OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 68

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v.68

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Judge Advocate General's Department

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 68

including

CM 318727 - CM 319591

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

JAGH - CM 318727

12 JUN 1947

U N I T E D S T A T E S	)	ATLANTIC DIVISION AIR TRANSPORT COMMAND
v.	)	
Major OSCAR P. HOFFMAN (0-805460), Air Corps	)	Trial by G.C.M., convened at Long Beach Army Air Field, Lon Beach, California, 13 November 1946. Dismissal, total forfeitures, and confinement for six (6) months.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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: Violation of the 96th Article of War.

Specification 1: In that Major Oscar P. Hoffman, Squadron A, 591st AAF Base Unit Stockton Field, California, did, at Stockton, California on or about 5 July 1946, with intent to defraud wrongfully and unlawfully make and utter to the Clark Hotel of Stockton, Incorporated, Stockton, California, a certain check, in words and figures as follows, to wit:

(2)

90-109 Stockton Main Office 90-109
345 East Main Street
First Citizens Bank & Trust
~~BANK OF AMERICA~~
National Trust and Association
Savings
Smithfield, N. C.
~~Stockton, Calif~~ July 5 19 46

Pay to the Order of

CLARK HOTEL ---------- $ 32 94/00

Thirty-two and 94/100 ---------- DOLLARS

Stockton Field
1438 S. Union St.

Oscar P. Hoffman /signed/
Maj. A. C. 0-805460

and by means thereof, did fraudulently obtain from the Clark Hotel of Stockton, Incorporated, services of the value of about $32.94 in payment of hotel bill, he the said Major Oscar P. Hoffman, then well knowing that he did not have and not intending that he should have sufficient funds in the First Citizens Bank and Trust Company of Smithfield, North Carolina for the payment of said check.

Specifications 2 through 12 are identical in substance with Specification 1, except that each check is made payable to "Cash" and except dates, amounts, and other details, which exceptions are as follows in the specifications indicated:

Spec	Date of Offense and of Check (1946)	Amount of Check and Amount Alleged Obtained	Drawee Bank	To Whom Uttered
2	26 Jun	$ 35.00	1st Citizens Bank & Trust Co., Smithfield, N. C.	Matteoni's Club
3	5 Jul	15.00	1st Citizens Bank & Trust Co.	Clark Hotel
4	5 Jul	25.00	1st Citizens Bank & Trust Co.	Clark Hotel
5	28 Jun	50.00	1st Citizens Bank & Trust Co.	Matty's Cocktail Lounge
6	29 Jun	25.00	1st Citizens Bank & Trust Co.	Matty's Cocktail Lounge
7	1 Jul	20.00	1st Citizens Bank & Trust Co.	Matty's Cocktail Lounge
8*	12 Jul	25.00	American Trust Co., Stockton Office	Matty's Cocktail Lounge
9*	13 Jul	100.00	American Trust Co., Stockton Office	Matty's Cocktail Lounge
10*	14 Jul	20.00	American Trust Co., Stockton Office	Hotel Main, Stockton, California
11	3 Jul	50.00	1st Citizens Bank & Trust Co.	Commissioned Officers Club, Stockton, Cal.
12	25 Jul	25.00	1st Citizens Bank & Trust Co.	Heart's Place, Stockton, Cal.

* Specifications 8, 9, and 10 also vary from Specification 1 in that they allege, instead of insufficient funds, " * * * then well knowing that he did not have and not intending that he should have an account with the American Trust Company, Stockton Office 90-1367, 24 North Sutler Street, Stockton, California, for payment of said check." In Specification 10, while the date of offense is alleged as 14 July 1946 the date on the check itself is "_____ 1946."

Specification 13: In that Major Oscar P. Hoffman, Squadron A, 591st AAF Base Unit, Stockton Field, California, did, at Stockton, California, on or about 28 June 1946, with intent to defraud wrongfully and unlawfully make and utter to Allen H. Cunningham, a certain check, in words and figures as follows, to wit:

66-437
5

Smithfield, N. C. June 28 1946 No.

FIRST CITIZENS BANK & TRUST COMPANY

Pay to the Order of Allen H. Cunningham $ 100 00 xx

One hundred and no/100 ---------- DOLLARS

For cash deposit automobile

Oscar P. Hoffman /signed/
Maj. A. C. 0-805460

and by means thereof, did fraudulently obtain by Allen H. Cunningham's endorsement thereof, from Matty's Cocktail Lounge, 429 E. Weber, Stockton, California, One hundred dollars ($100.00), he the said Major Oscar P. Hoffman, then well knowing that he did not have and not intending that he should have sufficient funds in the First Citizens Bank and Trust Company of Smithfield, North Carolina for the payment of said check.

Specification 14: In that Major Oscar P. Hoffman, Squadron A, 591st Army Air Forces Base Unit, (1st MAT Group), Continental Division, Air Transport Command, did, at Stockton, California, on or about 28 June 1946, with intent to defraud, wrongfully and unlawfully make and utter to Captain Allen H. Cunningham, a certain check, in words and figures as follows, to wit:

Smithfield, N. C. June 28, 46 66-437
5

FIRST-CITIZENS BANK & TRUST COMPANY

Pay to the order of Allen H. Cunningham $300.00

Three hundred and no/100 Dollars

For cash deposit automobile

/s/ Oscar P. Hoffman
Maj A.C. 0-805460

and by means thereof did fraudulently obtain from the said Allen H. Cunningham value to the extent of cancellation of a pre-existing debt of three hundred dollars ($300.00) owed by Captain

Robert B. Alexander to the said Captain Allen H. Cunningham, and in return for said check and other consideration the said Captain Robert B. Alexander delivered to the said Major Oscar P. Hoffman one 1940 model Cadillac sedan automobile, he, the said Major Oscar P. Hoffman, then well knowing that he did not have and not intending that he should have sufficient funds in the First Citizens Bank and Trust Company of Smithfield, North Carolina, for payment of said check.

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

"Additional Specifications" 2, 3, and 5 through 14 are identical in substance with Specification 1 of the Charge, except for dates, amounts and other details, which exceptions are as follows in the specifications indicated:

Add Spec	Date of Offense and of Check (1946)	Amount of Check and Amount Obtained	Payee	Drawee Bank	To Whom Uttered
2	17 Jul	$ 50.00	Cash	1st Citizen Bank & Trust Co.	Elite Cleaners, Stockton, Cal.
3	21 Jul	10.00	Cash	1st Citizen Bank & Trust Co.	Horse-Shoe Club, Stockton, Cal.
5	23 Jul	100.00	Thomas C. Buck	1st Citizen Bank & Trust Co.	Thomas C. Buck
6	29 Jul	300.00	Horse-Shoe Club	1st Citizen Bank & Trust Co.	Horse-Shoe Club
7	5 Aug	25.00	Cash	1st Citizen Bank & Trust Co.	Horse-Shoe Club
8	14 Aug	25.00	6th Ferrying Group Officers Mess	1st Citizen Bank & Trust Co.	6th Ferrying Group Officers Mess, Long Beach, Cal.
9	17 Aug	25.00	Cash	1st Citizen Bank & Trust Co.	Bomb-Shelter Drive-In Cafe, Long Beach, Cal.
10	17 Aug	15.00	Cash	1st Citizen Bank & Trust Co.	Bomb-Shelter Drive-In Cafe
11	19 Aug	25.00	6th Ferrying Group Officers Mess	1st Citizen Bank & Trust Co.	6th Ferrying Group Officers Mess
12	19 Aug	25.00	6th Ferrying Group Officers Mess	1st Citizen Bank & Trust Co.	6th Ferrying Group Officers Mess

Add Spec	Date of Offense and of Check (1946)	Amount of Check and Amount Obtained	Payee	Drawee Bank-	To Whom Uttered
13	20 Aug	$ 25.00	6th Ferrying Group Officers Mess	1st Citizen Bank & Trust Co.	6th Ferrying Group Officers Mess
14*	29 Aug	25.00	Cash	Bank of America' Trust & National Savings Ass'n, North Long Beach, Cal.	Bomb-Shelter Drive-In Cafe, Long Beach, Cal.

* Specification 14 varies from Specification 1 of the Charge in that instead of alleging insufficient funds, this specification alleges as follows: " * * * then well knowing that he did not and not intending that he should have an account in the Bank of America, National Trust and Savings Association, North Long Beach Branch, for the payment of said check."

The place of offense alleged is Stockton, California, in all specifications except that in "Additional Specifications" 8 to 14, inclusive, the place alleged is Long Beach, California.

The accused was not arraigned upon "Additional Specifications" 1 and 4 of the Additional Charge. The accused pleaded not guilty to each specification and each charge and was found guilty of all specifications and charges. 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. No evidence of any previous convictions was introduced. The reviewing authority approved the sentence but remitted two and one-half years of the confinement imposed 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 was identified as being in the military service and was known by all witnesses. A handwriting expert testified that all the checks were written by the same person (R 62). It is noted that all the checks drawn on the First Citizens Bank and Trust Company bear the endorsements of the banks in which they were deposited and of intermediate banks and clearing houses, including the Richmond Country Clearing House, Richmond, Virginia, and that these endorsements are cancelled. It was stipulated by

the prosecution, defense and the accused (R 65, Pros Ex 21) that the accused and his wife had had a joint account at the First Citizens Bank and Trust Company, Smithfield, North Carolina, since March 1944 and that from 5 June 1946 to 5 September 1946 the balance in that account was 27 cents. In his deposition, introduced in evidence as Prosecution Exhibit 22, the cashier of that bank stated that accused's account had a "dormant" balance of $.27 since 5 June, the bank does not permit overdrafts and that all checks that would cause overdrafts were returned unpaid. No deposits were received during June and July 1946. It was stipulated between the prosecution and defense and accused (R 64, Pros Ex 19) that the assistant cashier of the Bank of America, North Long Beach Branch, would testify that an examination of the records of the bank "fails to disclose any account in the name of Oscar P. Hoffman at this time or at any time in the past." The deposition of Mr. Bashor, Office-Manager, Stockton Office, American Trust Company, was admitted in evidence as Prosecution Exhibit 20 (R 64). He identified the three checks described in Specifications 8, 9 and 10 (Pros Exs 5D, 5E and 2A, respectively), and stated that the endorser of each check had an account at the bank, but that the maker of the check did not and that the checks were refused for the reason that the account could not be located at that office of the bank (Pros Ex 20).

Specifications 1, 3 and 4 of the Charges: These specifications relate to three checks uttered to the Clark Hotel of Stockton, Inc. By deposition (Pros Ex 1) the manager of the Clark Hotel testified that he had seen three checks which were shown to him, but described in the deposition merely as Prosecution Exhibits 1, 2 and 3 for identification. The check identified as Prosecution Exhibit 1 for identification was delivered to the witness by the hotel auditor. The witness did not see accused sign it, but the consideration given for it was a credit of $22.94 on accused's hotel bill and $10 in cash. With respect to the other two checks, the witness personally saw accused sign one and gave him cash for it, but is not sure which of the two checks it was. Accused, however, received from the hotel $15 in cash for the one identified in the deposition as Prosecution Exhibit 2 and $25 in cash for the one identified as Prosecution Exhibit 3. All three checks were endorsed by the hotel auditor on about 6 July 1946 and were deposited in the Bank of America, Main Branch, Stockton. About 20 July 1946 the bank returned all three checks, giving "insufficient funds" as the reason (Pros Ex 1).

Over objection by defense that there was no evidence accused had signed the checks, the three checks described in the specifications were admitted in evidence, the one described in Specification 1 as Prosecution Exhibit 1A, that in Specification 3 as Prosecution Exhibit 1C, and that in Specification 4 as Prosecution Exhibit 1B (R 25-26). Each check was stamped with the endorsement of the Clark Hotel.

(S)

Specification 2 of the Charge: Mr. George Pitzer, a night club proprietor, testified by deposition (Pros Ex 4). He identified and described the check referred to in Specification 2, but did not recall seeing accused sign the check. The consideration paid for the check was $35. It was endorsed by the witness for Matteoni & Pitzer, deposited in the Stockton Savings and Loan Bank, and the check was returned unpaid because of insufficient funds (Pros Ex 4). The check described in the specification and in the deposition was admitted in evidence as Prosecution Exhibit 4A (R 30). It was endorsed "Matteoni and Pitzer" by rubber stamp.

Specifications 5, 6, 7, 8 and 9 of the Charge: Mr. Fred Chinchiolo, by two depositions (Pros Exs 5, 6), testified that he is a tavern owner. He identified and described in his depositions the checks described in Specifications 5, 6, 7, 8 and 9 and stated that he saw each of the checks signed by the accused and that the consideration for each check was cash in the amount of the respective check. Each check was endorsed in the witness' presence by Fred Matteoni and deposited in "our" account known as "Matty's" in the American Trust Company, Stockton Office. All the checks were later returned; the three drawn on the First Citizens Bank and Trust Company for the reason "insufficient funds", and the two on the American Trust Company, Stockton Office, for the reason "Unable to locate account." Accused told the witness he had an account at the American Trust Company and asked for blank checks on that bank (Pros Exs 5, 6). Five checks, as described in Specifications 5, 6, 7, 8 and 9 and in the deposition (Pros Ex 5), were admitted in evidence as Prosecution Exhibits 5A, 5B, 5C, 5D and 5E, respectively (R 32). Each was endorsed "Fred Matteoni", in writing; the two drawn on the American Trust (Pros Exs 5D, 5E), having printed slips attached which stated "we are unable to locate an account at this office on which this check is drawn * * * The American Trust Company."

Specification 10 of the Charge: Miss Leila Ferrero, assistant manager of Hotel Main, Stockton, testified by deposition (Pros Ex 2). She stated that she had seen "Prosecution Exhibit 4 so marked for identification, which purports to be a check." The check is not further described in the deposition. She further testified that she was present and saw accused sign the check on 14 July 1946 and gave him $20 in cash for it. The check was endorsed by one of the hotel clerks and deposited in the American Trust Company, Stockton Office. Sometime later that bank returned the check unpaid, giving as a reason "unable to locate account at the office on which drawn."

The hotel was later paid $20 in cash by Mrs. Hoffman, accused's wife (Pros Ex 2).

A check as described in Specification 10 was admitted in evidence as Prosecution Exhibit 2A (R 27). It was endorsed, by rubber stamp, "Pay to order of Stockton Office, American Trust Company, Hotel Main" and had attached a printed slip stating "we are unable to locate an account at the office on which this check is drawn * * * American Trust Company."

Specification 11 of the Charge: Mr. Clyde W. Sherfey, Secretary-Manager of Stockton Officers' Club testified by deposition (Pros Ex 3). He stated that he had previously seen a check which was shown to him, identified in the deposition only as "Prosecution's Exhibit No. 5 so marked for identification." He did not see accused sign it, but it was delivered to him by a bartender at the club and $50 was given as consideration for it. The witness endorsed the check and presented it for payment about 5 July 1946 at the Stockton Savings and Loan, Stockton, California. Two or three weeks later the check was returned by that bank unpaid because of insufficient funds. A check as described in Specification 11 was admitted in evidence as Prosecution Exhibit 3A (R 28). It bears a rubber stamp endorsement, "Commissioned Officers' Club of Stockton."

Specification 12 of the Charge: Mr. Loren Morris, a tavern manager, testified by deposition (Pros Ex 7) that accused cashed a check "at my place of business." He described the check shown him as "Prosecution Exhibit 15," and stated that it was signed by accused in his presence and that $25 in cash was given for it. The check was endorsed by the owner, Mr. Heartz, in his presence, was presented to the Stockton Savings and Loan Bank for payment, and was returned by the bank unpaid, the reason given being, "insufficient funds" (Pros Ex 7). A check as described in Specification 12 and in deposition (Pros Ex 7) was admitted in evidence as Prosecution Exhibit 7A (R 34). It bears a rubber stamp endorsement, "for deposit only, Stockton Savings and Loan Bank, Stockton, California, Hearts."

Specifications 13 and 14 of the Charge: Captain Allen H. Cunningham, an officer on terminal leave, testified by deposition (Pros Ex 8). He identified and described the two checks set forth in Specifications 13 and 14. Both were signed by accused in his presence, and made payable to him. The witness endorsed the $100 check and after Fred Matteoni cashed it for him, he gave the $100 to a Captain Alexander. He endorsed the $300 check and deposited it in his account in the Mercantile National Bank, Dallas, Texas. Later, the $100 check was returned to him by Fred Matteoni unpaid (Pros Ex 8). As to the $300 check, he was notified by the Mercantile National Bank that the check was returned for insufficient funds and that they had charged this amount against his account. The accused redeemed these checks by giving Captain Cunningham a check signed by his wife, whereupon Captain Cunningham reimbursed Fred Matteoni. The circumstances as to the consideration for these two checks were as follows: Captain Cunningham, Captain Alexander and the accused were together at Matty's Grill. Captain Alexander owed Captain Cunningham $300 and accused decided to buy an automobile from Captain Alexander. It was agreed that the accused would give his check for $300 to Captain Cunningham, who in turn agreed to accept it in payment of Captain Alexander's indebtedness to him. Captain Alexander then credited the accused with $300 on the

price of the car. Captain Cunningham knew Fred Matteoni, owner of the grill, and since Captain Alexander wanted some cash, accused made the $100 check payable to Captain Cunningham, who endorsed it, had it cashed by Fred Matteoni and gave the $100 to Captain Alexander. Captain Cunningham's only interest in the check was "to act as an endorser in order that Captain Alexander could secure some cash"; it was as "a convenience and courtesy to Captain Alexander" (Pros Ex 8). The two checks as described in the deposition and in Specifications 13 and 14 were admitted in evidence as Prosecution Exhibits 8A and 8B, respectively, over objection of defense on the ground that there was no consideration. (R 38) Prosecution Exhibit 8A, the $100 check, was endorsed by Allen H. Cunningham and by Fred Matteoni, the other check was endorsed by Allen H. Cunningham "for deposit only."

"Additional Specification" 2 of Additional Charge: Bob Townsend, proprietor of Elite Cleaners, testified by deposition (Pros Ex 11) and stated that he had seen a check which was shown to him, marked Prosecution Exhibit 26, but not otherwise described. This check was signed by accused in his presence about 17 July 1946, at the Elite Cleaners and he gave accused $50 in cash therefor. The check was endorsed by his wife, Edith Townsend, and presented to the bank, Stockton Office, American Trust Company, for payment. About two or three weeks later it was returned unpaid by the bank, which gave as a reason "insufficient funds" (Pros Ex 11).

A check was described in "Additional Specification" 2 as admitted in evidence (R 42). It was endorsed in writing, "Edith Townsend."

"Additional Specifications" 3, 6 and 7 of the Additional Charge: The three checks involved in these specifications were allegedly uttered to the Horse-Shoe Club at Stockton, California. Mr. Wilmot Paullo testified by deposition (Pros Ex 10) that he had seen three checks shown to him but identified only as Prosecution Exhibits 22, 23 and 24 for identification. The one identified as Prosecution Exhibit 22 was signed by the accused in the witness' presence about 29 July 1946. The witness requested that accused have Mrs. Hoffman also sign the check. Accused left and twenty minutes later Mrs. Hoffman returned with the check signed by her as co-maker and the witness cashed the check, giving her $300. The witness endorsed the check and presented it to his bank, the Bank of America, East Side Branch. In the early part of August it was returned unpaid, the reason given being "insufficient funds." The witness did not see the signing of the check identified in the deposition as Prosecution Exhibit 23 but it was delivered to him by one of his employees and he cashed it, giving $25 in exchange therefor. The witness also endorsed and presented this check to his bank about 6 August 1946. It was later returned unpaid because of insufficient funds. The check identified as Prosecution Exhibit 24 was presented to the witness by accused personally, although he did not see the accused sign it. The witness gave accused $10 for this check, endorsed it about 22 July 1946 and presented it to his bank. Early in August it was returned by the bank unpaid due to

insufficient funds. The witness never received the amounts of these checks from anyone (Pros Ex 10).

The three checks described in "Additional Specifications" 3, 6 and 7 were admitted in evidence without objection as Prosecution Exhibits 10C, 10A and 10B, respectively (R 42). Each check was endorsed by rubber stamp by the Horse-Shoe Club.

"Additional Specification" 5 of the Additional Charge: Thomas C. Buck testified by deposition (Pros Ex 9) that he had previously seen a check shown to him and identified only as Prosecution Exhibit 20 for identification. He did not see accused sign the check, but the accused gave him the check and he in turn gave accused $100 in cash therefor. The witness endorsed the check to the Horse-Shoe Club and received $100 for the check. About the last of August or first of September, Mr. Paullo, the owner of the Horse-Shoe Club, called upon him to make the check good and he returned the amount of the check, $100, to Mr. Paullo. He has not been reimbursed for this check. Mr. Paullo testified by deposition (Pros Ex 10) that he had previously seen the check (identified only as Pros Ex 20) and that he received it from Thomas C. Buck, giving Buck $100 in consideration therefor. He endorsed the check about 26 July 1946 and presented it to his bank, Bank of America, East Side Branch. About 20 August 1946 that bank returned the check unpaid due to insufficient funds. He stated that he had never received payment on the check from the bank, the accused, or anyone else (Pros Ex 10). A check as described in "Additional Specification" 5 was admitted in evidence, without objection, as Prosecution Exhibit 9A (R 39). This check was endorsed in writing by "Thomas C. Buck" and, by rubber stamp, by the Horse-Shoe Club.

"Additional Specifications" 8, 11, 12, 13 of the Additional Charge: The checks in these specifications were all made payable to the 6th Ferrying Group Officers' Mess. Captain William M. Martin, the assistant mess officer, identified four checks drawn on the First Citizens Bank and Trust Company, Smithfield, North Carolina, each for $25, each signed by the accused and made payable to the Officers' Mess. The checks were admitted in evidence as follows: one dated 14 August 1946 as Prosecution Exhibit 12; one dated 19 August 1946 as Prosecution Exhibit 13; one dated 19 August 1946 as Prosecution Exhibit 14, and the fourth dated 20 August 1946 as Prosecution Exhibit 15 (R 45). Three were endorsed by the witness himself and all, by rubber stamp, by the Officers' Mess. All the checks were accepted by the girl on duty for cash and all were returned from the bank because of insufficient funds. The witness did not know accused's signature (R 46). The Officers' Mess has been reimbursed for these checks (R 47).

"Additional Specifications" 9, 10 and 14 of the Additional Charge: Mr. Irving Safady, manager of the Bomb-Shelter Drive-In Cafe testified that he knows accused, and he identified three checks, shown to him, as checks

that "looked like checks the accused gave him" (R 49). These checks were described and admitted in evidence, without objection, as follows: check described in Specification 9 as Prosecution Exhibit 17, check described in Specification 10 as Prosecution Exhibit 16, and check described in Specification 14 as Prosecution Exhibit 18 (R 49). The witness further testified that he had received four or five checks from accused and had cashed at least three of them personally. All checks received by the witness at the Bomb-Shelter Drive-In Cafe are, in regular course, taken by him to another place of business, the Circle, owned by the same parties, as "they do our depositing" (R 50). "Their" endorsement, "Kimmel and Orloff" was stamped on the back of the checks (R 50; Pros Exs 16, 17, 18). The witness did not identify the specific checks in evidence as received by or cashed by him, but he is sure they were cashed in his establishment (R 51). They were presented to the Bank of America, Cherry and Anaheim Branch (R 51). These checks, with others, were returned unpaid because of insufficient funds but later were made good by accused (R 51-52). With respect to the check referred to in Specification 14, (Pros Ex 18), drawn on the Bank of America, North Long Beach Branch, the accused told Mr. Safady that he expected a Western Union check from his mother-in-law to be deposited to his credit in that bank by the time the check would reach it and that he was sure the check would be good (R 53). Accused said he would see his father-in-law "that evening and would find out if the deposit were made" (R 53). The witness testified that he thought accused asked him to hold the check and stated that it would be good by Monday (R 54, 55). He also testified that accused later informed him that the expected deposit had not been made, as the check had been left on the desk of either his mother-in-law or his uncle (R 53, 54). On the Saturday morning prior to Labor Day at about 10:30 a.m., accused and the witness went to the witness' bank (Bank of America, Los Angeles) where accused cashed a $290 Government check (R 52) and gave the witness funds to cover some checks already returned and all others which had not yet been returned, including the check described in Specification 14 (R 55-56). The latter check itself (Pros Ex 18) bears the endorsement of "Kimmel and Orloff" and that of the Bank of America, Los Angeles, which is dated 3 September 1946. It is noted that the Saturday prior to Labor Day 1946 was 31 August. The witness also testified that a check received by him on Thursday (which was the 29th and probably the day he received the check, R 55-60) would first be taken to the Circle (R 50) and would be deposited Saturday (R 60). If the check were received on Friday, which the witness thought it might have been (R 59), it would be deposited Monday (R 59-60). The witness and the accused had a search made at the bank for any of accused's checks in the deposit of the Bomb-Shelter Cafe, and one check was picked up at the bank. The witness was not sure whether it was the check marked Prosecution Exhibit 18 or not.

4. The evidence for the defense is summarized as follows:

Mr. John D. Massey, the accused's father-in-law, testified by two depositions (Def Exs A, B). About the end of June or first of July 1946 he

made arrangements with accused to deposit $1,500 in accused's checking account at the First Citizens Bank and Trust Company of Smithfield, North Carolina, but he did not make the deposit because of some other obligations he had. Some time about 15 or 20 July, he notified accused by telephone that he had not made the deposit. The bank statements of accused's account were received at witness' address but were not forwarded to accused. He also instructed his bank to honor three checks payable to Allen H. Cunningham drawn on his account by Mrs. Hoffman, wife of the accused. The three checks totaled $450. He does not know whether accused was notified of this since the witness did not notify him. About the latter part of July he also instructed the bank to honor other checks drawn on his account by his daughter, Mrs. Hoffman.

By two depositions (Def Exs C and D), Mr. S. T. Proctor testified that on or about 15 June 1946, he agreed with accused to deposit about $1,000 or $1,500 to accused's credit in the First Citizens Bank and Trust Company of Smithfield, North Carolina, as a loan. He did not make the deposit because he had a heart attack the following morning and was in the hospital for eight weeks during which time he could not attend to any business. He did not notify accused until the last part of August that the deposit was not made (Def Ex C) but stated later (Def Ex D) that "as far as dates are concerned, I have no cause to know what day of the month it was at that time or any period of August."

The accused elected to remain silent after his rights as a witness were explained to him by the defense counsel.

5. With respect to Specifications 1 to 12, inclusive, of the Charge, and "Additional Specifications" 2, 3, 5 and 7 to 13, inclusive, of the Additional Charge, the evidence above summarized shows that each check was uttered by the accused as alleged, and that he received the amounts alleged.

While in some cases the witnesses did not see accused sign the checks in question, in other cases witnesses did see accused sign the checks, and a handwriting expert testified that the same person signed all the checks.

With respect to Specification 2 of the Charge, the check was allegedly uttered to "Matteoni's Club." Mr. Pitzer testified that he cashed the check and personally endorsed it for Matteoni and Pitzer. The rubber stamp endorsement of "Matteoni and Pitzer" gave their address as 230 North California Street, Stockton, which is the same address given in the Specification for Matteoni's Club. The Board of Review is of the opinion that the variation between the proof and the Specification is not material and that the accused was not misled by the Specification.

In Specifications 5, 7, 8 and 9 of the Charge it was alleged that the described checks were uttered to "Matty's Cocktail Lounge." Mr.

Chinchiolo testified that he saw the accused sign the checks and paid the consideration alleged for each. The checks were endorsed in his presence by Fred Matteoni and deposited in "our account known as Matty's." While the full name "Matty's Cocktail Lounge" does not specifically appear in the evidence, the Board of Review is of the opinion that there is no material variation in the proof, and that in fact the evidence supports the findings that the accused uttered the checks as alleged.

In CM 226219 Rickards, 15 BR 27, 36, where the evidence did not in any way establish the identity of the persons to whom certain checks were uttered or the identity of the persons from whom the proceeds of the checks were fraudulently obtained, and where the genuineness of the endorsements on the various checks was not proved, it was held that such failure was not fatal to the conviction, because the gravamen of the offenses charged lay in making, uttering and cashing the particular checks with fraudulent intent, all of which was proved. Consequently, there could be no question as to the identity of the offenses. The proof was such that the record would support pleas of former jeopardy if the accused were again charged with offenses involved in the making and uttering of the checks.

In the case of the checks referred to in Specifications 8, 9 and 10 of the Charge, the evidence shows that the accused had no account in the American Trust Company, Stockton Office, on which the checks were drawn. As to the Specifications 8, 9 and 10, therefore, the Board of Review is of the opinion that the record of trial is sufficient to support the findings of guilty (CM 256706, Siddon, 36 BR 335).

The checks in Specifications 1 to 7, inclusive, and 11 and 12 of the Charge, and "Additional Specifications" 2, 3, 5 and 7--13, inclusive, of the Additional Charge were all drawn on the First Citizens Bank and Trust Company of Smithfield, North Carolina, where accused had only a $.27 balance. There is no direct evidence that these checks were actually presented to that bank. It was shown, however, that the checks were in fact worthless when drawn and at all times thereafter, since the balance of the account was only 27 cents. All of these checks bear the endorsements of banks and clearing houses showing that they passed through the usual banking process to the Richmond Country Clearing House of Richmond, Virginia, and all endorsements are cancelled. The cashier of the Citizens Bank testified that any check presented which would have caused an overdraft would have been returned. The endorsements on the checks are evidence which would warrant the court in finding that the checks had been presented in due course, particularly when coupled with the testimony of the payees or first endorsers that they had been returned to them through their own banks, unpaid. (CM 274174, Reid, 47 BR 135, at p 139)

In view, however, of the evidence for defense, which is in no way refuted or impeached, respecting the deposits which were to have been

made to accused's account, it cannot be said that accused uttered these checks "with intent to defraud". But since he knew his account was not sufficient to pay the checks without these deposits, it was incumbent upon him to make sure that the deposits had been made before he drew and uttered the checks. Notwithstanding his failure to determine the status of these deposits, it cannot be said that the accused wrote the checks not intending that he should have sufficient funds in his account to cover them. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 to 7, inclusive, 11 and 12 of the Charge and "Additional Specifications" 2, 3, 5, 7 to 13, inclusive, of the Additional Charge, relating to checks on the First Citizens Bank and Trust Company, as find the accused guilty of making and uttering the described checks as alleged and of wrongfully failing to maintain a sufficient balance in his account to pay said checks when presented in due course (CM 249993, Yates, 32 BR 259, p 261; CM 249232, Norren, 32 BR 95, 3 Bull JAG 290). The accused's conduct in failing to ascertain that the deposits were made, coupled with the fact that some of the checks must have been returned even before he was notified that the deposits had not been made, is evidence sufficient to support such findings.

6. With respect to Specifications 13 and 14 of the Charge, it appears that the accused, Captain Cunningham and Captain Alexander were together at a place called Matty's Grill. Captain Alexander apparently agreed to sell a 1940 Cadillac car to accused. The former owed Captain Cunningham $300 and Captain Cunningham agreed to settle the debt by taking the accused's check for $300. The accused then gave Captain Cunningham the check described in Specification 14 of the Charge and Captain Alexander credited accused with $300 on the purchase price of the car. Captain Cunningham testified that, because Captain Alexander wanted some cash, and since witness knew Fred Matteoni, the owner of the grill, he agreed as an accomodation to Captain Alexander to cash accused's check for $100. Accused then wrote out the check described in Specification 13 of the Charge and Captain Cunningham, after endorsing it, had it cashed by Fred Matteoni and gave the cash to Captain Alexander. The evidence does not show whether accused ever received the automobile.

Specification 13 alleges that accused made and uttered to Allen H. Cunningham a check for $100 and "by means thereof, did fraudulently obtain by Allen H. Cunningham's endorsement thereof, from Matty's Cocktail Lounge * * * One Hundred Dollars * * *." Specification 14 alleges that accused made and uttered to Captain Allen H. Cunningham a check for $300 and "by means thereof did fraudulently obtain from the said Allen H. Cunningham value to the extent of cancellation of a pre-existing debt of three hundred dollars ($300) owed by Captain Robert B. Alexander to the said Captain Allen H. Cunningham and in return for said check and other consideration the said Captain Robert B. Alexander delivered to the said Major Oscar P. Hoffman one 1940 model Cadillac sedan automobile * * *."

Captain Cunningham's testimony with respect to this transaction and his statement that Captain Alexander agreed to sell his car to accused is not hearsay, since his testimony refers to agreements among the three parties concerned and since the accused was present and a party to the agreement. It is the opinion of the Board that the allegations of Specification 14 sufficiently allege that present valuable consideration was received by the accused for the $300 check and that the evidence supports the allegations, even though there is no evidence that the accused actually received the automobile. By giving the check the accused, at the time, at least received Captain Alexander's obligation to deliver the car which he had agreed to sell. That which was said above with respect to the other checks drawn upon the First Citizens Bank and Trust in regard to the sufficiency of the proof of fraudulent intent and the knowledge and intention with respect to the sufficiency of the account is applicable also to this specification. The Board of Review is therefore of the opinion that the record is legally sufficient to support only so much of the findings of guilty of Specification 14 as finds the accused guilty of making and uttering the check as alleged, and of obtaining the amount thereof, as alleged, and wrongfully failing to maintain a sufficient balance to pay said check when it was presented in due course.

With respect to Specification 13, accused did not, as alleged, by means of Captain Cunningham's endorsement, receive any money from Matty's Cocktail Lounge. Captain Cunningham's endorsement was not obtained by accused, but was for accommodation of Captain Alexander. While an offense with respect to this check was no doubt committed, it was not that alleged and the specification cannot be altered to fit the proof. The Board of Review is therefore of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 13 of the Charge.

7. As to "Additional Specification" 6 of the Additional Charge a different problem is presented. The evidence shows that accused made this check and requested Mr. Paullo to cash it. The latter refused unless Mrs. Hoffman also signed the check. Accused left and twenty minutes later Mrs. Hoffman returned with the check which she had signed as co-maker. She cashed the check and received the $300. The bank account in question was a joint account of accused and his wife and, while it was not shown that Mrs. Hoffman did not also have a separate account of her own, the evidence does show that the check was returned because of insufficient funds. It is a fair inference from the evidence that Mrs. Hoffman, in cashing this check, was acting for accused. The situation is not the same as if accused had not tried to cash the check initially and was not connected with it at all. That which was said above with respect to the allegations of fraud, and knowledge and intention respecting the sufficiency of the account in the First Citizens Bank and Trust Company is equally applicable to this specification. The Board of Review is therefore of the opinion

that the record of trial is legally sufficient to support so much of the findings of guilty of "Additional Specification" 6 as finds the accused guilty of making and uttering the check as alleged, and of obtaining the amount thereof, as alleged, and wrongfully failing to maintain a sufficient balance to pay the said check when presented for payment in due course.

8. With respect to the remaining specification, "Additional Specification" 14 of the Additional Charge, the evidence shows that the check involved therein was drawn on the Bank of America, North Long Beach Branch, in which accused had no account. Mr. Safady, who cashed the check, testified that when accused presented the check to him, accused told him in effect that it was not then good, but that he expected a deposit, in the form of a Western Union check, to be made to his credit by his mother-in-law. Accused asked Safady as to when his check would be deposited for collection and then told Safady that he thought the check would be good by the time it reached the bank. Mr. Safady was not sure whether the check was given to him on Thursday (29 August, the day the check was dated) or on Friday. If he received the check on Thursday, it would have been deposited Saturday, but if it were received Friday, then it would be deposited on Monday. Monday being Labor Day, it would in such case be deposited Tuesday, which was September 3d and this is in fact the date of the endorsement of Mr. Safady's bank.

On either Friday night or Saturday, the accused informed Mr. Safady that the deposit had not been made as he expected. On Saturday, 31 August, Mr. Safady and the accused went to the bank (Bank of America, Los Angeles), where the Bomb-Shelter Drive-In Cafe's account was kept. There the accused cashed a Government check and gave Mr. Safady funds to cover all of his checks which had been returned and those which were already deposited but not returned. One check was picked up at the bank from among those deposited by the Bomb-Shelter Drive-In Cafe on that day. Mr. Safady thought it might be the check in this specification, but his conclusion is negatived first by the date of the bank's endorsement and second by his own statement that the check picked up was on the North Carolina bank. As the deposits of the Bomb-Shelter Cafe were searched for any of accused's checks, it is therefore probable that the check in question was either deposited on Saturday after the accused and Mr. Safady were there, or on Tuesday.

Since accused duly apprised Mr. Safady of the status of his account or expected account at the drawee bank, and since the accused acted promptly and apparently in good faith in redeeming the check, upon learning that the deposit was not made as anticipated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of "Additional Specification" 14 of the Additional Charge.

9. The accused was born 5 September 1917 and is now over 29 years of age. His father was killed when accused was 14 years old, and because his

mother was obliged to work, he lived with his grandmother. When accused was about 20 years old his mother remarried.

He attended grade school and high school in New Orleans, Louisiana, and spent two years at Loyola University, taking a pre-medical course. In 1936 he left Loyola and attended Soule Business College from which he was graduated. From 1936 to 1940 he was employed, in office work and in retail advertising, by Schenley Distillers, Inc., and in 1941, in stenographic or secretarial work, by the Ford Motor Company.

The accused was married in 1936 and there is one child by this marriage. It is stated in the Review of the Atlantic Division, Air Transport Command Judge Advocate, dated 31 December 1946, that accused was divorced in 1943, remarried the same year, and that accused has two children by this marriage. The accused, however, in a written statement dated 14 March 1947, made to the Las Vegas, Nevada, police, copies of which are attached to the record, stated that he is still married to his first wife. This statement discloses that he is not, therefore, if accused's statement is true, married to the person purporting to be his present wife. In the same statement accused admits to a bigamous marriage in Las Vegas, Nevada, in March of 1946 to a third girl, who apparently had the marriage annulled within a few days.

Accused enlisted as an aviation cadet on 26 May 1942 and after completing cadet training was commissioned in the grade of Second Lieutenant on 30 January 1943. He was promoted to First Lieutenant on 8 August 1943, to Captain on 16 November 1944 and to Major on 16 October 1945.

After training in B-24's, and having been an instructor for some time, the accused was sent overseas, arriving in England in June 1944. There he was assigned to the 93d Bomb Group. He flew 29 combat missions, became Operations Officer of the 328th Bomb Squadron and flew his last seven missions as a command pilot. On his 29th mission he was shot down over Holland and spent about two months as a prisoner of war. He returned to the United States in June 1945 and after various assignments was, in May 1946, assigned to the 591st AAF Base Unit, Stockton Field, California, with duties as supply officer, Squadron A. At the time of trial he was assigned to Squadron A, 556th AAF Base Unit, Long Beach Army Air Field. Accused has been awarded the Air Medal with three Oak Leaf Clusters and the Distinguished Flying Cross. He is entitled to wear the American Theater Ribbon and the European Theater Ribbon with 4 battle stars.

Though the issue was not raised at the trial, the mental status of the accused was questioned sometime thereafter. There are attached to the file a letter to The Judge Advocate General from Mrs. O. P. Hoffman, wife of the accused, dated 12 March 1947, a letter to The Judge Advocate General from the Honorable James M. Morrison, House of Representatives,

dated 13 March 1947, and a letter to The Judge Advocate General from the Honorable Harold D. Colley, House of Representatives, dated 7 March 1947, each of whom requested a mental examination of the accused. He was examined by a Board of Medical Officers at Letterman General Hospital, San Francisco, California, in April 1947, and the full report of this Board, dated 17 April 1947, is attached to the file. Briefly, the findings of the Board are that accused has no neuropsychiatric disease. He is mentally competent now, and was mentally competent at the time of the commission of the offenses for which he was tried, he can distinguish right from wrong and can adhere to the right and could do so at the time of the alleged offenses. The Board also found that he was sufficiently sane to intelligently conduct and cooperate in his defense.

10. 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. For the foregoing reasons, it is the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1, 2, 3, 4, 5, 6, 7, 11, 12 and 14 of the Charge and of "Additional Specifications" 2, 3, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the Additional Charge as find the accused guilty of making and uttering the checks respectively described therein at the times and places and to the persons alleged and of obtaining by means thereof the respective amounts as alleged, and wrongfully failing to maintain sufficient funds in the drawee bank alleged to provide for the payment of said checks when presented for payment in due course, legally sufficient to support the findings of guilty of Specifications 8, 9, and 10 of the Charge, legally insufficient to support the findings of guilty of Specification 13 of the Charge and of "Additional Specification" 14 of the Additional Charge, legally sufficient to support the findings of guilty of the Charge and the Additional Charge, and legally sufficient to support the sentence and to warrant confirmation of the sentence. A sentence to dismissal, forfeiture of all pay and allowances due or to become due and confinement for six months is authorized upon conviction of a violation of the 96th Article of War.

A. Hetterstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip A. Smith, Judge Advocate

JAGH - CM 318727 1st Ind

WD, JAGO, Washington 25, D. C. JUL 8 1947

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Oscar P. Hoffman (0-805460), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of making and uttering, with intent to defraud, twenty-six checks, four being drawn upon banks in which the accused had no account (Specs 8, 9, and 10 of the Charge and "Additional Spec" 14 of the Additional Charge), the remaining twenty-two upon a bank where he had insufficient funds to pay the checks upon presentation, in violation of Article of War 96. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for three years. The reviewing authority approved the sentence, but remitted two and one-half 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 only so much of the findings of guilty of Specifications 1, 2, 3, 4, 5, 6, 7, 11, 12, and 14 of the Charge and of "Additional Specifications" 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the Additional Charge as find the accused guilty of making and uttering the checks respectively described therein at the times and places and to the persons alleged and of obtaining by means thereof the respective amounts as alleged, and wrongfully failing to maintain sufficient funds in the drawee bank alleged to provide for the payment of said checks when presented for payment in due course, legally sufficient to support the findings of guilty of Specifications 8, 9, and 10 of the Charge, legally insufficient to support the findings of guilty of Specification 13 of the Charge and of "Additional Specification" 14 of the Additional Charge, legally sufficient to support the findings of guilty of the Charge and the Additional Charge, and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

Between 25 June 1946 and 29 August 1946 the accused uttered a total of twenty-six checks in the total sum of $1472.24 at various places and to various persons and business concerns. With the exception of four checks all were drawn on a North Carolina bank in which the accused had a joint account with his wife. The balance maintained in that account from 5 June 1946 until 5 September 1946 was only twenty-seven cents. With respect to these checks the defense introduced evidence that the

accused relied upon the promises of his father-in-law and another person to make deposits to his account in the North Carolina bank which would have covered these checks. However the evidence shows that the accused did not attempt to ascertain whether the expected deposits had in fact been made.

With respect to the check involved in Specification 13, Charge I, which was drawn on the North Carolina bank there was a fatal variance between the allegation and the proof.

The other four checks were drawn on banks in which the accused maintained no account. However with respect to one of these checks ("Additional Spec" 14, Additional Charge), the evidence establishes that at the time the check was cashed the accused told the person to whom the check was uttered that the check was not good, but that the accused expected a deposit to be made before the check could be presented for collection. When the accused discovered that the expected deposit had not been made he redeemed the check, apparently before it was actually deposited.

The accused is 29 years of age. He attended Loyola University and is a graduate of Soule Business College.

Accused enlisted as an aviation cadet on 26 May 1942 and after completing cadet training was commissioned in the grade of second lieutenant on 30 January 1943. He was promoted to first lieutenant on 8 August 1943, to captain on 16 November 1944 and to major on 16 October 1945.

The accused served in the European Theater of Operations, arriving in England in June 1944, where he was assigned to the 93d Bomb Group. He flew twenty-nine combat missions, became operations officer of the 328th Bomb Squadron and flew his last seven missions as a command pilot. On his 29th mission he was shot down over Holland and spent about two months as a prisoner of war. He returned to the United States in June 1945. Accused has been awarded the Air Medal with three Oak Leaf Clusters and the Distinguished Flying Cross. He is entitled to wear the American Theater Ribbon and the European Theater Ribbon with four battle stars.

The accused was married in 1936 and has one child by this marriage. It is stated in the Review of the Judge Advocate, Atlantic Division, Air Transport Command, dated 31 December 1946, that accused was divorced in 1943, remarried the same year, and that accused has two children by the second marriage. The accused, however, in a written statement dated 14 March 1947, made to the Las Vegas, Nevada, Police, copies of which are attached to the record, stated that he is still married to his first wife. If accused's statement is true he is not lawfully married to the person purporting to be his present wife. In the same statement accused admitted that he entered into a bigamous marriage in Las Vegas, Nevada, in March of 1946 to a third girl, who apparently annulled that marriage within a few days.

War Department records show that prior to the offenses for which the accused was tried, numerous communications were received by The Adjutant General complaining of checks drawn on banks in which he had maintained insufficient funds. There is also attached to the file a letter from the Commanding General, Sixth Army, dated 28 May 1947, with inclosures thereto pertaining to reports of offenses committed by the accused since his trial. These latter offenses concern several bad checks uttered by the accused in Las Vegas, Nevada, a breach of restriction, and the bigamous marriage above referred to, all of which are admitted by the accused in his statement. Accused also stated that he was very drunk at the time he committed these offenses.

There are attached to the file a letter to The Judge Advocate General from Mrs. O. P. Hoffman, wife of the accused, dated 12 March 1947; a letter to The Judge Advocate General from the Honorable James M. Morrison, House of Representatives, dated 13 March 1947; and letter to The Judge Advocate General from the Honorable Harold D. Cooley, House of Representatives, dated 7 March 1947. In each it was requested that a mental examination of the accused be made.

He was examined by a Board of Medical Officers at Letterman General Hospital, San Francisco, California, in April, 1947. The report of this Board, dated 17 April 1947, shows that the Board found that the accused was mentally responsible at the time of the commission of the offenses for which he was tried and that he was sufficiently sane to intelligently conduct and cooperate in his defense.

5. I recommend that the sentence be confirmed and carried into execution.

6. 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. 245, 10 July 1947).

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

JAGH - CM 318728

15 APR 1947

UNITED STATES	)	HEADQUARTERS, AIR TRAINING COMMAND
	)	
v.	)	Trial by G.C.M., convened at Indoctrination Division, Air Training Command, San Antonio, Texas, 11 December 1946. Dismissal
	)	
First Lieutenant STANLEY (STANISLAW) R. CHMURA (0-684687), Army of the United States	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Stanley R. Chmura, Squadron BN-6 Indoctrination Division, Air Training Command, San Antonio, Texas, being on duty as Wing Duty Officer at Wing II Headquarters, Indoctrination Division, Air Training Command, San Antonio, Texas, on or about 3 November 1946, did, without proper authority, go from the properly appointed place of said duty and abandon the same before he was regularly relieved.

Specification 2: In that First Lieutenant Stanley R. Chmura, Squadron BN-6, Indoctrination Division, Air Training Command, San Antonio, Texas, was at San Antonio, Texas, on or about 4 November 1946, drunk and disorderly in uniform in a public place, to wit: a street in San Antonio, Texas.

He pleaded not guilty to, and was found guilty of, the Charge and both specifications thereof. 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. The Board of Review adopts the statement of the evidence and the law contained in the review of the Air Training Command Judge Advocate dated 30 December 1946.

4. War Department records show that the accused's name at the time he was commissioned was Stanislaw R. Chmura. The charge and specifications are directed against First Lieutenant Stanley R. Chmura. It is apparent that the accused used the name of Stanley R. Chmura throughout his service although no formal change of name appears in the accused's War Department personnel file. The defect was cured by the accused's plea to the general issue which admits that he is the person named in the specification.

5. Attached to the record of trial is a recommendation for clemency dated 11 December 1946, signed by the defense counsel and assistant defense counsel, wherein it is stated in part:

> "3. We wish to recommend to the Commanding General with General Court Martial jurisdiction that the sentence of the accused be reduced by the Reviewing Authority for the reason that we believe the sentence is unduly harsh and far in excess of other officers who have heretofore been tried on this basis and given punishment under AW 104. In this connection we would like to call the Reviewing Authority's attention to the fact that the accused had been in military service since 1939, had so many medals and commendations for his services and had never been tried for any offense or reprimanded for any misconduct.
>
> "4. These recommendations are made in the sincere belief that we, as the duly appointed attorneys, are doing our client the justice that is due him."

6. The accused is 27 years of age and unmarried. War Department records show that he is a high school graduate. He enlisted in the Army as a private on 16 March 1939. Upon completing aviation cadet training, he was commissioned a second lieutenant, Army of the United States, on 26 June 1943. He was promoted to first lieutenant on 15 February 1944. He served in the European Theater of Operations where he flew thirty bombardment missions as a co-pilot. He was awarded the Distinguished Flying Cross, the Air Medal and three Oak Leaf Clusters to the Air Medal. The only efficiency rating of record is excellent.

He was hospitalized at the AAF Regional and Convalsecent Hospital from 3 August 1945 to 30 October 1945. The diagnosis of the Disposition Board at that hospital was:

> "Anxiety reaction, chronic, moderate, as a result of 18 months overseas service, ETO as B-17 pilot, 30 combat missions; occurring in an individual of no known predisposition to neurotic breakdown; and manifested by anxiety, tension, insommia, combat dreams, startle reactions, restlessness, irritability, inability to concentrate, anorexia and mild weight loss. Condition on completion of case: Improved. Line of Duty: Yes. Impairment of functional capacity for the performance of military service - mild."

The Board recommended that he be returned to full military duty.

On 29 January 1945 a forfeiture of $50 and a reprimand were imposed upon the accused under the provisions of Article of War 104 for being drunk and disorderly at an officers' club on or about 16 December 1944.

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. 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 to dismissal is authorized upon a conviction of a violation of Article of War 96.

A. J. Hottenstein, Judge Advocate

Wilbur A. Self, Judge Advocate

_____, Judge Advocate

JAGH - CM 318728 1st Ind

WD, JAGO, Washington 25, D. C. MAY 1947

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 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 First Lieutenant Stanley (Stanislaw) R. Chmura (0-685687), Army of the United States.

2. Upon trial by general court-martial this officer was found guilty of abandoning his place of duty without proper authority and before being regularly relieved and of being drunk and disorderly in uniform in a public place, in violation of Article of War 96 (Chg, Specs 1 & 2). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Staff Judge Advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence and to warrant confirmation thereof. I concur in the opinion.

The accused was a member of Squadron BN-6, Wing II, Indoctrination Division, Air Training Command, San Antonio, Texas, and was duly detailed as Wing Duty Officer for twenty-four hours beginning at 1045 hours, Sunday, 3 November 1946. The duties of this assignment included the responsibility for the interior guards, assisting in supervision of Wing Mess halls, issuing passes and furloughs and acting for the Commanding Officer during his absence. At about 1730 hours on 3 November 1946, accused was seen at the Tropics Club, San Antonio, Texas, which was not within the Wing Area, and was wearing no side arm at the time. At about 0030 hours, 4 November he was seen staggering down Houston Street, San Antonio, Texas, in an obviously drunken condition and was arrested by the military police. He attempted to resist arrest and made some effort to brandish his pistol which he was then wearing. The civilians who witnessed this incident withdrew when it appeared that gun-play might occur. He was taken to military police headquarters in San Antonio, where, due to lack of cooperation on his part the military police found it necessary to forcibly procure his AGO identification card, his personal effects and his finger prints. During the occurrence of these events, accused continuously used profane, abusive and obscene language toward the military police, whereupon a sergeant slapped him in the face causing his nose to bleed and swell. He was sent to Brooke General Hospital at about 0200 hours, 4 November 1946, in an ambulance called by the military police.

The accused testified in his own behalf that a friend telephoned him from San Antonio at about 1730 hours, 3 November 1946, and asked him to come into town for a visit because the friend was leaving town. The accused left the post and met his friend at the Tropics Club between 1830 and 1900 hours. He checked his side arm and belt upon entering the club. From this club the two went to the White Plaza Hotel for dinner in San Antonio, and later joined others, an officer and two girls, in the friend's hotel room. Until this time, he had imbibed no liquor. At the insistence of his friends, however, he did take six or more drinks. Before drinking anything, the accused intended to return to the base and called the Charge of Quarters on the post. He left the party about midnight in an intoxicated condition and went to Houston Street to get a cab back to the base. He was arrested and taken to military police headquarters. There he was struck twice, passing out on the second blow. He regained consciousness in Brooke General Hospital. The accused was scheduled to be released from active duty within the week.

4. The defense counsel and assistant defense counsel recommended to the reviewing authority by letter dated 11 December 1946, that the sentence of dismissal be reduced, for it appeared unduly harsh in this instance, particularly in view of the accused's combat record. This officer served in the European Theater where he flew thirty combat missions. His decorations and awards include the Distinguished Flying Cross, the Air Medal with three Oak Leaf Clusters, four battle stars and the Presidential Citation.

On 29 January 1945 he was punished under the 104th Article of War for being drunk and disorderly in an officers' club.

5. In view of all the circumstances of the case, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of one hundred dollars, and that the sentence as thus modified be carried into execution.

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

CM 318728

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 172, 20 May 1947).

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

JAGK - CM 318737

31 JAN 1947

UNITED STATES v. First Lieutenant CARL J. EISERT (O-824111) and First Lieutenant JAMES J. EISERT (O-698275), both Air Corps.	MILITARY DISTRICT OF WASHINGTON Trial by G.C.M., convened at Fort Belvoir, Virginia, 31 October and 4 and 5 November 1946. EACH: Dismissal and total forfeitures

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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 officers named above has been examined by the Board of Review.

2. The accused, having been jointly tried, were each found guilty by exceptions and substitutions of the following charges and specifications:

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

Specification: In that First Lieutenant Carl J. Eisert, Halloran General Hospital, New York, New York, and First Lieutenant James J. Eisert, Engineer Training Center, Fort Belvoir, Virginia, acting jointly, and in pursuance of a common intent, did, at Fort Belvoir, Virginia on or about 18 September 1946, feloniously take, steal, and carry away

1 ea Motor, outboard, Johnson Seahorse 22 hp. Model POLR-15, serial number 459984	Value over $50.00
1 ea Drill, electric, Milwaukee standard heavy duty Type C-312, serial number C-35232	Value $61.00
1 ea Wrench, chuck. For the above electric drill	Value less than $20.00
1 ea Gun, lubricating, 16 ounces. Alemite lever Model 6593	Value less than $20.00
6 ea Bits, auger hand, fractional sizes	Value less than $20.00
12 ea Drills, twist, fractional sizes; 29/32", 27/32", 25/32", 23/32", 21/32", 17/32", 15/32", 13/32", 21/64", 17/64", 1/2", 3/8".	Value less than $20.00
1 ea Trailer wheel and assembly (one ton Trailer)	Value less than $20.00

of the value of over $50.00, property of the United States furnished and intended for the military service thereof.

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

Specification: In that First Lieutenant Carl J. Eisert and First Lieutenant James J. Eisert, acting jointly, and in pursuance of a common intent, did, at Fort Belvoir, Virginia on or about 18 September 1946 unlawfully enter warehouse TX-14 of the Engineer Training Center, with intent to commit a criminal offense, to wit, larceny therein.

No evidence of any previous conviction as to either accused was introduced. Each 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 at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence as to each accused, but remitted the confinement imposed in each case, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

About 4:45 p.m., 18 September 1946, a fireguard at the "ponton area" of Fort Belvoir, Virginia, heard some noises emanating from Building X-14 and upon further investigation noticed that the screening which had covered the furnace pipe aperture of that building had been torn off. Peering through this aperture, he saw two men standing inside the building. One of these men asked him if he was the guard and, upon receiving an affirmative reply, informed him that the persons inside the building were "working overtime". The guard then walked over to a window, the lower half of which had been raised, and looking through it noticed that accused Carl Eisert was one of the men inside the building. He then wandered approximately 150 yards away from the building and a few minutes later saw two men carrying a "heavy object" leave and enter the woods nearby. After notifying the military police, the guard also entered the woods in an attempt to follow the two men. He came upon an outboard motor, an electric drill, a lubricating gun, and some other objects in a cardboard container and in a cloth wrapping lying to the left of a trail about forty yards from the Mount Vernon Highway. He remained with these articles until he was relieved by two other guards (R. 69-76). This fireguard, a soldier, had been convicted of the crime of breaking and entering in West Virginia in 1942 and had been given a sentence of from one to ten years imrpisonment (R. 81).

On the night of 18 September 1946, two military policemen were stationed about eleven paces from this equipment in order to observe future activities. About 11:00 p.m. they heard an automobile and shortly thereafter a flashlight flickered and two men came down the trail from the highway. The two men walked off the trail to the spot where the guarded property was lying and bent over it. They were thereupon arrested by the military policemen. The two men

apprehended were accused Carl and James Eisert. About half an hour later the two military policemen discovered accused James Eisert's car on a road on the opposite side of the highway from the trail where the equipment was discovered. This car was taken to the post guardhouse where it was put under guard (R. 95-98,100,108,118-122-300).

An inventory of Building X-14, made on 19 September 1946, disclosed the following shortages: one outboard motor, one electric drill, one lubricating gun, one set of bits for an electric drill, one set of wood bits and one chuck wrench which had a yellow ring painted around it (R. 34,35). Also on this date, it was discovered that the front-wheel assembly of a trailer located at Fort Belvoir was missing (R. 19). The missing outboard motor, electric drill, lubricating gun and bits were found in the woods where accused were apprehended (R. 36-44). A trailer front-wheel assembly was found in accused James Eisert's car and a chuck wrench with a painted yellow strip was found in a "B-4 bag" which was also in the car. All these items were Government property (R. 21-27, 101,102,129,130,134).

Both accused were observed walking along the road leading towards the "ponton area" of Fort Belvoir between 5:30 and 5:35 p.m. on 18 September 1946 (R. 61). Accused James Eisert's car was observed parked on a road in the "floating bridge area" sometime after 5:40 p.m. that day and about 6:20 p.m. accused James Eisert got in the car and drove away (R. 137).

Evidence for the Defense

Accused Carl Eisert, having been advised of his rights, elected to take the witness stand and testify under oath. He stated that on 18 September 1946 he was a patient at Halloran General Hospital, Staten Island, New York. He had suffered a cerebral hemorrhage and had been ordered not to do any active physical work or to lift any heavy weights. About 10:10 a.m. that day he left the hospital and, traveling by bus, arrived at the Dixie Bus Terminal in New York City about 11:40 a.m. He had a two day "Hospital Pass" for the purpose of going to his home in Long Island, New York (R. 167,196; Def. Ex.A). While eating his lunch in New York he decided to visit his brother, accused James Eisert, at Fort Belvoir, and boarded the train for Washington, D.C. in Pennsylvania Station at approximately 1:30 p.m. (New York daylight saving time has been converted to standard time). The train arrived in Washington between 5:35 and 5:45 p.m. and he then traveled by street car and bus to Fort Belvoir. He arrived in Fort Belvoir about 6:45 p.m. where he met his brother James and went to James' quarters on the post. Since James had received his orders to proceed to the Fort Dix separation center for separation and had obtained his clearances from Fort Belvoir, the two accused decided to drive to their home in New York that night. They left the post and after traveling half a mile or so the car commenced to slow down and the temperature gauge indicated that the "engine was boiling over." They then decided that they had better return to the post and see what was wrong with the car and accordingly accused James Eisert turned off the highway into a narrow dirt

road to the side. When he tried to back onto the highway he could not get the car into reverse gear. The car was an Oldsmobile with hydromatic transmission. They drove down the dirt road in an effort to get the car turned about and finally came to a little clearing. By this time the engine was excessively hot and noisy and they decided not to drive the car farther. The two accused left the car and walked down a path which James thought led towards the post. After they had gone about thirty paces down the path they noticed "something unusual" off to the side. Accused Carl Eisert bent down to see what it was and both accused were immediately apprehended by military policemen (R. 197-206). He had not seen a trailer wheel in his brother's car (R. 201).

Accused Carl Eisert was seen in the Halloran General Hospital by a ward attendant around 10:00 a.m., standard time, 18 September 1946 (R. 148,149). A bus schedule was admitted in evidence from which it appeared that buses left from Halloran General Hospital for the Dixie Bus Terminal in New York City at 10 and 40 minutes past each hour from 9:00 a.m. to 2:00 p.m. (R. 253, Def. Ex.L). It was stipulated by and between the two accused, the defense counsel and the prosecution, that the over-all travel time from Halloran General Hospital to Pennsylvania Station, New York City, by Dixie Bus Lines, is one hour and twenty to one hour and thirty minutes, and that trains depart from that station for Washington, D.C. every hour on the half hour and take four hours to complete the trip (R. 171, Def. Ex.B). The return portion of a furlough ticket of the Pennsylvania Railroad Company for Washington, D.C. to New York City, stamped 18 September 1946 and belonging to accused Carl Eisert, was admitted in evidence (R. 224, Def. Ex. I). The deposition of a medical officer stationed at Halloran General Hospital stating that accused Carl Eisert had suffered a cerebral hemorrhage and had been instructed to refrain from any type of strenuous activity such as carrying or lifting heavy objects was read to the court (R.189, Def. Ex.C). Sometime after 18 September 1946, when accused James Eisert's car was driven to Washington, D.C. from Fort Belvoir it was observed to "labor in some fashion from--overheating" (R. 296). In rebuttal it was brought out that when the car was driven to the guardhouse from the vicinity of the place where accused were apprehended no mechanical difficulties were encountered (R. 307).

Accused James Eisert, having been advised of his rights, elected to take the witness stand and testify under oath. His version of the events leading up to the apprehension of both accused on the night of 18 September 1946 was practically identical with that of accused Carl Eisert (R. 256-262). When he was observed to get into his car in the "heavy equipment" area about 6:30 or 6:45 p.m. on 18 September 1946 he had just returned from an afternoon stroll (R. 254). He did not place the chuck wrench in his B-4 bag nor did he put the trailer wheel assembly in his car (R. 280,282,283).

Challenge for Cause

During cross-examination, accused Carl Eisert testified as follows:

"Q. Do you know any of the ATC boys, pilots and so forth in New York?

"A. No, sir.

"Q. Usually when traveling around, do you make a habit of taking the train or do you ever go to ATC bases and see whether or not there might be an available plane out going to your destination or a close destination?

"A. When I was last stationed in an ATC base in Dallas, Texas, and on official business, I was permitted to ride on an ATC plane. The officer in charge of giving you permission, putting your name on the manifest, made it very clear that you had to have orders before they would allow you to ride on an ATC plane. On those conditions, I never wasted any time trying to get a ride on an ATC plane unless I was on definite orders.

"Q. That is a priority that you are referring to, is it not?

"A. Yes, sir.

"Q. Well, how long have you been with the ATC?

"A. Almost two years, sir.

"Q. Well, then, undoubtedly you are acquainted with this transient flying that they do in ships that are coming in and out of the ATC posts and also the fact you need no orders to fly with transient airplane if you happen to be lucky enough to see one at the time you go into a base.

"Defense: Object to that, if it please the court.

"Prosecution: I am asking him if he knows that situation.

"A. I will explain that. It is all right. The statement you are making is, I believe, a little bit wrong. If a plane is being ferried, the pilot has no authority whatsoever to take any passngers on it, regardless of whether the passengers have their own parachute or not.

"Q. You mean to state that an ATC plane will not carry people without orders even on transient aircraft?

"A. There are no passengers to be carried on transient aircraft.

"Q. Now, are you stating that as a policy of ATC or merely the post where you happen to be stationed?

"A. As a ferry pilot, those are the instructions I received, not to carry any passengers." (R. 221-222)

And during examination by the court, accused Carl Eisert testified as follows:

"Q. Isn't it a fact that it is quite easy for an Air Corps officer or for other people to get a hop most of the time, by that I mean, a trip in an airplane from one point to another by going to the field and particularly if they have friends at the field?

"A. If they have, if you know a pilot he may take you, but he won't carry you on the records in the plane.

"Q. Is that more common amongst Air Corps officers than amongst officers of other branches; I mean, would it be easier for an Air Corps officer to get a hop of that sort than it would for any line officer,

ground officer?

"A. Well, I will explain that a little further, sir. Before I went overseas, during the war, apparently it was fairly easy to hop a ride. When I returned from overseas, I know the ATC was getting pretty strict about that and not permitted to take anybody. When I was being transferred from Dallas to Great Falls I wanted to come home on a delay en route. I was unable to get a ride even though I had been assigned there for several months as a duty pilot. I knew several of the officers there, and I was unable to get a ride from Dallas to New York or anywheres part of the way. I did come home by train." (R. 230)

At the close of the interrogation of accused Carl Eisert the court took a fifteen minute recess. When the court thereafter reassembled defense counsel expressed a desire to challenge a member of the court for cause (R. 244). The following then appears in the record of trial:

"Defense: It is with reluctance that the defense brings this point up, realizing it can alienate, as it were, a member if the challenge is not upheld, but it is of sufficient import that to the defense it indicates a trend of mind of one of the members of the court which is hostile to the defense and the defense feels that it must make this challenge. During the recess, Major Clark came down from the bench, entered into a discussion with the prosecution as to the truthfulness or accuracy of the statements of the defendant, Carl Eisert, with reference to the mechanics of whether or not a stranger might ride a transient run or not, stating that from his personal knowledge that that was an erroneous statement. He is entitled to and licensed to discuss anything germane to this case or germane to his possibility of belief or disbelief of any witness or the defendants with any member of the court. With no one else, he does not have that license. The defense at this time requests the court close to consider with propriety the question of whether or not he should remain after such a discussion.

"President: Does the defense wish to question the challenged member?

"Defense: No, sir, I have no wish.

"Prosecution: The prosecution would like to point out that during this alleged discussion a member of the defense counsel was also present.

"Defense: I overheard it and stopped the discussion.

"Prosecution: I am not referring to you, sir. The prosecution doesn't feel that in any way there was any argument or sentiment as to the truth or veracity of the statement made by one of the accused on the witness stand. It was merely as to whether or not it was possible to get a flight by ATC. He stated his opinion as to his experience.

"Defense: It is a discussion of the evidence of the case between the prosecution and general bystanders who were standing around and a member of the court, which is entirely improper.

"President: Major Clark will be sworn to testify as to his competency.

"The challenged member was sworn as to his competency to act as a member of the court, and testified as follows:

"Questions by prosecution:

"Q. Would you state your name, grade, organization, and station?

"A. DANIEL R. CLARK, Major, Headquarters Engineer Training Center, Fort Belvoir, Virginia.

"Q. Are you a member of the court now in session in this present case?

"A. I am.

"Questions by president:

"Q. Major Clark, will you state to the court the substance of the conversation held between you and the prosecution regarding matters that have been brought up by the defense?

"A. As far as I have knowledge, there was no discussion between the prosecution. The member I was arguing with on this particular subject was one of the assistant defense counsels. I was not arguing or discussing it with the prosecution.

"Q. Will you state the substance of your remarks or the substance of the conversation?

"A. The subject was brought up by the defense counsel, one of the assistant defense counsel, that he knew that it was impossible to get a flight on ETC. From my own personal experience I stated that it is possible and has been done in the past two weeks by myself out of the National Airport, ATC, Washington, D.C.

"Q. What was your status at that time?

"A. I was on duty at Headquarters Engineer Training Center, Fort Belvoir, Virginia.

"Q. What was your status as far as the travel was concerned?

"A. VOCO, no orders. I was not traveling on official orders. I was traveling for my personal convenience.

"Q. Were you on leave of absence?

"A. No, sir, just a VOCO.

"Q. Will you tell us approximately the transaction by which you obtained this transportation?

"A. I went into the ATC office at Washington, at National Airport, the desk in there, and talked to a captain. He says, 'Well, he wasn't authorized to let anyone ride on the flights.' So I hung around there and talked to several other officers and they said this flight was going to Harrisburg, which was just where I wanted to go, and that if I stuck around they thought they could get me on the plane. So about twenty minutes later the person came in and said, 'There is a flight

going to Dayton, Ohio, by way of Harrisburg.' I said, 'Well, Dayton, Ohio, would suit me fine. I could go on and visit relatives.' I said, 'How about coming back?' This officer I was talking to said, well, he was coming back the next day and I probably could come back with him. So in maybe another five minutes they told me to be ready to go, and I went out and got on the plane and landed in Dayton, Ohio; the next day I was out there, saw the same colonel, and came back with him.

"Defense. No questions.

"Prosecution: No questions.

"President: The court will be closed. The challenged member will withdraw with the rest of the personnel.

"The challenged member withdrew, the court was closed and voted upon the challenge by secret written ballot, and, upon being opened, the president announced that the challenge was not sustained, and the challenged member thereupon resumed his seat." (R. 244-247)

4. Discussion

From a perusal of the facts in this case it becomes manifest that accused Carl Eisert relied strongly on his defense of alibi and that, should this defense fail, the evidence against him would be most compelling. In brief, the defense of alibi depended upon the following evidence presented by the defense. Accused Carl Eisert was seen in the Halloran General Hospital in Staten Island, New York, by a ward attendant around 10:00 a.m., 18 September 1946. According to the bus schedule introduced in evidence, buses leave the hospital for their terminal in New York City at 10 and 40 minutes past the hour and take between one hour and twenty minutes and one hour and thirty minutes to make the trip. Accused Carl Eisert testified that he took the 10:10 a.m. bus and arrived in New York City about 11:40 a.m. It was further stipulated that trains for Washington, D.C. leave Pennsylvania Station in New York City every hour on the half hour and require four hours to complete their journey. According to his testimony, accused Carl Eisert took the 1:30 p.m. train from Pennsylvania Station and arrived in Washington, D.C. between 5:35 and 5:45 p.m. and in Fort Belvoir about an hour later. A return ticket for passage to New York City from Washington, D.C., stamped 18 September and issued by the Pennsylvania Railroad Company, belonging to accused Carl Eisert, was introduced in evidence. By adducing the above evidence the defense obviously hoped to raise in the minds of the members of the court the inference that accused Carl Eisert, having been seen in the Halloran General Hospital at 10:00 a.m. on the day the alleged offense was committed, did not and could not have made such transportation connections as to place him in Fort Belvoir by 4:45 p.m. that day, the time when he was reportedly seen in Building X-14. According to such evidence, it would have been impossible for him to have taken the 11:30 a.m. train out of New York City and the earliest train he could have taken out of Pennsylvania Station, the one leaving at 12:30 p.m., would only have placed him in Washington, D.C. at or about 4:30 p.m.

The prosecution and the court, apparently somewhat impressed with the evidence relative to accused Carl Eisert's claim of alibi, questioned him as to his past and present affiliations with the Air Transport Command and as to whether he would have been able to obtain Government air transportation from New York City to Washington, D.C. on 18 September 1946. In reply he stated that it was impossible to get such transportation without definite travel orders. Shortly after this question had been raised the court was recessed and, upon being reassembled, one member thereof was challenged for cause on the ground that during the recess he had entered into a discussion with the prosecution staff as to the truthfulness or accuracy of accused Carl Eisert's assertion that it was impossible to obtain Government air transportation without proper orders. Upon examination of the challenged member under oath, he was asked by the president of the court to state the substance of his conversation with the prosecution during the recess. He replied that he had not spoken to the prosecution but to a member of the defense staff and that he had said that it was possible to get Government air transportation without orders and that he had done so himself shortly before the trial. The president then questioned him at length as to the details of his obtaining such transportation. The challenge was not sustained and the challenged member resumed his seat and apparently participated in the findings and the sentence.

The action of the president of the court in requiring the challenged member to state the substance of the conversation held during the recess was entirely proper, for it was this conversation which was the basis of the challenge. We shall not dwell upon the question of the propriety of a member of the court discussing disputed questions of fact with members of the prosecution or defense staffs during a recess or upon the question as to whether this discussion revealed such bias on the part of the challenged member that the denial of the challenge constituted an abuse of discretion on the part of the court. As shall hereinafter appear, a far more serious question was presented when the challenged member was permitted, indeed requested, to give direct testimony as to his having obtained Government air transportation without travel orders.

Although accused Carl Eisert testified that it was impossible to obtain unauthorized Government air transportation when questioned on this matter by the prosecution and the court, such questioning, under the particular circumstances of this case, could not fail to raise a phantasy of speculation as to whether he had, in fact, traveled to Washington by air so as to have arrived in Fort Belvoir in time to have committed the offenses charged against him. In other words, these interrogations, though not per se improper, put sharply in issue, and made material to the case, the question of unauthorized air travel. When therefore, the challenged member testified at length on this subject, his testimony contradicting that of accused Carl Eisert and tending to impeach said accused and the defense theory of the case, such member became, in effect, a witness for the prosecution.

It has been held that where a member of the court testifies as a witness for the prosecution, with or without accused's consent and whether or not his testimony is prejudicial to accused and even though it relates merely to unimportant and collateral issues, he is disqualified as a matter of law from resuming his place upon the court and if he is permitted to do so the entire proceedings are null and void (CM 317039, Hightshoe; CM 259563, Grant, 38 BR 370). In the cases cited as well as in the more usual cases falling within the contemplation of Article of War 8 and paragraphs 4a and 59 of the Manual for Courts-Martial, 1928, the member so disqualified has actually been called to the stand by the prosecution and this is no doubt the motivating circumstance behind the reasoning of those decisions holding that the testimony subsequently elicited need not touch upon an issue material to the case. In the instant case, however, since a challenged member of the court may properly be questioned as to his bias or as to his qualifications as a member in general, such member does not become a witness for the prosecution in the sense that the whole proceedings are vitiated thereby until his testimony becomes materially adverse to the defense theory of the case. In this connection it may be noticed that the mentioned paragraph 59 of the Manual provides:

> "If at any stage of the proceedings any member of the court be called as a witness for the prosecution, he shall, before qualifying as a witness, be excused from further duty as a member in the case. Whether a member called as a witness for the court is to be considered as a witness for the prosecution depends on the character of his testimony. In case of doubt he should be excused as a member. ***" (Underscoring supplied.)

As we have indicated above, there can be no doubt that the testimony of the member in this case, apart from his mere account of what he had done and said during the recess, was adverse to the defense on a material issue of the case as to accused Carl Eisert. There remains to be considered the question as to whether such member became a witness for the prosecution as to accused James Eisert. Carl Eisert corroborated in every detail the testimony of his brother and co-accused, James Eisert, as to the innocent nature of the otherwise highly inculpatory circumstances surrounding their apprehension on the night of 18 September 1946. Therefore, since the direct testimony elicited from the challenged member tended to impeach the testimony of accused Carl Eisert as to the possibility of obtaining unauthorized Government air transportation and since the court might well have applied the principle of falsus in uno, falsus in omnibus in arriving at its findings, we are impelled to hold that the evidence furnished by such member is as fatal to the validity of the findings and sentence in the case of accused James Eisert as it is in the case of accused Carl Eisert.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

(On Leave), Judge Advocate
Carlos E. McAfee, Judge Advocate
Gilbert E. Ashbrook, Judge Advocate

FEB 7 1947

JAGK - CM 318737 1st Ind

WD, JAGO, Washington 25, D. C.

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

1. In the case of First Lieutenant Carl J. Eisert (0-824111) and First Lieutenant James J. Eisert (0-698275), both Air Corps, I concur in the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentences, and for the reasons stated recommend that the findings of guilty and the sentences be disapproved.

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

(CM 318737).

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.

JACH - CM 318767

10 APR 1947

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at Bamberg, Germany, 18 November 1946. Each: Dishonorable discharge and confinement for life. The Branch United States Disciplinary Barracks
Privates First Class NICK ANTONIADES (42200197) and JAMES T. PHILLIPS (38750399), both of Troop D, 53d Constabulary Squadron	)	

REVIEW by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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

2. The accused were tried in a common trial, to which each consented, upon the following Charges and Specifications:

As to accused Phillips:

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

Specification: In that Private First Class James T. Phillips, "D" Troop, 53rd Constabulary Squadron, did, at Schwabach, Germany, on or about 3 October 1946, forcibly and feloniously, against her will, have carnal knowledge of Edith Soellner.

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

Specification: In that Private First Class James T. Phillips, "D" Troop, 53rd Constabulary Squadron, did, at Schwabach, Germany, on or about 3 October 1946, carry a firearm, to wit, a pistol, without authority, in violation of standing orders.

As to accused Antoniades:

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

Specification: In that Private First Class Nick Antoniades, "D" Troop, 53rd Constabulary Squadron, did, at Schwabach, Germany, on or about 3 October 1946, forcibly and feloniously, against her will, have carnal knowledge of Edith Soellner.

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

Specification: In that Private First Class Nick Antoniades, "D" Troop, 53rd Constabulary Squadron, did, at Schwabach, Germany, on or about 3 October 1946, carry a firearm, to wit, a pistol, without authority in violation of standing orders.

Each accused pleaded not guilty to, and was found guilty of, the pertinent Charges and Specifications thereunder. Evidence of two previous convictions was introduced as to accused Phillips; no evidence of previous convictions was introduced as to accused Antoniades. 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 for the term of his natural life. The reviewing authority approved the sentence as to each accused, designated The Branch, United States Disciplinary Barracks, Greenhaven, New York, 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 as to the Charges under the 92nd Article of War against each accused may be summarized as follows.

Both accused were identified as being in the military service (R 20). Voluntary pre-trial statements of the accused Antoniades (Pros Exs 2, 3) and of the accused Phillips (Pros Ex 4) were admitted into evidence (R 21-22). From the statements of both accused, it appears that at about 2030 on the evening of 3 October 1946 the two accused left the 53d Constabulary Kaserne in Schwabach, Germany, to go for a ride in a jeep driven by Phillips. Both were in uniform, wore Constabulary helmets, and carried pistols. After leaving a companion at a house in the town, the two accused proceeded to drive around Schwabach (Pros Exs 2, 3, 4).

Edith Soellner, a 17-year old girl and a resident of Schwabach testified that she was walking along a street on her way home when she was stopped by two members of the Constabulary in a jeep who asked her for her pass (R 8). They were identified by the witness as the accused

(R 14). She stated that the accused wore helmets with blue and yellow stripes on them and that their jeep had blue and yellow stripes on it (R 10). Upon examining her pass the accused told her it was not in proper form, that they would have to take her to the police station and ordered her to get into the jeep (R 8). The accused, with the girl, then drove back through the town, passing by both the Military Police Station and the 53d Constabulary Kaserne. The girl was not too disturbed at passing the police station, though she remarked that they should stop there (R 9). She thought perhaps the place they had to go was the Kaserne (R 15) and she knew the jeep was going in that direction (R 9). The statments of the soldiers in fact show that one of them had stated that they would have to take her to the Kaserne while the other stated that they would have to take her to the Military Police (Pros Exs 3, 4).

After passing the Kaserne, Phillips drove on out of town some distance and turned off into the woods, stopped the jeep and turned off the lights. The nearest house was a farm house some 100 meters away (R 9-10). Miss Sollner stated that she was then scared and excited but, because she feared they would drive her farther away, did not cry out for help (R 9-11).

After stopping, the girl was told to get out of the jeep, and when she refused, one of the soldiers took her by the hand and she resisted. After some argument, she got out of the jeep (R 10, 16). Phillips had spread a blanket on the ground and both accused stated in their confessions that Phillips laid her on the ground (Pros Exs 2, 3, 4). The girl herself could not exactly remember how she got on the ground but thought one of the soldiers might have taken her by the shoulder and forced her down (R 11). There was some argument between the soldiers as to which would have the girl first (Pros Exs 2, 3). Phillips, however, after having placed her on the ground took off her underclothes (R 17; Pros Ex 4) and proceeded to have intercourse with her; he was followed in the assault by Antoniades (R 14; Pros Exs 2, 3, 4). The girl started to cry after the jeep stopped and asked to go home. She stated that she was too excited to scream but she did resist and struggle with Phillips on the ground. She also tried to resist Antoniades but then "couldn't do much" (R 11-12, 16-17). Phillips admitted that she resisted him (Pros Ex 4) and Antoniades confirmed her statement that she cried and asked to go home. He also stated that she screamed twice while Phillips was having intercourse with her (Pros Ex 2). The girl testified that she remained on the ground between the two assaults, because she could not run away, she "felt funny" and "thought it wouldn't have any sense" (R 13).

Following the assaults, the two accused took the girl back to town and left her near her home (R 13). On the way back one of the soldiers gave her a cigarette which she partially smoked, then put

it out and placed it in her pocket (R 17). Upon arriving home she reported the affair to her parents, who called the military police (R 7).

She was examined at about 2330 the same night, by First Lieutenant Wikera, an American doctor, whose testimony was admitted by stipulation. He found blood on the girl's skirt, injuries to her genital organs and the presence of spermatozoa indicating sexual intercourse but no other bodily contusions or abrasions were observed (R 20; Pros Ex 1).

Both accused were identified by the victim (R 14, 18). Neither accused at any time struck the victim or threatened her in any way (R 15, 17).

The evidence for the prosecution relative to the charge against each accused of carrying a weapon without authority in violation of Article of War 96 is summarized as follows. In the pre-trial statements of accused, each admits he carried a pistol on the evening of 3 October without authority (Pros Ex 3, 4). Edith Sollner testified that Antoniades had a pistol before they went into the woods and that he showed her his pistol on the way home (R 18).

4. The evidence for the defense consisted of the stipulated testimony of Captain Hungerford, Troop Commander of both accused, and the stipulated testimony of Sergeant Kukendal, Section leader of both accused. Each of these witnesses testified to the satisfactory performance of duty by accused, and that nothing in their conduct had been such as to reflect unfavorably upon their service. After being warned of their rights each accused elected to remain silent.

5. With respect to the charge of rape against accused, there is no doubt that the intercourse on the part of each accused was without consent on the part of the victim. While it is true that there is no evidence of great resistance on her part, her testimony is that she did not consent, and did resist and struggle while she was on the ground. Her entering the jeep in the first place is fully explained by the circumstances. The two accused were in uniform, wearing Constabulary helmets, were in a Constabulary jeep and asked for her pass. She had every reason to believe that they were acting lawfully and that she had to accompany them.

The Manual for Courts-Martial, 1928, states:

> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (Par 149b, p 165).

In this case her testimony as to lack of consent on her part is corroborated by the statements of each accused, neither of which contain even a suggestion of any consent asked or given. In fact the statements of each accused show a complete callousness toward the girl. She was alone, scared and excited at the turn of events, she knew at least one of the accused was armed and that both were far stronger than she. While the law requires a woman to resist, taking "such measures to frustrate the execution of a man's design as she is able to," it does not require her to risk what she may reasonably believe to be danger of serious bodily harm. It cannot be said that the resistance she did offer was a mere pretense or was so little that the court was unwarranted in finding, as it necessarily must have, that in fact she did not consent.

The voluntary pre-trial statements of the accused were properly admitted by the court after testimony as to the circumstances surrounding their taking and without objection by the defense (R 21-22). While the statement of one accused is inadmissible against the other, each statement is a complete confession in itself. Also, the testimony of the victim Edith Sollner fully establishes the corpus delicti as to the offense committed by each accused.

The Board of Review is therefore of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and the specification thereof against each accused.

6. With respect to Charge II and the specification thereof against the accused, Phillips, there is no evidence aliunde the confession that he had a pistol, nor any other evidence respecting the offense. Therefore, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge II and the specification thereof against the accused Phillips.

With respect to Charge II and the specification thereof against the accused, Antoniades, while the evidence, aliunde his confession, clearly shows that he did have a pistol, this fact is the only evidence other than his confession of the commission of the offense. It is the opinion of the Board of Review that the mere fact that accused was carrying a weapon is not of itself evidence that the offense charged was probably committed (MCM 1928, par 114a). The doing of an act which may be lawful or unlawful depending upon the existence or non-existence

of some other facts, is not of itself evidence tending to prove that the act in the particular instance was unlawful. The existence of some evidence aliunde the confession tending to establish some facts, such as that the accused was not on duty, which would tend to show that the act was unlawful might alter the situation, but there is no such evidence in this case. Therefore the Board of Review is also of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge II and the specification thereof against the accused Antoniades.

7. The court was legally constituted and had jurisdiction over each accused and the offenses. No errors injuriously affecting the rights of either accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of specification of Charge I and of Charge I against each accused, legally insufficient to support the findings of guilty of the specification of Charge II and of Charge II against each accused, and legally sufficient to support the sentence as to each accused. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92.

