room of Colonel Powers, was that he ".... appeared under the influence of some form of intoxicant, his eyes were red and glassy, his speech uncertain and his coordination was poor, his uniform was crumpled and appeared damp ...." (R 6). Accused was placed in arrest in quarters by Colonel Powers and the limits of his arrest explained to him. The accused indicated he understood the nature and limit of his arrest (R 8, 9). Accused attempted three times to salute, fell against the door and lurched out of the room (R 6). On the following day, not having been released by proper authority (R 14, 15) accused was observed by Major Kennedy and by First Lieutenant Quentin R. Ostrander, accused's company commander, beyond the limits of his arrest (R 6, 8, 11, 15). He was approached by Lieutenant Ostrander at that time, advised that he was still in arrest and ordered back to his quarters (R 15).

On 2 March 1946, after his rights had been fully explained to him, the accused made a sworn statement (Pros. Ex. 1). Such stated that about a week before he intentionally used a false amount on a certificate complying

with letter OAX 122.1 Nagoya Base, dated 22 February 1946 (Pros. Ex. 2), stating that he had obtained $156.95 as pay for the month of January 1946 and that he had sent home only $300. Accused signed the certificate (Pros. Ex. 3). He wished to conceal the fact that he had sent about $3,000 home. The letter order OAX 122.1 directed submission, by 27 February 1946, of certificates by officers of that Headquarters, setting forth the amount of pay received for January 1946 and the amount of money sent to the United States during the period 31 January - 25 February 1946 by Postal Money Orders and Personal Transfer Orders (Pros. Ex. 2).

Nine so-called "black market control certificates" (R 20), were admitted in evidence (R 27; Pros. Ex. 4; R 29; Pros. Exs. 5 to 12). Four certificates (Pros. Exs. 5 to 8) were to the effect that "the funds herewith transmitted by postal money order was legitimately obtained as payment of pay and allowances from a finance officer of the United States Army and were not obtained from the sale of property, black market currency operations or other illicit sources." The amount covered by the four certificates was $750.00. Accused admitted to the witness, Albin E. Erickson, a Criminal Investigation Detachment Special Agent, that he signed these four certificates (R 29), which were dated between the 12th and 21st of February 1946. Three of the four had Army Postal Service stamps upon them (Pros. Exs. 5 to 7) and totalled $600.00. The unstamped one (Pros. Ex. 8) was for $150.00.

As to the remaining five certificates (Pros. Exs. 4 and 9 to 12), the witness testified that accused admitted that the signature looked like his, but denied using them to transmit funds to the United States (R 28). The Special Agent testified that, in his opinion, the signatures on all certificates were in a different form than Exhibits 5 to 8. These were certificates that the officer signing them had satisfied himself as to the legitimacy of the source of the funds being converted and provided a space for the signature of the enlisted man whose funds were involved (R 21). On all the certificates in question the space provided for the enlisted man's signature was unsigned and the blank lined through. Four of these five had Army Postal Service stamps thereon, dated from 20 to 23 February 1946. The total amount represented on these certificates was $1,000.00, and that on the unstamped one (Pros. Ex. 4) was $200.00.

4. Evidence for the defense. During the presentation of the prosecution's case, at his own request, accused was placed on the stand for the limited purpose of rebutting Prosecution's Exhibit 4 (R 22, 24, 25). At the time of the date on this certificate, accused was Post Exchange Officer, and part of his duty was the conversion of currency for the enlisted men (R 25). In order to expedite the procedure, the accused customarily signed in advance as certifying officer the form of certificate used by the men, intending to fill in the amount and have the user sign when the transaction took place. But, he sometimes neglected to have the man sign on the blank provided before he left the window (R 25). He admitted the signature was his (R 25), but denied that he used the certificate to change his own money (R 26).

He did not know that the certificate in question was one signed in advance, but it was possible that it was (R 26).