[illegible], Judge Advocate

[illegible], Judge Advocate

[illegible], Judge Advocate

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

MAY 19 1947

JAGQ - CM 318777

UNITED STATES	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at Stuttgart, Germany, 11 October 1946. Dismissal.
	)	
Second Lieutenant ANDREW R. WEBER (0-1020180), Troop E, 1st Constabulary Squadron, 15th Constabulary Regiment.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of Not Guilty).

Specification 2: In that 2nd Lt. Andrew R. Weber, Troop E 1st Constabulary Squadron, did, at Knielingen and Malsch, Germany, from about 10 July 1946 to about 15 August 1946, willfully and wrongfully authorize the sale of Post Exchange gift items at a price in excess of the official Post Exchange price.

Specification 3: In that 2nd Lt. Andrew R. Weber, Troop E 1st Constabulary Squadron, did, at Knielingen and Malsch, Germany, from about 10 July 1946 to about 15 August 1946, knowingly and willfully fail to deduct from the Currency Control Books of purchasers of Post Exchange gift items, the price of items selling for more than five dollars, in violation of the provisions of Cir. #82, Hq. USFET, dated 3 June 1946.

The accused pleaded not guilty to all specifications and the Charge. He was found not guilty of Specification 1, guilty of Specification 2, guilty of Specification 3, except the words "knowingly and willfully fail to deduct from the currency Control Books of", substituting therefor the words "Knowingly and willfully fail to require the proper person to deduct from the Currency Control Books of", of the excepted words, not guilty, of the substituted words, guilty, and guilty of the Charge. 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.

Accused was platoon leader and exchange officer, 3rd Platoon, Troop E, 1st Constabulary Squadron, stationed at Malsch, Germany (R. 18). On or about 13 August 1946, a number of scarves were received among the exchange stores, listed to be sold for $8.50 each. Accused directed the enlisted man in charge of the sales to sell the scarves for $10.00 each, and to make no deductions from the purchasers' Currency Control Books. The extra money was to be devoted to the platoon club. Scarves were sold for $10.00 each to a Private First Class Edward C. Robertson, Corporal Richard N. Howard and Private Paul S. Kinser, and none of these sales was deducted from the purchasers' Currency Control Books (R. 19, 25, 33 and Pros. Ex. 9). Accused told a Sergeant Godlove that if he wanted to pay $20.00 for a Valpac listed at $12.50, the sale would not be deducted from the latter's Currency Control Book. Sergeant Godlove purchased the Valpac for $20.00 and no deduction was made in his Currency Control Book (R. 23, 29).

Before the witnesses testified concerning the exchange transactions the prosecution read to the court sub-paragraph 13F, Circular 82, Headquarters USFET, dated 3 June 1946, pertaining to deductions and authentication of entries in currency control books (R. 17).

The prosecution introduced a statement made by accused to the Battalion Executive officer, who had been directed by the Regimental Commander to make an investigation of allegations against accused. The defense objected on the ground that the investigating officer was necessarily prejudiced since it was a matter pertaining to his squadron. The court overruled this objection. In this statement accused stated that the exchange sometimes lost money through errors and a number of times he personally made up the losses. At other times excess prices were charged in order to make good the losses. He stated that it was not his policy to make any personal profit. In order to lower his currency control book to the amount of cash that remained after making up the losses he deducted additional amounts from his personal book (R. 38; Pros. Ex. 10).

4. Evidence for the Defense. The defense introduced the Currency Control Book of accused. This book contained an entry under date of 15 August 1946, showing a P.X. deduction of $149. At the time the book was accepted in evidence the defense counsel stated that accused deducted from his own book instead of from individual books, because his platoon was so scattered (R. 38, 39; Def. Ex. "A"). The Post Exchange non-commissioned officer, 1st Constabulary Squadron, testified that mistakes were occasionally made in the price lists furnished the troops (R. 40). It was also shown that the platoon post exchange accounts were $30.00 short at one time. This shortage was made up by accused (R. 42).

The accused remained silent (R. 43).

5. The evidence is conclusive as to the commission of the offense charged in Specification 2, and the Board feels that a detailed discussion of the evidence is unnecessary. The admission of the statement of the accused to the investigating officer was properly admitted in evidence. There was no tenable basis for the objection of the defense that the investigating officer was certain to be prejudiced since he was executive officer of the battalion.

6. The court found accused guilty of Specification 3 with exceptions and substitutions. An analysis of these exceptions and substitutions shows that accused was charged with failure to perform certain acts whereas the court found him guilty of failure "to require the proper person" to perform those acts. The effect of these changes was to add to the original specification the words underlined and quoted above.

Accused's failure to require another person to make deductions from Currency Control Books is not necessarily included in an allegation that accused himself failed to make such deductions.

As stated in CM 199063, Martin, 3 BR 325, "When a court by exceptions and substitutions finds an accused not guilty of the offense alleged but guilty of some other offense not necessarily included therein, it in fact finds the accused guilty of an offense for which he was not brought to trial. It is, of course, fundamental that such action is illegal and such a finding can afford no basis for a sentence." The whole course of adjudicated precedents support this statement (CM 120949, Espinosa; CM 120948, Garcia; CM 201596, Sigler, 5 BR 281).

The Board of Review is therefore of the opinion that the action of the court with respect to Specification 3 was illegal.

7. There remains then Specification 2 alone, as the basis for the sentence imposed upon accused. This brings us to consideration of the question of whether the offense of which accused was found guilty was of such a nature as to amount to a violation of Article of War 95. Accused caused certain Post Exchange gift items to be sold at a price greater than that authorized. There is no evidence to indicate that he did this for personal profit. To the contrary, it is shown that on a number of occasions the platoon post exchange showed a loss, and accused at times made up the deficit from his personal funds. On the occasion under discussion he caused the overcharge to be made in order to make up shortages and to increase the platoon club fund. This, of course, is not the proper method of accomplishing these ends, but it is the opinion of the Board of Review that such conduct is not an offense under Article of War 95, which denounces conduct unbecoming an officer and a gentleman. Accused's conduct does not, in the words of the Manual for Courts-Martial, seriously compromise his character and standing as a gentleman or seriously compromise his position as an officer and exhibit him as morally unworthy to remain a member of the honorable profession of arms (CM 227651, Hess, 49 BR 236; CM 235676, Davis, 12 BR 209). It is the further opinion of the Board of Review that accused's conduct was "to the prejudice of good order and military discipline" in violation of Article of War 96.

8. War Department records show that accused was born 25 September 1926, is a high school graduate, and attended City College of New York for one year. He is unmarried. He was inducted into the Army on 12 December 1944, and served as an enlisted man until commissioned a temporary second lieutenant, AUS, on 31 August 1945, upon graduation from the Officers Candidate Course, The Armored School. His efficiency index is not known. He has no previous convictions and has not been subject to disciplinary action pursuant to Article of War 104.

9. 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 3, and of the Charge, but is legally sufficient to support the finding of guilty of Specification 2, in violation of Article of War 96, and the sentence, and to warrant confirmation thereof. A sentence to dismissal is authorized upon conviction of a violation by an officer of Article of War 96.

A. H. Johnson, Jr., Judge Advocate

Joseph J. Stern, Judge Advocate

[illegible], Judge Advocate

JAGQ - CM 318777 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Andrew R. Weber (O-1020180), Troop E, 1st Constabulary Squadron, 15th Constabulary Regiment.

2. Upon trial by general court-martial this officer was found guilty of willfully and wrongfully authorizing the sale of Post Exchange gift items at a price in excess of the official Post Exchange price (Spec. 2), and failing to require the proper person to make deductions from Currency Control Books of purchasers of Post Exchange gift items selling for more than $5.00, in violation of the provisions of Circular #82, Headquarters USFET, 3 June 1946 (Spec. 3), in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 3 of the Charge, and is legally sufficient to support only so much of the findings of guilty of Specification 2 and the Charge as involves findings of guilty of the specification in violation of Article of War 96, legally sufficient to support the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that accused was the Post Exchange officer for his platoon in Germany. In order to make up certain shortages and to provide funds for the platoon club he directed the enlisted man in charge of Post Exchange sales to sell certain items at an increased price and not to deduct these sales from the Currency Control books of the purchasers. The increases in prices totaled $11. Accused had made up some previous shortages from his personal funds. He deducted the amount of some of the sales at excess prices from his own currency control book. He made no personal gain on these transactions.

5. War Department records show that accused was born 25 September 1926, is a high school graduate, and attended City College of New York for one year. He is unmarried. He was inducted into the Army on 12 December 1944, and served as an enlisted man until commissioned a temporary second lieutenant, AUS, on 31 August 1945, upon graduation from the Officers Candidate Course, The Armored School. His efficiency index is not known. He has no previous convictions and has not been subject to disciplinary action pursuant to Article of War 104. His civilian record appears clear.

Pleas for clemency were submitted with the record by the accused and by his company commander.

6. While the actions of the accused are not to be condoned it is believed that his conduct may properly be considered in the light of his youth, the motives actuating him, and the fact he did not profit personally from the transaction.

7. Consideration has been given to a letter from Congressman Benjamin J. Rabin and to a brief filed by Henry G. McDonough, attorney who represented accused at a hearing before the Board of Review.

8. I recommend that the sentence be confirmed but in view of the pleas for clemency and all the facts and circumstances, recommend it be commuted to a reprimand and forfeiture of $50.00 pay per month for two months, and that the sentence as thus commuted be carried into execution.

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

CM 318777

4 Incls
1. Rec of trial
2. Form of action
3. Ltr fr Repr. Rabin, 22 Jan 47
4. Brief filed by Atty. McDonough

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 215, 11 June 1947)

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

JAGH - CM 318851

22 JAN 1947

UNITED STATES	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Wiesbaden, Germany, 30 October 1946. Dishonorable discharge and confinement for one (1) year. Branch United States Disciplinary Barracks
Private HUNTER W. STACY (RA 15202691), Troop B, 81st Constabulary Squadron	)	

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Hunter W Stacy, Troop "B" 81st Constabulary Squadron, did, at Lauterbach Germany, on or about the 5th day of September 1946, feloniously, take, steal, and carry away, one lady's wrist watch, one "Agfa" camara and one lady's bracelet, value about $82.00, the property of Technician Fifth Grade William T Birt, Troop "B" 81st Constabulary Squadron.

Specification 2: In that Private Hunter W Stacy, Troop "B" 81st Constabulary Squadron, did, at Fulda Germany, on or about the 14th day of September 1946, feloniously, take, steal, and carry away 24 packages of cigarettes, value about $1.50, the property of Private Donald A Smith, Troop "B" 81st Constabulary Squadron.

He pleaded not guilty to the Charge and all Specifications. Of Specification 1, he was found guilty except the figures "$82.00" substituting therefor the figures "$42.50" of the excepted figures, not guilty, of the substituted figures, guilty. He was found guilty of Specification 2 and guilty of the Charge. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably discharged, 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, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution is summarized as follows:

Specification 1: On or about 4 or 5 September 1946, a lady's wrist watch, an Agfa camera, and a lady's bracelet were missing from the possession of the owner, Technician Fifth Grade William L. Burt (R 6). Burt had purchased the camera at a post exchange about six months prior to the trial (R 10) and had paid $5.00 for it (R 9). The watch and bracelet were also purchased at a post exchange about four months prior to the trial (R 11). Burt stated that he had paid $27.50 for the watch and $10.00 for the bracelet (R 8). Burt identified the items in question as his property (R 7; Pros Exs. 1, 2, 3), but admitted that they were not marked and admitted the possibility that similar items might have been purchased from a post exchange (R 9).

On or about 21 September 1946, on the basis of information received from a soldier named Smith, Captain Roland M. Hudson, the accused's troop commander conducted an investigation to determine whether the accused had stolen the camera described in Specification 1. Captain Hudson went to the barracks at Fulda where he found the accused. The accused was asked if he had Burt's camera and replied, "No." Captain Hudson then asked him if it is possible that one of accused's friends might be keeping it to which the accused replied in the affirmative. Captain Hudson later asked a Private Staton, who came into the room, if he knew anything about the camera. Staton replied, "Yes, sir, I am holding the camera that belongs to Private Stacy." Staton then opened his footlocker and produced the camera. Captain Hudson asked the accused if he stole the camera and the accused stated that he did. The accused was then asked if he had taken the wrist watch and bracelet which he denied.

Staton then told Captain Hudson that he had the watch and bracelet and gave these items to the troop commander (R 11). Captain Hudson identified Prosecution Exhibits 1, 2, and 3 as the items delivered to him by Staton (R 11-12).

Private Ivan J. Staton testified that the accused had entrusted the camera, watch, and bracelet to him for safekeeping because the accused had no footlocker. The witness thought that the items belonged to the accused (R 19).

Specification 2: Technical Sergeant Mario Casale, of accused's troop testified that, on 16 September 1946, a Private Smith had reported that five cartons of cigarettes were stolen from him. Shortly thereafter a Private Hansen reported to the witness that he was holding some cigarettes for the accused. The witness directed Hansen to bring the cigarettes to his office. After Hansen departed the accused and Smith reported to the witness who questioned the accused about having cigarettes. The accused merely stated that he had one pack in his pocket. A few minutes later Hansen returned with twenty-four packs of cigarettes. At this point the accused admitted that he had taken the cigarettes from Smith's bag (R 13).

Hansen testified that on or about 16 September 1946, the accused entrusted to him three cartons of cigarettes for safekeeping. About an hour later the accused requested and obtained the return of six packs of cigarettes which he stated he was going to sell (R 14-15). Later the witness learned from Smith that three cartons of cigarettes belonging to the latter were missing. Smith and the witness brought the twenty-four packs of cigarettes to Sergeant Casale's office where the accused was also present. When confronted with the cigarettes, the accused admitted that he had stolen them from Smith (R 15).

4. For the defense, the assistant defense counsel, testified that he had bought a bracelet, similar to Prosecution's Exhibit 2 at a post exchange and had paid $6.00 for it (R 16).

5. The principal questions presented by the record with respect to the findings of guilty of Specification 1 are:

a. Was Captain Hudson's testimony with respect to the accused's confession that he had stolen the camera described in the Specification properly admitted in evidence?

b. If the first question is answered in the negative, it must be determined whether the remaining evidence of guilty is so compelling that the error of admitting accused's confession did not injuriously affect the accused's substantial rights.

c. Are the court's findings with respect to value supported by the evidence?

6. With respect to the accused's confession, the record does not show that Captain Hudson warned the accused of his rights against self-incrimination at any time during the questioning of the accused concerning the alleged larceny.

In discussing the admissibility of confessions the Manual for Courts-Martial provides in relevant part:

> "It must appear that the confession was voluntary on the part of the accused. * * * No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the special circumstances of each case. The following general principles are, however, applicable.
>
> "A confession not voluntarily made must be rejected; but where evidence neither indicate the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made.
>
> * * * *
>
> "The fact that the confession was made to a military superior or to the representative of a military superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior.
>
> * * * *
>
> "Evidence that the accused stated that he made a confession freely without hope of reward or fear of punishment, etc, or evidence that the accused was warned just before he made the confession that his confession might be used against him or that he need not answer any questions that might tend to incriminate him is evidence, but not conclusive evidence, that the confession was voluntarily made." (MCM 1928, par. 114a, p. 116).

From the foregoing quoted provisions of the Manual, it is clear that the voluntary character of a confession is the fundamental and ultimate test of its admissibility. If it is voluntary it will be admitted and if it is involuntary it will be excluded.

In the application of the general rule that confessions which are not voluntarily made should not be received in evidence in military cases, consideration should be given to the fact that a confession made by a soldier to a military superior is likely to be involuntary for the reason that relationship of rank has a bearing on the strength of any inducement that may have been offered. In addition, it must be considered that there is an implied command, and consequently an element of

presumptive coercion, whenever a military superior asks a question of a subordinate, who either does not know, or has not been warned of, his privilege against self-incrimination. The principle is expressed in the 1921 Manual as follows:

> "In military cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. * * * Confessions made by private soldiers to officers or noncommissioned officers, though not shown to have been made under influence of promise or threats, etc., should, in view of the military relations of the parties, be received with caution.
>
> * * * *
>
> "Where the confession was made to a civilian in authority, such as a police officer making an arrest, the fact that the official did not warn the person that he need not say anything to incriminate himself does not necessarily in itself prevent the confession from being voluntary. But where the confession is made to a military superior the case is different. Considering the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, it devolves upon an investigating officer, or other military superior, to warn the person investigated that he need not answer any question that might tend to incriminate himself. Hence confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him, or unless it is shown clearly in some other manner that the confession was entirely voluntary." (MCM 1921, Sec 225b, pp. 187-188).

It has been held by the Board of Review, where a confession was made to a military superior without the accused being warned as to his rights and the circumstances under which it was made were not shown in the record of trial, that the confession was inadmissible (CM 234561, Nelson, 21 BR 55; CM 237255, Chesson, 23 BR 317; CM 242082, Reid, 26 BR 391; CM 254423, Gonzalez, 35 BR 248).

On the other hand a confession made to a military superior has been held admissible where it affirmatively appeared that the confession was made spontaneously upon the initiative of the subordinate although the latter had not been warned as to his rights (CM 255162, Lucero, 35 BR 47; CM 233611, Eckman, 20 BR 29; CM 224549, Sykes, 14 BR 159; CM 288872, Clark, 1 BR (POA) 89).

In the instant case the accused was under investigation and suspected of larceny. Captain Hudson entered the accused's quarters and asked him if he had the stolen camera. The accused denied having the camera in question, but on further questioning by his troop commander admitted that the camera had been entrusted to another soldier. After the camera was found, the accused's troop commander again asked the accused if he had stolen the camera, and the accused stated that he had.

There is a complete absence of spontaneity in the circumstances under which the confession was obtained, and there is nothing in the circumstances which would warrant an inference that the confession was voluntarily made.

In view of the foregoing authorities we are of the opinion that the court committed error in admitting evidence as to the accused's confession.

7. There remains for consideration whether the competent evidence of guilty is sufficiently compelling to render the error committed in admitting evidence of the accused's confession non-prejudicial.

It was shown that the property described in the specification was missing from the possession of the owner on or about 4 or 5 September 1946. On 21 September the property was found in Private Staton's footlocker. Staton testified that the accused had entrusted the property to him for safekeeping. There is, however, no evidence to show the date when the accused delivered the property to Staton.

Possession by an accused of stolen property is a fact from which a court may infer guilt of larceny if that possession is personal, recent, and unexplained (Donnegan vs. U.S., 287 Fed 641; Dig Op JAG 1912-40, Sec. 451 (87)). The probative value of this inference is strong if the evidence establishes the fact that the accused had possession of the stolen property within a few hours after the alleged larceny. But probative value of this inference diminishes as time elapses because the probability of innocent acquisition of stolen property becomes greater with the lapse of time.

In the instant case the stolen property was found approximately fifteen days after it was missing from the possession of the owner. It

was not shown how soon after 5 September 1946 the accused was seen in possession of the property. In our opinion such evidence, although not strong, would have been sufficient to warrant conviction in the absence of a confession by the accused.

It is the general rule that the prejudicial effect of errors in the admission of irrelevant, incompetent or immaterial evidence offered by the prosecution is to be measured by consideration whether the legal evidence of guilt is relatively conclusive or inconclusive, and the extent to which the evidence for the prosecution is contradicted or explained consistently with innocence by evidence on behalf of the accused.

Since the evidence of guilt of the offense alleged in Specification 1 does not seem to us to be strong, and since a confession has an extremely high probative effect, we are of the opinion that, on the facts of the instant case, the erroneous admission of evidence of accused's confession seriously prejudiced his substantial right.

Accordingly we are of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 1 of the Charge.

8. Because of the position which we have taken with respect to the prejudicial effect of the improperly received confession, it is not necessary to consider whether the court's findings with respect to value is supported by the evidence.

9. In Specification 2 larceny of twenty-four packages of cigarettes, the property of Private Donald A. Smith is alleged.

When questioned about the cigarettes by Sergeant Casale, the accused admitted that he had stolen the cigarettes and had taken them from Smith's bag, but he cannot legally be convicted upon his unsupported confession (MCM, 1928, par. 114a, p. 115). Apart from accused's confession the only evidence in the record tending to show that the cigarettes had probably been stolen is the testimony of Sergeant Casale and Private Hansen that Smith had reported the loss of the cigarettes and claimed ownership thereof. Such evidence is hearsay. It is incompetent and can not be used for the purpose of establishing the corpus delicti. Smith did not testify at the trial. Accordingly, it is our opinion that the record does not show by competent evidence aliunde the confession that the offense charged has probably been committed (MCM, 1928, par. 114a, p. 115). The competent evidence merely shows that the accused had possession of three cartons of cigarettes and that he entrusted them to

Hansen for safekeeping. In the circumstances it was improper for the court to consider the confession (CM 187316, Hensley, 1 BR 23; CM 187168, Greene, 1 BR 1).

Accordingly, we are of the opinion that the record is not legally sufficient to support the finding of guilty of Specification 2.

10. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

A. J. Rottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip E. Smith, Judge Advocate

APR 11 1947

JAGH CM 318851 1st Ind.

WD, JAGO, Washington 25, D. C.

To: Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, N. Y.

1. In the case of Private Hunter W. Stacy (15202691), Troop B, 81st Constabulary Squadron, 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 318851).

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.

JAGK - CM 318858

24 APR 1947

U N I T E D S T A T E S	)	OFFICE OF MILITARY GOVERNMENT FOR GERMANY (US)
v.	)	Trial by G.C.M., convened at Berlin, Germany, 17, 31 October and 7, 8, and 9 November 1946. Dismissal, total forfeitures, confinement for one year, to pay to U.S. a fine of $2,000 and to be confined at hard labor until said fine is paid but not for more than six months in addition to the one year adjudged.
Lieutenant Colonel JAMES G. FISHER (0-901837), Air Corps.	)	

OPINION of 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 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. (Finding of not guilty.)

Specifications 1, 2 and 3: (Finding of not guilty).

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

Specification 1: In that Lieutenant Colonel James G. Fisher, Economics Division, Office of the Military Government for Germany (US), did, at Berlin, Germany, from on or about 1 August 1945 to on or about 1 March 1946, wrongfully and unlawfully use his position as a member of the Army of the United States and engage, attempt to trade, and participate in business dealings with the Otis Elevator Company, a corporation in the State of New York and the United States, and its representatives, agents and servants Grover Higgins, Fred E. Town, Percy Douglas and Louis Scheel, and with Robert Lange, William Rubien and Otto Kuhn, enemy nationals, and with L. N. Rosenbaum, a resident of the State of New York, by conferring, exchanging correspondence and submitting plans for the reorganization and refinancing of the Otis Elevator Company's interests in Germany, which was not directly connected with his military duties and would tend to interfere and hamper the proper discharge of his military duties.

Specification 2: In that Lieutenant Colonel James G. Fisher, ***, did, at Berlin, Germany, from on or about 1 August 1945

to on or about 1 March 1946, acting as a representative and agent for and upon the special instance and request of the Otis Elevator Company, a corporation in the State of New York and the United States, through its agents and servants Grover Higgins, Fred E. Town, Percy Douglas and Louis Scheel, did, wrongfully, unlawfully, and without license of the President, attempt to engage in business and trade with Robert Lange, William Rubien and Otto Kuhn, with knowledge and reasonable cause to believe that said Robert Lange, William Rubien and Otto Kuhn were enemies, and allies of enemies, of the United States of America.

Specification 3: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its specifications and not guilty of Specification 3 of Charge II. Accused was found guilty of Charge II and Specification 1 thereof except the words "and engage" substituting therefor the word "to"; guilty of Specification 2, Charge II, except the words "acting as a representative and agent for and upon the special instance and request of the Otis Elevator Company, a corporation in the State of New York and the United States, through its agents and servants Fred E. Town, Percy Douglas and Louis Scheel, did." No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to be confined at hard labor, at such place as the reviewing authority might direct for a period of one year, to forfeit all pay and allowances due or to become due, and to pay to the United States a fine of $2,000, and to be further confined at hard labor until such fine is so paid, but not for more than six months in addition to the one year hereinbefore adjudged. 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 court took judicial notice of section 3, Title 50, U.S.C., providing in part as follows:

"Section 3, Title 50, U.S.C., Appendix:

"Acts Prohibited. It shall be unlawful:
(a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy."

The court likewise took judicial notice of paragraph 2e, AR 600-10, 8 July 1944, providing in part as follows:

"(1) (a) Officers of the Army will not use or permit to be used their military titles in connection with commercial enterprises of any kind.

(b) Officers of the Army will not engage in or permit their names to be connected with any activity incompatible with the status of an officer of the Army.

"(2) There are limitations upon the activities of officers and other personnel subject to military law. The general principle underlying such limitations is that every member of the Military Establishment, when subject to military law, is bound to refrain from all business and professional activities and interests not directly connected with his military duties which would tend to interfere with or hamper in any degree his full and proper discharge of such duties or would normally give rise to a reasonable suspicion that such participation would have that effect. Any substantial departure from this underlying principle would constitute conduct punishable under the Articles of War.

* * *

"(b) Any member of the Military Establishment subject to military law who is engaged or who contemplates engaging in outside business or professional activities, or who has or contemplates having outside interests is enjoined to inform himself of pertinent laws, regulations, and standards of the service. If after such investigation there is any doubt, the individual concerned will report all pertinent facts to the War Department and request instructions."

Over the objection by the defense there was introduced into evidence letter AG 004 OPGA Hq ETO USA 4 April 1945, Subject: "Prohibition Against 'Engaging in Business'" as follows:

"1. It is the policy of the Theater Commander that personnel subject to military law in this theater shall not, so far as can be avoided, disturb the economy of the liberated countries nor use their presence here in order to obtain or to lay plans to obtain any commercial advantages for themselves or for others.

"2. Pursuant to this policy, all personnel subject to military law are prohibited from 'engaging in business' in this theater.

"3. The term 'engaging in business' is defined to include:

a. Buying, selling or dealing in securities, except savings bonds regularly purchased from the issuing government; postage stamps; real estate; or any kind of property in this theater for present or future personal profit or investment. (As to dealing in currency, reference is made to letter, this headquarters, AG 121, OpGA, 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', dated 23 September 1944).

b. Acting as agent, intermediary or conduit in any business transaction for gain in this theater for any person, firm or corporation, wherever located or planned to be located.

c. Using the Army Postal System or other Army Communications systems for sending or receiving communications relating to any unauthorized business transacted, or to be transacted, in this theater.

"4. The types of activity enumerated below are specifically permitted, notwithstanding the foregoing prohibitions:

a. All personnel are permitted to engage in such business transactions as are required by their official duties in behalf of the Army or the United States Government.

b. Technical representatives, technical observers, war correspondents, and other civilians accredited to this theater for specific duties are permitted to carry out those duties.

"5. Any other exceptions will be made only by authority of this headquarters." (R. 26,99,100; Pros. Ex. 22)

On or about 1 August 1945 the accused was assigned duties as Economic Reporter in the Trade and Commerce Branch, Economics Division, Office of the Military Government for Germany. He held this assignment and performed the duties pertinent thereto until about 1 March 1946. His office was located in Berlin, Germany, and his duties appear to have been chiefly that of collecting information and data of an economic nature concerning German industries. Mr. Frederick Winant was chief of the Trade and Commerce Branch and Mr. Grover Higgins, an experienced American lawyer, was its legal adviser (R. 39, 156; Pros. Ex. 10).

In the French sector of Berlin there was located a partially destroyed plant owned and formerly operated by the Otis Elevator Company, an American corporation, with its principal offices in New York. Prior to his departure from New York to Germany, Mr. Higgins had acquired, through a friend who was an executive of the Otis Elevator Company, a list of former executives of their Berlin plant (R. 36,40; Def. Ex. M). Sometime in September Mr. Higgins gave this list of names to the accused and requested him to go to the plant, locate the persons named on the list, particularly the one named Lange, and to report to him on the advisability of recruiting such persons for work with the military government. The accused thereupon made a survey of the physical condition of the plant, interviewed the manager, Mr. William H. Rubien, an American citizen, who had been in Germany since 1928 and arranged to interview Robert Lange, the manager under German seizure. He later made an oral report to Mr. Higgins suggesting the advisability of procuring capital for the operation of the plant. Mr. Higgins requested accused to make a written report and on 20 September he submitted to Mr. Higgins a memorandum captioned, "Subject: Inspection of the Berlin Plant of Otis Elevator Company." Paragraphs 8 to 10 inclusive are pertinent to the issues herein and are as follows:

"8. Mr. RUBIEN states that with RM 500,000 which on the basis of the present value of the Allied Mark is 50,000 dollars, he could turn out items needed for rehabilitation in Berlin for which raw material is available. At the same time he would be able to make necessary repairs to the plant and knows where he could obtain some machinery which would be needed later on for elevator machinery and parts. He does not know what the policy of the Company is as to future operations but feels that they will want to put this plant back in operation to take advantage of the market which exists for Otis equipment in Europe, especially Germany. While he does not claim he can make any substantial profit from this amount of working capital he does maintain that by being enabled to keep his employees together and put the plant back in shape for later activity and at the same time operate even on a 'break even' basis the money will show a good return.

"9. Under present conditions it is not possible for Otis to advance money to their Berlin Plant nor could they communicate with them. However, I have a suggestion as to how this could be accomplished. I have the acquaintance of one of Berlin's leading bankers, Mr. OTTO KUHN. Through him an advance of RM 500,000 can be arranged. A receipt could be taken for Mr. RUBIEN for the amount, which receipt would be forwarded to New York. The New York office could then deposit an equivalent amount in a New York bank to the credit of a person to be named.

"10. If it would appear to the New York office that they would be subject to censure on the possible basis that such a transaction would appear to be in aid of getting money out of Germany in violation of existing laws then the New York office could direct their plant in Brussels, Belgium to make the deposit in a Brussels bank." (R. 41, Pros. Ex. 11)

Mr. Higgins testified that he considered the proposal contained in the memorandum to be improper, that he showed it to Mr. Winant, mentioned the matter to an officer in Military Government and filed it away. Suspecting that the proposal carried further implications he wrote letters to his friends, Mr. Fred Town in New York and Mr. Percy Douglas whom he believed to be in Paris, France, both being executives of the Otis Elevator Company, advising them that due to conditions then existing, even if regulations permitted, it would be unwise to invest any money in the Berlin subsidiary. He thought that this would be a "useful warning to them" (R. 40-43). On some later date the accused asked Mr. Higgins if he had received a reply from Otis Elevator Company and Mr. Higgins replied that he had not (R. 42,44). On 29 September, accused wrote the Otis Elevator Company in New York stating that he had provided some food for Mr. Rubien and would use his influence to bring him to Berlin proper and get his son a job. The letter closed with this sentence, "If you have any special requests or instructions I will be glad to help" (R. 29, Pros. Ex. 1). The company replied by letter of 24 October thanking accused for assisting Mr. Rubien (R. 32, Pros. Ex. 6).

On 10 November, accused wrote Mr. Lange suggesting that he write to the Otis Company in New York stating that the subsidiary in Berlin needed 500,000 reichmarks and that he, Lange, had been assured that the money could be gotten locally if they approved the deal and that no interest or service charge would be required. He suggested further that Lange tell the Otis Company in New York to contact Mr. L. N. Rosenbaum, 565 Fifth Avenue, New York, who would act immediately and make arrangements for the funds (R. 64, Pros. Exs. 12,13).

On 8 December, accused wrote one of the vice presidents of the Otis Company in New York, inclosing a letter from Mr. Rubien, stating that both Rubien and Lange had asked him to arrange for a loan of 500,000 reichmarks which at the official rate of exchange amounted to $50,000, without interest, and requested the company to discuss the details with Mr. L. N. Rosenbaum, 565 Fifth Avenue (R. 29, Pros. Ex. 2). On 11 December he wrote the general manager of the International Division of the company stating further details of the proposal. The Otis Elevator Company would be expected to deposit $50,000 in New York. A Berlin banker would advance 500,000 reichmarks to Lange and Rubien, who would in turn forward a receipt to the company showing they had obtained the money. This letter also referred to Mr. Rosenbaum as being willing to handle the transaction (R. 29, Pros. Ex. 3). On 21 December accused forwarded to the Company in New York a detailed report on the condition of the Berlin plant, including a chronological history of its wartime activities and containing a complete financial statement. The report had been prepared by Mr. Lange (R. 30, 130; Pros. Exs. 4E, 4F, 4G). On 27 December, Mr. F. E. Town, Vice President of the Company, wrote accused that "our Mr. Louis Scheel, former Mgr. of Otis Aufzugswerke who has been in Italy" had been cabled to go to Berlin to "straighten out the situation as far as that is possible" (R. 32; Pros. Ex. 7).

Mr. Louis Scheel testified by deposition that sometime in the early part of January 1946, he arrived in Berlin and had contacts with accused until April. On one occasion he had dinner with accused, his "WAC" secretary and Major Dups at accused's quarters. Mr. Scheel testified further as follows:

> "SEVENTEENTH INTERROGATORY: What proposals, if any, did Lt. Col. James G. Fisher make to you?
>
> "Answer: Lt. Col. James G. Fisher made a proposition to supply the Otis German Company with German marks in exchange for American dollars to be given to Mr. L. M. Rosenbaum, of 565 Fifth Avenue, New York City. When I refused this first proposition on account of the fact that the Otis Elevator Company did not invest dollars in Germany, he then made a proposition to me that he would get a German whom he knew, to supply us with money there for an interest in the Otis Subsidiary in Germany. This proposition I also refused.
>
> "EIGHTEENTH INTERROGATORY: What amount of money, if any, was involved in these proposals?

"Answer: Fifty Thousand ($50,000.00) Dollars was to be paid by the Otis Elevator Company in New York, in accordance with instructions to be obtained from Mr. L. M. Rosenbaum; for which we were to receive Five Hundred Thousand (500,000) German marks, in Berlin.

"NINETEENTH INTERROGATORY: What did you tell him regarding his proposals?

"Answer: Not interested.

"TWENTIETH INTERROGATORY: Did Lt. Col. James G. Fisher answer all questions relating to his proposals which you asked?

"Answer: I did not ask Lt. Col. James G. Fisher any questions because I refused his proposition and made no proposals. However, I told him it was illegal and that it could not be done." (Pros. Ex.18)

The witness identified Prosecution Exhibit 21 as being a letter from Mr. P. L. Douglas, an executive of the company, which was delivered to him by the accused and which related to the rehabilitation of the Otis subsidiary in Berlin (R. 86; Pros. Ex. 18).

The deposition of Mr. Lewis Newman Rosenbaum, 737 Park Avenue, New York, was received in evidence as Prosecution Exhibit 16 (R. 82). In response to questions concerning his correspondence and business dealings with accused the witness stated that his firm, L. N. Rosenbaum & Son, was willing to advance $50,000 to help rehabilitate the German affilliate of the Otis Elevator Company "whereby their income tax in America would be increased", but that his correspondence with accused between 1 August 1945 and 10 May 1946 had become so "voluminous, and covered such a wide range of topics of non-business character that we did not retain these letters as a matter of record and do not have them now." Prior to the close of the case, the prosecution requested permission to strike the name of Mr. Grover Higgins from all specifications. As originally drawn, the specifications named Mr. Higgins as an agent of the Otis Elevator Company. The prosecution asserted that this was error of the draftsman. The defense objected to the motion "at this stage" of the case. The objection was overruled (R. 116). Further evidence offered by the prosecution is cumulative to that already set forth or relates to matters of which the accused was found not guilty and no comment is deemed necessary in relation thereto.

4. For the Defense

Major Louis Dups, OMGUS, Economics Division, Berlin, Germany, was called as a witness for the defense and testified that he was present on one occasion in February when Mr. Louis Scheel was a guest at the accused's billet. He stated that Mr. Scheel discussed at length matters concerning the Otis Elevator Company, asserting that the Berlin plant could get all the money it needed from "old pre-war friends." He did not recall accused making any propositions to Mr. Scheel (R. 132-134).

Without objection, there was received in evidence defense exhibits A to L inclusive, consisting of letters and radiograms from Mr. Grover

Higgins to officials of the Otis Company in New York and their replies to him. In one of these letters Mr. Higgins forwarded a report on the condition of the Berlin plant but none of these communications to the company suggest the transfer of credit or money to such plant (R. 34,36). Defense Exhibit "M" was the list of employees of the Berlin plant which was furnished Mr. Higgins and Exhibit "N" was the copy of a radiogram from accused to the Otis Company in New York dated 15 January 1947 and advising that Mr. Scheel had arrived in Berlin (R. 84).

After being duly advised of his rights the accused elected to be sworn and testified in his own behalf. He stated that Mr. Higgins came to him with a list of former employees of the Otis Elevator Company, asserting that the company had had no contact with its Berlin plant or the personnel thereof since 1941 and requested him to go to the plant and get as much information as possible. He complied with the request by going to the plant, surveying its condition and interviewing Mr. Lange and Mr. Rubien. The plant needed capital to get into production. Lange and Rubien suggested that with 500,000 reichmarks they could get raw materials and turn out items needed for the rehabilitation of Berlin. He reported this to Mr. Higgins verbally and later in writing. Higgins led him to believe that the report was being forwarded to the company through a Mr. Douglas who was supposed to be in Paris. He visited the plant again and believed that financing it was just "a further step in the request which I had originally received." Accused stated that his reports and suggestions to the company and its agents were also considered by him as being further action in compliance with the original request. His letters to the company and its agents were merely suggestions, he did not know at the beginning, whether the money could be raised. He was not an employee of the Otis Elevator Company. In August and before he met Lange and Rubien he had a conversation with Mr. Kuhn, a Berlin banker who stated that there were people in the city who were looking for investments. No definite agreement was reached by him and Mr. Kuhn. Although admitting that he wrote the letters to the Otis Company which were introduced in evidence by the prosecution, he denied that this amounted to a plan for refinancing the Berlin plant.

Defense counsel asked the accused to state whether he had ever engaged in trade or business with Mr. Lange. Over the objection by the prosecution, he was permitted to answer and replied in the negative. He also denied that he had ever engaged in business or trade with Mr. Rubien or Mr. Kuhn. He stated further that if any of his propositions had been accepted no contract or business transaction would have resulted (R. 137-155).

On cross-examination accused was asked if financing German firms was "none of our business" as had been stated by the Chief of the Trade and Commerce Branch, Economics Division, OMGUS. He replied as follows:

> "Strictly speaking yes, it might be said that he is correct, however there is room for some difference of opinion" (R. 159).

Upon being asked why he put paragraph 10 in his letter (Pros. Ex. 11) accused replied:

> "A. Well, I conceived of this transaction, if it was such a transaction, to be one which would be handled by the Otis Elevator Company personally or entirely and I did not want to suggest anything to them which would seem to be leading to an illegal transaction or one which would be criticised for its possible illegality." (R. 159).

He admitted corresponding with Mr. Rosenbaum in New York but construed such matters as "a suggestion - not a request *** there was no obligation on them to do it" (R. 162). Accused admitted that during an investigation of the case he was asked if he had ever made any suggestions to any representative or employee of the Otis Company concerning a refinancing plan for their plant and that he had replied, "I don't recall discussing it. If we did it was in connection with their request. *** I had no interest in making suggestions because that was a matter for the company concerned to work out for themselves." He explained his statements by saying that he did not consider that he had "any refinancing plan as such" (R. 164-165). In response to a question by the court accused stated that he did not believe he "by-passed" Mr. Higgins office because he was ready to discuss the proposition with the legal counsel at any time (R. 165).

5. For convenience, we consider the offenses in reverse order. The accused was found guilty of Specification 2, Charge II, so as to read:

> "Specification 2: In that Lieutenant Colonel James G. Fisher, Economics Division, Office of the Military Government for Germany (US), did, at Berlin, Germany, from on or about 1 August 1945 to on or about 1 March 1946, wrongfully, unlawfully, and without license of the President, attempt to engage in business and trade with Robert Lange, William Rubien and Otto Kuhn, with knowledge and reasonable cause to believe that said Robert Lange, William Rubien and Otto Kuhn were enemies, and allies of enemies, of the United States of America."

It is apparent that this specification was intended to denounce a violation of the Trading with the Enemy Act (Act Oct. 6, 1917, 40 Stat. 411, 50 U.S. C. App. Secs 1-31, incl., as amended by Act Dec. 18, 1941, 55 Stat. 839, 50 USC App., Supp. IV, Secs. 5, 616). It is contended by counsel that this specification does not state an offense, no specific act constituting "trading" having been alleged therein. The view we take of the foregoing act, insofar as it applies to the accused herein makes it unnecessary to discuss this question. On 25 April 1946, the Treasury Department in response to a War Department request for license for American Military Personnel under the Trading with the Enemy Act, advised the War Department as follows:

"You are advised that the Treasury Department does not require licenses for members of the United States Armed Forces, or for accredited personnel attached to or accompanying the Armed Forces, to engage in commercial activities of a purely personal nature within overseas theaters, provided that such activities within Germany, Japan and Korea are not for or on behalf of, any person situated outside those areas. We assume that all commercial activities engaged in by members of the Armed Forces and accredited personnel are regulated by directives or other instructions of the responsible theater commanders or their representatives." (SPJGW 1945/11500, 1946/785)

We attribute great weight to the interpretation placed upon the Trading with the Enemy Act by the department of the Federal Government which is most vitally concerned with the enforcement of its provisions. The portion of the specification which was stricken from the findings of guilty, viz., "acting as a representative and agent ***" therefore eliminated pleading which, under the circumstances herein, was necessary in order to denounce a violation of the act as it is construed by the United States Treasury Department.

In Drewry v. Ovassis, 39 N.Y. Supp. (2) 688; 179 Misc. 578, the court in construing the Trading with the Enemy Act, said at page 694:

"*** the purpose of the act must be kept in sight. It has a rationale. The Act is designed to prohibit and prevent the lending of aid and comfort to the enemy by frustrating the enemy's attempt to garner sinews of war *** whatever hampers our war effort is the target."

On the outbreak of the war with Germany in 1939 a very comprehensive definition of trading with the enemy was laid down in the British Trading with the Enemy Act, 1939 (2 & 3 Geo. VI, c. 89 ss. 1, 4, and 6). It is stated in section 15 that "enemy territory means any area which is under the sovereignty of, or in the occupation of, a power with whom His Majesty is at war. Such territory, however, does not include an area occupied by Great Britain or by a power allied with her." (See Oppenheim's International Law, Vol. II, pp. 255,256.) It appears therefore that the British act, which is similar to ours in many respects, recognized that the status of "enemy" as used in the act did not continue to fasten upon the inhabitants of territory occupied and controlled by the allied armed forces. The powers exercised by the old sovereign are suspended during the occupation and, to a certain extent, are exercised for the time being by the commander of the occupying forces. These forces, including the individual members thereof, must ordinarily have certain trade relations with the inhabitants of the occupied territory, this being accepted as a more civilized and just form of the ancient but now generally abandoned custom

of "living off the land." There are many transactions of a private nature with the inhabitants which would appear to have little or no bearing upon the "enemies'" power to wage war, and the determination of what particular conduct of the occupying personnel might tend to hamper the effectiveness of the occupation would seem to be a matter within the peculiar province of the commander of the occupying forces or his representative. His on the spot judgments of what measures are necessary and proper to be taken to best effectuate the purposes of the occupation are considered, both by international and municipal law, to constitute part of the law of the occupied territory and within applicable limitations of superior law his ordinances and decrees as to the government of the occupied territory are a sufficient regulation of the relations between the inhabitants and the occupants. We see nothing in the Trading with the Enemy Act purporting to limit this power of the commander to control the actions of persons subject to his command who may properly be considered members of the occupying forces. (But see par. 328, FM 27-10, forbidding the use of official position for commercial transactions for private gain in "hostile" country.) It is our opinion that the Trading with the Enemy Act is not applicable to the facts and circumstances of this case and that the findings of guilty of Specification 2, Charge II, should be disapproved. It is therefore unnecessary to consider other issues raised by the defense, including the question of whether the act was in full force and effect at the time of the alleged offense, and also whether the evidence established that accused did not have a license from the President.

Specification 1 of Charge II alleges that the accused, during the times mentioned, used his official position to "attempt to trade *** by conferring, exchanging correspondence and submitting plans *** which was not directly connected with his military duties and would tend to interfere and hamper the proper discharge of his military duties." The evidence shows that, acting upon a request of counsel for the Military Government to locate and interview certain persons formerly connected with the Otis subsidiary, he went into the French zone, examined the partially bombed plant, conferred with a German banker relative to a loan and made arrangements through a banker in New York to accept from the parent company money to secure the German loan. He wrote letters both to the parent company and to a banker in New York urging the loan as a profitable business venture. All of these transactions were carried on outside of official channels of communication, indicating that his activities were not in line of duty. He made a proposition to Mr. Scheel to procure the loan without assistance from interests in New York in consideration for an interest in the plant. We construe such acts and conduct as attempting to engage in "activity" within the meaning of AR 600-10 which was incompatible with his status as an Army officer. The defense contended that if Mr. Higgins, as legal counsel for the Berlin office, Military Government, did in fact construe accused's proposal as being "improper" he should have said so and that by his silence he misled the accused. This argument is untenable. A field officer of mature years could not reasonably expect a civilian, even though he were a lawyer, to advise him against violation of an Army Regulation presumed to be within the knowledge of all officers

of the Army. Nor did Mr. Higgins' conduct effect an entrapment (CM 215630, Romero, 11 BR 1). The financing of the plant was not conceived by Mr. Higgins nor did he make any suggestion or do any act to encourage accused. Mr. Higgins was entirely passive about the matter except to advise officials of the company to refrain from entering into any suggested plan to invest money in the German plant. The court was justified, from the evidence, in striking Mr. Higgins name from the specifications alleging that he was an agent of the company.

The conduct of accused in attempting to finance the plant is shown not to have been in any manner connected with his military duties, and the testimony of Mr. Scheel shows that accused was attempting to use his office in the Military Government to procure an interest in the plant. Although paragraph 2e, AR 600-10, does not set out every type of "activity" which is incompatible with the status of an Army officer, any reasonable construction of this regulation would indicate that accused's attempt to procure the loan and an interest in the plant was such "activity" as would tend to interfere and hamper the proper discharge of his military duties. Had the deal been consummated, the fidelity required of accused to the military establishment would have been seriously compromised. The violation of an Army regulation has long been recognized as an offense under Article of War 96 (CM 293926, Haug, 20 BR ETO 329,336). An attempt to commit an offense is likewise chargeable under this article (par. 152c, p. 190, MCM, 1928; CM 298450, Ward, 22 BR (ETO) 297,305).

In addition to the provision of Army Regulations referred to above, the Commanding General, European Theater of Operations, had on 4 April 1945 issued letter AG 004 OPGA prohibiting military personnel from using their presence "here" to obtain or lay plans to obtain any commercial advantage for themselves or others. The term "engaging in business" was defined to include,

> "b. Acting as agent, intermediary or conduit in any business transaction for gain in this theater for any person, firm, or corporation, wherever located or planned to be located," and
>
> "c. Using the Army Postal System or other Army communications system for sending or receiving communications relating to any unauthorized business transacted, or to be transacted, in this theater." (See Pros. Ex. 22.)

There can be no doubt upon the evidence in this case that accused did act as intermediary in a private business deal, that he acted as a conduit in using the USA postal system to communicate with persons in furtherance of such unauthorized transaction and that he made definite proposals which, if carried out, would have given him an interest in the Berlin subsidiary of the Otis Elevator Company. We conclude that such conduct violated both the Army Regulation quoted and the directive of the Commanding General, Headquarters European Theater of Operations. The accused is chargeable with knowledge of the provisions of both AR 600-10 and the directive of the Commanding General, Headquarters European Theater of Operations, referred to herein (CM 256497, Jaycox, 36 BR 269; CM 307097, Mellinger).

It is contended by counsel that in order to constitute an attempt, something beyond mere planning and preparation is necessary. We believe this to be a sound statement of the law unless the word "preparation" is intended to include overt acts committed in furtherance of the intended act. As defined in the court-martial manual, "an attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission" (MCM, 1928, par. 152c, p. 190 (Clark); underscoring supplied).

The independent circumstances here which prevented accused from "engaging in business" to the extent of procuring a loan for and an interest in the Otis subsidiary were (1) the warning given by Mr. Higgins to the company and (2) the refusal of Scheel to accept the proposition because he considered it to be illegal. The acts constituting the attempt were the forwarding of the letters (outside of channels), the procuring of New York and Berlin bankers for consummation of the deal and the numerous consultations and proposals leading to financing of the plant. The only remaining acts required for consummation of the deal were the depositing of the money with the suggested persons and the forwarding of the receipt as suggested by accused.

6. War Department records disclose that the accused is 49 years of age and married. He attended New York Law School for two years and studied corporation law for two years in connection with the Chicago stock exchange. From 1923 to 1932 he was chief statistician and analyist of a Chicago business firm and from 1932 to 1942 he was manager, L. N. Rosenbaum and Company, a New York financial syndicate. Accused entered upon active duty as a captain, AC, AUS, on 14 April 1942, was promoted to major on 9 June 1943, and to lieutenant colonel on 14 June 1944. Two available efficiency reports rate accused's manner of performance of his military duties as excellent and on one report he is rated as superior.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge II and Specification 1 thereof, but legally insufficient to support the findings of guilty of Specification 2 of Charge II; legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Christy D. Silva, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert E. Hayes, Judge Advocate

MAY 7 1947

JAGK - CM 318858 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel James G. Fisher (0-901837), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully attempting to trade and participate in business dealings with the Otis Elevator Company, a New York corporation, and its agents, some of whom were shown to be enemy nationals, and with L. N. Rosenbaum, a resident of New York, by conferring, exchanging correspondence, and submitting plans for the reorganization and refinancing of the company's interests in Berlin, Germany, which activity was not directly connected with his military duties and would tend to interfere and hamper the proper discharge of his military duties (Spec. 1, Chg. II); and of wrongfully and unlawfully and without license of the President attempting to engage in business with certain named German nationals knowing or having reasonable cause to believe that such persons were enemies of the United States (Spec. 2, Chg. II), both in violation of Article of War 96. He was sentenced to be dismissed the service, to be confined at hard labor, at such place as the reviewing authority might direct for one year, to forfeit all pay and allowances due or to become due and to pay to the United States a fine of two thousand dollars ($2,000), and to be further confined at hard labor until said fine is so paid, but not for more than six months in addition to the one year hereinbefore adjudged. The reviewing authority approved the sentence and forwarded the record 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 finding of guilty of Charge II and Specification 1 thereunder but legally insufficient to support the finding of guilty of Specification 2, Charge II. I also concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the sentence and to warrant confirmation of the sentence.

The evidence shows that during the period 1 August 1945 to 1 March 1946 the accused was assigned to the Trade and Commerce Branch, Economics Division, Office of the Military Government for Germany. In the French zone of Berlin there was a partially bombed plant which, prior to hostilities, was owned and operated by the Otis Elevator Company of New York. In September 1945 the legal counsel for the Trade and Commerce Branch, Mr. Grover

Higgins, gave accused a list of former employees of the Otis subsidiary in Berlin and requested that he interview such persons with a view of employing them in the Military Government. The accused went to the plant, made a survey of its condition, interviewed German employees and filed a report with the legal counsel suggesting that money be borrowed to finance the plant. Mr. Higgins filed the report away, and advised friends of his who were connected with the company to refrain from attempting to finance the plant. He did this because he suspected accused's motives. The accused then proceeded to write numerous letters to officials of the Otis Company in New York instructing them that $50,000 could be deposited with one L. N. Rosenbaum, 565 Fifth Avenue, New York, and that he had arranged with a Berlin banker to advance 500,000 reichmarks to the Berlin subsidiary upon evidence of such deposit. Accused procured a German banker to agree to advance the reichmarks and made arrangements with Mr. Rosenbaum to accept the money in New York. The Otis Elevator Company sent a representative to Berlin and accused explained the proposition to him. When the representative refused to accept the proposition as outlined, accused proposed that for an interest in the company he would procure the loan locally without the deposit in New York. This plan was also rejected as being illegal. None of the transactions were carried on through official channels and the evidence shows that such activities on accused's part amounted to an attempt to engage in business incompatible with his duties as an officer, and contrary to Army regulations and theater directives.

4. War Department records disclose that the accused is 49 years of age and married. He attended New York Law School for two years and studied corporation law for two years in connection with the Chicago stock exchange. From 1923 to 1932 he was chief statistician and analyist of a Chicago business firm and from 1932 to 1942 he was manager, L. N. Rosenbaum and Company, a New York financial syndicate. Accused entered upon active duty as a captain, AC-AUS, on 14 April 1942, was promoted to major on 9 June 1943 and lieutenant colonel on 14 June 1944. Two available efficiency reports rate accused's manner of performance of his military duties as excellent and on one report he is rated as superior.

5. Three members of the court-martial which tried this case, including the president, recommended to the reviewing authority that clemency be extended. I recommend that the finding of guilty of Specification 2, Charge II, be disapproved, and in view of the fact that the illegal transaction was not in fact consummated, and considering accused's age and prior acceptable record, I recommend that the sentence be confirmed but that the forfeitures be mitigated to forfeiture of $500 of accused's pay, that the confinement and fine be remitted, and that as thus modified the sentence be ordered executed but that the execution of that portion thereof adjudging dismissal be suspended during good behavior.

6. Consideration has been given to letters from Mr. Edward P. Felker, Executive Secretary, Advisory Board, Office of War Mobilization and Recon-

version, Washington, D.C.; Mr. L. J. Cullen, former chicago business executive; and Mr. J. DeForest Richards, President of the Boulevard Bank of Chicago, Illinois, addressed to the Secretary of War, all of which attest to the prior good record and character of accused. On 17 February 1946, Mr. Laurens G. Hastings, Attorney, 120 La Salle Street, Chicago, Illinois, appeared before Board of Review No. 2, made oral arguments in behalf of accused, and filed a brief.

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

CM 318858

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Form of action
3. Ltr fr Mr. L.G. Hastings to SW, 20 Feb 47, w/3 incls
4. Brief filed by Mr. Hastings, counsel for accused

(G.C.M.O. 177, 20 May 1947)

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

JAGH - CM 318873

10 APR 1947

UNITED STATES v. Privates ABRA L. ALLIE (RA 13237484) and RALPH COLEMAN (RA 14211994), both of 3295th Quartermaster Service Company, APO 59	KOREA BASE COMMAND Trial by G.C.M., convened at Headquarters Korea Base Command, APO 901, 31 October 1946. Allie: Confinement for three (3) months and forfeiture of $60 for one (1) month. Coleman: Confinement for three (3) months and forfeiture of $42 for one (1) month. Pung Song Stockade, APO 59

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

1. The record of trial in the case of the above-named soldiers has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the findings and sentence as to accused Coleman, and legally sufficient to support the findings, but legally insufficient to support the sentence in part, as to accused Allie. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused Allie was tried upon the following Charge and Specifications:

CHARGE: Violation of the 86th Article of War.

Specification: In that Pvt Abra L. Allie, RA 13237484, 3295th Quartermaster Service Company, APO 59, being on guard and post as a sentinel, at Post #25, QM Depot, Inch'on, Korea, on or about 2215 hours, 3 October 1946, was found sleeping upon his post.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for three months and to forfeit two-thirds of his base pay for a like period. The reviewing authority approved only so much of the sentence as provides for confinement at hard labor for three months and forfeiture of $60 per month for one month. As thus modified the sentence was ordered executed. The Pung Song Stockade, APO 59, was designated as the place of confinement. The result of trial was published in General Court-Martial Orders No. 14, Headquarters Korea Base Command, 14 December 1946.

3. The record of trial is legally sufficient to sustain the findings of guilty, and that portion of the sentence as modified by the reviewing authority which provides for confinement at hard labor for three months. The only question presented for consideration is whether the approved forfeiture of pay in the amount of $60 for one month is legal.

4. It is provided by paragraph 104b, Manual for Courts-Martial, 1928, that "a court shall not by a single sentence which does not include dishonorable discharge adjudge against an accused a forfeiture of pay at a rate greater than two-thirds of his pay per month * * *." Paragraph 87b, Manual for Courts-Martial, page 76, provides that "the punishment imposed by the sentence as mitigated or remitted must be included in the sentence as imposed by the court and should be one that the court might have imposed in the case."

5. The charge sheet shows that accused enlisted 29 April 1946, that he had no prior service or any Class F deduction, and that his base pay is $90 per month. However, this amount includes $15.00 for foreign service pay, which pay does not accrue in any period during which accused is confined pursuant to a sentence which has been lawfully ordered executed (Sec 402 (8), Bull JAG, Jan 1945, p 7). Therefore, during confinement accused will be paid only $75 per month, and $50 is the maximum forfeiture per month which the court or the reviewing authority could legally impose.

6. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months, and forfeiture of $50 for one month.

A. J. Fortenstein, Judge Advocate

William A. Gill, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 318873 1st Ind

WD, JAGO, Washington 25, D. C. APR 28 1947

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 Abra L. Allie (RA 13237484), 3295th Quartermaster Service Company, APO 59.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence, as modified by the reviewing authority, as provides for confinement at hard labor for three months, and forfeiture of $50 for one month. I concur in the opinion of the Board, and for the reasons stated in the opinion, recommend that so much of the sentence, as modified by the reviewing authority, as is in excess of confinement at hard labor for three months and forfeiture of $50 pay be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of that portion of the sentence vacated be restored.

3. Inclosed is a form of action designed to carry into effect the above recommendation, 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. 155, 2 May 1947).

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

JAGN-CM 318922

U N I T E D S T A T E S	)	86TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Marikina, Rizal Province, P.I., 21 November 1946. Dishonorable discharge and confinement for two (2) years and eight (8) months. Disciplinary Barracks.
Private LONNIE A. PRESSON (38735066), Company A, 311th Engineer Combat Battalion.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

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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 96th Article of War.

Specification 1: In that Private Lonnie A. Presson, Co. A, 311th Engineer Combat Battalion, a prisoner in the 86th Infantry Division Stockade, APO 450, did, at Marikina, Rizal, PI, on or about 1530 hours 25 September 1946, threaten to strike Private Miguel L. Espinoza, 86th Military Police Platoon, a sentinel in the execution of his office, with an iron bar.

Specification 2: (Finding of Not Guilty).

Specification 3: In that Private Lonnie A. Presson, Co. A, 311th Engineer Combat Battalion, a prisoner in the 86th Infantry Division Stockade, APO 450, did, at Marikina, Rizal, PI, on or about 8 October 1946, attempt to strike Private Kenneth S. Grimes, a sentinel in the execution of his duty, in the face with his fist.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Private Lonnie A. Presson, Co. A, 311th Engineer Combat Battalion, a prisoner in the 86th Infantry Division Stockade, APO 450, did at Marikina, Rizal, PI, on or about 1530 hours, 25 September 1946, assault Corporal Lawrence R. Sudlow, a noncommissioned officer who was then in the execution of his office, by striking him on the chest with his fist.

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

Specification: In that Private Lonnie A. Presson, Co. A, 311th Engineer Combat Battalion, a prisoner in the 86th Infantry Division Stockade, APO 450, having been duly placed in confinement in the 86th Division Stockade, on or about 2 August 1946, did, at Marikina, Rizal, PI, on or about 11 October 1946, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to and was found not guilty of Specification 2, Charge I, guilty of Charge I and Specification 1 thereunder, except the words "with an iron bar," substituting therefor the words, "with a shelter tent pole," of the excepted words, not guilty, of the substituted words, guilty, and guilty of all other Specifications and Charges. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years and eight months. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp McQuaide, California, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½

3. It is the holding of the Board of Review that the record of trial is legally sufficient to support the finding of guilty as to Charge II and its Specification; and Charge III and its Specification. It is therefore deemed necessary that only the evidence relative to Charge I and Specifications 1 and 3 thereunder need be considered in this holding.

With respect to Specification 1, Charge I, the record of trial shows that the accused and Private Brewington were in solitary confinement, guarded by Private First Class Miguel Espinoza; that accused picked up a shelter tent pole; held it at his side, and came out of solitary confinement to eat (R. 10). Accused held the pole as a walking cane, did not have a threatening manner toward Espinoza, did not threaten to strike him, and did not act like he was going to strike him (R. 11).

As to Specification 3, Charge I, the record of trial shows that Private Kenneth C. Grimes had been in charge of a group of prisoners, including accused; had just signed the prisoners over, and had been relieved, although he was still wearing his brassard (R. 12-13). Just after turning his detail over the accused approached him, and after an exchange of remarks, accused swung at him, but missed (R. 13). The two were about three paces apart at the time of the incident (R. 13).

4. The accused, after having been advised of his rights as a witness, elected to remain silent. No evidence was offered by the defense.

5. The accused was found guilty of threatening to strike Private First Class Miguel Espinoza, a sentinel in the execution of his duty, with a shelter tent pole. A reading of the record of the testimony of Espinoza clearly negatives the commission of the alleged offense. There is no evidence in the record of trial whatever from which the court could draw a reasonable inference that such an offense as charged was committed by the accused. The finding therefore, cannot be sustained (CM 212505, Tipton, 10 BR 237, 245).

The record of trial established that after being relieved of his duty as sentinel Private Kenneth C. Grimes was approached by the accused, and after an exchange of words, accused struck at Grimes. The evidence clearly shows that at the time of the alleged offense Grimes had been relieved from duty as a sentinel and no longer retained that status (CM 195778, LaVal, 2 BR 301). However, the record does clearly show that the accused did assault Grimes and is sufficient to support a finding of the lesser offense of assault, the maximum sentence for which is three months confinement at hard labor and forfeiture of two-thirds pay per month for three months. Par. 104c, MCM, 1928.

6. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 1 of Charge I, legally sufficient to support the findings of only so much of Specification 3 of Charge I as finds accused guilty of an assault at the time and place and upon the person alleged, legally sufficient to support the findings of guilty of all other Charges and Specifications, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of two years and three months.

Edward T. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

Francis J. Parker, Judge Advocate.

318927

JAGN CM 318927 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Adjutant General, Washington 25, D. C.

1. In the case of Private Lonnie A. Presson (38735066), Company A, 311th Engineer Combat Battalion, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that the finding of guilty of Specification 1 of Charge I be disapproved, that only so much of the finding of guilty of Specification 3 of Charge I be approved as finds accused guilty of an assault in the manner, at the time and place and upon the person alleged, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years and three months. Upon taking such action execution of the sentence will be authorized.

2. This office has been advised that the 86th Infantry Division has been inactivated, in view of which it is recommended that a War Department General Court-Martial Order be published. A draft of such General Court-Martial Order is inclosed.

3. The return to this office of the holding together with copies of the published War Department General Court-Martial Order is requested.

2 Incls
Record of trial
Draft of GCMO

THOMAS H. GREEN
Major General
The Judge Advocate General

G.C.M.O. 154, 2 May 1947).

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

MAY 19 1947

JAGQ - CM 318935

UNITED STATES	)	SAN FRANCISCO PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Fort Mason, California, 16 December 1946. Dismissal and total forfeitures.
Lieutenant Colonel RUSS T. WHITE (0-422515), Transportation Corps.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Lieutenant Colonel Russ T. White, Transportation Corps, did, at Camp Stoneman, California, on or about 7 May 1946, wrongfully convert to his own use and benefit one Sherman Clay and Company console combination radio-phonograph, well knowing that said radio-phonograph was a possession of and under the control of the United States for its use in the military service.

Specification 2: (Finding of Not Guilty).

Specification 3: In that Lieutenant Colonel Russ T. White, Transportation Corps, did, at Pittsburg, California, on or about 29 June 1946, wrongfully and unlawfully sell and deliver to Major Lyle M. Markhart, IGD, one Sherman Clay and Company console combination radio-phonograph of the value of about one hundred seventy dollars ($170.00), well knowing that said radio-phonograph was possessed by and under the control of the United States for its use in the military service.

Accused pleaded not guilty to all specifications and the Charge. He was found guilty of the Charge and Specifications 1 and 3 thereof and not guilty of Specification 2 of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Building K-314 at Camp Stoneman, California, had been used for sometime prior to April 1946 as a dormitory for civilian telephone operators (R. 10). Except for a few Government-issue items such as blankets, comforters, and linen, the furnishings of this building were of a commercial or civilian type (R. 38) and included a combination radio-phonograph supplied by the Government for which Captain Dennis Hall, Post Signal Officer, was the accountable officer (R. 10). Captain Hall had been in the Army 13 years as an enlisted man, three years as an officer, and was thoroughly experienced regarding responsibility and accountability for Government property (R. 22-23).

Accused who was the Executive Officer at Camp Stoneman (R, 39) and Captain Hall were quite friendly, often having coffee together in the mornings (R. 39). During the period between 19 April and 20 May 1946, Captain Hall visited Building K-314 several times with accused for the purpose of determining whether the building was adequate as quarters for transient officers (R. 11). During one of these visits, accused remarked that he would like to "have" (R. 12, 19), "own" (R. 38), or "borrow" (R. 39, 65) the combination radio-phonograph. Hall replied that there was no reason why he couldn't have it because he "was going to turn it in" (R. 12, 112) as he had been advised that someone would take over the property in this building (R. 114).

At some subsequent date not later than 29 May 1946 between 1000 and 1200 (R. 20), accused and Captain Hall carried this combination set from Building K-314, placed it in the back of accused's car, and drove to accused's home (R. 14, 46), in Pittsburg, California (R. 83). When they were ready to return to the post, accused said, "Let's take this one back so I can get it out of the way" (R. 14). Captain Hall thereupon picked up an "old cabinet radio" (subsequently identified, and hereinafter referred to, as a Lyric radio) (R. 14) which was in the garage connected with accused's home (R. 14, 107). This Lyric radio was placed in accused's car which he drove back to camp, stopping in front of Building K-314 (R. 14, 112). Captain Hall carried this Lyric radio

into Building K-314 and placed it in the same room from which the combination model had been removed (R. 108).

Hall made no statement to accused as to whether the transaction was a loan or a trade, but Hall "took it for granted it was a loan" (R. 32, 109), although no mention was made by either accused or Captain Hall about a memorandum receipt (R. 12, 22, 109), Hall explaining that he often issued Signal Corps property such as telephones without receipts (R. 23).

A Receiving Report was introduced in evidence (R. 65) showing that Captain Hall receipted for a "Radio, Combination, including records, Fada or equal" on 20 July 1943, cost price $187.75 (Ex. A). Captain Hall stated that the combination set mentioned in this Receiving Report was placed in Building K-314; that he could not recall its exact trade name; that it was similar to the combination set introduced in evidence (Ex. B); that he had only one combination set on his records (R. 64-65), and the trade name thereof was not shown thereon (R. 64). Captain Hall stated that he did not know of his "personal knowledge" that the combination set was Government property (R. 32), but he thought it was (R. 42), and he carried it as such on his property records (R. 108).

Towards the end of May, Captain Hall received orders to attend school at Carlisle Barracks, Pennsylvania. He immediately telephoned accused who directed that he call Fort Mason about a relief. Lieutenant Newman and Lieutenant Villarreal arrived and Hall transferred his property to them (R. 15). Prior to leaving Camp Stoneman, Captain Hall asked accused about the radio and he replied that "he would take care of it" (R. 16, 66).

According to Captain Hall, the relieving officers did not "get around" to checking the room in Building K-314 where the combination set should have been, he did not tell them this set was at accused's home, and did not have any conversation with them concerning it (R. 29, 65).

About 29 June 1946, accused told Captain James E. Reynolds, IGD, Camp Stoneman, that the home he then occupied was going to be for rent and it was desired that the party who rented his home purchase approximately $350 worth of his furniture. This was more than Captain Reynolds desired to pay so he passed the information on to Major Lyle M. Markhart who was also a member of the Inspector General's Division, Camp Stoneman (R. 50-51, 58). Major Markhart and Captain Reynolds went to accused's home and before making a decision, inquired whether the price included the combination radio-phonograph which was in the room (R. 51). Accused responded that this radio would be $75 additional (R. 51, 58-59). Major Markhart finally agreed

to buy the furniture and the radio for $425 (R. 52, 58) and gave accused a check for $300 as a down payment (R. 52). Accused excepted a table and a lamp from the sale, explaining that the former belonged to the officers' mess and the latter, to some other club on the post (R. 52). Both Major Markhart and Captain Reynolds identified "Exhibit B" as the combination set involved (R. 53, 59).

Captain Robert Villarreal and Lieutenant Henry E. Newman identified "Exhibit C" as the Lyric radio set which they found in the lounge, Building K-314, when they took over Captain Hall's property (R. 71, 77), and Captain Hall testified that "Exhibits B" and "C" "looked like" the combination set and the Lyric radio mentioned in his testimony (R. 13, 14, 36-37). The accused also identified Exhibit B as the combination set involved (R. 82-83).

Two men who were familiar with radio values testified that in May-June 1946, the combination set (Ex. B) had a value of about $125-175 and the Lyric radio (Ex. C) had a value of about $10. The value of the combination set would vary somewhat according to its condition but even if neither the radio nor the turntable were working, it would be worth more than $50 (R. 48-49, 60, 62). On cross-examination, one expert testified that he based his valuation on market conditions in San Francisco and was not familiar with conditions at Pittsburg, California (R. 63).

4. Evidence for the Defense.

Accused was advised in open court of his rights, elected to be sworn as a witness, and testified as follows:

From April to June he was Executive officer at Camp Stoneman (R. 80). He always liked to tinker with things (R. 83) and about March, he bought a portable phonograph which would not work, so he asked Captain Hall to fix it, which he did. He told Hall that he was searching for a cabinet in which he could install this phonograph and a Halikrafter S-29 radio which he owned (R. 80). About that time the camp commander decided to convert Building K-314 to a BOQ for field grade officers (R. 81). The station complement was to assume responsibility for the property in this building which was previously charged to Captain Hall (R. 82). No mention was made of the radio combination or radio cabinet during the inspections of this building but during the course of a conversation with Hall, "mention was made that he had the radio and I could have it if I wanted it". They both then entered Building K-314 and accused saw the combination set for the first time (R. 82). In company with Hall, they removed the combination set from Building K-314, placed it in his car, "drove out of camp to my house and put the radio in my house" (R. 82-83). This was done in the morning,

the top of accused's car was down, and no attempt was made to conceal the radio (R. 83).

While en route to his home, accused explained, "I suddenly recall asking how much that radio was going to cost me. I wasn't interested in the radio and phonograph part, all I wanted was the cabinet part. Captain Hall said, 'Have you got a radio? Well how about the one you have?' I said, 'Mine works — yours don't. All I need is a cabinet. I'll trade you.'" (R. 83).

Upon arriving at the house, the trade was consummated (R. 84). In a subsequent description of this incident, accused explained that Hall knew from previous talks that accused had an upright cabinet and without having seen same, Hall said, "I'll take that and you can have this cabinet" (R. 96).

There were no Government markings on this radio (R. 83); Captain Hall never mentioned that it was Government property (R. 87); did not ask for a receipt (R. 83), and gave accused no reason to believe it was Government property (R. 83). He assumed the transaction was a trade and "strictly personal between Captain Hall and myself" (R. 84).

On cross-examination, accused stated it is not good procedure to intermingle Government and personal property and generally speaking, he would check property in a Government building to ascertain for certain whether it was Government property. He further stated, however, that if an officer offered to sell him a chair in a Government building <u>and said it was his chair</u>, he would not doubt the officer (R. 93-94). He did not recall what Captain Hall said about the radio being his personal property but he "gave me a good impression it was his property, otherwise I would not be willing to make the trade. *** I formed my conclusion knowing Captain Hall's habits of having a number of items here, in his office, and the film library" (R. 95). Accused stated that in addition, while inspecting this building, Hall had pointed out various items which were his personal property (R. 87).

Accused did not think it "peculiar" that Captain Hall would trade a combination set for an old radio (R. 92-93). He explained that the radio in the combination set would not work, the phonograph had a bent rod, and the exterior of the cabinet required a complete refinishing (R. 84). Altogether, he spent five or ten hours of his own time and at least $37 of his money on this combination set (R. 85-86). (It was stipulated that accused had spent at least $18.98 for repair work on this combination set (R. 63).) The Lyric radio, on the other hand, was in good, working condition (R. 84) and he therefore thought that he was giving Captain Hall a "square deal" but "naturally, I thought I was

getting the best of the deal because I was especially interested in the cabinet" (R. 94).

Captain Hall never mentioned the radio again to accused (R. 87) but on 12 November 1946, accused phoned Hall "to satisfy a curiosity I had" about charges against Hall. During an ensuing meeting, Hall asked accused why he had sold the combination set and he answered "because I considered it mine on the trade" (R. 90).

Captain Robert Villarreal, Signal Corps, testified that he took over part of Captain Hall's accountable property but not the radio-phonograph. However, he was present with Lieutenant Newman when an inspection was made of Building K-314; that the Lyric radio was in the lounge of the building; that when Lieutenant Newman asked Captain Hall about the "combination" shown on the list, the latter stated that the turntable portion was in the signal office in Building K-312; that witness stepped across the street and brought the turntable to Building K-314 and that Captain Hall stated that the Lyric radio and the turntable constituted the combination radio-phonograph with which he was charged (R. 70-72),

Lieutenant Henry E. Newman testified that he assumed responsibility for the "non-standard Signal Corps property" charged to Hall; that he checked the property in Building K-314 with Captain Hall and Captain Villarreal (R. 96). When they came to the radio-phonograph combination on the list, Captain Hall pointed to the Lyric radio and said "There it is — the record playing attachment is over in the Signal Office" (R. 72, 78). Lieutenant Newman signed for Hall's property including the combination set, that other articles (vacuum cleaner, electric toaster and some smaller articles) were later found missing and Captain Hall made adjustment by paying for them (R. 78).

Colonel Louis R. Rapp, Commanding Officer, Colonel David H. Allen, Commanding Officer of the Overseas Replacement Depot, and Captain Joseph L. Judson, SJA, all of Camp Stoneman, testified that accused had a good reputation for truth, honesty, and veracity (R. 96, 100, 101). Colonel Rapp stated that accused performed his duties in an efficient and capable manner, was given a superior rating, and was awarded the Army Commendation Ribbon for his handling of men returning from overseas during the Christmas 1945 season (R. 99-100).

In rebuttal, Captain Hall testified that he did not know whether the combination set was working when it was removed from Building K-314 (R. 21, 64), that it had been repaired at a Government repair shop sometime prior to 19 April (R. 32, 42) and that the cabinet was not scratched or damaged (R. 21).

He testified that quite sometime before this incident, accused told him that he was looking for a cabinet in which he could install a radio of his own (R. 19, 105). He did not remember, however, having told accused that he had found a cabinet for him (R. 105). He denied having told accused that the combination set belonged to him or having made any statement that might be so interpreted (R. 104-105). He denied having any personal property in Building K-314 but did have personal property in the signal office (R. 102). He denied any conversation regarding a trade and had never seen the Lyric radio until after the combination set was delivered to accused's home (R. 104).

On 12 November 1946, when he met accused pursuant to the latter's phone call Hall asked why accused had sold this radio and accused answered, "Well, you was gone, the property was transferred, I was leaving, and I just sold it" (R. 37, 38, 40). The Lyric radio did not have any attachments (R. 105) but there was a "reproducing arm, turntable, and record changer" in the signal office. This was later seen by Captain Hall near the Lyric radio in Building K-314, but he did not know who brought it to that building. The Lyric radio and the turntable were not supposed to be the combination set on his property records; he did not intend the Lyric radio as a substitute for the combination set (R. 108) and did not "pawn (it) off on Lt. Villarreal and Lt. Newman as the combination set" (R. 106-107).

5. a. The prosecution's evidence clearly established and accused admitted that sometime between 19 April and 20 May 1946, accused removed a combination radio-phonograph from Building K-314, Camp Stoneman; took it to his home off the post; and on 29 June 1946, sold it for $75.00. The only questions involved are:

(a) Was the property "a possession of and under the control of the United States for its use in the military service", and

(b) Did accused know, or have reason to believe that it was property of that type?

b. "Exhibit B" was identified as, and admitted to be, the radio-phonograph combination involved in this case (R. 53, 59, 82). This set was a Sherman-Clay console (R. 13) but Captain Hall's property records did not show the trade name of the combination set with which he was charged (R. 64). Exhibit A reflected that in July 1943, Hall received a combination set described as "Fada or equal", purchased with appropriated funds. His testimony was that the set mentioned in this receiving report was placed in Building K-314; that he did not recall the name of the set but it was like Exhibit B and he had only one combination set on his

records (R. 13, 64-65). He first stated that he did not know of his "personal knowledge" that this set was Government property (R. 32) but he thought it was (R. 42), and he carried it as such on his property records (R. 108). From this accumulation of evidence, the court was justified in finding that the combination set was a possession of and under the control of the United States for its use in the military service as alleged.

c. Whether accused knew that the property was of that type is a question of inference. According to the testimony of Captain Hall and accused, neither had very much to say at the time the set was removed from Building K-314. Captain Hall testified that he made no statement to accused as to whether it was a loan or trade but that he considered it a loan (R. 32, 109). Accused considered it a strictly personal trade between Hall and himself (R. 84). There were no Government markings on the set and Hall gave him no reason to believe it was Government property (R. 84). On the other hand, accused had years of experience with Government property (R. 79-80) and he stated that he would generally check property in a Government building to ascertain whether it was Government or private property, however, if an officer told him that some particular thing was his personal property, he would not doubt the officer (R. 93). He then indicated that Hall did not make any direct statement that the combination set was his personal property - he only gave accused such an "impression", based on Hall's habit of having a number of personal items in his signal office (R. 95) and his identifying various items as his personal property in Building K-314, which Captain Hall denied.

Expert testimony indicated that the combination set was worth $125 to $175 whereas the Lyric set was worth only $10. Accused testified that Captain Hall accepted the trade before he had seen the Lyric set. In spite of accused's feeling that it was a "square deal" (R. 94), the difference in values of the two sets was such as to raise a doubt in the mind of a reasonable man that one would dispose of his personal property on that basis.

Factors favorable to accused are that Captain Hall had a habit of keeping personal property on the post, that Hall picked out certain personal items in Building K-314 (according to accused but denied by Hall), that the set was removed from Building K-314 in broad daylight, and that Captain Hall's veracity was attacked by contradictory testimony of the two officers who took over Captain Hall's property.

Factors against accused are his years of experience in the Army, his own admission that he would generally check property in Government buildings, his admission that Hall only gave him the impression that it

was personal property, his failure to make any inquiry as to cost until he was taking the set to his home, the extreme difference in values between the two sets and his failure to include the combination set as part of his personal furniture when he first offered said furniture for sale.

There is an irreconcilable dispute in the prosecution and defense evidence as to accused's knowledge that the property in question belonged to the United States. However, the court within its province saw fit to reject the explanation given by the accused and found him guilty as charged. The evidence as a whole leads us to the conclusion that the court was justified in its decision and the findings are amply supported by the evidence.

The court found the accused guilty of two specifications charging conversion and sale of this combination radio-phonograph. No value is alleged in the specification charging conversion but there was competent evidence that it was worth more than $50.00. The value is not of primary importance inasmuch as the Table of Maximum Punishments does not apply to officers.

d. Captain Joseph L. Judson was called as a character witness for the accused. The record of trial (p. 101) omits any reference to the swearing of this witness but the omission of the oath did not injuriously affect the rights of the accused.

6. The accused in this case is 35 years old, married, and has one child eight years old. He graduated from High School in 1935. He served from 1930 to 1933 in the 147th Infantry (National Guard). In October 1939, he joined the 117th Field Artillery (Alabama National Guard), serving as Regimental Supply Sergeant and Regimental Sergeant Major. This unit was inducted into Federal service on 25 November 1940. On 9 June 1941, accused was commissioned as a second lieutenant. He was promoted to Lieutenant Colonel on 15 April 1945 and has always received efficiency ratings of Excellent and Superior. He served overseas for 18 months in New Guinea and the Philippine Islands. He was awarded the Bronze Star Medal and is authorized to wear the Army Commendation Ribbon, two battle stars, and the Philippine Liberation Ribbon and star. He is a graduate of the Adjutant General's School and Command and General Staff School, and has applied for a commission in the Regular Army.

7. 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 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. Dismissal is authorized upon conviction of a violation of Article of War 96.

W H Johnson Jr, Judge Advocate

Jacob J Ettern, Judge Advocate

E Y Lehman, Judge Advocate

JAGQ - CM 318935 1st Ind

WD, JAGO, Washington 25, D. C. MAY 29 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 Lieutenant Colonel Russ T. White (O-422515), Transportation Corps.

2. Upon trial by general court-martial, this officer was found guilty of wrongfully converting to his own use and benefit on or about 7 May 1946 a radio-phonograph combination, property of the United States (Spec. 1) and wrongfully selling the same, knowing that it was Government property (Spec. 3), both in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial 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 and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. While Executive Officer at Camp Stoneman, accused, with the assistance of the Post Signal Officer, removed a combination radio-phonograph, value $125, from a Government building on the post, took it to his home, gave "in exchange" a $10 cabinet radio, which was placed in the building from which the combination set had been removed. About six weeks later, accused sold this combination set for $75, along with his personally-owned furniture. Accused testified that he did not know that the set was Government-owned and thought that it was the Signal Officer's personal property, and that the Signal Officer authorized the taking. The court's findings of guilty indicate that it did not believe accused's sworn testimony, and there is ample evidence to support the inference that he did know it was Government property.

5. This officer entered the Army through the National Guard. He has a good record. He was awarded the Bronze Star Medal. His efficiency ratings were consistently excellent and superior.

6. A conversion of Government property appears to have been committed, aggravated by an attempt by accused to place the blame on an

officer under his supervision. (The Signal Officer was punished under A.W. 104 by reprimand and forfeiture of $140 of his pay.) I recommend that the sentence be confirmed but in view of the circumstances and the good record of the accused, recommend that the forfeitures be commuted to a reprimand and forfeiture of $100 pay per month for three months; and that the sentence as thus modified be carried into execution, but that the execution of that portion of the sentence adjudging dismissal be suspended during good behavior.

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

CM 318935

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 210, 11 June 1947)

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

JAGH - CM 318936

APR 1947

UNITED STATES	)	FLYING DIVISION, AIR TRANSPORT COMMAND
v.	)	Trial by G.C.M., convened at Randolph Field, Texas, 20 December 1946. Dismissal and confinement for two (2) years
First Lieutenant RUSSELL M. POTTS (0-703309), Air Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 94th Article of War.

Specification: In that First Lieutenant Russell M. Potts, Air Corps, did, at Randolph Field, Texas, on or about 16 September 1946, feloniously take, steal, and carry away, the following described articles:

Nomenclature		Amount	Price
	Class 03-A		
4004-4020-72C42	Propeller, wood, 6'.	2	$ 46.00
	Class 03-C		
4202-AN3160-50	Breaker, circuit, toggle type, SPST, Spec. AN-C77.	8	16.00
4202-AN3210-1	Switch Assy. low travel limit.	1	.55

	Nomenclature	Amount	Price
	Class 08-A		
7700-320800	Fan-elec., desk and bracket type, AC, oscillating 16", 110-V, 60 cycle.	2	28.40
	Class 17-B		
7900-015800	Bar socket ext. 3/8" sq. dr. 5".	1	.32
7900-015950	Bar socket ext. 3/8" sq. dr. 8".	1	.36
7900-076580	Caliper outside micro. 2-3" grad. 1-10000, ratchet stop.	1	11.00
7900-076660	Caliper outside micro. 3-4" grad. 1-10000, ratchet stop.	1	8.81
7900-087500	Chest tool mach. 20 x 8-1/2 x 13", Kennedy type.	2	13.74
7900-241950	Drill elec. 1/4" cap. universal current.	1	20.10
7900-297981	File rotary medium cut, 1/4" dia. shank, 11/64" dia. cut. 2-1/8" length.	2	1.14
7900-297985	File rotary med. cut 1/4" dia shank, 15/64" dia. cut 1-5/8" length	2	1.16
7900-297989	File rotary med. cut 1/4" dia shank, 7/16" dia. cut. 1-9/16" length.	2	1.88
7900-297998	File rotary med. cut 1/4" dia shank, 5/8" dia. cut 1-3/8" length.	2	3.02
7900-321320	Frame hack-saw 8-12" adj.	1	.32
7900-361720	Gage telescope 5/12-1/2".	1	1.80
7900-361750	Gage telescope 1/2-3/4".	1	1.80
7900-361810	Gage telescope 1-1/4-2-1/8".	1	2.40
7900-361780	Gage telescope 3/4-1-1/4".	1	3.08
7900-361840	Gage telescope 2-1/8-3-1/2"	1	3.00
7900-361860	Gage telescope 3-1/2 - 6"	1	4.79
7900-412540	Hammer-mach. ball pein 8 oz.	1	.34
7900-414496	Hammer-pneu. riveting off-set handle slow hitting.	2	102.00
7900-436780	Hoist chain spur gear, 1-ton	1	54.20

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	Nomenclature	Amount	Price
7900-469840	Kit-tool, Kennedy type, 16 x 7 x 7.	1	1.15
7900-557800	Pliers flat nose non-side cutting 5".	1	.62
7900-559770	Pliers jewelers cutting 4-1/2"	1	1.91
7900-560160	Pliers jewelers round nose 4"	1.	.65
7900-560400	Pliers jewelers snip nose 5"	1	.57
7900-563340	Pliers water pump packing nut 9-1/2".	1	.62
7900-633760	Rod end meas. flat end 2".	1	1.30
7900-633790	Rod end meas. flat end 3".	1	1.50
7900-655390	Saw hole 3".	1	1.76
7900-655450	Saw hole 3-1/4".	1	1.76
7900-663890	Screwdriver CLOB 1-1/2".	1	.10
7900-666630	Screwdriver offset double end 6".	1	.14
7900-774510	Tape rule 72".	1	2.00
7900-798500	Torch welding, Smith #2.	1-set	25.20
7900-835380	Wrench box O.E. 9/16 x 9/16".	1	.70
7900-836460	Wrench box 3/8 x 7/16".	1	.35
7900-836490	Wrench box 1/2 x 9/16".	1	.39
7900-836520	Wrench box 5/8 x 11/16".	1	.67
7900-857660	Wrench pipe adj. 8".	1	.55
7900-857690	Wrench pipe adj. 10".	1	.73
	Class 17-C		
3F-4071	Multimeter, test set.	1	23.94
	Class 17-B		
7900-741890	Tachometer, hand, 300 to 15,000 RPM.	1	36.00
7900-854262	Wrench OEDH 9/16 x 5/8".	1	.90
	Class 18		
8030-JH97EST	Puller-standard ball bearing.	1	70.00
	Class 19-C		
Tire, tube and wheel. (Estimated price.)		2	40.00

07352

Nomenclature		Amount	Price
	Class 24		
8500-30400	Flux, all purpose brazing, can	1 lb.	.75
	Class 29		
6700-179850	Caster-metal chain, 2" hand rubber.	8	1.44
	Quartermaster		
Typewriter, non-portable 12" carriage, Underwood, Ser. No. 3684026-12.		1	75.00
	Ordnance		
51-C-1554-15	Compound, anti-freeze.	2-gal.	3.06

of the total value of $619.97, property of the United States furnished and intended for the military service thereof.

He pleaded guilty to the Charge and guilty to the Specification except the figures $619.97, of the excepted figures not guilty. He was found guilty of the Charge and guilty of the Specification except the words and figures "7900-559770, Pliers jewelers cutting, 4-1/2, 1, $1.91," and "7900-361860, Gage, telescope, 3-1/2-8, 1, $4.79" and"$619.97," and substituting for the figure "$619.97" the figure "$613.17," of the excepted words and figures not guilty, of the substituted words and figures guilty. He was sentenced to be dismissed the service, to pay to the United States a fine of five thousand dollars, to be confined at hard labor at such place as the reviewing authority may direct for ten years, and to be further confined at hard labor until said fine is so paid, but for not more than one year, in addition to the ten years thereinbefore adjudged. The reviewing authority approved only so much of the sentence as provides for dismissal from the service and confinement at hard labor for a period of two years, and forwarded the record of trial for action under Article of War 48.

3. Notwithstanding the plea of guilty entered by the accused, the prosecution called a number of witnesses and offered proof as to all elements of the offense. A complete summary of the evidence may be found in the review of the Staff Judge Advocate, Randolph Field, Texas, dated 6 February 1947. In view of accused's plea of guilty, the following brief statement of the prosecution's evidence is considered sufficient background for the questions to be discussed in this opinion:

The accused was Property Officer and Assistant Base Maintenance Officer in the Base Shops at Randolph Field, Texas (R 43; Pros Ex 54-55). About 25 September 1946, he came into possession of the typewriter described in the specification (Pros Ex 51). This machine had been broken and, as the result of a Report of Survey, had been ordered salvaged and dropped from accountability (R 33; Pros Ex 55). Accused found that it could be repaired, and had the work done in the Base Shops (R 34-37; Pros Ex 53), taking the typewriter to his quarters after it had been reapired (Pros Ex 55). The remainder of the property listed in the specification, with the exception of the two items excepted by the findings, as to which no proof was offered, consisted of tools and supplies which were Government property (R 13, 18-33; Pros Exs 2-52, 54-55) and were taken by the accused from the Base Shops (Pros Exs 54-55). At the time the items were taken, the accused had signed memorandum receipts for them (Pros Exs 54-55). The property in question was found in a footlocker belonging to the accused (R 8, 12) and in accused's trailer (R 9, 14). He willingly submitted to the search of his footlocker and trailer and freely admitted to investigators that some of this property belonged to the Government and that he had taken it from the Base Shops. (R 8, 11-12, 14). The values listed in the specification are the original cost prices, as listed in Government stock list catalogues (R 18-33).

4. At the instance of the defense, it was stipulated that if Lieutenant John J. Wooster, Medical Corps, a psychiatrist, were in court, he would testify as follows:

> "'1. The above named officer, a combat veteran, is referred for evaluation before a possible court-martial.
>
> "2. Examination reveals considerable dependency and insecurity with anxiety resulting. There is, however, no evidence of psychosis.
>
> "3. This officer is capable of differentiating right from wrong, adhering to the right, and conducting his own defense with counsel.
>
> "4. Disgnosis: Anxiety reaction - moderate.
> Incapacity - minimum.
> LOD - Yes.'" (R 42).

The accused, having been apprised of his rights to testify or remain silent, elected to take the stand, and testified under oath that he entered the Army as an aviation cadet on 24 April 1943, that he is 21 years old, and has been an officer for about three years. Prior to being assigned to Randolph Field, he had been hospitalized due to an

anxiety state (R 43). After his release from the hospital, he was detailed as a primary instructor, but was grounded when it was found that he was still in an anxiety state. On 6 July 1946 he was assigned as Air Corps Maintenance Officer and Property Officer at the Base Shops, Randolph Field (R 43). He had never had any experience in this type of duty, and received no training in it. At various times he had seen others, including officers senior to him, have private property repaired in the shops, and remove Government property from the shops. The great majority of the property which he is charged with misappropriating was condemned and had been sent to salvage (R 44). The property he took from the shops was Government property and he took it without permission, with the intention to keep the majority of it and return some of it (R 45).

5. Larceny has been defined as the taking and carrying away, by trespass, of personal property which the trespasser knows to belong to another, with intent to deprive such owner permanently of his property therein (MCM 1928, par 149g).

The first question presented for consideration is whether the property was taken by trespass. The accused, after having signed memorandum receipts for the property in question, appropriated it to his own use by removing the property to his quarters, with the intention of keeping "the majority of it." If, by virtue of his position as property officer and by signing the receipts when the property was issued to him, he had acquired possession of the property, there would have been no trespass, and a finding of guilty of larceny could not be sustained. It has, however, been held repeatedly that an officer of the Army has mere custody, and not possession, of property coming under his care as a result of his official position, and that a conversion of such property to his own use constitutes larceny (CM 317327, Durant; CM 252103, Selevitz, 33 BR 383, 394; CM 268478, Brown, 44 BR 291, 294; CM 275547, Garrett, 48 BR 77 (104)). The findings are, therefore, supported by the record of trial.

Where an officer has been convicted of larceny, the value of the property stolen is immaterial for the purpose of fixing the length of confinement (CM 267247, Bewley, 43 BR 359, 362). It is, however, material when considering the appropriate place of confinement, for no person may be sentenced to confinement in a penitentiary for larceny of property of a value of fifty dollars or less (CM 259545, Rowe, 38 BR 365; CM 226579, Evans, 15 BR 125).

The accused pleaded guilty to the specification, except the figure "$619.97," as to which he pleaded not guilty. The value of each item listed in the specification was alleged therein, and the values as alleged totaled $619.97. If his plea of guilty be considered as admitting the value of each item, his plea of not guilty as to the total value would be completely ineffective. The latter must, therefore, be considered as placing in issue the entire question as to value of the items listed in the specification. It is therefore proper that we consider the sufficiency of the proof as to value of the property stolen.

The only evidence as to values was the testimony of Captain Baldauf, Base Shops Maintenance Officer, who testified as to the original cost of each item. Original cost, or replacement value, is the proper measure of value of distinctive articles of Government issue which, because of their character, have no readily determinable market values (CM 194353, Hyden et al, 2 BR 133). The evidence adduced by the prosecution shows that the items of property listed in the specification were articles which were obtainable on the civilian market. Captain Baldauf testified as follows:

> "Q. Is all this property known to you to be Government property?
>
> "A. To the best of my knowledge the Government has property identically like this.
>
> "Q. Is property similar to this furnished and intended for the Government's use thereof?
>
> "A. It is."

It must, therefore, be assumed that the items had a market value which could be ascertained, and such market value is the proper measure of value (CM 208002, Gilbert, 8 BR 389; CM 208481, Ragsdale, 9 BR 13; CM 209131, Jacobs, 9 BR 69; CM 212983, Dilsworth, 10 BR 265; CM 213765, Krueger et al, 10 BR 283; CM 218143, Panetta, 11 BR 373).

In CM 192408, Carr, 1 BR 357, the property involved consisted of articles of uniform, issued many months before and probably used to some extent prior to loss. The Board of Review there held:

> "Such being the facts it cannot be said that the proof shows that the lost property was of value equal to its list price. Inasmuch as the articles were issued and, presumptively, were still useful at the time of loss, it may be assumed that they were of some value."

Although replacement value is now the proper measure of value as to articles of uniform, the above statement is, in our opinion, applicable to the instant case. The accused testified that the great majority of the property had been condemned and sent to salvage. As to the typewriter, it was established that the machine had already been ordered salvaged as not being repairable. Even salvaged property is not, however, without value. By the accused's own testimony, some of the salvage was to be "sold out by the pound as metal." Hence, while the record of trial is legally insufficient to support so much of the findings of

guilty as pertains to the value of the property stolen, it is legally sufficient to support a finding of guilty of larceny of the property described, which was property of some value, not in excess of twenty dollars.

6. The accused is 21 years of age, a high school graduate, married and has one child. The records of the Office of The Adjutant General show his service as follows: Enlisted as an aviation cadet 5 February 1943 and discharged on 23 December 1943 to accept a commission; appointed a second lieutenant, Army of the United States on 24 December 1943 and entered active duty the same date; promoted to first lieutenant, 15 November 1944. He served in the European Theater of Operations from 11 March 1944 to 4 August 1944, flying 31 missions and 211 combat hours as a navigator of a heavy bomber. On 15 missions, he was flight navigator. He has been awarded the Distinguished Flying Cross and the Air Medal with three Oak Leaf Clusters, and is entitled to wear the European-African-Middle Eastern Theater Ribbon with two European Air Offensive stars. His efficiency index to 31 December 1945 was 36.2 (very satisfactory).

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review, the record of trial is legally sufficient to support only so much of the findings of guilty as involves a finding that the accused, did, at the time and place alleged, take, steal and carry away the property described in the specification, with the exception of the property excepted in the findings, all of which was of some value not exceeding twenty dollars, property of the United States furnished and intended for the military service thereof, legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 94th Article of War.

A. Feustein, Judge Advocate

Wellemer A. [illegible], Judge Advocate

Philip R. Smith, Judge Advocate

JAGH - CM 318936 1st Ind

WD, JAGO, Washington 25, D.C. APR 28 1947

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 Russell M. Potts (0-703309), Air Corps.

2. Upon trial by general court-martial, this officer was found guilty of larceny of Government property of a value of $613.17, in violation of Article of War 94. He was sentenced to be dismissed the service, to pay a fine of five thousand dollars, to be confined at hard labor for ten years, and to be further confined at hard labor until payment of the fine, but not more than one year in addition to the ten years theretofore adjudged. The reviewing authority approved only so much of the sentence as provides for dismissal and confinement at hard labor for two years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves a finding that the accused did, at the time and place alleged, take, steal and carry away the property described in the specification, with the exception of the property excepted in the findings, all of which was of some value not exceeding twenty dollars, property of the United States furnished and intended for the military service thereof, legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

The accused, Property Officer of the Base Shops at Randolph Field, Texas, took a number of salvage items of Government property, for which he was responsible, from the shops to his home, where he employed them for his own personal needs. He testified that he intended to return some of the items, but intended to keep the majority of them.

I recommend that only so much of the findings of guilty be approved as involves a finding that the accused did, at the time and place alleged, take, steal, and carry away the articles described in the specification, with the exception of the property excepted in the findings, property of the United States, furnished and intended for the military service thereof, of some value not to exceed twenty dollars, that the sentence as modified by the reviewing authority be confirmed, but that one year and six months of the confinement imposed

JAGH - CM 318936 1st Ind - contd.

be remitted in view of the age of accused and his creditable combat record. I further recommend that a United States Disciplinary Barracks be designated as the place of confinement, 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 144, 2 May 1947).

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

MAY 20 1947

JAGQ - CM 318975

U N I T E D S T A T E S	)	86TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Marikina, Rizal Province, PI, 6 December 1946. Dishonorable discharge (suspended), and confinement for one (1) year and three (3) months. United States Disciplinary Barracks.
Private JAMES C. THOMAS, JR. (44125575), Headquarters Battery, 331st Field Artillery Battalion.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

1. The record of trial in the case of the above-named soldier has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence. The record 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 Charges and specifications:

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

Specification: In that Private James C. Thomas Jr. Headquarters Battery 331st Field Artillery Battalion did, without proper leave absent himself from his camp at Grace Park, Rizal Province, P.I. from about 0100 hours 1 November 1946 to 2300 hours 6 November 1946.

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

Specification: In that Private James C. Thomas Jr. Headquarters Battery 331st Field Artillery Battalion did, at Grace Park, Rizal Province, P.I. on or about, 21 October 1946 feloniously take, steal, and carry away one Cal. 45 pistol Serial Number 1933715 value about $38.00, the property of the United States Government furnished for the military service thereof.

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

Specification: In that Private James C. Thomas Jr. Headquarters Battery 331st Field Artillery Battalion did, at Julies Snack Bar, Paranaque, P.I., on or about, 6 November 1946 unlawfully carry a concealed weapon, Viz. a Cal. 45 pistol serial number 1933715.

He pleaded not guilty to and was found guilty of all Charges and specifications. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year and three months. The reviewing authority approved the sentence and ordered it executed, suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp McQuaide, California, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 65, Headquarters 86th Infantry Division, 27 December 1946.

3. The only question to be considered is the propriety of the investigating officer acting as defense counsel. The papers accompanying the record of trial show that the charges were investigated by Major Philip H. Riedel, Jr. (Report of Investigating Officer). Major Philip H. Riedel, Jr., was the regularly appointed defense counsel of the court which tried the accused (R. 2), and he signed the record of trial as defense counsel (R. 8). The record of trial contains the following statement: "The accused stated he desired to be defended by the regularly appointed defense counsel" (R. 3). The trial judge advocate announced that the charges were investigated by Major Philip H. Riedel, Jr. (R. 3). It appears from the report of investigation accompanying the record of trial that Major Philip H. Riedel, Jr., recommended that accused be tried by general court-martial.

In CM 284066, Mejie, the Board of Review said:

"Although at the beginning of his trial the accused, in response to a question by the Trial Judge Advocate, stated that he wished to be defended by the regularly appointed defense counsel, we cannot assume from this answer that the accused appreciated the full significance of such a choice or that he realized the inconsistent position in which defense counsel would be placed. Defense counsel, on the one hand, by his sworn statement asserted his belief in the guilt of the accused and, on the other hand, entered for the accused a plea of not guilty and undertook the

duty of conducting the defense with undivided fidelity and by all honorable means known to the law. To expect the court to hear the accused's testimony, without being prejudiced by the defense counsel's pre-trial actions as the accuser, is to require the performance of a mental feat beyond the compass of ordinary minds. Article of War 8 provides that, 'No officer shall be eligible to sit as a member of such court when he is the accuser'. Thus military law forbids the accuser to sit in judgment upon the man he has accused. For equally good reasons, the law forbids an accuser to purport to defend the man he has accused. For an accuser to serve in such inconsistent capacities is unfair to himself, unfair to the court, and a mockery of the requirement that he must serve the accused with 'undivided fidelity' and by all 'honorable and legitimate means known to the law'.

In CM 315877, Ellis, the Board of Review said:

"*** It follows that when the investigating officer then takes up the side of the defense he has placed himself in an inconsistent position which is incompatible with his prior view of the matter as investigating officer. We do not mean to say that in no event is it permissible for an accused to be represented in his trial by the officer who made the formal pretrial investigation of the case; indeed, to so hold could very well constitute an abridgement of the right of an accused person to be defended by military counsel of his own choice. What we do hold, however, as a matter of fundamental fairness, is that, in the absence of a full recorded explanation to the accused of the factors and principles involved in such a choice, it cannot be assumed to his detriment that he appreciated the full significance of that choice or realized the inconsistent position in which such defense counsel would be placed in the eyes of the court."

The Board of Review is of the opinion that where it affirmatively appears that the officer who investigated the charges against accused and who recommended trial by court-martial thereon acts as defense counsel at the trial and there is no indication that accused particularly desired and sought the services of such officer in preference to or along with those of other defense counsel the conviction obtained upon such trial must be set aside.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

W. H. Johnson Jr, Judge Advocate

Joseph J. Stern, Judge Advocate

E. Y. Scherman, Judge Advocate

JAGQ - CM 318975 1st Ind

WD, JAGO, Washington 25, D. C. JUN 4 1947

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 the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private James C. Thomas, Jr. (44125575), Headquarters Battery, 331st Field Artillery Battalion.

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, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which this 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 this recommendation, 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. 214, 11 June 1947).

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

JAGK - CM 318983

6 FEB 1947

UNITED STATES v. Private DENNIS N. CHAPMAN (RA 15216790), attached unassigned Signal Training Center, Fort Dix, New Jersey, attached Company S, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey, and Private HOWARD R. EREHART (RA 39074722), assigned Company I, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey.	FORT MONMOUTH, NEW JERSEY Trial by G.C.M., convened at Fort Monmouth, New Jersey, 19 December 1946. As to accused Chapman: Confinement for six (6) months and forfeiture of $50 per month for six (6) months. Guardhouse. As to accused Erehart: Dishonorable discharge (suspended), total forfeitures and confinement for one (1) year. Disciplinary Barracks.

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 soldiers has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the findings and sentence as to accused Erehart but legally insufficient to support the findings and sentence as to accused Chapman. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused were tried upon the following charge and specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private, then Private First Class, Howard R. Erehart, Assigned Company I, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, did, in conjunction with Private Dennis N. Chapman, Attached Unassigned Signal Training Center, Fort Dix, New Jersey, Attached Company S, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, then Attached Company GG, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, at Neptune, New Jersey, on or about 28 September 1946, without the consent of the owner, wrongfully take and carry away one black Chevrolet Coupe, license number M C 56 W, motor number 3945825, value about $100, the property of Edward Goldberg, 1311 Corlies Avenue, Township of Neptune, New Jersey.

After a plea in bar of trial as to each accused had been denied by the court, each pleaded guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced as to accused Chapman. As to accused Erehart, evidence of one previous conviction was introduced.

Accused Erehart was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances, and to be confined at hard labor at such place as the reviewing authority might direct for one year. Accused Chapman was sentenced to confinement at hard labor for six months and to forfeit $50 per month for a like period. The reviewing authority approved the sentences as to both accused, but suspended the dishonorable discharge as to accused Erehart pending the soldier's release from confinement and ordered the sentences executed. As to accused Erehart, the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of War might direct was designated as the place of confinement. In the case of accused Chapman the Post Guardhouse, Fort Monmouth, New Jersey, was designated as the place of confinement. The result of trial was published in General Court-Martial Orders No. 2, Headquarters, Fort Monmouth, New Jersey, 10 January 1947.

3. The evidence, coupled with his plea of guilty, fully sustains the findings of guilty as to accused Erehart.

4. Although accused Chapman pleaded guilty to the Charge and Specification, it is necessary to look to such specification to determine whether it sufficiently alleges the commission of any offense by him. Eliminating certain descriptive words therein, it alleges that accused Erehart, "did in conjunction with Private Dennis N. Chapman *** wrongfully take and carry away" certain property. This accusation is directed solely against accused Erehart, the phrase "in conjunction with Private Dennis N. Chapman" being merely descriptive of accused Erehart's offense. The obvious meaning of the specification is that accused Erehart, while associated with Private Chapman, wrongfully took and carried away the property in question and no other meaning can be given to such specification by construction of law. There is, therefore, no allegation that Private Chapman committed any offense (CM 250668, Kistler, 33 BR 31).

The specification in court-martial proceedings, as in the case of an indictment, information or complaint, must be positive in respect to the person accused and the crime alleged (31 C.J., sec. 179, p. 659). Having purportedly been brought to trial on a specification which failed to allege the commission of any offense by him, Private Chapman's plea of guilty thereto was of no legal effect, for there was no case before the court in which any pleadings by him could have been entertained. In other words, the court, in the instant case, had no jurisdiction to try and determine the issue of Private Chapman's guilt or innocence of any offense which may have been committed by him (CM 257983, Biondi, 3 BR (ETO) 39,45; CM 260797, Hundley, 40 BR 19).

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to accused Chapman.

Albert E. Gilbert, Judge Advocate

(Sick in Quarters), Judge Advocate

Robert E. Lathrop, Judge Advocate

JAGK - CM 318983 1st Ind

WD, JAGO, Washington 25, D. C. FEB 21 1947

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 the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Dennis N. Chapman (RA15216790), attached unassigned Signal Training Center, Fort Dix, New Jersey, attached Company S, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey, and Private Howard R. Erehart (RA 39074722), assigned Company I, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey.

2. I concur in the opinion of the Board of Review that the record of trial as to the accused Chapman is legally insufficient to support the findings of guilty and the sentence, and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which the accused Chapman 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 the recommendation hereinabove made, 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. 75, 12 March 1947).

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

MAY 6 1947

JAGQ - CM 319058

UNITED STATES v. Private JAMES E. WHITE (35781121), 6815th Military Police Training School Overhead Detachment.	SEVENTEENTH MAJOR PORT Trial by G.C.M., convened at Bremen, Germany, 30 September and 1 October 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James E. White, 6815th. Military Police Training School Overhead Detachment, did, at or near Brake, Germany, on or about 2 September, 1946, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Margarethe Michalke, Alserdiech Strasse, Rodenkirchen, Germany.

The accused pleaded not guilty to, and was found guilty of, the Charge and specification. No evidence of previous convictions was introduced. The court sentenced him to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 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 evidence for the prosecution shows that on 2 September 1946, a little after 10:00 P.M., Margarethe Michalke, a single girl 22 years of age was walking along the road between Brake and Rodenkirchen, Germany.

She was alone at the time and was enroute to her home, in Rodenkirchen after leaving her place of employment near Brake, where she was employed as a farm laborer. Rodenkirchen is located about 6 kilometers from Brake (R. 8, 9). At a point about 1 kilometer from Brake, Miss Michalke, encountered an American soldier walking in the opposite direction toward the town of Brake. He passed her without speaking, but shortly thereafter as she continued along her way, she was aware of the sound of footsteps approaching from behind her, and the soldier whom she had previously passed came up and asked her where she was going. When she replied that she was on her way home, he asked her if she could speak English and she said "a little bit". As the soldier followed her while Miss Michalke continued walking toward her home they conversed and when she indicated her difficulty in understanding him he frequently said "Was ist los nichts ist los." He offered her a cigarette which she refused. Thereafter he placed his hand on her shoulder and when she rebuffed him he seized her, causing her to lose her balance and as Miss Michalke stated, "he took me to the ground." She struggled to get up but accused was too strong for her. She struck him with her hands, kicked, scratched his face and hand and when she shouted for help, he struck her in the face with his fist. As a result of the blow her strength waned and she became "very unsettled." Accused pressed hard against her face and struck her whenever she tried to move. When she had lost most of her strength, he pushed back her pants, tearing them and had sexual intercourse with her (R. 8-11).

When he had completed the act he released her and she ran in the direction of her home in Rodenkirchen. Miss Michalke testified that she was with the accused from about 10:15 P.M. to about 10:30 P.M. When she arrived home weeping, she reported the incident to her mother. Her clothes were dirty and stained with blood.

The following morning she reported the attack to the American police (R. 10) and was examined by a medical officer stationed at Brake, Germany. There were black and blue marks on the bridge of her nose, lacerations on her lower lip, contusions on her face and on the inner aspect of both thighs. Vaginal examination showed slight laceration and bleeding of the orifice. The medical findings were "compatible with the possibility that the patient was raped" (R. 6, 7).

At the trial Miss Michalke identified the accused as her assailant, testifying that she recognized him by his voice, his short and curly hair and his very strong and dark eyebrows (R. 10).

Miss Lotte Bose, a resident of Rodenkirchen testified that she had known accused for two months and that she spent the evening of September 2nd with him at her home. She walked a short distance toward Brake with

him and left him about 9:00 P.M. He was always polite in his relations with her. There was one German expression which he frequently used when with her: "Was ist los, nichts ist los" (R. 11-13).

Private First Class Garrison, occupied the same quarters with accused at Camp Brake. On the morning of 3 September 1945 accused asked him how to wash an O.D. jacket and that afternoon about 3:00 P.M. Garrison observed accused washing a pair of O.D. trousers or an O.D. jacket in the basement of their quarters. He asked accused why he didn't have the PW's do that and accused replied that he was in a hurry (R. 13, 14).

Accused was examined about 7:00 P.M. 3 September by the same medical officer who had examined Miss Michalke. He was found to have a slight laceration of the left cheek and one above the right eyebrow. In addition there were lacerations on both sides of his neck and a slight laceration on the dorsal aspect of the penis (R. 7).

On 4 September 1945, a CID agent from Bremen, Germany, interviewed accused at Camp Brake, warned him of his rights under Article of War 24 and obtained a voluntary signed statement from accused which was received in evidence without objection by the defense counsel (R. 16; Pros. Ex. A). Therein accused stated that he left his girl friend Allota about 8:30 P.M. and started to walk to camp when he met a German girl walking along the dike. He engaged her in conversation and walked with her for a time, and then put his arm around her several times. Each time he did so, she removed his arm. Thereafter he placed both arms around her and tried to kiss her. She leaned back and accused fell on top of her. He asked her to have sexual intercourse with him several times and she persisted in her refusal. They were wrestling and she always resisted him. When she bit him on the cheek he "slapped the hell out of her." She continued to resist but finally he got on her and she "didn't try to keep me from it." Then he had intercourse with her and afterward she got up and went up the dike. Accused then returned to camp, arriving there about 11:35 P.M.

4. For the defense, evidence was introduced to show that American soldiers have been heard to use the expressions, "Was ist los" and "Nichts is los" (R. 16, 17). After his rights as a witness were fully explained, accused elected to remain silent.

5. The court convicted accused of raping Margarethe Michalke as alleged. Rape is the unlawful carnal knowledge of a woman by force and without her consent. The essential elements of proof are (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 (par. 148b, MCM, 1928).

The uncontradicted evidence clearly shows that on the evening of 2 September 1947, the accused had sexual intercourse with Margarethe Michalke, after accosting her on a highway between Brake and Rodenkirchen, Germany. It is also apparent that the act of sexual intercourse was not committed with the consent of the female concerned. This fact is convincingly established by the testimony of the victim and by that of the medical officer who found lacerations and bruises on Miss Michalke's face and body as well as a laceration of the vaginal orifice at the time of his examination which was within 24 hours after the alleged assault. Accused in his voluntary statement admitted that on the night in question he had sexual intercourse with a German girl (who could have been none other than Miss Michalke) and that he had "slapped the hell out of her" before she ceased her struggles. In addition, the scratches on accused's face as well as the laceration of his penis, which was observed when he was examined the day following the incident, gave mute testimony to the resistance he had encountered in accomplishing the penetration which he voluntarily admitted in his signed statement. Submission to sexual intercourse by a female under the circumstances of this case does not constitute consent (CM 227809, I Bull. JAG 364; CM 236612, Tyree, 23 BR 67, II Bull. JAG 310). Accordingly, the evidence supports the conviction of accused for the offense as alleged.

6. The court originally fixed punishment at dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six years. On the day following (1 October 1946) the court reconvened of its own motion because the punishment imposed was less than the mandatory sentence fixed by law for the offense of which accused had been found guilty. The court upon reconsideration sentenced accused to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life. This was an authorized and proper procedure (Art. of War 40(d)).

7. Accused is twenty-one years old. He enlisted in the Regular Army on 1 November 1945 after his discharge from service in the Army of the United States extending from 21 July 1944 to 31 October 1945.

8. The court was legally constituted and had jurisdiction of the accused and the offense charged. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of either death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92.

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

Carlton G Johnson, Judge Advocate

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

MAY 13 1947

JAGQ - CM 319154

UNITED STATES	)	9TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Augsburg, Germany, 15 November 1946. To be hanged by the neck until dead.
Private First Class GLENN W. BRANCH (RA 38393760), Company L, 60th Infantry.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Glenn W. Branch, Company L, 60th Infantry, did, at Furth im Wald, Germany, on or about 12 October 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Johnnie C. Goram, a human being by shooting him with a pistol.

Accused pleaded not guilty to, and was found guilty of the Specification and Charge. No evidence of previous convictions was introduced. The accused was sentenced to be hanged by the neck until dead, all members of the court present concurring therein. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Accused Branch, deceased Private First Class Johnnie C. Goram, and three other soldiers were in a railway car at Furth im Wald, Germany, at approximately 1400 hours, 12 October 1946. The train was enroute to

Poland returning displaced personnel and the soldiers were on duty as guards for the train (R. 8). Accused asked deceased to give him a bottle of whiskey but deceased refused and accused departed from the car. About five minutes later accused returned in company with an UNRRA nurse and again asked deceased to give him a bottle which request was also refused (R. 8). Thereupon accused asked one of the other soldiers for a bottle of whiskey and "after long persuasion" was given a bottle by Private First Class Kobyashi (R. 10). After accused and the nurse left the car, deceased told Kobyashi that he should not have given accused the whiskey as he would never "pay it back" and further stated, "that son of a bitch owed me some money and never paid it back and when he gets to the company I will get it from him" (R. 10). Accused who was standing outside of the car by the door then entered and said "are you talking about me, why don't you talk to my face" (R. 11). Deceased replied, "I'll say it to your face" whereupon accused pointed his forty-five caliber pistol at deceased (R. 25) and when deceased said, "why don't you shoot me", accused fired six or seven rounds, four of which entered deceased's body in the area of his stomach and he fell to the floor (R. 11). Death followed almost immediately as a result of the gunshot wounds (Pros. Ex. 2; R. 37).

The three soldiers who were in the car and eyewitnesses to the shooting described the action as follows:

<u>Private First Class Kobyashi.</u>

"A. I heard Branch say 'are you talking about me?' and Goram said 'yes' and Branch said 'why don't you talk to my face?' and at that time I saw a pistol, a .45 pointed at Goram.

"Q. Who pointed the pistol?
"A. It was Branch, sir.

"Q. And he was pointing the pistol at whom?
"A. Goram.

"Q. Then what did you see happen?
"A. Goram said 'why don't you shoot me?' or something like that, and then 6 or 7 rounds went out.

"Q. You heard Private First Class Branch speak to Goram, is that right?
"A. Yes, sir.

"Q. And you say that Goram was sitting on a sort of bed or couch?
"A. Yes, sir.

"Q. Did Goram have his back to the door where Branch was?
"A. When he was speaking to us he had his back toward the door.

"Q. And Branch could hear everything that Goram said while he was talking to you?

"LM: The court objects to the question.

"Q. Did you see Branch point the pistol at Goram while he was talking to Goram?
"A. Yes, sir.

"Q. Was Branch pointing the pistol at Goram when he said 'are you talking about me'?
"A. Yes, sir." (R. 11).

Private First Class Robert E. Conrad:

"A. Then Branch said 'why don't you say it to my face?' and then Goram said 'shoot me' and he shot him.

"Q. Did you see Branch pointing the pistol at Goram?
"A. Just when he shot him.

"Q. Did you see Goram turn around to look at Branch?
"A. Yes, sir.

"Q. Was Goram standing up or in a crouched position when he turned around?
"A. He was crouched.

"Q. Was he just in the process of getting up from where he was seated?
"A. I don't know whether he was getting up or still sitting.

"Q. You don't know whether he was getting up or still seated when he was shot, did you say?
"A. It looked like he was sitting to me.

"Q. It looked to you as if he was still sitting?
"A. Yes, sir.

"Q. Did you see Goram make any attempt to use a pistol which he had on him?
"A. No, sir, his pistol was on the other side and I couldn't see it.

"Q. How many shots did you hear fired?
"A. Around 5 or 6; maybe 7.

"Q. You were right behind Goram were you?
"A. Yes, sir.

"Q. You were right behind him when the shots were fired?
"A. Yes, sir." (R. 19-20).

Private First Class Richard Keesee:

"Q. Did you hear Private First Class Branch say anything?
"A. He said, 'Why don't you say it to my face', and Goram said he would and then I heard the shots.

"Q. Was Goram standing at this time?
"A. He was sitting.

"Q. Did you see Goram stand up at any time?
"A. Well, he kind of went into a crouch and that is the way he fell. He was in a crouched position all the way around. He never stood straight up. When he said 'I'll say it to your face' he kind of got up in a crouch and never got up.

"Q. Was Goram's back toward Branch?
"A. Yes, sir, it was. But when he got up he must have faced him to the side just a little bit because when the bullets hit him he turned clear around.

"Q. You say you saw Goram getting up from his bed?
"A. Yes, sir.

"Q. And before he got completely up the shots were fired?
"A. Yes, sir.

"Q. How far away from Goram were you?
"A. Well, my feet were about two feet away from him. I was stretched out on the cot.

"Q. Did you see Goram grab for his holster?
"A. I didn't notice that. I was looking over there and my head was turned. All I had seen was when he raised up and the next time I saw him I turned him over on his back." (R.24-25).

Captain Dallas A. Sharp, the train commander, testified that upon hearing the shots he took the following action (R. 28).

"A. When I heard the shots fired to the rear of my car I immediately ran to the door to investigate and see what the shots were. As I left the car by that door Pfc Conrad came up to me and said Goram has been shot. I, by this time, had jumped out of the door and started toward Goram's car which was the next car behind me. Pfc Branch was walking towards me with a .45 in his hand with the slide open and he walked up to me and handed over to me his pistol, holster and belt and said either 'I shot him' or 'I killed him'. I said 'you fool' and told him to come with me. I entered the car which was adjourning my car and told Pfc Conrad that I was placing Branch under arrest and he was to guard him. I told Branch to sit on the bed at the end of the car. Goram was on the floor on his back. I noticed holes in his trousers and immediately ripped his trousers open. I saw four holes in his groin. I ripped his shirt, the upper part of his clothing open to see if he was shot in the chest. I didn't see any holes in his chest. I sent Keesee after a doctor and ambulance immediately. The train at this time had begun to move. I sent Pfc. Busick, another guard, forward to stop the train. About three minutes after I entered the car Keesee returned with a German nurse. She looked at the man and said there was an aid station about 75 yards from the train and there was a doctor there and he should be moved immediately. We placed Goram on a coat and covered him with a blanket and I don't remember exactly what four soldiers carried him to the aid station. The Constabulary came along in a jeep and I turned Branch over to their custody and as soon as I did that I went immediately to the aid station and the German doctor, thru an interpreter, told me that Goram was dead. This was not more than 15 minutes after I heard the shots."

That when he examined deceased on the floor of the car his holster flap was buttoned and when he removed the pistol it contained a full clip of ammunition with none in the chamber of the weapon (R. 29).

He further testified that he overheard an argument between accused and deceased the evening before the shooting and described it as follows:

"Q. Did Branch speak to you about any difficulties he had with Goram?
"A. Yes, sir.

"Q. What did he say to you?
"A. He stated that there were cigarettes and candy missing out of the suitcase. I believe at this time he told me he was pretty sure that Goram had taken them and when he got back to the company he was going to straighten it out with him.

"Q. Did Goram ever come to you and complain to you about any difficulties he had with Private First Class Branch?
"A. He didn't come to me but he did state substantially the same thing. After they had argued and I talked to Branch I went to talk to Goram and he told me that he believed Branch had taken cigarettes and candy from the suitcase in which they packed their things together. He also stated that when he got back to the company he was going to straighten it out with Branch." (R. 30).

As train commander he had placed accused in charge of the train when it was necessary for the witness to be absent and deceased had asked him why he had put accused in charge but there was no trouble about the matter. While the train was in Poland the guards were not authorized to carry weapons and when he obtained deceased's pistol deceased had complained that as he had signed for the gun witness should not take it (R.31).

On cross-examination all three soldiers who witnessed the shooting testified that there was "bad feeling" between accused and deceased and described an argument between them as follows:

Private First Class Kobyashi.

"Q. Were you there on the night that Captain Sharp put Branch in charge of the detail?
"A. Yes, sir.

"Q. How did Goram react to that?
"A. He didn't like it very much.

"Q. Did he say anything?
"A. He said he didn't know that guy could kiss his ass that much.

"Q. He indicated a hostility toward Branch, is that it?
"A. Yes, sir.

"Q. At any time during the trip did he show he didn't like Branch?
"A. Yes, sir, he was accusing him of stealing his cigarettes and buying chicken with it." (R. 16).

Private First Class Conrad.

"Q. Conrad, did you have any conversation with Goram about Branch?
"A. Yes, sir.

"Q. What did Goram say to you?
"A. The morning he was shot he said he doesn't want to shoot Branch or fight him but he has to settle it one way or another." (R. 21).

Private First Class Keesee.

"Q. Did you hear Branch and Goram arguing prior to this incident?
"A. Yes, sir, the night before, they had a little argument.

"Q. What do you mean by a little argument?
"A. Well, they were just threatening each other that when they got back to the company they were going to settle it. That was all. The door was closed and you couldn't hear what they were arguing about.

"Q. You just heard them arguing?
"A. Yes, sir.

"Q. The morning of the day that the shooting occurred, did you see Branch and Goram together at any time?
"A. Yes, sir. That morning, Branch came into our car, I'd say around 10 o'clock - it was just before we crossed the Czech Border - and he had his arm around Goram and was talking to him.

* * * *

"Q. Did you hear him make any remarks in regard to Branch?
"A. How do you mean, sir?

"Q. Did he say anything about Branch?
"A. Well, he just said he was going to settle with him when he got back to the company.

"Q. Just what did he say do you recall?
"A. No, sir, he just said he was going to have it out with him.

"Q. Did he make any threats in one way or another?
"A. No, sir, I don't believe he did." (R. 26-27).

The rights of accused as a witness were duly explained to him by the law member and he elected to remain silent (R. 33).

4. 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 (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. An intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life.

The evidence clearly establishes a deliberate and intentional killing. The only defense offered, and that by way of inference from cross-examination of prosecution witnesses was one of self defense. The testimony does show that accused and deceased had previously engaged in an argument regarding some missing cigarettes, candy and post exchange supplies from their suitcase and each stated to third parties that they were "going to have it out" with the other when they returned to the company. However, the eyewitness testimony relative to the killing falls far short of proving that it was done in self-defense. There was no direct testimony that deceased reached for his gun and in fact his holster was still closed when accused shot him. Considering the evidence in the most beneficial light to accused it can only be said that deceased arose or started to arise from a sitting position and was "in a crouch" when accused fired. Such evidence is entirely insufficient as a matter of law to prove justifiable homicide.

Accused was examined prior to trial by a neuropsychiatrist who found him to be a tense and tremulous individual with a past history of marked instability, aggravated by combat and wounds received in action but with no evidence of psychotic ideation or mannerisms and was sane and could fully cooperate in his defense. No issue of insanity was raised

at the trial.

5. The charge sheet shows accused to be 28 years of age and not married. He enlisted in the Regular Army on 15 January 1946 after his discharge from service in the Army of the United States extending from 17 December 1942 to 5 November 1945. There is no evidence of previous convictions by court-martial or difficulties with the civil authorities prior to his induction.

6. On 1 May 1947, Mr. Robert B. Harbison, attorney, appeared before the Board of Review, presented oral argument and a written brief on behalf of accused. Careful consideration has been given by the Board of Review to the legal issues so presented and to the exhibits concerning the civilian and military background of accused.

7. 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 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.

W. H. Johnson Jr, Judge Advocate

Joseph J. Stern, Judge Advocate

Carlton G. Schenken, Judge Advocate

JAGQ - CM 319154 1st Ind

WD, JAGO, Washington 25, D. C. MAY 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 Private First Class Glenn W. Branch (RA 38393760), Company L, 60th 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 of the sentence.

3. The evidence shows that accused and deceased were members of a train guard unit en route to Poland returning displaced personnel. While the train was stopped at Furth im Wald, Germany, accused overheard deceased refer to him as "that son-of-a-bitch owes me some money and never paid it back and when he gets to the company I will get it from him", whereupon accused entered the railway car where deceased and three other guards were; asked deceased why he did not "talk to my face", pointed his pistol at deceased and fired six or seven rounds, four of which struck deceased in the area of the stomach causing his death a few minutes later. Deceased was wearing sidearms but the flap of his holster was buttoned and upon examination of his gun it was determined that there was no cartridge in the chamber. Accused and deceased had been involved in an argument the night before over some cigarettes and post exchange supplies which were missing from their luggage. The three soldiers who were eyewitnesses to the killing testified that deceased was sitting down with his back to accused when accused entered the car; started to rise and was in a "crouching" position when accused fired.

Accused was examined by a neuropsychiatrist prior to trial, found to be sane and capable of cooperating in his defense but has a past history of marked instability, aggravated by combat and wounds incurred in action. No issue of insanity was raised at the trial.

4. War Department records show that accused is 28 years of age, single and enlisted in the Regular Army 15 January 1946, after his discharge from service in the Army of the United States extending from 17 December 1942 to 5 November 1945. He has no previous convictions by court-martial and there is no evidence of any difficulties with the civil authorities prior to his induction.

5. On 1 May 1947, Mr. Robert B. Harbison, Attorney and friend of accused's family, appeared before the Board of Review, presented oral argument and a written brief, on behalf of accused. He further presented statements from numerous officials and private citizens of accused's home county and state certifying to accused's excellent civilian reputation as well as letters from soldiers in his unit to the effect that accused was courageous in combat and well liked by his associates in the service. There are also in the file letters from Senator Elmer Thomas, Senator E. H. Moore and Congressman Victor Wickersham and a petition urging clemency.

6. In view of accused's excellent past record, both civilian and military, coupled with the fact that his experiences and wounds received in combat have aggravated his emotional instability reaction to the extent that it is diagnosed as "chronic severe", I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life, and that as thus commuted the sentence be carried into execution. I further recommend that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

8 Incls.
1. Record of trial
2. Dft ltr for sig USW
3. Form of Exec. action
4. Ltr. fr. Rep. Wickersham, Nov. 26/46.
5. Ltr. fr. Senator Thomas, Apr. 29/47.
6. Ltr. fr. Senator Moore, May 3/47.
7. Brief of Mr. Harbison.
8. Petition dated Dec. 3/46.

(G.C.M.O. 197, 4 June 1947).

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

MAY 1 2 1947

JAGQ - CM 319163

U N I T E D S T A T E S	)	CAMP CAMPBELL
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, 20 December 1946. Dismissal and total forfeitures.
Captain WILLIAM B. RICE (O-117134), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

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

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

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

Specification: In that Captain William B. Rice, 39th Field Artillery Battalion, did, at Camp Campbell, Kentucky, on or about 4 December 1946, feloniously embezzle by fraudulently converting to his own use money, of the value of two hundred twenty-five dollars and sixty-one cents ($225.61), the property of Battery Fund, Battery B, 9th Field Artillery Battalion, entrusted to him as custodian of the said fund.

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

Specification 1: In that William B. Rice, Captain, 39th Field Artillery Battalion, being the custodian of the Battery Fund, Battery B, 9th Field Artillery Battalion, did, at Camp Campbell, Kentucky, with intent to defraud Battery Fund, Battery B, 9th Field Artillery Battalion, make a false and fictitious record in the accounts of said fund by making a part of said accounts a bank statement for the 25th of November 1946 purporting to be the statement of the transactions of the fund with the Planters Bank and Trust Company of Camp Campbell, Kentucky, when in fact said statement was false and fraudulent.

Specification 2: In that William B. Rice, Captain, 39th Field Artillery Battalion, being the custodian of the Battery Fund, Battery B, 9th Field Artillery Battalion, did, at Camp Campbell, Kentucky, on or about 25 November 1946, with intent to defraud, render a false report by certifying as true in the Council Book of Battery Fund, Battery B, 9th Field Artillery Battalion, that the balance on deposit with the Planters Bank and Trust Company, Camp Campbell, Kentucky, to the credit of said fund was $226.38, which certification was known by the said William B. Rice to be untrue.

Accused pleaded 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 and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48.

3. Evidence for the Prosecution.

On 25 November 1946 accused made an entry in the Council Book, Battery Fund of Battery B, 9th Field Artillery Battalion, at Camp Campbell, Kentucky, showing a balance of $226.38 on deposit with the Planters Bank and Trust Co. at Camp Campbell, Kentucky (R. 8-9).

After accused's departure from Camp Campbell (for overseas duty), several bank statements and cancelled checks were found in a trash can near the Guest House where accused had been living (R. 13, 17) and it was discovered the fund's bank balance on 25 November 1946 was only $104.58 (Ex. 14).

This difference may be analyzed as follows:

Actual Balance of Fund's Bank Account 11/25/46 (Ex.14)		$104.58
Outstanding check - issued but not cleared (R.8; Ex.14)		155.20
Adjusted bank balance - 11/25/46		50.62
Bank Balance 11/25/46 according to Council Book (R.9)	226.38	
Less Nov. service charge which was not recorded at time Council Book was closed (Ex. 14)	.77	
		225.61
Shortage in Battery Fund - 11/25/46		276.23
Deposit made 12/4/46 (Ex. 14)		51.08
Shortage in Battery Fund 12/4/46		225.15

On 3 December 1946 accused's wife secured some blank bank statements from the Planters Bank and Trust Co. (R. 23) and the Council Book entries mentioned above were supported by typewritten bank statements showing a balance that agreed with the Council Book entries and certificate (R. 8-9). The cashier at the Planters Bank and Trust Co. testified that same were not statements prepared by his bank; that valid bank statements were prepared on a Burrough's posting machine and certified to by the cashier and that the false statements introduced in evidence were prepared on a typewriter and were not certified by him (R. 19).

4. Evidence for the defense.

After being advised of his rights, accused elected to be sworn and testified in part as follows:

> "Well, sir, I do not deny anything, it was just that my child was sick, and I needed money, and I took this money, I intended to replace it, I made an agreement with another person to have the money wired to me and with it I intended replacing the $226.00 — I meant to replace the money." (R. 28).

Defense counsel introduced certain records and citations in accused's favor (R. 26-27) but at the suggestion of the Law Member, they were withdrawn with the understanding that they would be attached later with a plea for clemency (R. 27); however, a plea for clemency was never made. While the ruling of the Law Member in this regard was error as such evidence of the past good military record of accused is admissible, nevertheless such was only evidence in extenuation and did not bear in any degree on the guilt or innocence of accused. Therefore it cannot be said that such error injuriously affected the substantial rights of accused in violation of Article of War 37 particularly in view of accused's plea of guilty and his complete admission under oath that he did "take the money" in question.

5. The accused pleaded guilty to all Charges and specifications and this action apparently caused the trial judge advocate to relax in his presentation of his case. As a result, the evidence is not as complete as it should be. It is clear, however, that accused made a false entry in the Council Book as to the balance of Battery Fund, Battery B, 9th Field Artillery Battalion, and that he attached thereto a false bank statement purporting to show a balance agreeable to the false entry in the Council Book. It was further established that on 25 November 1946, there was a shortage of $276.23 in said account, a portion of which ($51.08) was returned by making a deposit of that amount on 4 December 1946.

When a person fails to account for money that has been entrusted to him, as custodian thereof, the logical inference that he embezzled it is justified in the absence of a credible explanation for the situation (CM 270061, Sheridan, 45 BR 188; CM 234153, Shirley, 20 BR 259, 2 Bull. JAG 341; CM ETO 1302, 3 Bull. JAG 189; CM ETO 1631, 3 Bull. JAG 421).

The failure of Specification 1 of the Additional Charge to allege the date of the offense did not prejudice the substantial rights of the accused. It was clear from the charge sheet that the offense must have occurred between 26 November 1946, the date of the false bank statement as set forth in the specification, and 16 December 1946, the date of the affidavit to the Charge and specifications. The test of the legal sufficiency of a specification is "whether the accused has sufficient notice of the offense with which he is charged" (CM 120017; Dig. Op. JAG 1912-1940, sec. 428 (10)). The accused's plea of guilty and his testimony in open court clearly indicate that he was fully apprised by the specification of the alleged offense and furthermore the defense raised no objection at any time to the omission of the date of the offense in the specification (CM 259026, Coleman, 38 BR 228).

6. War Department records show that accused is 28 years of age. He was divorced from his first wife and was ordered to pay $75 per month to the support of his son. He has married again and has another child by his second wife. He served 7 years as an enlisted man and was commissioned a second lieutenant, AUS, on 15 October 1942, served overseas as a captain, and was promoted to major upon separation from the service on 30 January 1946. He was recalled to duty at his own request on 4 September 1946 in the grade of captain and was en route overseas when his offenses were discovered. He served 9 months in the European Theater, was awarded two battle stars, the Bronze Star Medal, Purple Heart and Army Commendation Ribbon. He was wounded and captured by the enemy about 4 April 1945 but escaped 12 days later. As a result of this wound, he was hospitalized for 8 months but made a complete recovery. His efficiency ratings as an enlisted man and as an officer have been excellent and superior. No previous court-martial record is known.

7. The court was legally constituted and had jurisdiction of the person and subject matter. 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 93 and 96.

W H Johnson Jr, Judge Advocate

Joseph J. Stern, Judge Advocate

Carlton G. Schenken, Judge Advocate

JAGQ - CM 319163 1st Ind

WD, JAGO, Washington 25, D. C. MAY 21 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 Captain William B. Rice (O-1171734), Field Artillery.

2. Upon trial by general court-martial, this officer pleaded guilty to, and was found guilty of, embezzling $225.61 of Battery Funds in his custody, in violation of Article of War 93; of making a false and fraudulent entry in the Battery Council Book and of making a false and fictitious bank statement a part of said Fund records in support of the false and fraudulent Council Book entry, in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial 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.

4. Accused was an enlisted man for seven years and served as an officer for four years. His efficiency ratings have been excellent and superior. His combat record includes two battle stars, the Bronze Star Medal, Purple Heart, and Army Commendation Ribbon. He was wounded, captured by the enemy, and escaped after 12 days. His wound required eight months' hospitalization but his recovery was complete. This officer was recalled to active duty 4 September 1946 and was en route overseas when these offenses were discovered. War Department records contain letters relating to four previous financial difficulties involving this officer.

5. I therefore recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

6. 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

(G.C.M.O. 189, 27 May 1947.)

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 319168

17 APR 1947

UNITED STATES	UNITED STATES FORCES IN AUSTRIA
v.	Trial by G.C.M., convened at Vienna, Austria, 29,30,31 October and 1 and 2 November 1946. Dismissal, total forfeitures and confinement for life.
Second Lieutenant LLOYD R. POE (O-1338273), Corps of Military Police.	

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. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that 2nd Lieutenant Lloyd R. Poe, Headquarters 796th Military Police Battalion, did, at Vienna, Austria, on or about 3 April 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully kill one Charlotte Stowisek, 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 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 the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution

Eleonore Edelmann, an unskilled laborer and a resident of Vienna, Austria, saw her friend, Charlotte Stowisek, at about 3:15 p.m. on 2 April 1946 at the latter's apartment. At this time Miss Stowisek was taking a bath and there were no bruises or lacerations on her body. On the night of 2 April, Miss Edelmann and Miss Stowisek attended various "clubs" in Vienna at which they each had about four glasses of champagne, both becoming "a little drunk." About 11:15 p.m. they repaired to a street car stop on Billrothstrasse to obtain transportation to their various homes only to find that the last street

cars in operation that night had already gone. At this time, a jeep driven by an American officer came by and the driver hailed Miss Stowisek. After some conversation between the officer and Miss Stowisek, the two women got in the jeep, Miss Edelmann being under the impression that she was getting a ride home. The jeep then proceeded in the direction of Grinzing, however, and Miss Edelmann asked the driver, "Wo are you going?" The driver did not reply but Miss Edelmann was informed by her woman companion that they were going dancing. Miss Stowisek asked the officer "if he had a friend" and received the reply that he had not, "maybe tomorrow." The jeep came to a stop opposite a monument in Grinzing and the driver asked Miss Edelmann to get out. She did so, but Miss Stowisek remained seated in the jeep. The jeep then proceeded along Kobenzl Road. Miss Edelmann, noticing that she had left her handbag behind, called out after the jeep and Miss Stowisek called back that she would return the purse later. Miss Edelmann then went to a nearby soldier's barracks and asked a soldier acquaintance who lived there for a ride home. She identified prosecution's exhibits A and B as photographs of the body of her friend, Miss Stowisek, but could not identify accused as the driver of the jeep. The jeep was an "open" jeep, without top or doors (R. 11-30).

About 6:30 a.m. on 3 April 1946, Ottmar Haslauer, a professional hunter, in response to the summons of one Hedwig Leeb, found the body of a woman lying beside a dirt road just off the Kahlenberg highway and near an area known as the Rohrer Meadow. He marked the spot where he had found the body on a map introduced in evidence as prosecution's exhibit C. The body was on its back, the blouse and coat were open, the shoes were off and "she had on blue underwear." One shoe was approximately 10 centimeters away from the feet and the other was approximately three meters away from the head. About 10 centimeters away from the body there was a blue handbag in which was found an identification card bearing the name "Carlotta Stowisek." Half a meter in back of the head were three buttons which had come from the dead girl's blouse. There was one shot wound "deep below the right chest." Mr. Haslauer did not touch the body and notified the police. He took two photographs of the body which were introduced into evidence as prosecution's exhibits A and B. The nearest habitation was about a hundred meters distant (R. 32-39; Pros. Ex. C). Hedwig Leeb did not approach the body before Mr. Haslauer arrived (R. 39,41,42).

About 8:00 a.m. on the morning of 3 April 1946, Ernst Christ, a "criminal official" of Vienna, Austria, arrived in the locality where the body of the dead woman had been found by the hunter. The body was clothed in a flowered dress, a blue jacket, and silk stockings. The stockings had been "torn in small holes." On the inside of "the thigh" he found a "blue spot." There was a hole in the neighborhood of the liver which, in his opinion, had been caused by a "close" shot. There were two buttons near the body which were covered with the same material of which the jacket was made and the thread with which the buttons had been sewn on the jacket had been torn, "not cut." He found an empty shell casing on the ground near the body. On cross-examination by the defense, Mr. Christ was asked to give his opinion as a "criminologist" as to how the "accident" had come about. He stated that in his opinion

"It came to sexual intercourse and she defended herself. The man could not reach what he wanted to do and wanted to use force with the pistol. In the struggle, in a defensive move, the shot went off." He also stated that "if he would have had murderous intentions, the wound would not have been on that place. Because of that, and as a criminologist I come of the opinion that the shot came by accident. Under the circumstances, it could have been a person using a left hand." In his opinion the deceased had thrown off her shoes in her death struggles (R. 44-56).

Dr. Fritz Habermann, at the request of the Vienna police, inspected the body of a woman lying in the vicinity of the Rohrer Meadow about 10:30 a.m. on 3 April. The corpse he examined was the same as that shown on prosecution's exhibits A and B. The coat and jacket were open and the buttons on the coat were missing. Through the underwear and slip and extending into the body on the right side was a round hole through which blood was still running. The hole was in line with the chest warts, was 1.2 centimeters in diameter and had been caused by a projectile. Death had been caused by internal bleeding resulting from this wound. The doctor also found "scratch effects" on the lower thighs and "Through the torn stockings were small scratches, and wet underwear pants caused by urine and *** a round spot on the ground near the sex parts ***. No smell out of the mouth. No signs of a sexually forced act" (R. 58-63).

Joseph Beer, an undertaker, took the corpse shown on prosecution's exhibit A to "the law medicine, Sensengasse" on 3 April 1946 and there delivered it to one Perlitzsky (R. 65-69). Garauslaus Perlitzsky, a worker in the Institute of Law and Medicine in Sensengasse, received a corpse of a woman of approximately 30 years of age from Joseph Beer on 3 April. The corpse "had a shot *** in the stomach." He attached a tag to one of the feet and put the name Charlotte Stowisek on the tag (R. 97,98).

Dr. Fritz Reuter, "regular" professor of judicial medicine, examined the corpse tagged with the name Charlotte Stowisek. On the inside of the upper thighs and also on the outside thereof there were small scratches and very small blue blood spots. In his experience, such scratches were found in cases where "a person who is doing a deed tries to pull the upper thighs apart, but in this case the scratches were not only on the inside of the upper thighs but they were also on the outside. Therefore, this reasoning is not so sure in this case." There was a shot wound in the body, the shot having entered the lower right region of the breast, "in other words the liver region." The "shot channel" was "from the right upper to the left below," passing first through the liver, then through the bowels and finally through the big body artery on the lower left side near the spinal cord. There were no signs of a "close" shot. A projectile of a type unusual in Austria was found in the body. No signs of a forced sexual act were found. Death was caused by internal bleeding resulting from the shot wound. A person with such an injury would not, in the doctor's opinion, be apt to struggle and tear at her clothing in the last few minutes before death.

It would have been possible for a person so wounded to have lived "perhaps twenty minutes" but death would have been the inevitable result of such a wound even if medical and surgical care had been promptly rendered. In the doctor's opinion the wound was not self-inflicted. On cross-examination by the defense, the doctor stated that he was familiar with the position of the two seats in the front of a jeep. He thought it possible but not probable that the driver of the jeep, while seated on the left and embracing deceased on his right, had reached over the steering wheel with his left hand and removed a pistol from a pocket on his right side and in the act of raising the pistol over the steering wheel for the purpose of depositing it on his left side had fired it while in the raised position and pointed slightly downward. If this had occurred "the bullet path would have been more horizontal" (R. 98-108).

Second Lieutenant John W. Campbell, 796th Military Police Battalion, had shared the same quarters with accused, Lieutenant Johnson and Lieutenant Langberg in Vienna, Austria. Around "the middle of April" 1946, accused told Lieutenant Campbell that "he thought he had shot a woman." When asked for an explanation of this statement, accused said that

> "*** on the night before he had been to the officers' club known as the '505 M.P. Club', which was an officers' club for the members of the 505 Military Police Battalion. He said that he had gone there without a female companion and had stayed quite late, until the club was closing, and that he was in the company of several other officers there and that during the course of the evening he consumed quite a bit of intoxicating beverages. As a matter of fact, he related to me that he drank so much that he was intoxicated, drunk. He stated that when he left the club he got into a vehicle, a one-quarter ton vehicle known as a "jeep'. He stated that he had with him at the time a .32 or 7.65 caliber pistol which I knew he had. He stated that as he left the club he drove around parts of the XVIII District of Vienna. He didn't remember exactly how long he drove around, but during that time he said he was in a very intoxicated condition and as the time passed on apparently the effects of his drinking became more pronounced. He stated that he drew his pistol and loaded it and during his driving around through the XVIII District he fired several shots with his pistol at a street light. He related that he knocked out a street light with one shot. Following this he placed the pistol in his pocket and drove around some more in the area of the XVIII District of Vienna. Some parts he didn't know where he was going; he wasn't sure. As a matter of fact, all the time he was telling me this story he seemed very doubtful of exactly what had happened. He stated he didn't know exactly everything that had taken place, wasn't quite sure where he had been or of the times. But somewhere in the XVIII District he saw two young ladies, civilian girls, walking along the street

and he stopped and attempted to speak to them and following a brief conversation persuaded them to get into his vehicle. After they were in his vehicle he drove out in the direction of Grinzing, in the direction of Kahlenberg. Somewhere in the area known as Grinzing he stopped the jeep and allowed one of these girls to get out of the jeep, as she stated that she was going to pick up a boyfriend or another male companion. He stated after this girl got out of the jeep and left the jeep that the other girl remained in the jeep and that he drove off without waiting for the girl who had gotten out to come back with her friend. Following this, he drove up the hill to Kahlenberg. He never did go to the top or the restaurant known as Kahlenberg, but turned off on another road. He stated that he drove down this road a certain distance - he didn't say exactly where or how far - and somewhere on this road, which is in the region of Kahlenberg, he said he turned off. I don't recall whether he said right or left, but he turned off the road on to a dirt road, or an unpaved road, pulled the jeep off a short distance, and stopped it. Following the stopping of the jeep, he attempted some form of petting with this girl. I asked him if she resisted his advances and he said that she did not put up a strong resistance but objected only slightly. Incidentally, I recall at that point that he stated when one of these girls got in she wanted to go home. I don't remember which one it was and he didn't make it clear to me, but one of them wanted to go home. Apparently, it was this woman who went up to Kahlenberg. She wasn't too enthusiastic about his advances toward petting. He stated that all during this time his mind was filled with thoughts of another woman, one he identified as a girl named Margarita. I knew this Margarita and I knew that Poe had had a very, very close association with her over a period of several months, and I knew that she meant a great deal to him. Poe also stated to me at the time that in addition to being under the influence of intoxicants which he had had, he was very upset about this girl Margarita. It seems that he had found out some things about her which were not too desirable and he realized that they were true but in spite of that he had very strong feelings for her. In addition to that, he was expecting his wife to come over to Austria from the States. And he stated that all of these things were going through his mind at the time; that he was somewhat fearful of trouble that might come up between Margarita and his wife. As a matter of fact, he was in very great fear of such trouble. And he stated that while he was talking to this girl, or sitting with her there, that all these things were flashing through his mind and he was very very disturbed and he said he could actually seem to just picture this girl as being Margarita and he had some thoughts in his mind that this girl might even be Margarita. That is the impression I got, that he was so disturbed by the influence of these intoxicants and by his worries and thoughts over his family affair that he wasn't sure exactly what he was doing. At any rate,

he stated that with these thoughts in mind he drew this pistol from his pocket, the pocket of his blouse. Apparently, the pistol was still loaded with a round in the chamber. He placed the pistol in his hand and pointed it in the direction of this girl who he said was sitting on his right. He stated that he placed the pistol in the area of her left breast and the weapon went off and was fired. He had his hand on the gun in a normal manner. After this happened he said the girl gave a slight scream and slumped over, falling out of the jeep. He got out of the jeep and went around and looked at her. She was saying something like, "No, no, no." He stated he could not tell whether or not she was wounded or just frightened and saw no sign of blood. There was obviously something wrong with her, but he did not see an open wound nor did he see any signs of blood, no signs of gunshot wound physically speaking. She had given a scream and fallen over out of the jeep. He stated that he looked at her and he could see her and that she was definitely alive. He stated at that time he again pointed the pistol at the girl and attempted to fire it, but that the weapon failed to fire, that it jammed and apparently was due to some malfunction of the weapon. Following this, he got into the jeep and drove back to his billets in the XVIII District. He said that he went to bed immediately and dropped into a sound sleep, apparently forgetting about the entire incident. He stated that the next thing he knew he woke up about 7 o'clock in the morning. He was very sound asleep and suddenly realized that this nightmarish event had taken place. He was so confused at that time that he wasn't sure what had happened. He seemed to be very doubtful. It had been on his mind all day and he was quite worried about it and decided he had to talk to someone about it, so he came to me. And that concluded his story about what had happened that night. I beg your pardon - I recall he said that later in the day or perhaps that morning he had found a purse, apparently a woman's purse or pocketbook, in his jeep, in the vehicle. Apparently, this purse had belonged to one of these girls." (R. 111, 112,113,114.)

Accused then stated that he had disposed of the purse.

On cross-examination by the defense, Lieutenant Campbell described Margarita as being about 20 years of age. She had blue eyes, a fair skin, very blonde hair, and an exceptionally good figure. Accused had told Lieutenant Campbell that he was in love with Margarita and had indicated that there was a very definite conflict in his mind between Margarita and his wife. On frequent occasions Margarita stayed overnight in accused's apartment. Lieutenant Campbell found accused a likeable fellow, cooperative and attentive to his duties. However, he had formed the opinion that accused had a temperamental background and was emotionally unstable, somewhat

immature and rather "spoiled." At the time accused told Lieutenant Campbell the story of the shooting, accused was quite upset, emotional, and very nervous but his voice was calm. He was somewhat "hazy" about many details.

On redirect examination Lieutenant Campbell stated that accused had told him that he would kill Margarita if she ever broke up "the situation" between him and his wife. Lieutenant Campbell did not take this statement seriously. Lieutenant Campbell had the impression that the story accused told him about the shooting of the girl was "like a nightmare" to accused, "like something unreal, that it couldn't have happened, yet in his mind he felt that it must have happened." There was some doubt in Lieutenant Campbell's mind as to whether the events recounted to him by accused had actually occurred. However, at a later date, Lieutenant Campbell heard one of his men commenting on information he had received from a civilian police source that a civilian girl had been shot somewhere on Kahlenberg by an officer and that the police were unsuccessfully looking for her assailant. Accordingly, about 17 July 1946, Lieutenant Campbell related to a Mr. Steele of the Criminal Investigation Division the story accused had told him. On examination by the court, Lieutenant Campbell stated that accused had told him that while he was sitting in the jeep with the girl who was shot he visualized her as Margarita and was thinking that he would like to do away with Margarita, "but he just didn't have the nerve to do it." (R. 110-132)

On 18 July 1946, Criminal Investigation Division Agent Kenneth R. Granata, accompanied by Agent Krueger, searched accused's quarters in accused's presence and with his consent. Accused was asked whether he had a weapon in his possession and replied that he had an Army .45 caliber pistol and that he did not have any other type pistol. However, Agent Granata found a 7.65 Hungarian "blow-back" pistol in accused's bedroom and, when confronted with this pistol, accused admitted that it was his. About 22 July 1946 Agent Granata asked accused to go over the route he had taken on the night he had picked up the two girls and accused, accompanied by Agent Granata, drove the agent's Pontiac

> "*** down Peter Jordan-Strasse to Billrothstrasse, where the Roxy Theater is located. We stopped there and Lieutenant Poe told me that was where he picked up two girls. We turned left in the general direction of Kahlenberg - Do you have a map here so I could show you? Well, maybe I can go on - We went in the general direction of Kahlenberg and I think we turned up Grinzinger Allee and up the Kahlenberg Road. Part way up Kahlenberg Road the lieutenant stopped the car, where the former 242nd Infantry billets were located, and told me they had stopped there that night and the girl who was riding in the back seat of the vehicle had gotten out to locate a boy friend of hers. While the girl was in the billets, Lieutenant Poe took off again and continued on up the road towards

Kahlenberg. Well, there is a fork about half way up to Kahlenberg, i.e., the road to Kahlenberg goes straight ahead and it forks to the left. Lieutenant Poe took the left turn there and went on for some distance and stopped beside a narrow dirt lane that went out off the main road. He said he stopped there that night and had gone up this narrow dirt road, which has a rather sharp incline, and parked his vehicle and due to the fact that the road had such a sharp incline, the vehicle wouldn't stay put parked in gear. So at that point he backed down to the main road, continued in the same direction he had been going before for some distance, and came to an open spot just off the main road. He said that was where he had parked." (R. 89)

"When we came to the final open spot right off the road, Lieutenant Poe told me that was the spot where he shot the girl. *** it's not paved and it's dirt, quite open. If you drive into this open space, there is a house off to the left, I would say about 100 yards, and there are some woods directly to the front of this open spot and off to the right there is another dirt road that goes up to a rather large hill. The area surrounding this last location is quite open for some distance." (R. 90)

Agent Granata marked the spot where accused stated he had shot the girl on a map introduced in evidence as prosecution's exhibit J. Prosecution's exhibit J is identical with prosecution's exhibit C, and the spot marked by Agent Granata on the former is in the same relative position as the place marked by Ottmar Haslauer on the latter to indicate where he had found the body of Charlotte Stowisek. Agent Granata gave accused no instructions as to where to go (R. 85-97, Pros. Exs. C and J).

Criminal Investigation Division Agent Lloyd J. Krueger brought accused to his office about 12:30 p.m. on 18 July 1946, during the course of his investigation of the death of Charlotte Stowisek. At this time accused was warned of his rights under the 24th Article of War. After some interrogation, Agent Krueger, Agent Granata and accused went to accused's apartment where a 7.65 pistol was found. Accused and the two agents then returned to the "CID" office and accused was again warned of his rights under the 24th Article of War. Accused appeared to understand these rights and no promises or threats were made to him. Accused then made a signed, sworn statement which was admitted in evidence without objection as prosecution's exhibit K. On 23 July 1946, accused called the "CID" office and said that he desired to make another statement. Agent Krueger thereupon went to the 110th Station Hospital where accused was confined and accused handed him a statement which accused had written out in longhand. Accused was again warned of his rights under Article of War 24 and then signed and swore to the statement. No threats or promises were made to accused. This statement was admitted in evidence without objection as prosecution's exhibit L (R. 132-136,141).

In his written statement (Pros. Ex. K) accused said:

"On 2 April 1946, I went to the 505 MP Officer's Club about 1930 hours, where I drank the entire evening until the club closed. On this evening I was carrying, without a holster, a Hungarian, Blow Back, semi-automatic caliber 7.65 pistol, #86183, on my person. I had been drinking a great deal and when I started to leave the club I tried to take the pistol from beneath my left arm pit to place it in my short coat and it slipped from my hand and fell to the floor. 'George', a car guard, retrieved it and I placed it in my right hand short coat pocket. When leaving the club I was very despondent due to the fact that I had told an Austrian girl, whom I had been going with that she must get out of my life and find someone else because my wife was coming the following month. I had known the girl for some time and my mind was unrestful because I had to tell her that she was not to see me anymore. I got in my 'Jeep' alone and started to go home and decided to go for a ride. I rode around town for a while and took several shots at some street lights with the pistol. I put the pistol in my right hand coat pocket without ejecting the round from the chamber. I then decided to go home again, but due to my intoxicated condition I couldn't find the way. I came to Billrothstrasse by the Roxy Theater and saw two girls waving at me. I stopped and asked the girls if they wanted to go dancing. They agreed, but said they would have to go and pick up a friend. We went out in Grinzing to the EM Billetts of the 242 Infantry. The girl in the back seat got out and went into the billets for her friend. As soon as the girl got out the other girl sitting in the front seat started running her hand up and down my leg. She couldn't speak English and I said "Okey let's go". I started up the road to Kahlenberg and when I came to a fork in the road about half way up the hill I turned and took the left fork. I turned right off the main road onto a dirt road and stopped. Because there was an incline on this road and the jeep would not remain still I backed out to the main road again and started on down this thoroughfare again. I came to an open spot and drove off the road and stopped the jeep. I started making advances to the girl but she did not offer too much resistance. My gun, which was in my right hand short coat pocket was in the way and I wanted to transfer it to my left hand pocket. I grasped the weapon by the grip and in pulling it from my pocket, it discharged. The girl screamed and opened the door of the jeep. She had one foot out but fell from the jeep to the ground. I was frantic and got out of the jeep and ran around to the side where she had fallen. She was squirming on the ground and I bent down to look at her. She looked at me and turned her head in the opposite direction. I got back into the jeep and left her lying there. I drove back to my billets and went to sleep. I put the pistol in a desk drawer the next morning. I went down to

the jeep and noticed a pocketbook lying between the front seats. I picked it up and took it to my room where I put it in a foot locker. I saw no blood in the jeep. The pocketbook I found in the jeep I threw away after having burned the contents. The reason I did not report the incident was because I thought the girl had fainted when she started getting out of the jeep from the sound of the shot, in addition to the fact I could find no blood in the jeep. Today I was shown a pistol by Agents Granata and Krueger, namely a Hungarian, Blow back, semi-automatic caliber 7.65 pistol #86183 which I positively identify as my pistol and the one I had in my hands that discharged in the manner described above in my statement. I have read the above statement consisting of two typewritten pages and to the best of my knowledge and belief the facts contained therein are true and correct."

In his second written statement (Pros. Ex. 1) accused said:

"I, Lloyd R. Poe *** do hereby make the following statement: in addition and accordance with my original statement pertaining to the actual incident which took place at the spot where the girls body was found, the full particulars of which were not clear in my mind do to my drunken condition on the night 2 April 1946 and the almost four months which elapsed between the time of the accident and my confession.

"After backing down from the first road which was to steep for the jeep to remain stationary as I stated originally, I proceeded along the main highway again at which time the girl I had with me decided she wanted to go home and asked me to turn around. But I continued a short distance to the fork of two dirt roads where the girls body was found. When I had stoped she opened the half door which was on her side of the jeep and motioned that she would walk home if I didn't take her. I started the motor and was going to leave her there and I started to back away but she hung on to the door and I understood her to say she would stay here for five minutes with me. And as she climbed back in I grabed her to caress her and as my weapon which was still fully loaded was in the way, I reached into my right short coat pocket with my left hand attempting to transfer it to my left pocket. I remember I had it out of my pocket, when for some reason the girl tried to push away from me. The next thing I knew the gun had discharged and the girl started to fall from the jeep screaming angrily at me. Then she stood there with the aid of the helf door. I don't know what possessed me after that, I guess I was afraid someone might have heard the shot all I knew was that I wanted to get away and she was still there hanging on and so I backed up and forward again with the jeep trying to shake her off, but still she hung on speaking something in German. So I got out and went around to her and

made her release her grasp on the door and tripped her to the ground. I still had the pistol in my hand and she cried "no" and turned her head away without saying anything more. I thought she had fainted and so I ran around to the drivers seat of my vehicle and drove away without any lights."

Evidence for the defense

Eleanore Edelmann's reputation for truth and veracity was not good (R. 153,154,157).

Second Lieutenant Stanley Johnson, G-4 Section, Vienna, Austria, had known accused approximately nineteen months, both in the United States and overseas. He had shared an apartment in Vienna with accused, Lieutenant Campbell and Lieutenant Langberg. Margarita frequently visited accused in this apartment and remained overnight. Margarita was "a rather attractive girl, a fairly nice figure. She is not an innocent girl by any means. She has seen a lot of the world and I didn't particularly have any liking for her." Accused was well liked and was "a lot of fun at a party" but was temperamental, rather hot tempered, and quick to come to decisions either for disliking or liking a person. Accused was not a calm person. There were times when accused would drink and feel quite happy and then there were times when he felt moody and showed that he desired to be alone. Lieutenant Johnson noticed nothing unusual about accused's general conduct or demeanor during the months of April and May. Accused brought Margarita to the officers' club in the latter part of May and was in her company three days before his wife arrived. Prior to that time he had been separated from Margarita for about three weeks. Accused was trying to break off with Margarita and "surprised us all" by bringing her back to the club. On the first of June accused's wife arrived (R. 158-171).

Lieutenant Herman A. Langberg, 796th Military Police Battalion, had lived in an apartment in Vienna with accused, Lieutenant Campbell and Lieutenant Johnson. He had known accused in the United States and had attended officer candidate school with him. Lieutenant Langberg and accused had several disagreements at the time they were living together. Accused was a little quick-tempered and inclined to go off by himself, into his separate bedroom, when things did not go exactly as he desired. Accused seemed inclined to worry considerably. Lieutenant Langberg did not like Margarita. The fact that Margarita was often present in the apartment was the greatest cause for disagreement between the two officers. Lieutenant Langberg especially disliked to have Margarita remain in the apartment when the officers living there were not present. Also, she would be in the bathroom in the mornings when the officers were in a hurry to get to work and wanted to shave. Sometimes, accused would agree that Margarita's presence in the apartment under these circumstances was not proper but on other occasions he would get arther angry when the question was brought up. Accused had

stated that he loved Margarita and that he was very upset about what he should do when his wife arrived. Accused also loved his wife. On several occasions when accused, on a "double date" with Lieutenant Langberg and his girl friend, called for Margarita at her residence, Margarita was not home and had left a note saying that she was at some civilian club and that she was to be "picked up" there. On these occasions, accused would be "put out about it and said he was going to quit going with her, but he always would be back with her in the next two or three days." One night accused awakened Lieutenant Langberg and said that Margarita had tried to commit suicide by taking an overdose of sleeping tablets. Accused was worried about her condition and did not know what to do. Lieutenant Langberg looked at Margarita, prescribed a course of treatment for her and went back to bed. On cross-examination by the prosecution it was brought out that after accused's arrest, Lieutenant Langberg went to the 110th Station Hospital to visit accused. In the course of a general conversation accused stated, concerning the incident which had been the cause of his confinement, that

> "*** he had had considerable to drink that evening and had been at the 505 officers' club and he had left there. Upon leaving he had driven around for awhile and he had a pistol with him and proceeded to shoot out the street light bulbs, and drove on some more and stopped to talk to two women on a street corner. In the course of the conversation, they got into the vehicle with him and went to one of the ladies' houses, whereupon she got out and went into the house. After waiting a short time, this other lady and he drove away. After driving for awhile they stopped. He said that he proceeded to put his arm around her, or something to that effect, and in so doing the pistol that he had in his pocket was uncomfortable. He reached into his pocket to remove it and in so doing it was discharged. And the girl then stood up in the vehicle and screamed and stepped out the side of it and was lying on the ground. He said he got out of the jeep and walked around it and went over to her and that he could see nothing, no blood or anything on her, and thought that he may just have frightened her, not actually hit her. He didn't know exactly what had happened or what to do, so he got back in the vehicle and drove off." (R. 185-186)

Lieutenant Langberg knew of no occasions wherein accused had used violence of any sort toward Margarita or any other woman. Margarita and accused used to "scuffle around" in the apartment in a playful manner (R. 172-188).

Second Lieutenant James I. Duffield, 514th Quartermaster Group, Munich, Germany, had known accused "intimately" for over a year in the United States and had attended officer candidate school with him. Accused was emotionally unstable and temperamental. After drinking bouts, which were quite frequent and in the course of which he would drink "quite a little," accused would be

subject to periods of depression. Accused had stated that he was not sure whether he had "done the right thing" in marrying his wife. Few people could "handle" accused (R. 189-193).

Margarita Gwozdecki, a Viennese dancer, had known accused for about ten months. After she first met him she saw him "every day" and often went with him to his apartment where she stayed overnight. She and accused were very much in love with each other. Accused was jealous of Margarita and did not like her to talk or dance with other men. During this period of time she never had any quarrels with accused. Accused had told her that he was married and that his wife was coming overseas to live with him. In view of this situation, accused and Margarita agreed that they would have to terminate their relationship. The "last night at his apartment" she could not sleep and had a headache so she took some sleeping pills. Accused awakened her and asked her what she had done. He seemed very nervous. She mentioned having taken the pills and accused, after asking some one in the next room what to do about her condition, made her regurgitate. She then went back to sleep and left the apartment the next day. Eight or nine days later she saw him drive by in a jeep. He stopped the jeep and asked her to get in. They drove to a "little landing" half way up Kahlenberg and there entered into a conversation.

> "We talk about love from us and after he says, 'I know you love me. Maybe I love you now, but I must talk to you.' And he talked to me, after this I go from him this day. I left him. He comes back from his job and look for me and never find me at his apartment. So, he was very nervous. He doesn't know what happens with me. In the evening he goes to the club and gets drunk, and after he ride to my apartment and look for me. The apartment was closed, so he doesn't know what happens with me. He was very nervous and excited and he knows I took the pills, so maybe I be home, I be in the hospital - he doesn't know. He ride back on the streets and took the pistol and shoots street lights. And he comes on the street and there are going two girls. The girls talk very loud and he stopped the jeep and the two girls goes in. He drives with the two girls in the jeep. After the next time one of the girls want to go out. He let go out this girl and he told he drove the other girl to Kahlenberg. He had a cognac or whiskey in his jeep and they drunk together there. And after, they kissed together and so he drove over there and find the place where he can park the jeep and naturally they kiss together and maybe they want more. The girl was on the right side and kiss him and he kiss back, so they want love. I think so. And he has in the right pocket something that is no good for him. It was a pistol. So, he took it out of the right pocket and want to give it in the left pocket. The girl was drunk, so he took out the pistol with the left hand and want to give it in the left pocket. In this moment the girl kiss him again and he was thinking about me and lose his head and kiss the

girl again and he forgot he has the pistol in his left hand. They kiss again and after he looks at the girl and the pistol was exploded. He doesn't know how it happened. He doesn't want to shoot, but he forgot he had the pistol in his left hand. So, he was very, very excited and he think about me and he doesn't know how it happens that the pistol is exploded. So, after, he ride home and go to bed. The next day Lieutenant Poe wake up and he was thinking he had a bad dream. He was thinking about that all and he was very nervous in his head and he doesn't know is it true or it was a dream, so he get out in his jeep and he find something from this girl in there. So, he says it was not a dream; it must be true. So, he look and he go back in the hall and he thinks he must be crazy in his head, but he thinks it true. He is one of these people he need someone to talk to him. So, the first one he found was Lieutenant Campbell. Lieutenant Poe go to him and talk about that, but he was not right in his head. It was one day before he had met this girl. He can't believe what he talked to Lieutenant Campbell. So, he talked to him and after seven, eight, maybe nine days, I saw him and after eight days he was thinking about that and told me that and Lieutenant Poe talked to me. That is the truth what he talked to me. And I talk over here and that is the truth what I know." (R. 200-201)

Margarita and accused were together again about three days before accused's wife arrived and she saw him thereafter, "but only for one hour, two hours" (R. 196-210).

Doctor Otto Kauders, head of the psychiatry clinic of the University of Vienna, in conjunction with Captain Centa, an American psychiatrist, examined accused between 6 and 12 October 1946. Doctor Kauders made a case study of accused, taking into consideration accused's family history, his personal history and all the circumstances surrounding the crime allegedly committed by accused. He stated that

"*** the family history was not a favorable one for the development of a full, determined personality. For instance, it is mentioned in the family history of the accused that his family lead what he calls a nomadic life. The family went from one place to another. The boy changed schools and being already, of course, at this time a weak personality, he got from one influence under the other. And it is mentioned in the family history that there was much quarreling in the family. The father and mother didn't live in very good happy relations, so that has also had a bad influence on the development of the boy, but there is nothing remarkably important in the family history except that the father of the accused seems to be a nervous and irritable personality." (R. 218)

"Also, his personal history gave us the impression that he was a very emotional personality from the very beginning.