Accused subsequently resumed the stand during the case for the defense, limiting his testimony to Specification 1 of Charge II (R 36). He stated that he signed the certificate (Pros. Ex. 3) in a hurry and was not fully aware of the meaning of the certificate (R 37). He was puzzled by the certificate and put down the first amount that came into his head ($300.00), as he had no idea how much money he had sent to the United States for the period listed (R 37). On cross-examination he admitted making the confession (Pros. Ex. 1) and his statement therein as to intentionally submitting a false certificate referred to Prosecution's Exhibit 3 (R 38). On redirect examination he testified that he did not intend to deceive anyone by the certificate (R 39). He realized he had made a false official statement afterwards, but was too busy to do anything about it (R 39). The undated certificate was made out about 22 February 1946 (R 40), and turned in to the Personnel Adjutant of the 11th Replacement Depot (R 41). He sent home about $3,000.00 from December to the latter part of February, and about $1,000.00 in February alone (R 41). The Army Postal Service stamp means that the money has been received by the Post Office (R 41). He admitted the signatures on all of Prosecution's Exhibits 4 to 12 were his (R 41).

Lieutenant Thomas D. Burke, Jr., confirmed the nature and use of the certificate admitted as Prosecution's Exhibit 3.

Lieutenant Donald Deckman testified that he saw the accused in the 4th Infantry Officers' Club about 1600 to 1645 on 25 April 1946 and he was sober (R 43). Accused had two drinks of 1½ inches each in a tumbler in 15 or 20 minutes while under witness' observation (R 44). No other officers or women visitors were in the club while accused was there (R 43). Private First Class Harvey J. Snyder, manager of the club, saw accused for a little over an hour. He was not disorderly, did not break anything, had one or two drinks, last saw him about 1700 hours, and he was not drunk in his opinion because he was not incapacitated (R 45, 46).

Accused elected to remain silent as to Charge I and Specification 2 of Charge II.

5. The evidence is clear and convincing that accused after having been duly placed in arrest of quarters did break such arrest before being released by proper authority, such as to substantitate a finding of guilty as to Charge I and the Specification thereunder.

The gravamen of the offense charged in Specification 1 under Charge II is the making of the false official statement with intent to deceive.

Such was sufficiently proved by the signed confession of accused (Pros. Ex. 1), his oral testimony on the witness stand and other corroborating evidence. The actual amount of Postal Money Orders and Personal Transfer Orders, alleged to be in the amount of $1750.00, obtained by accused, is somewhat uncertain. The postal stamp on the "black market certificates" indicates that accused obtained Postal Money Orders or personal transfer orders in the amount of $1400 only. Inasmuch as $1400 is grossly in excess of the amount accused certified to in Prosecution's Exhibit 3, and in the light of all the evidence including accused's admissions, such variance is not prejudicial to the substantial rights of the accused, nor could he have been misled thereby.

As to Specification 2 of Charge II, the Board of Review is of the opinion that the evidence as a whole fails to reveal the quantum of proof required to sustain a violation of Article of War 95 as "being grossly drunk and conspicuously disorderly in a public place" (par. 151, MCM, 1928). Failing as it does to sustain the more reprehensible conduct contemplated by Article of War 95, the evidence nevertheless establishes the conduct of accused to be such as to be to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service, within the meaning of Article of War 96 (CM 259222, McKettrick, 38 BR 285). The action of the reviewing authority in approving only so much of the finding of guilty as to that Specification as involves a finding of guilty of drunk in uniform in a public place in violation of Article of War 96 was proper.

6. War Department records show that the accused was born 10 November 1925, is a high school graduate, and unmarried. He enlisted on 28 October 1943, serving as an enlisted man until commissioned a temporary Second Lieutenant, Infantry, AUS, on 7 May 1945, upon graduation from the Officers' Candidate Course, The Infantry School. His efficiency rating index as an officer is 2.3.

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. 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 mandatory upon conviction of a violation of Article of War 95.

W.H. Johnson Jr, Judge Advocate

Charles M. Dickson, Judge Advocate

Francis J. Gaudan, Judge Advocate

JAGQ - CM 315403 1st Ind FEB 7 1947

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 the opinion of the Board of Review in the case of Second Lieutenant Arthur B. Drilling, Jr. (0-1334834), Infantry.

2. Upon trial by general court-martial this officer was found guilty of breaking arrest on 26 April 1946, in violation of Article of War 69; of making a false official statement (Spec 1, Charge II) and of being drunk in a public place while in uniform (Spec 2, Charge II), in violation of Article of War 95. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge II as involved a finding of guilty of drunk in uniform in a public place in violation of Article of War 96. He 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 as approved by the reviewing authority and the sentence, and to warrant confirmation thereof. I concur in that opinion.

The evidence shows that about 25 April 1946 accused was found drunk in an officers' club in Osaka, Japan, by an officer directed to bring him to the regimental commander's room. There he was placed in arrest, while still drunk, and the limits of his arrest explained, and accused indicated that he understood. He was on the following day observed beyond the limits of his arrest. About 1 March 1946 accused, having been ordered to make a report, made an official statement that he had sent to the United States by money orders or personal transfer orders, during the period between 31 January 1946 and 25 February 1946, the sum of $300. In fact he had transmitted more than $1400 by such means during the period indicated. He testified that he made the statement hurriedly and without deceitful intent.

5. War Department records show that the accused was born 10 November 1925, is a high school graduate, and unmarried. He enlisted on

28 October 1943, and served as an enlisted man until he was commissioned a temporary second lieutenant, Infantry, AUS, on 7 May 1945, upon graduation from an Officers' Candidate School. His efficiency rating index as an officer is 2.3.

6. The accused has by his false official statement demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution.

7. Inclosed is a form of action designed to carry this recommendation into effect, 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

(G.C.M.O. 54, 27 February 1947.)

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

JAGH-CM 315408

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 14 June 1946. Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for five (5) years. United States Disciplinary Training Center.
	)	
Private ARTHUR E. FISHER (20454707), Attached-Unassigned Headquarters Company, First Staging Area Battalion.	)	

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

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1. The record of trial of the above-named soldier, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Arthur E. Fisher, attached unassigned Headquarters Company, 1st Staging Area Battalion, did, without proper leave absent himself from his Command at Company L, 180th Infantry, APO 45, from about 1 November 1943 to on or about 26 January 1946.

After submitting a plea in bar of trial under the Statute of Limitations, which plea was overruled by the court, he pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten (10) years. The reviewing authority approved the sentence, remitted five years of the period of confinement imposed, ordered execution of the sentence, as thus modified, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the MTOUSA Disciplinary Training Center, or elsewhere as the Secretary of War may direct, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 1451, Headquarters, Peninsular Base Section, APO 782, 6 July 1946.

3. The only substantial question presented by the record is whether the trial was barred by the Statute of Limitations (AW 39), it being evident that the arraignment of accused occurred more than two years after the date of the commission of the offense alleged.

4. The accused was arraigned on 14 June 1946. The evidence shows that he absented himself without leave from his command (Company L, 180th Infantry, United States Army) on 1 November 1943 and that he was returned to military control on 26 January 1946. At the trial accused pleaded the Statute of Limitations (AW 39) in bar of trial. The plea was overruled by the law member, without objection by any member of the court.

The 39th Article of War provides in pertinent part:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *** Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: ***."

The period of limitation begins to run on the date of the commission of the offense. Absence without leave is not a continuing offense and is committed on the date the person absents himself (par. 67, MCM, 1928 (Cor. 4-20-43)).

When an accused pleads the Statute of Limitations in bar of trial, and when it appears from the record that the statutory period of limitations as to time has elapsed between the date of the alleged offense and the date of arraignment, the burden devolves upon the prosecution, if it proposes to combat the plea, to prove such absence or other impediment as will except the case from the operation of the statute. The burden is not upon the defense to prove that no such impediment existed, and unless such impediment existed the plea should be sustained (CM 149051; CM 150340; CM 150341; CM 154086; Dig. Op. JAG, 1912-40, Sec. 396 (3)).

The trial judge advocate contends that the plea in bar should be overruled because the accused absented himself from military jurisdiction by hiding for three years during the time he was absent without leave.

A mere allegation to the effect that the whereabouts of the offender was unknown to the military authorities during the interval of more than two years which had elapsed since the offense, is not a good averment of a "manifest impediment" in the sense of the Article (R. 35640, Oct. 1874; Dig. Op. JAG, 1912, p. 171, 172).