When he met difficulties, he got always under an emotional strain and he behaved very emotionally in an unbalanced way. It made a great impression on us that when the patient in the beginning of the year 1945 was denied admission to the Air Corps, he behaved in quite an irrational and emotional way. He got very angry, got drunk, and was punished for that. We have other examples in the case study that also on slight occasions in which a man, especially an officer must sustain, he got nervous, emotional, and very near to emotional outbursts." (R. 219)

Concerning accused's relations with his wife and with Margarita, and their effect on the events resulting in the death of Charlotte Stowisek on the night of 2 April 1946, Doctor Kauders said:

"*** The first thing which impressed me was that he decided very quickly to marry her [his wife] and he married her at, I think, the beginning of 1945, so that at the time he was not 19 years old, at 18, and the married life of the accused was a very unhappy one. From our medical point of view, we consider the unhappiness of this life that didn't lead to very happy, normal sexual intercourse. There was a mutual masturbation as far as I could understand. To the accused this did not bring the physiological satisfaction of normal sexual life; on the contrary, it increased the nervous tension under which the accused was living. When the accused arrived in Vienna in December of 1945, I think, a new figure came into his life and it is the girl called Margarita who played such an important role in the whole proceedings, and he hadnow quite normal sexual experiences and to a very high degree he got under the spell of this girl. It was a very troublesome situation for him to know that very soon, in a few weeks, his wife would arrive. He got deeper and deeper into the relation with Margarita, and from the psychiatric point of view we must say that he got wholly dependent of her.

* * *

"*** I think that from January to April of 1946 the accused lived under perpetual nervous strain and he was in a deep conflict concerning his love affairs and the things came to a crisis when on the second of April there was taken up the decision on the part of the accused to separate himself totally from Margarita. But at the same time, as always in such cases, he knew very well in his interior that this separation was not possible for him. He just could not separate or detach himself totally from this woman under whose influence he had gotten so deeply. He despised himself and he despised his weakness and on this day he was also under the influence of much teasing from his comrades. It is mentioned in the facts that he was in the afternoon at the club 505, where his comrades teased him very

much and he got very irritated. It made him ashamed. It made him ashamed that everybody laughed at his decision to separate himself from Margarita because he wished to separate himself, but at the same time he felt his absolute weakness in this point. He felt that again and again it was not possible for him to get rid of her. In this already nervous and excited state of mind, the accused drank an unusual amount of alcoholic beverages. We tried as psychiatrists to make clear if the accused had a remembrance of everything, of every detail, that happened on this unhappy day of the second of April, 1945, and concerning all the facts which happened in the club his remembrance seems to be not a very good one, not concerning all the details. I think this drinking attributed a good deal to his already certain degree of abnormal state of mind.

* * *

"I think that on leaving the 505 Club his state of mind can't be considered quite a normal one because the accused behaved in a very peculiar, abnormal, irrational way. He did a thing which, of course, he never did before. He shot at street lights and he had just a tendency to shoot. He told us that he sawin one of the street lights the face of Margarita and in shooting at the street light he had the idea of revenging himself, of killing Margarita. He told us that afterward he was obsessed by the idea of killing. He had not the idea of killing Margarita or killing a certain person, but he was obsessed by an idea of revenge, of killing, and then he made the acquaintance of the girl who was afterward shot by him, in this state of mind.

* * *

"If I may summarize, I want to say that at the time of the alleged crime, of the act, the state of mind of the accused was an abnormal one due to the following facts: We must consider the accused as a weak, immature, emotionally unstable personality - number one. Then, we are coming to the stress and strain of the last month with the perpetual conflict between Margarita and his wife. Number three, with the actual conditions of the night of the second of April, the alcoholic intoxication - if I may say so - combined with the emotional crisis resulted in an emotional outburst which first led the accused to the already mentioned fact of shooting at the street lights, and then brought him into this state of mind in which he committed the crime. If I may say what is to be told about the state of mind during the act, we consider such a state of mind as very limited, as very narrow. He had one idea - we say compulsory idea - in his mind to kill and it was completed. As the accused told us, he would have killed anybody who would have come in his near presence." (R. 219,220,221)

When, on the first examination of accused by Doctor Kauders, accused was asked to explain the inconsistencies between his various confessions, he became very nervous. It was not until the second examination that "he told us that he had killed." On this second examination accused had a very strong emotional outburst and behaved like an unbalanced person. He was weeping and trembling and it was "almost impossible" to get all his words. When Doctor Kauders was asked whether, in his opinion, accused was sane at the time of the alleged offense, the doctor replied:

> "As we express it, his ability, his insight into the situation, was impaired and his ability to adhere to the right was diminished ***. It was not that he was totally insane during the act, during the deed, but his insight was impaired and again his possibility to resist aggressive tendencies which he had was also diminished."

Doctor Kauders and Captain Centa were in accord on all opinions and conclusions formed as a result of their examination of accused.

On cross-examination by the prosecution Doctor Kauders stated that accused was not psychotic but had a psychopathic personality. On the night of 2 April 1946, accused was able to distinguish between right and wrong "in such effect as a crime of murder." Doctor Kauders further stated,

> "He told me that - if I am permitted to look at my remarks - 'I ever heard the word before me, "Kill, kill, kill!" If somebody else was there, I would have been pressed to kill him. I wished to free myself, but I was not able to free myself.' We took notes. He first said he had the idea to kill Margarita and then he had the idea to kill anybody.
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> "*** He told me as far as I can remember - the secretary couldn't follow due to the emotional outburst - but, as far as I could understand the accused, when the car stopped he touched the body of the other girl and he decided to shoot her in the left side of the body, into the heart actually, but changed his opinion and shot her in the right side.
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> "*** It was at this time impossible to put logical questions to the accused. He was crying and weeping and his only wish was to see the priest, the chaplain, and when we had gotten to this point it was from the psychiatric point of view necessary to interrupt the conference, the examination." (R. 240,241)

Accused's ability to adhere to the right was not diminished at the time of the mental examination. (R. 215-241)

Doctor Frieda Aufreiter, a member of the Viennese Psychoanalytic Association, made a psychiatric examination of accused on 24 October 1946 at

the request of defense counsel. She gave the following detailed account of her findings:

"*** If we consider first the relation that the accused, Lieutenant Poe, had to that Viennese Margarita, then we have to state that that relation was one of sexual bondage. The explanation of this relation is not easy to give because to explain that relation of sexual bondage, one has to perform more inquiries that go back to his infancy; but it is easy to presume that this relation of sexual bondage was only possible to come up because in his childhood, in his infancy, he has had certain experiences and certain fixations because that relation that we call sexual bondage is one that transfers, the situation of his early infancy, and therefore he is bound to that woman. He can't free himself easily. His other personality shows that he has certain fixations to his mother who defended him against his father, who didn't come up to the position as the father of the family, and it was the mother who took care of the children and took the responsibility. The situation with that girl Margarita was most certainly in a way similar to that attitude that he held towards his mother, of being in bondage, of referring to her, of not being able to be alone, and therefore this relation to that girl was for him very hard to break. It wasn't easy for him to separate from her, yet he had difficulties because of her with his friends who despised him, who ridiculed him, and according to his own statement he lost some friends because of her. When his wife had to arrive, he at last achieved the strength to separate from her. That was on the day before the incident. On the night of the incident, he went to his friends, he had drunk, and he wanted in a way sympathy from them, but they ridiculed him and told him that they were sure that tomorrow he would again run back to her. That, with the alcohol, caused a considerable excitement. When we now state how his behavior on this night was inexplicable to a reasonable mind, we have to discuss that, if that crime is at all explicable, because his behavior on that night shows certain characteristics that are not to be understood. For instance, he drove through the streets with the wish to kill that girl. He saw her face in the shine of the lamps and he was shooting towards them. You could explain that state, or you could try to explain that state, with the common drunkenness, but a man who is drunk, and badly drunk, does not shoot in the streets, but in company and he doesn't have hallucinations that he is shooting toward the face of someone he knows. The aggression of a common drunken person is simple; he doesn't drive through the streets and dream about these things. We have to assume therefore that that situation was a fantasy that he was killing her. It was a state on the border because he had the feeling that he wanted to kill her, he wanted to free himself at last from her, and yet he didn't try really to go to her house

to look for her and to kill her. Then he met that other girl, that unknown girl, who was certainly, as Margarita, a girl of dubious character. He went first with both of them, then with one of them, and in a certain moment he killed her. Why? There is no explanation to a reasonable mind why he should have killed her in that instant; but when we consider that that girl was also a girl of dubious character and that they got intimate in the moment he killed her, we can state that probably that girl took for his feeling the place of Margarita. It was a moment when his reasoning mind and his reasoning faculties, the critical and intellectual faculties were eliminated and his subconscious mind was in full action. The fact that you mistake a person can happen to everyone, especially to a drunken person, but then he will mistake her from the beginning; but he mistook her just in the moment when she was going to be intimate with him, when she made advances to him. And as she had certainly in that moment the same behavior as that other girl who also was of dubious character, she replaced her to his unconscious mind. Now, if we state that to him that replacement was possible, we have also to state that his reasoning mind was not in full action, was not capable to distinguish that this girl was not Margarita, and we again go back to this state he had in the beginning of the evening, of his raving and driving through the streets and shooting at her face. Then we have to say that was also a state when his reasoning mind was not in full action, where his unconscious mind was filling up his personality, and the urges and the aggressive impulses of his unconscious mind came to dominate. Now that is the situation as you see it from a psychoanalytical point of view, but to discuss it from a psychiatrist's point of view you have to ask why, how it is possible that he was in a state where the reasoning mind was not functioning. Then, you have two possibilities. Was he commonly drunk, or was he in a psychotic state of drunkenness? When you take the one possibility - was he drunk? - then you have to look for the characteristics of the common drunkenness. There you see certain physical symptoms, as inarticulate language or unsteady walk. Then the aggression of the drunken person is usually direct. A drunken person fights with his comrades. But to run around and drive around for hours and then to mistake another person for that one he wanted to kill, that is not the way a drunken person acts. So, if you assume that he was commonly drunken and planning murder because he had the murderous impulse - he states that himself, that he wanted to kill this girl Margarita - was it possible for a common drunken person to mistake for Margarita that unknown girl he killed after seeing her for a long time? I think you have to agree with me that he would have mistaken her at the first moment. So the explanation that he mistook her lies in a replacement of her in his unconscious mind. *** There is a certain state of mind which is called the pathological intoxication. ***

* * *

"If I refer to Billwanger, who describes that state, he distinguishes in the effect that the alcohol takes on the human body in two ways. One is that quantatative intolerance arises. That means the human body is intolerant to a certain amount of alcohol and if that amount is given to the human body, it reacts first with a state of excitement, then with a state of paralysis that can lead to death if the amount of alcohol is large enough. Then, this quantatative intolerance to alcohol is common as generally applied to everyone and everybody will react - to a certain personal difference - to the amount of alcohol in the same way. Then, there is qualitative intolerance. That means that the human body under certain predisposed factors reacts to the quality of alcohol in a certain way and that certain way of reacting is not caused by the amount of alcohol, but just by the fact that it is that substance, and it leads to a psychotic reaction. That reaction is called the pathological intoxication, and as the amount of alcohol that comes into the human body is not large at many times, you don't find the outward signs of drunkenness. Therefore, that man who reacts with a pathological intoxication is outwardly not drunk. His way of behavior is not different from other people, but his mind is not clear. He will tend to invite violent acts of aggression. He will knife an unknown stranger, an unknown walker on the street, without apparent reason. The explanation of his action in this state is not possible for there is a temporary insanity. The predisposed factors to that state are different. The state is well known as an epileptic illness because the qualitative intolerance is commonly known as an epileptic fit and can be caused by a small amount of alcohol, and also that pathological intoxication can happen to epileptic illnesses when they are drinking alcohol. Therefore, its predisposed factors are traumatic injuries of the head or of the brain, or other organic illnesses as tumors of the brain or syphilis of the brain. ***

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"*** when I examined Lieutenant Poe on the twenty-fourth of October, he was in a state of mind that showed paranoiac ideas. There were ideas of persecution. He had the feeling that the people around him wanted to kill either him or even the girl Margarita. That is a behavior that is not easy to understand. If you want to clarify that behavior, you have to make a longer observation, because often psychosis has in the beginning of the illness that pathological reaction. Then, if you test his behavior on the critical night, you see that he reacted to the ridicule of his friends in a way that showed that his head was not directed toward the company. For, if a person is ridiculed, he tends to defend himself and if he is drunk, he will be aggressive towards them. But his head was directed against that girl Margarita, from whom he had separated, so he had the feeling that she brought him into that ridiculed position and that his friends didn't find him capable to separate from her. Therefore,

she was so strong that he wanted to kill her in order to show them. That was not his reasonable mind that made these reckonings, but that was his feeling, his feeling of hate towards the obvious cause of the whole situation. When he went away from them, he was driving through the streets. He had illusions and hallucinations, which are described in that state of pathological incontinence. He is shooting at the face that he imagined he saw in the glare of the street lamps. Yet he was able to drive and he showed no symptoms of obvious drunkenness. He drove around her house but he didn't try to fetch her, to get her, and to kill her. That shows that he was not planning murder, but that he was living in a visionary world where his wishes, where his aggressive impulses were so strong that his reasonable mind couldn't function or plan. And when you take the third event, that he mistook that girl for Margarita, we have to state that how was that possible that he mistook her? Was she similar to her or was she behaving in the same way? If we state that her behavior caused that, then we have to again assume that his state of mind was deranged by his unconscious, because only in the term of the unconscious a person can replace another one by the way of the behavior, but by no outward similarity. His behavior after the incident, that he just went home and slept, is the usual finishing of that state because that pathological intoxication is terminated by a state of a long sleep. Then, his action on the following day, that he didn't know actually what had happened, and told the whole story to a friend, cannot be fully explained. It shows that he was not conscious that that happened. He had only a dreamlike feeling, and that is an interesting point. Some authors say that if there is a pathological intoxication, there is an amnesia and for the incident a lapse of memory. But Billwanger and my teacher, Professor Poetzl, my former chief, state that that is not true, that also a common drunkenness can be followed by amnesia, whereas the pathological intoxication often shows only a dreamlike memory. *** When we discuss the possibilities of what predisposed factors in the case of Lieutenant Poe we could assume to have caused that state of mind, I have to state that there are some. One is that, as Billwanger states also, a great emotional stress can make it possible that that qualitative intolerance takes place, and on that critical evening he certainly was in that condition. A second possibility is that, as I stated before, he showed when I examined him certain ideas of persecution, which in his case may be the beginning of a psychosis. That can't be cleared up now because only a longer observation under a psychiatrist can clear that point if in his case the beginning of a psychosis produced the state of temporary insanity, as the pathological intoxication is also called. A third possibility may be in this case there is an organic change

in the brain, because I was told by Captain Conason he was operated some months before, a gynecomasty of the left breast, and the histological examination showed that he was on the border of malignant growth. And you see, it is improbably that in his youth that gynecomasty was malignant, but the fact cannot be excluded and it would show one of the predisposing factors." (R. 244-250)

In her opinion accused was in a state of pathological drunkenness at the time of the offense allegedly committed by him on 2 April 1946. A person in a state of pathological drunkenness cannot distinguish right from wrong and adhere to the right.

On cross-examination by the prosecution, Doctor Aufreiter stated that accused had a psychopathic personality, but his actions on the night of April 2 were the result of pathological intoxication. When accused was examined by Doctor Aufreiter he "was mostly crying and didn't want to take into consideration the real facts of life." Accused had no capacity to distinguish between right and wrong and to adhere to the right at the time of the homicide for he was following an irresistible impulse and his reasoning mind, his conscious personality, was eliminated. In the doctor's opinion accused made the statement that he had killed the girl in an accident because "for him it was the easiest explanation he could find, as the real incident of the night was not explainable to him." A person can be in a state of pathological drunkenness for a period of from several minutes to several days and before or after this period it is impossible to detect any pathological disturbance in such person. Accused was in a state of pathological drunkenness only on the night of the killing. The doctor's opinion was formed from a reading of accused's personal and family history, from a consideration of his written statements and the admission he had made to Lieutenant Campbell and from a personal interview with accused. This interview lasted one hour and a half. On examination by the court, the doctor was asked if a person in a state of pathological drunkenness upon finding it unsafe to park a car at a certain place because of the condition of the ground underneath could logically be expected to make a decision to seek a safer place to park the car. She replied in the negative on the ground that such a person would not be bothered with the safety of the car. "A person in that state is governed by impulses and it would probably be easier to just abandon the car than to bother about the way to treat with it." At the time of the mental examination, accused was, in the doctor's opinion, in a state of hysterical regression resulting in his being emotionally unable and unwilling to cope with the situation confronting him (R. 242-266).

Accused, his rights as a witness in his own behalf having been explained to him, elected to remain silent (R. 268). He was defended by the regularly appointed defense counsel and by civilian defense counsel of his own selection.

Evidence for the court

Captain Arnold Conason, neuropsychiatrist of the 110th Station Hospital, was called as a witness for the court. He had seen accused daily from about 15 October 1946 to the date of trial. On 24 October, accused cut both wrists with a razor blade, the cuts being superficial. He refused to go to bed when told to do so, cried and fought seven of the hospital personnel until he was put to sleep by an injection of sodium penethal. Captain Conason had an administrative problem, "Shall I keep him in a strait-jacket or shall I not?" In the captain's opinion, accused was, at the time of trial, in a constitutional psychopathic state, emotional instability severe. This diagnosis of accused's mental condition was based on

> "One, the episode of Thursday, 24 October 1946; two, his immature answers to many questions, such as, 'Get me out of this strait-jacket,' ten minutes after he is in the strait-jacket, persisting on doing that; three, his request to have Margarita come and stay overnight at the hospital; four, the possession of a little doll that he values tremendously and has a definite fixation upon; five, his lack of anticipated anxiety and emotional disturbance, the lack of it, in view of the situation; six, his concern about personal appearance when his concern should be on a greater scope." (R. 274).

However, accused was "sane" at the time of trial, knew the difference between right and wrong, knew what was going on in the court room and was able to assist in his own defense (R. 268-274).

4. General Discussion

Accused was found guilty of the murder of Charlotte Stowisek. Murder is defined in the Manual for Courts-Martial, 1928, as "the unlawful killing of a human being with malice aforethought." In discussing the term "malice," the Manual 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. ***" (MCM, 1928, par. 148a).

Justice Holmes, while Chief Justice of the Supreme Judicial Court of Massachusetts, 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).

And in CM 314939, Greene, the Board of Review said,

"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 ***. 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."

In the instant case there can be no doubt that the body of the woman found on the slopes of Kahlenberg on the morning of 3 April 1946 was the body of Charlotte Stowisek nor can there be any doubt that a shot from a gun in the hand of accused was the cause of her demise. Aside from the questions of mental responsibility and intoxication, which will be discussed later, the problem here presented is one of the degree of accused's homicidal act. Was the shot which took Miss Stowisek's life fired with malice, making accused's offense murder, was the fatal shot the result of accused's culpable negligence, resulting in involuntary manslaughter, or did the deadly bullet find its target without the aid of guilty motivation or omission of legal duty on the part of accused so as to give his act the character of pure accident? The various and inconsistent pre-trial statements of accused contain the only direct evidence of what may have actually occurred at the trysting place on Kahlenberg on the night Miss Stowisek met her death, for there were no human witnesses to the event other than accused and the dead woman.

Accused told his friend, Lieutenant Campbell, that, under the influence of intoxicants and the anxiety caused by his conflicting emotions concerning his wife and Margarita, he became subject to the delusion that the girl sitting beside him in the jeep, Miss Stowisek, might, in fact, be Margarita. He wanted to do away with Margarita, but "just didn't have the nerve to do it." He drew his pistol from his pocket and placed it "in the area of her left breast and the weapon went off and was fired." She screamed, slumped over and fell out of the jeep, but when he got out of the jeep to look at her he could not tell whether she was wounded "or just frightened" and could see no sign of blood. He then pointed his pistol at her and attempted to fire it, but the pistol jammed and failed to fire. Thereafter, he drove back to his apartment and went to sleep, leaving Miss Stowisek where she had fallen. In his account of this incident to Margarita, he stated that the pistol he was carrying in his right coat pocket got in the way of his amorous advances towards Miss Stowisek, who was seated on his right, and that while he was in the act of removing the pistol with his left hand, the deceased embraced him, causing the weapon to be fired accidentally. After accused's arrest, he repeated, in substance, this latter version of the shooting to his friend, Lieutenant Langberg, and further stated that since he could see no evidence of Miss Stowisek having been wounded and did not know "what to do," he simply drove away from the scene.

In his two written statements made to an agent of the Criminal Investigation Division, accused again asserted that the pistol had been fired accidentally, but there is a considerable variance in these two statements as to the circumstances leading up to and immediately following the discharge of the weapon. In his first written statement, accused claims that deceased did not offer "too much resistance" to his advances. The pistol he was carrying in his right coat pocket becoming somewhat uncomfortable, he grasped the weapon by the grip and in pulling it from his pocket it fired. Decease screamed, fell from the jeep and was writhing on the ground when accused got out to look at her. Accused was frantic, got back in the jeep, and returned to his billets leaving deceased behind. He had not reported the incident because he thought his famale companion had merely fainted at the sound of the shot and he could find no blood in the jeep. In his second written statement, accused admitted that during the ride to Kahlenberg, deceased had expressed a desire to go home and had asked accused to "turn around." When accused stopped at the place where deceased's body was found the next day, deceased opened the "half door" which was on her side of the jeep, got out, and said she would walk home if accused did not take her home. Accused started to drive away, intending to leave her, but deceased clung to the door and told accused that she would remain there with him for five minutes. When deceased climbed back in the jeep, accused embraced her and found that the pistol in his right coat pocket was in the way. As he was in the act of removing the pistol with his left hand, deceased pushed away from him and the pistol fired. Deceased, screaming angrily at accused, fell out of the jeep but was able to remain upright by grasping the door. Accused, afraid that someone might have heard the

shot and wanting to get away, unsuccessfully tried to shake deceased loose from the jeep by driving back and forth. He then got out, made her release her grip on the door and tripped her to the ground. Deceased became silent and, thinking she had fainted, accused drove away "without any lights."

It thus appears that in accused's explanation of the fatal shooting to Lieutenants Campbell and Langberg and to Margarita and in his two written pre-trial statements there is a claim that the pistol was discharged without volition on accused's part, that nothing more than mere mischance attended the act which resulted in Miss Stowisek's death. Where the prosecution relies solely on accused's admissions or confessions to connect him with the commission of a crime it is bound by accused's statements considered in their whole effect and the jury is not at liberty to reject or disbelieve the self-serving statements while accepting the disserving statements therein unless there is other evidence in the case tending to render the self-serving statements questionable, doubtful or inconsistent (State v. Dunkley, 85 Utah 546, 39 P. (2d) 1097; Forrester v. State, 93 Tex. Cr. 415, 288 S.W. 40; Eagan v. State, 58 Wyo. 167,128 P. (2d) 215, 225; CM 238485, Rideau, 24 BR 263,273; 26 A.L.R. 541). Nevertheless, since an inference of the untruth of such exculpatory statements may be drawn from all the evidence (Walker v. State, 138 Tex. Cr.343, 135 S.W. (2d) 992; CM 237145, Phillips, 23 BR 281,286), in view of the somewhat questionable character of the "accident" as described in accused's admissions to Lieutenant Campbell, accused's brutal and callous conduct, pregnant with malice, as portrayed in his second written statement and the highly inculpatory circumstantial evidence, it is indeed doubtful that the court in the instant case would be held to a finding of innocence or of no greater offense than involuntary manslaughter. We are not, however, restricted to such a narrow consideration of the degree of accused's guilt in this case, for accused has made other statements which amount to a full confession of the crime of murder and fasten upon his acts on the night of the 2nd of April the stigma of uncontrolled passion and depraved morality.

Doctor Kauders, called as a witness by the defense in an attempt to show that accused was mentally irresponsible, testified on direct examination that accused had told him that on the night of the homicide in question he shot at a street light because he saw the face of Margarita therein and wanted to revenge himself against her and that he was afterwards obsessed by the idea of killing, of killing anyone, and "made the acquaintance of the girl who was afterwards shot by him, in this state of mind." On cross-examination by the prosecution, Dr. Kauders stated that he had been informed by accused that accused had first decided to shoot deceased in the left side of the body, into the heart actually, "but changed his opinion and shot her in the right side." The testimony of Doctor Aufreiter, also a defense witness, likewise contained admissions by accused of having committed the malicious homicide for which he was on trial, which admissions had apparently been made to Doctor Aufreiter and which she employed in her detailed psychiatric testimony.

We are of the opinion that these admissions of guilt by accused of the crime charged against him, these confessions, are admissible in evidence and were properly considered by the court in arriving at its findings and sentence. In CM 293448, Yancy, 15 BR (ETO)207,224, the Board of Review said,

> "There appears to be no reason why the court might not regard the statement of accused to the members of the mental board *** as to his actions at the time in question, including his rape of the 'younger woman,' as a voluntary confession. The fact that he was not warned of his rights under Article of War 24 did not ipso facto render the confession involuntary. *** Its voluntariness was a question of fact ***, and as bearing on this was the fact that the defense offered the copy of the report in evidence. In the absence of evidence indicating voluntariness, the findings of the court will not be disturbed upon appellate review ***. The fact that the report contained such confession and also an account of accused's background, including his civilian criminal record, cannot, under the circumstances, be regarded as having affected his substantial rights. The defense obviously introduced the whole report for the purpose of supporting the conclusion therein that accused was insecure, immature and emotionally unstable. Any error was self-invited and, in view of other clear evidence, nonprejudicial."

Furthermore, the defense, having presented Doctor Kauders as a witness and having questioned him at length as to his opinion of accused's mental condition at the time of the commission of the offense in question, eliciting from the doctor testimony to the effect that the opinion he gave was based in part on what accused had told him concerning the crime, cannot complain of the tactics of the prosecutor in bringing out on cross-examination the details of the conversation between accused and the doctor (Commonwealth v. Gordon, 307 Mass. 155, 29 N.E. (2d) 719).

Although accused was in a highly nervous and emotional state at the time he made the confessions in question, we do not consider this circumstance a sufficient basis for excluding them. Medical evidence falling short of proving that accused's mental infirmities deprived him of the faculty of consciousness of the physical acts performed by him, of the power to retain them in his memory and of the capacity to make a statement of those acts with reasonable accuracy, has been held insufficient to warrant the exclusion of his confessions of murder (Commonwealth v. Zelinski, 287 Mass. 125, 191 N.E. 355; Commonwealth v. Sheppard, 313 Mass. 590, 48 N.E. (2d) 630, 639; CM 228891, Robnett, 16 BR 359,363). The gunshot wound in Miss Stowisek's body through which blood was still running, the condition of her clothing, the scratches on her thighs, the nearby empty shell casing and, indeed, all the circumstances surrounding the discovery of her corpse on the lonely mountainside, pointed towards death by external violence, indicated the

probability of unlawful homicide, and are a sufficient corroboration of accused's confessions concerning his role in this Viennese tragedy (CM 252086, Kissel, 33 BR 331,339; CM 295324, Parker, 29 BR (ETO) 395,400; CM 270205, Murphy, 4 BR (NATO-MTO) 69,73).

There being, then, ample and competent evidence tending to show that accused acted with malice aforethought when he fired the shot which took Miss Stowisek's life, the findings of guilty of murder were warranted provided the court could properly consider that accused was mentally responsible for such act and that the degree of his intoxication was not such as to negative his ability to entertain a malicious intent.

Concerning the argument relative to "premeditation" appearing in the brief filed by civilian counsel for accused, we feel it sufficient to point out that premeditation is not an element of murder either at common law or under the 92nd Article of War. Although by statute in some jurisdictions the presence or absence of premeditation may have some effect upon the degree of murder of which accused can legally be convicted, there are no degrees of murder in military law (CM 283129, Baines, 3 BR (CBI-IBT) 49, 52; CM 294141, Wesley, 16 BR (ETO) 327,332; Commonwealth v. Webster, 5 Cush. (Mass) 295,304; MCM, 1928, par. 148a).

Mental Responsibility

The standard of mental responsibility to be applied in military law is set forth in the Manual for Courts-Martial in the following terms:

> "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." (MCM, 1928, par. 78a.)

The rule of the Manual is broader than the early rule of the common law laid down in M'Naghten's Case (10 Cl. & F. 200) in that it includes the so-called "irresistible impulse" test as well as the right and wrong test. In this respect at least, it is similar to the standard of mental responsibility adopted by the Federal courts and by the courts of many of the States (Smith v. United States, 36 F. (2d) 548; 70 A.L.R. 659; Commonwealth v. Rogers, 7 Met. (Mass.) 500,502; see CM 246548, Maxwell, 2 BR (ETO) 251,273, for origin of rule). It has, as we shall see, been subject to considerable judicial interpretation.

Doctor Kauders testified that accused was not psychotic but had a psychopathic personality. At the time of the commission of the offense, accused's state of mind was "abnormal" due to his weak, immature and emotionally unstable personality, his alcoholic intoxication and the conflict between his feelings for Margarita and his wife. Although on the night of

the homicide accused was able to distinguish between right and wrong "in such effect as a crime of murder," his ability to adhere to the right was diminished. "It was not that he was totally insane during the act, *** but his insight was impaired and *** his possibility to resist aggressive tendencies which he had was also diminished." Accused's ability to adhere to the right was not diminished at the time Doctor Kauders examined him.

In CM 301324, Chaddock, 31 BR (ETO) 229,232, the Board of Review said,

> "The distinction between a psychotic - one who is insane - and one who has a psychopathic personality is well defined in law, when considered in defense of the commission of a crime (CM ETO 4219, Price). The inability of a psychotic to adhere to the right constitutes a defense to misconduct ***. On the other hand 'the inability of a constitutional psychopath who is without psychosis to adhere to the right is not mental irresponsibility and does not constitute a defense for wrongdoing' (CM ETO 3717, Farrington; CM ETO 4219, Price, supra; CM ETO 5747, Harrison; see also: 'Mental accountability under Military Law' by Lepcomb, The Judge Advocate Journal, Vol. II, No. 2, p. 14 and CM ETO 314, Mason)."

In CM 294675, Minnick (26 BR (ETO) 11,16), the Board of Review observed that a constitutional psychopathic state is generally recognized as a type of sanity rather than insanity (see also CM 244490, Peace, 28 BR 309,323) and in the War Department technical bulletin on psychiatric testimony before courts-martial it is stated that psychopaths are generally held to be legally responsible for their acts (TB MED 201, par. 4d(2),(5)). "Emotional insanity" was held to be no defense to crime in Taylor v. United States (7 App. D.C. 27, 43) and in Fisher v. United States (149 F. (2nd) 28), the court, in deciding whether the psychopathic characteristics of accused had prevented him from forming the deliberate intent necessary to constitute first degree murder, said,

> "With respect to the issue of deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes."

The opinion in the Fisher case was affirmed by the Supreme Court of the United States (Fisher v. United States, 328 U.S. 463).

Aside from the question of accused's psychopathy, it will be noted that Doctor Kauders' diagnosis of accused's mental condition was limited to a finding that at the time of the commission of the offense in question his ability to adhere to the right was simply impaired or diminished. It has been uniformly held that an impaired ability to adhere to the right, a partial irresponsibility, is no defense to crime. In so holding, the Board of Review in CM 289355, Smith, 21 BR (ETO) 25,33, said,

> "A powerful restraint to crime, other than moral, is fear of punishment. Those same persons whose will power is weakened to the extent of being without conscience, constitute the class who need the latter restraint most. To fail to punish a murderer, whom the court's findings place among that malevolent group who find it hard to do right, is to encourage and not to deter crime."

To the same effect are the following decisions: Commonwealth v. Clark (292 Mass. 409, 198 N.E. 641); CM 243048, Hall (1 BR (A-P) 213); CM 246548, Maxwell, supra; CM 274678, Ellis (47 BR 271,285); CM 307253, Hall (32 BR (ETO) 119,122).

Doctor Aufreiter testified that accused had a psychopathic personality but that the act for which he was on trial was the result of an irresistible impulse to kill which had come upon him while under the influence of a temporary psychosis known as pathological drunkenness. Her diagnosis of pathological drunkenness was largely predicated upon a consideration of accused's conduct on the night of the homicide, including his purported delusion in which he believed deceased was Margarita, upon the "possible" effect of accused's indulgence in alcohol on his already overwrought emotional state and upon the "possibility" of organic brain changes caused by a gynecomasty of the left breast for which accused had reputedly undergone an operation. In her opinion, accused did not have the capacity to distinguish between right and wrong and to adhere to the right at the time of the killing.

Even in those jurisdictions which recognize the doctrine of irresistible impulse, such irresistible impulse must be the result of true insanity, that is, mental disease or disorder which completely robs the actor of his will, in order to be a defense to crime. A so-called "irresistible impulse" which is merely the result of a deterioration of the moral fibre or stems from some personality defect is not sufficient (Wharton's Criminal Law, 12th Ed., secs. 60-64; 70 A.L.R. 659; Smith v. United States, supra; Commonwealth v. Rogers, supra; CM 289355, Smith, supra). In his first indorsement to CM 271889, Barbera, 46 BR 212,215, The Judge Advocate General said,

> "Whatever may have been the purpose of the disjunctive use of the words 'mental defect', 'disease', and 'derangement' in the sanity test of the Manual for Courts-Martial, it must be

conceded that the defense of irresistible impulse is limited solely to one who has a diseased mind and that 'diseased mind' does not comprehend a flighty, capricious, and undisciplined mind ***.

"In order that a person may be exempt on the ground of irresistible impulse, the impulse must be the result of disease of the mind, and it must be irresistible, or, in other words, the disease must exist 'to such an extent as to subjugate the intellect, and render it impossible for the person to do otherwise than yield thereto.' The act must have been the product of the disease solely."

We understand the term "diseased mind," as used in the above implicit definition of that type of "insanity" which alone can be considered as a complete defense to crime, to comprehend only those thoroughly irrational states of mind which are the result of a deterioration, destruction or constitutional malfunction of the mental, as distinguished from the moral, faculties. (See Black's Law Dictionary, 3rd Ed., p. 588; TB MED 201, par. 4b(2))

There can be no doubt that accused's "irresistible impulse" to kill, if he did in fact take Miss Stowisek's life while motivated by such an impulse, was at least occasioned by his voluntary ingestion of alcohol. In considering this aspect of the case, it may be noted that a temporary loss of reason which accompanies and is part of a drunken spree and which is not the result of delirium tremens or pre-existing mental disease of some duration or permanence produced by chronic alcoholism or otherwise, has been generally held not to be such "insanity" as to constitute a complete defense to crime (79 A.L.R. 906; CM 305207, Shropshire, 18 BR (ETO) 235).

The above rules would apply with like effect to the asserted "insane delusion" of accused which supposedly brought about his "irresistible impulse" to kill (Wharton's Criminal Law, 12th Ed., sec. 57; CM 204790, Hayes, 8 BR 57,73).

The only evidence that accused's homicidal act was the result or product of a psychosis as distinguished from a mere psychopathic aberation, the only evidence that his "irresistible impulse" to kill was conditioned by true mental disease, that is, by a deterioration, destruction or constitutional malfunction of his mental faculties, is to be found in the testimony of Doctor Aufreiter. Her conclusions were admittedly based in large part on conjecture, on "possibilities." The possibility of mental incompetency does not necessarily establish a reasonable doubt as to accused's sanity (CM 310518, Chutnicutt, 31 BR (ETO) 173,179). Doctor Aufreiter's diagnosis of pathological drunkenness was further weakened by her statement that a person in such a mental state would not be concerned about the safety of a vehicle whereas there can be little doubt, from accused's own admissions, that not only did he seek a safer place to park his car when he found that the first parking place he had selected on the fatal night had too sharp an incline,

but that he later remembered having done so. Finally, Doctor Kauders, in his testimony, expressed his professional opinion that accused was not psychotic and that accused's ability to adhere to the right was simply impaired at the time the offense was committed.

Upon careful consideration of all the evidence in the case, that relating to the circumstances surrounding the commission of the offense in question as well as that relating to accused's mental accountability, we are of the opinion that the court was warranted in arriving at the finding that accused was mentally responsible for his criminal act, which finding is included by necessary implication in the court's findings of guilty of the offense charged (CM 252628, Earle, 34 BR 111,116). As the Board of Review said in CM 298814, Prairiechief, 21 BR (ETO) 129,134,

> "Although it was stipulated that if available as witnesses three medical officers would testify that following an examination of accused they made a diagnosis of acute alcoholism and pathological intoxication and that they were of the opinion that at the time of the commission of the offense accused's mental state was such that he was unable to differentiate between right and wrong, to adhere to the right and to appreciate the consequences of his acts, *** notwithstanding the opinion of psychiatrists, which it was proper for the court to consider, it was the duty of the court to consider the facts in evidence in the light of its own knowledge of human motives and behavior under certain conditions *** (CM NATO 2047, 3 Bull. JAG 228)."

We are also of the opinion that the court could properly consider that the provisions of paragraph 63 of the Manual for Courts-Martial, 1928, requiring that an accused have sufficient mental capacity to "understand the nature of the proceedings" and to "intelligently *** cooperate in his defense" were sufficiently met by the testimony of Captain Conason to the effect that accused was "sane" at the time of trial, was aware of what transpired in the court room and was able to assist in his own defense.

Voluntary intoxication

The distinction between the complete defense of insanity which has been caused by excessive drinking and the mitigating circumstance of mere drunkenness is well recognized (CM 294675, Minnick, supra, p. 19). Although voluntary intoxication not productive of an unsound mind is not a complete defense to the crime of murder, in military practice it is properly considered on the question as to whether accused was able to entertain the malicious intent which is an element of that offense. If, as a result of voluntary intoxication, an accused's intellect is so obliterated or dulled as to be incapable of malice aforethought, his act of homicide committed during such intoxication is, at most, voluntary manslaughter (CM 305302, Mendoza, 20

BR (ETO)341). However, even though an accused's deliberative powers are impaired by drunkenness to such an extent that his actions are governed by passion and hysteria, this fact alone will not serve to reduce to manslaughter his impulsive, but nevertheless intentional, taking of human life where such violence has not been called forth by adequate provocation (CM 284389, Creech, 16 BR (ETO) 249,260). It can hardly be contended in the instant case that deceased, by any act of hers, provoked the fatal assault made upon her by accused or that the purported, delusory provocation existing only in accused's mind would in any sense be sufficient to mitigate murder to manslaughter (Wharton's Criminal Law, 12th Ed., sec. 54; CM 204790, Hayes, supra).

The question of the degree of accused's intoxication and the effect of his imbibing on his volition is generally one of fact for the court (CM 294675, Minnick, supra, p. 21). Where it appears from the evidence, as in the instant case, that accused was capable of retaining in his memory a recollection of the details surrounding his perpetration of the homicide, that he had the ability to perform acts requiring a high degree of coordination immediately before and after the commission of the crime, such as driving a jeep, that he manifested an interest in his personal well-being, as by seeking a safe parking place, and that he realized the enormity of his offense and the jeopardy in which it placed him, as shown by his flight from the scene of his misdeeds, we can but concur in the implied finding of the court that accused was not so intoxicated as to be unable to harbor malice prepense in his mind (CM 274678, Ellis, supra, p. 287).

5. For the reasons stated, the Board of Review is of the opinion that the court's findings of guilty of murder are fully sustained by the evidence and we find no reason to set them aside.

6. War Department records show that accused is twenty years of age and is married. He is a high school graduate and attended the State College of Washington for three months. On 11 December 1944, he entered the service as an enlisted man and on 23 April 1945 was selected to attend the Infantry Officer Candidate School, Fort Benning, Georgia. Upon graduation from the aforementioned school he was, on 6 September 1945, appointed and commissioned a second lieutenant in the Army of the United States.

7. All the members of the court who were present at the trial signed a petition for clemency addressed to the reviewing authority in which it was stated that in the opinion of these members accused's extreme youth and emotional instability made him peculiarly susceptible to the corrupting temptations allegedly rampant in Vienna. It was specifically recommended that the period of confinement be reduced to twenty years.

8. On 31 January 1947, Mr. Harold D. LeMar of Omaha, Nebraska, appeared before the Board of Review and made an oral argument and filed a

written brief on behalf of accused. Careful consideration has been given to both the argument and brief.

9. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Dismissal is authorized upon conviction of an officer of a violation of Article of War 92 and penitentiary confinement is authorized upon conviction of murder in violation of that Article.

Charles D. Silvers, Judge Advocate

(Sick in Quarters), Judge Advocate

Gilbert E. Athoyt, Judge Advocate

JAGK CM 319168 1st Ind

MAY 16 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 the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Lloyd R. Poe (O-1338273), Corps of Military Police.

2. Upon trial by general court-martial this officer was found guilty of the murder of Charlotte Stowisek, an Austrian civilian, in violation of Article of War 92. 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 the term of his natural life. 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 do not concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty of murder and the sentence and to warrant confirmation of the sentence. For reasons which will hereinafter appear, I am of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of involuntary manslaughter, in violation of the 93d Article of War, and legally sufficient to support only so much of the sentence as involves dismissal, total forfeitures, and confinement at hard labor for three years.

For a period of some months before 2 April 1946, accused, while stationed in Vienna, Austria, had known and been intimate with a Viennese girl by the name of Margarita Gwozdecki. His wife at that time was in the United States. To several of his brother officers, who shared a Viennese apartment with him, accused had mentioned his desire to leave Margarita, but he seemed to be unable or unwilling to part with her. However, shortly before the 2d of April, accused and Margarita agreed to terminate their relationship in view of the imminent arrival in Austria of accused's wife. On "the last night" in accused's apartment, Margarita took an overdose of sleeping tablets but was revived due to accused's efforts. She left the apartment the next day. On the night of 2 April 1946, accused became intoxicated at an officers' club in Vienna and, while driving through the streets in a jeep, shot at a street light.

Accused came upon Charlotte Stowisek and a female companion standing at a streetcar stop and offered them a ride. They accepted,

apparently on the understanding that accused was to take them home or that he was to go dancing with them. However, accused proceeded towards a place called Grinzing where Miss Stowisek's companion got out of the jeep. Accused and Miss Stowisek drove on alone towards a mountain known as Kahlenberg. Arriving there, accused chose a parking place, but noticing that the incline was too steep for the jeep's brakes to hold, he continued on to a more favorable spot where, after again parking the jeep, he made amorous advances to Miss Stowisek. According to statements by him he had a loaded pistol in his right coat pocket. According to an admission to a psychiatrist, he first decided to shoot Miss Stowisek in the heart "but changed his opinion and shot her in the right side." In another extra-judicial statement, however, accused claimed that while seated beside Miss Stowisek he became subject to the delusion that she might be Margarita and, wanting to do away with Margarita but not having "the nerve to do it," he placed the pistol "in the area of" deceased's left breast "and the weapon went off and was fired." In still another pre-trial statement, he claimed that in embracing Miss Stowisek, who was seated on his right, the pistol in his right coat pocket became uncomfortable and while he was in the act of removing it deceased suddenly pushed away from him causing the pistol to be accidentally discharged. After the shot, Miss Stowisek fell from the jeep. Deceased became silent and accused drove away.

The next morning, Miss Stowisek's body was found where accused had left her. Her clothes were in general disarray, her stockings were torn, there were scratches on her thighs, her shoes and some buttons which had obviously been pulled off her jacket were scattered about the body and there was a gunshot wound in the region of the liver from which blood was still flowing. There were no signs of a forced sexual act. Miss Stowisek had died as a result of the gunshot wound.

4. It appears from the papers accompanying the record of trial that during the period from 6 to 12 October 1946, accused was given an extensive psychiatric examination at the 110th Station Hospital by Captain Charles J. Centa, Medical Corps, Chief of the Neuropsychiatric Service of the 317th Station Hospital and Neuropsychiatric Consultant for the European Theater, and by Doctor Otto Kauders, Head of the Department of Psychiatry of the University of Vienna. Captain Centa had been ordered to make the examination by the European Theater Surgeon and Doctor Kauders was employed by the defense. Captain Centa and Doctor Kauders conducted their examination of accused jointly and submitted a joint report to the Commanding General, United States Forces in Austria. The two psychiatrists concluded in their report that at the time of the commission of the alleged offense, accused was able to distinguish right from wrong "as far as a major crime like murder is concerned" but that his ability to adhere to the right was "diminished." Accused was "partially responsible" due to the fact that "his insight into the whole situation and his insight to refrain from his aggressive behavior

tendency was impaired." Accused has a psychopathic personality with emotional instability. At the time of the psychiatric examination, accused was able to distinguish right from wrong and to adhere to the right. This report was not offered in evidence by either the prosecution or the defense but Doctor Kauders, in his testimony as a witness for the defense, reiterated its findings in substance. Doctor Frieda Aufrieter, a Viennese psychiatrist who had examined accused at the request of the defense, testified that accused had a psychopathic personality but that at the time of the homicide for which he was on trial he was subject to a temporary psychosis known as pathological drunkenness and could neither distinguish between right and wrong nor adhere to the right. Captain Arnold Conason, neuropsychiatrist of the 110th Station Hospital, stated that accused was "sane" at the time of trial, knew what was going on in the courtroom and was able to assist in his own defense but was suffering from severe emotional instability. The court, by its findings of guilty of murder, found by necessary implication that accused was mentally responsible at the time of the commission of the offense and that at the time of trial he had sufficient mental capacity to understand the proceedings against him and to cooperate intelligently in his own defense. I believe the court's findings as to accused's mental accountability are sustained by the evidence.

5. With the exception of certain statements made to psychiatrists during the course of a mental examination, accused has consistently maintained that the firing of the shot which took Miss Stowisek's life was the result of mere mischance. Grave doubt is cast upon the truthfulness of accused's admissions of murder to the psychiatrists because of the possibility, indeed, the probability, that they were intended solely to convey the impression that accused was in fact insane. Unless corroborated by other convincing evidence, I do not believe that these admissions can be accepted as sufficient to establish beyond a reasonable doubt that accused intentionally and maliciously killed deceased. I do not find such corroborating evidence. The record of trial does show, however, that Miss Stowisek's death resulted from an act of accused in handling a deadly weapon in a grossly and culpably negligent manner. At most, the proof is as consistent with a reckless homicide as it is with a malicious one and where there is a reasonable doubt as to the degree of the homicide accused has committed, that is, as between murder and involuntary manslaughter, the conviction should be of the lesser (CM 234998, McKenzie, 1 BR (ETO) 69, 81). I therefore recommend that only so much of the findings of guilty be approved as involves findings of guilty of involuntary manslaughter, in violation of Article of War 93, that only so much of the sentence be approved as involves dismissal from the service, total forfeitures and confinement at hard labor for three years, that the sentence as thus modified be confirmed and carried into execution and that a United States Disciplinary Barracks be designated as the place of confinement.

6. War Department records show that accused is 20 years of age and is married. He is a high school graduate and attended the State College of Washington for three months. On 11 December 1944 he entered the service as an enlisted man, and on 23 April 1945 was selected to attend the Infantry Officer Candidate School, Fort Benning, Georgia. Upon graduation from the aforementioned school he was, on 6 September 1945, appointed and commissioned a second lieutenant in the Army of the United States.

7. Careful consideration has been given to the written brief submitted on 31 January 1947 by Mr. Harold D. LeMar of Omaha, Nebraska, civilian counsel for accused. Consideration has also been given to a petition for clemency on behalf of accused signed by all the members of the court present at the trial, in which it is stated that, in the opinion of these members, accused's extreme youth and emotional instability made him peculiarly susceptible to the corrupting temptations allegedly rampant in Vienna. The petition recommended that the period of confinement be reduced to twenty years. Communications on behalf of accused written by the following persons on the dates indicated have been noted and are attached to the papers accompanying the record of trial:

Telegram from Mrs. Lloyd R. Poe, wife of accused, dated 27 March 1947, in which it appears that she has returned to the United States from Austria and in which she states that she is an expectant mother.

Letters from Mrs. Lloyd W. Poe, mother of accused, dated 23 November and 24 December 1946, respectively, and addressed to Honorable Sheridan Downey, United States Senator from California.

Letter from Honorable William F. Knowland, United States Senator from California, dated 25 November 1946.

Letters from Honorable Hugh A. Butler, United States Senator from Nebraska, dated 4 and 31 December 1946, respectively.

Letters from Honorable Kenneth S. Wherry, United States Senator from Nebraska, dated 4 December 1946 and 30 January 1947, respectively.

Letter from Honorable Sheridan Downey, United States Senator from California, dated 5 February 1947.

Letter from Honorable Wayne Morse, United States Senator from Oregon, dated 22 February 1947 and inclosing letters from Mrs. Lloyd W. Poe and former Governor Charles A. Sprague of Oregon.

Letter from Mr. R. N. Sonne, former employer of accused, dated 23 September 1946.

Letter from Mr. John G. Fox, vice-president of high school attended by accused, dated 24 September 1946.

Letter from H. F. Brubaker, head of the Physical Education Department of high school attended by accused, dated 24 September 1946.

8. I inclose herewith two forms of action: Form A to be used if you agree with the opinion of the Board of Review and Form B to be used in the event that you agree with my recommendations.

THOMAS H. GREEN
Major General
The Judge Advocate General

13 Incls
1. Record of trial
2. Telegram, 27 Mar 47, fr Mrs LR Poe
3. Ltrs, 23 Nov & 24 Dec 46, fr Mrs LW Poe
4. Ltr, 25 Nov 46 fr Sen Knowland's office
5. Ltrs, 4 Dec & 31 Dec 46, fr Sen Butler
6. Ltr, 4 Dec 46 & 30 Jan 47, fr Sen Wherry
7. Ltr, 5 Feb 47, fr Sen Downey
8. Ltr, 22 Feb 47, fr Sen Morse, w/incl
9. Ltr, 23 Sep 46, fr RN Sonne
10. Ltr, 24 Sep 46, fr JG Fox
11. Ltr, 24 Sep 46, fr H Brubaker
12. Form of action (A)
13. Form of action (B)

(G .C.M.O. 207, 11 June 1949).

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

JAGK - CM 319176

19 FEB 1947

UNITED STATES v. Private R. L. HENRY (34931369), 3027th Ordnance Base Engine Rebuild Company, Karlsfeld, Germany.	CONTINENTAL BASE SECTION Trial by G.C.M., convened at Munich, Germany, 7 November 1946. Dishonorable discharge and confinement for two (2) 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 has been examined by the Board of Review.

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

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

Specification 1: In that Private R. L. Henry, 3027th Ordnance Base Engine Rebuild Company, did at Karlsfeld Ordnance Depot, Karlsfeld, Germany, on or about 17 August 1946 wrongfully take and use without the consent of the owner, a certain motor vehicle, to wit: a 2½ ton G.M.C. 6x6 truck, property of the United States, of the value of more than $50.00.

Specification 2: In that Private R. L. Henry, ***, did, at or near Dachau, Germany, on or about 17 August 1946, strike and injure George Brehn, a German civilian, by colliding with a civilian truck and wrongfully leave the scene of the accident without rendering aid to the injured.

CHARGE II: Violation of the 84th Article of War.

Specification 1: In that Private R. L. Henry, ***, did, at or near Dachau, Germany, on or about 17 August 1946, through neglect, injure by colliding with a German civilian truck, a Government motor vehicle, to wit: a 2½ ton G.M.C. 6x6 truck of the value of more than $50.00, issued for use in the military service of the United States.

He pleaded not guilty to and was found guilty of all charges and their specifications. Evidence of two 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 two years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, 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. In the order appointing the court which tried this case "1st Lt THOMAS R. WARD 01553011 Inf 3028th OBER CO" is detailed as assistant defense counsel and the record of trial reveals that this officer was present in such capacity at the hearing. Accused, when asked by the trial judge advocate whom he desired to introduce as counsel, stated that he desired to be defended by "the regularly appointed Defense Counsel, Major William H. Griswold, and the Assistant Defense Counsel, First Lieutenant Thomas R. Ward." In announcing the name of the investigating officer, the trial judge advocate stated that the charges were investigated by "1st Lieutenant Thomas R. Ward, Ordnance Department, 143d OBAM" (R. 1-3). It appears from the papers accompanying the record of trial that "1st Lt Thomas Ward, 143d Ord B.A.N. Bn" was appointed to re-investigate the charges upon which accused was here tried and that "Thomas R. Ward, 1st Lt. Ord Dept. Investigating Officer" recommended trial by general court-martial. On page 30 of the record of trial the following appears:

> "First Lieutenant Thomas R. Ward, 143rd Ordnance Base Auto Maintenance Battalion, a witness for the prosecution, was sworn and testified as follows:
>
> DIRECT EXAMINATION
>
> "Questions by the Prosecution:
>
> "Q. State your name and your rank.
> "A. Thomas R. Ward, First Lieutenant, Ordnance Department.
>
> "Q. Your organization and station?
> "A. 3028 OBER Company, Karlsfeld Ordnance Depot, Germany.
>
> "Q. Were you, or were you not, the investigating officer in the case in which Private R. L. Henry was alleged to have wrecked a truck?
> "A. I was one of the investigating officers." (R. 30, underscoring supplied.)

Lieutenant Ward then gave testimony as to the estimated damage to the vehicle in question under the specification to Charge II. The record of trial was examined before authentication by the regularly appointed defense counsel, Major William H. Griswold (R. 39).

4. It thus appears that First Lieutenant Thomas R. Ward, 3028th OBER Company, was both investigating officer and regularly appointed assistant defense counsel

in this case as well as a witness for the prosecution. As investigating officer he had recommended that accused be tried by general court-martial and as assistant defense counsel he purported to participate in accused's defense.

In CM 284066, Mejie (4 Bull. JAG 334), the Board of Review held the record of trial legally insufficient for the reason that it appeared therein that the regularly appointed defense counsel was also the accuser. The Board said,

> "Defense counsel, on the one hand, by his sworn statement asserted his belief in the guilt of the accused and, on the other hand, entered for the accused a plea of not guilty and undertook the duty of conducting the defense with undivided fidelity and by all honorable means known to the law. To expect the court to hear the accused's testimony, without being prejudiced by the defense counsel's pre-trial actions as the accuser, is to require the performance of a mental feat beyond the compass of ordinary minds. *** For an accuser to serve in such inconsistent capacities is unfair to himself, unfair to the court, and a mockery of the requirement that he must serve the accused with 'undivided fidelity' and by all 'honorable and legitimate means known to the law.'"

And in CM 316898, Mesquite (5 Bull. JAG 332) the Board of Review, following the reasoning in the Mejie case, said:

> "The Board of Review is of the opinion that where it affirmatively appears that the officer who investigated the charges against accused and who recommended trial by court-martial thereon acts as defense counsel at the trial and there is no indication that accused particularly desired and sought the services of such officer in preference to or along with those of other defense counsel the conviction obtained upon such trial must be set aside." (Underscoring supplied.)

In the Mesquite case as in the instant case the record of trial contained the somewhat formalized statement that accused desired to be defended by the regularly appointed defense counsel and assistant defense counsel.

The Board of Review is of the opinion that the ratio decidendi of the Mesquite case applies with equal force and effect to the case at bar, and accordingly holds that the dual role of Lieutenant Ward as investigating officer and assistant defense counsel, under the circumstances here presented, is fatal to the legal sufficiency of the record of trial.

5. For the reasons stated, the Board of Review holds the record of

trial legally insufficient to support the findings of guilty and the sentence.

Clinton B. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Athayde, Judge Advocate

JAGK - CM 319176 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Continental Base Section, APO 807, c/o Postmaster, New York, New York.

1. In the case of Private R. L. Henry (34931369), 3027th Ordnance Base Engine Rebuild Company, Karlsfeld, Germany, 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 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 319176).

1 Incl
Record of trial

RECEIVED
CBS

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH - CM 319194

MAY 1947

UNITED STATES v. First Lieutenant THADDEUS P. AUSTIN (0-1016611), Cavalry and Staff Sergeant JOSEPH MADURI (31471906), Headquarters Company, First Battalion, 60th Infantry Regiment	)	9TH INFANTRY DIVISION Trial by G.C.M., convened at Augsburg, Germany, 13 September 1946. Austin: Dismissal, total forfeitures, and confinement for seven (7) years. Maduri: Dishonorable discharge (suspended) and confinement for one (1) year. The Wurzburg Rehabilitation Center

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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. In a joint trial, the accused, First Lieutenant Thaddeus P. Austin, was tried upon the following Charges and Specifications:

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

Specification: In that First Lieutenant Thaddeus P. Austin and Staff Sergeant Joseph Maduri, both members of the 60th Infantry Regiment (formerly of 31st Antiaircraft Artillery Provisional Trucking Company), acting jointly and in pursuance of a common intent, did, at or near Stuttgart, Germany, on or before 22 June 1946, knowingly and willfully apply to their own use and benefit about one hundred (100) pounds of coffee and about one hundred (100) pounds of sugar, of the value of about twenty-five dollars ($25.00), property of the United States, furnished and intended for the military service thereof.

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

Specification: In that First Lieutenant Thaddeus P. Austin and Staff Sergeant Joseph Maduri, both members of the 60th Infantry Regiment (formerly of 31st Antiaircraft Artillery Provisional Trucking Company), acting jointly and in pursuance of a common intent, did, at Stuttgart, Germany, on or about 22 June 1946, wrongfully and knowingly attempt to dispose of by offering and attempting to sell for personal gain and profit, about one hundred (100) pounds of coffee and about one hundred (100) pounds of sugar, of the value of about twenty-five dollars ($25.00), property of the United States, furnished and intended for the military service thereof.

Both Specifications were originally laid under Article of War 94 (R 4). Before pleading to the general issue the defense moved that the prosecution be required to amend the original Specification 1 (later changed to the Specification of Charge I) to allege the specific acts which constitute the misapplication of the goods described. The law member overruled the motion (R 6). The defense then moved to amend Specification 2 (later changed to the Specification of Charge II) by alleging the offense therein charged as a violation of Article of War 96 instead of a violation of Article of War 94 on the grounds that an attempted wrongful disposition of military property is not denounced by Article of War 94 and that attempts generally are offenses within the scope of Article of War 96. The law member granted this motion and the charges and specifications were amended as set forth above (R 7). The defense then moved to strike Charge II and the Specification thereof on the grounds that the offense therein alleged was included in the Specification of Charge I. This motion was denied (R 7-8). The accused then pleaded not guilty to and was found guilty of both charges and their specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed, 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 and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is summarized as follows:

At the time of the alleged offense the accused was a member of the 31st Antiaircraft Artillery Provisional Truck Company (R 8B). Early in June 1946, the accused and Staff Sergeant Joseph Maduri, who was tried jointly with him, were invited to the apartment of Karl Stoll, a German civilian, by the latter's brother-in-law, Karl Stich (R 11, 26). On that occasion Stoll offered to sell his Leica camera to Maduri for 18,000 marks, but this offer was refused because the price was too high (R 10-11). On a later occasion Stoll offered to sell the camera to Sergeant Maduri for 100 pounds of coffee. This offer was accepted by Maduri, who delivered the coffee to Stoll near the latter's home (R 23, 27).

Sometime after the first meeting the accused and Maduri again saw Stoll and offered to sell him 100 pounds of coffee for 16,000 marks and 100 pounds of sugar for 6,000 marks (R 12-14). Stoll agreed to look for a buyer and subsequently talked to an acquaintance named Behr, telling him of the offer and price (R 13, 30-31). Behr, a volunteer informer for a CIC agent named Osborne, told Osborne of the offer and was told to close the deal and arrange for delivery of the sugar and coffee (R 31). Behr informed Stoll that he would accept the goods in his garage, but Sergeant Maduri insisted that the rendezvous be in the Reichsgartenanschau, a public park (R 14, 31). At 2100 hours, 22 June 1946, the accused and Sergeant Maduri came to Stoll's apartment and asked him if he were going to the rendezvous (R 16). Sergeant Maduri and Karl Stich then went to Behr's home to make final arrangements. It was agreed that Behr would go to Stoll's apartment when he was ready and that Behr would then be guided to the rendezvous (R 16, 28). Behr and Osborne arrived at Stoll's apartment in a car at approximately 2300 hours on the same night. Stoll and Stich accompanied Behr and Osborne to the rendezvous at the Reichsgartenschau in Behr's car (R 17, 28, 32). Behr's car was followed by a vehicle occupied by two CIC agents (R 32, 36). At the rendezvous Stoll dismounted and after a short search located the accused and Sergeant Maduri, at which time the CIC agents arrested the accused, Sergeant Maduri, Stoll and Stich (R 17-18, 32, 36). One of the agents then asked the accused where "the stuff was" and were directed to some nearby bushes, where the agents found a sack of sugar and a sack of coffee (R 36-37).

The accused and Sergeant Maduri made a joint voluntary pre-trial statement which was admitted into evidence as prosecution's Exhibit 1 (R 10). The confession, as admitted into evidence, is quoted below:

> "Before me, the undersigned, authorized by law to administer oaths and take testimony in investigations of this nature, personally appeared 1st Lt. T. P. Austin and S/Sgt. Joseph Maduir this 7th day of July 1946 who were made aware of their rights under the 24th Article of War and, after having been duly sworn, testified as follows:
>
> Q: I show you a signed copy of the CIC report covering your arrest. Is is true and correct?
>
> A: (Lt. Austin) Yes, except for the words '200 lbs of coffee'. It was only 100 lbs. They seem to know more of the case than we did.
>
> (S/Sgt. Maduri) Yes, except for the price of the coffee and sugar. We had agreed upon 22,000 Marks.

Q: Where and when did you obtain the coffee and sugar?

A: (Lt. Austin) I obtained the coffee and sugar from 1st Armored Division units when they broke up in March.

Q: What did you do with the coffee and sugar?

A: (Lt. Austin) We stored it in the basement of our quarters, intending to use it in the mess.

Q: When did you first contact the Germans about selling the coffee and sugar?

A: (S/Sgt. Maduri) I made the original contact in the park in Stuttgart where I discussed buying a Leica camera from the two Germans. Sometime later the Germans came to our house and talked of a deal in coffee, sugar and cigarettes that were wanted by a French officer. They wanted us to bring the goods to a garage on Wednesday. We didn't go then because the Lt. and I didn't like it.'

The Germans came back again and agreed to pay 22,000 Allied marks for the coffee and sugar and I arrainged a meeting in the Park in Stuttgart on the 22nd June. I told the Lt. about the meeting.

Q: Why did you both take weapons?

A: (Lt. Austin). When I found out the meeting was at night in the park and some Germans were involved I told Sgt. we would take weapons to prevent our being attacked.

Q: When were you apprehended?

A: (Lt. Austin) After we got to the park we unloaded the jeep and the Sgt. went to look for the Germans. I remained sitting in the jeep. I saw another car drive up at a distance and as the Sgt. was coming back with the Germans, I heard someone say 'Put up your hands', both in German and English. I watched the men for a while and then one came over to me and told me to put up my hands. I told him I had a .45 that he had better take. The CIC then took us to the 793rd MP station and booked us.

Q: Did any money change hands?

A: (Lt. Austin and S/Sgt Maduri) No.

Q: What did you intend doing with the 22,000 marks?

A: (Lt. Austin) We intended to split it between us.

s/ Phillip R. Smith
t/ PHILLIP R. SMITH
Lt. Col., 60th Infantry,
Investigating Officer.

I have read the record of testimony above and find it to be true and correct.

s/ Thaddeous P. Austin
t/ Thadeous P. Austin,
1st Lt.,
31st AAA Provisional Trucking Co.

s/ Joseph Maduri
t/ Joseph Maduri,
S/Sgt., 31471906,
31st AAA Provisional Trucking Co."

4. After his rights as a witness were explained to him the accused elected to be sworn as a witness and testified that he operated a mess for five provisional truck companies which he commanded at the time. He had secured coffee and sugar from units of the First Armored Division when that division was inactivated, storing these supplies in his basement, with the intention of using them in his mess. On 15 June 1946 Sergeant Maduri told the accused that Stoll had offered to buy coffee and sugar and that Maduri had set a tentative price of 22,000 marks (R 41). At first the accused was reluctant to enter into the transaction, but later agreed to sell the goods when he realized that he had about $700.00 on his currency control book and no cash. He and Sergeant Maduri were due to return to the United States in a few days (R 42) and the proceeds of the sale would have covered the entries in both accused's and Sergeant Maduri's currency control book (R 42). In referring to his intention to participate in the transaction the accused stated, "It was only in the last couple of days before going home that I thought anything about it and a thousand dollars sounded pretty good for a sack of coffee" (R 45). Sergeant Maduri's original arrangement was to deliver the goods to a civilian's home but the accused disapproved of that arrangement and proposed that the commodities be thrown out in the park where the civilians could pick them up and deliver the money to the accused at the

same time. This arrangement was satisfactory to the civilians and after some delays it was agreed that the commodities be delivered on the evening of Saturday, 22 June 1946. On that evening the accused and Sergeant Maduri proceeded to the rendezvous and placed the coffee and sugar in a shelter half and laid it under a bush (R 42). At the rendezvous Sergeant Maduri was arrested. After watching the proceedings for about ten minutes the accused walked over to the CIC agents and surrendered his weapon (R 43).

5. As indicated above, before pleading to the general issue the defense moved that the prosecution be required to amend the Specification of Charge I to allege the specific acts which constitute the misapplication of the goods described. This motion was denied.

Since the Specification in question was drawn in accordance with the form prescribed on page 252, Appendix 4, Manual for Courts-Martial, 1928, and since it appears from the record as a whole that the accused was not misled as to the offense charged, we are of the opinion that the law member's ruling in denying the defense's motion was proper.

Nevertheless, it is to be noted that misapplication and misappropriation are broad offenses which may be committed in a variety of ways. (CM 243287, Poole, 27 BR 321). It is also noted that in prescribing the elements of proof the Manual for Courts-Martial provides in relevant part:

> "That the accused misappropriated or applied to his own use certain property in the manner alleged" (MCM, 1928, par 150i, p 185) (Emphasis supplied).

In view of the foregoing, we are of the opinion that it would have been a more desirable practice to allege the means by which the misapplication was effected, thus avoiding the danger that the accused might not have been fairly apprised of the offense alleged.

6. At the close of the prosecution's case the defense renewed its motion to strike Charge II and its Specification on the grounds that that Specification alleged the same offense as that alleged in the Specification of Charge I. This motion was denied (R 38).

The ninth paragraph of Article of War 94 provides in relevant part:

> "Any person subject to military law * * * who * * * knowingly and willfully * * * applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any * * * subsistence stores * * * or other property of the United States furnished or intended for the military service thereof * * * shall on conviction thereof be punished * * *."

The part of the statute above quoted denounces two separate and distinct offenses: (a) misapplication and (b) wrongful sale or disposition (CM 296230, Housel, 27 BR (ETO) 77, 79). It follows that an attempted wrongful disposition by sale of certain military property is a separate and distinct offense from the misapplication of the same property although the attempted wrongful disposition may have been incidental to, but not necessarily included in, the misapplication. The evidence in the instant case shows that an initial act of misapplication was completed when the coffee and sugar were removed from their place of storage for the purpose of wrongfully selling the property. The subsequent actions taken by the accused to effect the sale amount to an attempt to dispose the same property wrongfully. In our opinion the two specifications do not amount to a needless multiplication of charges. According, it is our opinion that the law member's ruling the defense's motion to strike Charge II and its Specification was proper.

7. Thereafter the defense moved for a finding of not guilty on the grounds of entrapment which motion was denied (R 36-37).

It is well settled that methods of entrapment which consist of initiating or inducing the commission of a crime where the accused would not otherwise have committed it, and where the law enforcement officers had no reasonable cause to believe that the accused was a law violator, are improper and exempt the accused from criminal liability on grounds of public policy. When the methods used by law enforcement officers amount to inducement, incitement and solicitation to commit crime, luring the accused on to its consummation under circumstances which clearly indicate that he would not have committed the crime at all, the defense of entrapment is available to the accused (Sorrels vs. U. S. 287 U.S. 435; U. S. vs. Echols (D.C.) 253 Fed. 862).

In CM 236937, Kent, 23 BR 179, 184, the Board of Review stated:

> "The principle of entrapment applies only when those who seek to entrap plan the commission of the crime, and incite or lure the accused into committing it. It does not apply to situation where the accused is the instigator."

In the instant case the evidence shows that Behr, the informer, and the CIC agents entered the case after Maduri who was acting jointly with the accused had already offered to sell the commodities if Stoll could find a buyer. There is no evidence tending to show that the offense was initiated or induced by either the informer or the CIC agent. Consequently, there was no entrapment. We are of the opinion that the defense's motion on the ground of entrapment was properly denied.

8. The Specification of Charge I avers that the accused and Staff Sergeant Joseph Maduri, acting jointly and in pursuance of a common intent, knowingly and willfully applied to their own use and benefit about

100 pounds of coffee and about 100 pounds of sugar of a value of about $25.00 property of the United States furnished and intended for the military service thereof in violation of Article of War 94, and the Specification of Charge II avers that the accused and Maduri acting jointly and pursuant to a common intent knowingly and willfully attempted to dispose of by offering and attempting to sell for personal gain the same property described in the Specification of Charge I in violation of Article of War 96.

The ninth subparagraph of Article of War 94 denounces in pertinent part:

> "Who sells, * * * knowingly and willfully * * * applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any * * * subsistence stores * * * or other property of the United States furnished or intended for the military service thereof; * * *."

Misapplication means devoting to an unauthorized purpose for the party's own use or benefit (MCM 1928, par 150i, p 184).

The elements of proof as stated in the Manual with respect to misapplication are:

> "(a) That the accused * * * applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and was furnished or intended for the military service thereof; (c) the facts and circumstances of the case indicate that the acts of the accused were willfully and knowingly done; and (d) the value of the property, as specified."

The elements of proof of sale or wrongful disposition are identical to those of misapplication except for the first clause thereof which is stated as follows:

> "(a) That the accused sold or disposed of certain property in the manner alleged" (MCM 1928, par 150i, p 184).

The uncontroverted evidence shows that the accused had obtained quantities of sugar and coffee from units of the First Armored Division when these units were inactivated, and stored the commodities in the basement of his quarters intending to use them in the mess of the units which he commanded. Early in June 1946, Sergeant Maduri offered to sell 100 pounds of coffee and 100 pounds of sugar for 22,000 marks if Stoll, a German civilian could find a buyer. Stoll offered the goods for sale to an acquaintance named Behr, who in turn told a CIC agent named Osborne

of the offer. Acting under instructions from Osborne, Behr accepted the offer and arrangements were made to deliver the goods in Behr's garage, but the accused insisted that the goods be delivered by stealth and in a clandestine manner in a public park. On the appointed night the accused and Sergeant Maduri removed the goods from their place of storage and placed them under a bush at the appointed rendezvous. They were waiting for the buyers to pick up the property when they were apprehended by agents of the CIC.

In his sworn testimony in his own behalf the accused fully corroborated the evidence for the prosecution.

The offense of misapplication was completed when the accused removed the goods from their proper place of storage with intent to sell them to unauthorized persons for personal profit.

The further actions taken by the accused to effect the sale amount to an attempt to wrongfully dispose of the property by sale. But for the intervention of the CIC agents, the wrongful sale would have been consummated.

The evidence clearly shows that the goods in question were the property of the United States furnished and intended for the miliary service.

The circumstances of the case clearly show that the accused's acts were willfully and knowingly done.

No evidence was introduced as to the value of the goods described in the specifications. Nevertheless judicial notice may be taken of the Quartermaster Corps Catalog, War Department which shows the Government contract price of coffee and sugar for the months of May and June 1946 to be $.20 per pound of coffee and $.06 per pound for sugar. Accordingly the aggregated value of the coffee and sugar described in the specification may be established as $26.00, which is in excess of the value alleged, $25.00.

In our opinion the evidence of accused's guilt of the offenses charged in the Specifications of Charges I and II is clear and compelling.

9. Numerous errors were committed during the course of the trial. The question remaining for consideration is whether these errors affect the legal sufficiency of the record in spite of the compelling evidence of guilty. The most serious errors are enumerated below:

a. The prosecution was permitted, over the objection of the defense, to examine Stoll concerning a transaction wherein a 100 pound sack of coffee was alleged to have been traded by Sergeant Maduri for a

Leica camera (R 23-24). The law member, in overruling the defense's motion to strike any reference to such other transaction, stated that "the court will naturally disregard any reference to any other transaction * * *". Nevertheless, the court, in examining the witness, proceeded to question him about the coffee and camera transaction (R 24-25). Even the law member, far from disregarding the incompetent testimony, referred to it in ruling on a defense's motion for a finding of not guilty, when he stated that "there is also evidence brought out on cross examination that the accused were on other times and other cases in similar practice" (R 39).

b. The prosecution was permitted to lead witnesses to such an extent that most of the prosecution's testimony is that of the trial judge advocate rather than of the prosecution's witnesses.

Were there any substantial conflict in the evidence, such conduct would consitute substantial and prejudicial error. In CM 273791, Gould, 47 BR 29, 74, the Board of Review stated:

> "It is the general rule that the prejudicial effect of errors in the admission of irrelevant, incompetent or immaterial evidence offered by the prosecution is to be measured by consideration whether the legal evidence of guilt is relatively conclusive or inconclusive, and the extent to which the evidence for the prosecution is contradicted, or explained consistently with innocence by the evidence on behalf of the accused. It seems obvious that evidence improperly admitted might affect the ultimate result in one case, and not in another. A conviction should not be set aside where the evidence is of compelling effect and the evidence improperly admitted could not therefore reasonably have affected the result (CM 237711, Fleischer, XXIV BR 89, 99-100)."

The record in the instant case discloses no substantial conflict in the evidence. On the contrary, the record proof is compelling, and is substantiated rather than rebutted by the evidence adduced by the defense. It is therefor our opinion that the errors committed by the court did not prejudice the substantial rights of the accused.

10. The records of the War Department show that the accused is 32 years of age, married and a high school graduate. He enlisted on 15 August 1942 and served as an enlisted man until his honorable discharge for the convenience of the Government to accept a commission on 5 March 1943. On 6 March 1943, he was commissioned a second lieutenant, Army of the United States, upon graduation from Armored Force Officer Candidate School and entered active duty. He was promoted to first lieutenant on 9 May 1944. He has served in the European Theater of Operations since February 1945. His civilian occupation was that of a mechanic and press and die worker. His efficiency index to 31 December 1945 - 35.2 (Very Satisfactory).

11. Staff Sergeant Joseph Maduri, who was tried jointly with the accused, was also found guilty, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for two years, reduced the period of confinement to one year and ordered the sentence executed but suspended the execution of the dishonorable discharge until the soldier's release from confinement.

12. The court was legally constituted and had jurisdiction over 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 and to warrant confirmation thereof. A sentence to dismissal, total forfeitures and confinement at hard labor for seven years is authorized upon a conviction of violations of Articles of War 94 and 96.

_____, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip A. Smith, Judge Advocate

JAGH - CM 319194 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and opinion of the Board of Review in the case of First Lieutenant Thaddeus P. Austin (0-1016611), Cavalry.

2. This officer was tried by general court-martial in a joint trial with an enlisted man and was found guilty of misapplication of a one hundred pound sack of sugar and a one hundred pound sack of coffee, property of the United States, furnished and intended for the military service thereof, in violation of Article of War 94; and of wrongfully attempting to dispose of by offering and attempting to sell said sugar and coffee, in violation of Article of War 96. No evidence of any previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years. The reviewing authority appoved 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.

The accused was commanding officer of several provisional truck companies. When other units were inactivated he obtained excess stores of coffee and sugar from those units and stored such supplies with the intention of using them at the mess. He and Staff Sergeant Maduri, who was tried with him, met a German civilian and offered to sell him one hundred pounds of sugar and one hundred pounds of coffee for 22,000 marks. In an attempt to find a customer for the sugar and coffee the German talked to a friend named Behr. Behr informed a CIC agent of the proposed transaction and was told to close the deal and arrange for delivery of the sugar and coffee. When a time and place had been set for the consumation of the transaction, Behr notified the CIC and the accused and Sergeant Maduri were apprehended at the agreed rendezvous in a public park where the sugar and coffee were found.

4. Sergeant Maduri was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved only so much of his sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for two years, reduced the period of confinement to one year and ordered the sentence executed but suspended the execution of the dishonorable discharge until the soldier's release from confinement.

5. In view of all the circumstances and the action taken by the reviewing authority in the case of Sergeant Maduri, I recommend that the sentence be confirmed, that the period of confinement be reduced to one year, that the sentence as thus modified be carried into execution, and that a United States disciplinary barracks be designated as the place of confinement.

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

CM 319194

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 169, 19 May 1947).

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

MAY 20 1947

JAGQ - CM 319202

U N I T E D S T A T E S	)	6TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Taegu, Korea, 17 December 1946. Dismissal.
	)	
Captain LEWIS C. WINGARD (0-1290353), Infantry.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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: In that Captain Lewis C. Wingard First Battalion First Infantry, APO #6, did at Skipworth, APO #6, on or about 24 November 1946, wrongfully, unlawfully, feloniously, and against the order of nature, have unnatural sexual intercourse with Lee, Tong Su, a male person, by forcing the said Lee, Tong Su, to take his, the said Captain Lewis C. Wingard's penis into his, the said Lee, Tong Su's mouth, thereby bringing discredit upon the military service.

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

Specification: In that Captain Lewis C. Wingard First Battalion First Infantry, APO #6, did at Skipworth, APO #6, on or about 24 November 1946, wrongfully, unlawfully, feloniously, and against the order of nature, have unnatural sexual intercourse with Lee, Tong Su, a male person, by forcing the said Lee, Tong Su, to take his, the said Captain Lewis C. Wingard's penis into his, the said Lee, Tong Su's mouth, thereby bringing discredit upon the military service.

The accused 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. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution's evidence shows that accused and another officer appeared at Camp Skipworth, Korea, on 24 November 1946 at about 1600 and were furnished a room for the night in the Bachelor Officer Quarters (R. 6, 7, 8-10). Accused who was en route home, was assigned to Room No. 5 (R. 9) and two Korean houseboys, Lee, Tong Su and Yu, Chun Sik (referred to as Charlie) carried in accused's luggage (R. 25, 40). Three of the parcels were taken to Room No. 5, while two others were carried by Lee to Room No. 1 at accused's request (R. 25). There Lee testified he saw accused and another officer, who departed when accused told Lee to go into the bedroom. Lee was directed to sit on the bed, which he did, and accused went into the other room returning shortly with a bottle of whiskey. When accused experienced difficulty in opening the bottle, Lee volunteered to open it and while he was so engaged accused removed all his clothing except his undershirt and lay upon the bed. He offered Lee a drink which was refused and then placing the bottle on the floor, took Lee's hand and placed it upon accused's penis which was erect (R. 26, 27). At accused's solicitation, Lee masturbated him for a while, but when he ceased accused told him to put his mouth to "it" and drew Lee closer to his penis. Lee testified, "He pulled me down, so I just went down naturally" (R. 27). Lee tried to keep his mouth closed, but accused forced his penis in, slapping him on the face and pulling his hair. When Lee succeeded in ejecting accused's penis, accused arose and ordered him to remove his clothes. He refused but accused "grabbed him"; forcibly removed his clothing by tearing his undershirt and seizing Lee by his trousers, directing him to remove them and "hit my seat." Observing that Lee's shirt was torn, accused went to the adjoining room and returned shortly thereafter with an undershirt to replace the one he had torn. Lee testified that in accused's absence, two officers entered the room in which he was standing, smiled and then left. Upon accused's return, he sat down on the bed, removed his trousers and directed Lee to kneel down on the floor between accused's legs (R. 28-31). He drew Lee to him, and when the latter resisted, accused again slapped him and succeeded in getting his penis in Lee's mouth. Lee did not call for help, although he testified, "I was crying very loudly, and I was hoping that somebody would come into the room to help me, and when I cried out louder, he told me to quiet down" (R.33). In the course of the incident he heard the other houseboy, Charlie, calling him but he did not answer because he thought Charlie couldn't hear him (R. 34).

Accused had his penis in Lee's mouth a short time when a light was turned on in the room. Accused then lay on the bed; drew the covers over himself and while Lee was still in a kneeling position, an officer opened the door of the bedroom, looked into the room and then withdrew. Lee then ran out into the hall, saw several officers standing there and attempted to tell them what had happened, but they did not seem to understand. He shouted, "No. 1 ...go to room...man...my mouth...kiss...I no do...hitting...hair. (The witness then pulled his hair)." He then ran to the houseboys' room and related his experience to Charlie (R. 34-35).

Charlie testified that he helped Lee carry the officer's baggage into the quarters about 4 P.M. on 24 November 1946 and he next saw Lee about 6 P.M., when the latter came into his room crying and stating "that he was forced to get into that captain's room, and he was slapped three times and he was forced to go through with the act". Lee's undershirt was torn and a button was off (R. 40-43).

Major Burnett testified that at about 1715 on 24 November 1946 he heard sounds coming from Room No. 1 which adjoined his room. It sounded like "someone having a nightmare or mumbling in their sleep." Upon returning from supper with a group of officers he stopped at this room and upon receiving no response to his knocking entered. There he saw the accused lying in bed and the witness Lee squatting against the door which Major Burnett had just opened. Accused asked Burnett what he was doing there and ordered him out. Burnett left and shortly thereafter observed Lee run out of the room crying and holding his hands to his stomach. The several officers in the hall attempted to learn what Lee was saying, but being unable to understand him, sent for the houseboy known as Charlie to interpret Lee's remarks (R. 12-15). Lee's clothes were dirty and his undershirt was torn in front (R. 17).

Lieutenant Colonel Wells, Chaplain Youman and Captain Brown accompanied Major Burnett from the officers' mess to Room N o. 1 in the BOQ, but remained in the hall while Major Burnett entered the room (R. 43, 44, 47). Colonel Wells testified that after Burnett rejoined him in the hall, Lee came running out of the room weeping and holding his hands to his groin. Both Colonel Wells and Captain Brown shortly thereafter saw accused come out of the room from which Lee had appeared, and upon being asked what he was doing in Chaplain Hartlage's room, accused replied that he had been given permission by the Chaplain to use the room and refused to state what had taken place (R. 44, 45, 47). Captain Brown heard accused say that a man "having been in combat had a right to knock a Korean around if he wanted to or kick him around or words to that effect" (R.50).

4. For the defense evidence was introduced to show that Lee was seen by a medical officer at about 6:00 P.M. on the day of the alleged offense and that at that time his clothes were dirty and ragged (R. 52). Three officers, including Chaplain Hartlage, and one enlisted man gave character testimony on behalf of accused to show that his reputation as an officer and a gentleman was beyond reproach. One witness testified that accused had expressed vigorous contempt for a certain person who was known to be "peculiar in his relations with other men." Chaplain Hartlage also stated that accused had his explicit permission to use the room at any time (R. 53-57).

After his rights as a witness were fully explained accused elected to be sworn and testified that when he was placed in arrest about 1800 on 24 November 1946, he was not advised as to the reason therefor. He further testified that he was not present when the investigating officer interviewed the witnesses although he was subsequently afforded the opportunity to cross-examine them but did not desire to do so (R. 59, 60).

5. The uncontradicted evidence clearly shows that on the date and at the place alleged the accused committed the offense of sodomy per os with Lee, Tong Su, a Korean houseboy, and that he used physical force in compelling Lee to commit the act with him. While the only testimony relating to the penetration was that given by Lee, one prosecution witness testified that he heard noises coming from the room in which accused and Lee were together which sounded as if someone were having a nightmare. A short time thereafter he also observed accused in bed in this room with Lee crouched behind the door. The accused expressed indignation at this intrusion and ordered the witness out of the room. Within a few minutes Lee was observed to run out of the room in an excited manner gesticulating wildly and attempting unsuccessfully to state in monosyllables what had occurred therein. When accused later came out of the room and was asked for an explanation he stated that as a combat soldier it was his privilege to kick a Korean around if he desired. This statement, inferentially at least, was an admission that he had assaulted a Korean. Lee's testimony as to the act of sodomy committed as a result of accused's coercion was not refuted, and while we find in Lee's testimony evidence which shows that at some time during the debauch he was not an unwilling party, there is nevertheless substantial and compelling circumstantial evidence corroborating his testimony that sodomy was committed and that force was used in its accomplishment.