Other than the mere assertion that accused wrongfully absented himself by hiding for three years, the prosecution did not prove, or attempt to prove, an absence or other impediment as would except accused's case from the operation of the Statute of Limitations. The Board of Review, therefore, is of the opinion that the court erroneously overruled accused's plea in bar of trial.

It cannot be said under all the circumstances of the case, that accused intended to or did waive his rights in the premises by his plea of not guilty. He pleaded not guilty only after his plea in bar of trial was overruled by the court. Such being the case his trial upon this specification, in plain violation of the 39th Article of War, was erroneous and unauthorized. This rule conforms to the opinion of the Board of Review previously expressed (CM 313057, Siwy; CM 314864, Kenney).

5. The charge sheet shows that accused is 27 2/12 years of age and that he was inducted at Wilmington, North Carolina, 3 September 1940, to serve for the duration of the war plus six months. He had no prior service.

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

D. Rottenstein, Judge Advocate

Wallenmar A. Self, Judge Advocate

On Leave, Judge Advocate

JAGH - CM 315408 1st Ind

WD, JAGO, Washington 25, D. C. SEP 27 1946

TO: The Under Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Private Arthur E. Fisher (20454707), Headquarters Company, First Staging Area Battalion, Peninsular Base Section.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and recommend that the findings of guilty and the sentence be vacated and all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, 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. 324, 28 October 1946.)

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

JAGH - CM 315467

6 DEC 1946

UNITED STATES v. Second Lieutenant EARLE P. HOFFMAN (O-1995876), Air Corps	)	AIR MATERIEL COMMAND Trial by G.C.M., convened at Army Air Forces Technical Base, Dayton, Ohio, 28 June 1946. Dismissal.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and FLANAGAN, 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: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Earle P. Hoffman, Air Corps, did, without proper leave, absent himself from his post and duties at Wright Field, Dayton, Ohio, from about 27 February 1946 to about 9 April 1946.

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

Specification 1: In that Second Lieutenant Earle P. Hoffman, Air Corps, did, at Dayton, Ohio, on or about 27 March 1946, with intent to defraud, wrongfully and unlawfully make and utter to the Wright Field Officers' Club, a certain check in words and figures as follows, to wit:

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27 March 1946

Gratz National Bank Bank

Gratz City Pennsylvania State

Pay to the order of THE WRIGHT FIELD OFFICERS' CLUB $15 00/100

Fifteen dollars and no 00/100- - - - - - - - - - - - - - - - Dollars

Printed Name Earle P. Hoffman Sign. Earle P. Hoffman

Address Bks. 1027 Area B A.S.N. 0-1995876

Phone No. Rank 2nd Lt.

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and by means thereof did fraudulently obtain from the Wright Field Officers' Club $15.00 in lawful money of the United States, he the said Second Lieutenant Earle P. Hoffman, then well knowing that he did not have and not intending that he should have any account with the Gratz National Bank, Gratz, Pennsylvania for the payment of said check.

Specification 2 through 11 are identical in form with Specification 1, excepting as to dates and amounts. The variations are as follows:

Spec	Date	Amount	Place	Organization Defrauded
2	28 Mar	$ 10.00	Wright Field	Wright Field Officers' Club
3	(Finding of guilty disapproved by reviewing authority).			
4	20 Apr	15.00	Wright Field	Wright Field Officers' Club
5	27 Apr	15.00	Wright Field	Wright Field Officers' Club
6	11 May	15.00	Wright Field	Wright Field Officers' Club
7	14 May	15.00	Wright Field	Wright Field Officers' Club
8	15 May	15.00	Wright Field	Wright Field Officers' Club
9	18 May	10.00	Wright Field	Wright Field Officers' Club
10	19 May	10.00	Wright Field	Wright Field Officers' Club
11	20 May	10.00	Wright Field	Wright Field Officers' Club

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. With respect to Specification 3 of the Additional Charge the reviewing authority disapproved the finding of guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for two (2) years. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that the accused absented himself without leave from his post and duties at Wright Field, Dayton, Ohio, on 27 February 1946 and remained in that status until he returned to duty on 9 April 1946 (R 8, 10-12; Pros Exs A, B, C, D, F, and G).