6. Certain questions of law raised by the record of trial merit our consideration:

a. Defense counsel challenged the competency of Lee as a witness, citing paragraph 120b of the Manual for Courts-Martial and stated

that Lee "does not have the apparent sense and understanding of the moral importance of telling the truth." Thereupon the witness, having stated that he was a Buddhist, was affirmed and interrogated by the court through the interpreter upon voir dire examination. It clearly appears from his testimony that he understood the sanctity of the affirmation and the court in the exercise of its discretion, properly overruled the objection (See Winthrop, Mil Law & Prec, 2nd Ed, Rev, p. 334).

b. Defense counsel's objection to testimony of the witnesses relating to what they heard the witness Lee say when he came out of the room which the accused was occupying was properly overruled. It is true that the officers could not testify to what Charlie, the person to whom he related the story in Korean, told them that Lee had said as such testimony would have been hearsay. But their testimony was limited to a description of Lee's gestures and to his remarks which they heard and understood from Lee himself. Furthermore, the witness Charlie testified to what Lee had told him almost immediately after the incident. This testimony as to what Lee was heard to say being utterances under such circumstances of shock as to show that they were made spontaneously and were not the result of reflection or design constituted a part of the res gestae and were properly admissible as an exception to the hearsay rule (CM 221399, Hay, 49 BR 141).

7. Accused was charged with the same act of sodomy by force in the Specification of Charge I as a violation of the 95th Article of War and in the Specification of Charge II as a violation of the 96th Article of War. Offenses under Article of War 95 and Article of War 96 are not the same, nor established by the same evidence, the former being applicable to officers and cadets, and the conviction of an officer under both articles on the same facts is not illegal as placing him twice in jeopardy for the same offense (McRae v. Henkes, 273 Fed. 108). The alleged act, although manifestly constituting "conduct, unbecoming an officer and a gentleman," is condemned by the following applicable authority as a violation of Article of War 95:

> "Offending against good morals, in violation * * * of public decency and propriety." (Winthrop's Military Law and Precedents, 1920 Reprint, pp 716-718).

The final clause of the Specification, "thereby bringing discredit upon the military service," is improper for charging an offense under Article of War 95. It should be used only to charge violations of Article of War 96 from which context it has been taken almost verbatim (CM 248934, Murray, 31 BR 399). However the language of the specification arises from the aforementioned clause, manifestly charges an offense condemned by Article

of War 95, and that part which is inconsistent therewith should be considered as surplusage and disregarded. The offense is also a violation of the 96th Article of War, differing from the civil offense chargeable under the 93rd Article of War. Proof that accused's acts were of a nature to bring discredit upon the military service, was necessary to establish the offense charged in violation of the 96th Article of War and would not have been required under the 93rd Article of War (CM 241597, Fahey, 26 BR 309). It is clear from the evidence that accused's act constituted conduct unbecoming an officer and a gentleman and also was of a nature to bring discredit upon the military service. Accordingly, the evidence is legally sufficient to support the findings of guilty of each Charge and its Specification.

8. Attached to the record of trial is a recommendation for clemency dated 21 December 1946 and signed by the defense counsel, the assistant defense counsel, and by six out of eight members of the court which tried accused. The recommendation is based upon accused's excellent combat record, his thirty-one months service overseas, and his previous good character. It requests that prior to execution of the sentence accused be submitted for psychiatric examination pursuant to War Department policy regarding homosexuals. A letter from the Chief of Medical Service of the 71st Station Hospital dated 30 November 1946 discloses that accused was examined and found to have no physical or psychiatric disease. The report of investigation contains an affidavit that accused was "nasty mean drunk" shortly after his arrival at Camp Skipworth around 1600, 24 November 1946, and the aforementioned hospital report sets forth that "a blood sample taken from accused (date not given but apparently 24 Nov 46) showed 104.6 mgm % of alcohol, which is consistent with severe intoxication."

9. War Department records show accused to be 27 years of age and married. He attended high school for two years and then enlisted in the Regular Army in 1938. According to the charge sheet accompanying the record of trial he served as an enlisted man from 25 October 1938 to 16 August 1942. War Department records further reveal that he attended Officer Candidate School at the Infantry School, Fort Benning, Georgia, and upon completion of the course was commissioned a second lieutenant, Army of the United States, on 17 August 1942. He was promoted to the grade of first lieutenant, Army of the United States, on 12 December 1942 and to captain on 3 April 1945. He saw service in the Philippine Islands and was awarded the Bronze Star Medal for heroic service during military operations against the enemy on 21 March 1945. He was wounded in action two days later. In the latter part of 1945 he returned to the United States on recuperative leave and subsequently returned to the

Pacific Theater. His record of service shows efficiency ratings varying from very satisfactory to superior.

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

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

C E Johnson, Judge Advocate

JAGQ - CM 319202 1st Ind

WD, JAGO, Washington 25, D. C. JUN 5 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 Captain Lewis C. Wingard (0-1290353), Infantry.

2. Upon trial by general court-martial this officer was found guilty of one act of sodomy in violation of Articles of War 95 and 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. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

On 24 November 1946, on his way to the United States, the accused stopped at Camp Skipworth, Korea, for the night. He induced a Korean houseboy who brought his baggage into the Officers Quarters to remain in his room and persuaded him to fondle accused's penis. Thereafter accused, apparently drunk, requested the boy to take his penis in his mouth and when he refused, slapped him and pulled his hair until the act was accomplished. While no witness saw the penetration, other officers were aroused by the noise coming from the room and one of them entered to find the accused in bed, partially disrobed and the boy crouching nearby. Within a short time the boy was observed to emerge excitedly from the room in full flight and attempted to explain what had occurred. A native interpreter testified that the boy told him at that time that the accused had succeeded in getting him "to go through with the act." Shortly after the boy left the room, the accused came out and when asked for an explanation by the commanding officer said something to the effect that it was the privilege of a combat soldier to kick a Korean around if he so desired. Several character witnesses testified to accused's excellent reputation. Accused took the stand for a limited purpose but gave no testimony relating to the offense charged. While the record of trial contains no evidence pertaining to accused's drunkenness at the time of the alleged offense, a letter in the allied papers signed by a

medical officer states that a blood specimen submitted for laboratory analysis showed "104.6 mgm %, which is consistent with severe intoxication." The accused was examined about 26 November 1946 and found to be free of physical or mental disease. Six of the eight members of the court and defense counsel recommended clemency.

By his misconduct accused has demonstrated that he is not worthy of his commission. I recommend that the sentence be confirmed and carried into execution.

4. 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

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

(G.C.M.O. 209, June 11, 1947

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

JAGN-CM 319228

U N I T E D S T A T E S	)	UNITED STATES FORCES IN AUSTRIA
v.	)	Trial by G.C.M., convened at Vienna, Austria, 10 October 1946. Dishonorable discharge and confinement for eighteen (18) months. Disciplinary Barracks.
Private First Class HAROLD McCOY (42218262), Company D, 796th Military Police Battalion.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and TAYLOR, Judge Advocates

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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 First Class Harold McCoy, Company D, 796 Military Police Battalion, did, without proper leave absent himself from his station at Vienna, Austria from about 3 July 1946 to about 11 September 1946.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification and 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 eighteen months at such place as the reviewing authority might direct. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings

of guilty of the Charge and its Specification. The only question to be considered is the legality of the sentence.

4. The Table of Maximum Punishments, paragraph 104c, MCM, 1928, limits the maximum authorized punishment for the offense of which accused was found guilty to dishonorable discharge, total forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Executive Order No. 9267, dated 9 November 1942, suspended such limitation, until further order, as to such offenses committed after 1 December 1942. By Executive Order No. 9683, dated 19 January 1946 (published as Executive Order No. 9883 in War Department Bulletin No. 2, dated 22 January 1946, and hereinafter referred to as Executive Order 9683), this suspension was terminated except as to offenses theretofore and thereafter committed in "occupied enemy territory."

The offense of which accused was found guilty was committed 3 July 1946 in Austria. To determine whether his sentence is within or in excess of the legal limitations in effect as of that time and place it must first be determined whether Austria was then "occupied enemy territory" within the purview of Executive Order No. 9683. A proper interpretation of such Order requires the application of two primary rules of construction. First, the intent of the Executive at the time of his promulgation of the Order, if it can clearly be ascertained, must be applied. Second, the Order, being in the nature of a penal statute, must be strictly construed, and all doubts resolved in favor of the accused. (Crawford on Statutory Construction, section 240).

The Board has been unable to find any aid to such interpretation within the Order itself, nor has it discovered any prior judicial determination of the question. It has, however, found that certain official expressions have been made of the attitude of the United States of America as to the status of Austria since 1937. Such expressions have been ably abstracted by the Department of State of the United States, and incorporated in its official press release numbered 761 and dated 28 October 1946, from which we quote, at length, as follows:

> "During the period following the first World War, the United States Government steadily encouraged the development of a free and independent Austrian State based on democratic principles, and viewed with strong disapproval all Nazi attempts to force Austria into the German Reich. The attitude of the United States toward the military occupation of Austria by Germany and its formal incorporation in the German Reich in 1938 was guided by this consideration and by the well-established policy of the United States toward the acquisition of territory by force. While as a practical matter the United States was obliged in its effort to protect American interests to take certain administrative measures based upon the situation

created by the Anschluss, this Government consistently avoided any step which might be considered to constitute de jure recognition of the annexation of Austria by Germany.

"In his radio address on May 27, 1941, President Roosevelt referred repeatedly to "the seizure of Austria", and described the Austrians as the first of a series of peoples enslaved by Hitler in his march of conquest. Secretary Hull stated at a press conference on July 27, 1942, that "this Government has never taken the position that Austria was legally absorbed into the German Reich". In various wartime administrative measures in the United States, such as the freezing of assets, Selective Service, and registration of aliens, Austrian nationals were included in a separate category from the German or were assimilated to the nationals of countries which Germany seized or occupied by force.

"The United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy State or a State at war with the United States during the second World War. The Department of State believes that this view has received diplomatic recognition through the Moscow Declaration on Austria and the Declaration issued at Algiers on November 16, 1943 by the French Committee on National Liberation concerning the independence of Austria. In accordance with the objectives set forth in the Moscow Declaration to see reestablished a free and independent Austria, an Austrian Government was formed after free elections were held on November 25, 1945. This Austrian Government was recognized by the four powers represented on the Allied Council, as announced simultaneously on January 7, 1946 in Vienna and the capitals of these States. In its meeting of April 25, 1946, the Allied Council, moreover, considered a statement of the United States Government's policy in Austria made by General Clark, and expressed its general agreement with Section I "Status of Austria", in which the United States maintained that since Austria had been liberated from Nazi domination, it should be treated as a liberated area.

"In the opinion of the Department of State, the judgment of the International Military Tribunal rendered at Nuremberg on September 30-October 1, 1946, gave further international confirmation to this view of Austria's status by defining the invasion of that country as an aggressive act - "a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries." The Nuremberg judgment also states that "Austria was in fact seized by Germany in the month of March 1938."

"In order to clarify the attitude of the United States Government in this matter, the United States Government recognizes Austria for all purposes, including legal and administrative, as a liberated country comparable in status to other liberated areas and entitled to the same treatment, subject only to the controls reserved to the occupying powers in the New Control Agreement for Austria of June 28, 1946. The United States Government believes that the international acts mentioned above are adequate for all members of the United Nations to regard Austria as a liberated country."

The "New Control Agreement", referred to in the last paragraph of the press release, recites in its preamble that its purpose is to carry out the aim, announced in the Moscow and Algiers Declarations, of reestablishing a free and independent Austria liberated from German domination. Its provisions are not in conflict with such status and are designed to implement Austrian rehabilitation by defining the nature and extent of the authority of the Austrian government and the functions of the Allied organization and forces in Austria.

In the light of such expressions of official attitude we cannot escape the conclusion that in issuing Executive Order 9683 the President did not intend to include Austria within the excepted "occupied enemy territory." Even though it may be conceded the matter is not one which can be categorically announced, the rule of strict construction before mentioned must constrain us to arrive at the same conclusion as being that most favorable to the accused.

For these reasons the Board of Review is of the opinion that the phrase "occupied enemy territory", as it appears in Executive Order 9683, did not and does not include the geographical territory of Austria, internationally recognized, as of 1937. In arriving at this conclusion we are not unaware of TWX #60151 from The Adjutant General to the Commanding General, United States Forces European Theater, dated 19 February 1946, stating that "Germany and Austria are the only areas in your theater considered as "occupied enemy territory" within the meaning of that phrase as used in Executive Order 9683, 19 January 1946 * * *." That TWX was concurred in by the Office of The Judge Advocate General. It should be noted that it was transmitted some eight months prior to the issuance of the Department of State press release above quoted. Until that clarification of the status of Austria was made the whole question was nebulous and subject to misrepresentation. Whatever may have been the basis for the opinion expressed in such TWX it now appears that such opinion was erroneous.

5. For the reasons stated the Board of Review holds the record of

trial legally sufficient to support the findings of guilty of the Charge and its Specification, but to support only so much of the sentence as involves dishonorable discharge, total forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

Edward [illegible], Judge Advocate.

Joseph F. Brock, Judge Advocate.

_____, Judge Advocate.

FEB 24 1947

JAGN-CM 319228 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, United States Forces in Austria, APO 777, c/o Postmaster, New York, N. Y.

1. In the case of Private First Class Harold McCoy (42218262), Company D, 796th Military Police Battalion, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for six months be approved and that a Post Guardhouse be designated as the place of confinement. Upon taking such action 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 319228).

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.

MAY 22 1947

JAGQ - CM 319268

UNITED STATES v. Private First Class ANGELINO P. PACHECO (30106770), 237th Ordnance Medium Maintenance Company, APO 957.	UNITED STATES ARMY FORCES, MIDDLE PACIFIC Trial by G.C.M., convened at APO 958, 21 November 1946. Dishonorable discharge and confinement for life. Oahu Prison, Oahu, Territory of Hawaii.

REVIEW by the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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 92nd Article of War.

Specification: In that Private First Class Angelino P. Pacheco, 237th Ordnance Medium Maintenance Company, did, at Honolulu, T. H., on or about 22 September 1946 forcibly and feloniously, against her will, have carnal knowledge of Mrs. Yoshi Tomaki.

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

Specification: In that Private First Class Angelino P. Pacheco, 237th Ordnance Medium Maintenance Company, did, at Honolulu, T. H., on or about 22 September 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of T/5 Ansel P. Jones, about $3.00 lawful money of the United States.

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Private First Class Angelino P. Pacheco, 237th Ordnance Medium Maintenance Company, did, at Honolulu, T. H., on or about 22 September 1946, unlawfully carry a concealed weapon, viz, a .45 Cal Pistol.

Accused pleaded guilty to Specification 2 of Charge III and not guilty to all Charges and the remaining specifications. He was found not guilty of Specification 1 of Charge III, and guilty of all Charges and all other specifications. No evidence of previous convictions was introduced. Three-fourths of the members present at the time the vote was taken concurring, 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, designated Oahu Prison, Oahu, Territory of Hawaii 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 in the Staff Judge Advocate's review.

4. The record of trial establishes that the accused and his civilian accomplice, Abellana, on the night of 22 September 1946 met Mrs. Yoshi Tomaki, an admitted prostitute, and her escort, T/4 Ansel P. Jones, while they were walking down a street in Honolulu, Territory of Hawaii. Brandishing a pistol, accused compelled Jones and Mrs. Tomaki to enter a nearby cemetery. There accused forced Jones to surrender three or four dollars which he had on his person and to lie face down on the ground with his hands clasped behind his head. While accused guarded Jones, Abellana led Mrs. Tomaki several feet away and commanded her to lie down. When she refused, he struck her in the mouth and abdomen several times. The blow to her mouth broke her dentures and her mouth became filled with blood. As a result of her weakened condition she was unable to shout for help, and thereupon, when Abellana said he would kill her unless she engaged in sexual intercourse with him, she submitted and penetration was accomplished. While Abellana was so engaged, accused came over carrying the gun, pushed Abellana from Mrs. Tomaki and prepared to engage in sexual intercourse with her. He gave Abellana the gun and the latter went toward the place where Jones was lying as ordered by accused. When Mrs. Tomaki struggled with accused, he raised his fist and threatened to strike her. She described the beating she received at the hands of Abellana as, "I got hit so hard I couldn't move" so that when accused threatened her, she ceased her resistance and accused had sexual intercourse with her. After the act was completed, she ran out of the cemetery and reported the incident to the police. Accused and his accomplice then departed, admonishing Jones to remain there for at least twenty minutes. Shortly thereafter Jones left and notified the police. Accused and Abellana were apprehended shortly thereafter and accused was found to have a .45 caliber pistol and loaded clip in his possession. Accused in his testimony admitted his presence in the cemetery with Abellana at the time and testified to being armed. He further admitted that he asked Jones if he had any

money, but denied that he had pointed the pistol at him, although he did hand the gun to Abellana when he went over to the spot where Abellana was engaged with the woman. He observed Abellana beat the woman and told him to desist. Thereafter he induced Abellana to go to Jones who was lying about twelve feet away while accused stayed with the woman. According to accused, she readily consented to have intercourse with him and assisted him in the act.

The court, within its province, rejected the incredible story of the victim's consent as related by accused. Notwithstanding the unsavory reputation of Yoshi Tomaki, there is abundant corroborative evidence to establish that she submitted to accused and Abellana only after being subjected to a ruthless beating at the hands of the latter. In addition the gun was displayed and she was threatened with death. Submission to sexual intercourse under such circumstances does not constitute consent. (CM 307006, Foland Garner, 60 BR 25, and cases therein cited.) Moreover, considering accused's testimony in the light most favorable to him, he would still have been guilty of the rape of Yoshi Tomaki because the law considers him a principal in her rape by Abellana, the accomplice, which rape accused's testimony readily admits (CM 1453, Fowler, 4 BR (ETO) 337). All essential elements of this offense as well as of the robbery of Jones were proved beyond a reasonable doubt. So, too, was the offense of unlawfully carrying a concealed weapon to which the accused pleaded guilty. The evidence amply supports the court's findings of guilty.

5. The accused is approximately 24 years of age and entered military service on 21 June 1943. He was inducted in Hawaii. The review of the staff judge advocate discloses that accused has a record of arrests extending back to 1938 for minor thefts, juvenile delinquency and assault and battery. Included in the allied papers is a certificate of previous convictions taken from accused's service record which shows that accused was tried by general court-martial for the offense of absence without leave on 20 July 1945, convicted and sentenced to dishonorable discharge, total forfeiture and confinement at hard labor for 10 years. The sentence was approved 29 July 1945 but the dishonorable discharge was suspended.

6. The court was legally constituted. 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. A sentence either of death or life imprisonment is mandatory upon conviction of rape, in

violation of Article of War 92. The accused being a resident of Hawaii, confinement in Oahu Prison, Honolulu, Territory of Hawaii, is authorized (Sec. III, W.D. Cir. 44, 18 Feb. 47).

W A Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

C G Johnson, Judge Advocate

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

JAGK - CM 319287

20 MAY 1947

UNITED STATES)	SEVENTEENTH MAJOR PORT
)	
v.)	Trial by G.C.M., convened at Bremerhaven,
)	Germany, 17 October 1946. Dismissal, to
Second Lieutenant WILLIAM)	be fined $250, and confinement for six (6)
PHINEZY (O-1556201),)	months.
Ordnance)	

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 61st Article of War.

Specifications 1, 3, and 4: (Findings of guilty disapproved by reviewing authority).

Specifications 2: (Finding of not guilty).

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

Specifications: In that Second Lieutenant William Phinezy, having been duly placed in arrest in quarters at 583rd Ordnance Ammunition Company, on or about 26 August 1946, did, at 583rd Ordnance Ammunition Company on or about 28 August 1946, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Second Lieutenant William Phinezy, 583rd Ordnance Ammunition Company, was, at 8 Kaiser Strasse, Bremerhaven, Bremen Enclave, Germany, on or about 1 September 1946 disorderly under such circumstances as to bring discredit upon the military service by pursuing a German woman, firing a pistol at her and in the direction of her flight, by entering an enlisted man's drinking club while wearing only a bathrobe, and by bandishing a pistol therein.

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

Specification: In that Second Lieutenant William Phinezy, 583 Ordnance Ammunition Company, did, without proper leave absent himself from his organization and station at or near Bremen, Bremen Enclave, Germany, from about 28 August 1946 to about 1 September 1946.

He pleaded not guilty to all charges and specifications and was found guilty of all charges and specifications except Specification 2 of Charge I and excepting the words "pursuing a German woman" and "at her and in the direction of her flight" of the Specification, Charge III. He was sentenced to be dismissed the service, to be fined $250, and to be confined at hard labor at such place as the reviewing authority might direct for six months. The reviewing authority disapproved the findings of guilty of Specifications 1, 3 and 4 of Charge I, approved the sentence and forwarded the record for action under Article of War 48.

3. Evidence for the Prosecution

The Specification and Charge II

There was received in evidence, without objection thereto, a duly certified extract copy of the morning report of 583rd Ordnance Ammunition Company, 583rd Ordnance Ammunition Company, 51st Ordnance Service Battalion, APO 751, with the following entry thereon:

"Morning Report 26 Aug 46
Phinezy, William (Ord) 01556201 2nd Lt
AWOL to Arr in qrs
S/ Raymond J Myles,
Capt., Ord. Dept." (R. 7, Pros. Ex.D)

Captain Raymond J. Myles, 583rd Ordnance Ammunition Company, Bremerhaven Staging Area, a witness for the prosecution, testified that on 26 August 1946 he was the commanding officer of the 583rd Ordnance Ammunition Company, Bremerhaven Staging Area, that on said date he placed the accused in arrest of quarters and gave him written notice thereof which was acknowledged by first indorsement duly signed by accused. The written notice referred to, signed by Captain Myles, accompanied by the acknowledgment thereof indorsed by the accused, was received in evidence without objection as Prosecution Exhibit G (R. 8). Captain Myles testified further that accused was never released from such arrest and that he knew of his own knowledge that at about 1300 hours on 28 August 1946 accused "left his quarters and terminated his arrest" (R. 8).

The Specification and Charge III

Irmgard Krause, age 25, a housemaid residing at 8 Kaiserstrasse, Wesermuende, Germany, testified that she knew the accused, that he was in her apartment on the afternoon of 1 September 1946, that he had a pistol in his hand and when he released the safety thereon she fled. As she was running down the stairway she heard "shooting" which sounded like it came from her apartment and that after this occurrence she went to the Military Police station (R. 9-10).

Corporal John Giddings, Detachment B, 43rd Air Supply Squadron, testified that at about 1430 hours in the afternoon of 1 September 1946 he was in the enlisted men's club, "Duffy's Tavern", at 10 Kaiserstrasse, Bremerhaven with six or eight other soldiers, when he heard five shots that sounded as if they came from "upstairs or from the hallway." He started toward the hallway and the accused, holding a pistol at his side and dressed in a bathrobe, rushed in and stated that he "was going after the Krauts; they were trying to shave this girl's head" (R. 11-12).

Private First Class Wayne C. Vernon, 43rd Air Supply Squadron, was one of the soldiers in "Duffy's Tavern" on 1 September 1946 when the accused entered the blub and said he was looking for "that" girl. The hallway to the club leads to 8 Kaiserstrasse and after he entered the club accused searched the place. On several occasions prior to this Private First Class Vernon had seen accused going upstairs at 8 Kaiserstrasse. On the occasion in question accused was dressed in a purple bathrobe and slippers and was holding a 38 silver-plated Colt automatic pistol (R. 14). On cross-examination Private First Class Vernon stated that accused appeared to be "normal" except for holding the gun (R. 15). Private First Class Herman P. Caillouet, 382 Military Police Company, Bremerhaven, testified that on 1 September 1946, pursuant to a report he had received, he went to an apartment known as 7 or 9 Kaiserstrasse, close to Duffy's Tavern, placed a round of ammunition in his "45" and "knocked at the door and said 'MP, MP,' and a man's voice, Lt. Phinezy's I presume, said, 'is it the MP?' and I said, 'Yes, it is the MP.' Then I entered the room." Accused had a chrome plated "Army 45" in his hand and another pistol in his left rear pocket. He was dressed in Army officers uniform but without a tie. He offered no resistance and the witness disarmed him. On cross-examination Private First Class Caillouet stated that the accused did not threaten him nor did he resist arrest or search (R. 16-18).

Without objection there was received in evidence a duly certified extract copy of the morning report of 583rd Ammunition Company for 29 August 1946 with entry thereon as follows:

"Phinezy, William (Ord) 01556201 2nd Lt
Fr Arr in Qrs to AWOL 1300 28 Aug 46
s/ RAYMOND J MYLES
Capt., Ord Dept" (R. 7, Pros. Ex. F)

For the Defense

No reference will be made to defense evidence concerning matters of which he was acquitted or concerning which the findings of guilty were disapproved by the reviewing authority.

Guentner Wittorf, 16 Helgolaender Strasse, Wesermuende, Sued, testified that on 29 August 1946 he saw the accused in bed at No. 8 Kaiserstrasse and that at the request of "the girl friend" he took a letter from accused to Lieutenant Slade and brought back to accused a message from Lieutenant Slade concerning payment of the troops. The witness stated that the accused was sick and had been sick for three days (R. 23-24).

Else Zeeb, 8 Kaiserstrasse, Bremerhaven, testified that she knew the accused and that he was sick three days in her house, 28 to 30 August 1946, inclusive. She had tried to locate a doctor but "couldn't get a connection" (R. 25-26).

First Lieutenant Wordie B. Slade, 583rd Ordnance Ammunition Company, stated that on or about 29 August 1946 he received a message that the accused was sick and that he called the hospital requesting that they send an ambulance to pick him up if the accused "asked for it." Lieutenant Slade did not go and investigate accused's condition due to a shortage of transportation. The witness stated further that due to an overcrowded condition in the officers' quarters, the accused had been assigned quarters on the ground floor of a building, the upper floors of which were occupied by enlisted men (R. 26-29).

Captain Raymond J. Myles was recalled to the stand by the defense and testified that accused's regularly assigned quarters were No. 2 Nuremberg Street in Bremen. On the 28th he "picked him up as breaking arrest in quarters" and on Sunday afternoon of the 30th he received the report that accused was sick in Bremerhaven (R. 32-33).

The defense recalled Irmgard Krause who stated that accused did not threaten her while he was at No. 8 Kaiserstrasse Street. She ran away because she saw the pistol (R. 33). Sergeant Joseph Chertic, 184th Port Company, Bremerhaven, testified as follows:

"Q. Did you see Lt. Phinezy on or about 1 September 1946?
A. Yes, Sir. He was brought to the guard house to be confined. That was on the 1st of September.
Q. Did you notice anything seemingly abnormal in the behavior of Lt. Phinezy?
A. Yes, later that night. Lt. Phinezy came downstairs to the

sergeant in the guard's office and I sent a sentry after him. I came up and Lt. Phinezy stated that someone was shooting at him and that the MPs were after him. I told Lt. Phinezy that he was perfectly safe and that no harm would come to him while he was there. I told him to go to bed and get a good night's sleep and he would be alright in the morning. He refused to go to bed and kept insisting that someone was shooting at him, and he said he would rather be locked in a cell block with the others. So I put him in the cell block and I told the guards to watch him closely. Lt. Phinezy crawled underneath the bed and he stayed there. The guard went inside and tried to get him from underneath the bed. He was shaking at that time and he was afraid to lie down. I came downstairs and I finally went inside and I succeeded in getting Lt. Phinezy to lie on the bed, and I told him to lie down and sleep. When I left the cell block he still crawled underneath the bed. About 3:00 o'clock in the morning the guards came up and got me and told me that the lieutenant was trying to commit suicide. I put on my trousers and ran downstairs. At that time, one of the guards succeeded in getting a glass out of his hands, and I noticed his hand was cut. We brought Lt. Phinezy up in the hallway and I sent the guard in the cell to get all the windows out of there and the glass. We couldn't get the windows out so I ordered them to use a club and break the glass down. I had the cell swept and issued him two new blankets. I had his shoe laces taken away and I tried to get his belt. He refused to give me his belt and he turned around and slapped one of the guards and he threw part of the sandwich which he was eating at me. After the cell was cleaned up, I tried to get him back into the cell and he started telling me about his children, that they were out in the hallway, and two dogs; and he also stated that his girl and his family were being crucified and that the marines were fighting the war and we were doing nothing. I told him that the war was over with and everything was all settled, and then I tried to get him to go back in the cell and lie down. Then he started to swing and I finally got a grip on him and got him into the cell and locked the cell up. I assigned another guard and I told him that I wanted him watched closely at all times. Then I called Lt. Elder, the doctor at the dispensary and asked him to come over. He came over and I told him the case and he said to send him to the hospital. So that afternoon, I had the ambulance come over and they took him to the hospital.

Q. Was there any odor of alcohol about the lieutenant when he was brought to the guard house?

A. No, Sir. Not that I know of." (R. 34)

After being duly advised of his rights the accused elected to be sworn and testified that during the times for which he was carried

absent without leave he was performing duties assigned to him and relating to the deactivation of the 3078th Ordnance MVD Company. There was a property shortage in this organization in excess of $30,000 and it was his duty to try to find the property. His presence in Bremerhaven was necessary in locating or attempting to locate missing vehicles of the organization. A 6x6 truck belonging to the organization was in his possession on 28 August, the day he came to Bremerhaven for the purpose of entering the 121st General Hospital. He stopped at 8 Kaiserstrasse, was taken ill there and was unable to leave. He made two attempts to contact his organization, one through a civilian who had previously been in his employ and the other through "Mrs. Zeeb." Accused testified that the reason he stopped at 8 Kaiserstrasse was that his personal effects were stored there, the officers quarters having been "filled". He had refused to bring his equipment and clothing into the quarters assigned him because there was "no security offered and no privacy". The time he had spent in the officers quarters he slept in the dining room on a couch. On cross-examination the accused admitted that he was placed in arrest of quarters on 26 August 1946. He stated that on the 28th he told Captain Myles that he was going to the hospital in a truck belonging to the 3078th and that he would have the truck sent back to the organization. Captain Myles did not tell him that he could go to the hospital but asked if he had transportation. He did not go to the hospital because he wanted to change his clothes. Accused asserted that he did not remember anything until he was taken to the hospital on 1 September 1946. He did not remember trying to make contact with the company "myself, no sir."

Upon being examined by the court accused testified that the reason he sought medical attention in the Bremerhaven Area rather than in Bremen was that "I had been at the 121st General Hospital before for the same illness". The illness was diagnosed as "delerium tremens" and accused attributed such condition to his nerves. While at No. 8 Kaiserstrasse he did not drink any liquor. Accused admitted that he was not responsible or accountable for the property of the 3078th Ordnance MVD Company, had not signed for any of the property neither had he been detailed to investigate the condition of the property account (R. 35-39).

It was stipulated between the prosecution and defense that Defense Exhibit 4 was a copy of the "discharge record of the 121st General Hospital at Bremerhaven" for 23 September 1946. The pertinent entry thereon is as follows:

"ADMISSION AND DISPOSITION REPORT
SECTION II DISPOSITIONS
4457 USA Hospital Plant APO 69
23 Sept 1946

WARD (1)	NAME ORGANIZATION (2)	ASN (3)	A/S GRADE (4)	RACE (5)	TYPE DATE (6)	CASE ADM	LEAVE DIAGNOSIS (7)	BLANK (8)
*		*				*		
11320	Phinezy William							
2B	583 ORD	0-1556201				ORD W	DIS Delerium Tremers	
						2nd Lt	3 Sept"	
*		*				*		

No further material evidence was presented by either the prosecution or defense.

5. We consider the evidence briefly, in disregard to what is obviously the salient question to be finally determined, viz, the mental responsibility of accused at the time of and for the offenses of which he was found guilty. The evidence clearly established, and the accused admitted, that he was, by competent authority, placed in arrest in quarters on 26 August 1946; that he signed an indorsement to his commanding officer acknowledging such status and that without being lawfully released, and under pretense of going to a hospital in another area, he broke his arrest on 28 August 1946 by going to the apartment of a German woman in Bremerhaven. There he remained for three days, although he stated that he intended only to change his clothes at the apartment and that he became too sick to leave. He was thereby absent without leave from the time he broke arrest and departed from his quarters even though his alleged illness may have been real. If he needed hospitalization he should have reported himself sick and requested to be transferred to a hospital. The offense was complete when he left his quarters without authority. Motive, although eligible for consideration in extenuation, is no defense to absence without leave (CM 239693, Burton, 25 BR 241, 244; CM 232596, King, 19 BR 129, 135). Neither absence without leave nor breach of arrest require any specific intent and voluntary drunkenness, if this in fact brought about accused's condition, would not be a defense (CM 232596, King, supra).

The evidence shows conclusively that accused, after firing a pistol several times, entered the enlisted men's club dressed only in a bath robe and bedroom slippers, brandished his pistol and asserted that he was "going after the Krauts." Such conduct, especially in the presence of enlisted men, is well within the ambit of that contemplated in Article of War 95 as being "conduct unbecoming an officer and gentleman".

We now consider the evidence from the standpoint of accused's mental responsibility. It is significant that neither the prosecution, defense, nor any member of the court ever requested that a Board of Medical Officers be appointed to examine accused or inquire into his existing mental condition. The accused testified intelligently in his defense, in fact he succeeded in convincing the court and the reviewing authority that he was not guilty of the several alleged offenses of absence without leave under Charge I. Although he asserted that he was extremely nervous, he denied drinking any liquor during his period of absence. The enlisted men who observed him in "Duffy's Tavern" noticed no abnormality except for his misconduct, and when Private First Class Caillouet went to the apartment to arrest him the accused inquired if he were an MP and upon being assured that the soldier was a military policeman he submitted to being arrested and disarmed. No incoherence was exhibited by such actions on accused's part. In a military court, as in our state and Federal courts, a person is presumed to be sane until a reasonable doubt of his insanity is shown (Commonwealth v. Clark, 292 Mass 409, 198 N.E. 641; Moore v. Com., 92 Ky 637; 18 SW 833; par 112a MCM 1928). We do not lose sight of the fact that when accused was confined in the guardhouse he showed signs of emotional instablity, expressing fear to the guards and even threatened his own life. Nor do we overlook the disposition report of the 4457 Hospital Plant dated 23 September 1946 with the diagnosis "Delerium Tremers", for which condition accused testified that he had previously been hospitalized.

Delirium Tremens is generally considered to be a form of "mental disease" which, if it exists to such an extent as to obliterate the intellect of accused or to otherwise thoroughly rob him of his powers of volition as to the offense charged, may be considered as a complete defense to crime (United States v. Drew (1828) 5 Mason, 28 Fed Cas. No. 14, 993; United States v. McGlue (1851), 1 Courd C.C. 1 Fed. Cas. No. 15, 679; Myres v. United States (1919) 168 C.C.A. 125, 256 Fed. 779; People v. Cochran (1924), 313 Ill. 508, 145 N. E. 207). On the other hand "a temporary loss of reason which accompanies and is part of a drunken spree and which is not the result of delirium tremens or pre-existing mental disease of some duration or permanence" is not insanity in the legal sense. (United States v. Clarke, 2 Cranch C.C. 158; Fed. Cas. No. 14, 811; United States v. Forbes, 1845 Crabbe, 558; Fed Cas. No. 15, 129; United States v. McGlue (1851) supra; McCarthy v. Com., 14 Ky Law Rep. 285, 20 SW 229; CM 319168 Poe. See also 79 A.L.R. 906-912.) In the instant case the court, by its findings of guilty, inherently found that accused was not suffering from delirium tremens, or, if he was, that he was not affected by such mental disease to such an extent as to be unable, concerning the particular acts charged, to distinguish right from wrong or to adhere to the right. From our examination of the evidence we conclude that there is no reason to disturb the court's findings, far as was said in CM 298814, Prairiechief, 21 BR (ETO) 129, 134:

"Although it was stipulated that if available as witnesses three medical officers would testify that following an examination of accused they made a diagnosis of acute alcoholism and pathological intoxication and that they were of the opinion that at the time of the commission of the offenses accused's mental state was such that he was unable to differentiate between right and wrong, to adhere to the right and to appreciate the consequences of his acts, it has been held that notwithstanding the opinion of psychiatrists, which it was proper for the court to consider, it was the duty of the court to consider the facts in evidence in the light of its own knowledge of human motives and behavior under certain conditions and to find upon all the evidence that at the time of the offense accused was capable of distinguishing right from wrong and of adhering to the right (CM NATO 2047, III Bull. JAG 228). Such a finding was inherent in the findings of the court in this case that accused was guilty as charged. The determination of accused's state of intoxication was essentially a question for the court and its determination, where supported by substantial evidence, will not be disturbed by the Board on appellate review (CM ETO 1953, Lewis; CM ETO 3937, Bigrow; CM ETO 5561, Holden and Spencer and authorities therein cited)."

In the instant case the accused knew of and acknowledged his status of arrest in quarters. He admits that without authority he deliberately broke his said arrest. He drove a truck to the residence of a civilian where he remained absent without leave for three days. He testified that he became sick and the civilians corroborate this testimony. He sent messages to an officer in his company stating his condition and fully recognized the military police who arrested him. Although he was obviously ill and mentally disturbed, these are not the responses of a thoroughly irrational mind.

6. War Department records show that the accused is 32 years of age and married. He attended the University of Indiana for two years and was inducted into the Army as an enlisted man on 20 February 1941. He was appointed Warrant Officer, Junior Grade, on 16 October 1942 and Second Lieutenant, Ordnance Department, AUS, after completion of a course of training at the Ordnance School, Aberdeen Proving Ground, Maryland, on 29 May 1943. His efficiency reports average excellent and he appears to have never received a superior rating.

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 of the

sentence. Dismissal is authorized upon conviction of a violation of Articles of War 61 and 69 and is mandatory upon conviction of a violation of Article of War 95.

Christy T. Silvey, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schenfeld, Judge Advocate

JAGK - CM 319287 1st Ind

WD, JAGO, Washington 25, D. C. SEP 15 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William Phinezy (O-1556201), Ordnance.

2. Upon trial by general court-martial this officer was found guilty of three offenses of absence without leave in violation of Article of War 61 (Specs. 1, 3 and 4, Charge I); breach of arrest in violation of Article of War 69 (Spec. and Chg. II), being disorderly under such circumstances as to bring discredit upon the military service by firing a pistol, by entering an enlisted men's drinking club while wearing "only" a bathrobe and by brandishing a pistol therein, in violation of Article of War 95 (Spec and Chg. III), and of absence without leave from 28 August 1946 to 1 September 1946 in violation of Article of War 61 (Spec. and Add'l Chg.). He was sentenced to be dismissed the service, to be fined $250, and to be confined at hard labor at such place as the reviewing authority might direct for six months. The reviewing authority disapproved the findings of guilty of absence without leave alleged in Specifications 1, 3 and 4, Charge I, 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof.

On 26 August 1946, by written orders, the accused was placed in arrest in quarters by his commanding officer, Captain Raymond J. Myles, Ordnance, for being absent without leave. Accused signed an indorsement to the order placing him in arrest, acknowledging his status and the reason therefor. On 28 August he broke arrest by leaving his quarters without authority and going to the apartment of a German woman in Bremerhaven, Germany, where he remained for about three days. At about 1400 hours on 1 September 1946 Irmgard Krause, a German girl residing at 8 Kaiserstrasse, Wesermuende (Bremerhaven), Germany, ran down the stairway from her apartment and reported that accused had a pistol and was shooting. Shortly after some shots were heard by enlisted men who were in "Duffy's Tavern" located near 8 Kaiserstrasse, accused entered the club with a pistol in his hand, wearing a bathrobe, and announced that he was after "Krauts" who were trying to shave the girl's head. A military policeman later found accused in the apartment, arrested and disarmed him. When accused was confined in the guardhouse he expressed fear for his life, crawled under a bed and made incoherent statements. He was subsequently hospitalized and on 20 September he was released with the notation "delerium tremers" after his name on the disposition report. No medical officers were called at the trial by either of the parties or by the court. Accused testified

that he had been previously hospitalized for "delerium tremers." On 12 August 1947 a board of medical officers appointed by the Commanding Officer, Valley Forge General Hospital found accused mentally responsible at the time of his offenses and at the present time.

I recommend that the sentence be confirmed but that the fine be remitted, and that as thus modified the sentence be carried into execution.

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

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

JAGH - CM 319291

APR 1947

UNITED STATES	)	9TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Augsburg, Germany, 19 and 20 December 1946. Dismissal, total forfeitures and confinement for three (3) years
First Lieutenant NORMAN P. ARTZ (0-2055970), Infantry	)	

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

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

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

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

Specification: In that First Lieutenant Norman P. Artz, Company D, 47th Infantry, was at Bad Worrishofen, Germany, on or about 16 October 1946, found drunk while on duty as a member of Screening Team Number 13.

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

Specification 1: In that First Lieutenant Norman P. Artz, Company D, 47th Infantry, was at Camp Dachau, Germany, on or about 20 November 1946, drunk and disorderly in the First Battalion Officers Quarters.

Specification 2: In that First Lieutenant Norman P. Artz, Company D, 47th Infantry, did, at Camp Dachau, Germany, on or about 21 November 1946, render himself unfit to perform properly his duties by reason of excessive use of intoxicants.

He pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and its Specification, guilty of Specification 1 of Charge II, except the words "and disorderly", guilty of Specification 2 of Charge II and Charge II. Evidence of one previous conviction by general court-martial for violation of standing orders was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is substantially as follows:

As to the Specification of Charge I: On 16 October, the accused was the officer in charge of No. 13 Army Screening Team at Bad Worrishofen, Germany, which was screening displaced persons at Headquarters No. 558, UNRRA Team (R 10). Lieutenant Colonel W. T. Shorthose, a British Officer who was the UNRRA representative on the Screening Team was present during the screening and testified that the accused "was shouting and making it difficult for the DP's" which appeared to be unlike the accused's previous exemplary conduct. The accused was not drunk at the time, but the witness gained the impression that he was "suffering from a hang-over". His eyes were red but he was not unsteady on his feet (R 11). The accused was inclined to interfere with the witness's work (R 11) by questioning the person with whom the witness was dealing (R 12). On cross examination the witness stated that as officer in charge the accused had a right to "discuss the problems pertaining to anybody who is examing a DP." The accused was coherent, but talked quickly (R 12).

Lieutenant Colonel Raymond F. Edwards, S5, 47th Infantry Regiment, arrived at the Screening Office at about 1000 on 16 October 1947, as a result of a report from Lieutenant Colonel Shorthose. Lieutenant Colonel Edwards testified that when he arrived the accused was "unsteady on his feet, his face was blanched and * * * his speech was thick." The witness noticed "a distinct odor of stale liquor." The witness told the accused to go on with his work and observed the accused interrogating a young lady in a foreign language which the witness did not understand. During the accused's interrogation of the young lady she appeared to become perturbed. The accused became excited and "banged his fist on the table." At this point the witness stopped the screening operation and directed the accused to report to another officer (R 14). The accused was able to walk out of the office without assistance (R 15).

As to Specification 1, Charge II: On the evening of 20 November 1946, First Lieutenant Shirley J. Thomas entered the bar of the First Battalion, 47th Infantry Regiment. The accused and a German civilian were in the bar, and accused was incoherent and had no control over his locomotion. Lieutenant Thomas told accused to go to bed and asked

the German civilian to assist him in taking accused to his room. While Lieutenant Thomas and the civilian were undressing accused, the accused was swinging his arms around, and "happened" to hit the German civilian and knocked his glasses off (R 16). The bar where accused was found was open to officers and it was fifteen minutes before closing time. Accused was not on duty and was not creating a disturbance (R 17).

As to Specification 2, Charge II: On the morning of 21 November 1946, Captain John J. Nazzaro, accused's company commander, saw accused at breakfast. Accused gave the impression of being under the influence of alcohol (R 7). His eyes were glassy and he was speaking in a "fairly loud voice," which was not usual for him (R 8). Captain Nazzaro did not want accused around the company so offered to take accused home and put him to bed. Accused and Captain Nazzaro were the only officers in the company and "took turns for whatever work came up." Captain Nazzaro did not assign any specific duty to accused that day (R 7). When asked if it was impossible for accused to do any of his assigned work, Captain Nazzaro testified:

> "I really don't know whether or not he could have done any particular job, but at that time I did not give him any particular job" (R 9).

4. The evidence for the defense is summarized as follows:

A former superior officer of the accused testified as to accused's excellent manner of performance of duty and good conduct (R 18). The accused, having been apprised of his rights as a witness, elected to be sworn and testified in his own behalf:

As to the Specification of Charge I: Lieutenant Colonel Shorthose, the UNRRA representative was not authorized to screen displaced persons but had presisted in doing so. While screening such persons he had passed two individuals who were naturalized German nationals and as such were not entitled to be treated as displaced persons (R 21) and were subject to automatic dismissal from the Displaced Persons Camp. The accused discovered these mistakes and ordered the individuals concerned back which angered Lieutenant Colonel Shorthose (R 22). The girl who was being interrogated when Lieutenant Colonel Edwards was present had been passed by Lieutenant Colonel Shorthose and had previously lied to the accused. Consequently the accused recalled her for questioning. The accused interrogated her in German because she did not speak English well and because the interpreter was not proficient.

As to Specification 1, Charge II: Accused went into the Officers Club at about 2030 and there was a poker game in progress. After the game ended, accused went to the bar and had a few drinks (R 21).

As to Specification 2, Charge II: Captain Nazzaro told accused that "he was relieving me of duty and told me to take the day off" (R 21). The company had very little work to do, and accused did not see anything unusual in being told to take the day off, as other officers took the day off instead of "hanging around the orderly room with nothing to do" (R 22). Many times, Captain Nazzaro himself had said that he was going home and sleep, as long as one of the other officers was there. Captain Nazzaro did not tell accused he was sending accused home because he did not want him around the area (R 23).

The accused's Officers Qualification Card (WD AGO Form 66-4), which was admitted in evidence as defense's Exhibit A (R 19) shows that the accused was commissioned on 28 October 1943 and that he has been consistenly rated as superior in the manner of performance of his duties. He has been awarded the Bronze Star Medal, the Combat Infantry Badge, and the Good Conduct Medal for service as an enlisted man, and the Presidential Unit Citation with one Oak Leaf Cluster. He is also authorized the American Defense Service Medal, the American Theater Service Ribbon, the European-African-Middle Eastern Campaign Ribbon with Service Stars for the Algeria, French Morrocco, Tunisia, Sicily, Normandy, Northern France, Ardennes, Central Europe, and Rhineland Campaigns, the World War II Victory Medal and the Army of Occupation Medal.

An Honorable Discharge Certificate issued to the accused on 27 October 1943 which was introduced in evidence as defense's Exhibit B (R 19) shows that the accused was last discharged honorably as a first sergeant on 27 October 1943 for the convenience of the government to accept an appointment as a second lieutenant, Army of the United States.

An extract copy of page 3 of accused's Service Record which was received in evidence as defense's Exhibit C (R 19) shows that the accused enlisted in the Army on 11 May 1929 and has served four enlistments. His character rating for each enlistment was excellent and he lost no time under Article of War 107.

5. Charge I, Drunk on duty: To support a finding of guilty of a violation of Article of War 85, it must appear that the accused was on a certain duty and that he was found drunk while on such duty (MCM 1928, par 145, p 160). While it is clear that the accused was on duty, there is no competent evidence that he was drunk. Two witnesses testified to the incident in question. The British officer, who was in the room with accused for an hour or more, testified that accused was not drunk, but was suffering from a "hang-over." The testimony of Lieutenant Colonel Edwards, who observed the accused for only a short time, tends to support the conclusion expressed by Lieutenant Colonel Shorthose, although Lieutenant Colonel Edwards expressed no opinion as to whether the condition of the accused was due to present or past intoxication. Both officers

testified that the accused was shouting and making things unpleasant for D.P.'s on the morning in question, but his explanation for this conduct, namely that he was reinterrogating individuals who had previously lied about their status, remains uncontradicated. Inasmuch as the record discloses no proof that the accused was drunk on the occasion alleged, the finding of guilty of Charge I and its Specification cannot be supported.

Specification 1, Charge II, Drunk in quarters in violation of Article of War 96: The uncontradicted evidence is compelling that the accused was, at the time and place alleged, drunk in quarters. The court properly excepted, in its findings, the words "and disorderly" as there was no evidence of any disorderly conduct on the part of accused. Accordingly, we are of the opinion that the record is legally sufficient to support the findings of guilty of Specification 1, Charge II.

Specification 2, Charge II, Rendering himself unfit to perform properly his duties by reason of excessive use of intoxicants: In CM 236632, Zander, 23 BR 79, 87, a case involving a similar offense the Board of Review discussed the elements of the offense charged as follows:

> "There are * * * three elements of the offense as to which proof beyond a reasonable doubt is required in order to sustain the finding of guilt; first, that accused had an important duty assignment; second, that he indulged in the excessive use of alcoholic liquor; and third, that such indulgence was voluntary and without justification and incapacitated him from performing the duty. Disgraceful, disorderly or dishonorable conduct are not involved but only that degree of intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties (MCM 1928, par 145)."

In the Zander case, the Specification alleged that the duty assignment was "important". In the instant case, no such allegation was made and it is, therefore, immaterial whether or not the assignment of the accused was important. It was shown that he had a duty assignment. It was also shown, however, that there was very little work to do in the accused's organization, and that it was a common practice for one of the officers to stay in the orderly room while the other returned to his quarters. The accused testified that he was not told he was being sent to his quarters because of intoxication, and that he thought nothing of it because of the nature of the company's work. On cross examination the accused's company commander was asked, "There was no criteria that he was to do any work that day?", to which the latter replied, "No, sir." He testified further that the work of the company officers consisted of "checking guard post and inspecting the billets," and that the accused normally carried out his duties very well, "but at that time I didn't assign him any."

The testimony as to accused's alleged intoxication consisted solely of the company commander's assertion that accused's eyes "appeared to be glassy and he was speaking in a fairly loud voice which was not usual for him." The company commander expressed the opinion that the accused was intoxicated "to the point that I didn't want him around the men." He was also erroneously permitted to testify that, if the men in the company had seen accused, "they probably would have received the same impression that I did, that he was under the influence of alcohol." The accused was, however, able to understand what was said to him and followed instructions without resistance or argument.

As to whether or not the alleged intoxication incapacitated him from performing his duties, the company commander's testimony was as follows:

"Q Was it true that 1st Lt Artz was unable to perform his duty for the day?
"A I didn't assign any specific duty to him that day, but I just didn't want him around the company at that time.
"Q The reason for that was that he was under the influence of alcohol?
"A I was under the impression that he was." (R 7-8).

These questions, on direct examination, were leading to the extent of amounting to testimony by the trial judge advocate, rather than testimony by the witness. On cross examination the company commander testified:

"Q Was he intoxicated to such a degree that it was impossible for him to do any of his assigned work?
"A I really don't know whether he could have done any particular job, but at that particular time I did not give him any particular job." (R 9).
"Q On that particular day did you think that he could carry out those duties as well as usual?
"A Well, I wouldn't say 'as well as usual'. I didn't want him in the company area at that time because of the impression he created." (R 9).

Because it is questionable whether the accused can be said to have had any duties for the day in question, because the testimony as to his alleged intoxication is meager and inconclusive, because the prosecution's sole witness as to this specification was le d and was permitted to testify as to the probable opinions of others and because there is no evidence that the alleged intoxication incapacitated the accused from performing his duties, the Board is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 2 of Charge II.

6. The accused is 38 years of age, married and completed two and one-half years of high school. War Department records show that he enlisted in the United States Army on 11 May 1929 and served as an enlisted man until 27 October 1943, when he was discharged for the convenience of the Government to accept a commission in the Army of the United States. He served as a first sergeant from 1 September 1942 to the date of his discharge. During his entire term of enlisted service his character was rated excellent and he lost no time under Article of War 107. He was commissioned a second lieutenant, Army of the United States on 28 October 1943, while serving in the North African Theater of Operations, and was promoted to first lieutenant on 19 July 1944. He served in the North African-European Theaters of Operation from 23 October 1942 to 8 September 1945 and from 18 July 1946 to the date of trial. He is entitled to wear the Combat Infantry Badge, the Presidential Unit Citation with one Oak Leaf Cluster, and the European-African-Middle Eastern Theater Ribbon with eight battle stars. He was awarded the Bronze Star Medal for meritorious service from 8 November 1942 to 15 August 1943. His efficiency index is 50 (superior).

Upon trial by general court-martial on 25 May 1945, accused was found guilty of violating standing orders by fraternizing with civilian inhabitants of Germany. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for three years. On 19 September 1945 the sentence was confirmed, but the confinement and forfeitures adjudged were commuted to a forfeiture of $75.00 per month for six months, and the execution of the sentence to dismissal was suspended. On 5 August 1946, the sentence to dismissal was remitted.

7. The court was legally constituted and had jurisdiction of the person and the offenses. With the exceptions noted above, 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 insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the finding of guilty of Specification 1 of Charge II, legally insufficient to support the finding of guilty of Specification 2 of Charge II, and legally sufficient to support the finding of guilty of Charge II and to support the sentence and to warrant confirmation thereof. A sentence to dismissal, total forfeiture, and confinement at hard labor for three years is authorized upon a conviction of a violation of Article of War 96.

R. H. Gettemeier, Judge Advocate

Wilhelmus A. Solf, Judge Advocate

On Leave, Judge Advocate

JAGH - CM 319291 1st Ind

WD, JAGO, Washington 25, D. C. MAY 5 1947

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 Norman P. Artz (0-2055970), Infantry.

2. Upon trial by general court-martial, this officer was found guilty of being drunk on duty in violation of Article of War 85, of being drunk in quarters, and of incapacitating himself for performance of duty by excessive use of intoxicants, both in violation of Article of War 96. Evidence of one previous conviction by general court-martial, for violation of standing orders, was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification (Drunk on Duty), legally sufficient to support the finding of guilty of Specification 1, Charge II, (Drunk in Quarters), legally insufficient to support the finding of guilty of Specification 2, Charge II (Rendering Himself Unfit for Duty), and legally sufficient to support the finding of guilty of Charge II, and to support the sentence and to warrant confirmation thereof. I concur in that opinion.

On 16 October 1946, accused was in charge of a screening team, interviewing displaced persons. He had an altercation with a British officer who represented UNRRA on accused's team, and the officer requested that accused be relieved. Accused was talking in a loud voice and was unsteady on his feet, however, the British officer testified that accused was not drunk, but had a "hang-over".

On 20 November 1946, at 2245, the accused was found by a brother officer in a bar located in the same building as accused's quarters. Accused was intoxicated but creating no disturbance, and the brother officer, assisted by a German civilian, helped accused to his room and put him to bed.

On 21 November 1946, accused's company commander saw the accused at breakfast, thought he was intoxicated and told him to go back to his quarters and go to bed. Accused's eyes were glassy and his speech was louder than usual. There is no other evidence that accused was intoxicated, and it does not appear that accused had any duties assigned to him for the day in question or that he was intoxicated to such an extent that he could not perform his duties.

4. A summary of the accused's service may be found in the accompanying opinion of the Board of Review. He served as an enlisted man for over fourteen years, with character ratings of excellent and lost no time under Article of War 107. He has served as an officer for three and one-half years, with superior efficiency ratings.

Upon trial by general court-martial on 25 May 1945, accused was found guilty of violating standing orders by fraternizing with civilian inhabitants of Germany. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for three years. On 19 September 1945, the sentence was confirmed, but the forfeitures and confinement were commuted to a forfeiture of $75.00 per month for six months, and the execution of the sentence to dismissal was suspended. On 5 August 1946, the sentence to dismissal was remitted.

5. I recommend that the findings of guilty of Charge I and its Specification and Specification 2 of Charge II, be disapproved. In view of the excellent previous service of the accused and the minor nature of the only offense of which he was legally found guilty, I further recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $100 of his pay, and that the sentence as thus modified be carried into execution.

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

CM 319291

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 176, May 20, 1947)

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

JAGK - CM 319322

20 MAY 1947

UNITED STATES v. Private First Class WILLIE SPENCER (RA 34327908), 17th Motor Transport Squadron, Ansbach Air Depot, Ansbach, Germany, APO 231	EUROPEAN AIR MATERIEL COMMAND Trial by G.C.M., convened at Headquarters IX Air Force Service Command, 23, 27 September 1946. Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for ten months. 7720th Rehabilitation Center, Wurzburg, Germany.

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 in the Office of The Judge Advocate General and there found legally insufficient to support the sentence. The record 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 96th Article of War.

Specification: In that Private First Class Willie Spencer, 17th Motor Transport Squadron, Ansbach Air Depot, for the purpose of obtaining two United States Postal Money Orders of the value of One-hundred Dollars ($100.00) each, did, at Ansbach, Germany, on or about 14 August 1946, use a certain entry contained in United States Forces European Theater Currency Control Record Serial No. B12746, issued to the said Private First Class Willie Spencer on 20 June 1946, to wit:

Aug 14,	46 PAY	196	0203	J. Russell Folio O-841922

such entry being false unauthorized and fraudulent and then known by the said Private First Class Willie Spencer to be false unauthorized and fraudulent.

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 eighteen months. The reviewing authority approved and ordered executed only so much of the sentence

as provides for dishonorable discharge, total forfeitures and confinement at hard labor for ten months, and suspended the execution of the dishonorable discharge until the soldier's release from confinement. 7720th Rehabilitation Center, Wurzburg, Germany, was designated as the place of confinement. The result of trial was published in General Court-Martial Orders No. 2, Headquarters European Air Materiel Command, 3 January 1947.

3. On 20 June 1946 Second Lieutenant Charles W. Wetzel, Adjutant of the 17th Motor Transport Squadron, issued currency control books to the members of his unit. The book issued to the accused, Spencer, bore the serial number B-12746 and the book issued to Corporal Herman Stemps was numbered B-12749. Subsequently the accused reported that his currency control book was lost and at about 0900 hours on 14 August 1946 he signed a certificate (dated 10 Aug 1946) in which he certified to the loss of his currency control book, describing it as No. B-12749 (R. 18-22; Pros. Ex. 1). At approximately 1030 hours on 14 August 1946 there was presented to Sergeant Weldon Tidwell, the postal money order clerk of the 231st Army Postal Unit, currency control book No. B-12726, heretofore issued to the accused, which contained the purported certificate of Second Lieutenant Russell Folio that as of 14 August 1946 the accused had a "balance available" of $203.00. Relying upon the integrity of this certificate, the postal clerk issued two $100 money orders in accused's favor. The certificate on accused's currency control book is shown to have been false and the signature of Lieutenant Folio to have been a forgery (R. 11,12,17).

Upon direct examination by the prosecution Sergeant Tidwell testified unqualifiedly that the accused "brought his control book and presented it to the money order window, which he had reported lost, we caught it there." And again "he (accused) brought the money order application in ***" (R. 18). This same witness, Sergeant Tidwell, upon being called as a witness for the defense, testified as follows:

"Q. Sgt. Tidwell, you have previously testified that on 14 August 1946, you received a control book while on duty at the Post Office, is that correct.

"A. Yes, sir.

"Q. Now, sergeant, who did you receive that control book from.

"A. From Corporal Stemps.

* * *

"Q. Now, again, for the court, at the time you received that book, who did you receive it from.

"A. From Corporal Stemps.

* * *

"Q. And when you recognized the name you stood up and turned to the window.

"A. Yes, sir.

"Q. Now, where was the book, in the Corporal's hand.
"A. Yes, sir, in the corporal's hand.
"Q. Did you see the accused at that time.
"A. Not until I asked him to come inside and I called the orderly room.
"Q. Did you have a conversation at that time, with him.
"A. In the office. I first asked if he had turned his book in as lost and he said no. When I started to call the orderly room he begged me, 'Sergeant let me talk to you just a minute, see if you can straighten it out.'
"Q. And that conversation was in effect that he wanted you not to turn him in.
"A. Yes, sir." (R. 28-29)

4. The defense presented several witnesses who testified that accused was an excellent soldier and had a reputation in his unit for good moral character (R. 30-32).

5. The specification alleges that "Spencer, ***, did *** use a certain entry *** Aug. 14, 46 PAY 196 0203 J. Russell Folio *** such entry being false *** and fraudulent and then known by *** Spencer to be false *** and fraudulent." It is obvious that the use, viz, presentation of such fraudulent paper to secure advantage, is the gist of the offense alleged, and is quite analogous to the offense of presenting or causing to be presented for approval or payment a false or fraudulent claim as denounced by Article of War 94. Without question, the primary element of the proof requisite for a conviction under such analogous offense, as in the instant case, is that the prosecution show "that the accused presented (used) or caused to be presented for approval *** such false or fraudulent claim" (see Proof.-(a), par. 150b, MCM, 1928). The only evidence in the instant case that accused "used" or presented the false and fraudulent entry as set forth in the specification is the testimony of Sergeant Tidwell on direct examination heretofore recited, that accused "brought his currency control book and presented it at the money order window." On being recalled this same witness testified that it was not the accused but Corporal Stemps who had the book and presented it for honor at the money order window and that he subsequently called the accused into the office. The record does not show nor is there reasonable basis for a presumption that Stemp was acting for or in concert with accused or even that accused knew his currency control book was being "presented" at the post office.

The fact that accused was not entitled to credit of $203 in his book, that the officer's purported signature was a forgery, that accused had previously certified that his book was lost and that when confronted by Sergeant Tidwell he first denied that he had so reported the book lost and then pleaded with the sergeant to refrain from reporting him does not form a basis for presuming specifically that he "used" the fraudulent entry. The existence of motive is of little or no importance in a case where there is no proof that accused committed the act alleged. Although it is true that when circumstances point to guilt a motive to commit the crime may turn the scale against

the accused, motive alone can never prove guilt, though it may strengthen circumstantial proof of guilt derived from other sources. What effect then is to be given the testimony of Sergeant Tidwell who stated that accused "brought his control book and presented it" and also that, not accused, but Corporal Stemps presented the same? With no adequate explanation from the witness, which it may be conjectured he could have given, and no explanation from Corporal Stemps, which it might also be assumed he could have brought forth, the incriminatory evidence as to the specific offense charged, stands contradicted in the same proceeding by the witness offering such testimony.

It is universally recognized that the truth of the statements of a witness may be tested by their consistency with each other, and a witness may be discredited by inconsistencies or contradictions in his testimony (70 C.J. Sec. 963, p. 782). Inasmuch as there is not sufficient evidence from which it may be presumed that Stemps was acting in concert with or at the behest of accused, was the court-martial then justified in accepting that portion of the sergeant's testimony showing the accused to have presented the false certificate and rejecting the testimony showing that another person presented the same? An interesting parallel to this situation is found in People v. Ledwon et ux (153 N.Y. 10, 46 N.E. 1046). The defendants were convicted of murder. Motive sufficient to the satisfaction of the jury was proven. The son of deceased testified that he was in the room with his father when the father was strangled or choked to death by the accused. On cross-examination the witness withdrew all that he had said and testified that the truth was that his father committed suicide by hanging himself. The court said:

> "It is quite unnecessary to consider at great length what is called the circumstantial evidence in the case, since the learned trial judge told the jury, in substance, that it was wholly insufficient without the direct proof in the case given by the boy, the son of the deceased and the defendant Annie. In this he was correct, and it only remains to take a glance at the testimony of this boy, which certainly constitutes the most remarkable feature of the case. *** The learned judge told the jury that the testimony of the boy, which was the only direct proof in the case, was involved in 'hopeless contradictions,' as it certainly was, but left to them to find whether, on the whole, what he had testified to, implicating the defendants, was worthy of belief or not."

In discussing the legal presumption of innocence the appellate court said,

> "When this legal presumption of innocence is rebutted, or when guilt is shown beyond a reasonable doubt, must, of course, in some cases at least, be a question of law. *** Whenever it is clear that the proof falls below the prescribed standard, the accused is entitled, as a matter of law, to an acquittal."

The appellate court thereupon held that the accused were, as a matter of law, entitled to a directed verdict and that a conviction based on such contradictory evidence could not stand. We believe the identical situation prevails as to the state of the evidence in the instant case.

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

Chester E. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ayres, Judge Advocate

JAGK - CM 319322 1st Ind

WD, JAGO, Washington 25, D. C. MAY 2[illegible]

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 the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Willie Spencer (RA 34327908), 17th Motor Transport Squadron, Ansbach Air Depot, Ansbach, Germany, APO 231.

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, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which 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 this recommendation, 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. 190, 27 May 1947)

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

JAGK - CM 319330

11 MAR 1947

UNITED STATES)	PHILIPPINES-RYUKYUS COMMAND
)	
v.)	Trial by G.C.M., convened at Headquarters PHIBCOM, AFWESPAC, APO 358, 3 December 1946. Dismissal, total forfeitures and confinement for three (3) years.
First Lieutenant FLOYD A. COSTELLO (0-1060743), 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 charge and specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Floyd A. Costello, Coast Artillery Corps, 21st Replacement Depot, did, without proper leave, absent himself from his organization at APO 75, from about 5 October 1945 to about 14 November 1946.

He pleaded guilty to the specification and charge and was found guilty of the specification except the word "5 October" substituting therefor the words "10 October" and guilty of the charge. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years. The reviewing authority approved the sentence, reduced the period of confinement to three years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution

The prosecution introduced into evidence an extract copy of the morning report of Headquarters Detachment Number 2, 21 Replacement Depot, Manila, P.I., showing the accused from duty to absent without leave 0100 hours 10 October 1945 (R. 6, Pros. Ex. A).

Corporal Claude L. Carter, 738th Military Police Station, identified an extract copy of the guard report of his station dated 14 November 1946. This report was received in evidence as Prosecution Exhibit B and it shows the accused in confinement on 14 November 1946 (R. 7).

4. For the defense

The accused was advised as to his rights as a witness and elected to make a sworn statement as to his service. He testified that he entered the military service 28 March 1941 and went to the Aleutians 28 July 1941. He remained in the Aleutians 22 months as a gun commander with the rank of corporal. He returned to the United States in April 1943 in order to attend officers candidate school. He had 30 months service as an enlisted man and was discharged, with character excellent, to accept a commission. He went to the European Theater of Operations in June 1944. On VE Day he had 110 points and was eligible to return to the United States. His unit left Marseilles, France, on 23 June 1945 and went to Manila by way of the Panama Canal. On VJ Day he had 118 points towards discharge; 85 points was enough for discharge. During his service as an officer he had two efficiency ratings as excellent and four as superior. He was promoted to first lieutenant on 1 December 1944. He is married and has two children (R. 9,10).

5. The accused pleaded guilty to being absent without leave as charged and the morning report of 10 October 1945 shows his absence at that time. He was shown to be in confinement on 14 November 1946. The prosecution's evidence showed the initial absence of the accused to be 10 October 1945. The court found the initial absence without leave to be 10 October 1945. This finding of the court cannot affect the substantial rights of the accused inasmuch as the finding of absence without leave is for a lesser period of time than that to which the accused pleaded guilty.

6. War Department records relative to this officer are not available at this time. The charge sheet shows that he was discharged 27 September 1943 for the purpose of accepting a commission as a second lieutenant.

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. 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 authorized upon a conviction of a violation of Article of War 61.

Christy X. Silva, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Jefferson, Judge Advocate

JAGK - CM 319330 1st Ind

WD, JAGO, Washington 25, D. C. MAR 21 1947

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 Floyd A. Costello (O-1060743), Coast Artillery Corps.

2. Upon trial by general court-martial, this officer pleaded guilty to and was found guilty of absence without leave in violation of Article of War 61. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten years. The reviewing authority approved the sentence, reduced the period of confinement to three years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The record shows that the accused was absent without leave from 10 October 1945 to 14 November 1946, slightly more than thirteen months. The accused offered no evidence in mitigation of his unauthorized absence but related his service experience. He had 30 months enlisted service, 22 months of which was overseas. He returned to the United States and attended officers candidate school and after receiving his commission he was sent to the European Theater of Operations. After VE Day his unit was sent to the Philippines where he remained until he went absent without leave.

I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

4. 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

2 Incls
1. Record of Trial
2. Form of Action

(G.C.M.O. 127, 8 April 1947).

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

JAGQ - CM 319347

MAY 22 1947

UNITED STATES	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 6 December 1946. Dismissal and confinement for ten (10) years.
First Lieutenant EDWIN J. FOUNTAIN (O-1307392), Infantry, 942d Ordnance Ammunition Company.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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 sumbits 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 Edwin J. Fountain, 942 Ordnance Ammunition Company, did, at or near Colle Salvetti, Italy, on or about 3 November 1946, with intent to commit a felony viz voluntary manslaughter, commit an assault upon Captain Cunningham C. Bryant, by willfully and feloniously shooting the said Captain Cunningham C. Bryant in the abdomen with a pistol.

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

Specification: In that First Lieutenant Edwin J. Fountain, 942 Ordnance Ammunition Company, having received a lawful command from Captain Cunningham C. Bryant, his superior officer to leave Captain Bryant's quarters at once, did, at or near Colle Salvetti, Italy, on or about 3 November 1946, willfully disobey the same.

Accused pleaded not guilty to, and was found guilty of, all Charges and specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for fifteen years. The reviewing authority approved the sentence, remitted five years of the confinement, directed that the accused be held at MTOUSA Disciplinary

Training Center pending further orders, and forwarded the record of trial for action under Article of War 48.

3. Accused, until 25 October 1946, had been the Commanding Officer of the 942nd Ordnance Ammunition Company located at Colle Salvetti, Italy. Prior to 3 November 1946 he had been transferred to the 480th Port Battalion but pending property clearances he remained with the company. His successor was Captain C. C. Bryant who had directed his company officers to meet for a conference at his quarters on the morning of 3 November 1946. Prior to the conference accused requested that he be allowed to speak to Captain Bryant privately, to which request the Captain acceded. Asking his officers to wait outside a few minutes the Captain and accused entered the Captain's quarters where accused initiated an argument with the Captain over the use of a jeep, during the course of which accused stated that he had been mistreated in the command by the Captain, alleging the Captain was trying to "mess him up" with property shortages. Captain Bryant told the accused he could see the Inspector General or Colonel Bigelow and, after further discussion, gave accused a direct order to leave the Captain's quarters, which accused refused to obey. When the order was repeated and there was no compliance, the Captain attempted to summon his company officers and when Lieutenant Cuff, one of such officers, appeared in the doorway, accused pushed him out and locked the door. Accused stated "I am using the jeep even if I have to kill you to do it. Do you want to die now?". He then pulled a Beretta pistol from his pocket and brought it forward, whereupon Captain Bryant grasped accused's right arm in an attempt to disarm him. As he did so, accused fired the pistol, shooting the Captain in the left thigh just above the hip bone. No bones were fractured, the bullet entering about half an inch below the surface of the skin and remaining in the body until removed that day at the hospital. Captain Bryant returned to his quarters the next day, the wound being superficial, and no complications developed (R. 6, 7, 33). Following the shooting, Bryant asked accused to take him to the hospital, but accused refused until Bryant promised to say that the wound was accidentally inflicted (R. 22).

Lieutenant Cuff testified that prior to the shooting, Captain Bryant called him into the room and that as he was entering accused pushed him out. He heard Captain Bryant say, "Fountain, get out of my quarters". Accused replied, "No sir, Let's have a talk." Shortly thereafter a shot was heard and when Cuff and the other two company officers, Proctor and Fields entered the room, accused was observed with a Beretta pistol in his hand and Captain Bryant was holding his side. Accused was heard to say to Bryant, "Now tell the gentlemen what you wish to say" (R. 30) and "Tell them it was an accident." He also asked Bryant if "he wasn't his best buddy" (R. 27). Bryant then stated to the officers that the shooting was an accident and that accused was his "best buddy" (R. 22, 24, 25, 27, 30). Accused also warned Bryant, stating, "Remember I still have a round in the chamber" (R. 28). He accompanied Captain Bryant to the station hospital in a weapons carrier, taking his gun with him. En route to the hospital accused threatened to

kill Bryant if he had him arrested (R. 8).

4. After his rights as a witness were fully explained, accused elected to remain silent and the defense introduced no evidence.

5. An assault with intent to commit manslaughter is an assault in an attempt to take human life in a sudden heat of passion, caused by provocation. The specific intent to kill is necessary, and the act must be done under such circumstances that had death ensued the offense would have been voluntary manslaughter (par. 149e, MCM 1928, p. 179). The evidence clearly shows that the accused, disgruntled by difficulty he was having in getting clearance on his property accounts, approached Captain Bryant, the officer succeeding him in command of a company and started an argument about the use of a jeep. Infuriated by the Captain's refusal to let him take the jeep, accused threatened him with death and drew his pistol. As Bryant grasped his arm, accused fired, the bullet penetrating the subcutaneous tissues above the left hip. From such facts and circumstances the court was warranted in inferring that accused shot Captain Bryant intentionally. It is axiomatic that intent to kill may be presumed from the use of a deadly weapon in such a manner. Whether the accused fired the gun in a "sudden heat of passion caused by provocation" is immaterial. The prosecution, in charging the offense, conceded this to be the fact, thereby reducing the grade of the offense to accused's benefit. The findings of guilty of Charge I and its Specification are entirely justified by the evidence (CM 239409, Gaygan, 25 BR 147).

With reference to the offense of willful disobedience of Captain Bryant's command to leave the room, the uncontradicted evidence clearly shows that the order was clearly given and repeated several times. That accused understood the order and in intentional defiance of authority refused to obey, is equally clear from his reply and subsequent conduct culminating in the shooting of Captain Bryant. Accordingly, the evidence supports the findings of guilty of Charge II and its Specifications.

6. War Department records show the accused to be 33 years of age and single. He graduated from high school and attended Arkansas State College for one year. In civilian life he was employed as a cook from 1938 until December 1940 when he left his employment to enlist in the Army. Thereafter he attended the Infantry School, Fort Benning, Georgia, and on 8 January 1943 was commissioned a second lieutenant, Infantry, Army of the United States. On 21 June 1943 he was promoted to the grade of first lieutenant. His efficiency reports disclose numerical ratings of "5" and "4.4", with a notation under estimate of the officer that "as a combat officer he showed aggression and boldness and led his unit in a commendable manner." No evidence of previous convictions was adduced at the trial but it appears that accused, while an officer of the 92nd Infantry Division, was tried and convicted on 21 September 1945 by general court-martial of being dis-

orderly in uniform and of an assault upon a First Sergeant, for which he was sentenced to be dismissed, with total forfeitures. The sentence was confirmed but commuted to a forfeiture of $75 of his pay per month for six months (GCMO 123, MTO, 7 Oct 1945).

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the rights of the accused were committed during the trial. In the opinion of the Board of Review the evidence is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of assault with intent to commit manslaughter, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 455, Title 18, United States Code.

W A Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

[illegible], Judge Advocate

JAGQ - CM 319347 1st Ind

WD, JAGO, Washington 25, D. C. JUN 5 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 Edwin J. Fountain (O-1307392), 942nd Ordnance Ammunition Company.

2. Upon trial by general court-martial in Italy this officer was found guilty of an assault with intent to commit a felony, viz., voluntary manslaughter, in violation of Article of War 93 (Spec., Charge I) and willful disobedience of a superior officer, in violation of Article of War 64 (Spec., Charge 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 fifteen years. The reviewing authority approved the sentence, remitted five 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 is of the opinion 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. I concur in that opinion.

On 3 November 1946, the accused who had been the Commanding Officer of the 942nd Ordnance Ammunition Company, approached his successor, Captain Bryant, in the latter's quarters at Colle Salvetti, Italy, and demanded that he be permitted to use a jeep belonging to the organization. Captain Bryant refused and the accused became abusive, as a result of which Captain Bryant ordered him to leave the quarters. The accused refused and after the order to leave the quarters was repeated, drew a pistol and said to Captain Bryant, "Do you want to die now". As the pistol was brought forward, Captain Bryant grabbed accused's arm whereupon accused fired, the bullet entering Bryant's thigh. Accused refused to permit the wounded officer to go to the station hospital for medical treatment until he promised that he would report the wound as having been sustained accidentally. The shot attracted the attention of other company officers, who upon entering the room heard accused say to Bryant, "Now tell them it was an accident". Accused accompanied Bryant to the hospital and en route threatened to kill him if he had accused arrested.

War Department records show accused was inducted 15 January 1941, and was commissioned on 8 January 1943 as a second lieutenant in the Army of the United States. He was promoted to first lieutenant on 21 June 1943. His efficiency reports disclose numerical ratings of "5" and "4.4", with a notation under estimate of the officer that "as a combat officer he showed aggression and boldness and led his unit in a commendable manner." No evidence of previous convictions was adduced at the trial but it appears accused was tried and convicted on 21 September 1945 by general court-martial, while an officer of the 92nd Infantry Division, of being disorderly in uniform and of an assault upon a First Sergeant, for which he was sentenced to be dismissed the service with total forfeitures. The sentence was confirmed but commuted to a forfeiture of $75 of his pay per month for six months (GCMO 123, MTO, 7 Oct. 1945). Accused is 33 years of age, single and attended college for one year.

4. Attached to the record of trial is a certified true copy of a letter dated 26 September 1945, relating to accused's combat record. Therein it is stated that accused served with the 365th Combat Team, that on 8 February 1945 at Mount Tuerico, Italy, during the course of a counter-attack launched by the Germans, accused personally accounted for the death of five of their number. For heroic action beyond the call of duty accused was recommended by his Commanding Officer for a citation. The offenses of which accused stands convicted are of a serious nature, but in view of his combat record and other facts and circumstances clemency is warranted.

I recommend that the sentence as approved by the reviewing authority be confirmed, but that the period of confinement be reduced to five years; that the sentence as thus modified be ordered executed and that a United States Disciplinary Barracks be designated as the place of confinement.

5. 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. 216, 11 June 1947)

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

MAY 15 1947

JAGQ - CM 319367

UNITED STATES v. Private CLIFFORD C. WELCO (33920971), Attached Unassigned Detachment 90, 3rd Replacement Depot, 476th Replacement Company, 90th Replacement Battalion.	)	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Bamberg, Germany, 6 November 1946. Dishonorable discharge and confinement for life. United States Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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 92nd Article of War.

Specification: In that Private Clifford C. Welco and Private Max K. Mulvaney, both of Detachment 90, 3rd Replacement Depot, 476th Replacement Company, 90th Replacement Battalion, acting jointly and in pursuance of a common intent, did, at Nurnberg, Germany, on or about 15 March 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Konrad Baier, a human being, by shooting him with a pistol.

CHARGE II: Violation of the 58th Article of War.
Specification 1: (Relates to Mulvaney only).
Specification 2: In that Private Clifford C. Welco, Detachment 90, 3rd Replacement Depot, 476th Replacement Company, 90th Replacement Battalion, did, at Schwabach, Germany, on or about 17 July 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Nurnberg, Germany, on or about 7 June 1946.

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

Specification: In that Private Clifford C. Welco, and Private Max K. Mulvaney, both of Detachment 90, 3rd Replacement Depot, 476th Replacement Company, 90th Replacement Battalion, acting jointly and in pursuance of a common intent, did, at Nurnberg Germany, on or about 15 March 1946, unlawfully enter a store on the corner of Bullmannstrasse and Comenuistrasse, Nurnburg, Germany, with intent to commit a criminal offense to wit, larceny therein.

Accused pleaded not guilty to all Charges and specifications. He was found guilty of all Charges and specifications. Evidence of one previous conviction by special court-martial for absence without leave was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the Branch, United States Disciplinary Barracks, Green Haven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence.

a. For the prosecution.

On the night of 16 July 1945, accused and Private Max K. Mulvaney escaped from the stockade at Schwabach, Germany (R. 46, 56). They both went to Nurnberg, met two girls there and began living with them in their apartments (R. 46). They saw each other from time to time until accused was apprehended at the apartment of one of the girls on 7 June 1946 (R. 46, 51, 62). During this period accused wore civilian clothes on at least two occasions (R. 54) and at times discussed the idea of surrendering to the military authorities (R. 54, 55).

On the night of 14 March 1946, accused and Mulvaney "wandered out" to find a store that they could "break in" to steal some food; they had not selected any particular store but "knew of several places" (R. 56); they selected Hollnack's store on Bullmanstrasse 20, Nurnberg (R. 55); entered by jimmying a window, and removed 40 packages of tobacco, a crate of eggs, 25 bars of soap, 2 electric heaters, and other merchandise of a total value of about 100 to 150 marks (R. 9, 62). While carrying their loot to Mulvaney's abode, Konrad Baier, a Nurnberg civilian policeman in uniform, stopped accused and Mulvaney for questioning and Mulvaney described subsequent events as follows:

They told the policeman that they were Americans and when he persisted in his questioning they asked him if he was crazy. This made him angry and when he reached for his gun, accused stuck his pistol in the policeman's stomach. Mulvaney also drew his pistol and cocked it. They pleaded with the policeman to go away and Mulvaney testified:

> "*** the first thing that I noticed he took his right glove off and started side-stepping away from us. With his — the side his pistol was on away from us and Welco, he shouldered a crate of eggs, I think it was, and I stuck my pistol in between my jacket like this, and I reached over my shoulder to get a sack when this man went for a pistol. He, I distinctly seen his arm reach for his pistol. I heard his hand hit the holster when I fired on him — I fired in his direction." (R. 47).

Accused did not do any shooting (R. 49). Accused and Mulvaney dropped their loot and ran from the scene (R. 13, 47). The police officer died before reaching the hospital (R. 27) and an examination of his gun showed that it was loaded, with the safety catch in locked position (R. 24). Some of the stolen merchandise was recovered and identified as property taken from Hollnack's store (R. 11).

Fingerprint evidence was introduced showing that accused's middle fingerprint was found on the icebox door at the Hollnack store (R. 37).

A confession was introduced in evidence, wherein accused admitted his escaping from the stockade, the breaking into a grocery store, and the shooting of a policeman. The only important variation between accused's confession and the testimony of Private Mulvaney was that accused states that he yelled,"Jesus Christ, don't shoot" — "When I yelled that, he had already shot five times." (Ex. 8).

b. For the defense.

Rosa Muhr, the girl with whom accused lived at Nurnberg, testified that after the shooting, Mulvaney had stated that he was the only one that fired any shots and that accused had not fired any shots (R. 64).

After being advised of his rights, accused elected to remain silent (R. 65).

4. The offenses will be considered in chronological sequence.

a. The only evidence of desertion on 17 July 1945 was the testimony of Private Mulvaney who escaped with accused from the stockade at Schwabach (R. 46, 56). There was other evidence of accused's apprehension on 7 June 1946 and of his activities during the interim, all of which was corroborated by accused's confession (Pros. Ex. 8). This evidence was ample to support the court's findings of guilty of desertion.

b. The corpus delicti of the burglary of Hollnack's store was established by the testimony of the manageress, Mrs. Wilhelmina Deinzer. Accused's connection with the offense was established by the testimony of his accomplice, Private Mulvaney, and by his own confession. All of the elements of housebreaking were clearly established.

c. "Murder is the unlawful killing of a human being with malice aforethought. *** Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life ***. It may mean *** an intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such an officer or other person so employed." (par. 148a, MCM).

Accused's only defense to the murder charge was the fact that he did not fire any shots — that the killing was done by Private Mulvaney. This is not a valid defense — "one who unites with others to commit an unlawful act *** with intent to resist opposition by force, is as guilty of murder committed by one of the parties in furtherance of unlawful design as the one actually wielding the weapon" (People v. King, 85 Pac. 2d 928).

d. The defense counsel objected to the court's receiving in evidence accused's confession (R. 39), contending that the statement was induced by allowing accused's "girl friend" to visit him in the cell block (R. 59, 61, 63). The evidence offered in support of this contention was not convincing and the court's action in accepting the confession was fully justified.

e. The identification of deceased was not thorough but the record contains substantial evidence from which the court could reasonably infer the deceased's identity (CM 12486, Herbert, 25 BR (ETO) 223).

f. The allied papers attached to the record of trial show that the officer who signed the charges was subsequently appointed as investigating officer. This is an undesirable procedure but it is not a

jurisdictional matter and did not injuriously affect the substantial rights of the accused. This is especially true in the instant case in that the report of investigation discloses a thorough inquiry was made in full accord with the provisions of Article of War 70. (CM 184069, Hughes; CM 200989, Osman, 5 BR 14, 33).