A statement made by the accused to the investigating officer was received in evidence (R 25; Pros Ex D), in which the accused after having his rights under the 24th Article of War explained, admitted leaving his station without orders for a period of about six days. During that time he attended the funeral of his grandfather in Gratz, Pennsylvania. When he reported for duty he got the impression that there was no rush in reporting to the place where he was assigned, as everything at Wright Field was mixed up due to so many officers reporting for duty at that station. He had been living in the visiting officers' quarters and was available most of the time excepting during the six days when he went to Gratz for his grandfather's funeral. No one had attempted to contact him at the VOQ and the first time that he had noticed that someone was trying to contact him was when his name appeared in the daily bulletin. When he saw his name, he reported immediately to the Personnel Office. He spent most nights in town and did quite a bit of drinking and consequently was in bed a good part of the day with a hangover. He flew four hours during March and received his flying pay for that month.

In support of the offenses of fraudulently making and uttering checks alleged in the Specifications of the Additional Charge, the amounts of which totalled $130.00, it was shown that the accused did not have an account in the Gratz National Bank, Gratz, Pennsylvania (R 29), upon which bank all the checks were drawn. However prior to the offenses here alleged, two of the accused's checks were paid by his mother (R 29, 35), after she had been notified by the bank that the checks has been received for payment (R 35). The accused's mother was satisfied that the two checks had been signed by her son. The ten checks were received by the bank but when the accused's mother, who did not have an account at the bank, failed to pay the checks, they were returned to the payee with a slip attached marked "No Account." The bartender at Wright Field Officers' Club cashed the checks dated 22 April (Spec 5) and 14 May (Spec 7) and gave the accused cash when the checks were presented to him (R 28). Each of the checks was introduced into evidence without objection by the defense (Pros Exs E 1 to E 11). During the trial a stipulation was entered into between the prosecution and the defense with the accused consenting, that all the checks were signed by the accused (R 38). The accused redeemed five of the checks before the trial. Notwithstanding warnings by Club employees that his checks were being returned he continued to make and utter checks with no account in drawee bank.

4. The defense counsel made an unsworn statement to the court on behalf of the accused which is summarized as follows (R 46): The accused had an arrangement with the Gratz National Bank to call upon his mother for such funds as might be necessary to cover any checks issued by him.

Previously, two of his checks had been paid by his mother when she was notified by the bank. The accused came directly into the Army from Gratz which is a small community of only about seven hundred people and was not aware of the commerical ramifications surrounding the issuance and payment of the checks. Neither the bank nor his mother notified the accused that the checks were being returned to the payee as a result of his not having an account in the Gratz National Bank. The accused redeemed all but the last five checks and would have redeemed those had he been permitted to leave his quarters to which he had been restricted (R 46).

5. From the foregoing it is clear that once having reported and after having received his duty assignment, the accused sought to take advantage of the administrative confusion caused by the heavy influx of officers reporting for duty at Wright Field. The statement by accused together with the other competent evidence clearly established his absence without leave as alleged in the Specification of the Charge and the Charge.

There remains for consideration the findings of guilty of the Specifications of the Additional Charge and the Additional Charge. The evidence is uncontradicted that the accused uttered ten checks drawn on a bank in which he had no account. Despite repeated warnings that some of the checks had been returned with notation slips marked "No Account," the accused persisted in uttering additional checks drawn on the same bank. Five of the checks were redeemed by the accused prior to the trial. The remaining five checks, according to accused's unsworn statement, would have been redeemed had he been given authority to leave his quarters for the purpose of cashing a money order.

The allied papers show that the accused was examined by the neuropsychiatrist of the Army Air Forces Regional Hospital, Wright Field, who found him to be normal and well balanced, capable of distinguishing right from wrong and responsible for his actions.