5. The accused is 26 years of age, married, and the father of two children. He attended school through the fifth grade and worked thereafter as a coal miner and farmer. His civilian record is clear so far as is known and he has two previous court-martial convictions— a sentence of three months' confinement and forfeiture of $18 per month for three months for 32 days' AWOL, and a sentence of four months' confinement and forfeiture of $18 per month for four months for a subsequent 16 days' AWOL. His record also shows:

15 Apr 45	Duty to AWOL
20 Apr 45	AWOL to Confinement
28 Apr 45	Confinement to AWOL
4 Jan 45	AWOL to Confinement
6 Jan 45	Confinement to AWOL
10 Jun 45	AWOL to Confinement
17 Jul 45	Escaped by sawing bars (Spec. of Chg.II).

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. A sentence to death or life imprisonment is mandatory upon conviction of a violation of Article of War 92. While a United States Disciplinary Barracks was designated as the place of confinement by the appointing authority confinement in a penitentiary is authorized under Article of War 42, murder being recognized as an offense of a civil nature and punishable by penitentiary confinement for more than one year under Sections 452 and 454 of the United States Criminal Code.

W H Johnson Jr, Judge Advocate

Joseph J. Stern, Judge Advocate

Carlton G Schenck, Judge Advocate

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

JAGH - CM 319392

15 MAY 1947

U N I T E D S T A T E S	)	SACRAMENTO AIR MATERIEL AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	McClellan Field, California,
First Lieutenant EDWARD	)	2, 3, and 10 December 1946.
H. BARISON (0-1642001),	)	"Dishonorable discharge,"
Air Corps	)	total forfeitures, and con-
	)	finement for two (2) years

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 58th Article of War.

Specification: In that First Lieutenant Edward H. Barison, Squadron A, 4127th Army Air Force Base Unit, (Area Command), did, at McClellan Field, California, on or about 10 June 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Los Angles, California, on or about 28 September 1946.

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

Specification: In that First Lieutenant Edward H. Barison, Squadron A, 4127th Army Air Force Base Unit (Area Command), did, at McClellan Field, California, between 8 November 1945 and 10 June 1946, feloniously embezzle by fraudulently converting to his own use about $1,199.25, lawful money of the United States, the property of the United States, entrusted to him by the said United States.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: (Disapproved by the reviewing authority).

Specification 3: (Disapproved by the reviewing authority).

Specification 4: (Disapproved by the reviewing authority).

To the Specification of Charge I he pleaded "Not Guilty but Guilty of absence without leave" and to Charge I he pleaded "Not Guilty but Guilty of a violation of the 61st AW." He pleaded not guilty to Charges II and III and their Specifications. He was found guilty of Charges I and III and their Specifications and guilty of Charge II. Of the Specification of Charge II he was found guilty except the words "about $1199.25," and substituting therefor the words "about $526.75" of the excepted words not guilty, and of the substituted words guilty. No evidence of any previous convictions was introduced. He was sentenced "to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor * * * for four and one-half (4½) years." The reviewing authority approved only so much of the findings of guilty of Charge I and its Specification as involves a finding of guilty of absence without leave in violation of Article of War 61, and disapproved the findings of guilty of Charge III and its Specifications. He approved only so much of the sentence as provides for "dishonorable discharge," forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution and the court pertinent to the approved findings of guilty is summarized as follows:

Specification of Charge I: Accused was identified as a first lieutenant, Air Corps, assigned to Squadron A, 4127th Army Air Force Base Unit (Area Command) (R 12, 46). The beginning of accused's unauthorized absence on 10 June 1946 is shown by morning report entry (Pros Ex 1) and that he was returned to military control at March Field 27 September 1946 by oral stipulation in open court between prosecution and defense counsel (R 15).

Mr. Knox E. Weaver, a Los Angeles, California, Police Officer of the Hollywood Police Station, testified that on the night of 27 September 1946 he received a call at the Hollywood Detective Bureau to go to the vicinity of Hollywood and Vine in front of Mike Lyman's Restaurant, that there was a person selling papers there who was a lieutenant in the Army Air Corps, who was AWOL; that witness went to that address and saw accused sitting on a box in front of a stack of newspapers; that witness walked up behind accused and said, "Barison." He stated accused got up and turned around and

said, "You have made a mistake," and witness then said, "We have information that your name is Barison and that you are AWOL from the Army," than accused said, "That is right, you've got me."

Witness put accused in "the car" and took him to the corner of Hollywood and Vine, let him "check in" his papers and took him to the Hollywood Police Station. Accused told witness he was AWOL since about 10 June. Witness turned accused over to an MP Corporal at 1250 North Main Street. Witness stated at the time of the arrest accused was wearing a suntan shirt and officer's trousers with only regular brown buttons and no insignia on the collar or anything to show his rank or connection with the Army; he was not wearing a cap. Witness stated accused showed him a card bearing his name, serial number, and rank (R 18-20).

Specification of Charge II: The accused was appointed Chief, Enlisted Mess Branch, Service Installation Section, McClellan Field, California, on 31 October 1945 by verbal orders of the Chief, Base Service Division at that field. This appointment was confirmed and made of record by Base Service Division Instruction No. 201-13, 5 November 1945, Sacramento Air Technical Service Command, Base Service Division, McClellan Field, California (R 16; Pros Ex 3). The accused's duties included being in charge of the consolidated mess at McClellan Field at which individuals authorized to mess separately were furnished meals at the rate of $.25 per meal (par 42a, AR 35-6660). Under the procedures in effect at McClellan Field, cash received for meals at the consolidated mess was initially deposited to the credit of the Rations Collection Fund in the Bank of America, North Scramento Branch, National Trust and Savings Association, as temporary depository for the fund. At some time during the following month a check for the total collections for the previous month was drawn on this account payable to the Treasurer of the United States. This check was then deposited with the Station Sales Officer through the Unit Personnel Officer (R 43).

When personnel authorized to mess separately ate at the consolidated mess, Sergeant Flock collected $.25 per meal and turned the money over to Sergeant Weiss, who counted and checked the money and signed the Daily Statement of Boarders (R 50-56; Court Ex V, R 82). The mess sent a Daily Ration Request showing the meals collected for on that day, to the Unit Personnel Officer. The Unit Personnel Officer, in turn, made up a daily Consolidated Ration Request which was transmitted to the Station Sales Officer (R 48). A sum equivalent to the monthly collections was paid by the accused to the Unit Personnel Officer for the months of February 1945 to April 1946, inclusive (R 46-47). During the month of May 1946, 2,175 meals were served and during the first week of June, 457 meals were served for which the Unit Personnel Officer received no payment from the accused (R 48).

Prosecution and defense stipulated accused paid to the Unit Personnel Officer the complete amounts collected for cash meals for the months as herein below tabulated (R 76; Court Ex I):

"November, 1945 . . . . . .$240.25
December, 1945 . . . . . 176.50
January, 1946 . . . . . 209.00
February, 1946 . . . . . 171.25
March, 1946,. 329.50
April, 1946 . . . . . 571.50

"That the total amount of cash represented by the Statement of Boarders, available for review, admittedly incomplete and not numbered consecutively, amounts to $673.50 for the period 1 May through 7 June 1946.

"That the total amount of cash represented by the Consolidated Ration Requests, available for review, which are compiled from informal memoranda, and are not an original record, amounts to $658 for the period 1 May through 7 June 1946."

Prosecution Exhibit 11 reads as follows:

"HEADQUARTERS PBS3A gmw
SACRAMENTO AIR TECHNICAL SERVICE COMMAND
McClellan Field, California

30 October 1945

Manager
Bank of America
North Sacramento Branch
North Sacramento, California

Dear Sir:

This letter will authorize you to honor the signature of 1st Lt. Edward H. Barison to sign checks made payable to the Treasurer of the United States for the account carried in your bank as Ration Collections, Base Mess, McClellan Field, California, due to Chief Warrant Officer Olin T. Flynt leaving the service.

For your information both the outgoing custodian, Chief Warrant Officer Olin T. Flynt, and the new custodian, 1st Lt. Edward H. Barison, have affixed their signatures below.

/s/ Olin T. Flynt
/t/ OLIN T. FLYNT, CWO, USA
Former Custodian

/s/ Edward H. Barison
/t/ EDWARD H. BARISON, 1st Lt, AC
New Custodian

/s/ P. C. Wilders
/t/ P. C. WILDERS
Colonel, Air Corps
Deputy for Personnel (T-1)"

The signature of accused to Prosecution Exhibit 11 was identified by Mr. Sherwood Morrill, prosecution's handwriting expert, from comparison with the signature on accused's WD AGO Identification Card (Pros Ex 10; R 39-40). The original of this exhibit was further identified, and the fact that it came into the possession of the North Sacramento Branch, Bank of America, National Trust and Savings Association, was testified to by Mr. V. M. Caselli, its Assistant Cashier and Operations Officer.

Mr. Caselli testified that the "Rations Collection Fund Account" was maintained in the North Sacramento Branch, Bank of America, National Trust and Savings Association (R 21). He identified a complete transcript of this account from 16 October 1945 to 1 June 1946, inclusive, which was received in evidence as Prosecution Exhibit 4 (R 23-24).

Prosecution Exhibit 4 shows that as of the close of business 1 May 1946 the balance of the Ration Collections Account on deposit in the North Sacramento Branch, Bank of America, National Trust and Savings Association, amounted to $44.75; that as of 2 May 1946, a deposit of $626.75 was credited thereto, thereby raising the balance to the sum of $671.50; that on 21 May 1946, a check in the amount of $571.50 was honored against this account thereby reducing the balance as of the close of business on 21 May 1946 to $100; and that on 1 June 1946, a charge of $626.75 was made against this account, thereby overdrawing the same in the amount of $526.75.

Mr. Caselli, identified Prosecution Exhibit 5, a check in the amount of $626.75, payable to the order of "Cash," indorsed "Rations Collection, Base Mess, McClellan Field, Lt. Edward H. Barison, 01 642 001," purportedly drawn by the accused against the First National Bank of Clearwater, Clearwater, Florida, and dated 15 May 1946 (R 25-27). He testified this check was taken in for deposit by the North Sacramento Branch, Bank of America, National Trust and Savings Association, credited to the account of the Rations Collection Fund and forwarded to the the drawee bank for payment but was returned by that bank marked "Not Good When Presented." He explained this meant "not sufficient funds to cover it," and that the North Sacramento Branch, Bank of America, National Trust and Savings Association then charged this check back to the account and returned the check to the depositor with an "advice slip" (Pros Ex 5a) with the signature of the witness thereon and the

notation "Refer to Maker." The witness explained "Refer to Maker" usually means not sufficient funds (R 26-27). This witness testified that the returning, unpaid, of the check for $626.75 by the drawee bank and the subsequent charging back of it to the Rations Collection Base Mess Account caused the overdraft of $526.75.

Prosecution's handwriting expert, Mr. Sherwood Morrill, identified accused's signature to Exhibit 5, the $626.75 check (R 39). The written signature "Lt Edward H. Barison, 01 642 001," to the indorsement on the back of Prosecution Exhibit 5 was not identified.

James W. S. Alyward, Vice-President of the First National Bank of Clearwater, Clearwater, Florida, testified by deposition (Pros Ex 12) that at all times on and after the close of business 23 April 1946 the accused's personal account in that bank was overdrawn $11.40; that as of 21 May 1946, a check against said account purportedly drawn by the accused was presented for payment in the amount of $626.75, which was returned marked "Not Sufficient Funds."

The check book of the "Rations Collection, Base Mess," apparently used by the accused, which was admitted in evidence without objection as a part of Court Exhibit V, though never properly identified by any witness, has passed therein a check purportedly signed by the accused reading on the face thereof as follows:

"This check is in payment of an obligation to the United States and must be paid at par. N. P.

90-1343 North Sacramento Branch 90-1343
BANK OF AMERICA
National Trust and Savings Association No.

North Sacramento, Calif., May 14 1946

Pay to the Order of Treasurer of the United States $571 50/100

Five Hundred Seventy One and ---------- 50/100 Dollars

RATION COLLECTIONS
BASE MESS

/s/ Edward H. Barison 1st Lt AC"

and indorsed on the back thereof as follows:

"For Credit to the
TREASURER OF THE UNITED STATES
May 17 1946
SALES OFFICER
McCLELLAN FIELD, CALIF.

Pay to the order of
BANK OF AMERICA
NORTH SACRAMENTO BRANCH 90-1343
For Credit to the
TREASURER OF THE UNITED STATES
May 20 1946
Disbursing Officer, U. S. ARMY
McClellan Field, California"

This check bears the perforated cancellation of the bank: "Paid M 21 46."

4. The evidence for the defense pertinent to the approved findings of guilty is summarized as follows:

As to the Specification of Charge I: It was stipulated, between accused, his counsel, and the prosecution, that if Ralph Golden, news vendor, Hollywood and Vine, Hollywood, California, were present, he would testify under oath, as follows:

> "On or about 14 June 1946 Lt. Barison and I engaged in a conversation on the corner of Hollywood and Vine concerning my recent discharge from the service and the type of work that I was engaged in. At the time he was dressed in uniform with the insignia of a 1st Lieutenant in the Army Air Forces. I do not recall whether or not he told me his correct name" (Def Ex E; R 58).

It was stipulated between the accused, his counsel, and the prosecution that if William Buxley, Area Representative, Los Angeles Times, Los Angeles, California, were present, he would testify under oath, as follows:

> "Lt. Edward Barison on or about 15 June 1946, applied for work at First and Spring Street, Headquarters, Los Angeles Times, under the name of Lt. Edward Barison and was placed in a position the same day. At the time he requested a position, he was dressed in Army sun tan pants, shirt, and cap, with insignia of a 1st Lieutenant, Army Air Forces. I told said Lt. Barison that, for matters of appearance, he should remove his insignia, to which Lt. Barison agreed" (Def Ex F; R 58).

The defense introduced in evidence an inventory of the personal effects of the accused (Def Ex G; R 60), found in his quarters at McClellan Field on 14 June 1946, including among other things two brief cases containing personal papers, an assortment of pipes and smoker's articles, 14 keys, miscellaneous toilet articles, fountain pen, a considerable quantity

of underwear, socks, handkerchiefs, one field jacket, one blouse with Major's insignia, 12 pairs of Officer's trousers, one battle jacket,14 Officer's wool shirts, 14 cotton shirts, six pair of trousers, cotton, pajamas, numerous books, two footlockers, canvas traveling bag, and a radio.

A letter of commendation from the 701st Army Air Force Base Unit, McClellan Field, California, dated 20 December 1946 wherein accused was commended for the "superior quality and continuing fine adminstration of the EM Mess #3," bearing a commendatory first indorsement signed by Brigadier General A. W. Vanaman, Commanding General, Sacramento Air Technical Service Command dated 27 February 1946 was received in evidence as Defense Exhibit H (R 61).

A photastatic copy of accused's AAF Officers Qualification Record, WD, AGO Form No. 66-2, was received in evidence as Defense Exhibit I (R 62). This exhibit shows the accused's military and civilian record to be substantially as summarized in paragraph 8 below.

5. The record of trial is legally sufficient to support the findings of guilty of the Specification of Charge I as approved by the reviewing authority.

6. With respect to the Specification of Charge II, the accused was convicted of embezzlement, between 8 November 1945 and 10 June 1946, by fraudulently converting to his own use about $526.75, lawful money of the United States, property of the United States, intrusted to him by the United States.

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come"(MCM 1928, par 149l, p 173).

The elements of proof as discussed in the Manual for Courts-Martial are:

> "(a) That the accused was intrusted with certain money or property of 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 149l, p 174).

In discussing the proof of embezzlement Winthrop stated in part:

"The receipt and possession of the property will commonly be shown by the accounts, returns, etc., of the accused, by the testimony of the officers or other persons by whom the money or other property was transferred, delivered or paid, by the testimony of the public depository, or by the open possession and use or disposition by the accused of the property as property of the United States.

"The fact of the fraudulent conversion in embezzlement may be evidenced by the absconding of the accused with public funds * * * by the rendering by the accused of a false return or account * * * in which a fictitious balance is made to appear.

"* * * a conversion may be presumable from an * * * exhibit made of such moneys, affected by borrowing money from other officers or persons to represent, for the moment, an amount of funds which should be in the possession, but have in fact been illegally used and is in deficit" (Winthrop, Military Law & Precedents, 2d Ed (1920, Reprint), p 705-706).

In the instant case it was established by competent evidence that the accused was in charge of the consolidated mess at McClellan Field, California, where individuals authorized to mess separately were furnished meals at the rate of $.25 per meal (Par 42a, AR 35-6660). The receipts for such meals were the property of the United States and as such were intrusted to the accused who was under a duty to account for such funds monthly.

The receipt and possession of proceeds for paid meals at the consolidated mess in the amount of $571.50 during the month of April was established by stipulation (Court Ex I) and by the accused's Certificate of Ration Money Collections, April 1946 which was received in evidence as a part of Court Exhibit V. The accused purported to account for this sum and reimburse the United States by a check for $571.50 drawn on the Bank of America, North Sacramento Branch, which was the temporary depository for the Rations Collection Account.

The accused's conversion of the funds in question may be inferred from the following facts:

As of the close of the depository bank's business on 1 May 1946, the balance of funds of the Rations Collection Base Mess account stood at $44.75. The evidence is clear that the accused raised the balance of this account to $671.50 on 2 May 1946 by depositing his personal check for $626.75 drawn against his account with the First National Bank of Clearwater, Clearwater, Florida, to the credit of the Rations Collection

Account. The accused's deposit of his personal check to the credit of the Rations Collection account created a fictitious balance of $671.50.

The court was warranted in inferring that $526.75 was the amount of public funds which should have been in the possession of the accused as of 1 May 1946 but which had in fact been illegally used and was in deficit.

The amount found to have been embezzled, $526.75, may be determined by substracting from the $571.50 due on 1 May 1946, the sum of $44.75, the true balance on deposit with the depository, before the accused deposited his personal check drawn on an already overdrawn bank account.

It is, of course, immaterial that the check drawn to the order of the Treasurer of the United States in the amount of $571.50 was in fact honored by the North Sacramento Branch, Bank of America, before that bank received notice that accused's personal check had not been honored by the Clearwater, Florida Bank.

A set of facts similar to those in the instant case was considered by the Board of Review in CM 192128, Strickland, 1 BR 329. The accused in that case, a post exchange officer, was in need of funds for a private business transaction and used post exchange funds to cash a $2,000 check drawn on his personal account. At the time the accused cashed his own check, 9:30 a.m. and until 3:45 p.m. on the same day there were insufficient funds in the accused's account to cover the $2,000 check. At about 2:30 p.m., on the day in question the accused made a deposit of approximately $6,000 to the credit of the post exchange fund in the same bank. His own check for $2,000 was one of the items of the deposit. At that time the accused sought to borrow $2,500 from the same bank, which he expected to deposit to his own account, thereby covering the $2,000 check, but the bank refused to lend the money. Thereupon the accused informed the bank of the overdraft of his personal account, and requested them to secure the money by cable on the following day. The bank refused to wait until the following day, but the accused was informed that he might make a deposit to cover his overdraft up to 4:00 p.m. that same day. At 3:45 p.m. the accused had borrowed $2,500 from other sources and covered the overdraft by depositing this amount to the credit of his personal account.

In sustaining a finding of guilty of embezzlement the Board of Review stated:

> "Had this ($2,000) check been good, it might not have borne the criminal taint, * * * but the check was in reality known not to be worth its face value at the time it was turned over in lieu of cash, for accused had in the bank insufficient funds to pay it. Whatever may have been his purpose with respect to covering the check or his confidence that he could cover it, * * * the check was not actually a

valuable consideration for the payment of the money and was known not to be * * * The testimony * * * shows * * * that he intended promptly to restore the amount appropriated, and that he did restore it after a lapse of five or six hours * * * Such good acts are not a defense * * * Accused's acts are none the less embezzlement."

The circumstances of the case, including the accused's actual shortage, the concealment of that fact by means of a bad check, and the accused's subsequent absence without proper leave establish beyond a question that the accused's conversion of the mess funds was with fraudulent intent (Wharton's Criminal Law, 12th Ed, Sec 1302, 1313, and cases cited therein).

In view of the foregoing authorities we are of the opinion that the record of trial is legally sufficient to support the court's findings of guilty as to Charge II and its Specification.

7. The court sentenced the accused to be "dishonorably discharged the service." Inasmuch as accused is an officer his sentence should have been dismissal. It has been held by the Board of Review that "dishonorable discharge" and "dismissal" are legal equivalents. The sentence although inartful is in legal effect a sentence to dismissal and was properly approved as such by the reviewing authority (CM 249921, Maurer, 32 BR 229; CM 271153, Karsonoff, 46 BR 61, 68).

8. The accused is 40 years old, married, and contributes to the support of his parents. He is a high school graduate. He enlisted as a private on 6 March 1925 and served in Hawaii until 15 September 1932 when he was discharged by purchase as a first sergeant. His civilian occupation was that of filing clerk in an accounting office and salesman of electrical appliances. He re-enlisted as a private on 4 June 1942 and was graduated from the Signal Corps Officers Candidate School and commissioned as a second lieutenant, Army of the United States, on 20 February 1943. He was promoted to first lieutenant on 31 March 1944. His manner of performance of duties was rated as excellent from 28 March 1943 to 5 November 1944, very satisfactory from 6 November 1944 to 31 December 1944, excellent from 1 January 1945 to 12 February 1946, and very satisfactory from 13 February 1946 to 13 June 1946.

9. Attached to the record of trial are recommendations for clemency addressed to the reviewing authority from the assistant defense counsel, two other officers who are familiar with accused's service and character, and a recommendation for clemency signed by Chaplain (Major) Estes L. Lewis, Staff Chaplain, Sacramento Air Materiel Area, based on accused's excellent service for twelve years and his apparent repentence. By first indorsement to the latter recommendation, Colonel Leslie E. Martin, Acting Deputy for Base Services, Sacramento Air Materiel Area, indicated his non-concurrence in the Chaplain's recommendation. In his review the staff judge advocate strongly recommended that the execution of the sentence be suspended in view of the accused's prior excellent service and other circumstances.

By letter to The Judge Advocate General dated 20 March 1947, the reviewing authority advised that since the trial the accused had made restitution for all known defalcation including amounts due the North Sacramento Branch, Bank of America. He further stated that although the accused was found guilty of embezzling $526.75 he made restitution to the United States in the amount of $1199.25 the amount alleged to have been embezzled. He also made full restitution in the amount of $90.00 to cover the four fraudulent checks which were the subject of the four specifications of Charge III, the findings of guilty of which had been disapproved by the reviewing authority.

10. 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. A sentence to dismissal, total forfeitures, and confinement at hard labor for two years is authorized upon a conviction of violations of Articles of War 61 and 93.

_____, Judge Advocate

On Leave, Judge Advocate

_____, Judge Advocate

JAGH - CM 319392 1st Ind

WD, JAGO, Washington 25, D. C. JUN 4 1947

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 Edward H. Barison (0-1642001), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of desertion from 10 June 1946 to 28 September 1946, in violation of Article of War 58 (Spec. of Chg I), of embezzling $526.75 of public funds in violation of Article of War 93 (Spec of Chg II), and of fraudulently making and uttering four checks in the total amount of $90.00 with insufficient funds in the bank for the payment of said checks, in violation of Article of War 96 (Chg III, Specs 1, 2, 3, 4). No evidence of any previous conviction was introduced. He was sentenced "to be dishonorably discharged," to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four and one-half years. The reviewing authority approved only so much of the findings of guilty of Charge I and its Specification as involved a finding of guilty of absence without leave in violation of Article of War 61. He approved the findings of guilty of Charge II and its Specification and disapproved the findings of guilty of Charge III and the specifications thereunder. He approved only so much of the sentence as provides for "dishonorable discharge", total forfeitures, and confinement at hard labor for two years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion 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. I concur in that opinion.

The accused was Chief of the Enlisted Mess Branch, Service Installations, McClellan Field, California, and as such was in charge of a consolidated mess where individuals authorized to mess separately were furnished meals at the rate of $.25 per meal. Under the operating procedures in effect at McClellan Field it was the accused's duty to account monthly for the receipts of the consolidated mess to the Unit Personnel Officer and to deliver a sum equivalent to the collections to the Unit Personnel Officer, who in turn was to deliver it to the Sales Officer for eventual deposit to the credit of the Treasurer of the United States (par 42a, AR 35-6660). Cash received during

each month was temporarily deposited to the credit of the Rations Collections Fund in the Bank of America, North Sacramento Branch, National Trust and Savings Association. Sometime after the first day of each month it was the accused's duty to draw a check against this account covering the receipts for the previous month and deliver it to the Personnel Officer.

The receipts for meals served in the consolidated mess during April 1946 amounted to $571.50. On 1 May 1946 the bank balance of the Rations Collections Fund stood at $44.75. The accused raised the balance of this account to $671.50 later in May by depositing his personal check for $626.75 drawn against his account with a Clearwater, Florida, bank to the credit of the Rations Collections account. At that time the accused's personal account was overdrawn by $11.40 and the accused's personal check was not honored by the Clearwater Bank when presented for collection. The court found that the accused had embezzled $526.75, the amount of the deficit in the Rations Collections Fund as of 1 May 1946.

On 10 June 1946 the accused absented himself without leave from his command at McClellan Field, California. On 28 September 1946 he was apprehended at Los Angeles, California, while vending newspapers on a street corner.

4. The accused is 40 years old and had served in the Army as an enlisted man for approximately eight years and as an officer for approximately four years.

5. Attached to the record of trial are recommendations for clemency addressed to the reviewing authority from the assistant defense counsel, two other officers who are familiar with accused's service and character, and a recommendation for clemency signed by Chaplain (Major) Estes L. Lewis, Staff Chaplain, Sacramento Air Materiel Area, based on accused's excellent service for twelve years and his apparent repentence. By first indorsement to the latter recommendation, Colonel Leslie E. Martin, Acting Deputy for Base Services Sacramento Air Materiel Area, indicated his non-concurrence in the Chaplain's recommendation. In his review the staff judge advocate recommended that the execution of the sentence be suspended in view of the accused's prior excellent service and other circumstances.

By letter to The Judge Advocate General dated 20 March 1947, the reviewing authority advised that since the trial the accused had made restitution for all known defalcations including amounts due the North Sacramento Branch, Bank of America. He further stated that although the accused was found guilty of embezzling $526.75, he made restitution to the United States in the amount of $1199.25 the amount alleged to have been embezzled. He also made full restitution in the amount of $90.00 to cover the four fraudulent checks which were the subject of the four specifications of Charge III, the findings of guilty of which had been disapproved by the reviewing authority.

6. The accused has a creditable military record and has made full restitution for all known defalcations including those of which he was not found guilty and those of which findings of guilty were disapproved by the reviewing authority. I recommend that the sentence as modified by the reviewing authority be confirmed, that the period of confinement be reduced to one year, that a United States disciplinary barracks be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

7. Inclosed is a form of action designated to carry the foregoing recommendations into effect, should such recommendations meet with your approval.

CM 319392

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 213, 11 June 1949).

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

JAGK - CM 319411

27 MAR 1947

UNITED STATES	FIFTH AIR FORCE
v.	Trial by G.C.M., convened at Tokyo, Japan, 29 October 1946. Dismissal.
Second Lieutenant RICHARD A. MEYERS (O-2080748), Air 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 officer named above and submits this, its opinion, to The Judge Advocate General. The trial herein was upon a rehearing. At a former trial the sentence of dismissal was vacated by the appointing authority and the case was remanded for further action in accordance with the provisions of Article of War 50½.

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

CHARGE : Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Richard A. Meyers, Headquarters Squadron PACUSA, did at Fort William McKinley, P.I., and Chofu Airdrome, Japan, during a period from about 16 April 1946 to 20 June 1946, wrongfully and repeatedly impersonate and hold himself out to be a pilot in the Army of the United States by wearing pilot and senior pilot wings on his uniform.

Specification 2: In that Second Lieutenant Richard A. Meyers, Headquarters Squadron, PACUSA, not a rated pilot, did at Fort William McKinley, P.I., and Chofu, Japan, and in various other places within the area of operations of Pacific Air Command during a period of from about 16 April 1946 to 20 June 1946, wrongfully and without authority cause himself to be checked out as pilot and co-pilot of various United States aircraft and under the guise of instructor pilot, pilot, and co-pilot did participate in various flights in the capacity stated, thereby, endangering lives and property.

He pleaded not guilty to Specification 2 and the charge but guilty to Specification 1 of the charge. Although the defense insisted that such pleas

stand, the court-martial proceeded as if upon pleas of not guilty to both specifications and the charge. He was found guilty of the charge and Specification 1 thereof and guilty of Specification 2 except the words "20 June 1946" substituting therefor the words "23 June 1946," and excepting the words, "cause himself to be checked out as pilot and co-pilot of various United States Aircraft," and except the words "instructor pilot." 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 for action under Article of War 48.

3. Evidence for the prosecution

From sometime before the month of April through the month of June 1946 the accused, who was communications officer and provost marshal of his assigned organization, wore pilot's wings or senior pilot's wings on his uniform and this circumstance caused the personnel of his organization to assume that he was in fact a rated pilot (R. 9,14,16,19,24).

The accused was listed as pilot on the flight record of a flight from Manila, P.I. to Chofu, Japan, on 7-8 June 1946. First Lieutenant Ray Sitton was listed as co-pilot and First Lieutenant Keith H. Spiker as instructor pilot. The plane was a C-46. While in the air the plane was "on auto-pilot most of the time." (R. 16-21). The flight reports (AAF Form 1) were received in evidence without objection by the defense and show the accused as pilot. However, Lieutenant Sitton testified that on this trip the accused acted as co-pilot and that Lieutenant Spiker actually flew the plane (R. 16,22; Pros. Exs. 2,3).

First Lieutenant Edward H. Risher, assistant operations officer and flight instructor of Headquarters Squadron PACUSA, testified that he had made two flights with the accused, on both of which flights accused was recorded as a pilot. One flight occurred "about March",1946, in a C-47. Witness flew as an instructor-pilot and accused, who was communications officer of the flight section, checked the radio at Nichol's Field. No other pilots were present in the plane. Checking the radio was the purpose for the flight. Air Force regulations required that there be both a pilot and a co-pilot on multi-engined aircraft. The other flight occurred on or about 23 June 1946 at Chofu (Japan) when the accused asked the witness to "check him out" in an L-5 aircraft. Lieutenant Risher accompanied him on this flight as instructor pilot and helped him make the take-off and landing (R. 8-14). The flight report showing accused logged as pilot was admitted in evidence without objection and marked Prosecution Exhibit 1 (R. 14). After this flight Lieutenant Risher concluded that the accused was not a proficient pilot because of his inability to land the plane (R. 10).

Major Richard Goree, Commanding Officer of the PACUSA Flight Line, testified that the accused was under his command in June 1946; that he observed

accused wearing senior pilot's wings and that he had made flights in the capacity of pilot, co-pilot and navigator. Major Goree further stated that accused was rated as a navigator, that he was not qualified or authorized to fly in the capacity of pilot, co-pilot or instructor pilot (R. 24).

4. For the defense

The accused, after being advised of his rights as a witness, elected to remain silent.

On cross-examination of Major Goree it was proven that accused had a superior rating for the performance of his duties as communications officer and provost marshal and that he was being considered for promotion.

No further material evidence was presented by the defense.

5. The court recalled First Lieutenant Risher, who testified as follows:

"Q. Will you please tell the court again what caused you to take the accused out as student pilot?
"A. I was approached by the accused and asked to fly with him in an L-5.
"Q. Do you recall what he said when he asked you to fly with him? How did he express himself?
"A. We had a board at that time in the operations section and you would sign up to fly. Then the operations officer would schedule the flights and after that it would be up to them to go up. It was just a set procedure in the squadron.
"Q. Did you know whether or not Lieutenant Meyers was a pilot at that time?
"A. I under-stood he was.
"Q. You understood he was?
"A. Yes sir.
"Q. What caused you to think that?
"A. He wore pilot wings." (R. 30)

6. Concerning Specification 1

The evidence sufficiently establishes that between 16 April 1946 and 20 June 1946 the accused wore pilot and senior pilot wings on his uniform and that officers of the unit to which he was assigned assumed from this badge of distinction that the accused was a pilot. The accused was not in fact a pilot and was not entitled to wear pilot wings. He held no rating except that of navigator. A soldier who wears pilot wings, when in fact he is not a pilot, is wrongfully impersonating a pilot in violation of Article of War 96 (CM 229977, Proctor, 17 BR 259,267).

Concerning Specification 2

By exceptions and substitutions, the court found accused guilty of this specification so as to read as follows:

"Specification 2: In that Second Lieutenant Richard A. Meyers, Headquarters Squadron, PACUSA, not a rated pilot, did at Fort William McKinley, P.I., and Chofu, Japan, and in various other places within the area of operations of Pacific Air Command during a period of from about 16 April 1946 to 23 June 1946, wrongfully and without authority and under the guise of pilot, and co-pilot did participate in various flights in the capacity stated, thereby endangering lives and property."

The evidence shows that on at least three flights the accused was listed on flight reports (AAF Form No. 1) as the pilot of Government aircraft and that he acted as pilot or co-pilot, although an instructor pilot was present and assisted in the operation of the planes. Such assistance as was rendered by the instructor is immaterial to the consideration of this case, accused having masqueraded as a pilot, procured himself to be classified on the flight reports as pilot and having performed at least some of the duties of pilot. Obviously, but for his false pretenses he would not have been entrusted with the operation of Government aircraft. It will be noted that this specification alleges that accused's acts endangered lives and property. There is no direct evidence establishing such fact. However, under all the evidence showing that accused was not a rated pilot and could not fly the planes in a proficient manner, we believe the court could reasonably presume that his flying was dangerous to life and property. Even though this part of the specification were deleted, there remains pleaded the proven offense of wrongfully and without authority participating in flights as pilot and co-pilot. The conclusion in the specification "thereby endangering lives and property" could, therefore, be treated as surplusage (CM 244946, Forbes, 29 BR 73, 80).

7. We note that at the former trial of this case the court-martial in its findings of guilty of Specification 2 of the charge therein excepted therefrom the same words as were excepted in the findings from the similar Specification 2 of the charge herein. Actually, therefore, the accused was, at the second trial, charged with matters of which he had been acquitted at the former trial but inasmuch as the court-martial upon rehearing excepted such words from its findings of guilty, no prejudice to accused's rights resulted thereby.

8. War Department records show that the accused is 26 years of age, and married. He attended Brooklyn Polytechnical Institute for two years, majoring in marine engineering and on 6 January 1942 he enlisted in the Navy where he received preflight training in small craft including Piper Cubs. On 30 December 1944 he was commissioned a second lieutenant, Air

Corps, AUS, and rated as a navigator. He has never held a pilot's rating, although he appears to have had considerable pre-flight training. His efficiency ratings are excellent or better for his entire military career.

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

Christy D. Silvers, Judge Advocate

(Sick in Hospital), Judge Advocate

Elbert T. Schmidt, Judge Advocate

JAGK - CM 319411 1st Ind

WD, JAGO, Washington 25, D. C. APR [illegible]

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 Richard A. Meyers (0-2080748), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and repeatedly, from about 16 April 1946 to 20 June 1946, impersonating a pilot by wearing pilot and senior pilot insignia and of wrongfully participating in various flights in Government aircraft under the guise of pilot and co-pilot, 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. 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.

4. Briefly summarized, the evidence shows that the accused, who was communications officer and provost marshal of Headquarters Squadron, Pacific Air Command, did, during the months of April to June 1946, inclusive, at various places in the Philippine Islands and in Japan, wear pilot and senior pilot's insignia, thereby causing his fellow officers to believe that he was a rated pilot. Under such pretense he was allowed to participate in several flights of Army aircraft as pilot or co-pilot. On each flight the record shows that an instructor pilot accompanied accused and assisted him in making takeoffs and landings. When it was observed that accused was not proficient at flying, it was discovered that he was not in fact a pilot and had never been rated as such. There is no direct evidence that his misconduct "endangered lives and property" as alleged in Specification 2 of the charge. Accused pleaded guilty to wrongfully wearing pilot's "wings" as alleged in Specification 1 and pleaded not guilty to participating in flights as alleged in Specification 2 and not guilty to the charge. The court proceeded as if accused had pleaded not guilty to the charge and both specifications.

Accused is shown to have had considerable pre-flight training as an enlisted man in the Navy and to have been rated as a navigator in the Army. His commanding officer testified that he considered accused an excellent communications officer and provost marshal and had planned to recommend his promotion. Although this young officer resorted to deception and

unlawful conduct in order to satisfy his zeal to be a pilot, there is no proof that he actually endangered life or property in so doing. Considering all the circumstances, including accused's prior good record of service, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $100 per month for three months.

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

CM 311411

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 147, 2 May 1947).

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

JAGH - CM 319423

8 MAY 1947

UNITED STATES v. Private First Class HENRY N. GILES (38738074), Attached Unassigned Detachment of Patients, 121st General Hospital and Technician Fifth Grade MARTIN E. ANDERSON (44165749), Detachment Medical Department, 121st General Hospital	SEVENTEENTH MAJOR PORT Trial by G.C.M., convened at Bremerhaven, Germany, 25 November 1946. Each: Dishonorable discharge and confinement for life. Each: The United States Penitentiary

REVIEW by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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 Giles:

CHARGE I: Violation of the 92d Article of War.

Specification 2: In that Private First Class Henry N. Giles, Attached Unassigned Detachment of Patients, 121st General Hospital, did, at Wesermunde-Lehe, Bremen Enclave, Germany, on or about 14 October 1946 wilfully and feloniously aid and abet. Technician Fifth Grade Martin E. Anderson in forcibly and feloniously and against her will having carnal knowledge of Marie Wilma Thea Rosenberger.

Specification 3: In that Private First Class Henry N. Giles, Attached Unassigned Detachment of Patients, 121st General Hospital, did, at Wesermunde-Lehe, Bremen Enclave, Germany, on or about 14 October 1946 forcibly and feloniously against her will have carnal knowledge of Marie Wilma Thea Rosenberger.

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

Specification: In that Technician Fifth Grade Martin E. Anderson, Detachment Medical Department, 121st General Hospital, and Private First Class Henry N. Giles, Attached Unassigned Detachment of Patients, 121st General Hospital, acting jointly and in pursuance of a common intent, did at Wesermuende-Lehe, Bremen Enclave, Germany on or about 14 October 1946 willfully, wrongfully and unlawfully commit an indecent assault upon Marie Wilma Thea Rosenberger by forcing her to enter an enlisted man's quarters and forcibly removing her clothing from her person against her will and without her consent.

As to accused Anderson:

CHARGE I: Violation of the 92d Article of War.

Specification 1: In that Technician Fifth Grade Martin E. Anderson, Detachment Medical Department, 121st General Hospital, did, at Wesermunde-Lehe, Bremen Enclave, Germany, on or about 14 October 1946 forcibly and feloniously against her will have carnal knowledge of Marie Wilma Thea Rosenberger.

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

Specification: In that Technician Fifth Grade Martin E. Anderson, Detachment Medical Department, 121st General Hospital, and Private First Class Henry N. Giles, Attached Unassigned Detachment of Patients, 121st General Hospital, acting jointly and in pursuance of a common intent, did at Wesermuende-Lehe, Bremen Enclave, Germany on or about 14 October 1946 willfully, wrongfully and unlawfully commit an indecent assault upon Marie Wilma Thea Rosenberger by forcing her to enter an enlisted man's quarters and forcibly removing her clothing from her person against her will and without her consent.

Each accused pleaded not guilty to, and was found guilty of, the Charges and Specifications thereunder pertaining to him. No evidence of any previous convictions was introduced as to either accused. Each accused was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for life. The reviewing authority approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution is summarized as follows:

On 14 October 1946, the accused Giles was a patient at the 121st General Hospital, Bremerhaven, Germany, and the accused Anderson was a member of the Detachment Medical Department at that hospital (R 31). Technician Fifth Grade John F. Septer testified that on the evening of 14 October 1946 the two accused left the hospital in the company of the witness (R 6). After consuming a quantity of liquor and riding about in a streetcar the two accused and the witness returned to the vicinity of the hospital. The latter returned to his quarters shortly after 2200 hours, leaving the two accused on a corner of the Langener-Landstrasse in Wesermuende, Bremen Enclave, Germany (R 67).

Marie Rosenberger, the victim, testified that shortly after 2300 hours, 14 October 1946, she had left Sergeant Raymond Wright, 121st General Hospital, a friend of the witness, near the hospital and proceeded to walk to her home on Wesermuende-Lehe, a short distance away. She passed three soldiers and one of them followed her, whom she identified in court as the accused Giles. When the accused Giles began to follow her along the sidewalk, she became frightened and began to run but Giles pursued her, seized her by the arm and forced her to stop. Giles told her that he wished to accompany her to her home but the witness refused him permission. At that point a second soldier arrived, whom the witness identified as the accused Anderson (R 9). She attempted to get away from them but was unsuccessful because they both held her. The two accused dragged the witness to a place known as Floetenkiel, which is at the corner of Langener-Landstrasse and Wursterstrasse. They then attempted to force her to walk across the street to a bunker. The witness resisted and started to shout but Anderson placed his hands over her mouth. After they had gone approximately to the middle of the street a car approached, and they returned to the sidewalk. Shortly thereafter an American sailor and two German girls passed close to the group. Anderson removed his hands from the girl's mouth. She asked the sailor and the two women for help, whereupon the sailor and the two women returned and asked what was the matter. Anderson placed his hand inside his jacket as if reaching for a pistol, and told them to go away or he would shoot them. After the sailor and the women left Anderson again covered Marie Rosenberger's mouth and nose with his hands and she kicked him in the shins (R 10, 23-24). Giles twisted her fingers telling her he would break her fingers if she did not do what they wanted her to do. Anderson took out a knife, opened it and gave it to Giles who held it in front of the girl's eyes and said, "You know I will kill you if you will not do what we want you to do." The two accused, each holding one of her arms, then forced the girl along a path to a nearby spot and forced her to the ground (R 11). Giles held her hands over her head and she could feel the knife in his hand (R 12). Anderson removed her panties, forced her legs apart and had sexual intercourse with her (R 12). She kicked and struggled but did not scream because she was afraid (R 20). After

Anderson had consummated the act and got up, the girl attempted to rise, but Giles pushed her back on the ground, and "laid himself upon me." She resisted by scratching his face and throat and by holding her legs together but Giles forced her legs apart and had sexual relations with her. Anderson did not actively assist Giles but stood approximately a meter away (R 12). While Giles was having sexual relations with her, a civilian came along the street and talked to Anderson. She heard Anderson laughing and the civilian finally went away (R 13). She did not scream at this time because of the threats the accused had made, and since "three people had run away, and one man could not do anything" (R 21). Shortly thereafter Giles released the girl, but Anderson grabbed her and said she would have to go to his room with him. On a pretext to get away, she said she would go to his room the next day but the two accused grabbed her arms and took her down the street. She could not resist any more because she "felt very badly." Every time a car passed the accused pulled her back where it was dark (R 14). On arriving at the hospital, the accused forced her through a hole in the fence and conducted her to the soldiers' quarters. One accused pushed, and the other pulled her through the front door. Anderson forced her upstairs and pushed her into a room. Giles and Anderson undressed and then Anderson turned off the light and locked the door. He ordered her to undress and when she said she "could not," Anderson proceeded to take her clothes off by force. The girl, then barefooted and with only her underclothes on, asked to go to the lavatory. Anderson, cursing, permitted her to go, and unlocked and opened the door for her (R 16). She grabbed her overcoat, which was not observed by the accused because it was dark, and went to the lavatory and then ran down the stairs (R 18). She ran out of the house and into the dark doorway of the next house, and looked to see if she was followed. She then went into the next house where there was a light. She asked a soldier where Sergeant Wright was but the saldier said, "he had no time." Another soldier came and she asked him for Sergeant Wright and told him what had happened. The soldier took her to his room and then went for Sergeant Wright (R 17). When Sergeant Wright came she then told him what had happened, and he got her some clothes and took her home (R 17).

Gerhard Mueller, a German civilian, testified that at about 11:20 or 11:25 on the evening of 14 October, on Langener-Landstrasse, he saw two American soldiers with a woman between them. She was being dragged, one soldier held her by the hair and was holding her mouth shut. He was about forty-six meters away and could not recognize them, but did see stripes on the sleeve of one of the soldiers (R 22).

Maria Schroeder, between 11:15 and 11:30 on 14 October, was on her way home, with a Mrs. Mueller and an American sailor, when they passed two American soldiers with a woman who asked for help. She could not recognize them, but one of the soldiers wore several stripes on his arm and the woman was between the soldiers. They approached the three, but immediately left when one of the soldiers made a motion to his pocket and said, "Go away, or I will shoot you." She did not at the time know the woman with the soldiers but later found out it was Mrs. Rosenberger (R 22-24).

Johanne Mueller, the companion of Maria Schroeder and the sailor, testified that she had known Mrs. Rosenberger for seven years. Just as they had passed Mrs. Rosenberger and the two soldiers, she heard her call for help. They then returned as Mrs. Rosenberger seemed frightened. One of the soldiers made a motion to his jacket and said, "Go away, or I will shoot you," whereupon, the witness and her companions left (R 24-26).

Sergeant Raymond Wright identified the accused and testified that he was mess sergeant at the 121st General Hospital, that he had known Marie Rosenberger about four months and that she is a very fine girl. He had spent the evening of 14 October 1946 at Marie Rosenberger's home, with her and her family. At about eleven he left to go back to the hospital for work and Marie walked part of the way with him. He left her on Langener-Landstrasse and took a short cut to the hospital, arriving there at about 11:15 p.m. Around midnight one of the cooks told him of Marie's trouble and he went to the billets and found her there. She had on a slip, a brown overcoat with one sleeve nearly torn out, and no shoes or hat. She could not talk coherently, was under a "lot of tension" and about to cry. Upon learning that Anderson was involved in the case, he went to look for him. He found him in bed, apparently asleep, and Giles was in the same room in another bed. Giles woke up "readily", but denied he knew anything about the girl. Anderson continued to sleep, or pretended to sleep. The room was in a general disorder and on the table was an overturned whiskey bottle and the bandage he had put on Marie's finger earlier in the evening (R 26-28). The witness could not find her clothes, so he had Private Wright take a field jacket and pair of shoes to her. When the witness returned to Anderson's room, after taking Marie home, Giles was gone. Sergeant Wright searched for him and found him in the cellar hiding behind an ash can (R 28). Giles then consented to get the girl's clothes which were hidden in a wall locker in an unused kitchen across the hall from the room occupied by Giles and Anderson (R 28).

Private First Class Edgar Wright testified that on the night of 14 October when he went to the latrine, he saw a girl standing in the hallway talking to another soldier. When he came out of the latrine the girl came up to him and said that some of the boys had taken her clothes and "did something to her that wasn't no good." She had on a coat but no shoes. She was white and hoarse and looked as if she had been crying. She wanted him to take her to the kitchen to see Sergeant Wright. He took the girl to his room and went and got Sergeant Wright (R 29-30).

Captain Edward G. Sykes was Administrative Officer of the Day. When the matter was reported to him, he went to the room in the billets where he found several people. He testified that Giles had several cuts on his face and was wearing an ETO jacket with technical sergeant's stripes (R 31-32). Although there was a great deal of noise and confusion, Anderson appeared to be asleep but got up immediately when the witness shook him and told him to get up. He talked with Giles and

Anderson separately and they both said they knew nothing of the girl, but told different stories of what they had done that evening (R 33). Finally, upon being told that their stories did not agree "we arrived at a story that agreed with the girl's except where the rape and violence was concerned" (R 33).

It was stipulated by the prosecution and the defense that Captain John G. Fee, Medical Corps, if present, would testify that a blood test of Private First Class Giles was made at 0300, 15 October and that the test showed .5 mg alcohol per c.c. of blood, indicating he had been drinking, but was not conclusive proof of it (Pros Ex 1). It was similarly stipulated that Captain Fee would testify that a blood test of Technician Fifth Grade Anderson was also made at 0300, 15 October and this test also showed .5 mg of alcohol per c.c. of blood (Pros Ex 2). It was further stipulated that Captain William Jend, Jr., Medical Corps, if present, would testify that he made an examination of Marie Rosenberger at about 0330 hours on 15 October and that spermatozoa were seen on vaginal smears when examined in the laboratory (Pros Ex 3).

4. The evidence for the defense is summarized as follows:

First Lieutenant William S. Howland, 121st General Hospital testified that he had known Anderson for six months, that Anderson was chief ward master on Lieutenant Howland's ward and performed his duties very efficiently, and that he was well thought of by the nurses (R 34).

Technician Fifth Grade Septer was recalled for the defense and testified that he had known Anderson for eight months, and that he worked in the next ward. Most of the people liked him, but he did not know what the other men in the organization think of him (R 35).

Both accused, upon being warned of their rights as witnesses, elected to remain silent.

5. By direction of the court Marie Rosenberger was recalled as a witness and testified that she had lived in Bremerhaven twenty-four years, that she is married and her husband lived in Wesermuende, that she is not divorced but had been separated from her husband for five months and now lived with her parents and worked in the officers' quarters.

6. The foregoing evidence proves beyond any reasonable doubt all elements of the charges against each accused in this case. While the evidence as to the actual rape and the later indecent assault in Anderson's room rests upon the testimony of the victim, Marie Rosenberger, there is sufficient corroboration in the testimony of other witnesses to fully warrant the court in believing her testimony. There is no testimony whatsoever to contradict any of the prosecution's evidence. While the victim's failure to ask for help when the civilian approached might raise a presumption of consent, her explanation as to her failure to do so is adequate.

7. A letter urging clemency on behalf of the accused Anderson, by First Lieutenant William S. Howland, Medical Corps, to the Commanding General, Continental Base Section, dated 9 December 1946 is attached to the file and has been considered by the Board.

8. The court was legally constituted and had jurisdiction over each accused and the offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications against each accused, and legally sufficient to support the sentence as to each accused. A sentence to death or imprisonment for life is mandatory upon a conviction of rape under Article of War 92.

_____, Judge Advocate

On Leave, Judge Advocate

Philip A. Smith, Judge Advocate

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

JUN 4 1947

JAGQ - CM 319454

UNITED STATES	)	XII TACTICAL AIR COMMAND
v.	)	Trial by G.C.M., convened at Nordholz Army Air Base, 22 November 1946. Dismissal.
Captain BYRON H. BAREFOOT (0-1576903), Air Corps.	)	

OPINION of the BOARD OF REIVEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

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

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

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

Specification: In that Captain Byron H. Barefoot, 728th Air Materiel Squadron, 486th Air Service Group, APO 69, US Army, was at Bremerhaven, Germany on or about 8 October 1946, drunk under such circumstances as to bring discredit on the military service.

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

Specification: In that Captain Byron H. Barefoot, 728th Air Materiel Squadron, 486th Air Service Group, APO 69, US Army, was at Nordholz Army Air Base on or about 9 October 1946, drunk in quarters.

Accused made no plea to Charge I or to its specification; pleaded not guilty to Charge II and its specification and was found guilty of both Charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

At approximately 1000, 8 October 1946, Technician Fifth Grade Wayne B. Brown who was on duty in the dispensary, Bremerhaven Staging Area, Bremerhaven, Germany, was directed to meet a train which was due to arrive at 1015 and remove accused who was ill. He located accused who was asleep in a lower berth, advised him of his mission and requested him to get dressed. Accused "pulled on" his trousers "wrongside out" so the witness removed them "turned them right side out and helped him put them on". During this incident accused kept repeating that, "I know I am drunk but still I have got the flu" (R. 12-13). Accused had vomited on the floor of the train and when he was taken by the witness to the dispensary he was dressed only in blouse and pants (R. 14). Witness did not "believe accused was disorderly" (R. 15).

When the medical officer was examining him at the dispensary accused said "I know I'm drunk but I have the flu" and when asked if he knew where he was he replied, "I don't know" (R. 16). Accused was not creating any "disorder" (R. 17), although he was incoherent in speech, and arguing with enlisted men about various things (R. 18). Witness testified that he did not think accused was ill as his temperature and pulse were normal but he (accused) had been drinking (R. 18).

Captain Naffke, assistant provost marshal, Nordholz Army Air Base arrived at the dispensary about noon and when accused awakened at approximately 1400, he stated that he knew he was drunk and requested a cigarette. Thereafter when accused was preparing to go to the hospital witness recounted his conversation and difficulty in dressing as follows:

"Q. What trouble did he have getting dressed?
A. Well, he couldn't get his foot in the stocking and he couldn't get the right shoe on the right foot. I went over and carted all this stuff into this office adjoining the sick call room. One of the medical officers running the sick call line came in and Capt Barefoot sat on a chair in there and told him he was pretty sick and that nobody had done nothing about his being sick.

"Q. Did he say anything else?
A. Yes, he said he had a fever and his head was stopped up and insisted that the doctor do something for him. He'd go off on another angle — said he was drunk and knew

he was drunk but that wasn't the point. He started telling the doctor about the effects alcoholism has on a person. He kept saying that the Lost Weekend didn't portray anything that an alcoholic really saw, that it was mild. He wanted Phenol Barbizol to break up the condition in his head, so the doctor brought back some stuff in an envelope and a glass of water and gave it to him.

"Q. Did he get dressed?
A. Yes, it took him about three-quarters of an hour, a good three-quarters of an hour, to get him dressed. Then we discovered he was missing something on his uniform.

"Q. What was that?
A. The chief thing was he was missing his long coat. We checked around and couldn't find it, and he kept insisting that it made no difference to him, all that was important were his papers placing him on TDY. Finally the ambulance came back from the 121st General Hospital again, and pulled up right outside of the window and here in the back of the ambulance was all of his clothing and personal stuff, which had apparently been left there in the ambulance. He put his clothes on and we started back to Niederwerrn. All the way back he kept saying he was pretty sick and rambling on about the Lost Weekend, and how sick he was. He kept talking about the inefficiency of different branches of the service, and horses on this base being under Special Service instead of under QM and then again back on the subject of the Lost Weekend. None of it was joined, it was all rambling." (R. 9).

The following morning, 9 October 1946, witness was directed to go to the Bachelor Officers Quarters and determine why accused had not reported to the commanding officer as he had been ordered to do. He found accused in bed and described his condition as follows:

"Q. What did the room look like?
A. A couple of empty bottles were there and he was in bed. I told him the C.O. was waiting for him and that it was now 9 o'clock. He told me he didn't care, he didn't want to see the C.O., so I went out and got on the telephone and called Col McConnell and he said to bring him down, and I said it would probably take a little force and wanted his permission to use force, and he said OK.

"Q. What was the accuseds condition at this time?
A. He was apparently very drunk or had a terrific hangover.

"Q. What led you to believe that he was still intoxicated or just drunk again?
A. First, his speech was very ppor, all slurred and run together and just telling me in the way he did that he didn't want to see the C.O. led me to believe that he was still pretty loaded.

"Q. Was the smell of liquor on his breath?
A. I didn't get that close but the room smelled like a bar room. The odor of liquor was very heavy in there.

* * * *

"Q. Did anything happen then?
A. When he left, Capt Barefoot pulled a bottle out from under the blankets and took a pretty good slug of it.

"Q. What was in the bottle?
A. Schenley's bottle, believed to be whiskey." (R. 10-11).

Colonel McConnell, Commanding Officer, Nordholz Army Air Base testified that when accused arrived in his office on 9 October he "didn't have enough of his facilities to make a coherent statement" and was in the "talkative stage" of intoxication so:

"A. I considered that he wasn't in condition to talk to me, to give answers to protect himself, so I directed him to proceed to his quarters and return to my office the following morning.

"Q. What was his general appearance at that time?
A. Unshaven, uniform wasn't pressed, he wasn't presentable. He was sort of wrinkled, generaly unkempt appearance.

"Q. What led you to believe that he had been drinking?
A. Because of the fact that he wasn't the man that he was when he was sober.

"Q. Anythihg else?
A. Well, his general appearance, which wasn't that of an officer." (R. 20).

The deposition of Captain De Luccia, Medical Corps, was introduced in evidence (R. 19; Pros. Ex. 1). He testified that he was on duty in the dispensary on 8 October 1946; examined accused at approximately 1600 and described his findings as:

"A. Captain Barefoot was sent to me because he complained of 'flu'. He did not have it, or rather, I did not find any evidence of 'flu' at that time but found him to be suffering from the effects of overindulgence in alcoholic beverages. I sent him to his quarters with recommendation that that he go to sleep.

"Q. What was his general appearance when you saw him?
A. His general appearance was poor; clothes were badly pressed. Seemed to be suffering from a lack of sleep. He was trembling and his speech was mildly slurring." (Pros. Ex. 1).

He also saw accused in his quarters the following day, 9 October 1946 at 1100 and:

"Q. Under what circumstances did you see him?
A. Well, he was moderately intoxicated at the time I got to his quarters. He was complaining of 'flu' however his temperature was normal; his lungs were clear and he showed no evidence of respiratory disease.

"Q. You stated that you saw him at his quarters. Where were these quarters?
A. In the old Officers Club at Nordholz Army Air Base.

"Q. At the time you saw him on the morning of 9 October, did it appear to you that he had been drinking?
A. Yes, I would say that he had been drinking.

"Q. Would you say that he was under the influence of alcohol?
A. Yes, I would say, that he was, moderately under the influence of alcohol.

"Q. What led you to believe that he was under the influence of alcohol?
A. Well, his speech was moderately slurring, and moderately incoherent; his trend of thought wasn't clear; his gait was unsteady and his breath smelled of alcohol.

* * * *

"A. His clothes were very badly pressed; I should say, suffering from not being pressed enough. They smelled of alcohol. He was unshaven and his attitude was not that of a good officer.

"Q. You have stated his attitude was not that of a good officer, what do you mean?
A. He insisted that he had the 'flu' and after I found no evidence of 'flu'; he insisted that I did not understand his condition. I told him I did. He insisted he be hospitalized for more care for his 'flu.'" (Pros. Ex. 1).

It was stipulated that a blood specimen taken from accused at 1100, 8 October 1946 contained 3.0 mg ethyl alcohol per cc of blood and that no examination was made to determine if accused was under the influence of drugs (R. 19).

4. Evidence for the Defense.

Accused, after being advised of his rights as a witness by the Law Member (R. 21) elected to testify under oath to the effect that on 7 October 1946 he was in Wiesbaden, Germany, preparing to entrain for Bremerhaven. He procured some APC pills from the medical officer because he had the "flu", and was taking them while on the train. He "did drink some" and "vomited at Bremerhaven". A fellow passenger departed the train at Bremen and "he left all his whiskey and said to take it, and I took about one or two inches" (R. 22). He further testified:

"Q. Was it a full bottle that he gave you?
A. No, he said he was getting off the train and didn't want to take it with him, so I drank what was left, about two or three inches, and took a couple more pills. I asked the soldier who takes up the tickets that when I got to Bremerhaven, I would like to go to the hospital. He said, OK, and when we got there, I remained in my berth. The rest is as they have stated.

"Q. What do you know about what happened at the hospital?
A. When I got to the hospital, I complained of a headache, told the doctor my back hurt, and later I found how I had prostytis, and well, I didn't do anything but just lie there. I argued with him and told them I was sick. I freely admitted I was sick and I had had whiskey. No doubt about that. That's all." (R. 22-23).

He admitted having difficulty in dressing but stated that "I felt at that time that I was sick, and in the first place I didn't want to dress myself. I told them, 'I want to see a doctor'" (R. 23). He remembers talking about "The Lost Weekend" and admitted being in the hospital immediately subsequent to this incident for five weeks with his condition diagnosed as chronic alcoholism (R. 25). He drank the liquor before seeing Colonel McConnell on the morning of 9 October because "I thought I was sick. I was still taking these pills" (R. 26). He had drunk only "3 inches" from a quart before arriving in Bremerhaven but he was "drunk" and ordinarily "gets drunk" on that amount (R. 26). He had not "touched a drop" for three weeks prior to this episode (R. 28).

5. The record of trial does not expressly state that when accused failed or refused to plead to Charge I and its specification, a plea of not guilty was entered for him by the court, nevertheless the provisions of paragraph 86c, TM 27-255, Military Justice Procedure (Feb. 1945) and paragraph 70, Manual for Courts-Martial, were read to the court (R. 5). It is clear from reading the record that the trial proceeded and the court considered the case as if accused had pleaded not guilty to this Charge and Specification. Such procedure was in conformity with Article of War 21 and paragraph 70, Manual for Courts-Martial and therefore the Board of Review has considered the case as if accused had pleaded not guilty to all Charges and Specifications.

The Specification of Charge I alleges that accused was, on 8 October 1946 at Bremerhaven, Germany, drunk <u>under such circumstances as to bring discredit on the military service</u>, in violation of the 95th Article of War. It has been repeatedly held by the Board of Review that the words underscored above should not be used in charging an offense under the 95th Article of War and when so used should be considered as surplusage (CM 248934, <u>Murray</u>, 31 BR 399). Therefore, whether the allegation that accused was "drunk at Bremerhaven, Germany" constitutes a violation of Article of War 95 depends upon all the facts and circumstances as disclosed by the evidence.

Winthrop cites, as an instance of an offense chargeable under Article of War 61 (95), "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Reprint, p. 717).

From the evidence it is obvious that accused was conspicuously and grossly drunk, in improper uniform, on a public railway and in the presence of military inferiors. His drunkenness was characterized by a shameful exhibition of himself in being unable to dress, vomiting on the floor of the railway car and engaging enlisted men in argumentative

and incoherent conversation. The evidence supports, beyond a reasonable doubt, the findings of guilty of Charge I and its Specification.

The evidence further establishes that accused was drunk in quarters on 9 October 1946. An officer of the Medical Department examined him in his room at the barracks and so testified. Accused's actions in refusing to report to his commanding officer and his statements relative thereto leave no doubt on this point. This offense in violation of Article of War 96 was clearly proved.

While accused admitted that he was "drunk" on both occasions he also contends that he was "more sick than drunk". The testimony of the three Medical officers who examined him to the effect that he was not ill, but was under the influence of alcohol was sufficient evidence from which the court was justified in determining that accused's condition was not brought about by his alleged illness.

6. War Department records show the accused to be 30 years of age and married. He graduated from high school and attended State Teachers College, Troy, Alabama, for three years. He taught high school for one year before entering the Regular Army as a private on 28 October 1941. He was discharged 13 August 1942 to accept a Reserve Commission as a Second Lieutenant, QMC, and entered on active duty 14 August 1942. He was promoted to First Lieutenant 23 April 1943 and to Captain, 28 March 1944. His efficiency reports disclose numerical ratings of "4.1" and "3.2" and include the notation that his "personal habits are making him an undesirable officer." No evidence of previous convictions was adduced at the trial but it appears that accused has on two previous occasions received punishment under the 104th Article of War, once for interferring with military police in the execution of their duties and once for appearing before enlisted men of his command in an intoxicated condition. In each instance he received a reprimand and fine of $100.00.

7. The court was legally constituted and had jurisdiction of accused and the offenses charged. No errors injuriously affecting the rights of the accused were committed during the trial. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

W H Johnson Jr, Judge Advocate.

Joseph J Stern, Judge Advocate.

E Lehmann, Judge Advocate.

JAGQ - CM 319454 1st Ind

WD, JAGO, Washington 25, D. C. JUN 1 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 Captain Byron H. Barefoot (O-1576903), Air Corps.

2. Upon trial by general court-martial, this officer was found guilty of being drunk under such circumstances as to bring discredit on the military service (Spec., Charge I), in violation of Article of War 95 and of being drunk in quarters (Spec., Charge II), 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 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 evidence shows that accused was taken by enlisted personnel to an Army dispensary from a railway train in Bremerhaven, Germany, while in a grossly intoxicated condition. The next morning he was again so intoxicated in his quarters that he was unable to keep an appointment with his commanding officer. 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.

4. Subsequent to the trial accused addressed a letter to the War Department stating that he was a confirmed alcoholic and had received treatment for this condition on two previous occasions. Consequently, it was recommended by this office that upon the return of accused to the United States and pending review of the record of trial accused be transferred to a general hospital for observation and report by a board of medical officers with respect to his mental responsibility.

The report of a board of medical officers convened at Tilton General Hospital, Fort Dix, New Jersey, dated 24 April 1947, shows that the board found accused sane, so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong, and sufficiently sane to conduct and cooperate intelligently in his defense, but found that he was suffering from "addiction, alcoholic, chronic severe", and "that because of the nature of the officers mental and physical illness, he was not able to adhere to the right with regard to his alcoholism." The board recommended that accused be hospitalized for consideration for retirement for medical reasons by retiring board action.

5. In view of the findings of the board of medical officers and all the circumstances of the case I recommend that the findings and sentence be disapproved, and that the officer be promptly separated from the service by administrative processes.

6. War Department records show that accused is 30 years of age and married. He graduated from high school and attended State Teachers College, Troy, Alabama, for three years. He taught high school for one year before entering the Regular Army as a private on 28 October 1941. He was discharged 13 August 1942 to accept a Reserve Commission as a Second Lieutenant QMC and entered on active duty 14 August 1942. He was promoted to First Lieutenant 23 April 1943 and to Captain, 28 March 1944. His efficiency reports disclose numerical ratings of "4.1" and "3.2" and include the notation that his personal habits are making him an undesirable officer. No evidence of previous convictions was introduced at the trial but it appears that accused has received punishment under the 104th Article of War on two previous occasions, once for interfering with military police in the execution of their duties and once for appearing before enlisted men of his command in an intoxicated condition. In each instance he received a reprimand and fine of $100.

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

CM 319454

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. R/T
2. Form of action
3. Medical report

(G.C.M.O. 232, 26 June 1947).

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

JAGH - CM 319456

22 MAY 1947

UNITED STATES v. Second Lieutenant ROBERT C. SAYLES (0-745190), Air Corps	)	TECHNICAL DIVISION, AIR TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 6 January 1947. Dismissal, total forfeitures, and confinement for six (6) months

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 Second Lieutenant Robert C. Sayles, Air Corps Unassigned, Attached Squadron I, 3705th Army Air Forces Base Unit, did without proper leave, absent himself from his station at Drew Field, Florida, from about 17 August 1945, to about 27 September 1946.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of two 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 six (6) months. 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 the evidence and the law contained in the review of the Technical Division, Air Training Command Judge Advocate, dated 21 January 1947.

4. At the time of the commission of the offense of which accused has been convicted, he was single and was 23 2/12 years of age. His parents and one older brother reside in Portland, Oregon. He had completed one year at the University of Portland prior to his enlistment in the Air Corps on 13 April 1942. Upon completion of aviation cadet training, he was appointed a second lieutenant, Air-Reserve and ordered to active duty on 20 May 1943. He arrived overseas in January 1945 and flew eighteen combat mission in the European Theater of Operations, returning to the United States on 4 July 1945. He was awarded the Air Medal and two Oak Leaf Clusters to the Air Medal. The only efficiency ratings of record show three ratings of excellent and one rating of very satisfactory.

On 15 January 1944, he was reprimanded under the provisions of Article of War 104, for operating aircraft within an airway traffic control area without the proper approval of a flight plan for such operation. He was tried by a general court-martial on 3 May 1944, for three-days' absence without leave, for which he was sentenced to forfeit sixty-five ($65.00) dollars of pay per month for three months and to be restricted to the limits of his post for fourteen days. He was tried by a general court-martial on 30 May 1944 for making a false statement under oath on 3 May 1944 and sentenced to be dismissed the service, which sentence was commuted to a reprimand, forfeiture of seventy-five ($75.00) dollars of his pay per month for six months and a restriction to the limits of his post for three months.

5. The Board has given consideration to the following communications which recommend clemency on behalf of the accused: A letter from his special defense counsel to the reviewing authority, dated 22 January 1947; two letters from Honorable Guy Gordon, United States Senate, to Major General Wilton B. Persons, Chief, Legislative and Liaison Division, dated 10 and 14 January 1947; a letter from Mr. Merle R. Chessman to Senator Gordon, dated 4 October 1946; and a letter from Mrs. O. C. Sayles to Mr. Chessman, dated 8 January 1947.

6. 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. 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 to dismissal, total forfeitures, and confinement at hard labor for six (6) months is authorized upon a conviction of a violation of Article of War 61.

_____, Judge Advocate

Wilbur A. Sap, Judge Advocate

Philip J. Smith, Judge Advocate

JAGH - 319456 1st Ind

WD, JAGO, Washington 25, D. C. OCT 4 1947

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 Robert C. Sayles (0-745190), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from about 17 August 1945 to 27 September 1946, in violation of Article of War 61. Evidence of two 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 six (6) months. 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 review of the Staff Judge Advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

4. The accused after returning from overseas duty on 4 July 1945 was placed on temporary duty at Jefferson Barracks, Missouri. By paragraph 53, Special Orders Number 210, Army Service Forces, 1722d SCU, WD Personnel Center, Headquarters Reception Station, Jefferson Barracks, Missouri, 17 August 1945, accused was transferred to Squadron A, 301st Base Unit, Army Air Forces, Drew Field, Tampa, Florida. He failed to comply with these orders and never reported to his new unit.

At the trial accused elected to be sworn as a witness and testified in substance as follows: About VJ-Day he started drinking and celebrating and evidently "took off." When he came to, about two weeks or a month later, he was in Denver. He realized at that time that he was absent without leave but was in such a mental and physical state that he "didn't particularly care." Thereafter, and until he surrendered himself at Lowry Field on 27 September 1946, he worked at several places, earning from $90 to $220 a month. Nine days before returning to military control, he married a girl whom he had met at the Catholic USO in Denver while he was absent.

5. At the time of the commission of the offense of which accused has been convicted, he was single and was 23 2/12 years of age. He had completed one year at the University of Portland prior to his enlistment

in the Air Corps on 13 April 1942. Upon completion of aviation cadet training, he was appointed a second lieutenant, Air-Reserve and ordered to active duty on 20 May 1943. He arrived overseas in January 1945 and flew eighteen combat missions in the European Theater of Operations, returning to the United States on 4 July 1945. He was awarded the Air Medal and two Oak Leaf Clusters to the Air Medal. The only efficiency ratings of record show three ratings of excellent and one rating of very satisfactory.

On 15 January 1944, accused was reprimanded under the provisions of Article of War 104, for operating aircraft within an airway traffic control area without the proper approval of a flight plan for such operation. He was tried by a general court-martial on 3 May 1944, for three days' absence without leave, for which he was sentenced to forfeit sixty-five ($65.00) dollars of his pay per month for three months and to be restricted to the limits of his post for fourteen days. He was tried by a general court-martial on 30 May 1944 for making a false statement under oath of 3 May 1944 and sentenced to be dismissed the service. This sentence was commuted to a reprimand, forfeiture of seventy-five ($75.00) dollars of his pay per month for six months and restriction to the limits of his post for three months.

6. Consideration has been given to the following communications which recommend clemency on behalf of the accused: A letter from his special defense counsel to the reviewing authority, dated 22 January 1947; two letters from Honorable Guy Gordon, United States Senate, to the Chief, Legislative and Liaison Division, dated 10 and 14 January 1947; a letter from Mr. Merle R. Chessman to Senator Gordon, dated 4 October 1946, and a letter from Mrs. O. C. Saylos to Mr. Chessman, dated 8 January 1947.

7. I recommend that the sentence be confirmed and carried into execution.

8. Inclosed is a form of action designed to carry into effect the foregoing 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. 211, June 11, 1947.)

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

JAGN-CM 319466

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at
	)	Bamberg, Germany, 20 September
Staff Sergeant CHARLES W.	)	1946. Dishonorable discharge
KIRKLAND (38432483), 820th	)	and confinement for one (1)
Constabulary Military Police	)	year. Disciplinary Barracks.
Company.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Staff Sergeant Charles W. Kirkland, 820th Constabulary Military Police Company, did between the dates of 1 July 1945 to 29 November 1945 at Weidhaus, Germany, with intent to deceive, wrongfully induce Kaethe Schmucker, a German national, to participate in a marriage ceremony purporting to constitute her, the said Kaethe Schmucker, his lawful wedded spouse, then and there knowing said ceremony to be legally insufficient to constitute her, the said Kaethe Schmucker, his lawful wedded wife.

Specification 2: In that * * *, did between the dates of 1 October 1945 to 29 November 1945, at Weidhaus, Germany, with intent to deceive, wrongfully induce Dr. Georg Goetz, a German national, to perform a marriage ceremony between himself, the said Staff Sergeant Charles W. Kirkland and Kaethe Schmucker, a German national, then and there knowing said ceremony to be legally insufficient to constitute her, the said Kaethe Schmucker, his lawful wedded wife.

Accused pleaded not guilty to the Charge and its Specifications, was found guilty of both Specifications and of the Charge, and 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 one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty and the only question to be determined is the legality of the sentence.

4. The acts of accused as set out in the Specifications do not set out offenses specifically listed in the Table of Maximum Punishments (par. 104c, MCM, 1928). They do constitute conduct of a nature to bring discredit upon the military service (par. 152b, MCM, 1928) and are closely related to the offense listed in such Table of Maximum Punishments as "Disorderly under such circumstances as to bring discredit upon the military service," for which the maximum punishment is fixed at confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

The offenses alleged in the two Specifications of the Charge constitute one transaction and hence are punishable only in the most serious aspect of such transaction (CM 257824, Cox, 50 BR 204).

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and its Specifications, but legally sufficient to support only so much of the sentence as provides for confinement at hard labor for a period not to exceed four months, and forfeiture of not to exceed two-thirds pay, per month, for a like period.

Edward J. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

Francis S. Dunbar, Judge Advocate.

JAGN-CM 319 466 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, New York

1. In the case of Staff Sergeant Charles W. Kirkland (38432483), 820th Constabulary Military Police Company, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the sentence be approved as involves confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. Upon taking such action 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 319466).

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.

MAY 15 1947

JAGQ - CM 319474

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Bamberg, Germany, 7 November 1946. Dishonorable discharge and confinement for life. United States Disciplinary Barracks.
Private MAX K. MULVANEY (37445307), Attached unassigned Detachment 90, 3rd Replacement Depot, 476th Replacement Company, 90th Replacement Battalion.	)	

REVIEW by the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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 92d Article of War.

Specification: In that Private Clifford C. Welco and Private Max K. Mulvaney, both of Detachment 90, 3rd Replacement Depot, 476th Replacement Company, 90th Replacement Battalion, acting jointly and in pursuance of a common intent, did, at Nurnburg, Germany, on or about 15 March 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Konrad Baier, a human being, by shooting him with a pistol.

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

Specification 1: In that Private Max K. Mulvaney, Detachment 90, 3rd Replacement Depot, 476th Replacement Company, 90th Replacement Battalion, did, at Schwabach, Germany, on or about 17 July 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Nurnburg, Germany, on or about 9 June 1946.

Specification 2: (Relates to Welco only).

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

Specification: In that Private Clifford C. Welco, and Private Max E. Mulvaney, both of Detachment 90, 3rd Replacement Depot, 476th Replacement Company, 90th Replacement Battalion, acting jointly and in pursuance of a common intent, did, at Nurnburg, Germany, on or about 15 March 1946, unlawfully enter a store on the corner of Bullmanstrasse and Comeniustrasse, Nurnburg, Germany, with intent to commit a criminal offense, to wit, larceny therein.

Accused pleaded guilty to Charge III and its specification and not guilty to all other Charges and specifications. He was found guilty of all Charges and specifications. Evidence of three previous convictions by special court-martial — twice for AWOL and once for giving false information to superior officers — 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 Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence.

a. For the prosecution.

On the night of 16 July 1945, accused sawed the bars on a window in the stockade at Schwabach, Germany, and he and Private Welco escaped (R. 8). They went to Nurnberg, met two girls, and began living with them in their apartments (R. 8, 30-31). They saw each other from time to time up until 7 June 1946 (R. 8). Accused was apprehended on the night of 9 or 10 June 1946 while wearing civilian clothes (R. 22, 25) and when he made a gesture to reach for a pistol, he was shot by one of the German policemen assisting in his arrest (R. 24).

On the night of 14 March 1946, Private Welco went to accused's apartment. They went out together, entered a store by jimmying a window, (accused went in first), and departed with a crate of eggs and two sacks of groceries. On their way back to accused's apartment, they were stopped and questioned by Konrad Baier, a German policeman in uniform. They told him that they were American soldiers and that he had no right to "monkey" with them. The policeman tried to pull his gun but Welco beat him to the draw and stuck his gun in the policeman's

stomach and pushed the latter's holster towards the middle of his back. Welco put his gun away and he and the policeman then shook hands. The policeman started to walk away when Welco told him "it was best not to be crazy" and this angered the policeman who told accused and Welco to go with him. Instead, Welco picked up his crate and started off. Accused pulled out his pistol. Welco told him to take it easy and as he lifted the eggs to his shoulder, he heard accused holler, "Let him have it Charlie". Welco said "Jesus Christ, don't shoot" but accused was already shooting. Welco saw the policeman "double up" and fall backwards. When someone called from a building on the street, accused fired another shot and they both dropped their loot and ran from the scene (R. 8-9). The police officer died before reaching the hospital (R. 21, 27) and an examination of his gun showed that it was loaded, with the safety catch in locked position (R. 23).

A portion of the testimony that accused had given at the previous trial of Private Welco (CM 319367) was read into the record, over the objection of defense counsel. In this testimony, accused had admitted his escape from the stockade with Welco (R. 31), the breaking into Hollnack's store (R. 31), and the shooting of the German policeman (R. 31). Accused's version of the shooting was similar to Private Welco's testimony except that he claimed that he had distinctly seen the policeman reach for his pistol and "I heard his hand hit the holster when I fired on him. I fired in his direction" (R. 31).

b. For the defense.

After being advised of his rights in open court, accused testified under oath the same as he had testified at Private Welco's trial (R. 34-40).

In addition, accused made an unsworn statement reviewing the same facts.

Accused insisted in his several statements that he "was never angry with the German (policeman) *** (he) had no right to try and arrest us or take us in as he tried to do. He knew we were American beyond a doubt. Also he did not know we had German foodstuffs. *** In my estimation, there was no malice aforethought, or premeditation connected with this shooting" (R. 42). He also insisted that he had to shoot to save himself — "He was twenty paces or so away when I distinctly saw his right arm slip for his gun. I also distinctly heard his hand slap the holster." (R. 42).

4. a. The escape from the stockade, the absence of almost a year terminated by apprehension, and accused's activities during that interim (all admitted by accused) justified the court's finding of guilty of desertion.

b. The only evidence regarding the housebreaking charge was the testimony of the accomplice, Private Welco. Accused's plea of guilty to this charge obviated the necessity of proving this offense but it would have been better procedure for the trial judge advocate to have presented a prima facie case.

c. Accused's only defense to the murder charge was his testimony that he acted in self-defense. He appears to have been absolutely sincere, but equally incorrect, in his contention that the German policeman had no right to interfere with his American freedom. Accused's own testimony is the only evidence that the policeman made any effort to reach for his gun. Private Welco did not see him make any such move (R. 15). There was other evidence that the policeman's gun was on safety (R. 23) and that the policeman was shot in the back (R. 27).

d. "Murder is the unlawful killing of a human being with malice aforethought. *** Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life ***. It may mean *** an intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such an officer or other person so employed." (par. 148a, MCM).

The evidence conclusively shows that accused not only noticed that deceased was an officer of the law but also that he was interrogating accused and his accomplice concerning the stolen goods which they were transporting through the city street. Thus, the conclusion is inescapable that the intentional killing of the officer under such circumstances was without legal justification and constituted the crime of murder.

e. The identification of deceased was not thorough but the record contains substantial evidence from which the court could reasonably infer the deceased's identity (CM 12486, Herbert, 25 BR (ETO) 223).

f. The allied papers attached to the record of trial show that the officer who signed the charges was subsequently appointed as investigating officer. This is an undesirable procedure but it is not a

jurisdictional matter and did not injuriously affect the substantial rights of the accused. This is especially true in the instant case in that the report of investigation discloses a thorough inquiry was made in full accord with the provisions of Article of War 70. (CM 184069, Hughes; CM 200989, Osman, 5 BR 14, 33).

5. Accused is 31 years of age, married, and has two children. He graduated from High School and worked as a chauffeur. He was inducted on 19 November 1942, joined the 3rd Division at Anzio on 7 February 1944 and remained with them until 4 June 1944.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. A sentence to death or life imprisonment is mandatory for a violation of Article of War 92. While a United States Disciplinary Barracks was designated as the place of confinement by the appointing authority, confinement in a penitentiary is authorized by Article of War 42, murder being 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, United States Criminal Code.

C. H. Johnson Jr, Judge Advocate

Joseph J. Stern, Judge Advocate

Carlton E. Schenken, Judge Advocate

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

JAGN-CM 319475

UNITED STATES v. Private First Class JAMES E. ASKINS (7000297), Headquarters and Headquarters Troop, 10th Constabulary Regiment.	)))))))))	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Stuttgart, Germany, 23 October 1946. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, Judge Advocates

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review. The only question requiring consideration is whether the court by which accused was tried was legally constituted.

2. It appears from the 1st Indorsement on the Charge Sheet that on 1 October 1946, the case was "referred for trial to Captain Richard E. Eggleton Jr., Inf., Trial Judge Advocate of general court-martial appointed by paragraph 2, Special Orders No. 123, Headquarters U. S. Constabulary, APO 46, U. S. Army, 19 September 1946, as amended by Par 1, SO 127, Hq U. S. Constabulary, APO 46, U. S. Army, 24 Sep 46." Page one of the record of trial recites that the court in this case was convened at Stuttgart, Germany, pursuant to "the following order:", an official extract copy of paragraph 2, Special Orders No. 123, Headquarters United States Constabulary, APO 46, United States Army, dated 19 September 1946, being attached thereto. The amendment contained in paragraph 1, Special Orders No. 127, same headquarters, dated 24 September 1946, does not in any manner change the composition of the court as earlier named. Lieutenant Colonel Kenneth W. Collins was named, in such original order, as the senior member and the law member of such court.

Also attached to page one of the record of trial appears an official extract copy of paragraph 12, Special Orders No. 150, same headquarters, dated 22 October 1946, which reads as follows: "LT COL WALTH T MULVANITY 029674 Ord Hq 3d CON Brigade, is detailed as LAW MEMBER of the GCM aptd by par 11, SO 150, this Hq, cs, for the trial of T/Sgt Alfred A. Duplessis, 31222488, 72d Constabulary Squadron, and Pfc James E. Askins, 7000279, 10th Constabulary Regiment, only, vice LT COL KENNETH W COLLINS 022169 Inf Hq 10th Constabulary Regiment reld for the above mentioned cases only" (Emphasis supplied).

The trial began on 23 October 1946. Lieutenant Colonel Walth T. Mulvanity was present, sworn, and sat as a member and law member of the court (R. 2-4), although it appears from the record that he was not included in the detail for the court appointed by paragraph 2, Special Orders No. 123, referred to above. This being the case it is elemental that these proceedings were thereby invalidated (CM 238607 Mashburn, 24 BR 308, II Bull JAG 338).

3. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Edward L. Johnson, Judge Advocate.

Joseph L. Brack, Judge Advocate.

Francis H. Taylor, Judge Advocate.

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

JAGK - CM 319501

6 FEB 1947

UNITED STATES	FORT ORD, CALIFORNIA
v.	Trial by G.C.M., convened at Fort Ord, California, 23 December 1946. Dishonorable discharge and total forfeitures.
Technician Fourth Grade DONALD E. GILBERT (39551154), 162d Ordnance Maintenance Company, Second Engineer Special Brigade, Fort Ord, California.	

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 has been examined by the Board of Review.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that T/4 Donald E. Gilbert, 162d Ordnance Maintenance Company, 2nd Engineer Special Brigade, Fort Ord, California, did, in building #T 1769, Fort Ord, California, on or about 3 and 4 December 1946, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per anum with T/5 Augustus Z. High, 44019331, 162d Ordnance Maintenance Company, Fort Ord, California.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. First Lieutenant Charles A. Hall, Medical Corps, the Chief of the Psychiatric Service, Regional Hospital, Fort Ord, California, testified that he examined the accused at the request of the Provost Marshal. He questioned the accused concerning his past life and the accused freely admitted the acts charged in this specification. The accused also stated to Lieutenant Hall the details concerning the offenses charged in such a manner as to constitute a complete confession of this crime. Lieutenant Hall did not warn the accused of his rights under the 24th Article of War. From this examination Lieutenant Hall concluded that the accused has had overt homosexual experiences but is not strongly homosexual. His behavior is probably firmly ingrained in his character and will not change. He probably would not benefit from treatment (R. 6-8, Pros. Ex. A).

Major Thomas D. Montgomery identified a pre-trial statement made by the accused to him. This statement was received in evidence as Prosecution Exhibit B. The statement is a complete confession to the crime charged (R. 10,11; Pros. Ex. B).

The accused elected to remain silent.

4. An accused cannot legally be convicted upon his unsupported confession. There must be, in the record, other direct or circumstantial evidence that the offense charged has probably been committed (MCM, 1928, par. 114a). The general rule which has been stated and applied by the Board of Review in numerous cases is that while the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of the evidence or at all, nevertheless some evidence must be produced to corroborate the confession and such evidence must touch upon the corpus delicti (CM 239085, Jones, 25 BR 41,43; CM 202213, Mallon, 6 BR 1,2; CM 220604, Antrobus, 13 BR 11,13; CM 237225, Chesson, 23 BR 317,319).

In this case, the evidence consists solely of the confession of the accused as made to Major Montgomery and the testimony of Lieutenant Hall detailing the statements made by the accused to him during a psychiatric examination. There is no other evidence touching upon the corpus delicti. It is manifest that in this case the accused was convicted upon his unsupported confessions. The statements made to the psychiatrist were made without warning to the accused as to his rights against self-incrimination. We deem it unnecessary to determine whether or not these statements were voluntary, for without some evidence touching upon the corpus delicti any number of confessions introduced by the prosecution would not supply such missing evidence.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Clinton D. Gilbreath, Judge Advocate

(Sick in Quarters), Judge Advocate

Gilbert E. Schwartz, Judge Advocate

FEB 21 1947

JAGK - CM 319501 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Fort Ord, California

1. In the case of Technician Fourth Grade Donald E. Gilbert (39551154), 162d Ordnance Maintenance Company, Second Engineer Special Brigade, Fort Ord, California, 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 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 319501).

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.

JAGK - CM 319511

21 APR 1947

UNITED STATES	)	XII TACTICAL AIR COMMAND
v.	)	Trial by G.C.M., convened at Bad Kissingen, Germany, 5 December 1946. Dismissal.
First Lieutenant JEROME M. KERSTING (O-697037), 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 charges and specifications:

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Jerome M. Kersting, 14th Liaison Squadron, did, while enroute between Nordholz, Germany and Bamberg, Germany, on or about 3 August 1946, knowingly and willfully misappropriate to his own use and benefit about 15 gallons of gasoline, value of about $2.00, property of the United States.

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

Specification 1: In that First Lieutenant Jerome M. Kersting, ***, did at Stuttgart, Germany, on or about 29 September 1945, wrongfully and unlawfully and with intent to deceive, cause a privately owned Opel 5 passenger Sedan Automobile, which was in his possession and under his control, to be painted olive drab color, to be marked with a white star, the words "military police", and numbers having the appearance of government vehicle registration numbers.

Specification 2: In that First Lieutenant Jerome M. Kersting, ***, did in various parts of the American Occupied Zone of Germany from about 1 October 1945 to 1 August 1946 wrongfully and unlawfully and with intent to deceive own and operate an Opel 5 passenger Sedan Automobile, which was painted olive drab color, marked with a white star, the words "military police", and numbers having the appearance of government vehicle registra-

tion numbers.

Specification 3: In that First Lieutenant Jerome M. Kersting, ***, did at Nordholz, Germany, from about 1 May 1946 to about 1 August 1946, wrongfully and unlawfully own and operate an Opel 5 passenger Sedan Automobile, without license plates and without having properly registered said vehicle.

Specification 4: In that First Lieutenant Jerome M. Kersting, ***, did at Nordholz Army Air Base, on or about 30 July 1946, wrongfully and unlawfully and with intent to deceive display a government maintenance card on the windshield of his privately owned Opel 5 passenger Sedan Automobile.

Specification 5: In that First Lieutenant Jerome M. Kersting, ***, did at Bamberg, Germany, on or about 10 September 1946, wrongfully introduce into his quarters Asta Staderman, a civilian female.

He pleaded not guilty to all charges and specifications. He was found guilty of both charges and all specifications thereto excepting Specification 1 of Charge I, of which he was found not guilty. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On motion of the prosecution the court took judicial notice of pertinent directives issued to military personnel in the European Theater which are as follows:

Letter AG 62, GAP AGO, dated 5 June 1946, Headquarters US Air Forces in Europe, Subject: "Billets, Quarters and Transient Accommodations."

"1. The following instructions will govern assignment and use of billets, quarters, hotels and transient accommodations.

a. In hotels and transient accommodations operated by or for the army in which sleeping accommodations are provided for personnel of but one sex, members of the opposite sex will not be allowed above the first or ground floor.

b. In those hotels or transient accommodations where members of both sexes are authorized accommodations, every effort will be made to segregate the sleeping facilities used for each sex by floor. Care must be taken that transient married couples are provided suitable accommodations together without risk of embarrassment or inconvenience.

c. In barracks and barrack-type billets, guests of the opposite sex will be permitted only in rooms specifically designated for entertaining guests.

d. Billets assigned to officers, enlisted men or civilian employees will be classified as bachelor quarters and the rule set forth in paragraph 1c above will apply.

"2. The above is not to be construed as prohibiting mixed dinners, or other social affairs in billets or quarters assigned to either sex, provided the generally accepted rules of good conduct are enforced, nor to restrict in any way the use of quarters assigned to married personnel and their dependents for entertaining or housing their guests." (R. 55)

Paragraph 1, subparagraph 2c, Circular No. 101, Headquarters United States Forces, European Theater, entitled "Vehicle Maintenance Certificate" as follows:

"2c. The Certificates of Maintenance will be issued only to vehicles bearing US registration numbers, and any such vehicle which does not display a certificate will not be furnished gasoline. In addition, it is the responsibility of military police, commissioned officers and enlisted personnel (as designated by higher authority) to stop any such vehicle not equipped with a Certificate of Maintenance and take appropriate action as indicated." (R. 55-56)

Changes No. 1, United States Forces, European Theater, Standard Operating Procedure No. 65, "Motor Vehicle Operation", subparagraph 2f:

"Vehicles that are not US government owned or utilized will bear no markings that in any way resemble US markings or that tend to identify them as US government vehicles. The national symbol will not be shown and such markings as USA or US Army, etc. will be completely obliterated immediately."

Letter AG 451 GAP-AGO, United States Forces European Theater, dated 27 April 1946, entitled "Vehicle and Traffic Code", subparagraph 3b:

"Every owner of a motor vehicle which shall be operated or driven upon the public highways shall, except as otherwise expressly provided, cause to be presented, by mail or otherwise, to the office or branch office of the registrar, or to any agent of the registrar, constituted as provided in this code, an application for registration addressed to the registrar, and on a blank to be prepared under the direction of and furnished by the registrar for that purpose, containing: (1) A brief description of the motor

vehicle to be registered, including the name and factory number of such vehicle, the character of the motive power and such other facts as the registrar shall require; (2) the name, residence and business address of the owner of such motor vehicle."

Subparagraph 3f:

"Certificate of Title: No person shall operate a motor vehicle, a motor cycle or a trailer in the US Occupied Territory of Germany unless a certificate of title thereto has been obtained.

"When a motor vehicle is sold certificate of title shall be assigned to purchaser at time of delivery.

"No person shall alter or forge any certificate of title or assignment thereof or possess or use any such certificate or assignment. Such alteration, forgery, possession or use shall be punished by a fine not exceeding $500 or by imprisonment not exceeding 2 years, or both." (R. 57)

Paragraph 5, subparagraphs a and b:

"a. No motor vehicle, motor cycle or trailer may be operated unless the same has been registered and valid registration plates for the current year are displayed.

"b. Registration card identifying the vehicle must be signed by the owner and be in possession of the operator of the vehicle. If the registration card is lost or becomes illegible, within 48 hours thereafter the owner shall apply for a duplicate registration card. Pending issuance of the duplicate registration card, the owner shall be permitted to operate the motor vehicle for a period not in excess of 20 days." (R. 57)

The court also took judicial notice of Circular No. 64, United States Forces European Theater, dated 14 May 1946, entitled "Control and Issue of Certificates of License and License Plates for US Army Vehicles in the European Theater" and particularly paragraph 13 thereof subtitled "Non-Military and Civilian Vehicles" as follows:

"None of the foregoing will apply to non-military and civilian motor vehicles. These vehicles will be licensed in accordance with letter, AG 451 GAP AGO, this headquarters, 'Vehicle and Traffic Code', 27 Apr 1946." (R. 57)

On approximately 1 June 1946 the accused was assigned duties of provost marshal of 324th Fighter Group Base, Nordholz, Germany. Master Sergeant Lester D. Totten was motor sergeant at the base and supervised the operation of the motor pool. Sometime in July Sergeant Totten had received at the pool an Opel (German) sedan No. 1836468). The vehicle was in "bad shape" and was deadlined. On various subsequent occasions Sergeant Totten

noticed accused driving an Opel sedan around the Base. The motor pool had jeeps only and did not dispatch the Opel sedan to accused. No person named James W. Phillips had been a dispatcher at the pool. Sergeant Totten identified a picture of the Opel sedan alleged to have been driven by accused and stated that it was painted olive drab "like all our sedans and it had a white star and 'military police' painted on it." The Opel had been in the motor pool on several occasions and the sergeant asked Captain Wright about the matter but never pursued it further (R. 12-14). Sergeant Totten did not know for sure that the Opel was a captured car but "it was an Opel though. It must have been" (R. 15).

Sergeant John Edward Hagan was a military policeman working under accused at Nordholz. He identified a picture of an Opel sedan painted like a U.S. Army vehicle and with "Military Police" written thereon as being the vehicle driven by accused in the latter part of June and in which he rode with accused to Kassel. The accused stated that he owned the car. Sergeant Hagan had been in the European Theater only a short time and was interested in finding out how to procure a captured German sedan. He questioned accused about the car and accused showed him a bill of sale, maintenance sticker and trip ticket stating that the trip ticket was "phoney" (R. 17-22). On a later date Sergeant Hagan helped accused move some furniture in the Opel from the Provost Marshal's building to the officers' quarters. Over objection of the defense the picture of the Opel sedan identified by Sergeants Totten and Hagan was introduced into evidence as Prosecution Exhibit 1 (R. 18).

On some date in "August" 1946, Private First Class Octavius Lufrano and Corporal Patterson "moved accused's stuff" from Nordholz to Bamberg, Germany. They used a 2-1/2 ton 6x6 Government vehicle and accused accompanied them in an Opel sedan with Army markings which he was driving and in which there was a woman. On the trip the sedan ran out of gasoline on two occasions and the enlisted men took a total of three cans from the truck, which cans the accused emptied into the tank of the sedan (R. 23-25). Private First Class Lufrano identified in the court room a woman known as Asta Staderman, whom he said was the same person who rode in the sedan with accused to Bamberg (R. 26 (a)).

Asta Staderman, German national, testified that she knew the accused and worked for him at Nordholz. She accompanied him in an Opel sedan with Military Police markings to Bamberg sometime in August. On the way the soldiers took gasoline from the truck and poured it into the sedan. She did not know which soldier did this. The furniture which they took to Bamberg - "I have took it along into the house." Officers lived in the house but she "still had another home in town." She had a room on the first floor of the house where the accused stayed but when an officer on the second floor moved away she moved upstairs opposite accused's room. The witness kept some of her clothes in accused's room due to lack of space in her room. Miss Staderman stated further that she was employed by the German labor office as a maid and interpreter in the house where accused was quartered but she had not received any pay (R. 28-34). On cross-examination the witness produced a labor card

purporting to have been issued by the German labor office at Bamberg and which authorized her to stay at 14 Liaison Squadron, Bamberg, Spinnseyer Street, Bamberg, and work as interpreter. It provided that the "permit to stay is valid only for the above mentioned unit." On motion of the defense the alleged labor card was introduced in evidence as Defense Exhibit 1, read by the interpreter and was apparently withdrawn at the close of the trial (R. 35). Upon further examination the witness stated that she moved to Bamberg because she had sinus trouble, that she slept in accused's bed part of the time inasmuch as the radio was in his room and he was away (R. 36-37). Captain Ray G. Parker, Adjutant of the 14th Liaison Squadron, Bamberg, Germany, testified that he conferred with the accused on 24 August 1946 and asked him if he had a German girl in his billets, to which accused replied, "Yes" but that she was a maid. Captain Parker then told accused the maids had to be hired "thru the office." By "office" he meant the U.S. Constabulary office operated by Americans hiring German people. The witness did not know whether the German girl was so employed, but the 14th Liaison Squadron had no record of such employment (R. 39-40).

Lieutenant Colonel Bruce Downs, Commanding Officer of the 14th Liaison Squadron, testified that he called a meeting of all the officers of the squadron and brought to their attention the policies of "USAFE" and "USFET" regarding consorting with civilians after prescribed hours. On 8 and 10 September, he visited the billets of the accused and saw Asta Staderman. She was on the ground floor which is set aside for entertainment and considering the prescribed hours he was of the opinion that she was authorized to be at the house. The witness did not know whether the girl was legally employed but stated that to his knowledge she was not (R. 41-42).

Pursuant to letter orders issued to him by the XII Tactical Air Command, Major Edwin R. Bane, AC, on or about 10 September 1946 proceeded from Bad Kissingen to Bamberg, Germany, for the purpose as stated in his orders "of conducting a visit of observation" (R. 43). Major Bane interviewed the accused at length after advising him of his rights under Article of War 24. The accused stated that he had owned and operated an Opel sedan while he was at Nordholz, that he purchased the car from a Belgian corporal who in turn had acquired it from a German. The car was purchased at Stuttgart and "we painted it there." The white star and Military Police markings were placed on the car "so he could hang on to it" and conceal it so as to be able to get Government gasoline. The accused admitted that he did not have orders to travel from Nordholz to Bamberg by privately owned conveyance. The defense stipulated that the 15 gallons of gasoline was taken from the Government truck and placed in the car and that it had a value of less than $20.00. When asked if he had a trip ticket, accused stated that "I filled out some." He did not have a proper license for the car andhe placed the stickers on it "for concealment. As you and I both know that the papers aren't right and it would be picked up" (R. 46,48). In response to a question concerning the legality of his actions accused stated that he did not consider the transaction illegal. "I wanted to keep the car until such time as I could get a license for it,

get a civilian license for it and to keep it from being picked up" (R. 49). It was stipulated that the vehicle purchased by accused at Stuttgart was the same vehicle that was on 10 September 1946 impounded by the 14th Liaison Squadron, Bamberg, Germany (R. 47). Major Bane inspected this vehicle at the motor pool. He found a trip ticket in the sedan made out to accused, dated 3 August 1946, and showing the vehicle number USA 1836468. This trip ticket was introduced as Prosecution Exhibit 2. Another trip ticket found in the car dated 3 June 1946 showed the vehicle number as USA 219616 and that it was dispatched to Lieutenant Kersting by "Pvt Phillips." This ticket was received in evidence as Prosecution Exhibit 3 (R. 50). Another trip ticket found in the car being dated 4 June 1946 showed the driver's name as Lieutenant Kersting, the dispatcher as Private J. W. Phillips, and carried the car number as USA 519616. This trip ticket was received in evidence as Prosecution Exhibit 4 (R. 51). Prosecution Exhibits 5 and 6 were Unit Commander's certificates of Maintenance which Major Bane "scraped" off the car. Exhibit 5 carried the USA registration number of the vehicle as 219615 and Exhibit 6 carried the number 1836468 (R. 51). Prosecution Exhibit 7 was a certificate issued by German authorities at Stuttgart, Germany, on 9 March 1945 purporting to register the "Wagen Opel Super 6 Motor No. 3813521, Chassis No. 104 A 5997 in the name of Corporal Robbens Alfons, Belgian M.P." and transferring title thereto to the accused under date of 27 September 1945. The accused told Major Bane that this was his certificate of title to the car (R. 51).

Major Bane questioned accused concerning the alleged dispatcher, Private J. W. Phillips. He stated that on 3 and 6 June he was at Nordholz but denied signing the name Phillips on the trip tickets. Accused could not explain the circumstance of the name being on the tickets as a dispatcher (R. 52).

4. At the close of the case for the prosecution the defense moved for a finding of not guilty and upon the motion being overruled offered no evidence. The accused elected to remain silent (R. 60).

5. Comment

Specification 2, Charge I, alleged that accused did "willfully misappropriate to his own use and benefit about 15 gallons of gasoline, value of about $2.00, property of the United States." The evidence shows that the three 5-gallon cans of gasoline were taken from a Government truck, poured by accused into the tank of a German make car which he claimed as his property. He was travelling on orders but he had no authority to travel by private conveyance. This constituted a misappropriation of Government property, irrespective of who benefited thereby, or whether accused had custody or control over the gasoline. The purpose to which accused devoted the gasoline was unauthorized. The gasoline was intended to be used in the Government vehicle (par. 150h, p. 184, MCM 1928; CM 243287, Poole, 27 BR 321, 326; CM 288901, Delano, 1 BR (POA) 263,268).

Specification 1, Charge I, alleged in effect that accused, with intent to deceive, caused the Opel to be painted with U.S. military markings and Specification 2 alleged that he owned and operated such vehicle. We construe both of these specifications as being carved out of the prohibition contained in Changes No. 1, USFET, Standard Operating Procedure No. 65, prohibiting vehicles not Government owned or utilized from bearing markings resembling "U.S. markings or that tend to identify them as U.S. Government vehicles." The accused admitted that he and the Belgian painted the vehicle with U.S. markings to effect concealment, and it was proven that he operated the sedan with such markings. We think the circular intended to denounce "owning" and the "utilizing" of such improperly marked vehicles and that no unreasonable multiplication of offenses resulted thereby. Specification 3 alleges that accused wrongfully and unlawfully owned and operated the sedan without license plates and without having registered said vehicle. Although the evidence shows that there had been a registration of the vehicle by German authorities prior to 27 April 1946, it was incumbent upon accused to register the sedan, if he had a bona-fide title thereto, under subparagraph 3b, Letter AG 451 GAP AGO USFET dated 27 April 1946. It is clear therefore that accused owned and operated the sedan "without license plates and without having properly registered said vehicle."

Specification 4 alleges that, with intent to deceive, accused displayed a Government maintenance card on the windshield of his privately owned Opel. Major Bane testified that he scraped two of such cards off of the windshield of the car. The "USA Registration" numbers thereon varied. Inasmuch as the vehicle is shown to be not Government owned the displaying of Unit Commander's certificates thereon was wrongful as tending to deceive and was done, as accused admitted, in order to procure Government gasoline.

We recognize the fact that the accused apparently used the vehicle on occasions in the performance of his duties but this did not condone any of the alleged acts of deception (CM 288901, Delano, supra).

Although all the combined acts herein relating to the Opel sedan effected a deception concerning its true identity, each act alleged appears to be a separate offense. However, should it be considered that there is an overlapping, no prejudice to accused's substantial rights would be affected since conviction upon either specification would warrant imposition of the sentence (CM 307786, Gunning, 52 BR (ETO) 85).

Lastly, Specification 5 alleged that accused on or about 10 September 1946 wrongfully introduced Asta Staderman, a civilian female, into his quarters. We deem it unnecessary to dwell at length on the evidence adduced to establish a conviction under this specification. Miss Staderman stated that she went with accused to Bamberg and stayed at his quarters, keeping some of her clothes in his room and occupying the room when he was away. She moved from the first floor to a room on the second floor opposite

accused when that room was vacated by another officer. Paragraph 1e of letter AG 62, GAP AGO Headquarters United States Air Forces in Europe, heretofore quoted provided that in billets, guests of the opposite sex would be permitted only in rooms specifically designated for entertaining guests. Although a reluctant witness, by her own testimony she was allowed too much freedom of accused's quarters.

6. War Department records show that accused is 25 years of age and married. He has a high school education and worked for a construction company as a carpenter before enlisting in the Army on 22 July 1942. After receiving basic training in the Infantry he was on 8 November 1942 transferred to the Air Corps and given preflight training. Accused was commissioned second lieutenant, AUS, on 3 November 1943 and promoted to first lieutenant 16 August 1945. He is qualified as a single engine and glider pilot. On 10 November 1944 accused arrived in the European Theater of Operations as a member of a Troop Carrier Squadron. He is accredited with participation in the Rhineland and Central European campaigns and was awarded the Air Medal on 27 May 1945. One available efficiency report shows a numerical rating of 3.5, or barely excellent. He is considered a conscientious officer who takes a definite interest in his work but lacks tact and diplomacy.

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 thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 or 96.

Chester E. Silva, Judge Advocate

(Sick in Quarters), Judge Advocate

Gilbert E. Schwab, Judge Advocate

JAGK - CM 319511 1st Ind

WD, JAGO, Washington 25, D.C. MAY

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 Jerome M. Kersting (0-697037), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of misappropriating 15 gallons of Government gasoline in violation of Article of War 94, of wrongfully introducing a female civilian into his quarters and of four specifications respectively involving the painting of a privately owned automobile with military markings, owning and operating said vehicle, operating the same without proper license plates, and bearing a fictitious military maintenance card on the windshield, all with intent to deceive 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. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

On or about 3 August 1946, near Bamberg, Germany, the accused caused 15 gallons of Government gasoline to be taken from a military truck and poured into the gas tank of an Opel sedan he had purchased from a Belgian soldier. He had previously painted the sedan with U.S. military markings and with the words "Military Police" thereon. He operated the Opel sedan with improper license plates and with fictitious military maintenance stickers on the windshield. Fictitious trip tickets were found in the car. These acts were in violation of pertinent military directives and were done to conceal the fact that the Opel sedan was probably a captured vehicle. Accused's duties involved that of Provost Marshal at Nordholz and later Bamberg, Germany. When he was transferred to Bamberg he took with him in the Opel sedan a German girl who lived at his quarters and kept part of her clothes in his room. There is evidence in the record that accused was using the vehicle, partially at least, in the performance of his duties.

I recommend that the sentence be confirmed but in view of all the circumstances of the case, and of evidence in the record indicating a lax condition of discipline in accused's unit, recommend that the execution of the sentence be suspended during good behavior.

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

(G.C.M.O. 187, 27 May 1947).

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JUN 11 1947

JAGQ - CM 319514

UNITED STATES	)	FIFTH ARMY
	)	
v.	)	Trial by G.C.M., convened at Percy Jones General Hospital, Fort Custer, Michigan, 6, 7 November 1946. Dismissal, total forfeitures and confinement for two (2) years.
	)	
Major HARRY E. ROBBINS (0-490413), Medical Administrative Corps.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, Judge Advocates

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

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

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

Specification 1: In that Major Harry E. Robbins, Medical Administrative Corps, 9951 Technical Service Unit, Surgeon General's Office, Percy Jones General Hospital, for the purpose of obtaining the approval, allowance and payment of a claim against the United States in favor of Enid Bunn, a civilian employee, in the amount of $86.82, did at Battle Creek, Michigan on or about 29 June 1946 make a certain writing, to wit: Time and Attendance Report, Standard Form 72-A, U. S. Civil Service Commission, which said writing as he, the said Major Robbins, then knew contained an entry that the said Enid Bunn had rendered service to the United States for a total of 80 hours during the period 17 June to 29 June 1946, inclusive, which entry was false and fraudulent in that the said Enid Bunn had rendered no service to the United States during the said period, and was then known by the said Major Robbins to be false and fraudulent.

Specification 2: (same allegations as in Specification 1, except the amount of the claim is $97.68, the date of the offense is 13 July 1946 and the period involved is 30 June to 13 July 1946.)

Specification 3: (same allegations as in Specification 1, except the amount of the claim is $97.68, the date of the offense is 27 July 1946 and the period involved is 14 July to 27 July 1946.)

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

Specification 1: In that Major Harry E. Robbins, Medical Administrative Corps, 9951 Technical Service Unit, Surgeon General's Office, Percy Jones General Hospital, did, at Percy Jones General Hospital, Battle Creek, Michigan on or about 29 July 1946 with intent to deceive the Commanding General, Percy Jones General Hospital, officially state in an application for leave that the reason for said leave was "to take daughter home from hospital" which statement was known by the said Major Harry E. Robbins to be untrue in that the daughter of Major Harry E. Robbins was not in a hospital.

Specification 2: In that Major Harry E. Robbins, Medical Administrative Corps, 9951 Technical Service Unit, Surgeon General's Office, Percy Jones General Hospital, did, on or about 1 May 1946 at Fort Thomas, Kentucky, wrongfully and unlawfully enter into bigamous marriage contract with Enid M. Bunn, the said Major Harry E. Robbins then being lawfully married to Ruth M. Robbins, who was then living.

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

Specification: In that Major Harry E. Robbins, Medical Administrative Corps, 9951 Technical Service Unit, Surgeon General's Office, Percy Jones General Hospital, did, on or about 1 May 1946 at Fort Thomas, Kentucky, wrongfully and unlawfully enter into a bigamous marriage contract with Enid M. Bunn, the said Major Harry E. Robbins then being lawfully married to Ruth M. Robbins, who was then living.

Upon arraignment the accused "stood mute" and the court entered a plea of not guilty on his behalf to all Charges and Specifications. He was found guilty of Specifications 1, 2 and 3 of Charge I, not guilty of Charge I but guilty of a violation of the 96th Article of War and guilty of all other 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 five years. The reviewing authority approved the sentence, but reduced the period of confinement to two years, and forwarded the record of trial for action under Article of War 48.

3. Charge I, Specifications 1, 2, 3.

During the period 1 June 1946 to 27 July 1946 and for sometime prior thereto accused was Chief of the Reconditioning Service at Percy Jones General Hospital, Battle Creek, Michigan. He was charged with the duty of supervising and administering the reconditioning program, both at the main hospital and the hospital annex located at nearby Fort Custer, Michigan (R. 204, 269; Ex. 1). In that capacity he had under his control several hundred civilian employees, one of whom was Mrs. Enid Mae Bunn, a divorcee, who married accused on 1 May 1946. (The evidence relating to this marriage is hereinafter discussed). Mrs. Bunn was employed at the hospital from about 15 March 1945 to about 1 August 1946 as a teacher in the educational department which was under accused's jurisdiction as Chief of the Reconditioning Service (R. 57).

Standing Operating Procedure at the hospital required that all civilian employees record their last name and the time of arrival and departure each working day and for this purpose daily "sign-in and-out" sheets were provided (R. 91, 201). Separate sheets for each working day during the three pay periods from 17 June to 27 July 1946 were received in evidence (R. 216; Pros. Exs. 23, 24, 25).

Mrs. Eula Gregory, who was the accused's time clerk during the period herein involved, testified that in the performance of her duties she used the "sign-in and-out" sheets in the preparation of the Time and Attendance Reports (Standard Form 72, U.S. Civil Service Commission) (R. 201). For purposes of brevity we hereafter refer to the former as "time sheets" and to the latter as "attendance reports." The pay rolls were prepared from the attendance reports (R. 166). Three attendance reports, each covering a two-week period, the first commencing on 16 June 1946 were identified by Miss Gregory as having been prepared by her from the time sheets, and were received in evidence without objection (R. 177, 201; Pros. Exs. 11, 12, 13). These attendance reports show Enid Bunn credited with full time attendance at work from 16 June 1946 to 27 July 1946 with the exception of one day, 5 July 1946, which according to the report was a day of absence and charged to annual leave. The signature "Bunn" appears on each of the time sheets except two, those for 26 June and 1 July. Each entry shows arrival at 8:00 A.M. and departure at 5 P.M. In nine instances, 27 June, 3, 9, 10, 11, 17, 22, 25 and 26 July the signature Bunn appears as the final entry on

those sheets, each containing approximately thirty signatures. Several employees who signed these sheets were unable to state who had written the name Bunn appearing thereon and Mrs. Bunn, called as a witness by the prosecution refused to answer questions pertaining thereto on the ground that such answers might tend to incriminate her (R. 138-141). Other prosecution witnesses, however, testified that while on some occasions as a matter of courtesy employees signed in their co-workers, who were actually present (R. 92, 98, 206), they did not see Mrs. Bunn present at her usual place of employment during the period in question. Mary Moore, Mrs. Bunn's sister, an employee at the hospital, testified that she did not see her sister at the main office of the hospital (R. 129), and other witnesses who were in a position to have seen her had she been present, testified that she was not there from 15 June 1946 to the end of July 1946 (R. 207, 211, 252, 258, 279).

About 15 June 1946 accused told his time clerk, Mrs. Gregory, that Enid Bunn would henceforth work at the Hospital Annex and directed her to carry Mrs. Bunn present on the time sheets of the main hospital (R. 203). Mrs. Bunn testified that accused told her to report for work at the Annex about this time (R. 158). The first week in August 1946, Mrs. Gregory brought these time sheets (Ex. 21, 22, 23) to accused, reminded him that he had said Mrs. Bunn was working at the Annex and that she had therefore credited Mrs. Bunn with full time on the attendance reports, although her name had not been signed on the time sheets. Accused asked for the time sheets and she left them with him. When she received them back, "probably the same day", she filed them without further examination (R. 212, 260). Mr. William Morphew, a clerk, testified that on one occasion between 15 June 1946 and 27 July 1946 he saw accused sign Enid Bunn's name on one of the time sheets (R. 278, 283).

Captain Marjorie Wright, who was accused's assistant and in charge of the employees working at the Hospital Annex testified that Mrs. Bunn did not work at the Annex during the period of 1 June 1946 through July 1946. According to Captain Wright, Mrs. Bunn could not have been present without her knowledge (R. 219).

The attendance reports for the Hospital Annex during the period from 15 June 1946 to 27 July 1946 were received in evidence without objection. These reports were not signed by accused and Enid Bunn's name did not appear thereon (R. 182, 188, 189; Pros. Ex. 16-21, incl.).

The attendance reports for the main hospital received in evidence without objection as Prosecution Exhibits 11, 12, 13, credited

Enid Bunn with 80 hours of service for each of the three periods, 16 June to 29 June, 30 June to 13 July, and 14 July to 27 July 1946. At the bottom of each form appears the following printed certificate:

> "I certify that attendances and absences noted above are correct and that all overtime and leave were approved in accordance with existing laws and regulations."

and on the line for signature under which there is the printed word "Supervisor" there appears the signature, "Harry E. Robbins." It was accused's responsibility to have these attendance reports prepared under his supervision and to certify their correctness (R. 166, 167). Civilian Personnel Memorandum Number 5, Percy Jones Hospital Center, dated 29 April 1946, required the accused to "maintain or delegate to an authorized subordinate the keeping of an accurate daily record on Standard Form 72 or 72a of the time and attendance of each employee supervised." It further required him to "Total, check and certify the time and attendance report at the end of the reporting period" (R. 188, 193; Pros. Ex. 22). Although none of the witnesses testified that they saw accused sign the attendance reports, two witnesses familiar with accused's handwriting, identified his signature appearing on allotment forms and these documents were received in evidence for comparison of accused's known signature appearing thereon with the signatures purporting to be his and appearing on the attendance reports (R. 22, 27, 264, 265; Pros. Exs. 5, 6, 36). Each of the attendance reports was received in the Civilian Personnel Division of the Hospital and certified pay rolls were prepared from each. These pay rolls were then sent to the Finance Officer, United States Army, Fort Custer, Michigan, where checks in accordance therewith were issued and delivered to the Civil Personnel Division (R. 168). Among these checks was one dated 5 July 1946, No. 256949, in the amount of $86.82 (Pros. Ex. 31), another dated 19 July 1946, No. 261083, in the amount of $97.68 (Pros. Ex. 32), and a third dated 2 August 1946, No. 270853, in the amount of $97.68 (Pros. Ex. 33), all payable to the order of Enid Bunn. The three checks were either given to Mrs. Bunn in person or handed to accused for delivery to her. The third check, No. 270853, was returned by accused to the civilian personnel division "inasmuch as this case was pending" (R. 169, 170, 238, 239).

Charge II, Specifications 1, 2; Charge III, Specification.

Ruth Leonard married the accused on 19 June 1938 in Miami County, Indiana (R. 16, 24; Pros. Ex. 2). Of this union, one child, Susan, was born and was living on 1 August 1946 (R. 34). At the time of the trial

Mrs. Ruth Robbins was still married to accused, although divorce proceedings were initiated by her after 23 August 1946 (R. 17, 21). A separation agreement was entered into between her and accused at Battle Creek, Michigan, on 23 July 1946 (R. 22). Accused had maintained a home for her in Sebring, Florida, and in April 1946 she and accused appeared at the office of Judge Livingston, an attorney of that city, in connection with the purchase of a lot in joint tenancy (R. 43-45). On 23 July 1946, Mrs. Robbins and accused were having marital difficulties and Mrs. Robbins met with accused at Battle Creek, Michigan, for the purpose of discussing divorce arrangements. Mr. O. M. Leonard, a brother of Mrs. Robbins, was present during the conversation and testified that on that occasion there was talk of obtaining a divorce at which time accused and his wife entered into a property settlement agreement (R. 49-51; Pros. Ex. 39). Meanwhile, on 1 May 1946, prior to this discussion, accused had married Mrs. Enid Mae Bunn at Fort Thomas, Kentucky (R. 57-59; Pros. Ex. 4) and they lived together as man and wife thereafter until her discovery early in August of accused's existing marriage (R. 75, 76, 114, 148, 289).

On about 29 July 1946 accused filed his application for four days leave with the assistant executive officer of Percy Jones General Hospital stating that he desired to take his daughter home from the hospital in Fort Wayne, Indiana (R. 265, 266; Pros. Ex. 36). The accused had previously obtained fifteen days leave about 22 April 1946 on the representation that his child was a victim of poliomyelitis and was in a Florida hospital. The executive officer referred accused to the commanding officer and the request for leave was approved (R. 266).

Accused's daughter, Susan, who lived with Mrs. Robbins in Sebring, Florida, was ill with a cold in July or August 1946, but at no time did she suffer from poliomyelitis nor was she hospitalized in Fort Wayne, Indiana, on or about 1 August 1946 (R. 34). The accused did not see Susan at any time between 15 July 1946 and 15 August 1946. Mrs. Robbins denied that she informed accused that their daughter was ill between 15 June 1946 and 15 August 1946 or that she had sent accused a telegram about 1 July 1946 concerning the illness of Susan. She further denied any conversations with accused about a contemplated visit to a hospital with Susan for a physical check-up (R. 35-37).

The accused and Enid Bunn traveled to Kirksville, Missouri, the latter part of July 1946. They stopped at Fort Wayne, Indiana, en route but did not remain there long. Upon their return from this trip, the early part of August, accused told Mrs. Bunn of his existing marriage (R. 144, 146, 148).

4. On behalf of accused evidence was introduced to show that he obtained ten days emergency leave on 2 July 1946 pursuant to a telegram received by him on 1 July 1946, purporting to have been sent by Mrs. Ruth Robbins from Sebring, Florida, requesting his presence because of the illness of their daughter Susan (R. 299, 306; Def. Exs. A, B).

Accused's brother, John Robbins, of Sebring, Florida, testified that as early as January 1946, Ruth Robbins expressed her intention of divorcing accused and showed him a letter which she was mailing to accused. Thereafter in March accused showed him this same letter which he had received from her, wherein she stated, "We might as well go ahead with the divorce" (R. 322-325). Accused was in Sebring in April 1946 and stayed at John Robbins' home, but during this visit lived apart from his wife. John Robbins drove accused and Ruth Robbins to the office of Attorney Livingston. Accused returned to Sebring on 4 July 1946 and remained about a week at his brother's home. Again during this period accused lived apart from Ruth (R. 326-328). About 23 July 1946 John Robbins received a communication from accused requesting him to obtain some papers from Judge Livingston. The papers were an abstract to a lot and John Robbins at no time saw any divorce papers (R. 329, 331).

After his rights as a witness were fully explained accused elected to be sworn as a witness, limiting his testimony to the offenses alleged under Charges II and III, and testified that after receiving the telegram (Def. Ex. B) he called his wife who informed him that the child was suspected of having infantile paralysis. He thereupon obtained emergency leave and went to Sebring, where he found that Susan was ill with a fever. Inasmuch as her illness was not diagnosed as infantile paralysis, it was agreed at the time that the child would be submitted for a tuberculin test, and, according to accused, about a week later he saw his wife and daughter in Macy, Indiana, where it was agreed the tuberculin tests would be made in Fort Wayne. By subsequent telephone arrangements he was to meet his wife at the Biron Hospital, Fort Wayne, Indiana on 1 August 1946 where the test was to be given (R. 344, 345, 390, 391). Accused testified that he talked to the assistant executive officer the first part of July and to the assistant adjutant of Percy Jones General Hospital on 29 July 1946 about the leave (R. 346). The assistant adjutant testified that accused had requested him to grant the latter leave and that the papers were processed through the assistant executive officer (R. 303).

On 1 August 1946 accused stopped at Fort Wayne while en route by motor car to Kirksville, Missouri. Mrs. Bunn was with him on this trip, which was taken on leave granted for the purpose of taking his daughter home from the hospital. Upon arriving at Fort Wayne, accused

called the hospital but was informed that neither his wife nor child was there. He thereupon called his wife at Macy, Indiana, and upon being advised that she would be unable to keep the appointment, he and Mrs. Bunn continued on to Kirksville, Missouri (R. 345, 380, 392).

As to the offense of bigamy, accused testified that he and his wife had been unable to "get along" for over a year; that as a result of increasing demands which she made upon him, they decided to separate and entered into a written separation agreement in December 1945. The document disappeared after his wife visited him at Percy Jones General Hospital in March 1946, but he did not discover the loss until he prepared to depart for Florida in April. The agreement provided for a property settlement and a divorce to be obtained by Mrs. Robbins. Upon his arrival in Florida in April 1946, accused went with his wife to Judge Livingston's office where accused on 15 April or a little after that date signed what he believes was "divorce papers, waiving any further rights of contesting it." According to accused, "The lawyer told me we would be divorced in two weeks" (R. 347-352, 398). On April 30, 1946, while on a trip to Churchill Downs race track, the accused proposed marriage to Enid Bunn, whom he had known since November 1945 and they were married the following day (R. 373, 396, 397). At the time of this "marriage" accused thought he was divorced from Ruth Robbins but on 10 July 1946 she informed him that she had not filed her suit for divorce (R. 354, 355). When accused "married" Enid Bunn he had taken no action to learn whether the divorce had actually been granted (R. 374).

5. The accused was convicted of three separate offenses involving the signing by him of attendance reports, knowing them to contain false and fraudulent entries and with the intention of aiding another person through the use of such false reports, to obtain payment of claims against the United States. He was also convicted of contracting a bigamous marriage with the person whom he intended to aid in obtaining payment of the fraudulent claims against the United States and of making a false official statement with intent to deceive his commanding officer.

Charge I - Specifications 1, 2, 3. The evidence in support of Charge I and its three specifications clearly shows that accused as Chief of the Reconditioning Service at Percy Jones General Hospital was in charge of all civilian personnel employed in that branch of the hospital. It was his duty to supervise the personnel, to see that accurate attendance reports were presented bi-weekly, and to certify to the correctness of these reports from which the payrolls were prepared. By reason of his high position and the prestige of his rank, his subordinates carried out his instructions with respect to keeping

attendance records in the manner directed by him. Consequently, when accused on about 15 June 1946 informed his time clerk, Mrs. Gregory, that Enid Bunn would henceforth work at the Hospital Annex and directed her to carry Mrs. Bunn on the attendance records of the main hospital, she fully complied with his instructions. It is clear from the evidence that Mrs. Bunn did not work either at the main hospital or at the Annex between 15 June and 27 July 1946. Several employees who were in a position to know of her presence had she been at either place during this period testified that she was not there and their testimony stands unrefuted. It is also clear that accused knew of her absence from duty when he signed the attendance reports for the three bi-weekly periods, each of which credited Enid Bunn with full attendance at work. The accused had known Enid Bunn at least since November 1945, and after a brief courtship, participated in a marriage ceremony with her in May 1946. Thereafter, and during the period these offenses are alleged to have occurred they lived together as man and wife. It is inconceivable that under such circumstances the accused did not know that Enid Bunn was not at work during the period in question. Moreover, when Mrs. Gregory, during the first week of August reminded accused that he had instructed her to carry Mrs. Bunn as present on the attendance reports and that the time sheets did not show her as present, accused merely took the sheets and made no reply. Furthermore, Mr. Morphew on one occasion saw the accused write the name Bunn on one of the time sheets. From these facts and circumstances the court was fully warranted in concluding that when accused signed the attendance reports certifying the correctness thereof he then well knew that Enid Bunn's name appeared on each, credited with eighty hours of work which she had never performed and therefore accused had willfully made the false writing with the intention of aiding Enid Bunn to obtain the allowance of false claims against the United States.

The accused is charged in each of these specifications with what amounts to the making of a false and fraudulent writing knowing it to be false, for the purpose of aiding Enid Bunn to obtain the approval, allowance and payment of a claim against the United States. The fourth clause of Article of War 94, denounces this offense. It reads as follows:

> "Any person subject to military law who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or uses, or procures, or advises the making or use of any writing or other paper knowing the same to contain any false or fraudulent statement;"

The essential elements necessary to establish this offense are (a) that the accused made a certain writing as alleged (b) that certain statements (entries) in such writing were false or fraudulent (c) that the accused knew this; (d) the facts and circumstances indicating that the act of the accused was for the purpose of aiding another to obtain the approval, allowance, or payment of a certain claim against the United States, as specified, and (e) the amount involved, as alleged (par. 150d, MCM 1928).

It is apparent from the analysis of the evidence as set forth above that each of these elements was conclusively established. The prosecution's evidence stands unrefuted and the findings of guilty must be upheld unless, as urged by defense counsel, the respective specifications of the Charge are fatally defective.

After the prosecution rested its case, defense counsel moved for findings of not guilty of Charge I and its three specifications, relying upon CM 145339 (1921), digested in section 452 (6) of the Digest of Opinions, Judge Advocate General 1912-40 and the two federal cases therein cited (U. S. v. Wallace, 40 Fed. 144; U.S. v. Reichart, 32 Fed. 142).

Because of the importance of the question involved and as our search has failed to disclose any subsequent court-martial cases in which the precise question was raised, we have felt it necessary to re-explore the field of Federal decisions since the date of these opinions.

The case reported in the Digest of Opinions reads as follows:

> "A specification laid under A. W. 94, which alleges in effect the presentation of a false claim against the United States for the purpose of obtaining approval, allowance and payment thereof, but which contains no averment that the claim was presented to any officer of the United States or other person authorized to approve, allow or pay the claim, fails to state any offense in violation of A. W. 94 or of any other article of war and will not support a conviction, for the reason that the presentation of the claim to a person authorized to approve, allow or pay it is an essential element of the offense sought to be charged. (Citing U.S. v. Wallace, 40 Fed. 144; U.S. v. Reichart, 32 Fed. 142; and C.M. 137945.) C. M. 145339 (1921)." (Dig. Ops. JAG 1912-40, par. 2 of (6), p. 336, Sec. 452).

Both of the court-martial cases above cited involved offenses laid under the 94th Article of War. In each the only question at issue was the sufficiency of a specification which alleged the fraudulent presentation of a false claim against the United States but failed to allege that the claim was presented to an officer of the United States or other person authorized to approve, allow, or pay it. In holding these specifications fatally defective, the Board of Review in each instance found support for its conclusions in prior decisions of the Federal courts interpreting section 5438 of the Revised Statutes (Act of Mar. 2, 1863, Ch. 67, 12 Stat. 696, 698).

In the case of United States v. Wallace (40 Fed. 144) decided 18 October 1889, the court in finding an indictment under this statute fatally defective for failure to name the person or officer in the service of the United States to whom the claim was presented, quoted from the statute in existence at that time. Section 5438 of the Revised Statutes then read as follows:

> "Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

This act as amended by the Act of 30 May 1908, was repealed by the Act of 4 March 1909 (Ch. 321, Sec. 341, 35 Stat. 1153). The present statute, relating to the same subject matter found in Article of War 94 is contained in sections 80, 82, 83, 84, 85, and 86 of Title 18, U.S.C.A. (Acts of Mar. 4, 1909; Ch. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, Ch. 194, 40 Stat. 1015; June 18, 1934, Ch. 587, 48 Stat. 996; April 4, 1938, Ch. 69, 52 Stat. 197). Section 80 of Title 18, U.S.C.A. now reads as follows:

> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder,

any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

In the recent case of Roberts v. United States (137 Fed. 2d Series, 412 (1943)) decided by the Fourth Circuit Court of Appeals, there arose the same question of the sufficiency of an indictment which failed to name the person or officer of the United States to whom the false claim was presented. Therein, the court, after pointing out the modern concept in several cited cases to the effect that the sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical, considerations disposed of the Wallace case, supra, and others relied upon by the defense by stating, "The opinions in these cases were written before the statute was amended and are not controlling here."

In the Roberts case, the indictment under five counts, each of which charged accused with presenting a false claim to the Navy Department of the United States, was attacked as insufficient on the basis of the Wallace decision. As it is the opinion of the Board of Review that CM 145339 (1921) (Sec. 452 (6) Dig. Ops. 1912-40), quoted above, is inconsistent with modern practice and no longer controlling due to the amendments of the basic statute we deem it advisable to quote at length from the opinion in the Roberts case. The court there said:

"In an able and exhaustive discussion on the question of the sufficiency of an indictment Judge Parker, of this court, in the case of Nye v. United States, 137 F. 2d 73, decided at the June Term 1943, lays down the rules governing this question as follows:

"The rule here applicable was well stated by the Supreme Court in Hagner v. United States, 285 U.S. 427, 431, 52 S. Ct. 417, 419, 76 L. Ed. 861, as follows: 'The rigor of old common-law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Cochran and Sayre v. United States, 157 U.S. 286, 290, 15 S. Ct. 628, 630, 39 L. Ed. 704; Rosen v. United States, 161 U.S. 29, 34, 16 S. Ct. 434, 480, 40 L. Ed. 606'

"The same rule was laid down by this Court, speaking through Judge Rose in Martin v. United States, 4 Cir., 299 F. 287, 288, in the following language: 'The sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical, considerations. Does it, under all the circumstances of the case, tell the defendant all that he needs to know for his defense, and does it so specify that with which he is charged that he will be in no danger of being a second time put in jeopardy? If so, it should be held good. Section 1025, Revised Statutes (Comp. St. sec. 1691 [18 U.S.C.A. sec. 556].'

"Following the decision in the Martin case we have consistently followed the rule there laid down, sustaining under a variety of circumstances indictments drawn in general terms where they set forth the ingredients of the offense as defined by statute with sufficient definiteness and certainty to apprise the defendant of the crime charged and to protect him against further prosecution for the same offense. Belvin v. United States, 4 Cir., 12 F. 2d 548, 550; Hill v. United States, 4 Cir., 45 F. 2d 812; Center v. United States, 4 Cir., 96 F. 2d 127; Bersio v. United States, 4 Cir., 124 F. 2d 310, 314; Ong v. United States, 4 Cir., 131 F. 2d 175.

"Very much in point is the case of United States v. Polakoff, 2 Cir., 112 F. 2d 888, 890, 134 A.L.R. 607. The indictment there, while for conspiracy to violate the statute here involved, was attacked as insufficient because it merely alleged that the defendants conspired to influence and impede the official actions

of officers in and of the United States District Court, without specifying the officers whose actions were to be so impeded. In holding the indictment sufficient, the Court, speaking through Judge Learned Hand, said:

"'Since the case must be remanded we will pass upon the sufficiency of the indictment, and of the evidence to prove the charge. The indictment merely alleged that the accused conspired "to influence and impede the official actions of officers in and of the United States District Court * * * in order that said Sidney Kafton would receive a sentence of not more than one year and one day." The challenge is that it should have specified who were the "officers" that were to be so "impeded". We do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars. Decisions such as Heaton v. United States, 2 Cir., 280 F. 697, and Kellerman v. United States, 3 Cir., 295 F. 796, are of doubtful service today, when objections which do not go to the substance of a fair trial no longer get much countenance. Hagner v. United States, 285 U.S. 427, 431, 52 S. Ct. 417, 76 L. Ed. 861; Berger v. United States, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314; Crapo v. United States, 10 Cir., 100 F. 2d 996, 1000.'"

It seems to us that the language of Judge Learned Hand in the Polakoff case should set at rest once and for all the claim that the validity of a specification may be determined by purely technical considerations. The present trend in civil criminal pleadings was long ago announced by Winthrop as appropriate under military jurisprudence (See footnote 5, p. 133, Winthrop's Mil. Law. & Prec. 1920) wherein, quoting from Cushing, 7 Opinions 604, it was said:

"A specification does not need to possess the technical nicety of indictments at the common law. Trials by court-martial are governed by the nature of the service which demands intelligible precision of language, but regards the substance of things rather than their forms. * * * Hence undoubtedly the most bald statement of the facts alleged as constituting the offence, provided the legal offence itself be distinctly and accurately described in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate groundwork of conviction and sentence."

Assuredly, then, if civil procedure has relaxed the rules of preciseness in pleadings, in view of the language quoted from Winthrop, it would be manifestly unfair to require more of the military legal draftsman than of his civilian counterpart. However that may be, it is clear that Wallace v. U.S., supra, which formed the basis for the Board of Review decisions in the past, is no longer to be followed and any decisions bottomed upon that case must be overruled.

In our opinion the specifications adequately set forth all elements of the offense and sufficiently apprised accused of the offense intended to be charged. In our opinion the motion for findings of not guilty was properly overruled, and the court's findings of guilty are fully sustained by the evidence.

We can only speculate as to why the court found accused guilty of a violation of Article of War 96 instead of Article of War 94 as charged. Presumably, the contention of the defense counsel that the specifications were fatally defective raised some doubt in the mind of the court as to whether the acts as charged were violations of Article of War 94, and the court thereupon based its findings on the more certain foundation that even if the specifications failed to comply with the technicalities of Article of War 94, they most certainly described a violation of Article of War 96. The specifications (1, 2, and 3 of Charge I) clearly set forth a violation of Sec. 80, Title 18, USCA and as such, the acts charged constituted violations of Article of War 96.

Charge II, Specifications 1, 2; Charge III, Specification.

The evidence clearly shows that accused entered into a marriage with Enid Bunn at a time when he had a lawful wife then living. Indeed, the accused admits that he was married to Ruth Robbins at the time he went through the marriage ceremony with Enid Bunn. The defense he offers is that on 1 May 1946 when he married Enid Bunn, he thought Ruth Robbins had obtained a divorce from him. He bases this belief upon the signing of what he believed were divorce papers in a law office in Sebring, Florida, about 15 April 1946 and upon the alleged statement of the lawyer that accused would be divorced in two weeks. However, he took no further action prior to his marriage to Enid Bunn on 1 May 1946 to learn whether his marriage to Ruth Bunn had been dissolved.

Assuming that accused acted in good faith in the belief that he had been separated from the bonds of matrimony when he entered into the marriage contract with Enid Bunn, it would be no defense to the offense

here charged. Although The Judge Advocate General has adopted the view that a second marriage by an accused under an honest but erroneous belief based on reasonable grounds, that the first marriage had been dissolved is a defense where the second marriage occurs in a state recognizing such belief to be a defense (CM 245510; Carusone, 29 BR 195), the testimony of accused fails to show that there was reasonable ground for his belief that the first marriage had been dissolved (Underscoring supplied). It is manifest that accused, a man 39 years of age and well educated, did not act as a prudent man when he contracted the second marriage without making inquiry to ascertain whether a divorce decree had actually been entered. Moreover, the question as to whether accused had any grounds whatever for believing he was divorced was in dispute, for Ruth Robbins testified that the papers which were signed at the lawyer's office about 15 April pertained to a conveyance of real estate and that nothing was said concerning a divorce. In view thereof the court, as the trier of the facts, was fully warranted in rejecting accused's explanation as to what had occurred and in accepting that of Mrs. Robbins. The evidence amply supports the court's findings of guilty of Specification 2 of Charge II and the Specification of Charge III. Bigamy is an offense in violation of both Article of War 95 and Article of War 96 (CM 223971, Tatum, 17 BR 5; CM 259005, Poteet, 38 BR 207). The conviction of an officer under both articles is permissible as offenses under Article of War 95 and Article of War 96 are not the same (McRae v. Henkes, 273 Fed. 108, MCM 1928, p. 224).

There remains for consideration the finding of guilty of the offense alleged in Specification 1 of Charge II, viz., the making of a false official statement with intent to deceive the Commanding General of Percy Jones General Hospital. The offense charged arose out of accused's written application for leave addressed to said officer wherein accused, in setting forth the reason for the request wrote "to take daughter home from the hospital." Here again, the testimony of accused and his wife was in conflict although the fact that accused did not see or take his daughter home from the hospital is not denied. Mrs. Robbins testified that she had no appointment to meet accused at the hospital in Fort Wayne, Indiana, where according to accused he was to meet her for the purpose of having their daughter submitted to a tuberculin test. It is not difficult to understand why the court rejected accused's explanation in view of the circumstances attending his alleged stop-over in Fort Wayne while en route to Kirksville, Missouri, on a pleasure trip with Mrs. Bunn. The court, within its province, chose to believe Mrs. Robbins and to disbelieve him, and there is no valid reason why the court's findings should be disturbed. Considering all the facts and circumstances in connection with this

offense the Board of Review is convinced that accused's deceitful conduct in obtaining leave on this occasion demonstrated his moral unfitness to be an officer or to be considered a gentleman (par. 151, MCM, 1928). In view thereof, we are of the opinion that the evidence is sufficient to support the findings of guilty of this specification as a violation of Article of War 95.

6. War Department records show the accused to be 39-9/12 years of age and married. He graduated from Greenbrier Military Academy in 1922 and attended West Virginia University for two years, thereafter serving in the United States Navy as an enlisted man in the Medical Corps from 1925 to 1929. He served with the United States Marine Corps Expeditionary Force in Nicaragua from 1927 to 1929 and thereafter was a United States Civil Service employee for three years, being employed as a physiotherapy technician by the Veterans' Administration until 1933. In 1935 he graduated from a physiotherapy college in Chicago, Illinois. He enlisted in the Regular Army on 6 March 1937. (At the time of this enlistment, his fingerprints were sent to the Federal Bureau of Investigation which reported that accused was wanted by the Sheriff's Office, Ann Arbor, Michigan, on charges of embezzlement and bigamy. The disposition of these charges is not known.) Accused was assigned to the Medical Department where he rose to the rank of Master Sergeant, and thereafter, on 15 May 1942 was appointed a warrant officer, junior grade, in the Army of the United States. On 17 August 1942 he was appointed a second lieutenant in the Medical Administrative Corps, Army of the United States, was promoted to first lieutenant on 6 November 1942, to captain on 5 May 1943 and to major on 22 June 1945. By paragraph 22, War Department Special Orders Number 168, Washington, D. C., 1 August 1946 accused was relieved from assignment and duty, pursuant to authority contained in Section III, War Department Circular 290, 1945. These orders were revoked on 16 August 1946 by letter orders of that date from The Adjutant General to the Commanding Officer, Percy Jones General Hospital, Fort Custer, Michigan. Accused's efficiency record shows two very satisfactory, eight excellent, and four superior ratings.

Attached to the record of trial is a recommendation for clemency with a view to accused's eventual return to honorable service, signed by all members of the court, one member excepting to the nature of the clemency proposed.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In

the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96. Confinement in a penitentiary is authorized for the offenses of bigamy and making false writings for the purpose of obtaining the approval and payment of claims against the United States which are recognized as offenses of a civil nature and punishable under Section 601 of Title 22, District of Columbia Code, 1940 and Section 80 of Title 18, United States Code, respectively.

W H Johnson Jr, Judge Advocate

Joseph J Stern, Judge Advocate

C E Schumann, Judge Advocate

JAGQ - CM 319514 1st Ind

WD, JAGO, Washington 25, D. C. JUN 19 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 Major Harry E. Robbins (0-490413), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of making three false writings with intent to aid another in obtaining approval and payment of three fraudulent claims against the United States, aggregating $282.18, in violation of Article of War 96 (Chg I, Specs. 1, 2, 3); of making a false official statement in connection with an application for leave, in violation of Article of War 95 (Chg II, Spec. 1) and contracting a bigamous marriage, in violation of Articles of War 95 and 96 (Chg II, Specs. 2 and Chg III, Spec.). 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 five years. The reviewing authority approved the sentence, reduced the period of confinement to two years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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 accused was the Chief of Reconditioning Service at Percy Jones General Hospital during the period 15 June to 27 July 1946, during which time he had several hundred civilian employees under his supervision, both at the main hospital located in Battle Creek, Michigan and at the Hospital Annex at nearby Fort Custer, Michigan. It was accused's duty to certify the correctness of time and attendance reports for the employees of his department, from which reports the pay rolls were prepared. The attendance reports were made up from daily "time in and out" sheets which the employees were required to sign. Accused's time clerk, using these time sheets prepared the attendance reports (Standard Form 72, USCGC) and submitted them bi-weekly to accused for his certification.

Mrs. Enid Mae Bunn was an employee in accused's department and worked under his supervision. He had married her on 1 May 1946, but this fact was unknown to her co-workers, and on about 15 June 1946, accused directed his time clerk to carry the person whom he referred to as Mrs. Bunn on the time and attendance reports of the main hospital, informing her that henceforth Mrs. Bunn would perform duties at the hospital annex, Fort Custer, Michigan. Mrs. Bunn was not present and

performed no duties after 15 June 1946 either at Fort Custer or at the hospital in Battle Creek. Nevertheless, her name was recorded on the time sheets of the main hospital showing her present for duty throughout the period. On one occasion the accused was observed to sign the name Bunn on one of these time sheets. During the period in question he and Enid Bunn cohabited as man and wife. As a result of accused's certification of the attendance reports, each containing the false entry as to Enid Bunn's performance of duty, the pay rolls drawn therefrom enabled Enid Bunn to receive three checks issued by the Finance Office, United States Army, Fort Custer, Michigan, covering her purported service from 15 June to 27 July 1946. Of these checks, one in the amount of $86.82, another for $97.68 and a third, also for $97.68, only one was returned without being negotiated. The accused returned the third check because, as he said, "this case was pending."

At the time of his marriage to Enid Bunn on 1 May 1946, accused was legally married to another woman then living. Accused admitted the first marriage, but sought to defend his marriage to Enid Bunn on the ground that he believed he was divorced from his first wife, Mrs. Ruth Robbins. He contended, in contradiction of his wife's testimony, that at a conference in a law office on about 15 April 1946, he signed what he believed were "divorce papers" in his wife's presence and was then told by the lawyer that he would be divorced in two weeks. When he married Enid Bunn on 1 May 1946, he had made no further inquiry to ascertain whether the divorce had been granted. The papers which accused signed and "believed were divorce papers" pertained to a conveyance of real estate.

Accused had one child by Ruth Robbins, a daughter about 6 years of age. The child was ill the first part of July 1946 and he obtained leave about that time to see her. Subsequently, on about 29 July 1946 he again applied for leave, and in his signed request stated that the purpose of the leave was to take his daughter home from the hospital. The child was not then and had not been in any hospital. Although he testified that by pre-arrangement he was to have met Ruth Robbins at a hospital in Fort Wayne where their daughter was to receive a tuberculin test, Mrs. Robbins denied that any such agreement was made. Moreover, the evidence shows that during this period of leave, accused accompanied Enid Bunn on a motor trip to Missouri.

Since receipt of the record of trial in this office, a communication has been received from the Commanding General, Fifth Army, that on 5 December 1946 accused filed two petitions in the Circuit Court of the Tenth Judicial Circuit of Florida, one seeking a divorce from Ida Sullivan Robbins and the other seeking an annulment of marriage against Ruth Leonard Robbins. It would appear therefrom that accused may have been married to and not divorced from Ida Sullivan Robbins when he married Ruth Robbins. As the validity of accused's marriage to Ruth Robbins was admitted in the trial of this case, the information now brought to light for the first time could not be considered by the Board of Review

in determining the legal sufficiency of the evidence relating to the offense of bigamy. Even were it possible so to do the result would be the same for the rule is well established that the burden of showing the illegality of the marriage to Ruth Robbins, if such was the fact, rested upon the accused. In the absence of this showing, the capacity of the parties and every other fact necessary to the validity of that contract of marriage must be presumed in a prosecution for bigamy.

4. Consideration has been given to a letter from Senator Alben W. Barkley attached to the record of trial.

In view of accused's long period of honorable and commendable service in the Army and Navy (over 14 years) both as an enlisted man and an officer, and in further consideration of the court's recommendation, the reviewing authority reduced the period of confinement to two years. 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.

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. 229, 26 June 1947).

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

JAGH - CM 319522

14 May 1947

UNITED STATES	)	2ND INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 3 January 1947. Dismissal, total forfeitures, and confinement for one (1) year.
First Lieutenant JOE T. JORDAN (O-502676), Finance Department.	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, 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 94th Article of War. (Disapproved by the reviewing authority).

Specification: (Disapproved by the reviewing authority).

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

Specification 1: In that 1st Lieutenatn JOE T. JORDAN, 1907 Army Service Unit (Headquarters Separation Center), then assigned to Headquarters 1922nd Service Command Unit, did, at Fort Huachuca, Arizona, on or about the 6th of May 1946, with intent to deceive EDGAR W. SIEVERT, Capt., QMC, Acting Transportation Officer at Fort Huachuca, Arizona, officially certify to the said EDGAR W. SIEVERT, Capt., QMC, Acting Transportation Officer, the NELLY C. JORDAN was a member of his immediate family, dependent upon him for support, and entitled to transportation at public expense on his last order for permanent change of station, which certificate was known by the said 1st Lieutenant JOE T. JORDAN, to be untrue.

(360)

Specification 2: In that 1st Lieutenant JOE T. JORDAN, 1907 Army Service Unit (Headquarters Separation Center), did, at Fort Lewis, Washington, on or about 28 May 1946, with intent to deceive Lieutenant Colonel JACK L. WILLIAMS, IGD, officially state to the said Lieutenant Colonel JACK L. WILLIAMS, IGD, that NELLY C. JORDAN and FRANCIS FITZGERALD were one and the same person, which statement was known by the said 1st Lieutenant JOE T. JORDAN, to be untrue.

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

Specification: In that 1st Lieutenant JOE T. JORDAN, 1907 Army Service Unit (HeadQuarters Separation Center), then assigned to Headquarters 1922nd Service Command Unit, did, on or about 13 May 1946, wrongfully and unlawfully transport and accompany FRANCIS FITZGERALD from Hereford, Arizona, to Tacoma, Washington, for immoral purposes and did co-habit with said FRANCIS FITZGERALD and represent her to be his wife.

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 eight years. The reviewing authority disapproved the findings of guilty of Charge I and its Specification, approved only so much of the sentence as provided for dismissal, total forfeitures, and confinement at hard labor for five years, remitted four years of the confinement so approved, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is summarized as follows:

Specification 1, Charge II: on 7 May 1946, accused signed a certificate on War Department, QMC Form No. 207 (Pros Ex 6) that Nellie C. Jordon was his wife and a member of his immediate family, dependent on him for support and was entitled to transportation at public expense on his order for permanent change of station. Relying on this certificate, Captain Sievert, QMC, Acting Transportation Officer at Fort Huachuca, Arizona, issued Transportation Requests covering first class rail transportation and one lower berth from Fort Huachuca, Arizona, to Tacoma, Washington, in the name of Nellie C. Jordan, wife of Lieutenant J. Jordan (Pros Exs 7, 8).

Nelly Coates Jordan testified by deposition (Pros Ex A) that she had known the accused since 1934 and had lived with him for five and one-half years at Hampstead, Long Island, New York, but had never been married to him. A certified copy of a marriage certificate (Pros Ex 5) was introduced to show that accused was married on 8 September 1931 to Mildred Cody. Accused admitted to the investigating Officer that he had never been married to Nelly C. Jordan, had not lived with her since about 1940, and that he was married to Mildred Jordan (R 25). Mildred Jordan testified by deposition that she was still lawfully married to accused (Pros Ex B).

Specification 2, Charge II: On 28 May 1946 Lieutenant Colonel Jack L. Williams was investigating charges against the accused. On that date, accused, after having been warned of his rights under Article of War 24, stated to Lieutenant Colonel Williams that Nelly C. Jordan and Miss Francis Fitzgerald were one and the same person (R 22, 24). On 16 July 1946, accused was again questioned by Lieutenant Colonel Williams, at which time accused voluntarily admitted that Nelly C. Jordan and Francis Fitzgerald were different individuals (R 25, 29).

Specification, Charge III: Major Herman Wieland testified by deposition that, on 9 May 1946, accused requested that Major Wieland see accused "off at the station" with a woman companion "whom he always referred to as 'Fran'" and that accused and "Fran" boarded the train together at Hereford, Arizona (Pros Ex C). Accused's wife was named Mildred Jordan (Pros Ex B). Accused had procured Transportation Requests covering the travel of "Nellie C. Jordan" from Fort Huachuca, Arizona, to Tacoma, Washington, (Pros Exs 6, 7, 8). Lieutenant Colonel Jack L. Williams testified that, on 28 May 1946, he called accused to his office for the purpose of investigating the alleged illegal use of transportation. Accused was told that it had been alleged that the transportation issued to Nellie C. Jordan had been used by Francis Fitzgerald, and accused stated that Nellie C. Jordan and Francis Fitzgerald were one and the same person (R 22). On about 16 July 1946, accused told Lieutenant Colonel Williams that Francis Fitzgerald was not the same person as Nellie C. Jordan, that Francis Fitzgerald had accompanied accused from Hereford, Arizona, to Tacoma, Washington, where they had stayed at the Tacoma Hotel, registered as Mr. and Mrs. Joe T. Jordan (R 25-27).

4. The accused, after having been apprised of his rights to testify, elected to remain silent, and the defense offered no testimony.

5. The uncontroverted evidence compels the conclusion that the accused made the certificate alleged in Specification 1, Charge II and the statement alleged in Specification 2, Charge II. It has been satisfactorily shown that both the certificate and the statement were official in nature, were false and were made with the knowledge that they were false and with the intent to deceive.

As to Charge III, the only evidence, aliunde the accused's confession, was to the effect that accused, and a woman addressed as "Fran," boarded a train together at Hereford, Arizona, on 9 May 1946, and that "Fran" was not the wife of the accused.

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself" (MCM 1928, par 114a).

It can hardly be said that the mere fact that accused boarded a train in Arizona with a woman not his wife indicates that he transported her to Tacoma, Washington, for immoral purposes or the he co-habited with her. Aside from the confession, there is not even a showing that Francis Fitzgerald was on the train after it left Hereford. Since there was no independent evidence of the corpus delicti, the evidence of accused's confession as to Charge III was imporperly received in evidence, and the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specification.

6. Lientenant Colonel Williams was permitted to testify as to interviews with prospective witnesses conducted by himself and by others. There was no objection by the defense, and the prosecution stated for the record that:

> "* * * this information is official information that the witness is quoting from, that is is not hearsay evidence, that it can be verified at any time and that it is from his official documents, which was his basis for further investigation in this case" (R 23).

This was a violation of the hearsay rule (MCM 1928, par 113b), but other competent compelling evidence supports the findings of guilty of Charge II and its Specifications, and there is no conflict in the evidence as to that Charge. It cannot be said, therefore, that the admission of the hearsay evidence prejudiced the substantial rights of the accused.

7. The accused is 45 years of age, married, and a high school graduate. He completed two years of accounting in La Salle Extension University and was employed as a steeple jack and as a pay clerk for the New York National Guard. He served as an enlisted man from 4 August 1919 to 7 April 1920; from 27 September 1920 to 26 September 1923 and from 14 January 1931 to 27 August 1931. He re-enlisted on 6 April 1934 and served until his honorable discharge on 14 October 1939. He entered active duty as a technical sergeant, New York National Guard on 10 October 1940 and was discharged 29 May 1941 to accept duty with the American Volunteer Group, serving with that organization in China from 2 June 1941 to 27 September 1942. He was appointed a first lieutenant, Army of the United States on 29 October 1942 and entered active duty 4 November 1942. His effeciency index from February 1943 to 31 December 1945 was 31.6 (Very Satisfactory).

8. 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. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specifications, legally insufficient to support the findings of guilty of Charge III and its Specification, legally

sufficient to support only so much of the sentence as provides for dismissal and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of the 95th Article of War, but forfeitures and confinement are not authorized upon such a conviction.

HOTTENSTEIN, Judge Advocate

ON LEAVE, Judge Advocate

SMITH, Judge Advocate

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

JAGK - CM 319531

24 APR 1947

UNITED STATES	)	ANTILLES DEPARTMENT
v.	)	Trial by G.C.M., convened at APO 851, c/o Postmaster, Miami, Florida, 30 November and 10 December 1946. Dismissal and total forfeitures.
Second Lieutenant CHARLES A. GIBBS (O-1337418), Infantry.	)	

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 95th Article of War.

Specification 1: In that 2d Lieutenant Charles A. Gibbs, Infantry, Headquarters and Headquarters Section, Post, Port, and General Depot, Fort Buchanan, Puerto Rico, did, at Fort Buchanan, Puerto Rico, on or about 26 June 1946, with intent to deceive his superior officers, wrongfully and dishonorably direct Mr. Jaime Rivera, an employee of the Fort Buchanan Officers Mess, to make an additional entry of Thirteen Hundred Dollars and Ninety-Two Cents ($1300.92) in the Inventory Book of the said Fort Buchanan Officers Mess, the said 2d Lieutenant Charles A. Gibbs intending that the said Inventory Book of the said Fort Buchanan Officers Mess would indicate that the total cash on hand of the said Fort Buchanan Officers Mess, as counted by 1st Lieutenant Antonio Sanchez, Corps of Military Police, as Inventory Officer on 26 June 1946 was Nineteen Hundred and Thirty-Three Dollars and Ninety-Five Cents ($1933.95), which amount was false in that the total cash on hand of the said Fort Buchanan Officers Mess, as counted by 1st Lieutenant Antonio Sanchez, Corps of Military Police, as Inventory Officer on 26 June 1946 was Six Hundred and Thirty-Three Dollars and Three Cents ($633.03).

Specification 2: In that 2d Lieutenant Charles A. Gibbs, ***, did, at Fort Buchanan, Puerto Rico, from about 25 June 1946 to about 27 July 1946, feloniously embezzle by fraudulently converting to his own use the sum of Two Thousand Six Hundred and Twenty-Nine Dollars and Six Cents ($2629.06), lawful money of the United States, property of

the Fort Buchanan Officers Mess, entrusted to him as Custodian of the said Fort Buchanan Officers Mess Fund.

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

Specification: In that 2d Lieutenant Charles A. Gibbs, ***, did, at Fort Buchanan, Puerto Rico, from about 25 June 1946 to about 27 July 1946, feloniously embezzle by fraudulently converting to his own use the sum of Two Thousand Six Hundred and Twenty-Nine Dollars and Six Cents ($2629.06), lawful money of the United States, property of the Fort Buchanan Officers Mess, entrusted to him as Custodian of the said Fort Buchanan Officers Mess Fund.

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 and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial pursuant to the provisions of Article of War 48.

3. Evidence for the Prosecution

On 19 December 1945 the accused was detailed as mess officer and club officer of the Fort Buchanan, Puerto Rico, Officers Mess and Club and as such became custodian of the funds of such organizations. On 11 April 1946 he was relieved as club and mess officer but was detailed as assistant to Captain Hugh R. Primm, who relieved him and by agreement accused remained as custodian of the organizational funds until 27 July 1946 (R. 7, 36-38, 52,61).

Mr. Osvaldo Padilla, an accountant, was the bonded bookkeeper for the officers mess and had held such position for about four years. He kept the records of the mess by a double entry system consisting of the various ledgers and journals showing accounts payable and receivable, and an inventory book. Mr. Padilla also kept a personal record book in which he recorded the amount of cash actually received for each day. This entry consisted of the tape reading on the cash register as of the close of the day's business. The cash receipts were then turned over to the accused as custodian of the funds, and it was customary for him to deposit the funds in the safe until deposit could be made at the bank. The accused had the combination to the safe and handled all the funds. Entries made in the official records required supporting vouchers, and the custodian, for convenience, instructed the bookkeeper to keep account of the daily transactions and at the end of the month the vouchers would be executed and proper entries made in the permanent records. This was the uniform system followed during all the times accused was the custodian of the funds (R. 7-13).

On 26 June 1946 Captain William Herrera and First Lieutenant Antonio Sanchez made an official inventory of the Fort Buchanan Officers Mess. They found the "cash on hand" to amount to $633.03 (R. 52). The inventory work sheets showing the above amount as cash on hand were received in evidence without objection as Prosecution Exhibit 1 (R. 53). The bookkeeper, Mr.

Padilla, testified that according to his records the cash on hand as of 26 June should have amounted to $1933.95 and that he advised accused of that fact (R. 13). The results of the inventory were normally transcribed into a permanent record entitled "Inventory Book" and in this book there was entered as "cash on hand" the sum of $633.03. Later the same day, at the direction of accused, Jaime Rivera Colon, the head bartender of the club, procured the inventory book and made an entry of $1300.92 underneath the original figures and totaled the same, showing the amount of cash on hand to be $1933.95. He then returned the book to its usual place. A certified true copy of the page of the inventory book showing the above entries was received in evidence without objection as Prosecution Exhibit 2 (R. 60).

On 23 July the bookkeeper did not have sufficient funds to pay the bills of the club and mess fund and notified Captain Primm who was then the club and mess officer but who had not handled the funds (R. 13).

On 26 July Mr. Maximo Crespo, a certified public accountant, began an audit of the club and mess fund which he completed on 7 August. As a result of his audit, Mr. Crespo testified that there was $1109.15 in the cash fund as of 27 July 1946, however, the fund, including an item of $215.00 in coupon books, should have been $3738.21, or a shortage existed in the fund of $2629.06 (R. 26,27).

Captain Hugh R. Primm, Cavalry, who had been officially detailed as club and mess officer in April notified accused on 25 July to get his accounts and books in order so that he could turn over the custodianship of the fund to Lieutenant Munoz. Captain Primm examined the books and ascertained that the bank deposits totaled $1490.80, whereas he had personal knowledge that accused should have deposited about $3890.80. While he was examining the books the accused called Captain Primm over to a table and told him, "Captain, I know I am short. I took the money. Will you give me until the last of this month to pay the money back?" Captain Primm explained that he could not grant the request and placed accused in arrest of quarters (R. 40). On cross-examination Captain Primm admitted that his failure to make a monthly check on the condition of the funds was "one of my biggest mistakes" but he had other duties too onerous to permit much attention to the mess and club fund (R. 46). At the time he admitted the shortage accused told him "I pooped it off" which, in the slang of the American people, the captain understood to mean "free spending" (R. 49).

Captain Roy H. Haggerty, Finance Department, testified that he was president of a board of officers which was appointed "about the latter part of July 1946" to investigate and determine the extent of an alleged shortage in the funds of the Fort Buchanan Officers Mess. The accused appeared before the board and after being advised of his rights under Article of War 24 and AR 420-5 made a statement to the board which was transcribed from the shorthand notes of the reporter. Later accused refused to sign the statement but did voluntarily turn over to the board a sufficient amount of money

to cover the alleged shortage. His first payment amounted to $2500 in cash and later an adjustment was made on the coupons. The final amount paid back was "the amount shown in the statement of the certified public accountant" (R. 63-69).

The prosecution introduced First Lieutenant Burton M. Schuman as a witness for the stated purpose of showing that accused lost the embezzled funds at gambling but on objection thereto by the defense the court refused to permit the witness to testify in this regard (R. 70).

4. After being instructed as to his testimonial rights by the law member, accused elected to remain silent and no evidence was presented in his behalf.

5. Specification 2 of Charge I and the Specification, Charge II, are identical, each alleging embezzlement of the same money but in violation of the 95th and 93rd Articles of War, respectively. This manner of pleading finds sanction in the military law and is not an illegal multiplication of charges even though the separate offenses stem from the same set of facts (CM 281663, Hindmarch, 22 BR (ETO) 223,229; McRae v. Henkes (C.C.A. 8th 1921) 273 Fed. 108, cert. denied, 258 U.S. 624, 66 L. Ed. 797 (1922)). The testimony of the bookkeeper and certified public accountant leave no doubt but that during the times mentioned a substantial shortage occurred in the accounts of the mess fund. We note that Prosecution Exhibit 2 is entitled "Officers Club inventory as of 26 June 1946," but it is apparent that "mess fund" and "club fund" as used in the record refer to the same fund and that there was in reality but one fund. The accused is proven to have been the custodian of the funds which were duly entrusted to him for the use and benefit of the officers at Fort Buchanan. A conversion of such funds to his own use, which he voluntarily admitted, is clearly embezzlement within the approved definition of the offense as set out in Moore v. United States (160 U.S. 268; par. 149h, MCM, 1928). The presumption of an intent to defraud is fortified by the fact that when the inventory of 26 June revealed a shortage accused induced the bartender to make false entries in the records so as to show a greater amount of cash than actually existed.

Final reimbursement of the true amount of shortage, although a commendatory act on accused's part, is no defense to the embezzlement already consummated. This is so even though it be conceded that at the time he took the money he intended to reimburse the fund at some future date (CM 276435, Meyer, 48 BR 331,338; Hughes v. United States, 4 Fed (2d) 686). The return of the amount of shortage post litem motam and under pressure of court-martial charges is of no probative value except as an admission that he was responsible for it (CM 253054, Howard, 34 BR 235,251).

The defense objected to the testimony of Mr. Padilla concerning entries made in his so-called "personal day-book." These entries were shown to have been made in the regular course of business and were therefore competent

irrespective of whether they were actually made from personal knowledge. (See "Shop Book Rule", act of 20 June 1936, Ch. 640, sec. 1, 49 Stat. 1561, 28 U.S.C.A., sec. 695.)

The testimony of the certified public accountant shows that the actual shortage for the period alleged was $2414.06 in actual cash and $215.00 in coupon books. Some adjustment was made concerning these books which is not revealed in the record, however, should the books have had an actual cash value of less than that shown on the face thereof, such circumstance would not prejudice accused's rights. The total amount embezzled would in any event be some amount in excess of $2414.06.

6. War Department records disclose that the accused is 33 years of age and has been married. He is a native of Puerto Rico but has lived in New York City and Newark, New Jersey. Prior to his induction in the Army on 2 December 1943 he was a professional singer, taught model airplane construction at a high school in New York and was a labor supervisor for various construction companies. On 31 July 1943 accused was commissioned a second lieutenant, AUS, at Fort Benning, Georgia. An efficiency report for the period 1 August to 31 December 1945 shows a rating of excellent, and a report for the period 1 July 1946 to 31 December 1946 shows a rating of very satisfactory.

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 of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 and mandatory upon conviction of a violation of Article of War 95.

Christy E. Silva, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Asproyl, Judge Advocate

(370)

JAGK - CM 319531 1st Ind

WD, JAGO, Washington 25, D. C. MAY 2 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 Second Lieutenant Charles A. Gibbs (O-1337418), Infantry.

2. Upon trial by general court-martial this officer was found guilty of having, with intent to deceive, dishonorably directed the bartender of the Fort Buchanan Officers Mess to make a false credit entry of $1300.92 in the inventory book of the mess so as to show the total cash on hand of $1933.95, which amount was false, and of embezzlement, during the period 25 June 1946 to 27 July 1946 of $2629.06, of property of the Fort Buchanan Officers' Mess, entrusted to him as custodian of the mess fund, in violation of Article of War 95. He was also found guilty of embezzlement of the same funds in violation of Article of War 93. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the provisions of 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 during the months of June and July 1946 the accused, acting in his capacity as officers' club and mess officer, or the assistant thereto, at Fort Buchanan, Puerto Rico, had custody of the funds of such organizations and that during the period stated a shortage of approximately $2629.06 occurred in the funds. The shortage was proven to exist by the testimony of the bookkeeper who kept the records and also by the testimony of a certified public accountant who made a thorough accounting of the funds of the club and mess. Accused admitted the shortage and requested time to repay the money. On 2 August 1946 he made reimbursement of the shortage to a board of officers who had been appointed to investigate the condition of the funds.

I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

4. 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

(G.C.M.O. 188, 27 May 1947).

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

JUN 3 1947

JAGQ - CM 319556

UNITED STATES	)	FIFTEENTH AIR FORCE
v.	)	Trial by G.C.M., convened at MacDill Field, Florida, 24 October and 22 November 1946. Dismissal and confinement for three and one-half (3½) years.
First Lieutenant KELLER J. WAGNER (O-1699181), Air Corps.	)	

OPINION of the BOARD OF REVIEW
JOHNSON, STERN and SCHENKEN, 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that First Lieutenant Keller J. Wagner, Air Corps, Squadron "A", 326th Army Air Force Base Unit, MacDill Field, Florida, did, without proper leave, absent himself from his organization and station at Drew Field, Florida, from about 22 August 1945, to about 11 April 1946.

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

Specifications 1 and 2: (Nolle Prosequi).

Specifications 3 to 73 except Specifications 3, 4, 9, 22, 35, 41, 57, 60, 67, 73: (Nolle Prosequi).

Specification 3: In that First Lieutenant Keller J. Wagner, Air Corps, Squadron "A", 326th Army Air Force Base Unit, MacDill Field, Florida, having made and uttered to Roy Hamilton, Restaurant Manager, Hotel Mirasol, Tampa, Florida, on or about 15 August 1945, a certain check, in words and figures as follows, to wit:

THE NATIONAL BANK OF FORT SAM HOUSTON NO._____
San Antonio, Texas

Pay to the Order of
THE MIRASOL HOTEL 15 August 1945
$ 3.75

Three and 75/100 ..... Dollars

0-1699181 /s/ Keller J. Wagner
1st Lt., A.C.,

and by means thereof having received the sum of three dollars and seventy-five cents ($3.75), lawful money of the United States, cash and/or merchandise, did wrongfully fail to maintain a sufficient balance in the said NATIONAL BANK OF FORT SAM HOUSTON, San Antonio, Texas, or to arrange sufficient credit thereto for the payment of said check.

Specifications 4, 9, 22, 35, 41, 57, 60, 67, 73, same as Specification 3 with pertinent details as follows:

Spec. No.	Amount	Date	Payee
4	$25.65	20 Aug 45	Woolf Brothers, Tampa, Fla.
9	110.00	18 Sep 45	Sir Walter, Raleigh, N.C.
22	78.31	30 Oct 45	Hotel Heidelberg, Baton Rouge, La.
35	50.00	3 Dec 45	The First National Bank, Lincoln, Nebr.
41	75.00	10 Dec 45	The Cano Downs Clothing Co., Denver, Colo.
57	50.00	14 Jan 46	Citizens Natl. Trust & Sav. Bk., Riverside, Calif.
60	50.00	5 Feb 46	First Natl. Bk.,Salt Lake City
67	50.00	18 Mar 46	Mich. Natl. Bank, Battle Creek, Mich.
73	50.00	5 Apr 46	American Trust & Banking Co., Chattanooga

Accused pleaded guilty to Charge I and its specification and not guilty to the remaining specifications of Charge II and Charge II. He was found guilty of all Charges and specifications. No evidence of previous convictions 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 three and one-half years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. a. Evidence for the Prosecution.

On 22 August 1945, while attached unassigned to the Detachment of Patients, AAF Regional Station Hospital, Drew Field, Florida, accused absented himself without leave (Pros. Ex. 1) and remained in that status until he surrendered at the Station Hospital at Fort Oglethorpe, Georgia, on 11 April 1946 (Pros. Ex. 2).

During his unauthorized absence, accused cashed checks at Tampa, Florida; Raleigh, North Carolina; Baton Rouge, Louisiana; Lincoln, Nebraska; Denver, Colorado; Riverside, California; Salt Lake City, Utah; Battle Creek, Michigan; and Chattanooga, Tennessee, in amounts varying from $3.75 to $110.00. The ten checks involved in the specifications of which accused was found guilty amounted to $542.61, for which checks accused received equivalent values in cash or merchandise. All checks were drawn on the National Bank of Fort Sam Houston, San Antonio, Texas (Pros. Exs. 3-14, inclusive). All of the checks referred to above were returned unpaid (Pros. Ex. 3), accused's account in said bank having been closed on 18 October 1944 and never reopened (R. 39).

b. For the defense.