6. The accused is 25 years of age, single and one parent, his mother, who is a widow, is still living. He graduated from high school in Gratz, Pennsylvania in 1938 and worked as a textile inspector for the Gratz Manufacturing Company from 1939 to 1941. In July and August 1942 he worked as a freight clerk for the Reading Railroad. He was appointed an aviation cadet on 11 March 1943, a flight officer on 2 October 1943 and was commissioned a second lieutenant, Army of the United States on 23 August 1944. His efficiency ratings have been excellent. He served overseas for twelve months, during which time he engaged in thirty-five missions as a bombardier, totalling approximately 250 combat hours. He is authorized to wear four bronze battle stars and was awarded the air medal, with three clusters, and the distinguished flying cross.

7. The court was legally constituted and had jurisdiction of the person 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, as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violations of the 61st and 96th Articles of War.

R. Hottenstein, Judge Advocate

Wilhelmus A. Self, Judge Advocate

Irene J. Hannigan, Judge Advocate

JAGH - CM 315467 1st Ind DEC 23 1946

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 the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Earle P. Hoffman (0-1995876), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 27 February to 9 April 1946, in violation of the 61st Article of War and of making and uttering, with intent to defraud, eleven checks totaling $145.00, with no account in drawee bank, and fraudulently obtaining the proceeds of the checks, in violation of the 96th Article of War. He was sentenced to dismissal and confinement at hard labor for two (2) years. The reviewing authority disapproved the finding of guilty of Specification 3 of the Additional Charge (bad check for $15), 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. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the sentence.

Lieutenant Hoffman was assigned by paragraph 1, Special Orders 39, Headquarters, Air Technical Service Command, Wright Field, Dayton, Ohio, dated 25 February 1946, to the Engineering Division of that headquarters. The same day the Engineering Division in Personnel Orders No. 806 assigned the accused to the Equipment Laboratory. He did not report for duty and remained absent without leave until 9 April 1946.

Between 28 November 1945 and 20 May 1946, the accused made and cashed ten checks payable to the Wright Field Officers' Club. These checks, totaling $130.00, were drawn on the Gratz National Bank, Gratz, Pennsylvania, in which bank the accused did not have an account. Prior to the offenses here alleged his mother redeemed two of his checks, when notified by the bank, but failed to accept any others. At no time did the mother of the accused have an account in the Gratz National Bank. After several of the accused's checks had been returned to the Wright Field Officers' Club marked "No Account," the club officer warned him not to issue any more checks. Despite this warning, and warnings given to accused by civilian employees at the club, he continued to utter additional checks. He made good five of the checks.

The accused stated to an investigating officer that he reported for duty but was given the impression that there wasn't any "rush" to report to his duty assignment because of the coming weekend. He received word of his grandfather's death and left the post for six days in order to attend the funeral. There were many officers reporting at Wright Field and as everything was generally mixed up, he and many other officers took their time in reporting. He spent the greater part of every day in bed and no one attempted to contact him as was done on other posts where he had been stationed. The first time he knew someone was trying to locate him was when he saw his name in the daily bulletin.

In an unsworn statement to the court, the defense counsel stated that the accused came from a small town of several hundred inhabitants and had no knowledge of commercial transactions, that the accused had a working arrangement with the bank whereby it would call upon his mother for such funds as might be necessary to pay any of his checks which the bank received and that neither the accused's mother nor the bank notified him that the checks were being returned marked "No Account."

5. The evidence sufficiently establishes the frauds found under the specifications involving the checks. The circumstances however, while indicating irresponsibility, do not justify an inference that accused intended in the end to avoid payment of the checks.

6. This 25 year old officer is single and resides with his mother in Gratz, Pennsylvania. He was appointed an air cadet on 11 March 1943, flight officer on 2 October 1943 and commissioned a second lieutenant, Army of the United States on 23 August 1944. His efficiency ratings have been excellent. He served overseas twelve months, went on thirty-five missions as a bombardier in the European Theater of Operations and had approximately 250 combat hours in the air. He is authorized to wear four bronze battle stars, the air medal with three clusters and the distinguished flying cross.

7. I recommend that the sentence be confirmed but in view of all the circumstances, including the accused's combat record, recommend that the sentence be suspended during good behavior.

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

CM 315467

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 7, 15 January 1947.)

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