Major Hensley S. Johnson, Medical Corps, testified that one of accused's kidneys had been removed, and although he was not suffering pain he was not capable of doing much physical work as it would reduce his life expectancy (R. 40-43).

It was stipulated that accused's brother had written to all the holders of his checks, requesting that same be sent to him for payment (R. 44).

After being advised of his rights as a witness, accused elected to be sworn, and testified as follows:

He enlisted in the Royal Canadian Air Force in January 1941 and was commissioned a pilot officer 25 September 1941. He entered the United States Army on 16 May 1942 and was assigned as a flying instructor at the Greenville Army Air Base (R. 45). Upon entering the Army, he was fully qualified for flying duties. In October 1942, he suffered a sore throat and was given "one of the sulfonomides." Accused feels that a misunderstanding of his prescription resulted in his getting a quadruple dose of sulfa which precipitated in his kidneys and caused his future trouble. After taking two doses, accused suffered a "sulfonomide shock" which was the beginning of a long period of intermittent hospitalization which has continued to the present time (R. 46-47). In November 1943, his right kidney was removed and thereafter he was placed on limited

duty (R. 48). Altogether he had been hospitalized on 15 different occasions for periods of 10 days to six months (R. 47).

Accused appeared before a retiring board at Drew Field, Florida, on 24 January 1946 and again on 22 March 1946. The reconvened Board found accused "incapacitated by reason of the absence of the right kidney * * * not an incident of service * * * originated prior to entrance upon active duty." The Surgeon General disagreed with these findings and recommended that his incapacity be considered an incident of service (Def. Ex. A) and a third hearing was ordered to be held at Drew Field (R. 49). Accused's relations with the Board were not "harmonious"; the Hospital Commanding Officer and his alternate were determined to see that accused "got the least presentation of the case" and accused was told that he could not present an argument before the Board (R. 49-50). After the last hearing, accused was informed that the Board had "held" to its old opinion (R. 52) and he requested leave during the review of the proceedings by the Surgeon General. When his request was denied he became a "victim of acute depression", his "behavior was extremely erratic" and he was "restricted to the hospital grounds for a period of 6 weeks for no malfeasance whatsoever". "The whole period, July and August were exceptionally hazy" and he could not recall going absent without leave. About the 27th, 28th or 29th of August, he was in St. Petersburg, Florida, and realized that he was absent without authority (R. 50-52). His initial desire was to "get out of this command" and his feeling "well * * * another day will not hurt" kept him absent. While at Chattanooga in April 1946, he became ill and was taken to the Fort Oglethorpe Station Hospital (R. 53).

Regarding the check charges, accused testified that his father died in 1940 (R. 53) and his share in the estate was over $8,000 (R. 54). His brothers handled the estate and accused understood that the monies accruing to him would be kept at the Union National Bank, Chandler, Oklahoma. Accused did not draw on these funds until sometime in July or August, when he phoned his brother, Basil Wagner, to send his accrued funds, which he believed to be around $6,000, to the National Bank of Fort Sam Houston (R. 54-55). Later, he "heard from a third party" that the money had been deposited as requested. He wanted his account transferred from the bank at Chandler, Oklahoma, because his brother's father-in-law was president of that bank; he "knew it was going to cost me considerable money" and he did not want his home town to be "gossiping" about his being a "waster" (R. 55). He "was living in dread of apprehension" and was trying to regain his "mental vigor and strength" so that he could turn in. He went from place to place, saying "I will turn in here" but kept postponing his actual surrender (R. 55). Each and every time he wrote a check, he believed that he had sufficient funds

to cover same and he did not know of any difficulty about these checks until he turned in at Fort Oglethorpe (R. 56). During his travels, he had not communicated with his bank or requested a statement because "the MPs would have been after me right away." After his surrender, he called upon his brother for an explanation why the money had not been sent to the bank in San Antonio. The latter explained that there was a little delay and before the money was forwarded, he learned of accused's absence without leave; he could not understand accused's conduct and thought someone might be "misusing" him and therefore, he did not transfer the funds to the San Antonio bank (R. 57). Since that time, accused's brother, R. L. Wagner, has written to all holders of checks issued by accused, notifying them to send same to the Union National Bank at Chandler, Oklahoma, for collection and every check has been paid in full; if not, adequate funds are on deposit to pay same (R. 44, 57).

On cross-examination accused stated that he wrote approximately $6,000 in checks during his absence without leave (R. 72); that he wrote different Army addresses below his signature on several checks because he "had intentions" of going to the posts so indicated (R. 62-63).

4. The offense of absence without leave was proved by accused's plea of guilty, his admission on the stand, and the extract copies of the morning reports (Exhibits 1 and 2) showing initial absence without leave and termination thereof by surrender.

The offenses charged under Specifications 3, 4, 9, 22, 35, 41, 57, 60, 67 and 73, involving the issuance of checks and wrongful failure to maintain or establish sufficient funds to provide payment therefor, were proved by stipulations (R. 39, Exs. 3-14) and accused's admission that he closed his account at the bank and never re-opened it (R. 64); that thereafter he drew the checks in question and that all of said checks were returned by the bank unpaid. This stipulation (Ex. 3) admits all elements of the offenses charged. Accused's defense was that he believed that his brother had deposited sufficient funds in the bank to pay the checks upon presentment. This explanation was not accepted by the court. Considering accused's failure to re-open his account, his failure to contact the bank for a period of more than eight months during which he issued checks for approximately $6,000, his irresponsible rambling over the country listing different and false duty stations on the checks issued and his inconclusive account of the monies supposedly due him the court was clearly justified in not accepting his explanation.

The negotiation by an officer of worthless checks without intent to defraud is conduct of a nature to bring discredit upon the military service in violation of Article of War 96 (CM 224286, Hightower, 14 BR 97,

1 Bull. JAG 215).

A member of the military service "is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect" (CM 249232, Norren, 32 BR 95, 102; 3 Bull. JAG 290; cited with approval in CM 275488, Wagner, 48 BR 51). The burden referred to was not sustained by accused in this case.

Although witnesses were called as to two checks issued by accused, practically the entire case against him was established by stipulations. Ordinarily, stipulations amounting to a confession of guilt should not be received when the accused has pleaded not guilty, but in the instant case, his theory of defense was not inconsistent with the facts contained in the stipulations and therefore, he was not prejudiced by their acceptance by the court (CM 275648, Creighton, 48 BR 117, 123; CM 317140, Rust).

5. Mental Condition.

Prior to trial accused was examined at the Pratt General Hospital on 30 July 1946 and found to be sane and responsible. The doctor considered accused a constitutional psychopath and stated "it is possible but not probable that he was suffering from an alcoholic psychosis" at the time of the alleged offense. This information was not presented to the court as no issue of accused's mental capacity was raised at the trial.

Prior to approval of the sentence however the reviewing authority again transferred accused to the Pratt General Hospital and requested that a Board of Officers be convened to determine accused's mental condition. On 14 January 1947 the Board so appointed found accused sane and responsible, and commented as follows:

> "The inconsistent statements of this officer are not looked upon with seriousness and are not considered reasons for believing him insane or mentally incompetent. These symptoms were investigated in detail and it was felt they were probably secondary to alcoholic indulgence."

6. Accused served in the Royal Canadian Air Force from 25 September 1941 to 15 May 1942, when he was repatriated and commissioned as a first

to cover same and he did not know of any difficulty about these checks until he turned in at Fort Oglethorpe (R. 56). During his travels, he had not communicated with his bank or requested a statement because "the MPs would have been after me right away." After his surrender, he called upon his brother for an explanation why the money had not been sent to the bank in San Antonio. The latter explained that there was a little delay and before the money was forwarded, he learned of accused's absence without leave; he could not understand accused's conduct and thought someone might be "misusing" him and therefore, he did not transfer the funds to the San Antonio bank (R. 57). Since that time, accused's brother, R. L. Wagner, has written to all holders of checks issued by accused, notifying them to send same to the Union National Bank at Chandler, Oklahoma, for collection and every check has been paid in full; if not, adequate funds are on deposit to pay same (R. 44, 57).

On cross-examination accused stated that he wrote approximately $6,000 in checks during his absence without leave (R. 72); that he wrote different Army addresses below his signature on several checks because he "had intentions" of going to the posts so indicated (R. 62-63).

4. The offense of absence without leave was proved by accused's plea of guilty, his admission on the stand; and the extract copies of the morning reports (Exhibits 1 and 2) showing initial absence without leave and termination thereof by surrender.

The offenses charged under Specifications 3, 4, 9, 22, 35, 41, 57, 60, 67 and 73, involving the issuance of checks and wrongful failure to maintain or establish sufficient funds to provide payment therefor, were proved by stipulations (R. 39, Exs. 3-14) and accused's admission that he closed his account at the bank and never re-opened it (R. 64); that thereafter he drew the checks in question and that all of said checks were returned by the bank unpaid. This stipulation (Ex. 3) admits all elements of the offenses charged. Accused's defense was that he believed that his brother had deposited sufficient funds in the bank to pay the checks upon presentment. This explanation was not accepted by the court. Considering accused's failure to re-open his account, his failure to contact the bank for a period of more than eight months during which he issued checks for approximately $6,000, his irresponsible rambling over the country listing different and false duty stations on the checks issued and his inconclusive account of the monies supposedly due him the court was clearly justified in not accepting his explanation.

The negotiation by an officer of worthless checks without intent to defraud is conduct of a nature to bring discredit upon the military service in violation of Article of War 96 (CM 224286, Hightower, 14 BR 97,

1 Bull. JAG 215).

A member of the military service "is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect" (CM 249232, Norren, 32 BR 95, 102; 3 Bull. JAG 290; cited with approval in CM 275488, Wagner, 48 BR 51). The burden referred to was not sustained by accused in this case.

Although witnesses were called as to two checks issued by accused, practically the entire case against him was established by stipulations. Ordinarily, stipulations amounting to a confession of guilt should not be received when the accused has pleaded not guilty, but in the instant case, his theory of defense was not inconsistent with the facts contained in the stipulations and therefore, he was not prejudiced by their acceptance by the court (CM 275648, Creighton, 48 BR 117, 123; CM 317140, Rust).

5. Mental Condition.

Prior to trial accused was examined at the Pratt General Hospital on 30 July 1946 and found to be sane and responsible. The doctor considered accused a constitutional psychopath and stated "it is possible but not probable that he was suffering from an alcoholic psychosis" at the time of the alleged offense. This information was not presented to the court as no issue of accused's mental capacity was raised at the trial.

Prior to approval of the sentence however the reviewing authority again transferred accused to the Pratt General Hospital and requested that a Board of Officers be convened to determine accused's mental condition. On 14 January 1947 the Board so appointed found accused sane and responsible, and commented as follows:

> "The inconsistent statements of this officer are not looked upon with seriousness and are not considered reasons for believing him insane or mentally incompetent. These symptoms were investigated in detail and it was felt they were probably secondary to alcoholic indulgence."

6. Accused served in the Royal Canadian Air Force from 25 September 1941 to 15 May 1942, when he was repatriated and commissioned as a first

lieutenant in the United States Army Air Forces. From May until October 1942 he served as a flying instructor in the United States and in the latter month a medical history of approximately 15 hospital admissions and more than one-half of his Army career spent in Army hospitals was initiated. Since October 1942 he has been of no value to the Army. Accused appeared before a Reclassification Board on 22 December 1944 which recommended that he be separated from the service. On 26 February 1945 the Secretary of War directed that the Reclassification proceeding be suspended pending action by the Army Retiring Board before which accused appeared on 24 January 1945. He was found not incapacitated for active duty but was diagnosed as having only one kidney and deficient in minimum physical requirements. The record was returned by The Surgeon General, and the Board, reconvening on 22 March 1945, found accused was incapacitated, because of the absence of the right kidney, due to a Nephrectomy for hypertrophy of right ureter; that the disability existed prior to service and was not an incident of service. The record was returned by The Surgeon General and the Board reconvened on 28 June 1945, when it reiterated its opinion that the incapacity existed prior to service and was not an incident of service. The Surgeon General then agreed with the Board and transmitted the proceedings to The Adjutant General, who forwarded the record to the Secretary of War's Separation Board, and on 8 September 1945 this latter named Board ordered that accused be discharged under the provisions of AR 605-230 and Section 2 of the Act of 13 December 1941 (55 Stat. 799; Sec. III Bull. No. 37, WD 1941); that accused not be granted a Certificate of Service or accrued leave and that the proceedings of the Army Retiring Board be filed without action thereon. Prior to the order of the Secretary of War for the accomplishment of accused's separation from the service under the provisions of AR 605-230 accused went absent without leave, from which action the present proceedings developed. Accused is thirty-three years of age and married.

6. The court was legally constituted and had jurisdiction over the accused and the subject matter of the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon convictions of a violation of either the 61st or the 96th Article of War.

W. H. Johnson, Jr., Judge Advocate.

Joseph J. Stern, Judge Advocate.

[illegible], Judge Advocate.

JAGQ - CM 319556 1st Ind

WD, JAGO, Washington 25, D. C. JUN 1 6 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 Keller J. Wagner (O-1699181), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for seven and one-half months, in violation of Article of War 61 (Spec., Charge I), and of wrongfully failing to maintain a sufficient balance in bank to meet his checks amounting to $542.61, in violation of Article of War 96 (Specs. 3, 4, 9, 22, 35, 41, 57, 60, 67, 73, Charge 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 three and one-half 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.

4. On 22 August 1945, while attached unassigned to the Detachment of Patients, AAF Regional Station Hospital, Drew Field, Florida, accused absented himself without leave and remained in that status until he surrendered at the Station Hospital at Fort Oglethorpe, Georgia, on 11 April 1946.

During his unauthorized absence, accused cashed checks at Tampa, Florida; Raleigh, North Carolina; Baton Rouge, Louisiana; Lincoln, Nebraska; Denver, Colorado; Riverside, California; Salt Lake City, Utah; Battle Creek, Michigan; and Chattanooga, Tennessee, in amounts varying from $3.75 to $110.00. The ten checks involved in the specifications of which accused was found guilty amounted to $542.61, for which checks accused received equivalent values in cash or merchandise. All checks were drawn on the National Bank of Fort Sam Houston, San Antonio, Texas. All of the checks referred to above were returned unpaid, accused's account in said bank having been permanently closed on 18 October 1944.

5. Accused is 33 years of age. He joined the Royal Canadian Air Force in January 1941; entered the United States Army in May 1942 and has been under medical care almost continuously since October 1942. He has lost one kidney. A Reclassification Board recommended his separation on 22 December 1944 but action was suspended pending accused's appearance before an Army Retiring Board. Final action was delayed until September 1945 when it was ordered that he be separated under the provisions of AR 605-230 (Reclassification), that he not be granted a certificate of service or accrued leave, and that the proceedings of the Retiring Board be filed without action. Prior to accomplishment of this order, accused went absent without leave. The attached record of trial is the result of charges based on that unauthorized absence and the checks were issued during such absence. In addition to checks in the amount of $542.61 described in the specifications of which accused was found guilty, he issued numerous other bad checks which he estimated amounted to almost $6,000.

6. The defense counsel, president, and law member of the court have submitted a recommendation for clemency based on accused's physical condition. If the accused is required to serve any period of confinement, it is highly probable that he will spend the greater portion of that period in the hospital. He is not capable of performing hard labor.

I recommend that the sentence be confirmed but in view of the physical condition of accused recommend that the confinement and forfeitures be remitted, and that the sentence as thus modified be carried into execution.

7. Consideration has been given to a letter from Senator Elmer Thomas and also to a letter from R. L. Wagner, brother of accused, to Senator Thomas.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls.
1. Record of Trial
2. Form of action
3. Ltr fr Sen Thomas

(G.C.M.O. 231, 26 June 1947).

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

JAGK - CM 319573

13 MAR 1947

UNITED STATES v. Sergeant WILLIAM A. O'BRIEN (RA 42190392), Headquarters Detachment, Peiping Headquarters Group, Peiping, China.	ARMY ADVISORY GROUP Trial by G.C.M., convened at Peiping, China, 12 and 13 November 1946 and 4 January 1947. Sentence: To forfeit thirty-five dollars ($35.00) of his pay per month for six months.

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 in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence. The record 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 charges and specifications:

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Sergeant William A. O'Brien, Headquarters Detachment, Peiping Headquarters Group, Peiping, China, did, in conjunction with Private 1st Class Robert C. Steffler, United States Marine Corps, at Tangku, China, on or about 14 August 1946 wrongfully strike Fu Lien Shan on the face and head with his hands.

He pleaded not guilty to both charges and their specifications. He was found not guilty of Charge I and its specification, guilty of Charge II and guilty of the specification to Charge II "except the words 'strike Fu Lien Shan on the face and head with his hands' and substituting therefor, respectively, the words 'throw him into the river', of the excepted words, not guilty, of the substituted words, guilty." No evidence of any previous conviction was introduced. He was sentenced to forfeit thirty-five dollars of his pay per month for six months. The reviewing authority approved the sentence and ordered it executed. The result of trial was published in General Court-Martial Orders No. 3, Army Advisory Group, APO 909, 18 January 1947.

3. As a result of the exceptions and substitutions made by the court,

the specification of which accused was found guilty reads as follows:

> Specification: In that Sergeant William A. O'Brien, Headquarters Detachment, Peiping Headquarters Group, Peiping, China, did, in conjunction with Private 1st Class Robert C. Steffler, United States Marine Corps, at Tangku, China, on or about 14 August 1946 wrongfully throw him into the river.

It is a fundamental principle of law that the Government's pleading in a criminal case, be it an indictment, complaint or a specification in court-martial proceedings, must charge a violation of law. If it does not do so a finding of guilty under such defective pleading will be of no legal effect whatsoever no matter what crime or crimes the evidence may show accused has committed (CM 316886, Chaffin; CM 318983, Chapman).

In CM 310602, Skinner, 32 BR (ETO) 297, accused was tried upon a specification alleging that he "did *** with intent to do her bodily harm, commit an assault upon Christina Kospszak, Polish displaced person, by willfully, and feloniously grabbing the said Christina Kospszak on the neck with hands." He was found guilty thereof except the words "with intent to do her bodily harm, commit an assault upon Christina Kospszak, Polish displaced person, by willfully and feloniously grabbing the said Christina Kospszak," substituting therefor the words "willfully grab." The Board of Review said:

> "The court, by exceptions and substitutions, apparently intending to find accused guilty of a simple assault because of his drunken condition, found nothing more than that accused, at the time and place alleged, did 'willfully grab on the neck with hands,' in violation of Article of War 96. But such substituted specification clearly fails to state any offense under Article of War 96 or under any other article of war. It does not appear therefrom that accused grabbed or otherwise assaulted any named or described person, an essential element of the offense (MCM 1928, par. 149l, pp. 177-178). *** Accused was acquitted of all material allegations excepted by the court in its findings ***. Since the substituted specification of which accused was found guilty does not state an offense, the findings of guilty cannot be sustained ***."

The Skinner case presents an obvious and almost exact parallel to the instant case. Accordingly, we are of the opinion that the substituted specification of which accused was found guilty herein likewise fails to state an offense under the 96th or any other Article of War and that the findings of guilty thereunder may not be sustained.

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

Lehester D. Silvus, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Ashcroft, Judge Advocate

JAGK - CM 319573 1st Ind
WD, JAGO, Washington 25, D.C. MAR 4 1947

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 the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Sergeant William A. O'Brien (RA 42190392), Headquarters Detachment, Peiping Headquarters Group, Peiping, China.

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, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which 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 this recommendation, 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. 104, 19 March 1947)

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

JAGK - CM 319591

20 MAY 1947

U N I T E D S T A T E S)	FLYING DIVISION, AIR TRAINING COMMAND
)	
v.)	Trial by G.C.M., convened at Barksdale Field, Louisiana, 17 and 18 December 1946. Dismissal and confinement for two years.
Second Lieutenant JOHN M.) POGUE (0-2051286), Medical) Administrative Corps)	

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. Accused was tried upon and, by exceptions and substitutions, was found guilty of the following charges and specifications:

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

Specification: In that Second Lieutenant John M. Pogue, Medical Administrative Corps, did, at Barksdale Field, Louisiana, on or about 7 August 1946, feloniously embezzle by fraudulently converting to his own use:

17 10-Inch Records, Victrola, of a value of about	$12.75
17 Albums, Victrola Records, of a value of about	76.50
2 14-Inch Records, Victrola, of a value of about	2.00
12 Records, Victrola, Symphony, Assorted, of a value of about	12.00

of a total value of about one hundred three dollars and twenty-five cents ($103.25), the property of the Convalescent Training Department of Station Hospital, Barksdale Field, Louisiana, entrusted to him by virtue of his office, by the said Station Hospital, Barksdale Field, Louisiana.

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

Specification: In that Second Lieutenant John M. Pogue, Medical Administrative Corps, did, at Barksdale Field, Louisiana, on or about 7 August 1946, knowingly and willfully misappropriate and apply to his own use and benefit:

81	Armed Forces Radio Recordings, of a value of about	$972.00
17	V-Disk, Overseas Recordings, of a vlue of about	8.50
1	each A-2 Flying Jacket, of a value of about	8.15
2	each Summer Flying Suits, of a value of about	21.38
1	each Jacket, Type AN-J-4, value of about	33 .28
1	each Winter Flying Jacket, B-10, of a value of about	19.86
1	each Winter Flying Cap, B-2, of a value of about	1.30
1	pair Winter Flying Gloves, A-10, of a value of about	1.75
1	pair Winter Flying Shoes, A-6, of a value of about	10.00
1	each Convalescent Training Suit, of a value of about	3.50
1	each Blanket, Hospital, White, of a value of about	9.75
1	each Kit, First Aid, Aeronautic, with Morphine Syrette, of a value of about	3.45

of a total value of about one thousand ninety-two dollars and ninety-two cents ($1092.92), property of the United States, furnished and intended for the military service thereof.

No evidence of any previous conviction was introduced. Accused was sentenced to be dismissed the service, to pay the United States a fine of ten thousand dollars, to be confined at hard labor at such place as the reviewing authority might direct for ten years and to be further confined at hard labor until said fine is so paid, but not for more than one year in addition to the ten years hereinbefore adjudged. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and confinement at hard labor for a period of two years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

From 19 February to 8 April 1946, accused was "medical" supply officer and from 25 May 1946 to 19 July 1946 he was convalescent training officer of the station hospital at Barksdale Field, Louisiana. As convalescent training officer he had supervision of the "sound room" of the Convalesant Training Department of the hospital from which phonograph records and radio transcriptions were broadcast throughout the institution. Accused had custody and control of these phonograph records and transcriptions. Accused was not on a flying status and had no duties which would require that he have articles of flying equipment in his possession. Sometime prior to 19 July 1946, accused had received orders to report to a separation center for separation from the service, but these orders were cancelled due to accused being hospitalized. However on 19 July he had obtained a property clearance from the station hospital at Barksdale Field. Accused would not have been a captain in the Reserve on terminal leave (R. 12, 19, 50, 51, 55, Court's Ex. A; Def. Ex. 4).

From about the end of May 1946 until he became a patient in the hospital approximately six weeks later, accused shared a set of Government quarters at Barksdale Field with Lieutenant Edward G. Merhige. These quarters consisted of three rooms, a bedroom, living room and a "day room". The "day room" separated the other two rooms. There were individual wall lockers in the "day room", one of which was used by accused, a closet in the bed room used by both officers, and a closet in the living room which was used entirely by accused with the exception that Lieutenant Merhige had an empty B-4 bag therein. About two weeks before accused was hospitalized, Lieutenant Merhige saw accused pack about three wooden crates and three footlockers, all of which were placed in the day room. When the provost marshal and his party inspected the quarters on 7 August 1946, Lieutenant Merhige separated his clothing and equipment from that belonging to accused and pointed out the boxes and footlockers (R. 58-62).

On 7 August 1947, the provost marshal of Barksdale Field, accompanied by the executive offiber of the station hospital and a criminal investigator, searched the Government quarters occupied by accused and Lieutenant Merhige. Accused was in the hospital at this time but Lieutenant Merhige was present. The post commander had knowledge of the proposed search of accused's quarters and had authorized his executive officer to determine the time of the search. Searches were generally conducted by the provost marshal or his representative (R. 36-38, 47). The searching party found sixty-four 10 inch records, "several" albums of phonograph records and twelve Victrola symphony records in the closet of the living room (R. 38, 47). Eighteen 10-inch records were admitted in evidence as prosecution's exhibit C, two 14-inch records as prosecutions exhibit D, twelve Victrola symphony records as prosecution's exhibit E, and twenty-four albums of Victrola records as prosecution's exhibit F (R. 12-15). In the "day room" were three wooden boxes, one metal footlocker, one wooden footlocker, and one Air Corps packing case. The boxes had been nailed shut and the footlockers were locked. There were no markings on the boxes. In these containers were found "a number of" Victrola record albums, 81 Armed Forces Radio Recordings, 17 V-Disc Overseas Recordings, one Jacket, Type A-N-J-4, one Winter Flying Jacket B-10, one Winter Flying Cap B-2, one pair of Winter Flying Gloves A-10, one pair of Winter Flying Shoes, A-6, one Convalescent Training Suit and one White Hospital Blanket (R. 39,40,52). These items, with the exception of the record albums, were introduced in evidence as prosecution's exhibits G, H, I, M, N, O, P, Q, and R, respectively (R. 28, 31-35). An A-2 Flying Jacket and a Summer Flying Suit were found in a wall locker in the "day Room", which items were admitted in evidence as prosecution's exhibits J and K, respectively (R. 29, 39). A stencil stamped "Capt John M Pogue 235 South Arlington Ave Springfield, Ohio USA" was found near a box containing the Victrola records, flying equipment and various items of personal clothing (R. 51,52, Court's Ex. A). There was white paint similar to that on the stencil on the box (R. 46).

Accused had received letters addressed to "Captain" John M. Pogue and lived in Springfield, Ohio (R. 61, 62).

Lieutenant Merhige had observed accused packing "the Victrola records," the flying shoes and some flying gloves and had seen him stencil a box marked Defense Exhibit 1 on the top. The top was apparently missing when the box was called to Lieutenant Merhige's attention at the trial. He identified two other boxes by means of "these painted places" as having also been used by accused (R. 62-64).

All the articles found in the quarters occupied by accused and Lieutenant Merhige which were not claimed by the latter were taken to the provost marshal's office where they were sorted and itemized (R.39). Intermingled with the alleged Government property packed in the boxes and footlockers were various items of a personal nature. A separate list of these personal effects was made and they were turned over to accused who signed for them as being his property (R. 46, 52; Pros. Ex. U). A consolidated list was made of the remaining property but this list was not broken down to show specifically in what container or in what location in the quarters each particular item was discovered (R. 54, 58). It could not be determined which "records" had been found in the boxes (R. 48,53). The property retained by the provost marshal was brought to the courtroom for the trial (R. 39).

In addition to the Government exhibits heretofore mentioned, a second Summer Flying Suit (Pros. ex L) and an Aeronautical First Aid Kit (Pros. Ex. S) were admitted in evidence (R. 30,38). Prosecution's exhibits C through S were the "identical" property which had been recovered from the Government quarters occupied by accused (R. 56).

After the search, accused had been placed under arrest and, not being advised of his rights under the 24th Article of War, "made a voluntary, spontaneous statement to the effect that some of the records in question had been taken by him to play in his quarters from the phonograph library at the hospital and that some of the Government equipment, to-wit, some of the flying equipment, was surplus on his records at Supply" (R. 43).

At the time they were accepted in evidence, all but one (R. 20,21) of the eighteen 10-inch records contained in prosecution's exhibit C were marked with a number painted thereon with white paint and attached to some of the records were index cards which apparently bore a notation of the title of the record and the number which had been painted thereon (R. 13). These index cards, or some of them, appear in the record of trial as prosecution's exhibits C-2, C-4 and "C-." The substituted description of prosecution's exhibit C appearing in the record of trial does not indicate what numbers had been painted on the records contained in such exhibit nor does the record of trial contain any evidence as to what these numbers may have been. Also, there is no evidence as to how

the index cards became attached to the phonograph records. An enlisted man who had charge of the "sound room" at the station hospital under the supervision of accused testified that when phonograph records were received they would be marked with a number with white paint and an index card would be made out for the property files bearing the title of the record and its assigned number. The markings on the phonograph records in prosecution's exhibit C were similar to the markings used in the "sound room" and two of the attached index cards had been made out by him (R. 12, 14, 21, 53). The executive officer of the station hospital had initialed the index cards attached to the phonograph records in prosecution's exhibit C (R. 45).

The two 14- inch records admitted in evidence as prosecution's exhibit D were marked respectively "X8" and "X14" with white paint and index cards bearing the titles and numbers of these records were attached thereto. The cards and markings were similar to those used in the "sound room" (R. 14). The twelve Victrola symphony records admitted in evidence as prosecution's exhibit E had markings similar to those placed on like records in the Convalescent Training Department and some of these records also had index cards attached (R. 14-16). The same was true of the 24 Victrola record albums contained in prosecution's exhibit F (R. 17). Defense counsel objected to the admission in evidence of the index cards attached to prosecution's exhibits C to F (R.13).

The V-Disc, Overseas Recordings contained in prosecution's exhibit G each bore the notation that "This record is the property of the United States Government and use for radio or commercial purposes is prohibited" and that it had been produced by the Special Services Division, Army Service Forces. The "sound room" in the station hospital had recordings similar to these (R. 17). The Armed Forces Radio Recordings admitted in evidence as prosecution's exhibit H each contained the statement that

> "This transcription is the property of the United States Government, and must be returned to the Armed Forces Radio Service upon completion of use. Its use or reproduction in whole or in part for commercial or other purpose is strictly prohibited, without consent of the Armed Forces Radio Service."

Similar recordings had been in the possession of the "sound room" (R. 18). There were no markings on the recordings in either exhibit G or exhibit H which would specifically indicate that they belonged to the station hospital (R. 21). The court took judicial notice of Section IV, War Department Circular No. 2, 3 January 1946, providing that all radio transcriptions disseminated by the Armed Forces Radio Service remain the property of the War and Navy Departments and that such transcriptions are not to be retained by private individuals (R.11).

The articles of flying equipment admitted in evidence as prosecution's exhibits I to P, inclusive, with the exception of exhibit L, a Summer Flying Suit, each were marked with a manufacturer's stamp indicating that they had been made under contract with the United States Government and

that they were Government property. Exhibit L had no such markings but appeared to be a Summer Flying Suit, ANS 31, of a type similar to that used in the Army Air Forces (R. 28-33). Prosecution's exhibit Q, a Convalescent Training Suit, coat and pants, was marked with the United States Medical Corps stamp as was the White Hospital Blanket, prosecution's exhibit R. Prosecution's exhibit S, an Aeronautical First Aid Kit, was marked with "U.S." on the cover (R. 34, 35).

The values of the items of clothing and equipment introduced in evidence as prosecution's exhibits I to S, inclusive, were established by appropriate Government price lists (R. 28-35). The program director of a radio station who claimed to know the market value of phonograph records testified that "he might not get fifteen cents" apiece for the phonograph records contained in prosecution's exhibit C and that he did not know their "fair market value" in their present condition. He did not know the second hand market value of any of the records or record albums in prosecution's exhibits C to F inclusive. When a record is used once, it is secondhand and a record can be played several times before it shows signs of wear (R. 24,25). The recordings admitted in evidence as prosecution's exhibits G and H were not phonograph records but electrical transcriptions. The value of such recordings remains the same, new or used, for they are purchased on a royalty basis, the cost depending on the talent taking part in the program transcribed and the number of times the transcription is broadcast. A fair market price, or fee, for using each recording in exhibit H one time would be from $25 to $30 and for similarly using each recording in exhibit G from $2.50 to $7.50, depending on the talent (R. 24-26).

Evidence for the Defense

The manager of the Post Exchange, Barksdale Field, testified that he had at one time supervised the sale of surplus Army material at the airfield. These sales first took place about a year before the trial but are no longer being held. Items similar to prosecution's exhibits M (B-10 Flying Jacket), I (Winter Flying Jacket AN-J-4), J (A-2 Flying Jacket) and P (Winter Flying Boots) were sold to military personnel and the labels indicating that such articles were property of the United States Government were not torn off prior to delivery to the purchaser. He did not sell any convalescent training suits, medical blankets, first aid kits or phonograph records. He did not remember selling anything to accused but sales girls had handled the actual sales to the customers. Receipts describing the property sold were given for every purchase. Some of the property sold appeared to be new and some appeared to be used (R. 77-79). Captain Clifton L. Bray, Air Corps, testified that he had purchased a pair of flying boots "identical" with those marked prosecution's exhibit P at a sale of surplus materials held at Barksdale Field. The "tags" had not been removed. He was given a receipt for his purchase which he still retained (R. 80-81).

Three boxes were admitted in evidence as defense exhibits 1, 2 and 3, defense counsel stating that "These offerings are made for the purpose of showing that there is no wording stenciled, painted, printed, or otherwise in any manner connecting the accused with them" (R. 72).

Accused's WD AGO Form No. 66-3 was admitted in evidence as defense exhibit 4 showing accused's average numerical efficiency rating for the period from 6 May 1945 to 25 July 1946 to be 5.0 (R. 72). The following officers stationed at Barksdale Field who had observed accused in the performance of his duties or who had associated with him socially testified as to his excellent reputation for honesty and integrity (R. 72-77):

Colonel Harold E. Schneider, Post Surgeon
Lieutenant Colonel Robert D. Whittington, Jr., Chief of Surgery, Station Hospital
Lieutenant Colonel Bernard C. Hammon, Base Dental Surgeon
First Lieutenant Egbert H. Luckey, Chief of Medical Service, Station Hospital
First Lieutenant Alvin T. Held, Assistant Surgeon, Station Hospital

The defense introduced in evidence as Defense Exhibit 5 fifty-seven letters from various persons who had known accused in civilian life and who wrote concerning accused's good character.

Mr. Francis Poque, 235 South Arlington Avenue, Springfield, Ohio, the brother of accused, testified that accused was twenty-one years of age. Accused graduated from Culver Military Academy and entered the service immediately thereafter. Accused wanted to be a soldier, that "was his highest ideal", but he knew he could never have a military career because he had lost one eye when he was about four years old (R. 81-83).

Mr. A. G. Samuelson, President of the A. G. Samuelson Company, Springfield, Ohio, and Mr. Chester E. Baker, general manager of the Springfield City Lines, Inc., of Springfield, Ohio, each testified as to the excellent reputation of accused in his home community (R. 84-87).

Accused, having been advised of his rights as a witness, elected to remain silent (R. 88).

4. Special Matters

Defense counsel moved to dismiss Charge II and its specification on the ground of duplicity in that the specification alleged the commission of two offenses, misappropriation and misapplication, which offenses were claimed to be separate and distinct. After the law member, subject to objection by any member of the court, refused this motion, the

defense further moved that the prosecution be made to elect whether it would proceed on the theory of misappropriation or that of misapplication. This motion was likewise overruled by the law member subject to objection by any member of the court (R. 9).

- The specification to Charge II alleged that accused did knowingly and willfully misappropriate and apply to his own use and benefit certain items of Government property. We think it obvious that the word "apply" was used by the pleader simply to describe the manner in which accused allegedly misappropriated such property. The question here presented then is whether a misapplication can be considered as lesser than and included in a particular misappropriation, that is, whether misapplication is one of the ways in which a misappropriation can be accomplished. In CM 243287, Poole (27 BR 321), the Board of Review said:

> "Misappropriating means devoting to an unauthorized purpose. Misapplication is where such purpose is for the party's own use or benefit. * * * an accused may be guilty of either misappropriation or misapplication of property, whether he was in original lawful possession thereof or obtained it by trespass. * * * The gist of the offense of misappropriation, and misapplication, is the application of the property to an unauthorized and wrongful purpose."

It would appear, therefore, that it is entirely proper to charge an accused with having misappropriated property by applying it to his own use, as was, in effect, done here and that the rulings of the law member on the motions under discussion were legally correct. Furthermore, the granting of the motion to elect was at least impliedly prohibited by the provisions of paragraph 71a of the Manual for Courts-Martial, 1928.

The defense next urged a motion for a bill of particulars as to the specifications of Charges I and II on the ground that as drawn they were too vague and indefinite to enable accused to properly prepare his defense. The specifications listed each article allegedly embezzled and misappropriated, describing them by means of what appeared to be official Army nomenclature, but the defense requested information as to where each article was found. The defense also desired to be informed by the bill of particulars whether the items listed in the specification to Charge I were Government property and whether the alleged owner of these items, the Convalescent Training Department of the Barksdale Field Station Hospital was a Government instrumentality and, if not, whether it was a legal entity. This motion for a bill of particulars was overruled by the law member subject to objection by any member of the court (R. 10).

The bill of particulars had never been authorized in courts-martial procedure (CM 257469, Mackay, 37 BR 129, 140). Even if a request for such a bill were proper, it would not have been necessary to require the prosecution to enlarge the specifications by furnishing particulars as

to where each article allegedly embezzled or misappropriated had been discovered by the Government. Only sufficient facts to include all the elements of the offense sought to be charged need be pleaded (MCM, 1928, par. 29a) and the office of a bill of particulars is not to compel the Government to disclose its evidence, but to give accused such information in addition to that contained in the Government's pleadings as law and justice require that he should have in order to enable him fully to understand the crime with which he is charged and to prepare his defense (Commonwealth v. Jordan, 207 Mass. 259, 265). The specification to Charge I having been laid under the 93rd Article of War, the questions as to whether the property therein listed belonged to the Government and as to whether the Convalescent Training Department was a Government instrumentality were immaterial (see CM 199737, Taft, 4 BR 163). Also, the alleged owner in an embezzlement specification need not be a legal entity (CM 301840, Clarke, 24 BR (ETO) 203, 210; CM 272588, McGovern, 46 BR 305, 310; CM 276298, McNeil, 48 BR 287, 299).

The defense then, before the taking of evidence and before pleading to the issues, moved to suppress certain evidence, specifically, the items listed in the specifications to both charges, on the ground that such articles had been taken from the quarters of accused by unreasonable and unlawful search and seizure without a warrant by agents of the Government. This motion was overruled by the law member, subject to objection by any member of the court, on the ground that the Base Commandant had the power to authorize a search of Government quarters (R. 10). Even though the prosecution had not, at the time this motion to suppress evidence was made, offered any evidence whatsoever in the case, the motion is not to be considered premature for this reason and should have been determined as an interlocutory matter (United States v. Alabama Highway Express, 46 F. Supp. 450; Price v. Johnston, 125 F. (2d) 806; Rochia v. United States, 78 F. (2d) 966). No evidence on the motion, however, was offered by either side prior to the ruling of the law member thereon. The question was again raised, and properly so (Distefano v. United States, 58 F (2d) 963; Bell v. United States, 9 F. (2d) 820), by objections of the defense to testimony as to where the contested evidence was found when such testimony was offered during the course of the trial (R. 36,37). Evidence was thereupon adduced by the prosecution as to the authority for the search, from which it appeared that the post commander had knowledge of the proposed search of accused's quarters and had authorized his executive officer to determine the time thereof. The search was conducted by the post provost marshal.

A search of Government quarters, authorized by the commanding officer having jurisdiction over the locality where such quarters are situated, is legal. Such authorization is the equivalent of a search warrant, the commanding officer being responsible for and having control over the personnel and property in his charge. It is obvious that the commanding officer need not make the search himself nor need he prescribe the specific manner of conducting it. These administrative details may properly be delegated to those subordinates whose duty it is to carry

out the commander's general directives in this respect (CM 248379, Wilson, 31 BR 231, 235; CM 264067, Utermoehlen, 7 BR (ETO) 117, 127). The search in question was, therefore, legal and the evidence relating to the results of the search was admissible.

At the close of the prosecution's case the defense requested that the court "charge itself" with certain written propositions of law. This request was in the form of a request for instructions to the jury as used in the civil courts. The law member, subject to objection by any member of the court, refused this request on the ground that the court was already bound by its oath to proceed according to law (R. 70).

We believe this ruling of the law member was correct. There is no provision in military law for the giving of instructions on points of law to the members of a court-martial in open session. Counsel for defense was apparently confusing the position of the law member on a court-martial with that of a judge sitting with a jury in a civil court. No such strict analogy can be drawn between the procedure of a court-martial and that of court and jury under the common law. The two legal systems, insofar as their procedure is concerned, stem from different historical sources, this distinction being consistently recognized in the various acts of Congress creating military tribunals (Winthrop's Military Law and Precedents, 2d Ed., Chap. V). Paragraph 38a of the Manual for Courts-Martial provides:

> "Each member has an equal voice and vote with other members in deliberating upon and deciding all questions submitted to a vote or ballot, neither the president nor the law member having any greater rights in such matters than any other member."

The law member's principal duty is to rule upon interlocutory questions which may arise during the trial (see pars. 40, 50, MCM, 1928; AW 31). The law member has no authority to bind the court by his rulings on substantive principles of law over the objection of any other member and his observations upon the substantive law made prior to the vote on the findings in closed session are advisory only. Likewise, there is no requirement that the court as a whole, either through its president or law member or otherwise, indicate to defense counsel what legal rules it intends to follow in arriving at its findings. Defense counsel may, of course, and should, consistently with his duty, inform the court what principles of law he believes should be applied to the facts disclosed by the evidence but he may not require the court to indicate its agreement or disagreement with such legal arguments.

On page 90 of the record of trial the following appears:

> "The court was opened, and the president announced the findings and sentence.
>
> "The president announced that it was the intention of the court to recommend to the reviewing authority that

clemency be shown in view of the age of the accused and his previous military record."

Attached to the record of trial is a "Recommendation for Clemency" signed by the president of the court on behalf of all its members stating that, although the sentence was legal and proper, special consideration was warranted due to accused's age and prior good record and recommending that the length of confinement and amount of fine be reduced. As a result of the above occurrence, defense counsel, in his brief attached to the record of trial, argues that the sentence was illegal in that it failed to express the true intention of the court.

Paragraph 80a of the Manual for Courts-Martial, 1928, provides:

"To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment. * * * In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of accused as given on former discharges, the number and character of previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment. The members should bear in mind that the punishment imposed must be justified by the necessities of justice and discipline. * * *"

It is therefore apparent, from the clear intendment of the cited paragraph, that the court should consider in arriving at its sentence in a case where no particular sentence is made mandatory all those matters loosely described as "clemency" matters, such as the character of accused and his service, accused's age and all other matters in extenuation or mitigation. This the court patently did not do in the instant case.

It does not follow, however, that this failure of the court to fully perform its assigned duties was error prejudicial to the substantial rights of accused. Matters in extenuation or mitigation go only to the sentence, and the sentence of a court-martial is inchoate until approved by the reviewing authority and, in cases such as this one, by the confirming authority (AW 46, 48). Here again, it is fallacious to draw too close an analogy to the practice in civil criminal cases. The power of the reviewing or confirming authority over the sentence of a court-martial is not at all similar to the pardoning power of a chief executive or his representative. The exercise of the pardoning power is but an act of grace (39 Am. Jur. p. 522), whereas the reviewing authority, and in some cases the confirming authority, must as a matter of law give careful consideration to and take action upon the sentence of a court-martial before it is carried into execution. The reviewing and confirming authorities are thus an integral part of the military justice system, are exercising a judicial function given them by law and are not merely performing a discretionary executive act. Recognizing the above principles, paragraph 87b of the Manual provides:

"The reviewing authority may properly consider as a basis for mitigation or remission not only matters relating solely to clemency (e.g., long confinement pending trial or the fact that an accomplice turned State's evidence), but any factors which properly should have been, but apparently were not, considered by the court in fixing the punishment. See 80a (Basis for determining sentence)."

In CM 243015, Fisher (27 BR 257), the Board of Review said:

"The court's action, however, in receiving only that part of the stipulation which asserted that accused was sane and in arbitrarily rejecting that part of the stipulation which presented strong mitigating factors favoring the accused, violated accused's rights to place before the court evidence in mitigation of the offense charged. Since, however, the evidence in question did not prejudice the accused's rights insofar as the findings of guilty are concerned and since the sentence imposed is within the legal limits provided by law, the error does not require the disapproval of either the findings of guilty or the sentence. * * * Although the error in the present case was not rectified by the reviewing authority, it has been held in CM 232160, McCloudy, that'* * * if the irregularity did not prejudice accused so far as the findings are concerned * * * there is no foundation for holding the sentence illegal and relief must come from the final authority in the military justice procedure - the confirming authority.'"

As indicated by the substantial reduction of the sentence by the reviewing authority in the instant case, it is apparent that no material harm was done to accused by the error here under discussion.

5. General Discussion

Charge I and its Specification

The various Victrola records and albums which accused was found guilty of having embezzled under the specification to Charge I were introduced in evidence accompanied by index cards which listed the titles of the records and the numbers painted thereon. Although there might be some basis for a supposition that such index cards had been obtained from the property files of the Convalescent Training Department of the Barksdale Field Station Hospital, no evidence was presented as to the manner in which they became attached to the exhibits introduced in evidence. Even the greatly simplified method of proof of business records made possible by the Federal shop book rule (28 U.S.C. 695) does not dispense with the necessity of a positive showing that the preferred business entries came from the custody of the office in which they were made or deposited (see CM 261107, DuBoff, 40 BR 131). These index cards

may not, then, be considered as evidence tending to show that the records and albums in question were the property of the Convalescent Training Department as alleged. However, the questions as to whether the improper admission in evidence of the index cards amounted to fatal error and as to whether the fact that the records and albums were marked with white paint in a manner similar to that used for identification purposes in the Convalescent Training Department would give rise to a fair inference that they were the property of the alleged owner need not be decided here, for we are of the opinion that the findings of guilty of Charge I and its specification must fall because of a failure to prove one of the essential elements of the crime of embezzlement.

In embezzlement as in larceny it must be shown beyond a reasonable doubt that accused intended to deprive the owner permanently of his goods (Commonwealth v. Este, 140 Mass. 279, 284; Moore v. United States, 160 U.S. 268, 269; Hubbard v. United States, 79 F (2nd) 850, 853; CM 205811, Fagan, 8 BR 229, 232; CM 205920, McCann, 8 BR 239, 245). This proposition is not to be confused with those cases where accused has "borrowed" moneys entrusted to him by others with the intention of replacing such moneys with other funds at a later date. This may be an embezzlement of the funds so converted, for the intent to replace them with an equivalent amount is but an intent to make restitution, which is not a defense to embezzlement (CM 253054, Howard, 34 BR 235, 250; CM 276435, Meyer, 48 BR 331,338).

Sixty-four 10-inch records, twelve Victrola symphony records and "several" albums of phonograph records had been found in a closet in accused's quarters. Although "a number of" Victrola record albums had been discovered in some boxes which had been packed by accused and left in his quarters, we must, giving accused the benefit of every reasonable doubt, assume that the records and albums which he was found guilty of having embezzled were those taken from the closet, for no witness was able to identify any of the phonograph records or albums accepted in evidence as having been among those seen in the boxes and the number of records and albums found in the closet is sufficient to include the number of similar items he allegedly embezzled.

It appears from the evidence that prior to being hospitalized, accused was about to depart from Barksdale Field on so-called "terminal leave." It also appears that he had done considerable packing preparatory to such departure. Since the phonograph records and albums which were made the subject of the embezzlement charge had not been packed away but were found lying in a closet in accused's quarters, there is, therefore, as strong an inference that he intended to leave them behind as that he intended to take them with him. The inference that he did not intend to fraudulently and feloniously convert this property to his own use is further strengthened by his "spontaneous" statement made after his arrest that some of the records in question had been taken by him to play in his quarters. There was no evidence that the records

and albums had been secreted in the closet (see CM 274389, Scheaffer, 47 BR 159, 165). The evidence in support of Charge I and its specification is obviously insufficient to exclude every other reasonable hypothesis except that of accused's guilt.

Charge II and its Specification

The 81 Armed Forces Radio Recordings and the 17 V-Disc, Overseas Recordings which accused is alleged to have misappropriated were found in boxes in the "day room" of the Government quarters occupied by accused and another officer. These boxes had been packed by accused and were nailed shut. Accused had expected to return to his home on "terminal leave" and near one of the boxes was a stencil with accused's name and home address stamped thereon. Thus, it is a fair assumption that accused placed these radio transcriptions in the boxes with the intent to send them home.

The Convalescent Training Department of the Station Hospital at Barksdale Field maintained in its possession recordings similar to the ones in question, and, although there were no markings on these transcriptions specifically indicating that they belonged to the Station Hospital and no evidence was adduced showing that any such recordings were missing from the hospital, each of the recordings found in the boxes had imprinted thereon a notification to the effect that it was the property of the United States and that its use for commercial purposes was prohibited. Accused had been in charge of the Convalescent Training Department and had custody of the radio transcriptions supplied for its use.

It thus appears that an opportunity was afforded accused to secure possession of Government property of the same type and kind as the recordings here under discussion and that he did in fact avail himself of this opportunity. The property itself was of such a nature that any ownership other than governmental would be most unusual. We are of the opinion that the only reasonable hypothesis under the circumstances disclosed by the evidence is that the recordings in question were property of the United States furnished and intended for the military service thereof and that accused misappropriated them (CM 307143, Klingensmith, 1st Ind., 60 BR 379). However, the evidence failed utterly to prove that these recordings were of the value alleged or any other specific value, for no market value was shown nor does the record of trial contain a description of such recordings sufficient to enable the Board of Review to take judicial notice of whatever Government price lists there may be on the subject (see CM 301154, Hufendick, 15 BR (ETO) 137).

The other items accused is alleged to have misappropriated in the specification to Charge II, that is, the flying equipment, convalescent training suit, hospital blanket and first-aid kit were each of a type similar to like property furnished and intended for the military service

and all these articles, with the exception of one of the summer flying suits, were marked with a Government stamp. Of the items in question all except the two summer flying suits, the A-2 Flying Jacket, and the first-aid kit had been discovered in accused's quarters in the boxes packed by him. The summer flying suits, A-2 Flying Jacket and first aid kit had been taken from other places in accused's quarters.

The rules we have used in determining that the court was warranted in finding accused guilty of the misappropriation of the radio transcriptions cannot be applied to the question of accused's guilt of misappropriating the other items listed in the specification to Charge II. There is no evidence rising beyond a mere suspicion tending to show that accused at any time had been connected with or had control over the supply or distribution of similar items. Although accused admitted in his "spontaneous" statement after his arrest that "some of the flying equipment was surplus on his records at Supply" and although it appears that for a time he was "medical" supply officer of the Station Hospital at Barksdale Field, there is a complete lack of evidence as to what type of Government property was in his care as "medical" supply officer and it is impossible to determine what specific articles of flying equipment are included in the "same" to which he referred in his pre-trial statement. Furthermore, it is not clear from his statement whether he was referring to his individual equipment records or the records he may have kept as a supply officer.

Although a showing of custody or control over property allegedly misappropriated is not necessary to a conviction of the misappropriation thereof (CM Poole, supra), such evidence is most pertinent where, as here, it is not proved where accused obtained the property in question or that any such articles were missing from the Government installation involved and accused has not confessed to the crime charged. Such evidence, as in the case of the recordings discussed above, is employed to show that accused had a peculiar opportunity to misappropriate Government property, and that the property found in his possession under circumstances indicating that he had availed himself of this opportunity was, in fact, Government property. This is one manner in which proof of one of the essential elements of the offense of misappropriation in violation of the 94th Article of War, that the property in question was Government property furnished and intended for the military service thereof, may be supplied by circumstantial evidence.

Proof that accused had applied to his own use or to another apparently unauthorized purpose certain property of a type and kind generally furnished and intended for the military service, even though such property might bear manufacturer's markings indicating that it had been made under Government contract for ultimate use in the military service, is insufficient to support a conviction of misappropriation in violation of the 94th Article of War unless such proof is accompanied by further evidence that the property in question had been unlawfully obtained from military custody or that items similar to such property were not sold on a legitimate open market in the locality where the

offense was alleged to have been committed or by other showing, by fair inference or accused's own admission, that such property was in fact military property (CM 318062, Guevara; CM 250426, Hecht, 32 BR 361, 368; CM 210763, Pelletier, 9 BR 351, 353; CM 203511, Wedmore, 1st Ind., 7 BR 221, 225; par. 150i, MCM, 1928). The above rule is of particular validity today when large stocks of items formerly exclusively used by the military service are sold to the general public in an effort to dispose of surplus war supplies. Indeed, in the instant case, there is credible testimony that articles identical to some of those here in question were sold to military personnel at Barksdale Field and that the Government markings were not removed prior to such sales.

For the reasons stated above, we are of the opinion that the evidence falls short of establishing beyond a reasonable doubt that the flying equipment, convalescent training suit, hospital blanket and first aid kit were, at the time they were found in accused's quarters, property of the United States furnished and intended for the military service thereof.

6. War Department records show that accused is 21 years of age. At the age of six he was involved in an automobile accident which resulted in the loss of his left eye. He graduated from Culver Military Academy, having been president of his senior class, and attended Yale University for six months. On 21 July 1943 he was inducted into the military service and served as an enlisted man until his graduation from the Medical Administrative Corps Officer Candidate School when, on 22 December 1944, he was appointed and commissioned a second lieutenant in the Army of the United States.

7. On 10 March 1947, Mr. Whitfield Jack, civilian counsel for accused at the trial, appeared before the Board of Review and made an oral argument in accused's behalf. Careful consideration has been given to the argument of counsel for accused and to his written brief addressed to the reviewing authority and attached to the record of trial. Consideration has also been given to the court's recommendation of clemency and to the 57 letters from members of accused's civilian community concerning accused's good character, which letters are attached to the record of trial as exhibits.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally insufficient to support the findings of guilty of Charge I and its specification, legally sufficient to support the finding of guilty of Charge II, legally sufficient to support only so much of the finding of guilty of the specification to Charge II as involves a finding that accused did, at the time and place and in the manner alleged, misappropriate

81 Armed Forces Radio Recordings and 17 V-Disc, Overseas Recordings, of some substantial value not in excess of twenty dollars, property of the United States furnished and intended for the military service thereof, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of an officer of a violation of Article of War 96.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Hoyt, Judge Advocate

JAGK - CM 319591 1st Ind

WD, JAGO, Washington 25, D. C. JUN 2 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 Second Lieutenant John M. Pogue (O-2051286), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of the embezzlement of a number of Victrola phonograph records and albums, the property of the Convalescent Training Department of the Station Hospital, Barksdale Field, Louisiana, in violation of Article of War 93 (Charge I and its specification), and of the misappropriation of 81 Armed Forces Radio Recordings, 17 V-Disc, Overseas Recordings, several items of flying clothing, a convalescent training suit, a hospital blanket and a first-aid kit, the property of the United States furnished and intended for the military service thereof, in violation of Article of War 94 (Charge II and its specification). No evidence of any previous conviction was introduced. Accused was sentenced to be dismissed the service, to pay the United States a fine of ten thousand dollars, to be confined at such place as the reviewing authority might direct for ten years and to be further confined at hard labor until said fine is so paid, but not for more than one year in addition to the ten years previously adjudged. The reviewing authority approved only so much of the sentence as provides for dismissal from the service and confinement at hard labor for a period of two years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the findings of guilty of Charge I and its specification, legally sufficient to support the finding of guilty of Charge II and legally sufficient to support only so much of the finding of guilty of the Specification, Charge II, as involves a finding that accused misappropriated 81 Armed Forces Radio Recordings and 17 V-Disc, Overseas Recordings, property of the United States, furnished and intended for the military service, of some substantial value not in excess of twenty dollars. I also concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. In announcing the findings and sentence the president of the court stated that the court would recommend clemency. This was done. I find no error in this connection.

From 19 February to 8 April 1946 accused was medical supply officer and from 25 May 1946 to 19 July 1946 he was convalescent training officer of the station hospital at Barksdale Field, Louisiana. As convalescent

training officer he had custody and control of the phonograph records and radio transcriptions which were broadcast throughout the hospital from the sound room of the Convalescent Training Department of that institution. It did not appear what accused's duties had been as medical supply officer.

Sometime prior to 7 August 1946 accused had received orders to report to a separation center to be separated from the service but these orders had been cancelled due to accused's having been hospitalized. On 7 August, and while accused was in the hospital, a search was made of the Government quarters occupied by accused and another officer. This search had been authorized by the post commander. In a closet used by accused were found the phonograph records and albums which he is charged with having embezzled. These items were marked with white paint in a manner similar to that used by the Convalescent Training Department in indexing its phonograph records. Accused stated, in a pre-trial statement, that he had taken some phonograph records from the hospital for the purpose of playing them in his quarters. In the day room of accused's quarters were found some wooden boxes which had been packed and nailed shut by accused preparatory to sending them to his civilian home address. These boxes contained the Armed Forces Radio Recordings, V-Disc Overseas Recordings and many of the other articles he was charged with having misappropriated. The Convalescent Training Department of the hospital maintained a supply of radio transcriptions similar to those discovered in the boxes and each such recording was inscribed with a notice to the effect that it was Government property and that its use for commercial purposes was prohibited. Each of the other items allegedly misappropriated by accused was of a type and kind similar to like items issued for use in the military service and all but one of these other items bore a manufacturer's stamp indicating that they had been made under Government contract for ultimate use by the military service. However, no evidence was presented tending to show that any such items were missing from accused's station and no proof was elicited at the trial as to where accused had obtained these articles. Various types of flying clothing, similar to some of that found in accused's quarters, had been sold to military personnel at surplus sales held at Barksdale Field and the Government stampings had not been removed prior to delivery to the purchaser.

I am of the opinion, as is the Board of Review, that the evidence fails to establish beyond a reasonable doubt that accused fraudulently and feloniously converted to his own use the phonograph records discovered in the closet of his quarters, which phonograph records he was found guilty of having embezzled, for the inference that he intended to leave them in his quarters, after a mere temporary use of them, is as strong if not stronger than the inference that he intended to take them home with him when he left the service. The articles accused was charged with having misappropriated, with the exception of the Armed Forces Radio Recordings and the V-Disc Overseas Recordings, were not, in my opinion, sufficiently shown to have been property of the United States at the time they were found in the quarters occupied by accused. As to the Armed Forces Radio Recordings and the V-Disc

Overseas Recordings, the evidence is sufficient to establish to a reasonable and moral certainty that accused had wrongfully taken them from his place of work in the Convalescent Training Department of the hospital. As convalescent training officer he had custody of like radio transcriptions which were in use by that Department, had every opportunity to take them and it would indeed be most unlikely that those found in his possession, packed away in boxes ready for shipment to his home, could have come from any other source than the Government installation over which he had charge. I believe, therefore, that these recordings were shown to have been property of the United States furnished and intended for the military service thereof and that the findings of the court that accused misappropriated them should stand. No evidence of the specific monetary value of these recordings was, however, adduced.

4. War Department records show that accused is 21 years of age. At the age of six he was involved in an automobile accident which resulted in the loss of his left eye. He graduated from Culver Military Academy, having been president of his senior class, and attended Yale University for six months. On 21 July 1943 he was inducted into the military service and served as an enlisted man until his graduation from the Medical Administrative Corps Officer Candidate School when, on 22 December 1944, he was appointed and commissioned a second lieutenant in the Army of the United States. His efficiency ratings for the year 1945 were "Excellent." No other ratings are available to this office.

5. On 10 March 1947, Mr. Whitfield Jack, civilian counsel for accused at the trial, appeared before the Board of Review and made an oral argument in accused's behalf. Consideration has been given to the arguments of counsel and to his written brief addressed to the reviewing authority and attached to the record of trial. Consideration has also been given to recommendation by the court for clemency, to fifty-seven letters from members of accused's civilian community attached to the record of trial as exhibits and to two letters from Honorable Clarence J. Brown, House of Representatives, dated 13 March 1947 and 3 May 1947, respectively, expressing an interest in the case.

6. For the reasons heretofore stated, I recommend disapproval of the findings of guilty of Charge I and its specification, approval of the finding of guilty of Charge II and approval of only so much of the finding of guilty of the specification to Charge II as involves a finding that accused did, at the time and place and in the manner alleged, misappropriate 81 Armed Forces Radio Recordings and 17 V-Disc, Overseas Recordings, of some substantial value not in excess of twenty dollars, property of the United States furnished and intended for the military service thereof. In view of the youth of accused, his prior clear record and all the circumstances of the case, I further recommend that the sentence as approved by the reviewing authority be confirmed but that the confinement be commuted to a reprimand and forfeiture of $100 pay and that as thus modified the sentence be ordered

executed but that the execution of 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 319591

3 Incls
1. Record of trial
2. Form of action
3. Ltrs fr Hon Clarence J Brown, 13 Mar 47 and 3 May 1947

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 206, 11 June 1947).

(G.C.M.O. 18, 17 Oct 1947).

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

JUL 10 1947

JAGQ - CM 317383

UNITED STATES	)	XII TACTICAL AIR COMMAND
v.	)	Trial by G.C.M., convened at Neubiberg, Germany, 17 and 18 September 1946. Dismissal.
Captain PHILIP M. N. McHUGH (O-812108), Air Corps.	)	

OPINION of the BOARD OF REVIEW
STERN, JOHNSON and SCHENKEN, 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. The accused was tried upon the following Charges and Specifications:

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

Specification 1: (Finding of not guilty).

Specification 2: In that Captain Philip M.N. McHugh, 364th Fighter Squadron, 357th Fighter Group, having received a lawful order from his Squadron Commander, Captain Thomas N. Adams, 364th Fighter Squadron, on or about 12 August, 1946, at approximately 0930 hours, at Army Air Force Station Neubiberg, Neubiberg, Germany, to report to him, the Squadron Commander, at 1245 hours, 12 August, 1946, did willfully disobey the same. Said order was delivered to Captain McHugh by First Lieutenant Doyle Price, O-713661, 364th Fighter Squadron.

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

Specification 1: In that Captain Philip M.N. McHugh, 364th Fighter Squadron, 357th Fighter Group, did at Army Air Force Station Neubiberg, Neubiberg, Germany, on or about 13 August, 1946, at approximately 1951 hours, violate

flying regulations by flying a P-51 type aircraft, serial number 44-72310, without proper authorization in direct violation of USAFE Regulation 60-22, dated 24 January 1946.

Specification 2: In that Captain Philip M.N. McHugh, 364th Fighter Squadron, 357th Fighter Group, did at Army Air Force Station Neubiberg, Neubiberg, Germany, on or about 13 August, 1946, at approximately 1951 hours, violate flying regulations in that he took off in a P-51 type aircraft, serial number 44-72310, from Neubiberg airfield against a stop warning signal in the form of a red flare shot from the Control Tower in direct violation of the provisions of USAFE Manual 60-0-1, paragraph 35 D-1, and paragraph 35 D-2.

Specification 3: In that Captain Philip M.N. McHugh, 364th Fighter Squadron, 357th Fighter Group, on or about 13 August, 1946, from approximately 2000 hours to 2030 hours, did violate flying regulations in that he did fly below the altitudes specified, over the USAF Munich-Riem airfield, several times in direct violation of USAFE Regulation 60-16, paragraph 2b, dated 8 January, 1946.

Specification 4: In that Captain Philip M.N. McHugh, 364th Fighter Squadron, 357th Fighter Group, on or about 13 August, 1946, from approximately 2000 hours, to 2030 hours, in the vicinity of Army Air Force Station Munich-Riem, did violate flying regulations in that he did perform aerial acrobatics below the minimum altitudes prescribed in Memorandum 50-1, Hq XII TAC, 28 June 1946.

Specification 5: In that Captain Philip M.N. McHugh, 364th Fighter Squadron, 357th Fighter Group, on or about 13 August, 1946, from approximately 2000 hours, to 2030 hours, in the area over and surrounding Army Air Force Station Munich-Riem, did violate flying regulations in that he did fly a P-51 type aircraft in such a manner as to endanger other persons and to endanger Government property in direct violation of the provisions of USAFE Regulation 60-16, paragraph 8, dated 8 January, 1946.

Specification 6: In that Captain Philip M.N. McHugh, 364th Fighter Squadron, 357th Fighter Group, on or about 13 August, 1946, at approximately 1951 hours, did violate flying regulations in that he did fly a P-51 type aircraft from the airfield, Army Air Force Station Neubiberg, Neubiberg, Germany, without proper flying equipment, namely a parachute, in direct violation of AAF Regulation 60-5, dated 5 September 1945.

Specification 7: In that Captain Philip M. N. McHugh, 364th Fighter Squadron, 357th Fighter Group, did, at Munich, Germany, on or about 11 August 1946, wrongfully take and use without proper authority a certain motor vehicle, to wit: 3/4 ton truck, property of the United States of a value of more than $50.00.

Specification 8: In that Captain Philip M. N. McHugh, 364th Fighter Squadron, 357th Fighter Group, on or about 11 August 1946, was, at approximately 0030 hours, drunk and disorderly in uniform in a public place, to wit: the English Garden, Munich, Germany.

Accused pleaded not guilty to all Charges and Specifications and was found guilty of all Charges and Specifications, except Specification 1 of Charge I of which he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Specification 2 of Charge I and Charge I as involved findings that accused having received the order as alleged, did at the time and place alleged, wrongfully fail to obey the same in violation of Article of War 96, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Accused was in the English Garden, Munich, Germany, on the night of 10 August 1946, and departed at approximately 0030 the next morning in the company of First Lieutenant George G. Roberts. An Army 3/4 ton truck was parked at the entrance of the club, secured by a lock and chain around the steering wheel, and accused proceeded to drive it away. The truck was the property of the United States, was not assigned to accused and he had no authority to take it (R. 8, 9, 11, 12). After driving about two blocks accused was unable to negotiate a turn because of the chained steering wheel when Second Lieutenant Escola, a military policeman, arrived on the scene and as accused had no "trip ticket" or driver's license he was requested to enter the "jeep" of the military police and

go with them to military police headquarters (R. 9, 12). Accused protested verbally and it required "about an hour" to get him out of the truck (R. 12). At the military police station accused was loud, boisterous and created a "spectacle" (R. 12). Both Lieutenants Roberts and Escola testified that in their opinion accused was "drunk". On 12 August accused received an order through First Lieutenant Price from Captain Adams, his squadron commander, to report to him (Adams) at 1245, 12 August 1946, which order accused failed to obey (R. 17, 19, 21).

On the evening of 13 August about 1900 accused was drinking in the Officers' Club, Neubiberg, Germany, and "acted as if he were a little intoxicated" (R. 21, 22). Thereafter at approximately 1930 the same evening the tower operator at Neubiberg air strip noticed a P-51 type aircraft being "preflighted" for an unusally long time and then the pilot, who wore captain's bars on his cap, "pulled his own chunks"; entered the plane with no parachute harness, head set or flight equipment; "taxied" to the runway and "took off", despite a red flare fired in front of the plane by the tower operator. The ship bore the markings "NC 6" and the pilot had no "clearance" (R. 23-25). This P-51 flew over the air field with its wheels down at approximately two or three hundred feet altitude, efforts to contact it by radio were unsuccessful, and it flew over Munich-Reims air field which was about one and a half or two miles from Neubiberg in the following manner:

"Q. Just tell what you yourself saw and did
A. Well, this P-51 went into a dive, I thought he was going to crack up. He came down, made a touch and go landing and made a slow roll

"Q. Can you give an approximation of the height at which this roll was completed?
A. He was climbing, he started in about 500 feet

"Q. Give an estimation. Was it 1,000 feet or 8,000 feet
A. About 1,000 feet. He came back then over the runway about 50 feet off it, buzzed the runway. We gave him a green light, then as he pulled up we gave him two green flares and he was between the middle of the runway over the grass and as he pulled up two fighter ships from Neubiberg came in over the field. The 'phones were ringing then I lost track of him. The next thing I remember I heard a roar from the north. He seemed to drop over the terminal building and head south.

"Q. Who was he?
A. The P-51

"Q. What were the markings?
A. Nc 6 on the side

"Q. Is that the same plane, same markings that did the slow roll?
A. Yes, sir

"Q. Continue
A. He headed down and almost touched the grass

"Q. Once again be more specific
A. This 51, NC 6, dropped down and almost touched the grass, and headed straight to the GCA on the south side of the field. He pulled up and went over it and then he turned and went almost straight to the tower. He was about 50 feet from the tower and I gave him a red flare, and just before he hit the tower he banked and he rose. Again the 'phones rang and the next time I saw him he was coming from the south, seemed to be almost touching with his wheels and then this 51 went to the west side of the field, I thought he left the field and called Neubiberg. The next thing I remember he was coming right up the perimeter from east to west and continued heading west. That's all I can remember right now except the last time I saw the plane it was headed toward the southeast, toward the mountains, low on the ground.

"Q. In what position were the wheels on this airplane, NC 6?
A. Down all the time".

* * *

"Q. Is that a P-51 type aircraft?
A. Yes. They pulled up off the end of the runway and did a few slow rolls and the next thing I remember he was coming behind the tower. came over and buzzed the GCA shack north end of the runway and buzzed the field one other time, and made passes at it and we gave him a green and red light to keep him away and he also buzzed the tower twice, made a direct buzz right at the tower and pulled up and the last buzz he did make he turned up the ramp.

"Q. Tell the court what you mean by buzz
A. He was very fast or low

"Q. What is the height of the tower where you were?
A. The height of the tower, 300 feet off the ground.

"Q. Was it above or below you the first time?
A. The first time he was below us and the second time he was almost level. He made a wide circle in front of the tower.

"Q. You stated previously this aircraft did slow rolls. Tell the court approximately how many
A. I only saw one and at that time operations called again. It was the first, touch and go, and I looked again he was at the east end of the field, climbing.

"Q. At appromately what altitude did this aircraft go into this roll?
A. Pattern altitude about 1,000 feet.

"Q. And where was the roll completed?
A. Just about pattern altitude." (R. 28, 29-30).

This ship was flying over Munich-Reims for about 30 minutes and the control tower operator fired 12 flares in its direction (R. 29).

Lieutenant Denison, Air Corps, 442nd Troop Carrier Group, estimated the roll was completed at 3 or 4 hundred feet altitude and the ship "made several passes" at the field flying from 50 to 100 feet above the ground.

Lieutenant McDonald flew his P-51 "beside" the "NC 6", signaled that the latter's wheels were down but the signal was ignored and:

"A. He rolled, I was in between him and the field, he rolled down towards me and towards Munich-Reims and I got out of the way.

"Q. Did you see anything unusual as he rolled away from you?
A. He went back to the field. It appeared he did slow roll by the tower." (R. 36).

Later that evening accused landed a P-51 type plane on a small field at Landshut, Germany, used by the Seventh Field Artillery for observation planes. The field had no lights and it was dark when he landed (R. 43). The next day accused stated to Second Lieutenant Hicks who was stationed at Landshut that "I got a confession to make. I got pretty high last night and took this airplane without authority". He

also said "something about buzzing a field some place." (R. 44). Accused also stated that when he took the plane he "was going to Switzerland". Captain Black, also talked to accused at Landshut and testified as follows:

> "A. Well, we went out to the plane, and on the way out I told him I heard him come in the night before, and I asked him how he got in, and he stated he didn't remember too well how he got in the field, he was surprised he got in. On the way back he stated he had taken the plane illegally and he had not obtained a clearance and I asked if something would not happen to him, and he said yes, probably something would when I get back, and stated he was doing flips and everything else, I am not familiar with Air Corps terminology." (R. 46).

On 14 August 1946, Major Davis, 33rd Fighter Group, Neubiberg, Germany, was directed by his commanding officer to go to Landshut and "pick up" a P-51 type aircraft; place accused under arrest and return to Neubiberg (R. 48). He "went in" with an L-5 type plane, observed the P-51 with NC 6 markings on the field at Landshut; found accused in a hotel room and placed him under arrest. The air strip at Landshut is about 1200 or 1500 feet in length; the NC 6 ship was the only P-51 type plane on the field; there was no parachute in it and when it was flown back to Neubiberg it functioned properly and the wheels retracted without difficulty (R. 52-53).

Major Gardner, A-3 section, 70th Fighter Wing, testified that each of the regulations accused was alleged to have violated were in effect on 13 August 1946 and that the copies introduced in evidence as Prosecution Exhibits 2 to 6 inclusive were such regulations with all pertinent changes (R. 54-56).

4. <u>Evidence for the Defense</u>.

Captain Marsh, flight surgeon, AAF Neubiberg, testified that he examined accused "a week after the incident" and found him suffering from a "very marked and severe anxiety state"; sent him to the 98th General Hospital for examination and treatment and in his opinion accused knew "right from wrong" at the time of the alleged offenses but because of his "anxiety state and alcoholism" he had a very definite impairment in his ability to adhere to the right (R. 61, 62).

Captain Cohen, Chief of the Psychiatric Section, 98th General Hospital testified that he examined accused and that Defense Exhibit A was his report of the examination in which he made the following conclusions:

"* * * At the time of his offense the patient could distinguish right from wrong concerning the particular acts charged, but the cerebral changes concomitant with chronic alcoholic excesses, prevented him from adhering to the right.

"At the time, this soldier is able to understand the nature of court-martial proceedings and to assist his defense counsel in the preparation and trial of his case."

Upon being recalled by the court Captain Cohen explained his findings in the report of psychiatric examination as follows:

"Q. Then in general you would say that alcoholism — perhaps a person knows right from wrong, but alcoholism prevents him from doing the right thing?

A. Alcoholism, especially chronic alcoholism will impair a man's judgment, and although he may know right from wrong his judgment is so poor that he doesn't know enough to adhere to the right. In your acute alcoholism a man may not even distinguish right from wrong, not be able to distinguish right from wrong. Your chronic alcohelism is distinguished by the impairment of judgment, that is concomittant with it.

"Q. You make this statement then 'at the time of this event the patient could distinguish right from wrong'. Did you ask the patient particularly?

A. I did. I went into great detail on what his thought patterns were at the time these incidents happened, and his recollection of the events was fairly good, and his recollection of the morals involved was good. However, his judgment was so impaired that he didn't or couldn't adhere to the right.

"Q. Would you say at the time of these events that the man did have a definite psycho neurosis or neuro-psychiatric disturbances, or were these events the cause of his acute neuro psychiatric disturbances when you saw him?

A. With chronic alcoholism you get certain generalized changes, not only in the brain but also in the general nervous system and in the rest of the somatic organs and so it is associated with alcoholism and increased nervous tension, etc. However, I do wish to make this point, that the man has always been emotionally unstable, that he has always tended to over-react to stresses, and has been unable to socialize many of his excessive tendencies and these

tendencies were precipitated by an excellent and prolonged combat record and as a result of these excesses and tensions which combat generated, this man was in a constant state of instability and constantly ill, which would explain why he resorted to excessive alcoholism. However, that is not a true psycho-neurosis. This is more of a behavior disorder. Legally, alcoholism is no excuse for one's acts, however, I feel that this man, although he cannot be put into the category of a psycho-neurotic and termed mentally ill, it cannot be denied that a great deal of his difficulties resulted from the instability arising out of his combat experiences and that should be considered as an extenuating circumstance in his present charges.

"Q. Your diagnosis here, then as emotional instability reaction, chronic, severe, manifested by restlessness, moody spells, etc., is that a psychiatric diagnosis?
A. That is a psychiatric diagnosis, which according to the latest TB Med does not warrant medical disposition, it is an administrative diagnosis, is that clear?" (R. 65-66).

The accused after being advised of his rights as a witness elected to testify (R. 64) that he is 24 years of age, served four years in the Army, has sixty-four combat missions with 5 confirmed victories and has been awarded the Distinguished Flying Cross and Air Medal with three Oak Leaf Clusters.

5. Specification 2 of Charge I. The evidence establishes beyond any reasonable doubt that accused received through a brother officer the order of his commanding officer to report to him at a definite time on the very day the order was given. Accused failed to comply with the order and did not report. As the order was to perform a duty in the future and the evidence does not show an intentional or willful defiance of authority the action of the reviewing authority in approving only so much of this finding of guilty as involved a finding that accused failed to obey the order as alleged in violation of Article of War 96 was proper. The offense of failing to obey the order of his commanding officer was clearly proved beyond any doubt.

Specifications 1, 2, 3, 4, 5 and 6 of Charge II. These specifications allege that accused violated certain specified flying regulations in violation of Article of War 96. The uncontradicted evidence clearly shows that at the times and places alleged accused flew the P-51 type plane without proper authorization in direct violation of USAFE Regulation 60-22, 24 January 1946, (Spec. 1); that he "took off" against a stop

warning signal in the form of a red flare in violation of paragraphs 35 D-1 and D-2, USAFE Manual 60-0-1, 1 January 1946 (Spec. 2); that he flew well below the specified altitudes several times in violation of paragraph 2b, USAFE Regulations 60-16, 8 January 1946 (Spec. 3); that he performed aerial acrobatics well below the required minimum altitudes in violation of Memorandum 50-1, Hq. XII TAC, 28 June 1946 (Spec. 4); that his manner of flying endangered persons and Government property in violation of paragraph 8, USAFE Regulations 60-16, 8 January 1946 (Spec. 5) and that he flew the ship in question without parachute equipment in violation of AAF Regulations 60-5, 5 September 1945 (Spec. 6). Military personnel are presumed to have knowledge of military regulations just as is the case with public civil law (CM 267639, Tressler, 44 BR 32) and violations thereof constitute disorders to the prejudice of good order and military discipline in violation of Article of War 96 (CM 254517, Bryant, 35 BR 271).

Specifications 7 and 8 of Charge II. These specifications allege respectively that accused wrongfully took and used a certain Government vehicle without proper authority and was drunk and disorderly in uniform in a public place. The evidence is impelling that accused drove the vehicle in question from the Seehaus Club when he had no authority to do so. In fact the truck was secured with a lock and chain and he did not know in whose possession the vehicle rightfully belonged at the time. While the ownership of the truck was proved there was no evidence of its value. However, the court could reasonably infer a value of over $50.00 from the testimony as to its type and condition at the time (CM 228274, Small, 16 BR 115). The evidence also is clear that accused was drunk and disorderly in uniform and created a scene with the military police while they were in the execution of their duties. Even his "accomplice" in taking the vehicle testified that accused was "drunk". The "place" was public in that it was on a public street in the immediate proximity of the English Garden, or officers club.

The Board of Review is of the opinion that all of the offenses were proved beyond any reasonable doubt by clear and compelling evidence.

The mental capacity of accused was placed in issue at the trial by the defense and the psychiatrist who examined him testified in explanation of his written report which was also introduced in evidence (Def. Ex. A). While the expert testimony of the medical officer was to the effect that accused was impaired in adherring to the right because of his anxiety state and chronic alcoholism, he further clarified his remarks by stating that accused was not a psycho-neurotic

or "mentally ill" and that his "inability" to adhere to the right was due to alcoholism impairing his judgment which "should be considered as an extenuating circumstance in his present charges". He further testified that his diagnosis was "administrative" and would not warrant medical disposition of accused.

The court, in finding accused guilty, evidently concluded that he was sane, responsible for his acts, knew right from wrong and could adhere to the right. While the court is not bound to accept "expert testimony" as conclusive on any point, it cannot even be seriously contended that the court's findings in this case were in conflict with the expert medical testimony. The explanation of the psychiatric report by the officer who made it was to the effect that the "judgment" of accused was impaired by chronic alcoholism and that he was not "mentally ill". In view of such explanation the Board of Review is of the opinion that the sanity of accused and his ability to adhere to the right was sufficiently established to support the findings of the court.

6. War Department records show accused to be 25 years of age and single. He attended Rutgers University for two years where he received R.O.T.C. training. He enlisted in the Army 7 January 1943, and upon graduation as an Air Cadet he was commissioned a Second Lieutenant, Air Corps (AUS) on 1 October 1943, promoted to First Lieutenant, 17 June 1944 and to Captain on 9 March 1946. His efficiency reports disclose numerical ratings of "4.5", "4.6" and "2.7" with notations to the effect that he is careless and boastful of his individual undertakings. No evidence of previous convictions was introduced at the trial but it appears that accused received punishment under the 104th Article of War on 14 June 1945 for failing to report to his properly appointed place of duty. He has been awarded the distinguished flying cross and air medal with three oak leaf clusters.

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

Joseph D. Stern, Judge Advocate

W. H. Johnson Jr, Judge Advocate

C. E. Schenken, Judge Advocate

JAGQ - CM 317383 1st Ind

WD, JAGO, Washington 25, D. C. AUG 18 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Philip M. N. McHugh (O-812108), Air Corps.

2. Upon trial by general court-martial in Germany this officer was found guilty of willfully disobeying an order of his squadron commander in violation of Article of War 64 (Spec. 2, Charge I); of six offenses involving violations of Army Air Forces Regulations (Specs. 1 to 6, incl., Charge II); of wrongfully taking and using a Government vehicle without proper authority (Spec. 7, Charge II) and of being drunk and disorderly in a public place (Spec. 8, Charge II), all in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Specification 2 of Charge I and Charge I as involved findings that accused having received the order as alleged, did at the time and place alleged, wrongfully fail to obey the same, in violation of Article of War 96, 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 of the sentence. I concur in that opinion.

4. The evidence shows that at about 0300, 11 August 1946, upon leaving an officers' club in Munich, Germany, accused entered a Government vehicle which was parked at the curb and secured by a lock and chain around the steering wheel and proceeded to drive it away. He had no authority to take it and did not know in whose possession it belonged. When he was unable to negotiate a turn because of the chained steering wheel the military police arrived and as accused had no driver's license or "trip ticket" they requested him to accompany them to headquarters. Accused protested; was "loud, boisterous and created a spectacle." It required "about an hour" to get him in the military police vehicle. Two officers testified that he was drunk. The following day accused received an order from his squadron commander to report to him at a certain hour, but accused failed to obey.

On 13 August 1946 at approximately 1930 hours accused "took off" from Neubiberg air field in a P-51 aircraft without permission, with no parachute or flight equipment and despite a red flare fired in front of the plane by a tower operator. He flew the plane over Munich-Reims air field for twenty-five or thirty minutes with its wheels down, performing acrobatics, "buzzing" the field and adjacent buildings at altitudes far below the minimum required by Army Air Forces Regulations. During this

time the tower operator at Munich-Reims airfield fired 12 flares at the aircraft but they failed to have any effect on the manner in which the ship was being operated. The manner in which accused flew the ship clearly endangered persons and property. Later that evening he landed the aircraft on a small field at Landshut and stated that he had taken it without authority, failed to obtain a clearance and that he had "been doing flips and everything."

The mental responsibility of accused was placed in issue at the trial. A psychiatrist who examined him prior to trial testified that he was suffering from a very marked and severe anxiety state and that alcoholic excesses prevented him from adhering to the right. In view of these statements accused was transferred to Valley Forge General Hospital on 24 April 1947 for observation and report by a board of medical officers. A report by such a board, dated 19 May 1947, concludes that at the time of his alleged offenses, accused was so far free from mental defect, disease and derangement as to be able concerning the particular acts charged to distinguish right from wrong except insofar as this ability was temporarily interfered with by excessive alcoholic indulgence, that he could adhere to the right and could intelligently conduct and cooperate in his defense.

5. War Department records show accused to be 25 years of age and single. He attended Rutgers University for two years where he received R.O.T.C. training. He enlisted in the Army 7 January 1943, and upon graduation as an Air Cadet he was commissioned a second lieutenant, Air Corps (AUS) on 1 October 1943, promoted to first lieutenant, 17 June 1944, and to captain on 9 March 1946. His efficiency reports show numerical ratings of "4.5", "4.6" and "2.7". No evidence of previous convictions was introduced at the trial but it appears that accused received punishment under the 104th Article of War on 14 June 1945 for failing to report to his properly appointed place of duty. He has been awarded the distinguished flying cross and air medal with three oak leaf clusters.

6. Attached to the record of trial is a memorandum from the Commanding General, Army Air Forces, in which he recommends that the sentence be carried into execution. 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. 302, 27 Aug. 1947):

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TITLE

DATE	BORROWER'S NAME	EXT.